Neutral Citation Number: **[2023] EWHC 968 (Ch)**

Claim No: BL-2020-002295

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Friday, 28 April 2023

Before:

ROBIN VOS
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

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Between:

(1) CAREY STREET INVESTMENTS LIMITED (in liquidation)

(2) 245 BLACKFRIARS ROAD PROPERTY INVESTMENTS LIMITED (in liquidation)

Claimants

- and -

(1) GRANT TIMOTHY BROWN

(2) EQUITY TRUST (JERSEY) LIMITED

Defendants

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CHRISTOPHER PARKER KC and EDWARD MEULI (instructed by **Gateley PLC**) appeared for the **Claimants**
HUGH NORBURY KC and DAN MCCOURT FRITZ (instructed by **Gowling WLG (UK) LLP**) appeared for the **Defendants**

Hearing dates: 28 February, 1, 2, 6, 7 and 10 March 2023

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Approved Judgment

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This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 28 April 2023 at 10:30am

DEPUTY JUDGE ROBIN VOS:

Introduction

1. The claims in this case involve allegations of tax evasion relating to the affairs of the two claimant companies (which are both UK companies), Carey Street Investments Limited ("CSI") and 245 Blackfriars Road Property Investments Limited ("BRP"). Both of these companies are now in liquidation, having substantial debts (totalling close to £10m) to HM Revenue & Customs ("HMRC").

2. During the period relevant to these proceedings (between 2004-2006), the second defendant, Equity Trust (Jersey) Limited ("Equity Trust"), a trust and company service provider in Jersey, was the trustee of two trusts known as the Ironzar Trust and Ironzar II Trust (which I will refer to for simplicity as Ironzar or the Ironzar Trusts) connected with the family of Simon Halabi, a well-known figure in the UK property industry. In its capacity as trustee of those trusts, Equity Trust was the ultimate owner of the claimant companies.

3. The first defendant, Grant Brown joined Equity Trust in July 2004 as an executive director. Mr Brown is a chartered accountant. He took over responsibility for the Ironzar structures and the relationship with Mr Halabi when the previous director, Melvin Kalman retired in October 2004. He became a director of the claimant companies and also their Jersey parent companies.

4. CSI was the owner of a property in Carey Street, London known as New Court. BRP owned another London property known as Ludgate House.

5. The claimant companies say that, in breach of his duties as a director, Mr Brown, with a view to the evasion of corporation tax on capital gains by the claimant companies, agreed to the transfer of the properties owned by them to their parent companies at a substantial undervalue. CSI also says that Mr Brown, in a further attempt to evade tax on the part of CSI, agreed improperly to the payment by CSI to its parent company of interest and management charges which were not justified.

6. There are two further matters which the claimant companies complain about in relation to the transfer of the properties by those companies to their parent companies. As far as CSI is concerned, this is the payment of a dividend representing part of the proceeds

of sale of New Court in respect of which CSI alleges that the relevant statutory requirements were not met. As far as BRP is concerned, the issue relates to the fact that a part of the purchase price for Ludgate House was left outstanding as a loan due from the parent company to BRP.

7. Given that the alleged breaches of duty all took place between 2004-2006 and the claims were only issued in 2020, they would normally be outside the relevant limitation period. However, the claimants say that the breaches of duty were fraudulent so that, in accordance with s 21 Limitation Act 1980, no limitation period applies.

8. I should mention that, in the pleadings, there is some reference to the possibility that some of the transactions identified by the claimants may have been ratified by the relevant parent company. The response to this from the claimants is that the transactions in question are unlawful distributions and therefore incapable of ratification and that a fraudulent breach of duty cannot in any event be ratified.

9. The defendants concede that, if the breaches of duty are found to be fraudulent, ratification is not available as a defence. On this basis, the question as to whether the transactions give rise to unlawful distributions does not arise except in relation to the CSI dividend where, as I have said, the allegation is that Mr Brown knew that the statutory requirements were not satisfied (which would render the dividend unlawful).

10. The claimants' case against Equity Trust is that it is liable for the breaches in question either on the basis that it is vicariously liable for the actions of Mr Brown (as his employer) or that the breaches of duty were committed by Equity Trust itself either as a shadow director or de facto director of the claimant companies. In relation to the question as to whether any such breaches were fraudulent, they say that Mr Brown's knowledge can be attributed to Equity Trust.

11. As can be seen, some of the claims are made by CSI and others by BRP. For convenience, I will however just refer to the claimants collectively rather than distinguishing between them in respect of each separate element of the claims. The total value of the claims made by the claimants is close to £26m.

Background facts

12. Before looking at the claims made by the claimants in more detail, it is helpful to set the scene by summarising the background facts in respect of which there is no real dispute.

13. The Ironzar Trusts held a number of significant property investments for the benefit of Mr Halabi's family. The properties were held by various companies owned by Ironzar (where relevant, a reference to Ironzar or the Ironzar Trusts is intended to include Equity Trust in its capacity as trustee of those trusts).

14. Generally speaking, each property was held by a separate company owned either directly by the Ironzar Trusts or through one or more intermediate holding companies. During the period in question, the entire property portfolio was said to be worth close to £2bn although there were significant borrowings secured on the properties.

15. The property empire was overseen by Buckingham Securities Holding plc ("Buckingham"), a company owned by another trust connected to Mr Halabi's family. Mr Halabi provided input through his role with Buckingham although most of the day to day interactions with the Ironzar structure were handled by Buckingham's head of finance, Harry Sihra.

16. It appears that Buckingham's relationship with Ironzar was only formalised in December 2003 when it signed an agreement with Equity Trust (as the Ironzar trustee) to provide management services in relation to the various properties held by the companies owned by Ironzar including, at that stage, CSI.

17. During the period in question, the Ironzar structure received legal and tax advice from Olswang and SJ Berwin and also received accountancy and tax advice from BDO in Jersey.

18. CSI was originally part of the Blackmoor Group of Companies, a third party unconnected to Ironzar and Mr Halabi. In April 2002, Ironzar agreed to purchase CSI (and therefore New Court) for a total consideration equal to £60m (although, prior to completion, the purchase price was increased by about £220,000). The purchase was

made by a newly formed Jersey subsidiary of Ironzar, New Court Properties Limited ("NCP") which therefore became the parent company of CSI.

19. A large part of the purchase price was funded by borrowings from Société Générale ("Soc Gen") comprising a senior facility of £52m and a junior facility of £4m. For this purpose, in May 2002, Soc Gen obtained a valuation of New Court of £65m from a third party valuer, DTZ. The senior facility was 80% of that valuation.

20. As part of the purchase arrangements, NCP made a loan of £2.25m to CSI. The loan was to be interest free until a demand for repayment was made, at which point interest at 4% above the base rate of Barclays Bank plc was payable until the loan was repaid in full.

21. Mr Kalman who, at this time, was responsible for the Ironzar Structure became a director of CSI in December 2003.

22. In June 2004, Equity Trust was endeavouring to finalise the CSI financial statements for the period to 31 December 2002 as they should by then have already been filed with Companies House. In this context, Mr Sihra proposed that the loan due from CSI to NCP should bear interest at 12%, suggesting that the original documentation of the loan as being interest free was an error. He also proposed that CSI should pay a management fee of £150,000 a year to NCP.

23. These proposals were approved by CSI in November 2004, not long after Mr Brown had taken over from Mr Kalman as a director of CSI. Shortly after this, CSI's 2002 accounts were approved. In those accounts, New Court had been revalued to £65m based on the May 2002 DTZ valuation.

24. In March 2005, Ironzar agreed to purchase two properties from the Minerva Group (again, unconnected to Ironzar or Mr Halabi). One of those properties was Ludgate House. The other was an adjoining property known as Sampson House. These two properties were together known as the Bankside Estate.

25. As with New Court, the purchase took the form of the acquisition by newly formed Jersey subsidiaries of Ironzar of the shares in the companies within the Minerva Group which owned the two properties.

26. In the case of Ludgate House, the purchaser was Ludgate Property Holdings (Jersey) Limited ("LPH") which purchased the shares in BRP. For Sampson House, the purchaser was Sampson Property Holdings (Jersey) Limited ("SPH") and the company which was purchased was called Angelmist Properties Limited ("APL"). The combined purchase price was £229m. Of this, £78.5m related to BRP/Ludgate House and the remaining £150.5m related to APL/Sampson House.

27. Only a small amount of the purchase price related to the acquisition of the shares in BRP/APL. The balance took the form of loans to BRP/APL by the purchasing companies to enable BRP/APL to repay loans due to other companies in the Minerva group.

28. As part of the transaction, Minerva provided an indemnity for corporation tax payable in respect of any gain on a subsequent disposal of the properties by BRP/APL. The indemnity was however limited so that only gains calculated on a combined disposal price of up to £226 million (£78 million for Ludgate House and £148 million for Sampson House) would be covered if the disposals took place more than 12 weeks after completion of the sale by Minerva.

29. The bulk of the purchase price was funded by a new loan facility from Credit Suisse. This loan facility included a refinancing of the Soc Gen loan relating to CSI/New Court. For the purposes of this loan facility, Colliers (another third party valuer) provided Credit Suisse with valuations of the three properties in July 2005. New Court was valued at £72m, Ludgate House at £80m and Sampson House at £167m. The new facility/refinancing was known as Project Ocean.

30. On 18 July 2005, shortly before the completion of the purchase of the Bankside Estate from Minerva, the directors of CSI (Mr Brown and another director of Equity Trust, Ms Francis Leonard) agreed to sell New Court to NCP for £65m. The purchase price was left outstanding as a loan pending completion of the Credit Suisse refinancing.

31. Completion of the purchase of the Bankside Estate, through the acquisition of the shares in APL and BRP, took place on 3 August 2005. At the same time, Mr Brown and Ms Leonard were appointed as directors of BRP and APL.

32. On the same day the purchase price for New Court of £65m was satisfied by NCP paying off the amount due to Soc Gen from CSI, by set off against the amount of the loan due from CSI to NCP and by CSI paying a dividend to NCP of approximately £5.5m (which was also set off against the purchase price debt). This left an amount of just under £200,000 due from NCP to CSI which was earmarked for the payment of CSI's tax liabilities.

33. The original plan had been to transfer Ludgate House and Sampson House from their UK holding companies to their Jersey parent companies fairly soon after the purchase. This was to limit the exposure to UK tax on future capital gains in respect of the properties. However, this did not happen as it proved impossible to agree terms for an indemnity in favour of the proposed liquidators of the UK subsidiaries which was acceptable to Ironzar.

34. In December 2005, the possibility of an initial public offering of shares in a company owning Ironzar's wider commercial property interests was floated. This became known as Project Gold. This was replaced in May 2006 with an alternative proposal (named Project Protractor) to sell part of the portfolio to a third party private investor. In the event, neither project came to fruition.

35. In the meantime, Equity Trust had set up a separate corporate real estate group headed by Andrew Pollard, a chartered surveyor by training. At some point between December 2005 and May 2006, Mr Pollard's team took over responsibility for the administration of the companies in the Ironzar structure. Mr Pollard himself took over responsibility for the overall relationship with Mr Halabi/Buckingham. Mr Brown's team retained responsibility only for the administration of the Ironzar Trusts (but not the underlying companies).

36. By July 2006, it had become critical to complete the planned transfers of Sampson House and Ludgate House to their respective parent companies as soon as possible. The reason for this was that if the loans due from BRP/APL to their parent companies remained outstanding for more than a year (i.e. beyond the beginning of August 2006), over £1 million of withholding tax would be payable in respect of the interest on those loans when it was paid.

37. Mr Brown and Ms Leonard (who remained directors of APL/BRP despite Mr Pollard's team having taken over responsibility for the structure) approved the transfer of those properties by APL/BRP to their parent companies on 1 August 2006. The transfer price for Ludgate House was £78m and the transfer price for Sampson House was £148m (£226m in total). It will be noted that these figures coincided with the figures used for the tax indemnities given by Minerva at the time BRP/APL were acquired.

38. In the meantime, the relationship between Equity Trust and Mr Halabi had deteriorated with the result that, on 11 October 2006, Equity Trust was replaced as trustee of the Ironzar Trusts by another professional trustee in Jersey, Volaw. Around the same time, Mr Brown and Ms Leonard ceased to be directors of the claimant companies and of their Jersey parent companies.

39. It appears that the global financial crisis in 2008/2009 had a significant impact on the Ironzar structure. HMRC petitioned for the winding up of CSI, BRP and APL. A winding up order was made in relation to BRP in October 2009, in respect of CSI in November 2009 and in respect of APL in April 2010. New Court was subsequently sold by receivers in June 2010 for £60m. In July 2010, Ludgate House was sold, also by receivers, for £56m.

40. The present proceedings relate only to CSI and BRP but not APL. The reason for this is that APL, through its liquidators, brought a claim against Mr Brown, Ms Leonard and Equity Trust in July 2012 in respect of the transfer of Sampson House to SP. That claim was within the relevant limitation period and so there was no requirement to show that any breach of duty was fraudulent.

41. In the context of a summary judgment application made by APL, Master Bowles found in his judgment dated 30 June 2015 ([2015] EWHC 1858 (Ch)) that, although there was no suggestion of dishonesty, Mr Brown and Ms Leonard were in breach of their duties as directors and ordered them to make an interim payment to APL pending a full hearing as to the extent of their liability. It is important to note that, for the purposes of the summary judgment application, it was not alleged on the part of APL that Mr Brown and Ms Leonard were acting in bad faith.

42. No order was made against Equity Trust. The Master doubted that Equity Trust would have vicarious liability for the actions of Mr Brown and Ms Leonard but, being unaware

of any authority on the particular point, considered that this was not an issue which should be resolved on a summary judgment application. Likewise, he took the view that the question as to whether Equity Trust could be treated as a shadow director should also be left to a full trial.

43. It is perhaps surprising that CSI and BRP did not also bring their claims within the relevant limitation period. The result of course is that they have the additional hurdle of proving not only that Mr Brown was in breach of his duties as a director of the two claimant companies (and that Equity Trust was liable for any such breaches or was itself in breach of its duties) but that any such breaches were fraudulent.

Fraudulent breach of duty

44. Section 21 Limitation Act 1980 disapplies any limitation period which would otherwise apply under that Act in respect of an action by a beneficiary under a trust in respect of any fraudulent breach of trust.

45. It is well established that a director has fiduciary duties to the company of which they are a director. Section 21 Limitation Act 1980 has therefore been applied to an action brought by a company in respect of a breach of those duties (see for example *Gwembe Valley Development Company Limited v Koshy* [2003] EWCA Civ 1048 at [111-112]). The defendants accept in this case that, if any breaches of duty by the defendants are fraudulent, there is no limitation defence.

46. Millett LJ explained what is meant by a fraudulent breach of trust in the context of s 21 Limitation Act 1980 in *Armitage v Nurse* [1998] Ch 241 at [251B-F]. The key principles are as follows:

46.1 In the relevant context, fraud means dishonesty. This “connotes at the minimum an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interest of the beneficiaries or being recklessly indifferent whether it is contrary to their interest or not.” (at [251E]).

46.2 It is not necessary that the trustee should stand to gain personally. It is enough that they intend to benefit someone who is not the object of the trust.

46.3 A deliberate breach of trust is not necessarily fraudulent.

47. In relation to a breach of fiduciary duties by a director it is necessary to identify who are the "beneficiaries" for the purposes of the formulation adopted by Millett LJ. The immediate answer is of course that the beneficiary is the company to which the director owes their duties. This chimes with the opening words of s 21(1) Limitation Act 1980 as it will normally be the company which is bringing the action in respect of which the time limit is relevant.

48. However, the authorities dealing with directors' duties make it clear that, although the duties are owed to the company it is the interests of the members as a whole and, if the company is insolvent or bordering on insolvency, the interest of the creditors as a whole to which the director should have regard (see *BTI 2014 LLC v Sequana SA* [2022] UKSC 25 at [1 and 81]).

49. In the course of his submissions, Mr Parker KC (appearing for the claimants) accepted that, in determining whether Mr Brown had acted dishonestly (and therefore in fraudulent breach of his duties as a director) it was necessary to have regard to the interests of the members of the relevant company and, where appropriate, the creditors.

