



Jefcoate and Spread Trustee Company Limited et al
Royal Court
31st October, 2014

JUDGMENT
42/2014

Claim of Breach of Trust, alternatively Conspiracy.

Approved Text
31.10.2014

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Civil Case No 1563

BETWEEN:

STUART LAWRENCE JEFCOATE

Plaintiff

and

SPREAD TRUSTEE COMPANY LIMITED
COSIGN SERVICES LIMITED
SPREAD SERVICES LIMITED
COSIGN NOMINEES LIMITED
SPREAD NOMINEES LIMITED
CHRISTOPHER JOHN NICHOLSON
JOHN FIELD

Defendants

Hearing dates: 4th August 2014 - 8th August 2014 (inclusive)
12th August 2014 – 15th August 2014 (inclusive)
18th August, 19th August, 21st August, 22nd August,
26th August and 27th August 2014

Judgment handed down: 31st October 2014

Before: Her Hon Hazel Marshall QC, Lieutenant Bailiff

Counsel for the Plaintiffs: Advocate A L Lund & Advocate P Richardson
Counsel for the First to Fifth Defendants: Advocate J P Greenfield
Counsel for the Sixth & Seventh Defendants: Advocate P T R Ferbrache

Cases, texts and legislation referred to:

(a) Legislation:

The Trusts (Guernsey) Law 1989
The Trusts (Amendment) (Guernsey) Law 1990, s 34 (7)

The Trust (Guernsey) Law 2007
The Rules of the Royal Court 2007, r 10(2)
The Royal Court (Reform) Law 2008, s 13
The Evidence in Civil Proceedings Act (Guernsey and Alderney) Law 2009, s 1.

(b) Cases:

Guernsey

Silver Falcon Enterprises Limited & Ors v International Hellenic Operations Limited & Ors (CA (Guernsey), Civil Division, 20 October 1994)
IFS Investments Limited v Manor Park (Guernsey) Ltd (Royal Court 23/2004, 11 June 2004)
Jackson v Dear (Royal Court, unreported, 26th March 2013)
Jefcoate v Spread Trustee Co Ltd and others 2013-14 GLR 220

Jersey

Freeman v Ansbacher Trustees (Jersey) Ltd [2009] JRC 03, 12 ITELR 207 (Royal Court of Jersey)
A v D [2014] JRC 032

England and Wales

Re H (Minors) [1996] 1 AC 563
Johnson v Gore Wood (a firm) [2002] 2 AC
OBG v Allan [2008] 1AC 1

Shaker v Al Bedrawi [2002] EWCA Civ 1452, [2003] 1BCLC 157,
Gardner v Parker [2004] EWCA Civ 781, [2004] 2BCLC 554
Meretz Investments NV v ACP Ltd [2007] EWCA Civ 1303, [2008] Ch 244
Baldwin v Berryland Books Ltd [2010] EWCA Civ 1440
Ellis v Property Leeds (UK) Ltd [2012] EWCA Civ 32
Richards v Wood and Wood [2014] EWCA Civ 327
Sukhorchkin v Van Bekestein [2014] EWCA Civ 399 and [2013] EWHC 193

Singer & Friedlander Limited v John D Wood & Co [1977] 2 EGLR 84 (H Ct QBD)
Douglas v Hello! Ltd (No 3) [2003] EWHC 786,
Barnes v Tomlinson [2006] EWHC 3115
K/S Lincoln v Richard Ellis Hotels Ltd [2012] EWHC 1156 (TCC)
Constantin Medien AG v Ecclestone & Ors [2014] EWHC 387 (Ch)

Other

Hotung v Ho Yuen Ki [2010] HKCA 385
Sheila McAteer v Walter Lismore [2012] NICH 7

(c) Textbooks

Clerk & Lindsell *The Law of Torts 20th Ed*
RICS Guidance Notes for Surveyors Acting as Expert Witnesses

JUDGMENT

The parties

1. These proceedings arise out of dealings with a number of sites in Wales, formerly owned by the National Coal Board. The relevant transactions took place between September 2005 and March 2007. At the material times, the sites were owned by Holborn Investments Limited (“HIL”), a Guernsey company, registered in 2004 but dissolved in 2008.
2. The six plots, and the four impeached transactions, are the following. I shall refer to the plots by the shorthand titles which came to be used in the trial, for convenience.
 - i. **Plot 4:** A 0.56 acre plot of land at Factory Road, Bargoed.

This was transferred by HIL to J F Enterprises Limited, a company owned by the Seventh Defendant, (“Mr Field”) in September 2005 for nil consideration.
 - ii. **Plot 8:** A 0.58 acre plot of land at Ael y Bryn, Pantycraig Wen.

This was also transferred by HIL to J F Enterprises Limited in September 2005 for nil consideration.
 - iii. **Plot 13 or “Crosshands”:** A 4.97 acre site in a greater and lesser part, at Tynewydd Terrace, Crosshands.

This was sold by HIL to Carnation Holdings Limited, a company owned by a trust of which the Sixth Defendant (“Mr Nicholson”) is the principal beneficiary, in December 2005 for £500,000;
 - iv. **Plots 15, 16 and 19, or “Wernos Washery”:** Three sites (two small and one very large) totalling, 174.66 acres, at or near Wernos Washery, Ammanford.

These were the subject of an option to purchase granted by HIL to Landview Developments Limited, a company owned by Mr Field, in March 2006 at an option price of £1M. Mr Field subsequently transferred 99.5% of the shares in Landview to a company owned by Mr Nicholson and the option was then exercised in March 2007.
3. At the material times the shares in HIL were held, indirectly through an intermediate holding company (Tulip Investments Limited) by the Fourth and Fifth Defendants, Cosign Nominees Limited (“CNL”) and Spread Nominees Limited (“SNL”). They held the shares as bare nominees for the First Defendant, Spread Trustee Company Limited (“STC”). STC, as its name implies, is a company which provides trustee and trust administration services. It was created under an early arrangement between two firms of accountants who provided such services in the Channel Islands in the 1960s, namely Reads & Co and Spicer & Oppenheim – hence “Spread”. There have been changes of associations and names over the years, with the main group company now having become Intertrust Limited, but nothing turns on this and the corporate Defendants in this case have been referred to as “Spread” throughout. CNL and SNL are wholly-owned subsidiaries of STC and are routinely used as nominee shareholders, where needed or desired.
4. At all material times the directors of HIL were the Second and Third Defendants, Cosign Services Limited (“CSL”) and Spread Services Limited (“SSL”). These are also wholly-owned subsidiaries of STC, and are companies within the Spread Group which are routinely appointed as corporate directors where the Group’s trust administration functions require it to provide or appoint directors of limited companies.

5. The ultimate beneficial owners of HIL were three Guernsey discretionary trusts of which STC was, in each case, the Trustee. At the relevant time, these trusts were the Lesterps Settlement (“LS”), the Trust of Paraguay (“Paraguay”) and the Genoa Trust (“Genoa”). Their interests in the shares of HIL were in each case held through an intermediate holding company. These were Tulip Investments Limited (“Tulip”) in the case of LS, Carnation Investments Limited (“Carnation”) in the case of Paraguay, and Lilac Investments Limited (“Lilac”) in the case of Genoa, and the holding proportions were 47.5%, 47.5% and 5%.
6. LS and Paraguay had been the replacements for two earlier discretionary trusts formed in the 1980s. Nothing turns on this change. The two earlier trusts were the Sidney Jefcoate Life Interest Settlement (“SJLIS”) and the Christopher Nicholson Life Interest Settlement (“CNLIS”). The SJLIS had been a discretionary trust of which the late Mr Sidney Jefcoate, (“Mr Jefcoate”), initially the first Plaintiff in this matter, had been the principal beneficiary with his family. The CNLIS was a similar discretionary trust in which, Mr Nicholson) had been the principal beneficiary with his family. The Jefcoate family and the Nicholson family continued to be the discretionary beneficiaries of LS and Paraguay respectively, after the change.
7. Mr Jefcoate was the father of the now sole Plaintiff, Mr Stuart Jefcoate (whom I will refer to as “Stuart”, in order to distinguish him, or “the Plaintiff” where more natural). Mr Jefcoate was a co-Plaintiff in this action when it was commenced on 19th November 2010. He unfortunately died in October 2012, but the action has been continued by Stuart.
8. Genoa was a discretionary trust of which the late Mr John Piper and his family were the discretionary beneficiaries. Mr Piper had been the personal tax adviser to both Mr Jefcoate and Mr Nicholson. Shortly after the initial conception of the venture referred to below, they decided to give him a small (5%) share as reward for his assistance. Mr Piper was originally the eighth Defendant in the action, but the claim against him was struck out in April 2013 following an application to strike out made by him. Mr Piper died in October 2013.
9. The Seventh Defendant, Mr Field is a property developer and a business associate of Mr Nicholson. He is not connected with any of the trusts.

The claim

10. The essence of the claim now pursued by Stuart is that the six plots mentioned above formed part of a group of property assets which were subject to an “arrangement” (the correct label for it has been a matter of intense but immaterial dispute) entered into between Mr Jefcoate and Mr Nicholson. The venture involved those properties, amongst others, being acquired in order to be later realised to advantage, in general by adding value through obtaining planning permission for development, with the net profits then to be shared in the proportions mentioned above. The principal beneficiaries were thus to be, equally, the Jefcoate family trust and the Nicholson family trust, and ultimately also Mr Piper’s family trust to the minor extent indicated. Stuart claims that these sites, and indeed other sites (although claims in respect of those have been held to be time-barred) were transferred out from under the umbrella structure of the arrangement at a significant undervalue, and to entities owned by, or connected with, Mr Nicholson or his interests or associates (Mr Field being one), to the financial detriment of the Jefcoate interests and corresponding gain to Mr Nicholson, because the LS was thereby deprived of 47.5% of the further value which it should have received, and which went to Mr Nicholson, or Mr Field, or their interests.
11. In the form in which the claim has survived as far as trial - and it is as actually just as important for an understanding of this case to bear in mind what the claim is **not** for, as well as what it **is** for - it is made on two distinct bases, although in the end the money claim is the same.

(1) Breach of trust/duty

- (i) It is claimed against the corporate Defendants that the dispositions were at undervalue and were effected in breach, amounting to gross negligence, of the fiduciary duties owed to the discretionary beneficiaries of the LS (of which the Plaintiff is one) by STC as its Trustee, and by CNL and SNL as trustees of the shares in HIL, and also in breach by CSL and SSL of their duties as corporate directors of HIL.
- (ii) The complaints of breach of duty are, very broadly, (and levelled principally at STC, who in practice instructed the other corporate Defendants) that STC failed to take any proper steps to consider or ascertain the true value of the properties at the time of their disposal so as to safeguard the interests of the LS trust and its beneficiaries, but acted solely on the advice, recommendations and effectively instructions, of Mr Nicholson, whilst at the same time failing to keep Mr Jefcoate adequately informed of proposed significant transactions and seeking his approval, as had been intended by the trust arrangements, and actually agreed with Mr Jefcoate. This enabled the properties to be disposed of to the financial detriment of Mr Jefcoate and the Jefcoate trust – and benefit to Mr Nicholson and his trust – and contrary to the intention of the arrangement between Mr Jefcoate and Mr Nicholson, of which STC was well aware and which as Trustee of the LS it ought to have protected. The aggregate undervalue of the transactions is asserted to have been £4,085,000.
- (iii) Stuart therefore claims that the corporate defendants should pay 47.5% of this sum (£1,940,375) back to the LS either as restitutionary compensation or as damages for breach of trust. Alternatively he claims that there should be an enquiry as to the amount which the corporate Defendants should repay to the LS in respect of such restitution or damages.

(2) Conspiracy

There is an “alternative” claim in conspiracy, in respect of the same sums, here claimed as damages. This claim is made against all seven Defendants. It is pleaded that all seven, or some two or more, of the Defendants conspired together with the intention of causing loss to the beneficiaries of the LS by unlawful means, namely by effecting the transfer of properties out of HIL at an undervalue in breach of trust or duty (and thus unlawfully).

12. The Defendants reject these claims as follows, again in broad terms:

- (1) First, they all deny that the disposals were in fact at an undervalue at all. If so, there has, of course, been no loss to the LS, and this would in effect dispose of the claim entirely, against all Defendants.
- (2) Second, the corporate Defendants deny that there has been any breach of duty by them, as alleged by the Plaintiff or at all, on proper examination in all the circumstances of the case. They say that
 - (i) all decisions with regard to disposal of the properties were independent and considered decisions responsibly made in practice by (it is accepted and alleged) Mr Paul Schreiber, who was the “Engagement Director” with responsibility for the trustee and trust administration services being provided for Messrs Jefcoate, Nicholson and Mr Piper. They were made in the best interests of LS and in the combined best interests of the three trusts as the general body of shareholders in HIL,

- (ii) any reliance upon Mr Nicholson’s advice or recommendations was justified by (a) his acknowledged property expertise and (b) the previously established pattern of property investment projects between him and Mr Jefcoate, which Mr Schreiber reasonably understood to be continuing and to be agreed by Mr Jefcoate in regard to this venture; Mr Schreiber’s conduct in this context was not a breach of trust. Nor, if it is in fact material, were there any breaches of directors’ duties by CSL and SSL as regards HIL,
 - (iii) Mr Jefcoate was sufficiently informed - or at least Mr Schreiber reasonably understood and believed that he was - about the relevant decisions. No information was ever denied to him if he asked, STC complied with the provisions as to providing information contained in the trust deed, and no other agreement was ever made,
 - (iv) not only was Mr Jefcoate’s prior consent to such executive decisions not required, but seeking it would have undermined the whole objective of an off-shore trust scheme operating through a limited company such as HIL to be a beneficial vehicle in regard to UK tax. Such a feature of the arrangement was therefore never intended, nor agreed with Mr Jefcoate.
- (3) Third, if any breach of trust is shown, STC denies that this was either fraudulent or amounted to “gross negligence” and it therefore claims the benefit of an exoneration clause in the SJLIS and LS Trust deeds. All five corporate defendants also, alternatively, say that they acted honestly and reasonably and seek to invoke the court’s jurisdiction to excuse a trustee who has so acted if it is fair to do so. They further say that Mr Jefcoate waived or acquiesced in any such breach of trust as might in fact be found, and they rely on this, as well.
- (4) Fourth, the corporate Defendants take certain legal points:
- (i) The Fourth and Fifth Defendants argue that as mere nominee shareholders in HIL on behalf of STC, they owed no duties other than to follow the directions of their principal, and the claim made by the Plaintiff against them is entirely misconceived.
 - (ii) The Second and Third Defendants argue that, in their position as directors of HIL, they owed no duty to the Plaintiff, as beneficiary of a trust holding shares in HIL, at all.
 - (iii) All five corporate Defendants argue lastly that the nature of the claim against them is, in practice, a claim to recover in respect of loss suffered by a limited company, namely HIL. They submit that only the company can recover in respect of such loss in the absence of a properly constituted “derivative action” entitling some other person to bring proceedings to enforce the company’s rights, which there has not been in this case. They further argue that even if the Plaintiff succeeded in establishing his claims, the loss in respect of which he claims (ie the alleged loss to the LS trust) is merely reflective of loss to HIL, and the claim is therefore barred from any remedy by the doctrine of “no recovery for reflective loss”. This part of the claim must therefore fail, on any basis.
- (5) Fifth, and finally, as regards the conspiracy claim - which is the only claim advanced against Mr Nicholson and Mr Field - all the Defendants deny that there was any conspiracy. In fact, they go further and deny that the facts alleged by Stuart are capable of amounting to the required elements of an “unlawful means” conspiracy at all. Mr Field, in particular, says that, on examination, the cause does not even purport to allege the elements of such a conspiracy against him.

The trial – an overview

13. The above account heavily summarises a complex claim, arising out of a complex factual history and with a complex procedural history. It was for these reasons, and because of the likely interplay of matters of law and fact, that I agreed to hear the case sitting alone and without Jurats, pursuant to Section 13 of the Royal Court (Reform) Law 2008.
14. I will mention the procedural history later insofar as necessary to explain some points that might at first sight seem puzzling about this judgment, or the trial. I record here, only that the Plaintiff's claim is strictly confined to the complaints and transactions specified above, because those are all that are contained in the final form of the Amended Cause in the action, which was permitted, on a "last opportunity" basis, after a series of interlocutory procedural battles.
15. The wide ranging scope of the case, even so, is indicated by the fact that the trial took 15 hearing days, although not all were full ones. The general documents in the case filled twelve out of 16 lever arch files, in double side copying, produced for the trial, although in the end the documents actually referred to in the trial could be extracted and comfortably placed into just two. I heard oral evidence of fact from 11 witnesses. Two witness statements (those of Mr Piper and a Mr Brien) were read under s1 of the *Evidence in Civil Proceedings Act (Guernsey and Alderney) Law 2009* ("the Evidence Law"); I have given their contents such weight as I think fair and appropriate. Statements from seven further witnesses of fact on behalf of the Sixth and Seventh Defendants were agreed to be taken as read, and I have therefore treated this as unchallenged evidence. Three witness statements initially filed on behalf of the corporate Defendants were withdrawn, the corporate Defendants electing to proceed on the basis of Mr Schreiber's evidence alone, and I have therefore disregarded these. In addition, I heard valuation evidence from two expert valuers, Mr Nicholas Snowden MRICS for the Plaintiff and a Mr Scott Caldwell MRICS for the Defendants, whose very important evidence I consider later.
16. The Plaintiff was represented by Advocates Abby Lund and Paul Richardson, the First to Fifth Defendants by Advocate John Greenfield and the Sixth and Seventh Defendants by Advocate Peter Ferbrache. I am grateful to all of them for their work, their courtesy, and their assistance to me.
17. As the parties were unable to agree a pre-trial memorandum, or even a mutually acceptable list of issues for determination, I have had to distil the issues as they appear to me to arise. The parties were also not able to agree a chronology, even for several weeks after conclusion of the hearing itself. I have therefore received different versions, noting different points. This is unfortunate. The point of an agreed chronology is to provide a succinct and focused time-line account of the history surrounding the dispute, in order to help the court to place both agreed and disputed matters into the story. An agreed chronology is not part of any party's case, but a framework for the court to use in evaluating each party's case. It must therefore be neutral; it is not the place for submissions, argument or tendentious comment, although recording the nature of an important dispute about a fact at the relevant point is useful. Regrettably, the parties were not able to reach agreement as to the effect of these principles in this case.
18. It is simply not possible to set out every aspect of every point or submission made in the course of such a long hearing and upon so much material, in a judgment of sensible proportions. This judgment sets out only the matters which have weighed most in my conclusions, and even so, it is longer than I would have wished. However, I have carefully considered all the Advocates' submissions, with the aid of their very helpful skeleton arguments and speeches, and I have read and indeed re-read all the witness evidence adduced, together with my notes and assisted, where necessary, by listening again to the court recording. The mere fact that some particular aspect or point is not mentioned does not

mean that I have overlooked it. In addition, I have not found it necessary to resolve every point of factual dispute which emerged between the parties, particularly those which could go only to credit.