50. As far as dishonesty itself is concerned, the principles explained by the Supreme Court in *Ivey v Genting* [2017] UKSC 67 at [74] are well-known. It is necessary first to determine the relevant person's subjective state of knowledge or belief, the reasonableness (or otherwise) of a person's belief being only evidence as to whether they genuinely hold that belief. The question then is whether, based on that knowledge or belief, the person's conduct was dishonest applying the (objective) standards of ordinary, decent people.

51. Although it is expressed differently, there is in my mind no inconsistency between this formulation and the principles endorsed by Millett LJ in *Armitage v Nurse* in the context of fraudulent breach of fiduciary duties. What Millett LJ is simply confirming is that a fiduciary who acts in a way which they know is contrary to the interest of their beneficiaries or who is recklessly indifferent as to whether it is contrary to their interests is, objectively, dishonest.

52. The parties agree that, for this purpose, what is sometimes referred to as "blind eye" knowledge is sufficient. As explained by the Court of Appeal in *Group Seven Limited v Nasir* [2019] EWCA Civ 614 at [59], this requires a suspicion that certain facts may

exist and a conscious decision to refrain from taking any step to confirm their existence. The suspicion must be firmly grounded and targeted on specific facts.

The burden and standard of proof

53. The claimants acknowledge that they bear the burden of showing, on the balance of probabilities, that Mr Brown dishonestly breached his fiduciary duties.

54. Mr Norbury KC (appearing for the defendants) refers to the well-known observation of Lord Nicholls in the case of *In Re H (Minors)* [1996] AC 563 at [586E] that the Court should, to the extent appropriate, bear in mind that, the more serious the allegation, the less likely it is that the event occurred. This means that the evidence may need to be stronger before the Court concludes that the allegation is established on the balance of probability. As Lord Nicholls observes, "fraud is less likely than negligence".

55. Mr Parker acknowledges this is a starting point (see the comments of Males LJ in *Bank St Petersburg PJSC v Arkhangelsky* [2020] 4 WLR 55 at [117]) but notes that Males LJ goes on to say at [120] that:

> "…once other findings of dishonesty have been made against a party, or he is shown to have given dishonest evidence, the inherent improbability of his having acted dishonestly in the particular respect alleged may be much diminished and will need to be reassessed".

56. In assessing dishonesty, Mr Norbury draws the attention to the importance of considering a person's motive for acting dishonestly as well as the possible disincentives to participation in fraud (see the comments made by Calver J in *ED & F Man Capital Markets Limited v Come Harvest Holdings Limited* [2022] EWHC 229 (Comm) at [71 (iii) – (iv)]).

57. Mr Norbury notes that this is particularly the case where the person against whom dishonesty is alleged will not receive any direct benefit from the fraud, a point made by Mann J in *Mortgage Agency Services No. 1 Limited v Cripps Harries LLP* [2016] EWHC 2483 (Ch) at [88-90]. A similar point is made by Millet LJ in *Armitage v Nurse*

at [263F] where he observes that: *"…a charge of fraud against independent professional* trustees is, in the absence of some financial or other incentive, inherently implausible."

58. Nonetheless, it is important to bear in mind that, as the Court of Appeal emphasised in *Bank St Petersburg* at [44], the test is "...the simple balance of probabilities, neither more nor less". All of the factors I have mentioned are however relevant in determining where that balance lies in relation to the question of dishonesty.

59. Before leaving the question of the extent of the burden of proof which rests with the claimants, there is one further point which emerged during submissions which I must deal with. This relates to the alleged transfers at an undervalue. Mr Brown's case both in his pleadings and his evidence is that he was aware of the need to obtain an up to date valuation of the properties and that he did in fact do so.

60. Mr Parker submits that it follows from this that, if it is shown that Mr Brown did not have an up to date valuation available to him, he must have been dishonest as he has not put forward any other basis on which he could have an honest belief that the transfer price was the market value of the properties.

61. Mr Norbury accepts that there may be an issue with credibility if Mr Brown's pleaded case is not accepted but is adamant that the claimants still need to show, on the balance of probabilities, that Mr Brown was dishonest and submits that if he genuinely believed that the transfer price was market value (for whatever reason), the claimants cannot succeed. In support of this, he refers to the decision of the House of Lords in *The Popi M [19*85] 1 WLR 948, a case dealing with the reasons for the loss of a ship. Lord Brandon noted at [955H] that:

> "The Judge is not bound always to make a finding one way or another with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden."

62. There is of course no doubt that it is open to the Court to reject a claim based on the fact that the claimant has failed to discharge their burden of proof even if the Court does not accept the defendant's explanation of events, although, as noted by Lord Brandon

at [956A], a Judge will not decide a case purely based on the burden of proof if this can legitimately be avoided.

63. However, the real point being made by Mr Parker is, in my view, in substance a slightly different one. It is that it is not open to Mr Brown to maintain that he was honest if the Court were to find that he did not have an up to date valuation before him given that he has not, in his pleadings or his evidence, put forward any other explanation for his honesty. At its core, this is not therefore a question as to whether the Court is able to make particular findings of fact but whether, on the basis of the facts which the Court is able to find, an inference of dishonesty is justified.

64. Looked at in this way, I have no hesitation in rejecting Mr Parker's submission. Read as a whole, it is quite clear from the pleadings that the key question in issue is whether Mr Brown acted honestly. Although I accept the CPR (Rule 16.5) requires a defendant, in their defence, not only to deny an allegation but also to put forward their own version of events where appropriate, the failure to do so cannot relieve the claimant from having to prove their case. As Mr Norbury pointed out, if Mr Brown had simply denied dishonesty (and had not referred to any up to date valuation) it would still be up to the claimant to prove, based on the available evidence and on the balance of probabilities, that Mr Brown had been dishonest.

65. Although a finding that Mr Brown did not have an up to date valuation available to him would be a significant factor to take into account, it cannot in my view be conclusive as to whether or not Mr Brown acted dishonestly which must be judged in the light of all of the relevant circumstances.

66. Mr Parker also submits that, at the very least, an adverse inference should be drawn from the failure to provide an alternative explanation for Mr Brown's belief that he acted honestly should it be found that no up to date valuations were available to the directors. Again, in my view, this goes too far, particularly bearing in mind the time that has passed since the events in question. The lack of an explanation is a factor in determining whether Mr Brown acted dishonestly but must be looked at in the light of all the available evidence.

The witnesses and the evidence

67. Both parties provided expert valuation evidence. I will deal with that evidence and the approach of the experts when I consider the valuation issues (which are primarily relevant to the amount of any liability, should liability be established).

68. In terms of factual evidence, despite the passage of time, the Court had available to it a significant quantity of contemporaneous documentary evidence. It is however clear that the documentary record is not complete. There are for example documents which are referred to in correspondence which it has not been possible to locate. In addition, Mr Brown has given evidence suggesting that, due to the filing procedures operated by Equity Trust at the time, possibly only 70% of documents would find their way onto a file. Having said that, there is no other evidence to back up this assertion and so it must be viewed in the light of all the other evidence.

69. Mr Norbury makes much of the delay between the events in question and the date on which the claim was brought (approximately 15 years). He suggests that the Court should not draw adverse inferences from the fact that a document which is said to exist cannot be found. Indeed, he goes further than this and says that the Court should presume that any missing document did exist unless there is a cogent explanation showing that it did not.

70. Mr Parker does not however invite the Court to draw any adverse inferences in relation to missing documents. Instead, the claimants seek to show on the basis of the documentary evidence which is available that certain documents which are said to exist do not in fact exist. This includes for example up to date valuations justifying the transfer price for the properties and appropriate accounts justifying the payment of a dividend.

71. Clearly, where there are missing documents, the Court will need to look at all of the evidence to see where the balance of probabilities lies. This will include inferences which might be drawn from the documentary evidence which does exist. It will also involve taking into account the witness evidence although, as discussed below, the weight which can be put on this evidence may be limited. The length of time which has elapsed since the events in question will also be a relevant factor. There can however be no presumption that a document has been lost rather than that it never

existed in the first place just because it was said to have been created a long time ago. It will all depend on an assessment of the available evidence as a whole.

72. Turning to the witness evidence, the only witness of fact was Mr Brown himself although I should mention that both parties referred to the evidence given by Ms Leonard in her witness statement prepared for the purposes of the Angelmist proceedings. Although the weight which can be put on that evidence is limited by the fact that Ms Leonard did not give evidence in these proceedings and was not therefore cross-examined, her evidence is nonetheless helpful to the extent that it sheds light on the other evidence available in these proceedings.

73. Unfortunately, Mr Brown was not a reliable witness. Not surprisingly, given that the events in question took place over 15 years ago, there was much that he could not remember. Indeed, he prefaces his first witness statement by saying that he has a very limited memory of the specific events relevant to the proceedings but claims to have a better recollection of the general processes and procedures followed by Equity Trust.

74. The lack of any clear recollection of the events in question should not be held against Mr Brown given the passage of time. However, there was more than one occasion where the evidence which he gave was inconsistent with documentary evidence which had been drawn to his attention and where the inconsistency cannot be explained solely by the length of time since the events took place.

75. One good example of this relates to the question as to whether he would normally expect to obtain an up to date, independent valuation for a transfer of a property from a subsidiary company to a parent company. His evidence in these proceedings, which he initially confirmed in his oral evidence was that this was his normal practice. That evidence was given after apparently refreshing his memory as to what evidence he gave in relation to the Angelmist proceedings. However, his witness statements for those proceedings are equally clear that he would not generally expect to get an independent valuation for this purpose. Faced with this, he changed his position to say that he might have relied on advice from Buckingham and, indeed, that the advice may have been verbal.

76. There were also times at which Mr Brown purported to remember quite specific details which had not previously been mentioned by him. A case in point is the fact that the

cash consideration payable to Minerva was reduced by rent which had previously been received and which Minerva was permitted to retain. It might perhaps be surprising if Mr Brown had a clear memory of this but yet was unable to recall other more significant aspects of the transactions which are relevant to these proceedings.

77. There are of course numerous statements in the authorities relating to the fallibility of human memory and the need, particularly in commercial cases, to focus on the contemporaneous documents (see for example *Blue v Ashley* [2017] EWHC 1928 (Comm) at [65-67] and *Simetra Global Assets Limited v Ikon Finance Limited* [2019] EWCA 1413 at [48]). That is not to say that the witness evidence should be discounted. On the contrary, it must be weighed in the balance. However, given the passage of time and the inconsistencies in Mr Brown's evidence, what he says must be treated with some caution and certainly must be tested very carefully against the documentary evidence.

78. Having said this, whilst there were inconsistencies in Mr Brown's evidence some of which, as I have said, cannot easily be explained simply by the passage of time, I did not form the impression that his evidence was dishonest.

79. To take the example I have already given relating to the consistency between his witness statements in these proceedings and in the Angelmist proceedings, it would be somewhat surprising for a dishonest witness to give evidence in these proceedings which clearly contradicted their previous evidence and which they explained they had just read in order to refresh their memory. In my view, the more likely explanation is that the later evidence is a reconstruction arising from his review of the documents relating to this claim.

80. Mr Parker drew attention to one part of Mr Brown's evidence in the Angelmist proceedings which he says must have been untrue. This relates to a certificate of solvency relating to APL which Mr Brown says was signed after seeing a balance sheet confirming that APL would remain solvent after transferring Sampson House to APL's parent company at a price of £148m.

81. In fact, the balance sheet which was subsequently produced to the Court, and which forms part of the evidence in these proceedings, shows Sampson House at a value of £150.5m, on the basis of which the net assets of APL were approximately £2.1m. A

transfer of Sampson House at a value of £148m (being £2.5m less than the recorded value) would therefore have rendered APL insolvent to the tune of approximately £400,000. As Mr Parker points out, Mr Brown had no explanation for this other than to suggest that perhaps there might have been some other balance sheet for APL showing different figures.

82. Mr Brown was not of course cross-examined in the Angelmist proceedings as it was only a summary judgment application and not a full trial and it does not in any event necessarily follow that just because a witness has given untruthful evidence in one set of proceedings, their evidence in another should also be presumed to be dishonest. As I have said, in these proceedings, my conclusion is that, whilst Mr Brown's evidence was unreliable, it was not dishonest.

Transfer of New Court by CSI to NCP

83. As I have explained, in order to succeed, the claimants must show that Mr Brown acted in a way which he knew was contrary to the interests of those who would be affected by the duties which he owed as the director of CSI (blind eye knowledge being enough) or that he was recklessly indifferent as to whether his actions were contrary to their interests. The claimants do not suggest that the interests of creditors were engaged in relation to the transfer of New Court from CSI to NCP. On this basis, in assessing whether Mr Brown acted dishonestly, it is relevant to consider not only the impact of his actions on CSI but also their effect on the interests of NCP as the sole shareholder in CSI.

84. The claimants' case is that Mr Brown breached his fiduciary duty to act in good faith and in what he honestly believed to be the interests of CSI. In statutory terms, this would no doubt be a breach of the duty in s 172 Companies Act 2006 to act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.

85. The breach is said by the claimants to be fraudulent or dishonest on the basis that Mr Brown knew that he needed an up to date, independent valuation of New Court and yet failed to obtain one. He could not, according to the claimants, therefore have had an honest belief that he was acting in the interests of CSI as he had no other basis for concluding that the transfer price represented the market value of New Court.

86. Should it be shown that Mr Brown did not have actual knowledge that the transfer price was less than market value, the claimants' alternative case is that he had blind eye knowledge as he had a firmly grounded suspicion that the market value was higher than the transfer price and he deliberately refrained from getting an up to date, independent valuation with a view to assisting CSI to evade tax on any resulting gain.

87. Again, the claimants say that Mr Brown was therefore dishonest (in the relevant sense) as his blind eye knowledge that the transfer price was then less than market value means that he knew that the transaction was not therefore in the best interests of CSI.

88. The claimants go on to say that Mr Brown's actions also involved dishonesty in relation to HMRC. This aspect however only appears to be relied on in relation to the question as to whether any breach of duty by Mr Brown was capable of ratification by the shareholders of CSI. It has not for example been suggested by the defendants that any breach by Mr Brown of his fiduciary duties would only be fraudulent for the purposes of s 21 Limitation Act 1980 if that breach involved dishonesty in relation to HMRC.

89. As I have mentioned, the defendants have also conceded that, if Mr Brown's breach of duty is dishonest (in the sense that he acted knowingly contrary to the interests of CSI), the breach is incapable of ratification. The question of tax evasion is therefore in my view only relevant to the more general question as to Mr Brown's motivations and the inferences which can be drawn from that as to whether any breaches of duty were dishonest.

90. At a general level, the defendants' pleaded position is that Mr Brown acted in good faith and honestly in what he considered to be the interests of CSI and that he believed the transfer price to reflect the value of New Court. More specifically, he says he was aware of the need to obtain an updated valuation of New Court for the purposes of the sale to NCP and that an updated valuation was in fact obtained from DTZ in the form of a letter dated 30 June 2005.

91. In the light of this, the issues which the Court must determine are in my view as follows:

    91.1 Did Mr Brown have available to him an up to date, independent valuation of New Court when he approved the sale by CSI to NCP at a price of £65m?

91.2 If not, did he nonetheless consider that the transfer price of £65m reflected the market value of the property?

91.3 Even if he did, did he have a firmly grounded suspicion that the market value was higher than this but deliberately refrain from obtaining an up to date, independent valuation so that his suspicions were not confirmed?

92. It makes sense to consider first whether there was a letter from DTZ dated 30 June 2005 which the board of CSI had available to it when making the decision to transfer New Court to NCP at a price of £65m.

The DTZ letter

93. The board meeting of CSI approving the transfer of New Court to NCP took place on 18 July 2005. Mr Brown and Ms Leonard were present. The minutes of that meeting record that CSI had received valuation advice from DTZ and that this advice was tabled. The minutes state that the advice was to the effect that, taking into account the tenancy information and DTZ's view of rental value and yields, the market value of New Court was £65m.

94. What is said by the defendants to be the DTZ letter is a draft addressed to the directors of NCP and dated 30 June 2005. It cross refers to DTZ's "previous report and valuation" (there is no dispute that this is a reference to the May 2002 valuation prepared for Soc Gen) including "the details and description, tenuer [sic] and tenancy information". The letter concludes that the market value as at 30 June 2005 is £61m. DTZ stressed that the valuation was an informal desktop overview and that it should not be relied on for any purpose.

95. The first trace of the DTZ letter in the documentary evidence is an email dated 17 October 2005 from Mr Sihra of Buckingham to Nina Gomes and Angela Morris (members of Mr Brown's team at Equity Trust) sending them the draft letter and asking them to comment.

96. The documentary evidence also contains an annotated copy of the letter on which the value of £61m is deleted and replaced with a value of £65m. There are also notes which appear to have been added by someone at Equity Trust to the effect that the value is

being discussed between Buckingham and DTZ and that Equity Trust should speak to Mr Sihra in the week beginning 31 October 2005.

97. The metadata for the Word document sent by Mr Sihra to Equity Trust on 17 October 2005 shows that it was created on 17 August 2005 which is of course some time after the date of the board meeting on 18 July 2005.

98. Whilst Mr Norbury notes that the metadata is not conclusive as the document circulated by Mr Sihra could have been a separate document saved by him in August 2005, with an earlier version being available to the board on 18 July 2005, I have no hesitation in concluding that the DTZ letter was not available to the board of CSI when the transfer to NCP was approved on 18 July 2005 and that it is more likely than not that the DTZ advice tabled at the meeting was the May 2002 report.

99. The first point to note is that there is no doubt that Mr Brown has no clear recollection of what was available at the board meeting. In his pleadings and his witness statement, he says that the board must have had the DTZ letter available to it. However, in his oral evidence, faced with the information provided by the metadata, he suggested that he did not recognise the DTZ letter contained in the documentary evidence and that the letter which the board had in front of it may have been a different letter (not contained in the evidence and not previously referred to). I think it is fair to infer from this that any memory Mr Brown has of the DTZ letter is a reconstruction based on a later review of the documents.

100. The conclusion that the DTZ letter was only produced after the board meeting is also overwhelmingly supported by the documentary evidence:

100.1 Other than the generic reference to "valuation advice from DTZ" in the board minutes there is no reference to the DTZ letter prior to 17 October 2005.

100.2 The reference on the annotated version of the letter (which amends the value from £61m to £65m) to a proposed call with Mr Sihra in the week commencing 31 October 2005 would not make sense if the letter had been produced for the board meeting on 18 July.

100.3 Ms Gomes at Equity Trust emailed Buckingham on 26 July 2005 referring to her understanding that Buckingham were to provide details of who had valued New Court at £65m so that the details could be inserted into the board minutes. Buckingham replied on the same day to say that their understanding was that the property had been valued by DTZ and that confirmation of the value of £65m was being chased. This of course suggests that Equity Trust did not have the DTZ letter on 26 July 2005.

100.4 Mr Brown's explanation for this in his evidence is that Ms Gomes had a habit of asking for things without checking if they already had it and suggests that this is what must have happened in this case.

100.5 However, there are numerous subsequent references in the documents between October 2005 and June 2006 to the need for a valuation to support the transfer price of £65m which make it clear that, at that stage, no formal valuation existed. For example, an email on 15 June 2006 from Mr Herbert (in the accounting group at Equity Trust) to Mr Pollard includes as an outstanding issue "valuation to support £65m value attached to the property at [hive up]". Mr Pollard has noted against this "Harry Sihra to obtain".

100.6 Whilst these references could perhaps be explained on the basis that the DTZ letter available to the board on 18 July 2005 was a draft and/or that a more formal valuation needed to be obtained for tax purposes, these repeated questions about the existence of a valuation supporting the transfer price certainly support the inference from the other evidence that no independent valuation existed at the time the transfer took place.

101. It is therefore necessary to consider whether, despite this, Mr Brown believed that the transfer price was the market value of New Court.

Mr Brown's belief as to the market value of New Court

102. At the outset, it should be noted that, as Mr Parker has emphasised, Mr Brown has not put forward any explanation for holding an honest belief that the transfer price represented the market value of New Court at the time it was transferred to NCP other than his recollection of the DTZ letter which, as I have found, was not available to him

at the relevant time. However, as I have said, the claimants must still show that Mr Brown was dishonest which involves a consideration of his state of mind and, in particular, what he knew and believed in relation to the transaction in question.

103. Mr Brown asserts that he acted honestly and in good faith in what he considered to be the interests of CSI and that he considered that the price payable for New Court reflected the value of that property. These assertions must be tested carefully against what the documentary evidence shows as to Mr Brown's state of mind.

104. In relation to this, I should say that it is clear to me from Mr Brown's oral evidence and from the documentary evidence that he was kept up to speed by his team at Equity Trust in relation to any important discussions or developments relating to the Ironzar structure. I infer from this that facts known to his team are likely to have been known to Mr Brown as well.

105. Although it pre-dated his arrival at Equity Trust in July 2005, Mr Brown was clearly aware that NCP had acquired CSI (and therefore New Court) for a total consideration of approximately £60m in April 2002. It is notable that there is reference in the documentation which Mr Brown would have seen to DTZ having provided a valuation of New Court as at January 2002 of £60m. Mr Brown was however also aware that, for the purposes of financing the purchase, DTZ had provided to Soc Gen (the lender) a valuation of the property as at May 2002 of £65m.

106. From March 2004 onwards, Equity Trust took advice from Olswang in relation to the transfer of New Court from CSI to NCP. The consistent advice from Olswang was that the property should be transferred at market value both for insolvency and banking reasons and also on the basis that any tax liability would be calculated based on the market value of the property, irrespective of the price used. Although the initial advice was again before Mr Brown joined Equity Trust in July 2004, his evidence (which was not challenged) was that he would have reviewed the advice relating to the transaction. The advice was in any event repeated on various occasions after Mr Brown joined Equity Trust and took over responsibility for the Ironzar structures.

107. In March 2005, it was Olswang's understanding that the directors of CSI believed the value of New Court to be £60m and that this was the figure which they intended to use for the purposes of the transfer for NCP. They drew attention to the fact that the

property had been revalued in the accounts of CSI to £65m based on the May 2002 DTZ valuation and suggested that an independent, third party valuation should be obtained.

108. Following this, Equity Trust asked Mr Sihra about the value of New Court and, in particular, the revaluation to £65m. Mr Sihra had previously suggested to Equity Trust (in March 2004) that the value of New Court may have reduced from £65m since 2002 although in June 2004 had agreed that a value of £65m was appropriate.

109. Another member of Mr Brown's team at Equity Trust, Rachel A'Court discussed the valuation issue with Olswang following their letter in March 2005 in which Olswang expressed the view that it would be better to increase the value for the transfer to £65m. Ms A'Court has made a handwritten note on her note of the call with Olswang to the effect that the discussion had been superseded on the basis that the valuation should now be reflected at £65m. Given that this conversation took place a few days after Ms A'Court wrote to Mr Sihra asking for his comments on the valuation point, I infer from this that Mr Sihra had advised that £65m was an appropriate value to use for the purposes of the transaction.

110. At around the same time, the Ironzar net asset schedule (which listed all of the properties held in the Ironzar structure together with their values) however showed a value for New Court of £70m.

111. On 24 June 2005, Mr Brown signed on behalf of CSI a covenant compliance certificate in favour of Soc Gen confirming that CSI was in compliance with the covenants contained in the facility agreement. In particular, the certificate confirmed that, as at 8 April 2005, the loan to value ratio for the senior facility was 80%. In effect, this was confirming that New Court was worth £65m at that date as the senior facility was £52m which is 80% of £65m. This is shown in the calculation attached to the covenant compliance certificate which states in terms that the property was valued at £65m. The covenant compliance certificate was approved at a board meeting of CSI held on the same day.

112. At around this time, discussions were taking place in relation to the proposed refinancing with Credit Suisse known as Project Ocean. As part of that refinancing,

Mr Brown was aware that Colliers had been instructed by Credit Suisse to provide a valuation of New Court.

113. Olswang gave further advice in relation to the transfer from CSI to NCP on 11 July 2005. They reiterated the need for an independent valuation as well as noting that any valuation produced for the purposes of Project Ocean would be strong evidence of the market value of New Court. The letter from Olswang also noted that the capital gains tax base cost of New Court was approximately £64.5m and so corporation tax would be payable on any gain if the market value of the property on transfer was in excess of this figure.

114. On 14 July 2005, Ms A'Court wrote to Mr Sihra with a draft of CSI's accounts for the period ending 31 December 2004. She noted that the property was valued in the accounts at £65m and asked Mr Sihra to let her know if this was "still an issue". Mr Sihra's reply (if there was one) is not contained in the evidence available to the Court. However, the final version of the financial statements which was signed by Mr Brown on 7 September 2005 still show the value of Carey Street as £65m. I infer from this that he was happy with the value shown in the accounts.

115. It should however be noted that both the draft accounts produced in July 2005 and the final version signed in September 2005 noted that the valuation of Carey Street was historical, that the directors considered that the cost of obtaining a professional valuation would outweigh any benefits obtained by the members but were satisfied that any such valuation would show that the property had a value in excess of its historical valuation.

116. Colliers provided their draft valuation for Project Ocean to Credit Suisse on 20 July 2005. This valued New Court at £72m. Mr Sihra passed this figure on to Mr Brown on 21 July and sent him a copy of the draft report on 22 July. This was of course after the transfer of New Court to NCP on 18 July. There is no suggestion that Mr Brown or Equity Trust were aware of the result of the Colliers valuation when the transfer took place.

117. A number of points emerge from this evidence which are relevant to Mr Brown's state of mind. First it is clear that Mr Brown/Equity Trust relied on Mr Sihra/Buckingham for advice in relation to valuation issues. It is apparent that Mr Brown's team would

not adopt a particular valuation without a sign off from Buckingham. This is supported for example by the email sent by Ms Gomes to Buckingham on 26 July 2005 (referred to at paragraph 99.3 above) asking who had provided the valuation for the transaction. It is also consistent with Mr Brown's recollection in his oral evidence that he discussed valuation issues on a regular basis with Buckingham.

118. It is equally clear that both the team at Equity Trust and Mr Sihra were aware of the potential tax liability on any gains to the extent that the transfer price exceeded CSI's base cost of approximately £64.5m. They were however also aware of the likelihood that HMRC would challenge a "low" valuation and that independent evidence would be needed to support any valuation not only for tax purposes but also from the point of view of solvency and their lenders.

119. Mr Brown's team also knew that the use of a £65m valuation could adversely impact the Project Ocean refinancing. This is the only realistic inference to be drawn from Ms A'Court's question to Mr Sihra on 14 July 2005 as to whether the value of £65m in the draft 2005 accounts for CSI was an issue.

120. It is apparent therefore that there was a tension between setting a value for the transfer of New Court to NCP which would minimise any liability to tax on capital gains and ensuring that the Project Ocean refinancing was successful.

121. In his witness statement, Mr Brown suggested that there might be a difference between valuations produced for different purposes. He identified three categories: valuations for day to day transactions (such as the transfer by CSI to NCP), valuations for lending purposes (which might "push the envelope") and development valuations which he described as "big sky" thinking and which might include the valuations obtained for example for the purposes of Project Gold (the initial public offering). The possibility of valuations being different for different purposes was also a point made by Mr Brown in his oral evidence.

122. Both experts were agreed that there could only be a single market value for a property, whatever the purpose of the valuation. However, they also both agreed that there was a range of reasonable values in the sense that one valuer may reasonably come to a different conclusion to another. It appears that the concept of a range of values was also familiar to Mr Sihra as, in the content of the valuation of Ludgate House (as to

which, see further below), he asked Mr Pollard for guidance on "which side of the range to err on".

123. In my view, the only reasonable conclusion to be drawn from these facts is that, whilst Mr Brown was aware that a higher valuation was possible and that a lower valuation was preferrable from a tax perspective, based on guidance provided by Buckingham, a transfer price of £65m was a justifiable market value. In these circumstances it cannot be said that Mr Brown acted in a way which he knew was contrary to the interests of CSI, nor can he be said to have been reckless as to whether his actions were contrary to the interests of CSI as he clearly turned his mind to the question as to what the appropriate transfer price should be.

124. In cross examination, Mr Brown accepted that Buckingham were not valuation experts. However, as he pointed out, they were nonetheless property specialists. In these circumstances, it does not in my view follow (as the claimants have suggested) that Mr Brown could not have honestly believed that the transfer price was an appropriate market value for the purposes of the transaction.

125. Mr Parker draws attention to the 2004 accounts for CSI which Mr Brown signed in September 2005, approximately six weeks after the transfer of New Court. As I have mentioned, those accounts contained a note to the effect that the directors believed the value of New Court to be in excess of £65m.

126. However, in my view, little can be read into this. Mr Brown clearly could not recall his thinking and the circumstances in which those accounts were signed. As noted above, Mr Sihra was asked to comment on the value used in the accounts and, it is to be inferred, approved the proposed wording. Given that the concern in relation to the accounts clearly related to the Project Ocean borrowing, the statement in the accounts is perhaps not surprising given Mr Sihra's apparent use of a range of values. It does not therefore follow from this that Mr Brown must have thought that, in July 2005, when the transfer took place, a figure of £65m was below the market value of New Court.

127. The documentary evidence makes it clear that it was anticipated that, following the hive up of New Court to NCP and the subsequent refinancing (Project Ocean) which took place shortly afterwards, CSI would be put into solvent liquidation. Taking this into account and looking at the interests of the members of CSI as a whole, this

reinforces my conclusion that Mr Brown did not believe that his actions were contrary to the interests of CSI. This does however still leave the question as to whether Mr Brown may have had blind eye knowledge.

Blind eye knowledge

128. As I have explained, in order for Mr Brown to have blind eye knowledge that he was acting in a way which was contrary to the interests of CSI, it must be shown that he had a firmly grounded suspicion that New Court was worth more than £65m and that he deliberately refrained from taking any action to confirm his suspicion.

129. I have already found that Mr Brown was aware of the possibility that New Court could be valued at a price in excess of £65m. The property was for example shown in the Ironzar asset statements at a value of £70m. In addition, the clear purpose of the Project Ocean refinancing as far as New Court was concerned was to increase the level of borrowing which would, in turn, be dependent on New Court being valued at more than £65m. I would accept on this basis that Mr Brown's suspicion was firmly grounded on specific facts known to him.

130. However, I reject the suggestion that Mr Brown deliberately refrained from arranging for CSI to obtain an independent valuation for fear that this might confirm his suspicions. On the contrary, the documentary evidence makes it clear that it was always intended that a valuation should be obtained to support the £65m value. Olswang had advised numerous times in advance of the transaction that such a valuation would be needed. It is the very thing that Ms A'Court was asking Mr Sihra for in her email of 26 July 2005. Although it appears that it was never finalised, there can be little doubt that this is exactly what the DTZ letter was intended to be.

131. The claimants invite the Court to infer that Mr Brown made a deliberate decision not to obtain an up to date, independent valuation in advance of the transaction taking place on the basis of nothing more than his suspicion that a higher value for New Court could be justified. Given that the claimants can point to no other evidence justifying such an inference and that what evidence there is points in the opposite direction it would not, in my view, be appropriate to make such an inference. The reality is that Mr Brown considered that a value of £65m was justified based on his team's discussions with

Buckingham and that the question of obtaining independent, supporting evidence was left until later.

132. In this context, it is worth noting that, although the transfer of New Court from CSI to NCP had been discussed for some time, in the end, it took place in something of a hurry as, for stamp duty land tax ("SDLT") group relief purposes, the transaction had to be completed by 19 July 2005. It also had to be co-ordinated with the Project Ocean refinancing and the purchase of the Bankside Estate. It is perhaps therefore understandable that a supporting valuation was not obtained in advance of the transaction.

Motivation

133. As I have already mentioned, it is clear from the authorities that some consideration of a person's motivations are relevant in reaching a conclusion as to whether, on the balance of probabilities, that person may have acted dishonestly.

134. It is not suggested that Mr Brown stood to benefit personally in any way from a transfer of New Court to CSI's parent company at an undervalue. Instead, what is suggested is that what motivated Mr Brown was a desire to assist CSI to evade tax by falsely representing to HMRC that £65m was the market value of New Court.