The facts in more detail

19. The historical account which follows is based mainly on facts which are either common ground or are indisputable. Insofar as necessary it contains my findings of less central fact, based on the evidence before me.
20. Mr Sidney Jefcoate was a solicitor by profession, having qualified in England in 1963. He worked for the Greater London Council, and then for companies in the property world, in which he rose, apparently relatively rapidly, to senior positions. He sat on the Boards of P & O Holdings and Bovis Holdings, retiring in around 1985. Having apparently already accumulated significant wealth, he had begun to become involved in financing property ventures on his own account.
21. Mr Nicholson was an estate agent, originally in Bishops Stortford in England. In the early 1980s, he and a fellow agent, Mr Adrian Hibbert, began property development on their own account. Mr Nicholson was shrewd in spotting the redevelopment potential of redundant historic buildings, latterly, surplus NHS properties in particular, and he did so before more slow-moving, larger, property developers moved in on this market. In about 1983, he and Mr Hibbert founded a property development company, Pinecraven Limited, on an equal basis. Their first project was a success and they continued to work together.
22. Mr Nicholson and Mr Hibbert were introduced to Mr Jefcoate as a potential provider of finance, in the mid-1980s. They were looking for financial backing for Pinecraven's developments, and Mr Jefcoate was looking for investments. There was therefore a business fit, and the two sides began to co-operate in property projects. However Mr Nicholson, supported by Mr Hibbert, says that although Mr Jefcoate was well acquainted with property matters from a legal standpoint, his experience with Bovis Homes was "at the other end" of the perhaps more rough and tumble (my words) market in which he and Mr Hibbert were operating. As a result, they did not go to Mr Jefcoate for advice about transactions, and Mr Jefcoate did not concern himself with the details of their projects; Mr Jefcoate, they say, was a financier or backer, and not a partner.
23. A pattern developed to their dealings, in which Mr Nicholson spotted an opportunity, and Mr Jefcoate provided the funds for the acquisition of the relevant property as an unsecured private loan, over a relatively short period and at a relatively high rate of interest, typically 6 months at 15% per annum. This was pending either the "turn" of the property for profit in the short term, or the arranging of more commercial and longer term finance, if and insofar as required. The advantage of initially using Mr Jefcoate's resources was the speed at which acquisition funds could thereby be provided, and the ability then to put up the property as security for further commercial finance without complication. The aim was then to obtain planning permission and sell the property at a (hopefully significant) profit, and it was Mr Nicholson's (and no doubt initially Mr Hibbert's) expertise, and network of property contacts and work which were the main means of achieving this. The net profit from the ultimate disposal would then be divided as agreed, usually equally. By the time with which I am concerned, these ventures were only between Mr Nicholson and Mr Jefcoate, as Mr Hibbert had bowed out of the picture, but the scheme remained the same.
24. Mr Nicholson says that Mr Jefcoate's involvement in the actual work of preparing any property for beneficial onward sale was minimal and emphasises that Mr Jefcoate was really only a financial backer. He says that Mr Jefcoate was "risk averse", wanting to keep any expenditure to an absolute minimum and certainly not being willing to put up money for actual development. Stuart suggests that Mr Jefcoate's involvement was greater, and that

he took an active interest in the progress of the various projects. He denies that his father was “risk averse”, citing other projects of which he is aware where his father ran financial risks and even lost money.

25. In the event, I think this is more a dispute about language than substance. It is my clear impression that Mr Jefcoate’s appetite for hazarding expenditure was less than was Mr Nicholson’s, but that he was not “risk averse” in the sense of being particularly cautious about the basic nature of his investments. Although it was clearly likely to be Mr Nicholson’s efforts, property expertise and contacts which would produce the ultimate beneficial result, I am satisfied that Mr Jefcoate was not meant to be entirely passive and excluded from introducing suggestions or contacts, and on occasions he did so. However, his role was secondary, and it was Mr Nicholson who was, and was intended to be, the prime mover. Mr Jefcoate was, though, I am also satisfied, a hard-nosed businessman who was determined to make his money work well for him. He did not like spending money on professional fees (which produce no direct return) nor on matters where the prospects of a good return were less than very clear, and he did not like to get involved in unpredictable or uncontrollable expenditure. Whilst, therefore, he was willing to spend a reasonable (in his eyes) amount of money to obtain a valuable planning permission, he preferred to avoid problems, such as sites with contamination, or disputed rights, and was rarely willing to finance the actual building costs of development. Mr Nicholson was far more willing to take on such matters, with his eye on the possibility of greatly increased rewards. I am satisfied that Mr Jefcoate’s personal investment strategy was to make an acceptable return on his money at an early stage by lending it, with further participation or receipts being, as it were, “icing on the cake”. In the end, though, what matters is not what the parties’ respective personalities were, but what arrangement and agreement they actually made in respect of these relevant properties.
26. From the mid-1980s onwards, Stuart Jefcoate entered into the property industry himself, training and qualifying as a chartered surveyor. He took an interest in his father’s property affairs, and his interest grew in parallel with his business experience. I am satisfied that Mr Jefcoate discussed his property affairs with his son to some degree (this would have been only natural), although not as far as looking to him for serious advice - at any rate during most of the period (up to about 2007) with which I am concerned in this case. I am also satisfied that Mr Nicholson did not welcome any involvement of Stuart in the projects with which he and Mr Jefcoate were concerned. Mr Nicholson is a person who likes to be in control of events and I have no doubt that he would have perceived any involvement of Mr Jefcoate’s son as being more interference than assistance.
27. The above is the general pattern of several projects in which these two parties participated from about 1983 onwards, although the details, such as their precise profit shares, and what was to be done to enhance the property value, varied, as each project was conceived individually. I remind myself, because it is important context, that there were other transactions between Mr Nicholson and Mr Jefcoate apart from those with which I am concerned in this action. Stuart mentions (and the bare facts are not disputed) at least five other such ventures, namely a development of flats at Rye Street Hospital and a development of offices in a Pickfords warehouse in Bishops Stortford in the 1980s, a development of the Mendip Hospital site in about 1993, a development of a Victorian Mental Hospital in Devizes in 1995 and a development of the Westminster Theatre site in London in 1998. Each ran over several years. I am not concerned with the detail of any of them, but mention them to demonstrate the extent of the parties’ involvement with each other. Also, apart from their mutual dealings, both Mr Jefcoate and Mr Nicholson were simultaneously involved with other projects and investments, either alone or with third parties (Stuart mentions some of Mr Jefcoate’s of which he had direct knowledge). This is again not directly material, but the point is that the particular matters in this action were only a part, and not necessarily even a central part, of the two main protagonists’ lives and livelihoods at the relevant times. This is a fact which can get obscured because of the inevitable close examination of evidence in a

civil trial, but which it is important to bear in mind when now seeking to interpret their actions.

28. Mr Nicholson and Mr Jefcoate were undoubtedly financially astute. Both used the late Mr John Piper as their accountant, and they sought help and advice from him regarding mitigation of tax. As a result, they had each set up, in 1989, an off-shore settlement structure to ensure that the profits, in particular capital gains, made from their respective property ventures were made outside the UK, and also not by themselves personally. Initially, they each set up a discretionary life interest settlement, being the SJLIS and the CNLIS respectively, both of which were constituted in Guernsey. The trustees and trust administrators in each case were the First Defendant, now Spread Trustee Company Limited (“STC”). Mr Nicholson and Mr Jefcoate were introduced to Mr Anthony Rogers, who initially managed their affairs. As already mentioned, STC is a professional trust and administrative services provider. In 1998, and in fact during the material events (although not itself material), the SJLIS and the CNLIS structures became tax inefficient and discretionary trusts with non-resident UK settlors were set up to replace them. These were the LS and Paraguay (and possibly similarly, Genoa).
29. It was possible and convenient, therefore, for the parties’ respective profit shares in any project to be given effect by placing the underlying property assets into the ownership of a company whose shareholdings reflected the agreed proportion of that profit share. This could then be implemented by the company’s making an appropriate dividend distribution to its shareholders, when it came into the funds to do so. It is, of course, very common for settlements to own shareholdings in limited companies as trust assets. This may be merely as an investment, or it may be that the company conducts a business actively for the benefit of the trust. Here, the company’s affairs were being run for the benefit of three trusts. Where it is necessary for a trust to run the affairs of a company, it will, of course appoint directors, corporate or individual, formally to carry out that function. That is, again, what happened in this case.
30. Although Mr Jefcoate certainly had some meetings with Mr Rogers and latterly Mr Schreiberke with regard to the financial affairs which Spread was looking after for him, it is notable that these were not nearly as frequent (perhaps one or two a year) as were the meetings attended by Mr Nicholson, and almost as often by Mr Piper with him. This is explained by the fact that, as is accepted, Mr Nicholson was playing the main executive role in driving progress on the relevant property projects, and Mr Piper was professionally concerned as the parties’ accountant. One of the points which the parties were naturally concerned about was protecting the trust structure from challenge by the UK Revenue for being apparently run by UK residents. However Mr Jefcoate and Mr Nicholson had each executed the customary “Letter of Wishes” in relation to his trust and did, of course, expect information and a degree of input into what was going on.
31. Stuart has flagged up a record in 1990 where Mr Jefcoate made it clear to Spread (Mr Rogers and Mr Giles) that he must be informed and must approve any sums paid out of his trust monies, and that this was not to be done on the instruction of either Mr Nicholson or Mr Hibbert. This was agreed and noted on the file by Mrs Giles. This is said to show that at an early stage Spread were on specific notice that they could not simply assume that Mr Nicholson had Mr Jefcoate’s authority to deal with matters affecting Mr Jefcoate’s financial interests.
32. It is, to my mind, important to recognise some of the features of the “industry” in which the parties were operating, and this is a convenient point to do so. It is I think general knowledge, though also to be gleaned from the evidence in this case, that profits in property development and trading transactions can be spectacularly high. However, they are also made on an irregular basis, and often only after much hard work, grind, persuasion, persistence and even luck. A recurrent feature of what I might call “freelance” work in this

area, which is reflected in the evidence of many of the witnesses in this case, is that remuneration and reward are fluid, and erratic. Remuneration may be by cash payment, but quite often is made by the giving of shares in a venture, or in a company (if about to be sold), or by transferring development plots or individual built units in a particular venture, either for nothing, or at a discounted price. If a builder is involved, value may change hands by the builder carrying out works for the payee. Payments of “commission” or brokerage fees are commonplace, but rarely effected on the basis of formal written agreements, or indeed, it appears, any real agreement at all; it is more a question of hints, expectations and understandings, arising from the custom of the industry. Introductions are often brokered informally or indirectly, and if a transaction results, various people who have played, or think they have played, some part in the process may consider themselves entitled to seek a reward of “commission” from one or other party. This may well be accepted, although the amount will then be negotiated, or something else offered in lieu, or something promised for the future. The attitude of the party against whom such a claim is made will also depend on how much he values retaining the goodwill of the person making the claim, whose contacts and market information may be put his way in the future - or, if they fall out, may well not be. This situation can, it seems to me, frequently lead to parties falling out with each other over what is perceived to be fair treatment, or when hard bargains are driven. The instances of such fallings out amongst various persons involved in this case is notable.

The NCB Portfolio

33. In 1996, the NCB sold off its “Blue Book” portfolio of redundant land. Mr Nicholson had his eye on this purchase possibility and headed up a successful bid for these sites. The precise background does not matter, but the acquisition had to be made speedily, and this occurred in December 1996. The acquisition was fully agreed with Mr Jefcoate, and was discussed at meetings, at one of which, at least, Stuart was present. Mr Colin Grimwade of Pellys was to be instructed as their solicitor (he had acted in other transactions) and Mr Geoff Brien, a West Country surveyor and contact of Mr Nicholson, was also to be involved in managing the properties subsequently.
34. The NCB portfolio consisted of about 118 properties, varying hugely in size, individual value, likely development prospects, levels of contamination and so forth. A few had been identified by the NCB as having clear development potential and were therefore to be subject to a “clawback” term in favour of the NCB, as regards future disposals by the buyer at a profit. The identified gem of the transaction, referred to as the “jewel in the crown”, was the Penallta Colliery site (in fact two adjoining plots), which was one such clawback property.
35. There had, of course, been internal discussions to assess the varying potentials of this and the other properties during the pre-offer discussions and the meetings mentioned above. Some properties were known, or were likely, to contain “nasties” such as asbestos, coal and other contamination, liability to subsidence, or flooding, etc. These plots would be either worthless because of their problems, or require a great deal of preparatory work in order to make them saleable. The portfolio was therefore a very mixed bag; the NCB was plainly off-loading problem sites as well as disposing of sites with profit-making potential. The title deeds consisted literally of a lorry load. With a tight deadline for exchange of contracts, a week before Christmas 1996, it was decided to investigate the titles of only the most apparently valuable properties, so as not to lose the whole deal.
36. A subsidiary company called Pinecraven (South West) Limited (“PSW”) was to be the purchase vehicle. The funds for the purchase were to be provided by Fenchurch Finance Ltd, a Jersey finance company, and were to be procured by Mr Jefcoate whose resources they apparently were. Contracts were exchanged on 23rd December 1996, and the purchase was completed over two days on 17th and 18th February 1997.

37. The transaction followed the usual pattern. Mr Jefcoate's loan was to be of £1,487M, (virtually the entire purchase price and costs) and was to be repayable inside 6 months at 15% per annum. Mr Nicholson and he were to share the subsequent net profits equally. Although PSW was formally owned by CNLIS, it was acknowledged, in a separate document, that 50% of its shares were held as nominee for SJLIS.
38. Steps were immediately put in hand to sell two readily saleable sites with the most straightforward titles, in order to realise enough cash to repay Mr Jefcoate's initial loan, with interest. I am told that this was in fact achieved inside the expected six month period, although partly by the onward transfer mentioned next.
39. After the purchase, there was considerable discussion about the clawback provisions, which were poorly drawn. On legal advice, it was identified that they would probably not survive transfer to an (apparently) unconnected entity. Consequently, a "core" portfolio of the most potentially valuable properties was identified for sale onwards to a new company. Tomica Limited was newly incorporated in Guernsey in June 1997 for this purpose. Its shares were initially held by SJLIS, so as to hide any connection with Mr Nicholson and PSW, but there was again a side declaration that 50% of its shares were held by SJLIS as nominee for CNLIS. All this was, I am satisfied, agreed at a meeting between Mr Nicholson, Mr Jefcoate and Mr Rogers at this time. Tomica Ltd then took the more "Welsh" sounding name of Whitchurch Holdings Limited ("Whitchurch").
40. The group of properties identified for transfer to Whitchurch was to include the valuable properties, some subject to the intended clawback (in particular Penallta), but also some of the apparently worthless properties which could be retained without disadvantage. This was in order to give Whitchurch the apparent character of a property investment company rather than a property dealing company, again for beneficial UK tax effect.
41. The detail of the transfer was discussed and agreed, (it appears from the documents) at a meeting of 19th August 1997, attended by Mr Rogers, Mr Woodhead, (another Spread employee), Mr Nicholson and Mr Piper. The group of core properties, some 18 of them, was transferred from PSW to Whitchurch in August 1997 for £550,000. This was the aggregate of their individual values in a valuation made by Pope Waterfield, Chartered Surveyors. As it was important that the transfer should be conducted as a genuine arm's length transaction, money actually changed hands and, again, Mr Jefcoate provided, through his connection with Fenchurch Finance Ltd, the new funds needed for the acquisition by Whitchurch. The price was duly paid to PSW and ultimately it was paid out or distributed in accordance with the arrangements between the parties, thus in practice no doubt in part repaying Mr Jefcoate's original loan. The sale agreement was executed on 17th October 1997.
42. It was at around this time, that it was agreed by Mr Jefcoate that Mr Piper should be given a profit share in the venture, in recognition of his valuable services, particularly his taxation advice. According to the minutes of the 19th August 1997 meeting, this was conveyed to STC at that meeting, in the absence of Mr Jefcoate. Mr Nicholson in his witness statement gives the impression that Mr Jefcoate's agreement was somewhat later, and suggests that Mr Jefcoate "grumbled". However, whatever the exact timing, it was agreed that Mr Piper be given a 5% share, making the profit share 47.5% to each of the CNLIS and SJLIS and 5% to Mr Piper's similar trust, Genoa, and from at least February 1998, Whitchurch was beneficially owned in those proportions.
43. The broad plan was, of course, to exploit the value of the properties held by Whitchurch, and in particular the "jewel in the crown" property, Penallta. This would be a long drawn out business, - although just how long was probably not anticipated at the time. However, plainly a great deal of work was going to be needed to make this happen, and to dispose of

all of these disparate assets to best advantage, including, where appropriate obtaining a planning permission.

44. At a meeting on 23rd October 1997 in Guernsey, Mr Nicholson and Mr Piper introduced to Mr Rogers the persons who were intended to be involved with Whitchurch and with managing the Welsh properties and, ultimately, disposing of them to best advantage. The main persons were then Mr David Hambly, an architect of BBA Architects of Bath, and Mr Brien, who was a surveyor. The latter was to be general agent in respect of the properties, principally (apparently) involved in collecting rents on behalf of the new company. It was arranged for Whitchurch to issue letters of appointment.
45. Later, other persons and agents became involved, as the nature of the properties required, and there were several. The most important for present purposes were as follows. In April 1999, Mr Nicholas Sandy a “freelance” property agent, was appointed to find buyers for the relevant properties. This was apparently in place of BBA Architects, who were becoming over-committed, although Mr Hambly certainly had further involvement, in particular with the Celtic Energy site, referred to below. The services of both Mr Sandy and Mr Brien were formally ended in December 2000, on the grounds that Whitchurch no longer proposed to dispose of sites “in the traditional way” (a form of words drafted by Mr Nicholson for Mr Schreiber to use, a not uncommon occurrence). Where it was thought appropriate, in relation to more major sites, well known property agents, such as Chestertons (the contact being a Mr Mike Rees), were instructed. DTZ was another such agent. Other professionals were brought in to act on more specialist matters where required, such as dealing with planners, and advising on technical matters. One such was Mr Gareth George of Ateb Consultancy, who were geotechnical specialists. Another was Aaron Evans, a firm of architects.
46. I have already mentioned the replacement of the SJLIS and the CNLIS by LS and Paraguay (respectively) in order to mitigate the effect of changes to UK tax legislation in 1998. Further tax efficiency was also achieved at that time by incorporating a separate management company, Foxlear Limited, also owned in the same proportions as Whitchurch, and whose function was to carry out administration for Whitchurch, at a charge equivalent to 90% of Whitchurch’s profits. Foxlear could lawfully be a tax exempt company in Guernsey whilst Whitchurch could not.
47. From mid-1998, it does seem that Mr Jefcoate was looking to receive moneys from his trusts, in order to pay off loans he had taken out elsewhere to purchase or improve his residential properties, and in this context he was looking to have the loan from his trust to Whitchurch paid off. However, this did not happen as quickly as before. It proved difficult to obtain refinancing on the security of the Welsh properties at this time, and it was only between March and November 2000 that any substantial sums were in fact paid off by Whitchurch. The loan was not fully paid off until 2001.
48. In mid-1998, Mr Rogers retired through ill-health and Mr Scheibke took over the position of Engagement Director, and became the primary point of contact at Spread for the purpose of managing the three trusts’ affairs, together with his assistant, Mrs Elizabeth Giles. It is accepted that Mrs Giles’ part in the matter was never executive, but only as a secretarial and administrative assistant to Mr Schreiber. It was she who generally took notes at the meetings in Guernsey.
49. It is unnecessary in this general recital of the facts, to describe the progress of all the Welsh portfolio sites and transactions over the first seven years or so. Much relates to the claims now struck out. Two of such sites do, though, have some bearing on this action, as part of the context of some of the subject transactions, and because they have also been relied upon as allegedly proving a pattern of conduct by the Defendants detrimental to the interests of Mr Jefcoate and the SJLIS/LS, and thus (it is argued) supporting the allegations and causes of

action which remain the subject matter of these proceedings. The relevant sites are the plot known as “Plot 5” or the “Celtic Energy” site, and also the main site (in fact divided into two plots) at Penallta Colliery.