135. Whilst I would accept that a professional person such as Mr Brown may be keen to help their client achieve their objectives, as Lord Millett observed at [263F] in *Armitage v Nurse*, "a charge of fraud against independent professional trustees is, in the absence of some financial or other incentive, inherently implausible". Unfortunately, experience has shown that there are some professionals who are willing to act dishonestly in order to benefit their clients but, in the absence of any evidence of a reason for them to do so there would in my view need to be strong evidence supporting an inference of dishonesty.

136. Mr Brown was an employee of Equity Trust. Whilst he was also a director, there is no evidence that he shared in any profits from the relationship with Mr Halabi. At the time of the transfer of New Court, Mr Brown had only been responsible for the structure for a few months. He cannot have had any expectation that the client would follow him were he to move elsewhere. This conclusion is confirmed by the fact that, not long

afterwards, responsibility for the relationship passed to Mr Pollard. In the circumstances, it is in my view inconceivable that, as suggested by the claimants, Mr Brown would put his career and his reputation on the line for the client by dishonestly assisting CSI to evade tax.

137. In determining where the probabilities lie, an examination of Mr Brown's motivations supports my conclusion that Mr Brown did not act in a way which he knew was contrary to the interests of CSI.

138. I should say that I have no doubt that Mr Brown was in breach of his fiduciary duties as a director of CSI. He should have made sure that CSI obtained an up to date, independent valuation, as he had been advised to do. However, any breach of these duties was not fraudulent for the purposes of s 21 Limitation Act 1980 and, as the claimants accept, he can therefore have no liability in respect of a claim which was made so long after the events in question.

CSI dividend

139. As I have explained, the purchase price due from NCP to CSI in respect of the transfer of New Court was originally left outstanding as a debt due to CSI pending the completion of the Project Ocean refinancing. This occurred (at the same time as the completion of the purchase of the Bankside Estate) on 3 August 2005.

140. Olswang advised on the arrangements relating to the satisfaction of the purchase price. The documents show that the intention was that no cash should be left in CSI and that, in due course, CSI should be put into solvent liquidation. The proposal was that the purchase price should be satisfied as follows:

140.1 NCP would pay the balance due from CSI to Soc Gen of approximately £56m.

140.2 Part of the purchase price would be set off against the debt due from CSI to NCP (including interest) which was incurred at the time of the original purchase of New Court in 2002. By this time, the debt was approximately £3.6m.

140.3 A "retention" of approximately £187,000 earmarked to meet anticipated tax liabilities of CSI would remain owing as a debt due from NCP to CSI.

140.4 The balance of approximately £5.5m would be distributed by CSI as a dividend to NCP. This would extinguish the remainder of the purchase price by way of a set off.

141. Olswang prepared all of the documents necessary to implement these proposals including the board minutes of CSI declaring the dividend as well as producing a cashflow statement setting out the calculation showing the amount of the proposed dividend. That calculation, prepared on the day of completion, showed that the dividend would be £5,513,284.49.

142. Following discussions with the lawyers acting for Credit Suisse, Olswang advised that, in order to ensure that CSI remained solvent (and that the directors could therefore sign the solvency declaration required by Credit Suisse), Equity Trust as trustee of the Ironzar Trust should enter into a share subscription agreement with CSI under which it agreed to subscribe for shares in CSI of an amount equal to any UK corporation tax liabilities of CSI.

143. The board meeting at which the dividend was approved took place on 3 August 2005. Mr Brown and Ms Leonard were the directors in attendance. The minutes noted the various transactions referred to above which would result in the satisfaction of the purchase price due from NCP to CSI. The precise figures for the redemption of the Soc Gen loan and the amount of the loan due from CSI to NCP (including accrued interest) were written in by hand, as was the amount of the resulting dividend which is recorded as £5,521,846.35 rather than the slightly lower figure contained in the Olswang calculations mentioned above.

144. The minutes also referred to the share subscription agreement signed by Equity Trust as trustee of the Ironzar Trusts as well as "interim accounts and other financial information" produced at the meeting. As well as declaring the dividend, the directors resolved that the company was solvent (within the definition contained in the Insolvency Act 1986) both before and after the transactions referred to in the minutes, including the payment of the dividend.

145. The claimants' case is that the dividend was unlawful as the statutory requirements which, at the time, were set out in Companies Act 1985, were not followed. The claimants refer in particular to s 270 Companies Act 1985 which explains how a

company's profits available for distribution are to be calculated by reference to the company's accounts or, if appropriate, interim accounts. Section 270(4) Companies Act 1985 defines interim accounts as "those necessary to enable a reasonable judgment to be made" about the relevant matters including, in particular, assets and liabilities.

146. The claimants say that Mr Brown did not have any interim accounts available to him or, if he did, they did not comply with the statutory requirements as they did not contain an accurate list of CSI's assets and liabilities. In relation to this, the claimants draw attention to a number of points.

147. The first is that, by this time, Mr Brown had seen a draft of the Colliers valuation which valued New Court at £72m and had been advised by Olswang that there was a risk that HMRC would not accept the £65m transfer price, resulting in a higher liability to corporation tax. However, as Mr Brown accepts, whatever figures were used for calculating the dividend, no provision was made for tax on any gains on the transfer of New Court to NCP. Mr Brown's explanation for this is that he believed that such liabilities (if any) were covered by the share subscription agreement.

148. BDO had also advised Mr Brown's team at Equity Trust that HMRC was unlikely to accept a deduction for the interest payable on the loan due from CSI to NCP and that, if a deduction for the management fee payable to NCP was to be available, the basis for this would need to be justified.

149. At the request of Ms A'Court at Equity Trust, BDO prepared tax computations on the basis that HMRC would not accept the interest in the management charge as deductions. However, despite this, the directors decided to make a provision for corporation tax on the basis that the deductions would be allowed. It is not apparent from the documents what the basis for this decision was but, in his evidence, Mr Brown noted that it was open to the directors to make their own judgment in relation to this.

150. It has apparently not been possible to track down any interim accounts which were available to the board for the purposes of determining the amount of the dividend. The only reference in the documents to anything which might comprise such accounts is an email from Mr Herbert (a member of the Equity Trust accounting team) to Ms Gomes and Ms Morris on 1 August 2005 noting that he had prepared balance sheets for both NCP and CSI and had left these on Ms Morris' desk. He noted that the balance sheet

for CSI did not include any corporation tax provision for 2003-2005 – i.e. the balance sheets had been prepared on the basis that the deductions for interest and management fees would be allowed.

151. Mr Brown accepts that he was aware of the need for CSI to have sufficient distributable profits in order to pay the dividend and that, in order to assess this, he needed to have interim accounts available. His position is that he did have such accounts available which he believed to be properly prepared and that, based on those accounts, he exercised reasonable judgment in approving the dividend.

152. As far as dishonesty is concerned, the allegation from the claimants is that Mr Brown either did not have any accounts available to him (knowing that he needed them) or, if he did, he knew that they were defective in that they failed to take into consideration any tax liability on the transfer of New Court to NCP. The claimants also say that the statements in the board minutes that the statutory formalities had been followed was knowingly false and was therefore dishonest for the purposes of s 21 Limitation Act 1980.

153. Based on this, the questions for the court to determine are as follows:

153.1 Did Mr Brown have interim accounts available to him when he and Ms Leonard approved the dividend?

153.2 Even if he did, were those accounts, to his knowledge, defective so that he could not form a reasonable judgment as to whether a dividend of the amount in question could properly be paid?

154. I note that these questions do not necessarily align precisely with Millett LJ's formulation of the test for fraudulent breach of fiduciary duties in *Armitage v Nurse* which focusses on whether the actions taken by the relevant person were known to be contrary to the interests of the person to whom the duties were owed.

155. This is a point taken up by Mr Norbury in his closing submissions in which he suggested that there could be no dishonesty in circumstances where Mr Brown did not consider there to be any risk of prejudice to creditors even if the correct procedure was not followed. Mr Norbury makes the point that this would be the case even if there turned

out to be a tax liability for which no provision had been made in the accounts, taking into account both the existence of the share subscription agreement and also Mr Brown's evidence that Mr Halabi's practice was to introduce additional funds to the Ironzar structure where it was needed to meet liabilities. I will however consider first the two main questions identified by the parties.

Interim Accounts

156. Unsurprisingly, Mr Brown could not recall the precise details of what he had available to him at the CSI board meeting on 3 August 2005. He believes that he had accounts produced by Mr Herbert (possibly in draft) although, as I have said, it has not been possible to locate such accounts, if they existed.

157. However, the documentary evidence is clear that Mr Herbert did indeed produce a balance sheet for CSI as at 2 August 2005. Such a balance sheet can in my view properly be described as interim accounts (without expressing any view at this stage as to whether the balance sheet enabled the reasonable judgment to be made as to the amount of any distributable profits). When combined with the reference to interim accounts in the board minutes, I am satisfied that it is more likely than not that Mr Brown did indeed have a balance sheet of CSI available to him at the relevant board meeting.

158. I am fortified in this view by the fact that the board meetings contain very precise figures culminating in a figure for the amount of the dividend which was in fact declared of £5,521,846.35. There is no explanation as to where this figure came from as it is different to the figure of £5,513,284.49 provided by Olswang on the morning of the board meeting. There is for example no evidence that any updated redemption and cashflow schedule was produced by Olswang later in the day before the board meeting was held.

159. Whilst it is possible that Mr Brown's team updated Olswang's schedule to factor in other figures, there is again no documentary record of this. In the absence of any other documents, the most likely explanation in my view is that this change to the figures results from an entry in the balance sheet of which Olswang was unaware and which they had not therefore taken into account.

160. Having found that Mr Brown did have interim accounts in his possession, the next question is whether those accounts enabled him to form a reasonable judgment as to the amount of any distributable profits and therefore the amount of any dividend.

The accuracy of the interim accounts

161. Without having the CSI balance sheet available, it is of course impossible to know what assets and liabilities were listed. However, it is clear from Mr Herbert's email referring to the updated balance sheet that any figure for tax liabilities had been prepared on the basis that the management fees and interest costs would be deductible. It is also implicit in what Mr Herbert says in his email (to the effect that no corporation tax liability for 2005 has been provided for) and confirmed by an email sent by Ms Morris at Equity Trust to Mr Sihra on 29 July 2005 that the balance sheet did not contain any provision for tax payable on the sale of New Court by CSI to NCP.

162. Mr Parker notes that the cashflow schedule produced by Olswang also makes no provision for the payment of the management fees due from CSI to NCP. There is no direct evidence as to whether the CSI balance sheet produced by Mr Herbert made provision for these management fees but, based on the amount of the dividend which was declared, this seems unlikely. However, it is not suggested by the claimants that, if no provision was made for the management fees, this was anything other than an oversight. It is not for example alleged that Mr Brown knew that the management fees had been omitted.

163. Looking first at the fact that the provision for corporation tax was calculated on the basis that the management fees and interest charges could be deducted, it is clear that Mr Brown took a conscious decision that the tax provision should be calculated on this basis.

164. The claimants say that this was contrary to the advice of BDO. However, BDO's advice in respect of this is not clear and it is apparent that the written advice was supplemented with verbal advice. The email from BDO to Equity Trust on 28 July 2005 which contained the relevant advice for example refers to a conversation which had taken place the day before. That email suggested that the final tax liability would be greater than the draft computations previously prepared by BDO and so any retention should not be based on those computations.

165. However, the following day, when providing revised computations which disallowed the deductions for management fees and interest, BDO described this as "the worst case scenario" and noted that the computations would be subject to change pending finalisation of the financial statements. In my view, the inference from this is that BDO were not advising that a deduction for these expenses would definitely be disallowed. This is consistent with earlier advice given by BDO on 18 July 2005 which was broadly to the effect that the expenses would need to be justified although did warn that BDO felt that a deduction for the interest was unlikely.

166. Given that the point had been specifically addressed and considered by Equity Trust and that Mr Brown was aware of the point, it cannot in my judgment be said that the accounts did not enable a reasonable judgment to be made as to the distributable profits in relation to this particular point. The fact is that a judgment had been made. That judgment may have been aggressive given the tenor of the advice from BDO but it was not in my view dishonest particularly bearing in mind the existence of the share subscription agreement which was designed to deal with any liabilities to corporation tax.

167. Turning to the failure to make any provision for corporation tax in respect of the sale of New Court to NCP, Mr Brown's evidence was that, in his mind, this was neutral given the existence of the share subscription agreement. In effect, there was a matching asset and liability. As Mr Parker pointed out, this may not strictly be correct as it is not clear that the benefit of the share subscription agreement is correctly described as an asset and, in any event, this does not change the fact that no provision was made in the balance sheet for any tax liability in respect of the gain on the transfer of New Court bearing in mind that even at a transfer price of £65m, there would have been a gain of approximately £500,000 and therefore a tax liability (at 30%) in the region of £150,000.

168. There seems little doubt that, based on this, the interim accounts available to Mr Brown were defective. However, the question is then whether Mr Brown appreciated that they were defective. My conclusion is that he did not. He was clear in his evidence that, given the existence of the share subscription agreement, the position was, in his mind, neutral.

169. This is consistent with the advice from Olswang that the share subscription agreement should be put in place to meet any tax liability in respect of the transfer of New Court. It is also consistent with the position taken by Ms Morris in her email to Mr Sihra of 29 July 2005 which noted that the tax provision did not include any tax on the transfer of New Court to NCP as this would be dealt with under the share subscription agreement.

170. The conclusion reached by Ms Morris and by Mr Brown may well have been misguided, particularly bearing in mind that it was inevitable that there would be some tax liability on the transfer of New Court. However, I am satisfied that Mr Brown did not consider that this was an issue in relation to the interim accounts on which he based his decision to approve the dividend.

171. I should also note that the claimants make the point that, if Mr Brown knew that the transfer of New Court to NCP was at an undervalue, there would be an additional corporation tax liability on the increased gain. This is of course correct, but the comments made above apply in exactly the same way. Mr Brown would still not have appreciated that the omission of any provision for the tax from the balance sheet was a problem given his expectation that the liability would be met through the mechanism of the share subscription agreement.

172. Even if I am wrong and Mr Brown knew that the interim accounts available to him at the board meeting on 3 August 2005 were defective, I do not in any event consider that he acted dishonestly for the purposes of s 21 Limitation Act 1980. It was clearly everybody's understanding and expectation that CSI would end up in a position where it could be put into solvent liquidation. This was the entire purpose of the share subscription agreement which had been put in place on the advice of Olswang.

173. Mr Brown had no reason to suspect that the share subscription agreement would not be honoured. His evidence was that Mr Halabi would provide funding to meet liabilities where necessary. Although it is clear from the documentary evidence that liquidity was an issue and that liabilities (including tax liabilities) would sometimes not be paid until proceedings were issued in order to enforce those liabilities, there is no evidence that liabilities would not eventually be met where necessary. Indeed, when it became clear that CSI needed further funds shortly after the transfer of New Court in 2005, the documents show that such funds were provided.

174. In the circumstances, it cannot be said that Mr Brown acted knowingly or recklessly in a way which was contrary to the interests of CSI taking into account both the interests of any creditors as well as the interests of NCP as the sole member of CSI. Any breach of duty was not therefore fraudulent within the meaning of s 21 Limitation Act 1980.

175. This part of the claim therefore also fails.

CSI Management Fees

176. As I have mentioned, in the context of reviewing CSI's draft accounts for the year ended 31 December 2002 Mr Sihra of Buckingham proposed to Equity Trust in June 2004 (before Mr Brown joined the business) that two changes should be made. The first was to accrue management charges of £150,000 a year for the provision of various services by NCP to CSI. The other (which I shall come on to) was to charge interest on the loan due from CSI to NCP.

177. The proposal relating to management fees was accepted and an agreement between CSI and NCP was put in place on 2 November 2004, having been approved at a meeting of the board of CSI which took place on 26 October 2004. The minutes of the board meeting record that, since the acquisition of CSI in May 2002, NCP had been providing various services relating to financing, lease extensions, investment and development proposals. The meeting resolved that an agreement should be put in place to formalise the arrangements.