The Celtic Energy site

50. This site, also known as Plot 5, was acquired subject to an existing occupation Lease to Celtic Energy. The rent from that site therefore provided some income to the project, to fund the costs of the portfolio (interest, expenses, professional fees, etc). There was also the prospect of selling the site to realise a capital injection.
51. In brief terms Celtic Energy were seeking a new lease of their building, in early 1998. This new lease was negotiated, and was entered into in 1999 at an agreed rent of £52,000 a year, and at the same time Celtic Energy released three acres of their site back to Whitchurch. This had potential for development. The freehold investment was then put with Chestertons who, in November 1999 advised an anticipated sale price of £450,000 but said that any offer over £410,000 should be seriously considered. Mr Nicholson recorded that “we want £450,000 after costs”.
52. In January 2000, Chestertons were told to suspend marketing. In February 2000 it was recorded at a meeting between Mr Schreiber, Mr Nicholson and Mr Piper that it was agreed that the property should be sold to Paraguay (ie Mr Nicholson’s trust), apparently for £340,000, and Paraguay would then transfer it to its own wholly-owned company, Rivertree Properties Limited.
53. In April 2000, believing that their instructions to find a purchaser had been reinstated, Chestertons forwarded two formal offers of £475,000 and £450,000, to Whitchurch, recommending acceptance of the former. On 4th May 2000 Mr Schreiber responded that Whitchurch no longer wished to dispose of the property. This was a euphemism, as the land had, in fact, already been sold directly to Rivertree for £340,000.
54. Mr Jefcoate was in fact aware of the actual sale transaction, and that it was to Rivertree, and a large portion of this money went to pay off Mr Jefcoate’s loan to Whitchurch, something which, at the time, I am satisfied he was looking to have recouped. Mr Jefcoate had, it seems, also agreed the price. This, as is obvious, was far below either the figures suggested by Chestertons to Whitchurch or the offers they subsequently obtained. Mr Nicholson says that there was a discussion between him and Mr Jefcoate, at which an acceptable “open market” value of £400,000 was agreed, with him then agreeing to buy at a figure £20,000 higher than this as Mr Jefcoate said he himself would offer it. However this was then reduced by £80,000, because there was asbestos in the building, and this was the amount which any purchaser would then require to deduct, for remediation costs. This reduction was, thus, again agreed between Mr Nicholson and Mr Jefcoate.
55. Stuart cannot refute this, but says that any such reduction was agreed only in the belief that there really was asbestos contamination, whereas in fact there was none; this was a fabrication, and part of the pattern of sales at an undervalue, to the detriment of Mr Jefcoate and the benefit of Mr Nicholson. Stuart relies on evidence from Mr Martin Kehoe, a builder who used to do work for Mr Nicholson (and to whose evidence I shall have to return), to the effect that he could say, from inspection of the property, that there was no asbestos in it. Mr Nicholson says that the asbestos contamination was genuine, and has produced a copy of a building contract in respect of this site which included reference to clearing asbestos contamination, although not, as far as I could see, as part of an actual specification of works.
56. Whatever the position - and any claims in respect of supposed undervalue have been held to be prescribed - it does appear that the sale of the site contributed substantially to the eventual repayments by Whitchurch of the SJLIS loan, made between March and November 2000.

The outstanding balance was reduced to some £134,000, including interest accrued on the loan since July 1997, of £106,000, and this was also at a time when Mr Jefcoate was certainly requesting the Trustees to provide him with loan funds out of his trusts. How far he “needed”, or merely wanted, funds is not clear.

57. Carnation, which later took over the site, subsequently made a significant profit through reselling the Celtic Energy site for redevelopment to Redrow Homes. However, this was only several years later and not part of the sequence of events at the time.

Penallta

58. This former colliery site is central to the story, having been, by common consent identified as the best prospect in the portfolio. The commercially developable part of the site was potentially large enough to interest national house-builders, rather even, than merely regional firms, let alone small private builders. This is illustrated by the fact that plans for it included the building of a school, pub, petrol station and a supermarket as well as housing.
59. It (or the vast bulk of it) was eventually sold to Redrow Homes (South Wales) Limited (“Redrow”) for housing, in June 2004, although they had been expressing interest from as early as November 1999. There was a long and convoluted history to achieving this sale but the following condensed description, gives a flavour of the way in which these kinds of transactions are developed. There was not only the quest for planning permission for housing and other uses on this large, but heavily polluted site, but there were the ups and downs of an apparent sale of the adjacent “heritage” land, comprising the listed buildings such as the old colliery works and bath house, to the Phoenix Trust, a part of the HRH Prince Charles’ Prince’s Trust, for restoration and use as a museum. This prospect was, of course, a great coup in publicity terms, and association with the Princes’ Trust would improve the prospects of successfully obtaining planning permission for residential development on the adjacent land, because the making of a joint application for planning permission had been negotiated. It would also add to the cachet of the anticipated development.

(i) The colliery site

60. The prospective transaction with the Phoenix Trust was first mentioned at a meeting in Guernsey in October 1998, attended by Messrs Nicholson, Piper, Grimwade, Hambly and Schreiberke and Mrs Giles. It was noted that the Trust wished to purchase “the listed building” [sic] for £1, and it was suggested that accepting this was beneficial, because it would “cost Whitchurch money to demolish the building”. (This note suggests some misunderstanding or oversimplification, as these were listed buildings). The project got the general go-ahead from the Phoenix Trust by December 1998, at which point, there was a ceremony to mark its launch. As Mr Nicholson could not reveal his connection with Whitchurch at this stage, because the NCB might notice it, it was Mr Schreiberke and Mr Jefcoate who attended.
61. After further negotiations, Whitchurch contracted to sell the former pithead buildings and bathhouse buildings and surrounding land (totalling 19.3 acres) to the Phoenix Trust, by two transfers, in each case for £1, in September 1999. The transfers contained restrictions on any commercial development, in recognition of the nominal sale price. The remainder of the site, comprising the land developable for housing and other uses associated with a major residential development, was retained.
62. The Phoenix Trust obtained planning permission for a scheme to restore the heritage land in 2002. On hearing that they were looking for a development partner to carry out the restoration works, Mr Nicholson tendered for this project through another of his companies, and was appointed as preferred development partner in early 2003. However, the Trust had not by then obtained its grant funding, and there was in any event a shortfall in this of about

£600,000 against the development costs estimated to be required for the restoration project. The Trust therefore wanted to raise this money by carrying out commercial building on part of the site. Because it was seen, Mr Schreiber says, to be in Whitchurch's interests that the heritage land should be redeveloped, it was therefore agreed that Whitchurch would release the building restrictions on those sites, on condition that it received any surplus profit above the shortfall against costs which the Trust anticipated. Mr Nicholson said in his witness statement that this arrangement was actually very generous to Mr Jefcoate as it would enable him to share in "development profit", which, in the previous history of their arrangements, he had never yet done.

63. However, in the event the Phoenix Trust's restoration project never happened, because the Trust got into significant other financial difficulties, felt unable to proceed, and asked to "return" the properties for the original nominal payment. Mr Nicholson says that, feeling under pressure (dealing with royalty), and being aware of the potential prejudice to the retained land of the lack of development on the adjacent site, he agreed to take over the Phoenix Trust land, which he did in one of his other companies, which I think was either Swangraph Limited or Pinecraven (Penallta) Limited.
64. Mr Nicholson says that Mr Jefcoate was fully aware of and approved what was going on in this regard, as he (Mr Nicholson) kept Mr Jefcoate up to date with developments. He says that a letter written by Mr Jefcoate in October 2009, denying this and even that he was ever aware of the original sale to the Prince's Trust for £1, is a "barefaced lie" (as to which Mr Jefcoate is of course unable to comment). Mr Nicholson also says that, in practice, his taking over this land has been a financial disaster, leaving him, at the date of his witness statement for this action, with a stalled development and a liability to the Clydesdale Bank of £1.5M, for exactly the kind of reasons which caused Mr Jefcoate to be "risk averse" to becoming involved in actual development.

Penallta – the housing site

65. Obtaining an acceptable planning permission for this part of the site required a huge amount of work and negotiation, which unsurprisingly took a long time. It was necessary not only to satisfy the local planning authority and obtain planning permission (including negotiating affordable housing content, and Section 106 Agreements) but also to be able to present the site as a sufficiently attractive project, to a purchaser, to secure a good price, whilst potential purchasers were also of course themselves looking for profit out of the actual building. Hard-nosed negotiations over price, staggering of payments and other contractual conditions would be the order of the day. During the whole process of negotiating planning consent, there were (as would be expected) expressions of interest, more or less tentative/serious discussions, tactical approaches, negotiations and offers in principle from third parties. The account below gives only an outline of this whilst noting matters of particular relevance for this action.
66. It is useful to begin with the involvement of Mr Field, at this point. Mr Field had been introduced to Mr Nicholson in mid-1998, in the course of discussions and ultimately negotiations between Mr Hambly and Mr Allan Rogers (the local MP), with regard to the future of Penallta, and in particular its coal pollution. Together with Mr Rogers, but operating as the "front" man, no doubt to protect Mr Rogers' sensitive position, Mr Field owned a company called Domen Consultancy Limited, which specialised in contamination remediation.
67. Mr Field subsequently became involved in several aspects of the Welsh portfolio. In 1998, Domen had taken a lease of the vacant part of the Celtic Energy site from Whitchurch. In July 1999, Domen took an option to buy Crosshands from Whitchurch for £250,000, subject to planning permission, which was sought at the time but recommended for refusal and withdrawn. That option was never exercised.

68. As regards Penallta, itself, in October 1998, Domen entered into an option agreement with Whitchurch entitling it to a call for lease of the Penallta residential site for the purpose of coal reclamation, to be exercisable no later than one month after the grant of planning permission for such works (envisaged as part of the wider planning permissions being sought) and to be subject to a rent free period followed by £4,000 a month rent. At that time the right to remove the residual coal which had been left embedded in the potential residential land was believed to have commercial value. It was noted at a meeting in Guernsey on 13 October 1998, not involving Mr Jefcoate, that this transaction was beneficial to Whitchurch on the basis that it would receive the benefits of a rental payment, of not having the costs of itself removing the coal, and of having the land levelled.
69. At the time of the sale of the heritage land to the Phoenix Trust in 1999, the value of the remaining development land was unclear, but not great. It had, as yet, no planning permission and was subject to the possible costs of contamination remediation, infrastructure contributions and potentially high building costs, because of the nature of the site. In a letter to Mr Schreiberke of 8th October 1999, Mr Hambly suggested a value of somewhere between £120,000 and £240,000.
70. By 2000, the planning situation had progressed to the point where the grant of planning permission “soon” was now beginning to be anticipated. In February 2000, Redrow put forward an offer of £12M for the site, - but it wanted a £3M allowance for “abnormals”, (contamination, site difficulties, etc) which was not acceptable. Negotiations were to be continued through Chestertons, but seem to have fizzled out.
71. At a meeting between Mr Nicholson, Mr Piper, Mr Schreiberke and Mrs Giles in Guernsey on 31st August 2000, it was noted that Mr Hambly had negotiated a sale of the site “in principle” to Blestarde Ltd, a Jersey company owned by Mr Rogers and Mr Field, for £9,850,000, and of course dependent on planning permission. It was also noted that Mr Rogers and Mr Field expected a Finder’s Fee if the sale went ahead, and it was suggested that this might be related to compensation to Domen, who would not, then, take the coal reclamation lease. In fact, £500,000 was eventually offered. Mr Schreiberke and Mrs Giles, acting for Whitchurch, met with Mr Field and Mr Rogers later that day, and this was all confirmed. However, in the event, planning permission did not materialise at this time, and this interest fell away.
72. In October 2000, apparently under pressure, Domen exercised its option to take the lease of the Penallta development site for coal reclamation, and, as it was obliged to do, Whitchurch granted the required lease, in January 2001. However, this became disputatious, as Domen allegedly did not perform and there was some question about their ability to do so. In May 2001, Whitchurch threatened to terminate the agreement for alleged breach of contract. There was a brief digression when it appeared that Taylor Woodrow might take over the right to extract the coal, for which it would make a payment of £125,000, which Domen were prepared to accept to compromise their claim against Whitchurch and stand aside. However, negotiations with Taylor Woodrow fell through when Taylor Woodrow then changed their offer of £125,000 to a request for a payment of £600,000.
73. All this time other approaches came and went. Planning permission for Penallta was eventually granted in August 2002. One particularly vociferous objector, whose son had a chest ailment, had been bought off by a promise to pay her relocation costs. This promise actually gave rise to legal proceedings, and it appeared that Whitchurch had possibly been committed, by Pellys, to making the relevant payment even if the planning permission were not actually obtained - a matter which could easily have caused yet another falling out between parties involved in this case. However, this was avoided, as the permission did come through, and a settlement payment of £66,000 was made to resolve the matter in November 2002.

74. Selling the site now became a priority – it is clear that it had been necessary to hold it far longer than had been originally expected in 1997. The contamination issue remained a problem, however, as house-builders would naturally require either that the vendor remediated this, or a reduction in purchase price. The possibility of rights conferred by the arguably defunct Domes lease becoming an issue, whether genuinely or opportunistically, was also a potential problem. Although Mr Grimwade of Pelly’s expressed the view that this lease was “dead” because Domes had never paid any rent, Domes did not agree.
75. Ultimately a reclamation contract was made in mid-2003 with UVES Limited, who were introduced by Domes, with Domes’s asserted rights against Whitchurch being bought off with a promise of the sum of £125,000 which it had previously been willing to accept as the price of letting Taylor Woodrow take over its rights. As so often seems to happen, the UVES contract then, itself, became disputatious. UVES denied responsibility, under its contract, for removing the unpleasant sounding “filter cake” of residual coal contamination, which was the by-product of the remediation process. This gave Whitchurch a problem. There were time-limits on securing the beneficial sale contract with Redrow, mentioned below, under which the filter cake would have to be removed, so that it had no time to argue with UVES. This eventually led to a fraught scramble to move the filter cake, using space on other land within the Penallta site but not included in the Redrow site. Fortunately, other such land was available, namely part of the heritage site returned from the Phoenix Trust, but now owned by another of Mr Nicholson’s companies, Pinecraven (Penallta) Ltd, which received a fee for receiving the material. Mr Nicholson says, and Mr Schreiber supported this, that this was cheaper than contracting for the removal of the filter cake off site by third parties.
76. Again, these are matters which were later queried and challenged by Mr Jefcoate and Stuart, but they are outside the scope of this action. Mr Nicholson says that even if this had not all been known to Mr Jefcoate (which he denied, and said that it was) it was all necessary in order to bring about the hugely profitable sale to Redrow in which Mr Jefcoate shared, and it did not involve any separate and diverted profit for himself or his companies out of any property subject to the terms of the original acquisition arrangements in 1996/7, having regard to the transactions in the interim.
77. Redrow’s interest had been expressed since 1999, as previously noted. It was reiterated once planning permission was either obtained, or was a racing certainty. Mr Nicholson did not want to reveal his connection with the site to Redrow, believing it would be counter-productive, I infer because of the course of some previous business between them. Mr Field was therefore deputed to negotiate, on behalf of Mr Nicholson (as Mr Field says he saw it), with regard to the potential sale of the Penallta site, with which Mr Field was, of course, very familiar. Mr Field also, though, had his eye on gaining something out of the situation for himself. He apparently hoped to be able to persuade Redrow to pay some £2M above the figure which he (Mr Field) understood that Mr Nicholson would be willing to accept, and thereby to make a “turn” on the property, through a back to back sale. Unfortunately for him, Mr Nicholson insisted on becoming involved in the negotiations at a late stage, using an alias of “Mr John Davidson” in order to do so, and Mr Nicholson drove a harder bargain. This sliced away Mr Field’s effective commission from Redrow to the mere £400,000 which they later paid him, a fact which plainly, from his evidence, rankled hugely.
78. Mr Nicholson gave evidence that he had not known about Mr Field’s receiving money from Redrow until this fact emerged during this case. Mr Field agreed, saying that his arrangements with Redrow were none of Mr Nicholson’s business.
79. At the time of the sale, Mr Nicholson drew up a manuscript statement which was sent to Mr Schreiber, setting out expenses which Mr Schreiber was authorised to pay out of the initial receipt of funds, and the sums which would then be left for division. Again, some of the

expenses charged by Carnation, and which appear to have included a car, were originally challenged in this action but ruled to be prescribed as the basis for any claim.

80. Contracts were exchanged with Redrow Homes, in June 2004, for a total, and remarkable, price of £13,120,000, payable as to half on completion on 21st June 2004, and as to the other half, plus £742,000 interest, on 3rd July 2006. The second tranche was covered by a bank bond. After expenses were deducted, each of the LS and Paraguay ultimately received distributions of over £6M, with the appropriate amount also going to Genoa. This was a turning point in the NCB land venture.
81. Mr Nicholson and Mr Field both agree that Mr Field had been pressing Mr Nicholson for recognition of his work in dealing with Redrow, and the very good price achieved, from shortly after exchange of contracts. This pressure was referred on to Mr Schreiberke. On 26th June 2004, Domen issued an invoice to Whitchurch for £125,000, which was paid. It was stated to be for remediation work at the Penallta site. What it was actually for has been the subject of dispute and certain inconsistencies of evidence, as mentioned later.

After the Penallta sale – the subject transactions

82. In order to put further hurdles in the way of the NCB seeking to claim its clawback, it was agreed that once the hugely profitable sale of Penallta had gone through, Whitchurch should be wound up and dissolved, even if this could only finally be completed after the payment of the second tranche of the purchase price in 2006. For this purpose, Whitchurch had to dispose of the remaining properties out of the original 18, and it was decided, that these should be transferred to another new company, HIL, which would again be owned, through nominee holdings, for the three respective companies (Tulip, Carnation and Lilac) owned by the respective parties' family trusts. HIL would then continue the disposals.
83. In order to give this transaction a commercial appearance, the properties had to be transferred for proper value. Mr Brien, was instructed to provide valuations for this purpose. They would be compared, for accounting purposes, with the earlier Pope Waterfield valuations. It is accepted that the values which Mr Brien placed on the properties were "conservative". High values would not have been advantageous and therefore the objective was that they be the lowest "defensible" market value. It is disputed, as has been asserted by the Plaintiff, that Mr Brien was instructed what figures to use for these valuations by Mr Nicholson.
84. The transfer of these properties took place, on or about 2nd September 2004. Among the properties then transferred to HIL are the four properties, (six plots) with which I am concerned in this cause, and also one other, at Abernant. The purchase price was £450,000. It is not clear exactly how the funds were raised on this occasion, but probably not from Mr Jefcoate.
85. There is a dispute about relations between Mr Jefcoate and Mr Nicholson at this time. Mr Nicholson says that Mr Jefcoate had now indicated a strong wish to "retire" from their relationship now that Penallta had been sold, and had said that he wanted the matter "wrapped up". Their relations had cooled. He suggests that the evidence shows that Mr Jefcoate was short of ready funds, and was anxious to obtain what cash he could out of this venture. Mr Nicholson says that Mr Jefcoate had been put in difficulty with his own financiers through being unable to repay other loans he had taken out, owing to not having had receipts from the Welsh project. It was against this background, and Mr Jefcoate's desire to finish off the venture, that the disputed transactions, all of which were implemented in late 2005/early 2006 were effected. Mr Schreiberke supports Mr Nicholson's evidence that it was uncertain whether Mr Jefcoate would then continue with the project, saying that this was discussed at a meeting with Mr Jefcoate and Mr Clark in August 2004. However, on examination the meeting notes do not support this, and the reference seems to be to Mr Nicholson mentioning this to Mr Schreiberke at a separate meeting between them two days earlier.

86. I have, of course, no statement from Mr Jefcoate himself. Stuart denies that his father was in need of funds at the time, but agrees that relations had cooled. However, he attributes this more to a suspicion of Mr Nicholson which Mr Jefcoate had begun to harbour. He cites, as an example, another project between Mr Jefcoate and Mr Nicholson, also on an equal basis and conducted through the Guernsey trust structure, but through a different company, Yolanda Limited. This was in relation to the redevelopment of the Westminster Theatre. Stuart says that his father was particularly angry at the apparent level of personal expenses which Mr Nicholson had charged to this project. Disclosed documents also reveal a file note in July 2003 from Advocate Eades at Carey Olsen stating that Mr Jefcoate had sought advice because of concern as to control of the proceeds of this sale, bearing in mind the agreement for equal division, and fearing that these might be paid to Pellys rather than to STC for distribution. Mr Jefcoate was apparently advised to go to see Mr Schreiber immediately, and did so. Mr Jefcoate later recorded in a letter to Advocate Eades that the matter had been satisfactorily dealt with, but his letter did not state how.
87. I am satisfied that after the successful achievement of the Penallta transaction, with the second tranche payment being now merely a matter of waiting, the venture had lost much of its initial momentum. It had been in existence for seven years. I am also satisfied that relations between Mr Jefcoate and Mr Nicholson had become more distant, and perhaps even strained. It had not been possible to obtain commercial finance for the project in the years before the Penallta sale. This was one of the reasons why Mr Jefcoate's finance had not been repaid very quickly, but was also a difficulty for the project, in that it had had to be operated on rather a hand to mouth basis. It had only been after planning permission, at least, had been obtained that it had been possible to put up security in order to obtain a facility, from Barclays Bank. I have little doubt that Mr Nicholson saw Mr Jefcoate's seeking the payment of his loan funds (he and Mr Jefcoate ultimately did some deal to commute the final interest, in connection with the finances of one of their other transactions) as Mr Jefcoate's being unsupportive. Mr Jefcoate plainly expected still to receive his 47.5% share in the best possible return for the rump of the property portfolio, and he expected Mr Schreiber and Mr Nicholson to achieve this. I am again satisfied that his attitude of expecting this to be done for the least possible expenditure was irritating, particularly to Mr Nicholson, who felt – and I accept with probable justification – that Mr Jefcoate did not really appreciate the amount of work, trouble and energy which had been put into Penallta, and was expecting to reap a large reward for other people's efforts, principally his.
88. This was the general background to the particular transactions with which I am concerned.

The disputed transactions

Plots 4 and 8

89. Plot 4 comprised a long thin irregular plot of 0.56 acres of largely sloping scrub and woodland, with some dilapidated garages on it, on the north side of a street of modest terraced houses in the outskirts of Bargoed, potentially liable to partial flooding. It had been put in the hands of Mr Sandy, in the early days. It had been subject to claims of adverse possession, and his attempts to regularise this with the claimants by effecting a sale or payments had been unsuccessful. In mid-2000 he had expressed the view that the costs of taking the matter further would exceed the “£1,000 or so we may or may not achieve in selling the site” and so nothing further had been done.
90. In notable contrast, the valuation by Mr Brien of 11th August 2004, rather remarkably gave a market value of £35,000, reducing to £25,000 on a “restricted time frame of 6 months”. The site was within the settlement boundary of the village, and the possibility of development was therefore noted.

91. Plot 8 was quite similar. It comprised a plot of 0.58 acres of steeply sloping woodland land above a retaining wall on one side of the highway of a street of modest terraced houses, about a mile outside the town centre of Pontypridd. It was accessed by a public right of way consisting of steps. It had apparently been left as waste land, had been encroached on by adjoining owners in places, and had adverse possession problems. Attempts to regularise this and realise anything from this property had again been fruitless.
92. Mr Brien's valuation of this plot in August 2011 was £15,000 (but £10,000 on a restricted time frame). This plot was allocated as open space in the local development plan.
93. In a telephone conversation between Mr Schreiberke and Mr Nicholson on 17th August 2005 the possibility of "disposing of all the worthless bits of land in HIL to John Field for £1" was discussed, with Mr Schreiberke saying he "would rather dispose of these than have the costs of insurance/potential issues re upkeep, etc". Plots 4 and 8 were disposed of to Mr Field's company, JF Enterprises Ltd, for nil consideration on 5th September 2005. There is no record of any formal discussion about these disposals and Mr Schreiberke agrees that there were no meetings, but he says that the disposal was nonetheless a responsible and considered decision.
94. Plot 4 was subsequently sold by JF Enterprises at auction in December 2005 for £9,500, although from a guide price of £1,000. Plot 8 was subsequently sold by JF Enterprises at auction in March 2006 for £12,000.
95. The Plaintiff's valuation expert, Mr Snowden, says, in a retrospective valuation exercise carried out first in 2009-10 but confirmed for his evidence at trial, that Plot 4 was worth £10-15,000 and Plot 8 was worth £10-20,000. Mr Caldwell, the valuation expert called by the First to Fifth Defendants (and also relied on by Mr Nicholson and Mr Field), states his opinion that the value of Plot 4 was £4,500, and that of Plot 8 was £10,000.

Plot 13: Crosshands

96. Plot 13, Crosshands, is a 4.97 acre site in one large area of 4.47 acres, (originally consisting of a storage shed, parking area and scrubland) and two smaller areas of scrubland, one of about 0.5 acres and one of negligible size, at Tynewydd Terrace, Crosshands.
97. This site had been identified as a possibility for residential development before September 1999, Aaron Evans, Chartered Architects, having been consulted by Mr Sandy in this regard. Mr Sandy was seeking to pursue this prospect during 1999. However, there were highway and access issues. The site was accessed over a private road, owned by several individual frontagers, who primarily wished their access road to be taken over and maintained at public expense, but who were also not averse to seeking to make something out of their required cooperation for any major development of this adjacent land. The highway issue concerned the possibility of adequate sight lines and visibility splays necessary at the exit from the potential estate road on to the busy A476. The necessary space was occupied by a corner shop and the owner was wanting £250,000 to sell it.
98. In 1999 Whitchurch had granted to Domen an option to purchase the main site for £250,000 subject to planning permission, in return for a contribution to costs of planning, etc. However, this was never exercised and the planning application was withdrawn in March 2000, to forestall an anticipated refusal. Nothing of moment then happened until January 2003, after the land had been (it was observed) prospectively allocated for residential development in the draft deposit Unitary Development Plan.
99. In April 2003, there was interest in the property from Hale Construction ("Hales"). Internal notes suggest that Mr Nicholson had a value of £800,000 in mind, although no doubt on a conditional basis. However the formal offer, received by Ateb (Mr George) in late April

2003 was, subject to planning permission, to construct 50 homes on the site over five years, paying Whitchurch 8% of the price of each unit as sold. Whitchurch's formal response suggested that the land was worth £1,000,000, and put forward counter terms. After an improved offer, Whitchurch wrote in June 2003 that it would accept £700,000 for payment in full on receipt of planning permission, but if payments were to be phased with sales of units it would require £800,000 paid at £15,000 per sale and in full on sale of the 40th unit. Hales replied preferring the latter terms, and this offer was formally accepted by Whitchurch, subject to contract, on 14th July 2003. The matter was passed to solicitors.

100. In July 2003, Hales' solicitors said that the purchasers had discovered a problem with the access to the site, which they were investigating. This put the matter on hold for the rest of the year, and in January 2004 Whitchurch withdrew from the transaction, although it appears from references to missing correspondence that Hales may well have still wished to try to proceed. In March 2004 Ateb informed Hales that Whitchurch now proposed to pursue planning for Crosshands itself, and not to market the property until it had done so.
101. In fact, about a week later Whitchurch agreed to sell the main site to Pinecraven Properties Limited one of Mr Nicholson's companies, for £500,000, conditional upon planning permission being sought and being obtained within 9 months. At about the same time, there was also interest in acquiring the site expressed by Family Housing. This was, of course, all in the period when the Penallta sale to Redrow was nearing fruition.
102. In August 2004, Whitchurch agreed an extension of time under the contract for Pinecraven to lodge its planning application. It seems, though, that Mr Schreiberke at this time regarded Crosshands as having been disposed of, as he did not include it in a list of residual properties to be sold to HIL, which he sent to Mr Grimwade for confirmation. Neither was there any mention of Crosshands at the meeting of 11th August 2004, between Spread and Mr Nicholson and, for once, also Mr Jefcoate.
103. It was noted at a later meeting between Mr Schreiberke, Mr Nicholson and Mr Piper, on 20th August 2004 that it was now intended that Crosshands should be sold to HIL along with the other residual properties and that subsequently, Carnation (Mr Nicholson's company) would enter into a new subject to planning agreement with HIL, but would not develop the site. There was a hasty (no doubt because of its previous omission) and short valuation of Crosshands, on 9th September 2004, by Mr Brien at £60,000. This was said to reflect the absence of planning permission.
104. The Pinecraven contract was allowed to lapse, and in September 2004, a similar contract with Carnation was substituted, once again dependent on planning permission. In late September 2004, an application for outline planning permission was worked up, envisaging the construction of 50-60 dwellings. This was lodged, together with supporting technical reports and was formally registered in January 2005. Planning permission was not, however, granted until May 2007. I am told that this was because of difficulties satisfying the planning department about highway issues.
105. Completion of the sale by HIL to Carnation actually took place in December 2005, at £500,000. Mr Nicholson says that this was because of pressure from Mr Jefcoate to complete the prospective purchase, which he knew all about (indeed having urged Mr Nicholson to buy out the property himself, now that he had the money out of the Penallta deal) and buy the property without planning permission, so as to speed up the finalisation of the venture. Upon the completion, 47.5% of the completion monies were paid to the credit of LS; I infer that any concomitant expenses were charged separately.
106. Mr Snowden, for the Plaintiff, says that at this time, the true value of Crosshands was actually £1.5-£1.75M. Mr Caldwell says that it was £505,000 (putting £500,000 on the main 4.47 acre site and a nominal £5000 on the small site, if treated separately.)

107. On 14th December 2007, Carnation sold the property to Redrow Homes (South Wales) Limited for £2.25M, but this was, of course, rather later.

Plots 15, 16 and 19 - Wernos Washery

108. The Wernos Washery “site” in fact comprises three sites, along Pen-y-Banc Road at Ammanford, one of 1.22 acres at Hafod Road, one of 16.4 acres at Pen-y-banc Road, and the main Wernos Washery site of 172 acres.

109. Plot 15 comprises a larger parcel and a smaller one with a mineshaft beneath, which can be ignored as it is agreed to be valueless. As to the larger parcel, although the local UDP was not formally adopted until June 2006, it had been sufficiently well established in draft (since 2002) to be regarded as operative. Under this this larger site of just over one acre was allocated to residential development.

110. Plot 16 also consists of two parcels, on opposite sides of Pen-y-Banc Road, adjacent to the River Lougher. As regards planning, the northern part was allocated for employment use and the southern part was subject to a planning and development brief. (It has subsequently, and disappointingly, been designated for recreational use and associated activities, along with other parts of the Wernos Washery sites.) Both parcels are subject to flooding risks over most of the site. Approximately one acre of the southern parcel is not at flood risk and was thus a possible candidate for residential development, but not being an infill site, would not easily gain permission.

111. Plot 19 comprises 172 acres, of which at the relevant time a small parcel of 1.3 acres was allocated for residential use and a further 3 acres was within settlement boundaries and therefore had potential for permitted residential development. The remainder comprised the former coal washery site and works, and had been returned to natural landscaping. As regards planning, this was allocated as a regeneration site where the planning brief would explore recreational use and associated activities, but that planning brief was not developed. The site remained so allocated in the 2006 UDP, and this situation has not changed even today, with later planning reviews. There is, I am told, now no practical possibility of any residential development on this site until after 2016 or later.

112. Mr Brien valued these three sites (Plots 15, 16 and 19) at £40,000, £100,000 and £110,000 respectively, ie a total of £250,000, for the purpose of the transfer to HIL in September 2004.

113. There was little activity thereafter with regard to the Wernos Washery sites, although in April 2005, HIL sold a strip of land to a company which was the alter ego of Mr Huw Williams, a local small builder, who owned adjacent development land for £70,000, to facilitate his access.

114. All three of these sites were made the subject of a “call” option granted in March 2006 by HIL to Landview Developments Ltd, a company owned by Mr Field, apparently with a view, mainly, to exploiting the extraction of residual coal from the main site. However, Mr Field got into financial difficulty. With a view (he says) to assisting the termination of the venture, Mr Nicholson offered to take over Mr Field’s option, but this was achieved by Landview itself being transferred, as to 99.5%, to one of Mr Nicholson’s companies in late 2006 or early 2007. Landview then exercised the option on 29th March 2007.

115. Again, 47.5% of £1M, ie £475,000, was transferred to LS, and I assume that associated costs, if there actually were any separately identifiable costs, were charged separately.

116. Through his introduction to Mr Nicholson, Mr Williams became interested in developing some parts of the Wernos Washery land. Between October 2007 and April 2008 he submitted applications for planning permission in respect of the allocated residential

development land, being Plot 15 and the small site within Plot 19, the latter in conjunction with other land. He agreed with Landview (now also being administered by STC through Mr Schreiberke) to purchase the residential land in Plot 19 for £630,000. However, this deal became complicated, both in form and as a matter of analysis for valuation purposes, because (a) the sale was in conjunction with the vendor making a secured, interest bearing loan of £478,000 to his company for building costs and (b) payments of the purchase price and loan interest were to be made on sale of housing units.

117. Later, owing to the increased costs which this form of agreement generated for Mr Williams and the collapse of the housing market, this price was negotiated down to £540,000 with a reduction in the final interest payment. This would not, though, have any bearing on the analysis of the market value of the initial transaction. Mr Williams has also acquired, on a similarly complex but less closely examined transaction, the development land in Plot 15.
118. Mr Snowden says that at the time of the exercise of the option, which he takes as the relevant valuation date, the values of these three sites were £300,000, £225,000 and £3M - £3.5M respectively, a total of £3.525M - £4.025M. Mr Caldwell says that at the time of the grant of the options, which he takes as the relevant date, they were worth £120,000, £130,000 and £800,000, a total of £1,050,000.

Concluding the history

119. The only property still remaining in the portfolio was Abernant. This was subsequently transferred to Tulip, Mr Jefcoate's company. I am told that this was for £150,000, but also that, by a side agreement, it is held in the same proportions as the original trusts for Tulip, Carnation and Lilac. HIL itself was then wound up and dissolved in 2008. That concludes the material history of the properties and I do not need to refer to any later events.

The start of the dispute

120. In 2008, Mr Martin Kehoe, a builder who had worked a great deal for Mr Nicholson and also done some work for Mr Jefcoate, principally at his London home, fell out with Mr Nicholson and apparently went to see Mr Jefcoate and told him that Mr Nicholson had been "fiddling him". Mr Jefcoate told Stuart of this. In April 2009, Mr Jefcoate went to see Mr Schreiberke and had lunch with him. He tape-recorded part of the conversation, although Mr Schreiberke was not aware of this. The transcript has been put in evidence. I have not found it particularly controversial or illuminating. From it, it is clear that Mr Jefcoate was seeking to "pump" Mr Schreiberke about what had been happening on not only the Welsh portfolio properties but also other ventures as well, commenting that he had not really seen Mr Nicholson in two years and nothing seemed to have been happening. In the conversation, Mr Schreiberke's answers are vague, but this was, after all, over a lunch and not a formally convened meeting. Mr Jefcoate apparently gleaned enough, however, to "discover" that several of the Welsh properties, other than Penallta, had been sold to companies connected to Mr Nicholson without (he reported to Stuart) his knowledge.
121. Stuart then involved himself in investigations, and in June 2009, he wrote a letter to Mr Schreiberke asking for complete sets of accounts and details of all the sales of the original 18 sites transferred to Whitchurch (except for Abernant). The initial information provided to him by Mr Schreiberke was incomplete and unclear. It was improved somewhat in August 2009, but, rather remarkably, contained the statements that Plots 4 and 8 had been sold to JF Enterprises Ltd for £25,000 and £10,000 respectively.
122. On 3rd September 2009, Mr Jefcoate wrote to Mr Schreiberke, complaining of breach of trust by Spread – and indeed breaches of duty by Mr Nicholson, on the basis that the properties appeared to have been sold at below market value, and to companies connected with Mr Nicholson - with a provisional estimate of loss of £35M. Much of this included very high

figures for the alleged value of coal reclamation/exploitation rights. The matter was passed to Mr Le Hegerat of Spread, who sent a detailed reply on 6th October 2009, taken mainly from notes but also, no doubt from information from Mr Schreiber. The responses then advanced in relation to the subject properties were that

- Plots 4 and 8 had been disposed of for nil consideration to avoid the costs associated with keeping what were deemed to be virtually worthless pieces of land, and in any event the claimed loss did not take into account costs that would have been incurred in retaining the property.
- Crosshands had been valued at £60,000 in August 2004, and was sold in December 2005 to Carnation for £500,000 with Carnation paying all the planning and “neighbour dispute” costs. Whilst at the time the best offer was £700-800,000, being negotiated with Hales, this was not a sustainable comparison because Hales had pulled out of the deal owing to issues with access, etc.
- Wernos Washery had been valued at £52,000 in August 2004; alleged values of £30,000,000 were speculative on a by-pass being constructed (which it was not) and a suggested site value of £2-£3M was on the basis of planning permission being granted, which it had not been. The option offer of £1M, subject to planning, was made in March 2006; Mr Jefcoate had been informed of this in May 2006 and had not commented. The option had been exercised in March 2007 (though it was not mentioned that by this time Mr Nicholson had effectively taken over the company owning the option).

123. In November 2009 the Jefcoates went to inspect the sites with Mr Kehoe. In March 2010, they instructed Knight Frank in Bristol (Mr Snowden) giving them, apparently, all the information provided by Mr Kehoe, and asked them to provide retrospective valuations of all the 18 sites, making it clear that this was in connection with possible fraud proceedings. This action was commenced on 19th November 2010.

The trial - scope of the evidence and witnesses

(a) The place of matters occurring prior to 10th November 2004

124. When this action was commenced in November 2010 by Mr Jefcoate and Stuart as co-Plaintiffs, its original scope was rather different from the action as it eventually came to trial. In the original cause, many complaints were made about disposals at undervalue and in breach of trust (etc) regarding several earlier transactions with regard to the NCB portfolio when it was held by Whitchurch. There was also a complaint about the alleged rendering of false invoices to Whitchurch by entities owned by Mr Nicholson and Mr Field. These particular allegations were met by a defence of prescription, they having occurred more than 6 years before the commencement of proceedings. The riposte to this was a plea of *empchement d’agir*.