178. Under the terms of the agreement, the fee for the period from May to December 2002 was set at £150,000 and thereafter was to be agreed between the parties. In practice, the fee charged for each year (and pro rata in 2005 up to the date of the sale of New Court to NCP in July 2005) was also £150,000. It is common ground that any services which were being provided to CSI were not provided directly by NCP but were provided by Buckingham.

179. The claimants' case is that the management fees were not genuine but were simply a device to reduce the corporation tax payable by CSI and that Mr Brown knew this. He was therefore knowingly acting contrary to the interests of CSI in agreeing to the management charges.

180. Indeed, the claimants go further than this and say that the management agreement was a sham as it was intended to give third parties the appearance of creating legal rights and obligations different from the actual legal rights and obligations which the parties intended to create. However, no further submissions were made in support of this allegation and I do not therefore propose to deal with it as a separate matter.

181. Instead, the key question I need to determine is whether Mr Brown genuinely believed that the payment of a fee to NCP for services provided to CSI indirectly through Buckingham was justified.

182. Whilst I accept that Mr Brown is likely to have been aware that Mr Sihra's purpose in raising the issue of a management fee was to reduce the taxable profits of CSI, I reject the allegation that Mr Brown did not consider the management fee to be justified.

183. There is no doubt that Buckingham did in fact provide services relating to financing and potential development which were of value to CSI as the owner of New Court. Mr Parker tries to suggest that, in reality, the services were for the benefit of NCP given that NCP ultimately became the owner of New Court. However, I do not accept this given that NCP only acquired New Court more than a year after the proposed management fee was first raised in June 2004.

184. As far as the services themselves are concerned, the documentary evidence shows that Mr Brown's team at Equity Trust did question Mr Sihra quite carefully about the justification for the management charge. For example, a note of a meeting between Ms A'Court and Mr Sihra on 4 October 2004 records the services which Mr Sihra said had been (and were being) provided by Buckingham, including a specific description which Mr Sihra suggested should be used for the purposes of the management agreement. In a subsequent call on 21 October 2004, Mr Sihra confirmed that Buckingham held substantial backup documentation evidencing the services provided. He also said that invoices would shortly be raised (although in fact it appears that this never happened).

185. Based on this, it is in my view more likely than not that Mr Brown believed that the management fees were justifiable costs payable by CSI for the services which had been provided by Buckingham.

186. Mr Parker makes a number of criticisms of the way in which Mr Brown/Equity Trust acted in relation to the management fees. Whilst some of these criticisms may well be justified, they are in my view evidence of a failure to take proper care rather than dishonesty.

187. The first point relates to the precise mechanics for remunerating Buckingham for the services which are provided. Mr Parker makes the point that an agreement had been put in place between Buckingham and Equity Trust in its capacity as trustee of the Ironzar Trust in December 2003 which covered services provided both to NCP and to CSI. That agreement took effect from 1 January 2003 (and so was not in force during 2002). The agreed fee for the first year was £130,000.

188. It is not clear that Mr Brown was aware of the terms of this agreement when discussing the proposed arrangements in 2004. In his evidence, Mr Brown had some recollection that Buckingham was, one way or another, being paid for the services which it provided but could not recall any specific details. No doubt it could be said that Mr Brown should have investigated more thoroughly the contractual chain to see how everything fitted together.

189. Whilst there is no suggestion from the documents that this was ever done, it does not alter the fact that services had been provided to CSI which it was appropriate for CSI to pay for. The management fee which CSI agreed to pay was to NCP and not to Buckingham and so the real question would have been how the various contracts fitted together, resulting in CSI ultimately bearing the cost of the advice provided by Buckingham and for the fee which was paid to NCP ultimately finding its way to whichever entity within the structure in fact paid Buckingham.

190. This leads on to a second point which is the amount of the management fee. Mr Parker submits that Mr Brown gave this no independent consideration as is perhaps demonstrated by the fact that the initial suggestion was that the fee should be £150,000 a year but that the fee for 2002 (which only covered just over seven months) was agreed at the full £150,000 and was not pro-rated.

191. Again, Mr Brown can be criticised for not giving more thought to this aspect. However, it is apparent from the documentary evidence that Mr Brown and the team at Equity Trust relied on the advice from Mr Sihra and acted accordingly. On the face of it,

Buckingham would have been in the best position to assess the value of these services. There is no evidence that Mr Brown knew or suspected that the amount of the fee was not justified in relation to the services which had been provided.

192. I am also not persuaded that Mr Brown can be said to have been reckless as to whether he was acting in the best interests of CSI. I accept that little (if any) independent thought was given by Mr Brown to the amount of the fees. However, looking at the arrangements overall, taking account of the thought given to the justification for the services in the first place, it is in my view implicit that Mr Brown considered the fee to be appropriate. The evidence certainly does not suggest to me that Mr Brown simply did not care whether the fee was justified.

193. My conclusion therefore is that whilst Mr Brown may well have been in breach of his duties, he did not knowingly or recklessly act contrary to the interests of CSI and so any breach was not fraudulent for the purposes of s 21 Limitation Act 1980. This part of the claim cannot therefore succeed.

Interest on the loan due from CSI to NCP

194. The second proposal by Mr Sihra in June 2004 was that the loan due from CSI to NCP should bear interest from the date the loan was made in 2002 at a rate of 12% per year. He noted that "the fact that the loan agreement says it is interest free should be assumed to be an error which should be rectified retrospectively by both parties".

195. It is however clear from the contemporaneous documentary evidence at the time the loan was made that the decision that it should be interest free was deliberate due to concerns about withholding tax issues.

196. The amendment to the loan agreement to charge interest at 12% a year from the date the loan was made was approved at a board meeting attended by Mr Brown on 11 November 2004. This was implemented by a letter signed on the same day by NCP and CSI.

197. The claimants' case in relation to the interest is broadly the same as in relation to the management fee. They say that the decision to charge interest was simply a device to

reduce the corporation tax liability of CSI and that Mr Brown knew that the interest was not justified.

198. The original loan was made in 2002, more than two years before Mr Brown joined Equity Trust. There is no evidence that Mr Brown was aware of the circumstances of the loan or of the advice which resulted in the decision being made that the loan should be interest free. Indeed, the claimants do not allege that Mr Brown knew that the fact that the loan agreement stated that the loan was interest free was not an error. Their complaint is that he should have checked the position.

199. I should mention one piece of evidence which is an email from Mr Herbert to Ms A'Court on 20 September 2004 in which he states that "I don't believe the New Court loan was intended to be interest free". As Mr Parker points out, it is arguable from the context of this statement that Mr Herbert may have been trying to say the opposite – i.e. that the loan was in fact intended to be interest free. Given the ambiguity of this email, I do not place any great weight on it.

200. My conclusion is that, whilst Mr Brown could and should have investigated the position and that he was in no doubt in breach of his duties as a director in failing to do so, he was not in fact aware of the original arrangements and simply relied on Mr Sihra's advice that the original documentation of the loan as being interest free was an error.

201. Mr Parker notes that, when assessing a person's state of mind, the reasonableness of their belief is a factor in deciding whether they did in fact believe something (see *Ivey* at [74]). Mr Sihra noted when saying that documenting the loan as being interest free was a mistake that, as a low ranking junior loan it should bear interest at 12%. Mr Brown's evidence was that he would expect what was, in effect, a mezzanine loan to carry a significant rate of interest. In these circumstances, it cannot in my view be said that Mr Brown's acceptance of Mr Sihra's suggestion that there had been a mistake was sufficiently unreasonable to displace the inference that he did in fact hold that belief.

202. I have little doubt that, given the timing of the proposals made by Mr Sihra, Mr Brown would have been well aware that the main purpose of charging interest on the loan retrospectively was to reduce the taxable profits of CSI. However, it does not follow from this that Mr Brown considered that charging of interest was unjustified or that he was reckless as to whether it could be justified.

203. Had the documentation of the loan as being interest free indeed been an error, there is no reason why the payment of interest should not have been justified. In such circumstances, the original documented terms of the loan would be irrelevant and it would be expected that the error would be corrected with effect from the date the loan was made. The claimants do not specifically take issue with the rate of interest which, at 12% a year, is a high rate. However, as with the management fee, this was specifically queried with Mr Sihra who explained the justification for the rate.

204. What the claimants are effectively saying is that because Mr Brown knew that the purpose of charging interest retrospectively was to reduce CSI's tax bill, he could not have been acting in what he considered to be the best interests of CSI. However, for the reasons I have set out, I do not accept this.

205. The result is the same as for the management charges. Mr Brown may have been in breach of his duties as a director but did not act knowingly or recklessly contrary to the interests of CSI and any breach was not therefore fraudulent for the purposes of s 21 Limitation Act 1980.

Transfer of Ludgate House by BRP to LPH

206. The claimants' allegations in relation to the transfer of Ludgate House from BRP to LPH are broadly the same as those which I have already described (see paragraphs [84-89] above) in relation to the transfer of New Court from CSI to NCP. In summary, the claimants say that Ludgate House was transferred at a significant undervalue and that Mr Brown either knew this to be the case or that he had blind eye knowledge. As with the transfer of New Court, the claimants rely on Mr Brown's acceptance that he needed an up to date valuation and submit that no such valuation (or at least no independent valuation) was obtained.

207. The three issues I need to deal with are therefore the same as for New Court:

207.1 Did Mr Brown have an up to date, independent valuation of Ludgate House when he approved the sale by BRP to LPH at a price £78m?

207.2 If not, did he nonetheless consider that the transfer price of £78m reflected the market value of the property?

207.3 Even if he did, did he have a firmly grounded suspicion that the market value was higher than this and deliberately refrain from obtaining an up to date, independent valuation so that his suspicion was not confirmed?

Up to date, independent valuation of Ludgate House

208. Mr Brown's position in his pleadings in relation to Ludgate House is that he was aware of the need to obtain an updated valuation and that, although such a valuation cannot be located it should be inferred that such a valuation was obtained. Unlike in the case of New Court where there was a specific reference to the DTZ letter, there is no suggestion in the pleadings that the updated valuation was necessarily independent (as opposed, for example, to one which had been provided by Buckingham).

209. In his witness evidence, Mr Brown states that he would not have approved the transfer of Ludgate House without a valuation "of a similar nature" to the valuation for New Court. In cross-examination, he explained that he was referring to an independent valuation from somebody like DTZ.

210. However, I have little doubt that this is speculation on the part of Mr Brown. By his own admission, he has little, if any, recollection of the transaction. It is perhaps also relevant to note that, by May 2006 at the latest, responsibility for the corporate entities within the Ironzar structure had passed to Mr Pollard and his team. Mr Brown was not so closely involved with the discussions which were taking place between Mr Pollard's team and the various advisers in advance of the transaction taking place as he was when his own team was responsible. The documentary evidence, for example, shows that neither he nor members of his team were copied in on the majority of the correspondence at this time.

211. As Mr Parker points out, there is absolutely no evidence supporting the existence of an independent valuation of Ludgate House for the purposes of the sale to LPH. No copy of any such valuation (even in draft) has been located. None of the contemporaneous documents refer to any such valuation.

212. The lack of any such independent valuation is supported by Mr Brown's witness statement in the Angelmist proceedings which confirms that no independent valuation was obtained in respect of the transfer of Sampson House from APL to SPH which took

place at the same time. As Mr Parker points out, on all previous occasions, the Bankside Estate (Sampson House and Ludgate House) had been valued together. It is therefore implausible to suggest that an independent valuation of Ludgate House had been undertaken but no independent valuation of Sampson House.

213. Mr Pollard briefed Mr Brown and Ms Leonard in relation to the proposed transfer of Ludgate House (and Sampson House) in an email dated 31 July 2006. That email noted that valuation advice had been provided by Buckingham. There is no mention of any other valuation advice. This therefore again supports the conclusion that no independent valuation was obtained for the purposes of the transaction.

214. Finally, as Mr Parker observes, unlike the board minutes of CSI relating to the transfer of New Court, which refer to valuation advice from DTZ, the board minutes of BRP dealing with the transfer of Ludgate House make no reference to any valuation advice (whether independent or otherwise).

215. In the light of this overwhelming evidence, the only possible conclusion is that no independent valuation of Ludgate House was obtained for the purposes of the transfer from BRP to LPH. The closing submissions on behalf of the defendants did not seriously seek to argue to the contrary.

216. It is therefore necessary to consider whether Mr Brown believed that the transfer price of £78m reflected the market value of Ludgate House.

Mr Brown's belief as to the value of Ludgate House

217. In order to assess Mr Brown's state of mind, it is necessary to say a little more about earlier events and other valuations in order to put this in context.

218. As I have said, the total cost of the purchase of BRP (and therefore Ludgate House) was £78.5m and the total cost of the purchase of the Bankside Estate was £229m. There are however various figures relating to the value of Ludgate House at the time the purchase took place in August 2005 which are referred to in the documents.

219. Part of the reason for this is the way that transaction was structured. Ludgate House was originally owned by another company within the Minerva Group. In March 2005 that company agreed to sell Ludgate House to BRP (then also part of the Minerva

Group) for £77.5m. That sale completed immediately before the purchase of BRP by LPH on 3 August 2005. In some of the documents, this figure is referred to as the purchase price for Ludgate House. For example, the minutes of the BRP board meeting at which the sale to LPH was approved on 1 August 2006 record the fact that BRP acquired Ludgate House at a purchase price of £77.5m.

220. The sale and purchase agreement relating to the purchase by LPH of the shares in BRP refers to an agreement between the parties that Ludgate House should be assumed to have a value for tax purposes as at 16 March 2005 of £78m. It is also worth recalling that part of the deal with Minerva was that any liability to tax in respect of capital gains on a subsequent disposal of the property by BRP would be met by Minerva to the extent that the value of Ludgate House did not exceed the assumed value of £78m.

221. As previously mentioned, the purchase of the Bankside Estate was, to a large extent, being funded by a new loan facility provided by Credit Suisse which also involved New Court (Project Ocean). In that context, Credit Suisse had instructed Colliers to prepare valuations on New Court, Ludgate House and Sampson House. The valuation provided by Colliers for Ludgate House was £80m. Nonetheless, a draft financial assistance report prepared by BDO for the purposes of Project Ocean which refers to the Colliers valuation notes that directors of BRP considered that the market value of Ludgate House was, at that time, approximately £77.85m.

222. These figures show that there was a range of views in respect of the value of Ludgate House at the time of the purchase although there is no doubt that the total price paid by Ironzar was in fact £78.5m.

223. Although Mr Brown's evidence in his witness statement for these proceedings was that he did not have any particular knowledge of property value trends in London between 2002 and 2006, he accepted in cross-examination that, in broad terms, he was aware that prices were rising between 2005-2006.

224. Turning to other valuations of Ludgate House which Mr Brown would have been aware of prior to the transfer in August 2006, in response to a request from Ms Morris at Equity Trust in October 2005, Mr Sihra advised that the value of the Bankside Estate was £247.5m. Although it is not clear where this figure comes from, it broadly reflects the Colliers' valuation produced for the purposes of Project Ocean in July 2005 which,

as mentioned above, valued Ludgate House at £80m. The figure of £247m for the Bankside Estate was also quoted by Equity Trust to a potential purchaser in January 2006. Ms Morris described the valuation as "extremely conservative".

225. A desktop valuation of the Bankside Estate was also obtained from Colliers for the purposes of the proposed initial public offering (Project Gold) in March 2006. This gave a total value for the Bankside Estate of 280m. The gross value of Ludgate House was said to be just over £79m and the gross value of Sampson House was approximately £214m (£293m in total). On this basis, of the net value of £280m, approximately £75.775m must have related to Ludgate House and the balance of just over £204m to Sampson House. This is of course slightly surprising as it would suggest that Sampson House had increased significantly in value since August 2005 whilst Ludgate House had declined in value.

226. Although Mr Brown's initial evidence was that he had little involvement with Project Gold (given the transfer of the corporate structures to Mr Pollard's team), it is clear from the correspondence that, this time, Mr Brown continued to be closely involved and was sent a copy of the Colliers' valuation by Mr Sihra on 24 March 2006.

227. The documentary evidence also contains a document described as an internal briefing note which was prepared at the end of May 2006. This gives a value for Ludgate House of just over £106m. There is no evidence as to who prepared this report, what the purpose of the report was, where the value of Ludgate House came from or whether Mr Brown saw a copy of the report.