125. In June 2011, the Plaintiffs then sought to make wholesale amendments to their cause. The Defendants objected, and this resulted in a lengthy contested application to amend. The details of the initial case, and the proposed amendments, appear in the comprehensive judgment of the Bailiff handed down on 17th April 2013, (see 2013-14 GLR 220) and do not need repeating. In refusing leave to amend in the form then proposed, the Bailiff upheld the prescription argument in relation to the early matters, rejecting the saving plea of *empchement d’agir* on the grounds that the facts proposed to be pleaded were insufficient to support such a plea, and he gave directions as to the principles upon which the Plaintiffs might have a “final opportunity” to formulate a claim which could reasonably proceed. For present purposes, an important requirement was that the pleaded causes of action had to have

arisen no earlier than November 2004, a date which, coincidentally but neatly, in fact confined them to the disposals by HIL rather than including matters involving Whitchurch. The result is the limitation of the scope of the action between the present parties which has already been observed.

126. However, the Defendants therefore sought to argue, at a later case management hearing, that the Plaintiffs were not entitled to adduce any evidence in regard to transactions which took place earlier than November 2004, submitting that because those had been held to be prescribed as causes of action, evidence relating to them was therefore immaterial and inadmissible. I rejected this argument. The test of materiality and hence admissibility is whether the facts alleged would, if sufficiently proved, have any worthwhile probative value with regard to an issue in dispute. There is a crucial distinction between relying on facts outside the prescription period as the basis for a claim which is therefore prescribed and hence extinguished, and relying on facts outside the prescription period as evidence which is argued to be probative, or supportive, of allegations as to matters which are within the prescription period, and therefore going to found a cause of action which is live. I held that matters occurring before the relevant date for prescription were capable of providing context and history which *could* shed light on the correct interpretation of facts and matters taking place subsequently. One example would be if they tended to establish an earlier pattern of conduct which might therefore be argued to be likely to have continued. I therefore refused to rule that the Plaintiff was not entitled to adduce any such evidence, and the Plaintiff was therefore permitted to make such use as might be advised of otherwise admissible evidence, from whatever period it arose. This resulted, in practice, in my being referred to events regarding the two other sites which I have mentioned in the account above, namely Celtic Energy and the two Penallta sites.

(b) No other causes of action

127. In addition, I observe that other well-known causes of action in this area of law – such as complaints of dishonest assistance in breach of trust, or knowing receipt of trust property - have been previously considered in relation to this case in interlocutory applications, and have been expressly disallowed, either for being prescribed in any event, or for standing no realistic prospect of success on the basis of the facts pleaded. There could scarcely now, therefore, be any realistic possibility of yet further amendment to the “final opportunity” form of the Amended Cause upon which this action has proceeded, even if facts or allegations might appear to point to any such other cause of action.

128. Further, I record that any allegation of fraud against Mr Nicholson (or STC) has been expressly disavowed by the Plaintiffs, as further explained below in connection with the conspiracy claim. I also note that the claim does not include, and never has (so far as I can see) included, any claim of breach of contract by Mr Jefcoate against Mr Nicholson. There was a hinted allegation in the original letter of complaint of 3rd September 2009, that Mr Nicholson “appeared to have breached his duties *to the trusts and corporate structure*” (emphasis added) in his “appointment as project manager”, but this allegation was not pursued subsequently or, if it was, was found to be without substance in the interlocutory stages. Again, in the light of some of the evidence led, it is important to keep this in mind.

129. The above background may therefore explain any apparent peculiarities about the trial process, the particular issues canvassed or not canvassed and any noteworthy rigid approach to the pleadings, which may appear to have operated.

(c) Mr Jefcoate

130. It is an unfortunate, and of course sad, feature of this case that the main protagonist on the Plaintiff’s side is not able to give evidence. Much was made, by Advocate Ferbrache, and echoed by Advocate Greenfield, of the fact, that although these proceedings were started in

November 2010 and Mr Jefcoate did not pass away until October 2012, no statement had been taken from him in that time so as to be at least adducible under the *Evidence Law*. Earlier evidence, for the purpose of interlocutory hearings, had all been given by Stuart Jefcoate.

131. This all seemed to be being laid as the foundation of a submission that the court could and should draw inferences adverse to the Plaintiff from the absence of any statement from Mr Jefcoate. However this was not seriously pursued by the Defendants when a direct question was put by the court. This was rightly so, in my judgment. There had been no contravention of any court order with regard to exchange of witness statements, and this situation is far removed from the case where an obviously material witness who could seemingly attend to give evidence is not called to do so. The position is, therefore, that the evidence before the court is simply what it is; the Plaintiff suffers the evidential disadvantage of being unable to adduce evidence from Mr Jefcoate and I will be evaluating the probative strength and effects of such evidence as I do have, in all the circumstances as they now appear. These include, of course, that Mr Jefcoate's absence means that any other witness's assertion of things said or done by him is not susceptible to direct effective challenge.

(d) Plaintiff's witnesses

132. In the circumstances, it was inevitably the case that the Plaintiff's witnesses could give very little direct evidence of the matters in issue in the case. The Plaintiff gave evidence himself, and called five further witnesses.
133. Stuart Jefcoate gave evidence according to a witness statement which had been considerably truncated by earlier applications from the Defendants to strike out large parts of the original for being irrelevant or inadmissible. This was because he was not able to give direct evidence (ie evidence from the observations of his own senses) with regard to many matters in issue, but had included expressions of his view of what Mr Jefcoate had thought, intended or understood (or, even more objectionable, what Mr Jefcoate "would have" thought, intended or understood). It is trite evidential law that a witness cannot give evidence of the thoughts in another person's head, and that his opinion of what those thoughts are likely to have been is either immaterial or a matter for the judgment of the court and not the witness. However, a witness is perfectly entitled to say what he did observe of the acts conduct or behaviour of another person, from which, of course, inferences, often obvious ones, may then properly be drawn. Therefore, where a witness as an ordinary layman, expresses what may seem to be an opinion but is really no more than a compendious description of observed facts (eg "he was upset") that "opinion" is admissible on that basis. The difficulty is often drawing the line between the two, but this can usually be met by setting out the matters observed by, or the other direct knowledge of, the witness upon which he is relying, so that the logic of his "opinion" can be seen and weighed. It was by application of this process that an eventual version of Stuart Jefcoate's properly admissible evidence was finally produced.
134. Stuart Jefcoate was, I am satisfied, a sincere witness, who gave me truthful evidence. His answers were not always as supportive of his case as they could safely have been, and he candidly (and very properly) admitted to having no direct knowledge of many matters put to him in cross examination - largely to confirm just that point. He has a firm and genuinely held conviction that his father, and he by extension, have been cheated, or at least short-changed, in the course of the events the subject of these proceedings. How far this is justified, and how far it is, as Advocate Ferbrache ultimately submitted, the result of the Jefcoates' having been "wound up" by another malignly motivated witness, Mr Kehoe, is a different matter.
135. Stuart called Mr James Clark, an accountant and former banker, and a director of Fenchurch Trust Ltd of Jersey, who had assisted Mr Jefcoate to establish offshore trust structures for the purpose of pursuing UK property ventures, and had subsequently arranged finance for such

projects from resources of or provided to Mr Jefcoate (or his trusts), including the finance for the purchase of the NCB portfolio.

136. Mr Clark was a good witness, who gave evidence carefully, clearly and directly. His only fault was, perhaps, that he was too anxious to “help” and indeed had to be courteously restrained from expressing what were obviously going to be his opinions about what had eventually happened between Mr Jefcoate and Mr Nicholson. This helpfulness also led to him answering many questions in the past conditional tense, betraying the fact that much of what he said was based on what he had been told by others; he candidly stated that he had no first-hand knowledge of the NCB portfolio transactions. He was called mainly, I think, to counter the suggestion that Mr Jefcoate had been “risk averse” as regards his investment in such projects. Mr Clark refuted this except as regards “exposing the projects to the undue risk of UK taxation”. Whilst I feel able to rely on Mr Clark’s evidence with confidence, it did not take the matters in real dispute very far forward. I noted, though, that he said that he had always found Mr Nicholson to be open, frank and willing to provide information.
137. The remaining four of the Plaintiff’s witnesses were really called, not because of their having any direct knowledge of the matters in issue in this case, but to attack Mr Nicholson’s character.
138. Mrs Jean Moakes, a former PA to Mr Nicholson, from whose employment she had departed in unhappy circumstances, gave evidence by video-link owing to her medical inability to travel. Large parts of her original evidence had been struck out for being irrelevant personal opinion. I am quite satisfied that she was an honest witness, but what remained of her evidence really took the matter nowhere. Her cross-examination merely established that she knew nothing of the matters in contention in the case, and had found Mr Nicholson to be intolerably insensitive about her employment position when she had suffered ill-health.
139. Mr Andrew Parker similarly knew nothing about the matters in issue in the case. His evidence was, in essence, that he had been cheated by Mr Nicholson over a commission promised to him in regard to finding a purchaser for the Westminster Theatre property in about 2003, and that he had been “warned” not to tell Mr Jefcoate about an enforced reduction in that commission, in sufficiently sinister terms that he had felt obliged to move house.
140. Mr Parker was a very angry, nervous, tense and eventually vehement, witness. He had a huge antipathy towards Mr Nicholson, although this seemed to arise more from his having (he said) been threatened by Mr Nicholson – or more accurately by Mr Kehoe on Mr Nicholson’s behalf - than merely from what he perceived to be Mr Nicholson’s renegeing on an agreement. He denied himself having made counter-threats. He was certainly not a man for detail. He regarded (perhaps not unreasonably) cross-examination as to whether he had been paid by cheques or by bank transfers as mere lawyers’ pedantry. He accepted that he had failed to mention to the Plaintiff’s legal team that he had in fact been paid some more money by Mr Nicholson since his original complaint. Whilst I do not doubt the sincerity of Mr Parker’s evidence, I do not find it very helpful, except perhaps for one remark. When it was suggested to him that *Mr Jefcoate* had objected to paying him *any* money, in October 2003, his immediate response was that that would have depended on what Mr Nicholson told him.
141. Mr Glen Graham, was a bluff and down-to-earth builder, called to give evidence that he had carried out work worth some £192,000 on Mr Nicholson’s personal private residence, but was asked to invoice these as “additional” works on the Penallta site, where he had a contract for some building works being supervised by Mr Nicholson. (It would seem, therefore, that this relates to the former heritage land rather than the housing land at Penallta.) Mr Graham accepted that he had been paid more than that sum, and that he had also taken property units in lieu of some payments which he was owed. The facts of Mr Graham’s evidence were not really challenged, and I accept it for what it might be worth. Mr Nicholson’s later

explanation was that insofar as this had occurred, the sums were in fact properly offset against moneys which he had himself put into the Penallta project, but this was obviously a matter which Mr Graham would have known nothing about.

142. The Plaintiff's last oral witness was Mr Martin Kehoe. Mr Kehoe was also builder, and a "brickie" by training, who had known Mr Nicholson for 35 years, and had regularly worked for him during this time, latterly managing sites on his behalf. He had also done some work for Mr Jefcoate and he said he was impressed by Mr Jefcoate's keeping to his word to pay a somewhat inflated rate for an initial piece of work.
143. Mr Kehoe's evidence was, once again, largely directed at Mr Nicholson's alleged working methods and practices, but with some more specific examples of what Mr Nicholson had allegedly said, or sometimes actually done, with regard to diversion of funds or resources for his own benefit. In this instance, some allegations did at least relate to the more material sites in the NCB portfolio.
144. Mr Kehoe had fallen out with Mr Nicholson some five or six years ago. He said this was for three reasons, the main one being that he had asked Mr Nicholson for assistance when he was in financial difficulty, but this had been bluntly refused, despite Mr Kehoe's loyal work for Mr Nicholson for many years. As a result, and as mentioned above, he said he had gone to Mr Jefcoate and given him information about what he (Mr Kehoe) had perceived as happening with regard to many of the NCB properties and transactions, Mr Nicholson's involvement, and the prejudice to Mr Jefcoate which Mr Kehoe felt he had seen perpetrated, and even boasted of, by Mr Nicholson (albeit usually in the pub). He said that he had done so because he "just wanted to see justice done". It was this information which had prompted Stuart to make his initial enquiries of Spread with regard to these matters and to seek advice with regard to the true value of the NCB portfolio properties, and eventually led to the launch of these proceedings.
145. Several aspects of Mr Kehoe's evidence are somewhat unusual in civil proceedings. In the course of forceful (not surprisingly) cross-examination he calmly said that he had been a kind of heavyweight "enforcer" (my words) for Mr Nicholson and, even after being informed of the privilege against self-incrimination, he said that he had at times broken the law in achieving results which Mr Nicholson wanted, and had issued threats, albeit short of violence. He agreed that he had threatened Mr Parker. However, he denied having threatened Mr Nicholson or Mr Brien, as alleged in a letter to him from solicitors on their behalf in October 2011.
146. He had also, apparently of his own initiative, gone to see Mr Brien and his wife, socially, in 2009 and had covertly taped the conversation, the tenor of part of which being that Mr Brien obliquely admitted that he had valued properties in accordance with figures which were provided by Mr Nicholson. However he did so having assured Mr Brien that he would not break his trust, and also having said that there would be some reward for Mr Brien. Mr Kehoe accepted that he had therefore been lying to Mr Brien, but said matter-of-factly that you had to say what was necessary to get the truth out.
147. The Defendants applied before the trial to have the tape of this conversation disqualified from evidence on various grounds, but as the Defendants themselves, in particular Mr Nicholson, wished to rely, under the *Evidence Law*, on a witness statement which they had taken from Mr Brien, who was by the time of trial sadly suffering from dementia and unfit to give oral evidence, it seemed to me to be right that all available material should potentially be before the court, to enable it all to be weighed. I therefore refused to disallow the recording at the pre-trial stage, but give permission to apply again at the trial when the issues would be more clearly defined. In the event, no such further application was made.

148. Mr Kehoe alleged that Mr Jefcoate himself had had a further similar meeting with Mr Brien and him subsequently in a pub.
149. (I record here that Mr Brien’s version of events, contained in his witness statement for the Defendants, differs from Mr Kehoe, both as to content, and as to the nature, time and location of meetings. Although he said that there were two meetings, and that one, at least, was in a pub, he also said that they were both between him, Mr Kehoe and Mr Jefcoate. Mr Brien was plainly wrong to that extent at least, as the fact of the parties to the taped conversation clearly shows.)
150. Mr Kehoe further alleged that he had himself been offered a bribe during the pre-trial stages of this action, by some unknown person purporting to call on behalf of Mr Nicholson, to retract his evidence on behalf of Mr Jefcoate, and to sign an affidavit in favour of Mr Nicholson. This had occurred, he said, in two telephone calls, the first of which he had noted and the second of which he had anticipated and recorded. Mr Russell, Mr Nicholson’s English solicitor, has given further written and unchallenged evidence identifying that Mr Nicholson had been abroad on holiday at the time of these calls, and that the number from which the calls were made (as recorded by Mr Kehoe) is not one owned by Mr Nicholson or his family, and also recording that he had originally taken evidence from Mr Nicholson of threats to Mr Nicholson, and also about Mr Kehoe’s seeking, at an earlier stage, a large payment from Mr Nicholson in return for giving evidence favourable to Mr Nicholson, but that Mr Nicholson had decided to leave this out of his eventual witness statement for lack of relevance.
151. Advocate Ferbrache produced records of payments to Mr Kehoe, derived from records kept by the bookkeepers or accountants for Mr Nicholson’s very many companies, to show that Mr Kehoe had hugely understated monthly payments of wages made to him by or on behalf of Mr Nicholson. When confronted with these records, Mr Kehoe agreed that he had received most, although not all, of the recorded sums and property benefits. Advocate Ferbrache also put to Mr Kehoe that the figures given by him as Mr Nicholson’s alleged assertions about the value and potential of the Welsh sites from which he had benefitted were simply absurd, and that his evidence was false. Despite the substance (to my mind) in the premise that the figures were wildly implausible, Mr Kehoe remained firm that those had been the figures he had been told.
152. Advocate Ferbrache invites me, in the above context and all its aspects, to disbelieve Mr Kehoe’s evidence in its entirety, for being biased, concocted (the evidence of the alleged “bribery” telephone conversations having been fabricated), in places demonstrably false, from a wholly unreliable source and therefore wholly unreliable. He submits that Mr Kehoe is, in effect, the cause of these proceedings, through having “wound up” Mr Jefcoate, and Stuart Jefcoate in particular, out of some kind of vendetta against Mr Nicholson, and with, presumably, the hope of personal gain.
153. However, whilst I accept that Mr Kehoe’s evidence must be treated with very great caution, and whilst there may be some force in the point about his having encouraged the claims in this action, some of which have, certainly, been already shown to have been unrealistic or speculative, I do not feel able totally to dismiss Mr Kehoe’s evidence. I have little doubt that Mr Kehoe is capable of lying. He may well also have exaggerated – a not uncommon fault with the ordinary lay witness – but I was nonetheless left with the clear impression that there was some underlying truth in what he said, even though instances of what he recounted might well have been pub talk and braggadocio. In the end though, none of this matters greatly, because in practice, none of the findings which I need to make in order to decide this case actually depends on Mr Kehoe’s evidence, and I need delve into it no further.

(e) Defendants’ witnesses

154. For the Defendants, the key witnesses were plainly Mr Schreibke, and the Sixth and Seventh Defendants themselves.
155. Mr Schreibke was ultimately the only witness of fact for the corporate Defendants. They had submitted witness statements for three further witnesses, namely Mr Anthony Rogers, Mr Schreibke's predecessor, (who was therefore involved at the time of the acquisition of the NCB portfolio, but not at the time of the challenged disposals), and Miss Elizabeth Giles and Mr Stephen Woodhead. The two latter were employees of the Spread Group, who had taken part in the conduct of the trust affairs of Messrs Jefcoate, Nicholson and Piper. Mrs Giles, in particular, was even named in the Plaintiff's amended cause. However, given Mr Schreibke's evidence that the moving mind of all five Defendants had been himself, and that Mr Woodhead and others had only acted on his instructions as his assistants, with Mrs Giles, in particular, attending meetings simply as a note-taker, the corporate Defendants withdrew those three statements and relied solely on the evidence of Mr Schreibke.
156. Mr Schreibke was, of course, centrally involved with the subject transactions, but had only become involved directly with the Jefcoate/Nicholson/Piper trusts in mid-1998, upon the retirement of Mr Rogers through ill-health, and therefore he was not there at the inception of the Welsh property venture. He knew only what he had been briefed about that. Mr Schreibke gave evidence well, especially considering that he had not previously given evidence in court (except, I understand, briefly in relation to a driving offence). He did so with calmness, courtesy and dignity. He was plainly very much aware of the issues in the case, and in particular the criticisms being levelled at the conduct of the Spread companies, for which he said he took responsibility. He plainly wanted, and perfectly reasonably, to make it clear that he considered that his actions had been proper, careful and entirely defensible in all the circumstances of the situation.
157. I am generally satisfied that in so defending his position, he had proper regard for his oath and that his evidence was sincere. However, it was clear to me that most of his evidence had been derived from his files, with little clear personal recollection, and I felt that in some respects his concerns, and probably the chewing over of history in preparation for the case, had caused him to rationalise some of his evidence. One example of this was his insistence that an important reason for transferring Plots 4 and 8 to J F Enterprises for nil consideration was to pay Mr Field some more "commission" for his introduction of Redrow to the Penallta sale. This was never mentioned, either in contemporaneous notes, or in Mr Le Hegerat's response to the initial complaint. It was first mentioned in Mr Schreibke's original witness statement, certainly, but I have little doubt that it was absorbed from Mr Nicholson. Insofar as it was a reason in Mr Schreibke's thinking at the time, I am satisfied that it was very secondary, or it would have been remembered earlier. I repeat, however, that I do not find this to have been any kind of lie and I am satisfied that Mr Schreibke was a conscientious witness. I do find that this incident underlines, though, the extent to which Mr Schreibke had come, albeit quite honestly, to accept, rely on and align himself with, assertions made by Mr Nicholson.
158. The Sixth and Seventh Defendants called only two witnesses apart from themselves. Statements from Messrs Waterfield, Hibbert, Sandy, Williams and Russell were taken as read from the outset of their case. Subsequently, Advocate Richardson indicated that he did not wish to cross examine on the statements of Mr George and Mr Hambly either, and they too were accepted in written form.
159. The first of the Defendants' oral witness may have been called only owing to his early position in the trial timetabling and the need to take his evidence by pre-arranged video-link from Hong Kong. This was Mr Huw Williams, the builder who had acquired parts of the Wernos Washery site from Landview, had investigated other possible means of exploiting the site, and who still worked with Mr Nicholson, although they had some minor disputes in the

past. Owing to a freeze in the video equipment, his evidence was effectively by audio-link. It appeared to be sensible and objective, and was uncontroversial.

160. Mr Colin Grimwade of Pellys also gave oral evidence. He had been introduced to the project by Mr Nicholson and had acted throughout in relation to the Welsh portfolio, Whitchurch, and HIL, on a general retainer, and he also acted for Mr Nicholson on other projects. His evidence was clear, business-like and focussed and, I am sure, truthful. I found it helpful with regard to the origins of the NCB project.
161. He said in his witness statement that he had found Mr Nicholson to be a tough businessman but never, to his knowledge, to have acted improperly. However he admitted in cross-examination that he had known about Mr Nicholson's use of aliases, which, he said he deprecated. Ironically, he expressed his own opinions as to what was "likely" to have happened between Mr Nicholson and Mr Jefcoate in much the same way as had been strongly objected to by the Defendants in Stuart Jefcoate's witness statement. No objection was made by the Plaintiff, but I nonetheless ignore such opinions.
162. Mr Field, the Seventh Defendant, was the last of the oral witnesses. He had gone into property development at the age of about 40, having up to then had a very varied career in completely unrelated areas, including running his own vending machine firm. Through his introduction to the Welsh MP, Allan Rogers, a geologist by training who had an eye on opportunities for exploiting coal recovery and the further development of disused Welsh colliery sites, he became interested in brownfield site development. This led to his introduction to Mr Nicholson in 1998, and his subsequent involvement with some of the Welsh portfolio properties.
163. Mr Field struck me as just an ordinary entrepreneur in this area, probably without great business flair – he is a follower rather than a leader – obviously not as sophisticated as Mr Nicholson (although he has the wisdom to have his offshore trust) and certainly not as hard-nosed. He is straightforward according to his own lights, although these include the reasonableness of "getting in on the action" in any way he can, and not seeing anything questionable about seeking commission from both sides of a transaction which he was negotiating for one side.
164. I found him to be candid in his answers and I am satisfied that he was a truthful witness. He told me that he was aware of Mr Jefcoate, but only in the background as some kind of backer or partner of Mr Nicholson, and he did not know the details. I believe him. Interestingly, Mr Nicholson says that Mr Field railed at "Sidney Jefcoate" as part of his complaints over his miserable commission; Mr Field did not.
165. This leaves Mr Nicholson. From the evidence and from my own observations, he is intelligent, articulate, confident, energetic, quick-thinking and capable of charm. Equally, though, I am satisfied that he is ambitious, calculating, manipulative, and hard-nosed to the point of ruthlessness. Mr Nicholson's success stems from his ability as a negotiator and his skills as such are, I am quite sure, second nature. He instinctively calculates what is in his best interests, and finds a reason or an interpretation of events to fit this. He is quite unselfcritical, and can easily convince himself that a self-serving interpretation of events is the actual truth.
166. In order to maximise his influence, Mr Nicholson likes to control situations. He therefore likes to be an intermediary so as to be able to tailor or "spin" matters as best suits the occasion for him, and to take advantage of being able to play both sides against the middle. He is adept at using other people's "views" to disguise furthering what he himself actually wants. One clear, albeit not serious, example of this occurred in the evidence. Mr Williams said that Mr Nicholson told him that it was Mr Schreiber, to whom he "reported", who had insisted on an average provision in the sale to him of certain land. Mr Schreiber was confident that there

had been no such discussion with Mr Nicholson. Mr Nicholson agreed in evidence that he had indeed “used” Mr Schreiber in order to negotiate with Mr Williams. I am quite satisfied that this is typical of Mr Nicholson’s way of working.

167. Mr Nicholson will take liberties (a historic example being his asking for expenses to be paid out of the Jefcoate trust in 1990) because, if nothing is said, all is well and good, and if anything is said, such things can be dismissed as misunderstandings with profuse apologies. He also does not scruple about cutting corners (eg signing documents in Mr Piper’s name “for convenience”), nor about using aliases, where strategically “necessary” in order to achieve an outcome. Another example of what I am sure is an underlying attitude is a note in June 2003, which records Mr Nicholson’s comments, relayed by Mr Piper, regarding the prospects of his company doing work on the Penallta site for the Phoenix Trust, that whilst he might well make a reasonable profit out of the project, he only wanted to make a small profit *on paper* to give to the Phoenix Trust. These are all individually relatively minor examples, but I am satisfied that the attitude they demonstrate went quite deep.
168. Much was made of Mr Nicholson’s not keeping, and apparently not liking, paperwork and notes. I am satisfied that absence of paperwork suits Mr Nicholson’s style, because conversations can be more easily subject to re-interpretation or plausible denial if inconvenient.
169. It will be gathered from the above, that I did not form a favourable impression of Mr Nicholson. I would not have confidence that his word is reliable, particularly owing to his ability to rationalise matters in his own favour. I reach that conclusion whilst nonetheless having regard to the fact that where disreputable conduct is alleged, it should take cogent evidence to convince me, on balance of probabilities, that it is the case: see *Re H (Minors)* 1996 1 AC 563 at 586 per Lord Nicholls. I also give full weight to the fact that several witnesses for the Defendants, and also Mr Clark for the Plaintiff say that they have only known Mr Nicholson to be a straightforward person, albeit tough. I give this weight, but I balance this against the fact that Mr Nicholson appears to me to be adept at keeping up appearances, and also skilled at knowing how to look after people and his relationships with them as long as these are useful and his interests and theirs do not conflict. It is when Mr Nicholson considers that mutual interests with others no longer coincide to a worthwhile extent that there comes a falling out.
170. As to Mr Nicholson’s evidence, I make full allowance for the fact that he will have felt on the defensive when giving evidence in court, on the 10th day of an expensive trial in which his conduct and character were being heavily criticised. However, I nonetheless had the impression that his answers to questions were always calculated and measured for impression, rather than being just spontaneous truth. I noted that whilst he was initially careful (to the point of correcting himself at times) to phrase references to decisions about dealing with Whitchurch’s or HIL’s assets, discussed with Mr Schreiber, as being the latter’s decisions, with his own input being merely suggestions or recommendations, as he became more relaxed giving evidence, this formulation eventually slipped, and he started to refer to “we” taking such decisions, and even, on occasions “I”. I have no doubt that this was both closer to the truth, and what Mr Nicholson actually saw the position as being.
171. The upshot of my view of Mr Nicholson is that I shall be extremely cautious about accepting any self-serving statement of his unless it is either corroborated by other independent evidence or accords with basic common sense. I bear in mind, though, the truism that just because I may not be inclined to accept a witness’s evidence on a particular point that does not automatically mean that the opposite of it is true, and nor does it mean that all other aspects of his evidence are to be rejected. A further consequence of my impression of Mr Nicholson, though, is that I shall look very carefully when evaluating other witnesses’ evidence, to see where it has depended on or been influenced by information or statements emanating from Mr Nicholson. I was quite struck by the frequency with which witnesses in

the case told me what Mr Nicholson had said Sidney Jefcoate (or sometimes someone else) had said, and suchlike. However, many of the crucial issues in this case do not, in practice, turn on the truth or accuracy of Mr Nicholson’s evidence.

(f) Evidence Law statements

172. A witness statement signed by the late Mr Piper was adduced under the *Evidence Law* by the Sixth and Seventh Defendants. It broadly supported Mr Nicholson’s account of events, deposing to his having been the active operator in progressing the realisation of the Welsh portfolio. It also testified to his general honesty, although Mr Piper noted with “irritation” Mr Nicholson’s habits of forging his signature and of using aliases.

173. I get the clear impression generally from the documents, and from the frequency of Mr Piper’s accompanying Mr Nicholson to meetings in Guernsey, that Mr Piper had developed a much closer and more sociable relationship with Mr Nicholson than with Mr Jefcoate. I also get the clear impression that Mr Piper, for whatever reason, viewed his financial interest in the NCB venture in a rather detached way, happy to receive what it generated, but not particularly exercised if it did not. Mr Piper’s statement was business-like, but (not surprisingly) redolent with indignation at having been pursued under the original conspiracy claim, which he regarded as absurd. Enigmatically, he said in his statement that whilst he would trust Mr Nicholson, he would not trust Mr Jefcoate at all - but he then declined to elaborate on why.

174. The witness statement taken from Mr Brien was also admitted under the *Evidence Law*, as he is now suffering from dementia. Again, unsurprisingly, this denies that Mr Brien ever valued properties other than in accordance with his honest professional opinion and certainly not on the instructions of Mr Nicholson. His evidence is otherwise generally supportive of Mr Nicholson, as would be expected. I have, though, already noted the inconsistency of Mr Brien’s account with the irrefutable evidence of the tape recording showing that a significant meeting took place between him, his wife and Mr Kehoe alone, which Mr Brien did not mention (although I accept that in his witness statement he had not formally stated that he had told the “whole” truth.) In addition, the inconsistency of some of his valuations with other obvious evidence of value (in the case of Crosshands and Wernos Washery), and lack of value (Plots 4 and 8), even making some allowance for the rather questionable – but possibly quite common - concept of the “lowest [or highest, depending on circumstances] professionally defensible figure” causes me to be cautious about the reliability of his written statement, certainly in these regards. I can add that I am actually satisfied that Mr Nicholson is more likely than not to have put “appropriate” figures into Mr Brien’s mind for valuations, although he will have done so far more subtly and acceptably than by purporting to give an outright instruction.

(g) Valuers

175. Each side called, with permission, expert valuation evidence with regard to the value of the relevant properties. I deal with these witnesses below, under the relevant section on “Undervalue”.

(h) General

176. Finally, although I have not had any evidence from Mr Jefcoate, I have formed some general views about him, from the evidence which is before me, although I am careful to do so only where I can feel confidence about this; I bear in mind the lack of “level playing field” between him and Mr Nicholson with regard to any impression I might gain of each of them - to whichever’s advantage that might actually be.

177. I have already given some indication of my impression of Mr Jefcoate in my recital of the background facts. In summary, I am satisfied that Mr Jefcoate was also a hard-nosed businessman, careful about his own interests, looking for good but secure returns and loath to spend money where he could not see sufficient justification. This is not to suggest that he was ungenerous; he might well be if he felt it would bring him benefit. I am satisfied that Mr Jefcoate did complain about Spread's professional fees, as Mr Schreiber says. He would have seen these as being expensive and not good value for money, (they produced no immediate return). I suspect that he was also quite demanding. I am satisfied that he did press for Mr Nicholson to do more himself rather than for Spread to do it, perceiving this as likely to be cheaper. I accept that Mr Jefcoate was broadly, although not totally, unwilling to expend money on property ventures beyond what was clearly needed to obtain planning permissions, this being the obvious, cheapest and simplest way of generating significant added value.
178. The only clear example of Mr Jefcoate injecting additional funds into a project (£50,000 into Yolanda Limited in respect of the Westminster Theatre) was dictated by the imperative of "gutting" the building so as to avoid business rates, a valuable result. It is suggested that he only did even this reluctantly, and I think this would have been in character. In short, whilst I would not go so far as to use the words "greedy" or "tight", Mr Jefcoate certainly had tendencies to be "careful" about money, and the effects of this – and in particular Mr Jefcoate's now expecting, on the basis of terms agreed 8 years previously, simply to pick up a profit for little effort or work had begun to rankle with Mr Nicholson, for whom any gratitude at Mr Jefcoate's making the original finance easily available would long since have evaporated. Mr Nicholson's views are evidenced by a note of a meeting with Spread, in 2003, regarding (I think) Yolanda, in which he comments that Mr Jefcoate's expectation of a 50% profit is no longer justified by his input. Although this project was not part of the NCB venture, I have no doubt that a similar sentiment applied to the NCB venture as well.

Overall review

179. To return to the immediate background to the issues in the case, there is a dispute as to the general intended approach of the participants to the whole of the "Welsh portfolio" venture.
180. Mr Nicholson says that the focus was always the "jewel in the crown" site at Penallta Colliery. This was the key transaction, anticipated to generate (as it eventually did) the handsome profit which would be divided between the trusts, but he goes further and says that it was in fact the only site in the portfolio intended to be brought to such fruition for the parties' ultimate profit share. The other properties were subsidiary and were all intended to be used, either by management of income or by simple selling on, to provide funds to finance and support the Penallta project. They were (he says) the only means by which the necessary interim finance could be provided, as it was not Mr Jefcoate's wish or willingness, to put up other funds. It was almost impossible to obtain outside funds – at least until after the Penallta contract was signed – and for the most part, Mr Jefcoate was looking, and even pressing, to recover his loans. He suggests that Mr Jefcoate needed the money. He suggests, therefore that the reasons for these properties being sold out from under the umbrella arrangements without their value being particularly enhanced was that there had never really been the intention to do so. On that basis, there was nothing wrong with sales to his companies, as much as to any third party, so long as they were for proper value – which he says they were. He also says that in pressing for his return, Mr Jefcoate even urged Mr Nicholson himself to buy the residual properties, especially after he had received his share of the first tranche of the Penallta money. Once again, therefore, this explained and justified any acquisition of properties by him or his interests out from under the profit share arrangement. He adds that the fact that any property was later sold by him for development for a profit is immaterial; he had taken all the subsequent risk.

181. Stuart Jefcoate disputes that confining the “enhancement” aspect of the venture to Penallta was the basis of the agreement, as plainly, I am inclined to think from his reactions, did Mr Jefcoate. Stuart says that the agreed purpose was plainly to realise best value from all the properties purchased with the initial funds provided by Mr Jefcoate, enhancing this by gaining planning permissions wherever possible. This intention was not confined to Penallta, although ultimately it is only in respect of Penallta that the LS received a share in such enhanced value.
182. I do not accept Mr Nicholson’s evidence that the aim of enhancing the value for onward selling was confined, from the outset, to the Penallta site. This may have been the “gem” of the properties, but that was just a fact. There is no suggestion of any such limited objective in any contemporaneous documents, and if anything the evidence points differently. I am satisfied that this is an interpretation which Mr Nicholson has retrospectively come to think is “fair”, and he has therefore convinced himself that it really was the intention.
183. I find that the initial basic intention was simply to apply the same broad terms as had previously applied to the parties’ collaborative projects, ie that Mr Jefcoate would provide the initial funding, for which he would be paid back within about 6 months at 15% interest, the property value would be improved by obtaining planning permissions so far as practicably possible, and the properties would then be sold for profit, to be shared as agreed. However, the Welsh Portfolio was different from previous projects in that it included several properties rather than just one, not all of which had planning potential. There was therefore not just the need to onward-sell several properties, but also, in the interim, an estate requiring management. In addition, there would be costs and expenses to be met, which Mr Schreiber identified as: repayment of interest and capital of Mr Jefcoate’s loan, paying Spread’s trustee fees, paying any maintenance costs of the properties, and paying the costs of preparing and negotiating planning permissions.
184. How to find the necessary resources for this was catered for by an agreed variation of the basic terms at the outset (see Mr Grimwade’s evidence), in that seven valuable properties (including Penallta, Crosshands and Wernos Washery) were identified as candidates for the “value enhancement” treatment, and the others were regarded as more expendable and available to generate funds to support this. This approach became modified again, in practice, because paying off Mr Jefcoate’s relatively expensive loan was seen as important by Mr Nicholson to stop funds leeching away, and by Mr Jefcoate because he was, I am satisfied, eager to secure the safe restoration of his funds with a short term good return, although he was willing to re-finance the transfer to Whitchurch, bearing in mind the objective of protecting potential future profit from a 40% clawback by NCB. The Cae Duke and Llanharen sites were therefore sold at this point rather than retained for enhancement.
185. I am, moreover, satisfied that all this was perfectly apparent to Spread, at the time Mr Rogers, and was explored in the context of setting up the relations between the parties in the shape of tax efficient trusts and holding the appropriate shares in limited companies, to enable the parties ultimate intended profit shares to be realised. Of course, and as Mr Schreiber readily agreed in evidence, insofar as the parties’ agreement was to work for their common financial benefit, that would be satisfactorily effected by conducting the affairs of the limited company (first Whitchurch and latterly HIL) detachedly in the interests of the general body of shareholders, in the usual way, but the general objective of value enhancement was never supposed nor suggested to be confined to Penallta.
186. How far the objective could be ultimately realised in practice in respect of other properties would depend on the availability of funding to pursue this. No party could, I am satisfied, be required to use or provide his own funds to pursue planning. Whether any party could demand to have the opportunity to do so, or could object to another party doing so and instead require an immediate sale, is less clear, but fortunately does not need to be determined. The important point is that the default position, in the absence of consensus between the parties,

would have to be the that the properties remaining in the venture would have to be sold for (obviously) the best price/best terms reasonably obtainable at the time, in the market.

187. The above, therefore is what I find to have constituted the underlying arrangements between Mr Nicholson and Mr Jefcoate which the Spread Group understood itself to be furthering and facilitating in the provision of its trustee and trust administration services, and it is their performance of these services which is at the centre of this claim. I take this up further under “Issue 3 – Breach of trust or duty”, but I now turn to the four main issues in the trial, which I identified initially. Since aspects of them interlink, I will consider them in the order which I find most convenient.

Issue 1 – Conspiracy

188. Analysis of this claim, and the evidence supporting it has been complicated, by three factors. The first has been a lack of precision as to exactly whom this claim is pleaded against. The claim is generally pleaded as being a conspiracy between “any two or more together” of the Defendants, and thus theoretically covers a conspiracy, if proved, between only Mr Nicholson and Mr Field. However, this last possibility was never advanced, and indeed, given the nature of the overt acts relied upon as those allegedly committed in furtherance of the conspiracy, no such case could be sustained. Although the Plaintiff’s skeleton argument alleges that there had been a conspiracy between “all of the Defendants”, in practice, and more in accordance with the particulars given in the Amended Cause (Para 36A.1) the argued case was that the conspiracy took place between (a) STC and all four other corporate Defendants on the one hand, through Mr Schreiber as the moving mind of all of them (in the circumstances already discussed) and as the parties able to approve the disposal transactions which are complained of, and (b) Mr Nicholson and Mr Field, on the other hand, as the benefitting recipients. The alleged conspiracy was therefore, in practice, argued to be one between two factions, namely the corporate Defendants and the individual ones, the latter being either Mr Nicholson alone, or Mr Nicholson and Mr Field.