228. The figure of £280m was used for the purposes of the net assets schedule prepared by Equity Trust for the Ironzar structure at the end of April 2006. This figure was not broken down between Sampson House and Ludgate House but it is fair to infer that the figure was based on the Colliers' valuation for Project Gold and that the value for Ludgate House would therefore be approximately £75.775m.

229. As I have mentioned, the intention was to transfer Ludgate House to LPH soon after the acquisition in August 2005. However, this did not happen as a result of a failure to agree terms with potential liquidators. By July 2006, the requirement to transfer Ludgate House to LPH had become urgent as there would otherwise have been a significant liability to withholding tax in respect of the interest due from BRP to LPH.

230. This was picked up again in July 2006 by Mr Pollard's team as a result of a reminder from BDO about the potential withholding tax liability. Advice was sought from SJ Berwin who advised on 18 July 2006 that Ludgate House and Sampson House needed to be transferred at market value but also drew attention to the fact that if the transfer price for Ludgate House was in excess of £78m (and £148m for Sampson House), there would be corporation tax to pay on any gain in excess of these figures. SJ Berwin offered a conference call to discuss the position.

231. Mr Pollard asked BDO if they would be able to provide valuation advice but they declined to do so as they were not valuers. They suggested that somebody like Colliers should be instructed to carry out the valuations. On 26 July 2006, Mr Pollard emailed Mr Sihra suggesting that Buckingham would be providing a valuation. Mr Sihra's response was that he would need some guidance "as to which side of the range to err on" as well as saying that he would discuss the position with SJ Berwin.

232. SJ Berwin emailed Mr Sihra and Mr Pollard on 27 July 2006 asking for availability for a conference call the following day (28 July) to discuss the valuation issues. Mr Pollard and Mr Sihra both confirmed that they were available at 3.00pm on 28 July. In response to a question from Mr Sihra, SJ Berwin confirmed that the upper threshold for the purposes of the CGT indemnity was £78m for Ludgate House and £148m for Sampson House (i.e. £226m in total). This clearly came as something as a surprise to Mr Sihra as he reminded SJ Berwin that the total cost of the transaction in August 2005 had been £229m.

233. The contemporaneous documents do not confirm whether or not the proposed conference call took place, nor the result. However, the fact that, on 31 July 2006, Mr Pollard, in his briefing to Mr Brown and Ms Leonard (in their capacity as directors of BRP) noted that valuation advice had been provided by Buckingham strongly suggests that call did take place and that Buckingham had advised that Ludgate House should be transferred at a price of £78m (and Sampson House at £148m).

234. Based on this correspondence, it is in my view more likely than not that Buckingham gave advice on the value which should be used for the purposes of the transaction. It is also fair to infer that this advice was given verbally and was not recorded in writing given that there is no record of any written advice. Mr Brown was not a party to any

of these discussions or emails other than the briefing provided to him by Mr Pollard on 31 July 2006.

235. I note that in correspondence between Volaw and BDO in 2008, it is recorded that Buckingham had told Volaw that no valuation was completed at the time of the transfer of Ludgate House. However, this is not inconsistent with Mr Sihra providing verbal advice on the conference call which had specifically been arranged to discuss the valuation issues.

236. In the Angelmist proceedings, Mr Brown's evidence was that he discussed the transaction with Mr Pollard in advance of approving the sale of Sampson House to SPH. He confirmed in his evidence in these proceedings that such a discussion is likely to have taken place although he could not recall it.

237. A balance sheet was prepared for BRP as at 31 July 2006 in advance of the sale of Ludgate House to LPH. The balance sheet showed the value of Ludgate House as £78.5m. On this basis, BRP had net assets of approximately £770,000 and so a sale at a price of £78m would reduce the net assets to approximately £270,000.

238. The claimants invite the Court to infer that the purchase price for Ludgate House was set purely by reference to the Minerva capital gains tax indemnity figure of £78m and not by reference to the market value of the property. They further asked the Court to infer that Mr Brown knew that this was the case based on his discussions with Mr Pollard as well as his general understanding that property prices were increasing and that the total purchase cost for Ludgate House (as shown in the balance sheet) was £78.5m.

239. In my view, the evidence does not support the inferences which the claimants suggest. The position is more nuanced.

240. I accept that the evidence shows that the question of tax on capital gains was firmly in everybody's minds at the time the discussions relating to the proposed transfer of Ludgate House to LPH took place. The potential tax liability is something which BDO had flagged in a draft report relating to Project Gold prepared in April 2006 which, it is fair to infer, Mr Brown would have been aware of given that at that stage, his team

remained involved and he personally was closely involved in the discussions relating to Project Gold.

241. However, as Mr Norbury points out, the clear advice from SJ Berwin in July 2006 is that any transfer had to take place at market value irrespective of the limit of the capital gains tax indemnity. It was in that context that the discussion between Mr Pollard, Mr Sihra and SJ Berwin took place on 28 July 2006. Therefore, contrary to the submission made by Mr Parker, the need to set the price for the transfer of Ludgate House by reference to market value was also firmly in people's minds.

242. Taking account of this, it is in my view more likely that Mr Sihra did indeed advise that £78m was an appropriate market value to use for the purposes of the sale to LPH. Mr Parker suggests that this is implausible given that Mr Sihra knew that the total cost of purchasing BRP (and therefore Ludgate House) was £78.5m and that values had been increasing in the meantime. However, it is clear from Mr Sihra's request for guidance as to which side of the range to err on that he considered that there was a range of possible values, all of which could reasonably be said to be the market value.

243. The reality of this is starkly demonstrated by the valuation produced by Colliers in March 2006 which, although it valued the Bankside Estate at a total of £280m (a little over £50m more than had been paid in August 2005) the valuation of Ludgate House which was comprised in that figure was significantly less than £78m.

244. In addition, as Mr Norbury pointed out in his closing submissions, it would be very surprising indeed if the transfer price which emerged from a conference call with the solicitors acting in relation to the transaction and who had advised that the transfer price must be the market value was not expressed to be the market value but was a figure which was chosen purely to avoid any tax on gains which would otherwise result from using a higher figure.

245. Although Mr Parker sought to distance the claimants from any question as to whether Mr Pollard might also have acted dishonestly, it is impossible to escape the conclusion that, if the price had been set at a figure which was designed purely to avoid any tax liability and which was not thought to represent the market value of Ludgate House, Mr Pollard must have been complicit in that arrangement given that he was the one who

took the lead in the discussions and that Mr Brown was not involved in those discussions.

246. Although no evidence was provided by Mr Pollard, based on what can be discerned about his character from the documentary evidence it is in my view extremely unlikely that he would knowingly participate in such an arrangement. He was clearly somebody who expected things to be done properly. When he took over the relationship, he carried out a review which revealed numerous deficiencies, some of which were subsequently raised with Mr Halabi and Buckingham. Reading between the lines, it appears likely from the documentary evidence that Mr Pollard's rather stricter approach to compliance after he took over responsibility for the structure from Mr Brown played a large part in Mr Halabi's dissatisfaction with Equity Trust and his decision to move the structure to Volaw.

247. In response to Mr Pollard's review, his boss (Gordon Fitzjohn) acknowledged that Mr Brown's team had adopted an amateurish approach and had taken too many shortcuts. It is clear that this was not Mr Pollard's approach. This can be seen from an email sent by Mr Pollard to Mr Brown shortly after the transfer of Ludgate House to LPH in August 2006 commenting on a document sent to him by Mr Sihra valuing the Ironzar portfolio. He notes that Mr Sihra was proposing to value New Court at £65m in the context of the transfer of New Court to NCP in July 2005 but was now suggesting that it was worth almost £87m. Mr Pollard's comment was that "we can't have it both ways".

248. In the light of this, it would be very surprising if Mr Pollard was willing to recommend to Mr Brown and Ms Leonard a sale of Ludgate House at a price of £78m if he did not think that this was justified as being the market value.

249. Turning to Mr Brown, he was not directly involved in the preparatory work relating to the proposed transfer of Ludgate House to LPH. However, he received the briefing from Mr Pollard which confirmed that valuation advice had been received from Buckingham and that the transfers of Ludgate House and Sampson House should take place at a combined value of £226m. He would of course have understood this to be £78m for Ludgate House at £148m for Sampson House, as confirmed in the board minutes. Mr Pollard's comment was "I see no reason not to proceed".

250. It is accepted on both sides that Mr Brown would have discussed the position with Mr Pollard who would no doubt have informed him of his discussions with Mr Sihra and SJ Berwin. I accept that the question of tax on capital gains is likely to have formed part of that discussion but, in line with the findings I have made, Mr Sihra's advice that £78m was an appropriate figure for the market value would also have been relayed.

251. In the light of this briefing, it cannot be inferred that Mr Brown knew that the market value of Ludgate House was in excess of £78m despite his knowledge that the total purchase cost had been £78.5m and his general understanding that prices had been increasing over the previous year. Although, as I have said, Mr Brown accepted in cross-examination that Buckingham were not valuers, he certainly took the view that they were significantly more qualified than he was to express an opinion on values.

252. There is no evidence that, in August 2006, Mr Brown had in mind the Colliers valuation of March 2006 which valued Ludgate House at just under £76m. However, he was clearly aware of the existence of the valuation and in the absence of any clear recollection of events on the part of Mr Brown, this is in my view a relevant factor to take into account in determining whether it is right to infer that Mr Brown knew that the transfer price was less than the market value of Ludgate House. I do not however place any great weight on this point as the other evidence in my judgment provides sufficient grounds for inferring that Mr Brown did believe the transfer price of £78m to reflect the market value of Ludgate House.

253. I do however still need to address the question as to whether Mr Brown had blind eye knowledge that the transfer price was less than the market value.

Blind eye knowledge

254. As was the case in relation to New Court, I accept that Mr Brown would no doubt have had a suspicion (based on his knowledge of the total price paid for BRP/Ludgate House, the Colliers valuation of £80m produced for Project Ocean and his understanding that property prices had increased since then) that the transfer price was less than the market value of Ludgate House. However, there is simply no evidence that Mr Brown consciously refrained from getting an up to date, independent valuation for fear that it might confirm his suspicion. On the contrary, he was told that valuation advice had been obtained from Buckingham and he relied on that advice.

255. The claimants note that Mr Pollard initially approached BDO in order to obtain an independent valuation of Ludgate House and that, after being told by BDO that they could not provide a valuation, there is no evidence that Mr Pollard attempted to obtain an independent valuation from anybody else. The claimants suggest that the reason for this is that Mr Brown instructed him not to do so.

256. In my judgment, this submission is implausible. There is no evidence that Mr Brown knew that Mr Pollard was seeking an independent valuation let alone that he insisted that Mr Pollard refrain from doing so. In any event, given what I have said about Mr Pollard's approach to the administration of the Ironzar structure, it is in my view inconceivable that, even had Mr Brown tried to do so, Mr Pollard would have agreed. A much more likely explanation is that Mr Pollard realised that it was simply not possible to obtain an independent valuation in the time available and therefore asked Mr Sihra to provide valuation advice instead.

257. My conclusion therefore is that, in approving the transfer of Ludgate House at a price of £78m, Mr Brown did not act in a way which was knowingly or recklessly contrary to the interest of BRP. It may be that he should have asked more questions than he did but that is a different matter. Any breach of duty was not fraudulent for the purposes of s 21 Limitation Act 1980 and he therefore has no liability in respect of this element of the claim.

258. I will not repeat what I have already said (see paragraphs [133-138] above) about Mr Brown's possible motivation to act dishonestly. I simply note that the same points apply in relation to Ludgate House, possibly with even more force given that, at this stage, Mr Brown was no longer responsible for the relationship with Mr Halabi.

Ludgate House – outstanding purchase price

259. The final matter complained of by the claimants is that, on the transfer of Ludgate House to LPH, Mr Brown agreed that £766,000 of the purchase price could remain outstanding as a debt due from LPH to BRP.

260. It is not at all clear on what basis the claimants say that this was a fraudulent breach by Mr Brown of his duties to BRP. The particulars of claim suggest that BRP would have no means of compelling payment from LPH and that Mr Brown gave no independent

consideration as to how the amount would be repaid. It is also noted that no security was taken. On this basis, it is said that Mr Brown was in breach of his duty to act in the best interests of BRP as he consciously subordinated the interest of BRP's creditors to the interests of LPH.

261. In closing submissions, Mr Parker clarified that what the claimants are saying is that, on the basis that tax would be due in respect of the transfer of Ludgate House to LPH (assuming that £78m was less than the market value), the transaction would have rendered BRP insolvent which would then require Mr Brown to have regard primarily to the interests of BRP's creditors rather than its members.

262. I accept Mr Norbury's submission that this part of the claim can therefore only succeed if it is shown that Mr Brown knew that the transfer was at an undervalue and that there would therefore be a tax liability. As I have found that this was not the case, there can be no fraudulent breach of duty.

263. In any event, it seems unlikely that there would be any fraudulent breach of duty if Mr Brown had no reason to suspect that the loan would not in due course be repaid. Based on the evidence I have seen, I have no doubt that Mr Brown would have expected that the loan would be repaid in due course when funds were needed broadly for the reasons set out at paragraph [173] above in connection with Ironzar's obligations under the share subscription agreement relating to CSI.

264. On the basis of the findings I have made, it seems unlikely that this was a breach of duty at all, never mind a fraudulent breach of duty. This part of the claim therefore also fails.

265. I would observe there is a common theme which runs through all of the actions of Mr Brown that the claimants complain about. As Mr Pollard's boss, Mr Fitzjohn, noted, Mr Brown and his team clearly took shortcuts. They failed to get valuations which should have been obtained and they did not fully investigate matters which should have been considered in more detail. However, as will be apparent from what I have said, I am not satisfied that Mr Brown knowingly or recklessly acted contrary to the interests of the claimant companies. He was not therefore dishonest and any breach of his duties was not fraudulent within the meaning of Limitation Act 1980.

Liability of Equity Trust

266. The liability of Equity Trust is put on the basis that it is either vicariously liable for the acts of Mr Brown as his employer or, alternatively, that Equity Trust itself was either a shadow director or a de facto director of the claimant companies and, in that capacity, is itself in breach of its fiduciary duties. As to whether any breach may have been fraudulent, it is said that Mr Brown's state of mind should be attributed to Equity Trust.

267. As I have found that Mr Brown did not commit a fraudulent breach of his duties in respect of any of the matters alleged, Equity Trust can have no liability, either vicarious or direct.

268. I will however briefly address the points raised by the claimants on the assumption that (contrary to my findings) Mr Brown did commit one or more fraudulent breaches of duty in case I am found to be wrong in any of the conclusions I have reached in respect of the matters I have already dealt with.

Vicarious liability

269. The claimants say that Mr Brown was acting in the course of his employment with Equity Trust when he took the actions which they complain about notwithstanding that he was also acting as a director of the claimant companies. The defendants' position however is that an employer cannot be vicariously liable for the act of its employee as a director of another company even if it is part of the employee's job to act as a director of other companies.

270. In the context of the relationship between an employer and an employee, the principle of vicarious liability is that justice requires that an employer should be liable for the acts of their employee in the course of their employment irrespective of any fault on the part of the employer. The reasons for this were explained by Lord Phillips in *Various Claimants v Catholic Child Welfare Society* [2013] AC 1 at [35].

271. Lord Reed, in *Cox v Ministry of Justice* [2016] UKSC 10 took the view at [20-23] that, of the factors mentioned by Lord Phillips, the most significant were that:

271.1 the wrong will have been committed by the employee as a result of activity being taken on behalf of the employer;

271.2 the employee's activity is likely to be part of the business activity of the employer; and

271.3 the employer, by employing the employee to carry on the activity, will have created the risk of the wrongful act taking place.

272. Lord Reed summarises these principles at [23] where he notes that:

> "The essential idea is that the defendant should be liable for torts that may fairly be regarded as risks of his business activities, whether they are committed for the purpose of furthering those activities or not".

273. As to the question whether activities are carried out by an employee in the course of their employment, Lord Nicholls of Birkenhead noted in *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 at [22] that the law has given this concept an extended scope as a result of the principle of allocating risk to the employer rather than leaving those who have been wronged with a remedy which may be of doubtful value against the employee who committed the wrong.