189. Second, the fact that this is the only claim pleaded against Mr Nicholson and Mr Field, but that other potential causes of action have been mooted but disallowed, means that I need to be scrupulous to have regard to the requirements of the tort of conspiracy as the only tort on the basis of which the Plaintiff can succeed.

190. The third difficulty arises as follows. In the course of an earlier case management hearing, the Defendants were, justifiably, anxious to have it made clear whether or not fraud was being alleged against them as part of the conspiracy allegations. Their complaint was that, if fraud or dishonesty were being alleged, this was insufficiently pleaded, in contravention of the basic principle that a plea of fraud must be expressly and clearly made, with all necessary particulars stated.

191. On behalf of the Plaintiff, however, Advocate Richardson denied to the court that it was either intended or necessary to allege fraud, and he disavowed any intention of doing so. That clear and express representation appeared to me to be sufficient to deal with the Defendants’ reasonable concerns as a matter of practicality. However I found it difficult to understand how the Plaintiff could reconcile the plea of unlawful means conspiracy with the concept of not pleading fraud, when the very unlawful means which he was apparently relying on was the effecting (by the corporate Defendants) and the procuring (by the individual Defendants) of breaches of trust by a sale at an undervalue, for the very purpose of defeating the profit entitlement of the Jefcoate trust interests.

192. I therefore directed that the Plaintiff should provide a written statement explaining his position with regard to fraud, so that this would be entirely clear. This was done in the form of a written submission served in June 2014, which was also incorporated into the Plaintiff’s skeleton argument for the trial. The gist of that submission was to examine the authorities

which establish that (i) “unlawful means” conspiracy requires some intention to injure the Plaintiff by the relevant unlawful acts, even if not as the predominant intention, but (ii) it is not necessary that the alleged unlawful means should consist of or include *fraudulent* activity. Therefore, it was submitted, it was not necessary for the Plaintiff to allege fraud in pleading his claim to be the victim of an unlawful means conspiracy.

193. I was, and remain, sceptical of the logic of the Plaintiff’s submission. The issue for which explanation was required was not whether an unlawful means conspiracy *could* be pleaded without at least implicitly pleading fraud, but whether the Plaintiff actually *did* plead an unlawful means conspiracy without implicitly pleading fraud. The unlawful means alleged were, in essence, the sales of the relevant properties at an undervalue and therefore in breach of trust and/or duty. The conspiracy alleged was a deliberate agreement by the Defendants to join together to effect such dispositions, with, at least partly, the intention of causing harm to the Jefcoate interests. The harm was the deprivation of value to which they were entitled, by the diversion of that value to Mr Nicholson and/or Mr Field, by the effecting of those dispositions. A sale at an undervalue *need* not be fraudulent to amount to a breach of trust; it can happen merely by negligence. However, one cannot agree to achieve something by negligence; the agreement inevitably makes the result deliberate. In those circumstances, ie where the alleged deliberate intention is to cheat the Plaintiff directly out of his rights, I find it difficult to see how that can have any character but that of fraud.

194. I heard no direct argument on this point, however, because the Defendants elected not to make a further issue of this point, but simply to contest the claim against them on the basis of what was pleaded, coupled (in the case of the Sixth and Seventh Defendants in particular) with reliance on the fact that, therefore, no “unlawful acts” which would have constituted a fraud either were, or in the circumstances could be, alleged against them. The practical effect of the Plaintiff’s stated position, though, apart from founding a submission by Mr Ferbrache which I will come to, was to have a noticeably limiting effect on the scope of Advocate Richardson’s cross-examination, of Mr Nicholson in particular, under which some seemingly obvious questions were not put because they could not properly be put.

Law relating to conspiracy

195. It is common ground that conspiracy to injure is an economic tort which is recognised in Guernsey law, and that this applies the same principles as those laid down in English law cases. I can therefore deal with the ingredients of this tort quite quickly.

196. The essence of the “wrong” which gives rise to liability in conspiracy as a distinct tort in itself is the law’s acceptance of the wrongfulness of *scheming* to do injury to others. There are two distinct forms of the tort of conspiracy, namely “lawful means” and “unlawful means” conspiracy. In broad terms, where the complaint is of a conspiracy to injure by acts which are not themselves unlawful, the cause of action is only made out where the sole or predominant purpose of the conspirators is to injure the Plaintiff. However, where the complaint is of conspiracy to injure by acts which are unlawful in themselves, the case is made out by proving merely that the conspirators had an agreed intention to cause injury to the Plaintiff without such intention having to be the sole or predominant intention. Plainly those who commit the actual unlawful acts will be liable without the additional charge of conspiracy. “Unlawful means” conspiracy is a means by which liability can be extended to those not directly involved in the commission of the unlawful acts, but who participated in other aspects of an overall concerted plan to commit those acts.

197. It is unlawful means conspiracy which is alleged in this case. The definition of the tort of unlawful means conspiracy in Clerk & Lindsell *The Law of Torts* 20th Ed Para 24-95 is:

“This form of tort is committed where two or more persons combine and take action which is unlawful in itself with the intention of causing damage to a third party who does incur the intended damage.”

Consistently with this in Guernsey law, in *IFS Investments Limited v Manor Park (Guernsey) Limited* (Royal Court 23/2004 11 June 2004), a case which has been later followed) LB Day analysed the two forms of conspiracy and stated the ingredients of an unlawful means conspiracy as follows, at [40]:

“The ingredients of this tort are the combination of two or more persons, the intention to injure, the fact of injury, and the use of unlawful means in doing so. What may amount to unlawful means is the subject of much academic debate, but if they amount to a tort itself, that must be sufficient. In contrast to an unlawful conspiracy to injure, there is no requirement that the predominant purpose must be to injure rather than, for example the furtherance or protection of legitimate self-interest. As Lord Bridge stated in Lonrho v Fayed [1992] IAC 448 (at p 465-466):-

“Where conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful.”

LB Day later added at [42] that where

“the overt acts [sc committed by the conspirators] are unlawful, then that fact in itself is sufficient to found the tort(the unlawful means conspiracy)”

198. The ingredients of the tort are common ground in this case. Advocate Ferbrache identified them, conveniently, as the following:

- An agreement or combination between two or more person (to combine to do the relevant acts causing damage).
- The commission of overt acts referable to that agreement or combination
- The fact of injury or loss
- The requisite intention to injure the Plaintiff
- The use of unlawful means

Agreement or combination

199. This element is essential, as it is the element of scheming to cause injury which is of the essence of conspiracy as a separate tort. The evidence must demonstrate an actual common plan, mutually discussed and agreed (at least implicitly), so as to show a shared purpose. It is in fact insufficient if the alleged co-conspirators merely had the same, but uncommunicated, intention to injure: *Douglas v Hello! Ltd (No 3)* [2003] EWHC 786. (I record this for emphasis; it is not this case). It is the Defendants’ case that no such planning, scheming or “combination” in fact occurred, and the Plaintiff fails to prove this element on the evidence.

Overt Acts

200. The need for “over acts” is, initially, an evidential one. It is in the nature of a conspiracy that the “scheming” is covert; very rarely will a Plaintiff be able to adduce direct evidence of the fact of a combination. Frequently, therefore, proven “overt acts” are relied on as material from which the court is invited to infer the existence of the necessary antecedent combination. This was recognised in *Silver Falcon Enterprises Limited & Ors v International Hellenic*

Operations Limited & Ors (Guernsey Court of Appeal, Civil Division, 20 October 1994) where it was said, at [35] that:-

"Particulars of overt acts fulfil two functions; they enable the Defendants to ascertain from what material the Court will be asked to infer a combination, and they supply the necessary pleaded causal link between the combination, the acts done pursuant to it, and the damage suffered. A bare plea of conspiracy without some reasonable particularisation of the overt acts stemming from it is liable to be struck out; the Plaintiff must not be allowed to engage in a fishing expedition in the hope that discovery will furnish material to support a case of which at present he is bereft."

201. The Defendants stress the requirement that the “overt acts” must not only provide a necessary causal link to alleged damage, but also be sufficient evidence to support an inferential finding that there *was* a pre-existing plan or combination, which has brought them about. It is the Defendants’ case that on examination, the matters relied on by the Plaintiff as “overt acts” are insufficient to constitute sufficient evidence of any such “combination” (in fact, because there was not one).

Loss and damage

202. The requirement of proof that acts committed in furtherance of the conspiracy caused loss to the Plaintiff obvious. In the present case, of course, it is the Defendants’ case that there was no such loss, because the disposals complained of were not made for any undervalue at all. This is a point which I consider separately.

Intention to injure

203. As already indicated, the cause of action requires an actual intention to injure the Plaintiff, albeit this does not have to be the sole or predominant intention of the conspirators. However, the precise quality of the required such intention has often exercised the English courts. The issue is generally that of whether a sufficient “intention to cause injury” to the Plaintiff can be found in the situation where harm has been caused by the unlawful acts of conspirators, but their motive for committing those acts was not that of causing harm to the Plaintiff (ie malevolence) but was something else, usually to obtain a personal gain or confer a gain on another person.

204. In *OBG v Allan* [2008] 1AC 1, perhaps the leading authority on the content of an “intention to injure” where this is a necessary ingredient of a tort, the need to show an intention to harm, and the insufficiency of any lesser state of mind was emphasised by Lord Nicholls at [166]:

“Lesser states of mind do not suffice. The defendant’s conduct in relation to the loss must be deliberate. In particular a defendant’s knowledge that his conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must intend to injure the claimant. This intent must be a cause of the defendant’s conduct.....”

In other words, an actual and actuating intention to harm the Plaintiff is required.

205. At [62] Lord Hoffmann distinguished between ends, means and consequences, and said

“One intends to cause loss even though it is the means by which one achieves the ends of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end, nor a means of attaining it, but only a foreseeable consequence”

206. In *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303, [2008] Ch 244 Arden LJ held, in relation to unlawful means conspiracy and adopting the words of Lord Hoffmann in *OBG v Allan* (*supra*), that it:

“is not enough that there is an intention to do an act which in fact causes loss. That act must be done with the intention that it will cause loss.”

207. Most recently, in *Constantin Medien AG v Ecclestone & Ors* [2014] EWHC 387 (Ch) Newey J considered the quality of intention to injure which is required for unlawful means conspiracy, when expressed in terms of “desire”. Plainly, “desire” is a state of mind which logically must precede “intention”. In that case, the unlawful means had been the payment of a bribe to induce a sale desired by the Defendant, and which had operated to the alleged damage to the Claimant in depriving it of overage payments. The necessary intention was held not to be established, because none of the alleged conspirators “desired” that the relevant shares should be sold at less than full value, or knew that that would be a consequence of what they wished to achieve.

208. Newey J considered the interaction between an intention to achieve gain for oneself, and an intention to cause loss, in the context of unlawful means conspiracy, in the following terms.

“...a relevant intention to injure will exist if a person desires to cause loss to a particular person or desires a result that he knows will cause that person loss. If the loss is, to a defendant's knowledge, inseparably linked to his own gain, a desire to achieve the gain will suffice. On the other hand, it is not enough for a claimant to show that loss to him was reasonably foreseeable or even that the defendant realised that there was a chance that such loss would be caused;” [citing Lord Nicholls' words in the *OBG* case above]

209. The Defendants relied mainly on the above citations. What I derive from these cases is this. Obviously the necessary intention to injure can be proved by showing that the motive for the commission of the relevant acts was malevolence towards the Plaintiff. More often, the driving motive will be that of obtaining personal gain or conferring gain on a third party. If the Defendant's intention is to obtain personal gain (or confer gain on another person) **by** causing loss to the Plaintiff, that is sufficient. The fact that the means of making the desired gain will inevitably cause an injury to the Plaintiff means that the Defendant cannot be heard to say that this injury was not his intention. Where, however, the acts in question merely **might** cause such a loss, even though that possibility is foreseeable, lack of necessary intention can be argued, as that will not suffice. Moreover, it will not suffice even where the damage is not merely a possibility, but a high probability. In those circumstances, the injury is merely a consequence of the acts, and not a sufficiently intended consequence.

210. Advocate Richardson, for the Plaintiff, submitted that the authorities went further than conscious intention however, and included “reckless indifference”. He placed particular reliance on the case of *Baldwin v Berryland Books Ltd* [2010] EWCA Civ 1440 and the statement by Etherton LJ, at [48], that:

“...in this area of the law, knowledge and intention are intimately connected. Intention to injure, and indeed acting in concert, cannot be inferred in the absence of the requisite knowledge. The leading authority on intention and knowledge in this context is OBG Ltd v Allan OBG is authority that, in this context, what is required is actual intention or reckless indifference. Mere foreseeability of a consequence does not satisfy the requirement of intention: [43] (Lord Hoffmann). A defendant's foresight that his or her unlawful conduct may or will probably damage the claimant is not enough: [164] (Lord Hoffmann). The same applies to knowledge. Relevant knowledge is actual knowledge or reckless indifference. Reckless indifference in this context means: “a conscious decision not to inquire into the existence of a fact”: [41] (Lord Hoffmann).

Advocate Richardson stressed the extension of the concept of knowledge of likely or inevitable damage to the Plaintiff to mere “reckless indifference”. As I understood it, he invited me to hold that, even if Mr Schreiber had not actively intended that the impeached dispositions should be effected to the damage of the LS beneficiaries, he was sufficiently “recklessly indifferent” to that inevitable consequence to incur liability.

211. In his closing submissions, Advocate Richardson, stressing this point, invited my attention to the position of one of the alleged co-conspirators in the *Berryland Books* case, a Mr Navaratanrajah, and to the findings of fact made about his part in the conspiracy at [36] and [42]. There it was said that his involvement had been “almost passive” in the context of the “overt acts” which he had participated in, and which were relied on with regard to the unlawful means conspiracy claim. These were confined to helping to incorporate a company which had then been used by a director of the Claimant wrongfully to divert employees and business away from the Claimant, and giving this help whilst appreciating that the director had sought his assistance because she did not want other directors of the Claimant to know what she was doing, so that he thereby “assum[ed] the risk” that she might be involved in some malpractice. Advocate Richardson relied on a comparison of Mr Navaratanrajah’s position to urge me that “reckless indifference” had a very broad scope, as to the degree of knowledge and intention required to found liability in unlawful means conspiracy. Unfortunately, on examination, those passages can be seen to be the findings of the judge below, which the Court of Appeal then reversed on the basis that they were insufficient to fix the Defendant with liability for an unlawful means conspiracy. In the circumstances they do not assist the Plaintiff.
212. In my judgment, the extension of the mental element required for unlawful means conspiracy liability which *Baldwin v Berryland Books* establishes is simply that such intention can be imputed where the alleged co-conspirator is found to have *taken an active decision not to enquire* whether the proposed planned course of action will or will not cause harm to the Plaintiff, in order to avoid discovering that it will. That situation does not arise in this case, and I find the concept of “reckless indifference” of no further assistance on this topic.

Unlawful means

213. This requires little further comment. It is accepted that the commission of anything which would be a tort, breach of trust, breach of contract or criminal offence is an “unlawful means” within the meaning of unlawful means conspiracy. Furthermore, as will be apparent from some of the foregoing cases, and as submitted by Advocate Lund for the Plaintiff, the unlawful means alleged to found the conspiracy do not have to be actionable at the suit of the Plaintiff himself; it is sufficient, all other requirements being met, if they would constitute a tort against a third party or a criminal offence. The Plaintiff relies on this point to invoke, as unlawful means, matters which might be said to constitute breaches of duties allegedly owed by other corporate Defendants towards STC, or of directors’ duties owed to WHL or, more pertinently HIL.
214. Advocate Ferbrache, for Mr Nicholson and Mr Field, submits that given the express absence of claims of knowing receipt and dishonest assistance against those parties, it is not pleaded that his clients participated in any of the unlawful acts thus relied upon by the Plaintiff, and the claim against his client must fail on that account. However, I do not accept that proposition. In my judgment it is not necessary that all conspirators participate directly in the acts constituting the unlawful means, but merely that they combined in the conspiracy that those unlawful acts should be committed by some or all of the other conspirators. They would thereby adopt those acts sufficiently in the absence of any direct involvement. This objection is therefore not necessarily fatal to the Plaintiff’s claim.

Discussion and conclusion

215. I am perfectly satisfied that the Plaintiff's claim in conspiracy must fail.
216. Having read, and carefully considered the Amended Cause and reviewed all the evidence advanced in this case, I am quite unable to conclude that there was ever any "agreement or combination" (which I shall now refer to as a "conspiracy") formed between STC and/or its relevant subsidiaries, (which I shall in this section include in any reference to "STC" for convenience) and Mr Nicholson, or Mr Nicholson and Mr Field, to injure the beneficiaries of the LS trust by unlawful means. This is especially so as this conspiracy is pleaded to have been formed "by no later than 2000". There is simply no evidence that I can see which could possibly justify the conclusion that any such conspiracy had been made in that time frame or, indeed thereafter.
217. The particulars of the alleged conspiracy are given at Paragraph 36.A of the Amended Cause. They are that it was conducted by Mr Schreibke (allegations against Mrs Giles now having been dropped) and Mr Nicholson "and/or" Mr Field. They state that the conspiracy was formed "no later than 2000", and that its objectives were to transfer the relevant properties at an undervalue, "and/or [sic]" to related parties of Mr Nicholson and Mr Field "in breach of the terms of the trusts on which they were held [sic]", thereby resulting in financial gain for Mr Nicholson and or/Mr Field. They allege that those actions were deliberate, from which it must be inferred that the consequences of causing loss to the Plaintiff was known and intended by the Defendants. (I observe that the pleading oversimplifies the property interest position, but no point has – pragmatically – been taken with regard to this. The general thrust of the Plaintiff's case is, by now, apparent.)
218. In Paragraph 37, the alleged "unlawful" acts by which the Defendants have carried out the conspiracy are pleaded, at great length. Some of them might conceivably, but many could not possibly, be evidence of a conspiracy, and many are merely pleading evidence. They are, first, the details of the four challenged transactions, and the associated circumstances pleaded as constituting breaches of trust in Paragraphs 26-29 of the Amended Cause, with additional pleas that these transactions, together with two further aspects of the Penallta complaints which are time-barred, demonstrate a "pattern" of approval of the disposal of each site by the corporate Defendants at a significant undervalue, without seeking independent professional advice as to value but relying solely on Mr Nicholson, Mr Brien and other parties connected with Mr Nicholson, and transferring the sites to entities connected with Mr Nicholson or in which he was interested, without informing Mr Jefcoate.
219. The two additional allegations do not, in fact, fit that pattern as they relate to more elaborate allegations about "the Defendants" (it is not clear which) mismanaging the realisation of profits from Penallta. The facts founding the accusations about these two further matters were not substantiated to my satisfaction on the evidence which I heard and read. In any event, though, I would not be prepared to find that the matters here pleaded, with or without these two additional matters, could amount to sufficient evidence of a "pattern" as would justify an inference that, on the balance of probability, they must have been the result of a pre-existing plan between the Defendants, systematically to commit breaches of trust (and presumably non-fraudulent ones?) towards the LS beneficiaries, as alleged.
220. Paragraph 37.2 relies on "failure to provide adequate information to Sidney Jefcoate or alternatively the provision of misleading information to Sidney Jefcoate or external parties". There then follow various assertions, some of which do, but many of which do not, constitute either the provision of information or evidence from which a conspiracy could be inferred. It is alleged that Mr Schreibke misinformed Mr Jefcoate as to having visited Mr Nicholson in the UK. That is no evidence of a conspiracy. It is alleged that Mr Schreibke falsely informed Mr Jefcoate that "most sites had been sold for negligible value and they did not have any development potential". As pleaded, this is a vague general statement. If it had been made in circumstances where it was demonstrably false and known to be false, and with some possible credible purpose of inducing Mr Jefcoate to take or not take some course of

action, then I suppose it might, with other evidence, become part of a body of acts which could suggest a conspiracy. However, I am not satisfied that any such statement was ever made at any relevant time, in the terms alleged or sufficiently similar terms, nor that any statements which might be interpreted in the manner alleged were deliberate falsehoods, rather than loose but innocent expression, or careless mistake of the moment. The evidence (and I have had regard to the evidence of the taped conversation between Mr Jefcoate and Mr Schreiberke in 2009, although this was long after the relevant time for this purpose) does not, I find, suggest that any such statements were made with the kind of frequency and consistency which could justify the inference that they were made in furtherance of a deliberate scheme to mislead Mr Jefcoate. Without that additional factor, any such statements are no more than consistent with the possibility of a conspiracy, and are not evidence of it.