274. The approach to be taken was described by Lord Toulson in *Mohamud v WM Morrison Supermarkets plc* [2016] A.C.677 at [44-45]. The first question is what field of activities had been entrusted to the employee – i.e. what was the nature of his job. Once this has been established, the second question is whether there was a sufficient connection between the position in which the person was employed and their wrongful conduct to make it right for the employer to be held liable.

275. There is no doubt that vicarious liability can arise where there has been a breach of fiduciary duties as opposed to (for example) a tortious act (see *The Northampton Regional Livestock Centre Company v Cowling* [2015] EWCA Civ 651 and *Dubai Aluminium* at [107]). However, the courts have been reluctant to hold an employer vicariously liable for the act of an employee as a director of another company.

276. In *Kuwait Asia Bank v National Mutual Life Nominees Limited* [1991] 1 AC 187, the Privy Council considered a situation where a bank had appointed two directors (out of a total of five) to a company in which it had a significant stake. The directors were said to have breached various fiduciary duties. It was argued that, as far as the employees of

the bank were concerned, these breaches were committed in the course of their employment and that the bank was therefore vicariously liable as their employer. The hearing was, in effect, an application by the bank to strike out the proceedings against it on the basis that the claims could not succeed.

277. The Privy Council had no hesitation in deciding at [221A-B] that:

> "In the absence of fraud or bad faith…a shareholder or other person who controls the appointment of a director owes no duty to creditors of the company to take reasonable care to see that directors so appointed discharge their duties as directors with due diligence and competence."

278. It is clear that this conclusion was based on the principle that, if the employer were held liable, this would undermine the principle of limited liability (see [221F]).

279. The Court emphasised at [222B] that the duties owed by the employees to their employer and the duties owed by them as directors to the company in question were "separate and distinct and different in scope and nature", noting at [222D-E] that, in performing their duties as directors, the employees were bound to ignore the interests and wishes of their employer and could not plead any instruction from the employer as an excuse for breach of their duties as directors.

280. The Privy Council also observed at [222E] that, if the bank exploited its position as employer to obtain an improper advantage for itself or to cause harm to somebody else, the bank would be liable for its own misconduct (i.e. it would have a direct liability).

281. This decision was followed in *Uavend Properties Inc v Adsaax Limited* [2020] EWHC 2073 (Comm). That case bears some similarity to this in that it was alleged that a professional trust company in Singapore was vicariously liable for the acts of two of its employees who were directors of the company which was in turn appointed as the corporate director of Adsaax Limited, a company which was owned by a trust of which the trust company was the trustee. Although the individuals were directors of the corporate director, it was accepted that the position was the same as if they had been appointed individually as directors of Adsaax Limited.

282. The case concerned a claim for wrongfully procuring of a breach of contract rather than a breach of the director's fiduciary duties. Nonetheless, the Judge considered that the case was virtually indistinguishable from *Kuwait Asia* even though the individuals in question were required to accept their appointment as director in the course of their employment by the trust company. The Court concluded at [69] that:

> "While they may have been required to accept the appointment in the course of their employment by Vistra Singapore, once appointed, they cease to be acting in the course of that employment irrespective of the fact that they remained employees of Vistra Singapore and irrespective of the fact that, as directors, they may have taken account of Vistra Singapore's wishes to the extent that those wishes did not conflict with the best interests of Adsaax Limited."

283. The judge in *Uavend* does appear (at [86]) to have placed some weight on the fact that, in that case, the trustee had no role in the day to day management of the company. However, she emphasised at [81] that the critical question is the capacity in which the individuals were in fact acting when carrying out the relevant act.

284. Mr Parker submits that the distinction in this case is the fact that the breach of duty is said to be fraudulent and, in particular, that Mr Brown was knowingly acting not in the interests of the company of which he was a director (CSI and BRP) but in the interests of his employer, Equity Trust in its capacity as trustee of the Ironzar Trusts. The underlying principle in Mr Parker's view for imposing vicarious liability where an employee acts as director of another company is that the employee consciously prefers the interests of their employer.

285. Even if this were right, the claimants cannot in my view succeed. The suggestion is that Mr Brown consciously preferred the interests of the overall Ironzar structure. Whilst Equity Trust was the trustee of the Ironzar Trusts, it did not stand to benefit in any way from the actions taken by Mr Brown even if they were taken with a view to promoting the interests of the Ironzar structure rather than the claimant companies.

286. The reason for this is that, whilst Equity Trust in its capacity as trustee of the Ironzar Trusts was the ultimate owner of the relevant companies, it had no beneficial interest

in them. A financial benefit accruing to, for example, NCP as a result of a transfer of New Court from CSI to NCP at an undervalue would not therefore benefit Equity Trust. It also did not employ Mr Brown in its capacity as the trustee of the Ironzar Trusts.

287. In any event, I do not accept that the question as to whether the employee, when taking decisions as a director, consciously preferred the interests of their employer is a principled reason to impose vicarious liability. The question is whether the employee was acting in the course of their employment. The Privy Council in *Kuwait Asia* was clear that actions taken by a director were not performed in their capacity as an employee even if they were appointed as a director by their employer and were performing their duties as director in the employer's time and at the employer's expense.

288. This was clearly accepted by the Court in *Uavend* at [69]. The reference in *Uavend* at [81] to determining the capacity in which the employees were acting when carrying out the relevant acts must in my view be a reference to determining whether those acts were carried out in their capacity as directors (in which case it was not in the course of their employment) or whether it was a more administrative act (in which case it might be undertaken in the course of their employment).

289. There is no doubt that Mr Brown had a dual function. He was an employee of Equity Trust charged with the administration of the structure. However, he was also a director of the claimant companies. No doubt Equity Trust would be vicariously liable for any default by Mr Brown which caused loss to the claimant companies when acting in relation to the administration of those companies as an employee of Equity Trust.

290. However, when acting as a director, he was no longer acting in the course of his employment with Equity Trust and Equity Trust cannot therefore be vicariously liable for his actions in that capacity. As a matter of principle, I cannot see that this conclusion is different in circumstances where Mr Brown consciously preferred the interests of Equity Trust to those of the companies of which he was a director.

291. Whilst, as the Privy Council pointed out in *Kuwait Asia*, this could in some circumstances give rise to a direct liability on the part of Equity Trust, it should not as a matter of principle affect the answer to the question as to whether Mr Brown was acting as a director in the course of his employment with Equity Trust.

292. There was some disagreement as to whether Mr Brown was appointed as a director of the claimant companies in the course of his employment with Equity Trust. His position is that he was free to accept or decline an appointment as a director as he saw fit. The appointment was therefore a personal appointment. He notes for example that Mr Pollard declined to take on the directorship of the Ironzar companies after he took over responsibility for the corporate elements of the structure.

293. Whilst it may be right that Mr Brown could have declined a request to act as a director of a company for which Equity Trust was responsible, there seems little doubt that there was an expectation that senior employees of Equity Trust would act as directors of such companies. It is equally clear that the expectation that they would do so was a part of their employment with Equity Trust.

294. The claimants draw attention to a number of documents which refer to Mr Brown acting as a director of the claimant companies in the course of his employment. I therefore have no doubt that Mr Brown became a director of the claimant companies in the course of his employment with Equity Trust. However, once appointed, as explained by the Privy Council in *Kuwait Asia* and confirmed in *Uavend*, his actions as a director were taken in that capacity and not in the course of his employment (however broadly defined) by Equity Trust.

295. Mr Parker notes that more than one employer can be vicariously liable for the act of an employee (see for example *NatWest Markets v Bilta (UK) Lim*ited [2021] EWCA Civ 680). This may well be right but it does not follow that an individual who is appointed by their employer to act as a director of another company is, whilst acting in that capacity, still acting in the course of their employment. Indeed, the Privy Council in *Kuwait Asia* makes it clear that they are not.

296. Approaching the issue in the way suggested by Lord Toulson in *WM Morrison* (see paragraph [274] above), whilst the field of activities entrusted to Mr Brown included the administration of the structure and the expectation that he would become a director of companies forming part of those structures, *Kuwait Asia* confirms that his activities in his capacity as a director, once appointed, were not part of the activities of his employment. The second stage of the approach suggested by Lord Toulson does not therefore arise.

297. Mr Parker notes that Mr Brown received an indemnity from Equity Trust when he left employment which covered his duties as a director of the Claimant companies. He was also protected in that capacity by Equity Trust's D&O insurance. However, in my view this is consistent with the fact that senior employees were expected to act as directors of companies administered by Equity Trust. It does not of itself mean that Mr Brown's actions in his capacity as a director were also part of his field of employment.

298. The result is that, even if I had found that Mr Brown had committed one or more fraudulent breaches of his duties as a director of the claimant companies, Equity Trust would not be vicariously liable in respect of such breaches.

Shadow director

299. The term "shadow director" was (at the relevant time) defined in s 741(2) Companies Act 1985 as "a person in accordance with whose directions or instructions the directors of the company are accustomed to act". Whether a particular communication is a direction or instruction is to be ascertained objectively in the light of all the circumstances. In many cases, proof of the communication and its consequences may be sufficient (*Secretary of State for Trade v Deverell* [2001] Ch 340 at [35]).

300. The submission on the part of the claimants is that Equity Trust was a shadow director of the claimant companies. The suggestion is that Mr Brown, together with his team at Equity Trust, effectively carried out all of the preparatory work and decided what to do and that the boards of the claimant companies then just rubber stamped the decisions which had already been taken.

301. Mr Norbury notes that there is an air of unreality about the suggestion that Mr Brown might take decisions in his capacity as an employee of Equity Trust and then instruct himself in his capacity as a director of the claimant companies to give effect to those decisions. However, I do accept that in principle it is possible for Mr Brown to take decisions in his capacity as an employee of Equity Trust and, in that capacity, to give directions or instructions to himself and Ms Leonard as the directors of the claimant companies. Having said that, in my view, the evidence does not bear this out.

302. As might be expected of a professional trust and corporate services provider, Equity Trust clearly had a process to be followed when board decisions needed to be taken.

Mr Brown gave evidence that the directors of Equity Trust (who served as the directors of the companies administered by them) would meet twice a day. Any transactions where board decisions needed to be taken by those companies would be highlighted.

303. The particular directors involved in the relevant company would then discuss the proposed transaction. The directors would normally be the senior member of the team responsible for the structure (in this case, Mr Brown) and one or more "independent" directors (i.e. directors of Equity Trust not involved with the structure – in this case, Ms Leonard).

304. The administration team responsible for the particular company would prepare a board pack setting out the background, the rationale for the proposed transaction and the supporting documents. An example of this can be seen from Mr Pollard's email of 31 July 2006 relating to the proposed transfer of Ludgate House to LPH. In addition, one or more members of the administration team would give a verbal briefing to the directors and would attend the board meeting itself.

305. This is one area where Ms Leonard's evidence in the Angelmist proceedings is helpful. Ms Leonard explained her approach in her witness statement in relation to those proceedings. Mr Parker criticised this on the basis that she appeared only to want to know whether advice had been taken and followed rather than giving any independent consideration to the proposed transaction.

306. This however mischaracterises her evidence. For example, she states on more than one occasion that she took her responsibilities as a director seriously and had independent regard to the interests of the company of which she was a director. This is clearly stated to be in addition to asking whether advice had been obtained and had been followed. In particular, Ms Leonard stated that she would want to be satisfied that a particular transaction was appropriate in the circumstances.

307. Ms Leonard describes in her evidence the practice of having at least one independent director involved in any board decision. No doubt there were good risk management reasons why this arrangement was adopted. If it were expected that the board would simply sign off on any proposal put to them without any independent thought or decision-making, this process would of course be completely pointless. It is in my view appropriate to infer from this that it was not expected by Equity Trust that the directors

would simply follow directions or instructions from the administration team and sign whatever was put in front of them.

308. Mr Brown gave evidence that both he and Ms Leonard had, on occasion, rejected proposals put to them in their capacity as directors. There is no documentary evidence supporting this and I do not therefore place a great weight on Mr Brown's assertions in this respect given the time that has passed since he and Ms Leonard were employed by Equity Trust. It is however consistent with the approach explained by Ms Leonard in her witness statement and with the process which Equity Trust had put in place in respect of the companies which it administered.

309. Mr Parker notes that the directors were not proactive in the management of the companies in question. For example, there is no evidence that the directors instructed the administration team at Equity Trust what to do. Instead, the evidence shows that the administration team worked up a particular transaction and then presented it to the directors.

310. Whilst I accept that this is how the system worked, it does not follow that the directors, when presented with the proposal would accept it without any independent thought. In any event, it ignores the fact that Mr Brown, for most of the period in question, led the administration team responsible for the claimant companies. In that capacity he had two roles. One was his role as an employee of Equity Trust, responsible for the administration of the structure. The other was in his capacity as a director of the claimant companies. Like all executive directors, it must in my view be the case that those decisions taken by him, or instructions given by him, as part of the day to day running of the structure which would normally be those expected of a director must be understood as having been in that capacity rather than as an administrator/manager employed by Equity Trust.

311. I do not therefore accept that Ms Leonard and Mr Brown were accustomed to act in accordance with the directions or instructions given by Mr Brown or Mr Pollard on behalf of Equity Trust. Instead, they were presented with proposals which had to be justified and in respect of which they gave independent consideration and made their own decisions. Equity Trust was not therefore a shadow director of the claimant companies.

De facto director

312. What makes a person a de facto director was described by Arden LJ (referring to the decision of the Supreme Court in *HMRC v Holland* [2010] 1 WLR 2793) in *Smithton Limited v Naggar* [2015] 1 WLR 189 at [33-45]. The key points are whether the person is part of the corporate governance system of the company and whether they assume the status and function of a director so as to make themself responsible as if they were a director. This question is to be determined objectively. It does not matter if the person did not think they were acting as a director. In this context, it is relevant whether the company considered them to be a director and held them out as such and whether third parties considered that the person was a director.

313. Mr Parker also referred to the decision of Arden LJ in *Muntaz Properties Limited* v *Ahmed* [2011] EWCA Civ 610 where she described at [47] someone as being a de facto director where the evidence showed them to be "one of the nerve centres from which the activities of the company radiated".

314. In this case, Mr Parker submits that Equity Trust was *the* nerve centre from which all of the activities of the claimant companies radiated. In one sense this is true. Equity Trust was the trustee of the Ironzar Trusts and so was able to set the strategy for the whole group. Mr Brown led the team in Equity Trust with responsibility for the Ironzar structure and so discussed matters of strategy and proposed transactions with Buckingham and Mr Halabi.

315. It is however apparent from the documents that strategic proposals relating to key issues such as purchases, refinancings, the proposed initial public offering and possible sales of all or part of the portfolio came not from Mr Brown or anybody at Equity Trust but from Buckingham and/or Mr Halabi. There is no suggestion from the claimants that Buckingham, Mr Sihra or Mr Halabi should be treated as de facto directors of the claimant companies.

316. It is true that the way in which the claimant companies were managed was that any proposals would be discussed by Mr Brown and his team with Buckingham and refined by them with the input of advice from professional advisers. It is also true, as noted by Mr Parker, that advice from external advisers was often addressed to Equity Trust and

not the Claimant companies. The board was only formally approached when all of the elements of a transaction were thought to be acceptable.

317. However, in my view, it does not follow from this that Equity Trust assumed the status and function of a director so as to make itself responsible as if it were a director any more than Buckingham or Mr Halabi did so. Although it is not necessary in order for there to be a finding that someone is a de facto director, there is no suggestion that anybody involved in the structure nor any external third party considered Equity Trust to be a director of the claimant companies.

318. Indeed, the very fact that key decisions were referred to the board showed that Equity Trust played a different part in the governance system of the claimant companies and that it did not itself assume responsibility to act as a director (whether knowingly or not). The fact that the day to day management of the companies took place without reference to the board (although under the leadership of Mr Brown who was, of course, one of the directors) is not inconsistent with this.

319. The claimants note that Buckingham was engaged by Equity Trust and not by the claimant companies. Similarly, professional advice was obtained by Equity Trust and not by the individual companies. However, this is consistent with Equity Trust's role as administrator. It does not of itself lead to the conclusion that Equity Trust was acting as a director of the companies.

320. As is the case in relation to the shadow director arguments, I also consider that, to the extent that Mr Brown took actions which could be said the be directorial in nature outside formal board meetings, he must be taken to be doing so in his capacity as a director of the claimant companies and not as an employee of Equity Trust.

321. Whilst Mr Parker submits that Mr Brown at no point removed his Equity Trust hat, as Mr Norbury observes, such a finding would be unrealistic and artificial. To treat Equity Trust as a de facto director of a company through the attribution to it of the actions of a person who is in fact a director of those companies simply makes no sense.

322. Taking all of this into account, my conclusion is that Equity Trust did not assume the status and function of a director. It was always expected that the board would ultimately

take the relevant decisions expected of a director. Equity Trust was not therefore a de facto director of the claimant companies and cannot be liable in that capacity.

323. In considering this issue and the question as to whether Equity Trust was a shadow director, I proceed on the basis that the knowledge and state of mind of Mr Brown can be attributed to Equity Trust. This was not disputed by the defendants. Although the question does not arise, I would therefore accept that, had I found Equity Trust to be a de facto and/or shadow director and had Mr Brown acted fraudulently, Equity Trust would also have been in fraudulent breach of its fiduciary duties.

Valuation evidence

324. The valuation evidence is relevant to the assessment of the amount of any compensation due in relation to the claims in respect of the transfers of New Court and Ludgate House from the claimant companies to their Jersey parent companies. As I have found that there was no fraudulent breach of duty on the part of the defendants, there is no liability. However, I will address the valuation evidence briefly as I have had the benefit of hearing from the expert witnesses.

325. Both expert witnesses clearly have significant experience in relation to the types of properties and the locations in question. Both were also credible witnesses in Court. The defendants' expert, Mr Whitfield did have a tendency to provide long explanations in response to a question put to him without actually answering the question but this does not affect the weight I consider can be given to answers he did in fact provide.

326. There was also some inconsistency in Mr Whitfield's evidence. For example, he dismissed an unhelpful comparator property on the basis that the data in relation to that property came from a transaction which would not have been known to the market at the relevant valuation date. However, it is clear that some of the other comparables relied on by Mr Whitfield would fall into the same category. I have taken this into account in considering the comparables but it has not otherwise affected the weight I have given to Mr Whitfield's evidence.

327. There was some suggestion from the claimants that Mr Whitfield was inappropriately partisan in his evidence in that he not only provided a valuation for the two properties at the relevant valuation dates but also provided a range of what he considered to be

reasonable values which another valuer might reach. Mr Whitfield accepted that he was not instructed to provide such a range and there is a suspicion that the only reason he did so was because his own valuation of Ludgate House exceeded the transfer price. The transfer price did however fall within the range of what Mr Whitfield considered to be reasonable values.

328. While such an approach is regrettable, it does not in my view in this particular case infect Mr Whitfield's evidence as a whole which, on a fair reading, exhibited an appropriate degree of independence. Indeed, a similar criticism could be made of Mr Manley's evidence in which he, in part, justifies his valuation of New Court by reference to his own valuation of that property in May 2002 when it was acquired by CSI. He was not asked to produce a May 2002 valuation and appears to have been unaware that the transaction under which the Ironzar Structure acquired New Court (through its acquisition of CSI) for a price of approximately £60m was an arm's length, third party transaction.

329. Again, the fact that Mr Manley may have exceeded his instructions does not, in itself, cast doubt on his other evidence although, as noted below, his lack of appreciation of the nature of the 2002 transaction is, in my view, relevant in determining the value of New Court at the relevant date.

330. I have therefore placed broadly equal weight on the evidence produced by both experts and have reached my conclusions as best I can taking into account the evidence both of them have provided.

331. There are many areas in respect of which both experts agree, including that the properties should be valued based on the yield which would be expected by an investor and the factors which are relevant to the choice of yield (such as the location, quality and size of the property, whether the rent is a market rent, the strength of the tenant's covenant, the unexpired term of the lease and what is likely to happen on the expiry of the lease). It is apparent that the main differences between the experts are their choice of comparable properties against which the yield should be tested and the extent to which possible future development potential should play a part in determining the yield.

New Court

332. The relevant date for the valuation of New Court is 19 July 2005, the date on which the property was transferred from CSI to NCP (following approval at the board meeting the previous day). Mr Manley values New Court at £72,150,000, representing a yield of 5.65%. Mr Whitfield uses a yield of 6.25% to reach a value of £65,179,584 which he rounds down to £65m.

333. In this case, I prefer Mr Whitfield's valuation. This is for the following reasons:

333.1 Mr Whitfield explains how he reaches his yield of 6.25%. Both parties accept that a starting point of 5.5% is appropriate at the time for Midtown Properties. Mr Whitfield has added 1% given the poor state of the property, a further 0.25% in respect of the relatively short unexpired term of the lease (six years and eight months) and then reduced the yield by 0.5% to take account of the strength of the covenant (the building being let to the Government). Mr Manley on the other hand performs no such calculation but simply expresses the view that a yield of 5.5% is appropriate "as this reflects the inherent potential of the property".

333.2 Overall, the most relevant comparables appear to support Mr Whitfield's conclusions. Time and again the only response Mr Manley had as to why a comparable was inappropriate was the development potential attributable to New Court.

333.3 Mr Manley cross-checked his conclusions by producing a site value for New Court based on development proposals mentioned by Colliers in their valuation report prepared in July/August 2005 for Credit Suisse in relation to Project Ocean. Mr Manley concluded that the site value was £92m. However, in cross-examination, it became clear that the site value is extremely sensitive to changes in the assumptions made such as the likely rent, the number of square feet which can be let and the building costs.

333.4 In addition, Mr Manley appears to have misunderstood in his report the nature of the development being referred to by Colliers. It is clear from the Colliers report that this is a single mixed use 25 storey development totalling 420,000

square feet. However, Mr Manley appears to have concluded that there were two possible developments, one mixed use and one of 420,000 square feet of office space. He has assessed the site value based on 420,000 square feet of office space. It is true that the body of the Colliers report refers both to the construction of an entirely new building as well as a refurbishment/extension. However, the more detailed appendix clearly shows a single proposal for a mixed use property of 420,000 square feet.

333.5 For all of these reasons, in my view, no reliance can be placed on Mr Manley's assessment of the site value. As Mr Whitfield commented, the valuers simply do not have the information available to them to make an accurate assessment.

333.6 Mr Manley further cross-checks his conclusions against his view of the value of New Court when it was purchased in May 2002 and against the eventual sale price of £60m in May 2010. He does this by looking at the MSCI index for Midtown and West End properties over the relevant period. Mr Manley's starting point was that New Court should be valued at approximately £65m in May 2002. However, in cross-examination, he accepted that an actual market transaction provided the best evidence of market value.

333.7 On this basis, the starting point should have been the figure of £60m paid by the Ironzar Structure for the property in May 2002. If this is taken as a starting point, the graph produced by Mr Manley in his report showing the change in the MSCI index, would support a value much closer to £65m in May 2005 than to his figure of just over £72m.

334. In reaching my conclusion, I bear in mind that Mr Whitfield has not made any express adjustment or allowance in his valuation for the development potential of New Court even though he clearly accepted in his evidence that a purchaser would carry out an appraisal of the development potential. Mr Manley however does not explain how any development potential should be taken into account in assessing the appropriate yield for New Court other than (implicitly) to suggest that a lower yield is appropriate.

335. In this context, it is noteworthy that the yield on the properties which form the comparables do of course take account of any potential development value although, as I have said, Mr Manley's reason for rejecting a number of the comparables was that

those properties did not, in his view, have the same development potential as New Court.

336. Overall, in the absence of any reliable assessment of development potential for New Court coupled with the lack of any suggestion as to what specific adjustment should be made to the yield to reflect whatever development potential the property may have had, it is not in my view appropriate to make any adjustment to the yield proposed by Mr Whitfield to take account of the development potential.

337. I also have taken into account the fact that the Colliers valuation in July/August 2005 proposed a value of £72m. This is of course very close to the value proposed by Mr Manley. As Mr Parker points out, this would fall outside Mr Whitfield's view of the reasonable range of values for New Court as the upper end of his range is £71.7m (representing a yield of 5.67%).

338. Mr Whitfield dismisses this report on the basis that each valuer must produce their own view of market value and should not be influenced by other valuations. He also notes that a number or valuations produced during this period (i.e. shortly before the global financial crisis in 2008/2009) have subsequently been challenged and that some have been held to be negligent.

339. Although the Colliers' valuation does of course support Mr Manley's conclusions, in my view Mr Whitfield's approach is correct in that the view of one valuer (even on a contemporaneous basis) should not be a significant factor in determining the value of New Court given that there is no opportunity to probe the circumstances and the assumptions underlying that valuation.

340. My conclusion in relation to New Court therefore is that the value as at 19 July 2005 was £65,179,584 in accordance with the view expressed by Mr Whitfield. As Mr Parker submits, there is no justification for rounding this down to £65m and Mr Whitfield could provide no explanation for this in cross-examination. Had there been a fraudulent breach of duty, the equitable compensation would therefore have been £179,584, being the difference between the transfer price and the market value of New Court.

Ludgate House

341. The difference between the two experts is relatively small in terms of yield. Mr Manley values Ludgate House on the relevant date (1 August 2006) at £88.9m representing a yield of 5.18%. Mr Whitfield's value is £83,682,986 (rounded to £83.7m) representing a yield of 5.5%.

342. It is clear that Ludgate House was, at the time, a difficult property to value. It is located south of the River Thames close to Blackfriars Bridge. This was not a mature market for office accommodation. At a result, Mr Whitfield's comparator properties are close to Southwark Bridge/London Bridge whilst many of Mr Manley's comparables are north of the river in midtown or City locations which tend to have a lower yield.

343. Mr Whitfield has taken as a starting point a yield of 5% which is midway between prime yields in the City of London (4.5%) and yields in Docklands (5.5%). He has increased the yield by 0.25% to reflect the fact that Ludgate House was let to United News and Media which was a good (but not very strong) covenant, that the unexpired term of the lease was less than ten years and that United News and Media had sublet parts of the property. Mr Whitfield adds a further 0.25% to the yield to reflect the fact that the specification of Ludgate House was inferior to more modern properties.

344. As with New Court, Mr Manley does not explain the yield which he had used other than by reference to the comparator properties and "the potential inherent in a major redevelopment of the site". However, in this case, I prefer Mr Manley's valuation. The key reasons for this are as follows:

    344.1 The total cost of the purchase of Ludgate House by the Ironzar structure was £78.5m in August 2005. The evidence from both experts shows that in the intervening year up to August 2006, office yields were reducing and prices therefore increasing.

    344.2 The only figures given by Mr Whitfield relate to yields in the City which, between June 2005 and June 2006 had reduced from approximately 6% to 4.75% (a reduction of over 20%). This is broadly consistent with some figures produced by Mr Manley based on comparable properties he had looked at in

August 2005 and August 2006. The average yield across all those properties had improved (i.e. reduced) by approximately 18% over that period.

344.3 The percentage increase in value suggested by Mr Whitfield however is only 6.6% and even the increase suggested by Mr Manley is only 13.25%. Although I accept that simply looking at the increase in value in respect of the property market generally cannot necessarily determine the amount of any change in value of a single property, these figures tend to indicate that Mr Manley's figure may well be closer to reality than the figure proposed by Mr Whitfield.

344.4 Mr Whitfield placed reliance on the fact that United News and Media had sublet part of the property. However, as Mr Whitfield accepted, this had no impact on the rent receivable by BRP as it was United News and Media that was taking the risk of any vacant periods between subleases.

344.5 Mr Whitfield excluded from his analysis a building not all that far from Ludgate House let to IBM with a yield much lower than other comparable properties at 4.3%. At the time of writing his report, his only reason for excluding this property was that the transaction would not have been known to the parties at the valuation date. However, as the transaction took place in August 2006, it does seem to me that it would be wrong to ignore this transaction. Indeed, as Mr Whitfield accepted in cross-examination, he has himself placed reliance on transactions which would not have been known to the market at the relevant valuation date in relation to New Court.

344.6 Both experts took the view that the comparables should be looked at as a whole rather than picking out individual properties. Including the IBM building would therefore significantly reduce the average yield based on Mr Whitfield's comparisons. Whilst this is a factor, I do not place a great deal of weight on it since, as Mr Whitfield identified, there may in fact be a good explanation for the lower yield and even Mr Manley accepted in cross-examination that this property was probably not a good comparison.

344.7 Mr Whitfield notes in his report that the comparables chosen by him, give rise to a range of yields between 5%-5.5% even after making adjustments for the differences between those properties and Ludgate House. Although his

adjustments based on a starting point of a yield of 5% (see paragraph [343] above) may be justifiable relative to prime properties, he gives no reason why the yield for Ludgate House should be at the top of the range of comparable properties.

344.8 For example, Mr Whitfield has made allowance for the fact that United News and Media was not such a good covenant as an AAA rated tenant or a government backed tenant. However, it is not apparent that the credit rating of United News and Media would be significantly worse (on average) than the tenants of other comparable properties. In these circumstances, it seems to me that Mr Manley's suggested yield of 5.18% which is closer to the middle of the range is more appropriate than a yield at the top of the range.

345. In coming to my conclusion, I have taken account of the fact that, in my view, Mr Manley's comparables are, generally speaking, less appropriate given that many of them are located north of the river in midtown and the City and therefore command lower yields. However, for the reasons I have explained, even based on Mr Whitfield's comparator properties, a yield of 5.18% seems to me to be more realistic than a yield of 5.5% as well as being more in line with movements in the London property market more generally.

346. I would also add that, in relation to a number of the comparable properties proposed by Mr Whitfield, it became apparent during cross-examination that, on closer analysis, the yields supported by those properties were closer to Mr Manley's figure than that suggested by Mr Whitfield once appropriate adjustments were made, providing further support for the lower yield.

347. Mr Manley again made much of the development potential at Ludgate House whilst Mr Whitfield played this down. Mr Whitfield did not make any specific adjustment for development potential whilst, as with New Court, Mr Manley's objections to many of Mr Whitfield's comparators was the lack of development potential.

348. None of this however affects my conclusion which is reached without reference to any specific allowance for development potential on the basis that some allowance for development potential will be present in the yields suggested by the indices and

comparators used by both experts and that Mr Manley does not identify what further adjustment should be made.

349. I should mention that Colliers produced valuations of Ludgate House in March 2006 and in October 2006. As I have already mentioned, the value for Ludgate House in March 2006 was only just over £75m. The value in October 2006 had gone up to £95m. For the reasons which I have already explained in relation to New Court, I do not believe that the Court can derive much assistance from these valuations, particularly in this case given that Colliers appear to believe that Ludgate House had increased by almost £20m (an increase of over 25%) in just seven months.

350. There is however one matter taken into account by Mr Manley which, for the reasons explained by Mr Whitfield, I do not agree with. Mr Manley suggests that, in August 2006, the market rent for Ludgate House was £4,950,000. This is £80,000 more than the actual rent of £4,870,000. Any increase would only come into effect at the next rent review date in December 2009. The suggested increase was on the basis that the upper floors had excellent views and more natural light. However, Mr Manley offers no hard evidence for his proposed increase which is of course a very small proportion of the passing rent of £4,870,000.

351. Mr Whitfield makes the point that neither he nor Mr Manley had the benefit of an internal inspection of Ludgate House. In the circumstances, I would agree with Mr Whitfield that the proposed increase in rental value should be ignored. According to Mr Whitfield's calculations, the impact of this is approximately £1,235,000.

352. On this basis, I find that the value of Ludgate House as at 1 August 2006 was £87,665,000 (£88.9m less the adjustment of £1,235,000). Had there been a fraudulent breach of duty, the amount of equitable compensation would therefore be £9,665,000 (being the difference between the transfer price of £78m and the market value of £87,665,000).

Conclusion

353. For the reasons I have explained, the claims made by both claimants are dismissed as there was no fraudulent breach of duty by either defendant. The extended limitation

period in s 21 Limitation Act 1980 does not therefore apply and the claims cannot succeed.