221. With regard to the destruction of files by Mr Piper on Mr Nicholson's instructions, first, I am inclined to accept the explanation in Mr Piper's witness statement, and second, the allegation itself does not, except by mere assertion, link this destruction with the relevant properties. I am satisfied that some general destruction of documents occurred, but not that it was for purposes other than a clear out of old documents. I am not satisfied, in any event, as to what exactly was destroyed, sufficient to be able to draw any inference from the fact of destruction. The facts here alleged, insofar as proved, do not amount to evidence in support of the existence of the claimed conspiracy.
222. The allegations next relied upon are of Mr Nicholson telling the Spread companies to conceal his involvement with the Welsh properties from parties including British Coal, Redrow, and the Princes Trust, and of his using aliases in order to do so, and of the Spread companies actively furthering this end, in particular by writing carefully worded correspondence. These facts are not denied by the Defendants, and indeed could not be, insofar as they are evidenced in documents. Various explanations have been given, and Mr Nicholson claims to be contrite about having "foolishly" resorted to using aliases. I find the explanations given plausible as to what occurred, in all the circumstances and I accept them. They give cause for criticisms, but in my judgment those do not include an inference that these matters are the product of, or in furtherance of, any conspiracy directed at the Jefcoate family interests.
223. I should add that in connection with these allegations, there is a completely unsubstantiated allegation that "the joint venture suffered loss" as the result of Mr Nicholson's initiating these false statements. There was not a shred of evidence to support this allegation. Nor was it suggested as to how it could be material, in itself, to the conspiracy claim under which it is pleaded. Its inclusion, however, is indicative of much of the difficulty with the Plaintiff's pleading, which frequently loses focus.
224. A final allegation that the Spread companies misrepresented the beneficial ownership of Whitchurch to Barclays Bank when opening its account, appears to have no connection with, or therefore relevance to, the existence of the alleged conspiracy. It appears, as does much of the pleading, to have been included simply as a matter for which the corporate Defendants could be criticised. As such it might go to credit, or lead to inferences about their general standards of care, but it is merely evidence and it should not have been pleaded: see *The Rules of the Royal Court 2007, r 10(2)*. In any event, this was explained by the Defendants as being a mistake, and I accept that explanation, because I cannot see the likelihood of any other one.
225. At Paragraph 37.3, it is pleaded that Mr Nicholson had frequent ("regular monthly") meetings with Mr Schreiberke between the inception of the NCB venture and 2005, whilst, in contrast Mr Jefcoate had only seven during that whole period. Details are then given, over several pages and apparently derived from Minutes produced by STC, of all the dates and attendees of all these meetings, and the fact that HIL, Whitchurch, or CNLIS were "discussed" at each of them. There is no plea as to the content of such discussions; the court is merely invited to infer from the fact of such meetings that "the proposals to carry out the breaches of duty were

discussed at those meetings, and the conspiracy was thereby forwarded”. That fact was, unsurprisingly, denied by all relevant witnesses.

226. In my judgment, no such inference can be drawn. The Defendants actually say that the particulars of the meetings pleaded are incorrect, but I do not need, and do not propose, to descend to that level of detailed finding. The Defendants accept, as a fact that there were more meetings held between Mr Nicholson and Mr Schreiber than between Mr Jefcoate and Mr Schreiber, but this was (they say) to be expected, because Mr Nicholson was the person directly involved in spearheading the attempts to manage and realise the properties held by Whitchurch and HIL. This is a proposition which I broadly accept. No inference as to these meetings being “conspiratorial” can be drawn merely from the fact of their happening, since they are just as consistent with the absence, as well as the existence, of any conspiracy. It is suggested by Advocate Greenfield that the presence at some meetings of other persons than Mr Nicholson (or Mr Field) militates against their having been the forum for any conspiratorial discussions. It is a point, but not a strong one, since the possibility of discussions between the alleged conspirators on their own separately, but on the occasion of such meetings, is obvious. The main point, however, is that the mere fact of such meetings, whether or not in significant disproportion to the number which Mr Jefcoate attended, is not, I am satisfied, evidence tending to support the existence of the alleged conspiracy.
227. It is pleaded by the Plaintiff, although only generally, that Mr Jefcoate was not kept adequately informed of what took place at these meetings. That fact alone does not advance the matter any further.
228. Paragraph 37.4 complains that the STC’s “due diligence” process regarding sales of properties did not lay down a requirement for obtaining independent valuations, which thereby “facilitated the matters complained of”. Once again, this pleading strays into circumstantial evidence rather than being a material fact capable of demonstrating a conspiracy.
229. Looking from the point of view of the evidence in the case, I can find no documents or other material which, alone or in combination, suggest the existence of a conspiracy, and in practice, none of the Plaintiff’s witnesses can give any first hand evidence of any such conspiracy, much of their evidence (Ms Moakes, Mr Kehoe, Mr Parker, Mr Graham) really going only to seek to undermine the credibility of, in particular, Mr Nicholson. Only Mr Kehoe came near to giving evidence directly pertinent to the possible fact of a conspiracy. However, even his evidence was aimed at Mr Nicholson and his attitude to Mr Jefcoate rather than being any evidence of a conspiracy involving any of the Spread companies.
230. In the end, the only facts which are asserted and satisfactorily prove and which involve both the corporate Defendants and the individual Defendants so as to even begin to be capable of evidencing some agreement between them are the facts of the very disposals of the properties themselves at the alleged undervalue and to, in effect, to Mr Nicholson or Mr Field, and the inevitable communications preparatory to these. Those facts, however, do not, I find, amount to evidence of a concerted and deliberate plan to make disposals at an undervalue at all, still less one conceived prior to 2000, which is what is required to be proved. Although the facts of each transaction plainly involve an agreement or arrangement between STC, the Second or Third Defendants and Mr Nicholson or Mr Field, those facts evidence only the agreement for the individual transaction and its being effected. The mere fact of several such allegedly tainted transactions, which is all that one has here, is not enough. More is required to convert this to evidence of a systematic plan, such as, at least, the clear knowledge and intention of all parties that each transaction was indeed at an undervalue. There is no sufficient evidence of that in this case.

231. The Defendants denied that any such conspiracy took place, although that would not be unexpected. There are however, several points which, to my mind, are compelling points positively pointing away from the existence of any such conspiracy.
232. First, and foremost, I can see absolutely no reason, incentive or motive for, the Spread companies to embark on any such conspiracy. People do not usually act without a reason. It has never been seriously proposed what benefit there was to the Spread companies in doing so. In the Plaintiff's skeleton argument it was weakly suggested, although in the context of postulating possible conflicts of interest and duty on the part of STC, that selling the properties on to entities which STC might then be called upon to administer would generate more business for them. I do not think it was ever seriously suggested to Mr Schreiberke that this had motivated him, but in any event, I would regard it as a fanciful proposition. I can in fact see no evidence which suggests any benefit to the Spread companies in conspiring with Mr Nicholson and Mr Field as alleged, still less of any active contemplation of this. STC are, I accept, a reputable provider of trustee and trust administration services. I consider that the suggestion that they are likely to have embarked on a conspiracy, in effect, to cheat one of their own trust clients in favour of another, as being absurdly implausible.
233. Second, it is to be recalled that the conspiracy allegation was initially also made against Mr Piper; but was struck out for disclosing no reasonable cause of action, on the grounds that he was not alleged to have been a participator in any "overt act" claimed to demonstrate the existence of a conspiracy. The late Mr Piper is not, therefore, implicated in the present case. However, I am entitled, in my judgment, to take note of the fact that initially it was thought appropriate by the Plaintiffs to allege the self-same conspiracy as is now being alleged against the present Defendants against Mr Piper as another participant. To my mind, that speaks tellingly about the quality of the assertion of conspiracy as made on behalf of the original Plaintiffs, including Stuart. It was flimsy to the point of being struck out against Mr Piper. On closer examination, it is little better against the other Defendants.
234. In conclusion, therefore, I am perfectly satisfied, on the evidence, that there simply was no conspiracy between the Defendants as alleged or at all. As that is sufficient to dispose of the conspiracy claim entirely, I make the following further points only for completeness.
235. In practice, my conclusions with regard to the necessary overt acts, intention to injure and unlawful means, have been dealt with in considering the question of evidence in support of the existence of a "combination". I should just clarify the last point in the light of the discussion of the law, above.
236. Subject always to the unexplored point whether asserting this would amount to an allegation of fraud which the Plaintiff disclaims, an intention by Mr Nicholson (at least) to benefit himself by acquiring any relevant property at less than its true market value, would necessarily, in my judgment, also amount to the necessary intention to injure the Jefcoate family interests by depriving them of the corresponding portion of the undervalue. (It would also appear, at first blush, to be a breach of the original agreement between Mr Jefcoate and Mr Nicholson, but, as already noted and for whatever reason, no such claim has been or is advanced, and this has not been argued.) However, to make out a conspiracy, it would also be necessary for Mr Schreiberke to have shared such intention to injure. This would mean that he would either have had to have actual knowledge that the disposition was at an undervalue, so that the relevant injury was inevitable, or, applying the *Baldwin v Berrylands Books* extension, he would have had to have *deliberately* avoided asking the question whether the consideration for the relevant disposition was an undervalue, so as consciously to avoid discovering the fact that the disposition would thereby damage the Jefcoate family interests. Anything short of this, namely a mere failure to enquire properly as to value even in a situation where it was a breach of trust or duty of care to fail to do so, is not enough. It is the motivation of avoiding discovery of an unwelcome truth which is essential. I am perfectly

satisfied that any failure by Mr Scheibke to make sufficient enquiry was not motivated by a desire to avoid discovering a feared unpalatable truth.

237. The conspiracy claim therefore fails. It does so on the grounds of absence of any actual combination and also for absence of the required intention to injure on the part of all of the alleged conspirators.

Issue 2 – Were the dispositions at a material undervalue?

238. The Plaintiff's case, as to both conspiracy and breach of trust or duty, depends, totally, upon his proving that the impeached transactions were indeed concluded at an undervalue in terms of consideration. If they were not, there was no loss and, on the basis of the way in which the Plaintiff's case has ultimately been advanced, there was no breach of trust. I make this last qualification because the extensive details in the Amended Cause would appear to be capable of encompassing not just an allegation of breach of trust (or director's duty) and gross negligence by effecting a sale at an undervalue at the time of the sale, but also an allegation of failing to take steps (and presumably spend money) on enhancing the value of the propert(ies) so as to enable them to be disposed of at greater profit at a later time (see, for example Paragraph 31.2 of the Cause.) In the event, however, no such different or more subtle form of breach of trust has been relied on by the Plaintiff either in his skeleton argument or at the trial, and the dispute has really proceeded simply on the basis that disposals of the sites in question constituted disposals at an undervalue at the time when they took place. Shades of this allegation do seem to underlie another aspect of the alleged breaches of trust, namely a failure to offer Mr Jefcoate the opportunity to provide funding to obtain a beneficial planning permission, although this allegation is pleaded expressly only in relation to the Wernos Washery sites.

239. The Defendants deny any undervalue in respect of any such disposition. If they are correct, then that is enough to dispose of the entire case, as no loss to the LS trust has resulted.

240. As to this dispute, the central evidence is that of the two valuation experts. The Plaintiff called Mr Nick Snowden, MRICS, a partner of Knight Frank LLP at their Bristol Office. The Defendants called Mr Scott Caldwell MRICS a director in the firm of Savills (UK) Limited in their Cardiff Office.

241. In the course of case management, in order to save costs and time, I directed that instead of an initial exchange of independent and separate expert reports followed by a discussion to narrow the issues, the appointed experts should meet and jointly prepare a statement of the issues upon which they agreed and disagreed with regard to the values, at the relevant times, of the four (or six) properties, together with a statement of their reasons for disagreement.

242. Since issues relating to value of the Wernos Washery land depended on the specialist question whether there were realisable coal reserves or deposits there, a single joint expert was instructed to provide an opinion on this aspect. In the event, this opinion was negative. Consequently the issue of the possible value of any coal at the Wernos Washery site was not pursued, removing £10M from the alleged aggregate undervalue and reducing the original claim in the Amended Cause by £4.75M. This was allowed by informal amendment.

243. Mr Snowden, then on behalf of Knight Frank LLP, had first been instructed directly by the then Plaintiffs in March 2010, to prepare a retrospective valuation of the entire 18 sites in the Whitchurch Portfolio, although in the event four of these, not being those the subject of this case, were either outsourced to another firm to avoid arguable conflict of interest (these including the Penallta Colliery sites) or were excluded for other reasons. This advice, he was told, was for the purpose of supporting a potential claim for gross negligence and possible fraudulent activity, but was advisory, and his report was not provided in the form of an expert witness report. Mr Snowden had been instructed further in August 2011, this time by the

Plaintiffs’ Advocates, to provide a further report, as a potential expert witness, as regards eight of the sites (including Crosshands and Wernos Washery but not Plots 4 and 8) as to the appropriate steps that a “prudent investor” would have taken with regard to maximising the value of each such site, including advice and investigations, likely costs and timescales and hence when and for how much each plot could have been sold. He was then not instructed further until February 2014, when he was instructed to meet Mr Caldwell as the Defendants’ expert in this action, in order to make the directed Joint Statement for the purpose of this trial, as mentioned above.

244. Mr Caldwell had not been instructed until the directions with regard to expert evidence had been made or anticipated imminently, in late 2013 or early 2014. He had been instructed by and on behalf of the corporate Defendants, but his evidence was always intended to be and was adopted by Mr Nicholson and Mr Field.
245. The experts’ meeting, in April 2014, and their subsequent telephone discussions, revealed considerable differences between them, regarding not only their respective views of value, but also of what properties were relevant, and even the scope of their instructions. The experts’ Joint Statements of matters agreed and disagreed noted these differences. Mr Caldwell had therefore been instructed to provide his own sole report, in “expert witness” form (in draft but final form), in relation to the values of the relevant sites at what he understood to be the relevant time, to provide background to his reasoning.
246. As a result, Mr Snowden was instructed to do likewise, but by providing an update and review of his original 2010 report, with regard to the relevant properties. He used the relevant sections from that report, confirming that his methodology and conclusions in that report were deemed applicable in his (now) expert witness report, and that he had now prepared this in accordance with the English CPR Part 35 and with the RICS Guidance Notes for Surveyors Acting as Expert Witnesses. The court was provided with this report, which appended also his 2011 report, his Aide Memoire of June 2014 regarding his review of his 2010 report, and a full copy of his 2010 report.
247. The valuers’ Joint Statement of matters agreed and disagreed acted as a helpful “executive summary” of the issues dividing them, and the other reports provided extensive material for examining their reasons for disagreement. The experts provided a summary table of their valuation opinions to the court, which I set out below. It illustrates the ultimate wide divergence of their views.

Plot	Valuation date	Snowden value	Caldwell value	HIL sale price and date	Subsequent sale price and date
4 Factory Road	Sept 2005	£10-15,000	£4,500	Nil Sept 2005	£9,500 Dec 2005
8 Ael y Bryn	Sept 2005	£10-20,000	£10,000	Nil Sept 2005	£12,000 Mar 2006
13 Crosshands	Dec 2005	£1.5-1.75M	£505,000	£500,000 Dec 2005	£2,250,000 Dec 2007
15 Hafod Road	Mar 2006 Mar 2007	 £75,000*	£120,000	 £300,000 under option granted Mar 2006 but exercised Mar 2007	 n/a
16 Penybanc Road	Mar 2006 Mar 2007	 £225,000	£130,000		
19 Wernos Washery	Mar 2006 Mar 2007	 £3M-3.5M	£800,000		
<i>Total of 3 WW plots</i>		<i>Total £3.3-£3.8M</i>	<i>Total £1,050,000</i>		

*This figure was corrected by Mr Snowden at the trial to £300,000 (which would in turn increase his total values for the Wernos Washery sites to £3.525M - £4.025M.)

The experts

248. Both experts were of similar length experience. However, Mr Caldwell was based in Cardiff, where his area of responsibility was residential development land across South and West Wales, and he had been in Cardiff with Savills since 2006, and also prior to that, with Bruton Knowles for five years. Mr Snowden was based in Bristol, having been there with Knight Frank since 2007, and before that with DTZ since 2004. Whilst his responsibility was likewise for residential development land, it extended across South West England and South Wales, and in practice his work was almost exclusively in South West England. He was not regularly involved with Wales, only doing so if his firm's Cardiff office requested assistance, which was infrequent. Specifically, he accepted that he had not been involved in any matters in Wales during the period relevant to the subject transactions, ie the time leading up to and including, in particular, 2005-7.
249. I regret to say that I found Mr Snowden very unimpressive as an expert witness. His oral evidence was discursive, and his style more that of a presentation aimed at impressing a client and gaining an instruction than of conveying solid factual and opinion evidence in a court of law. His evidence was full of vague, slightly grand, general expressions, such as the "sentiment of the times" and the "tone" of transactions, but was short on concrete examples, or convincing reasoning. I rather formed the view that, in his original report, he was significantly influenced by the reason for his instructions and by tendentious material drawn to his attention by the Plaintiffs in those instructions (such as a note reporting Mr Nicholson as expressing the view that the Wernos Washery site was worth £2-3M), without critically considering the objective underlying facts and revisiting these when asked to give expert evidence for this trial.
250. Mr Caldwell was far more business-like as a witness. He gave evidence well and with authority, and was plainly well focussed. His opinion was provided with far more of a concrete basis in hard facts than Mr Snowden's, and he responded well under cross-examination. He provided a helpful description of the market in the area as it was developing over the relevant period, with regard to the different classes of potential developers, and was able to do so from the background of direct experience. Ultimately, I have far more confidence in Mr Caldwell's opinions than I feel able to have in Mr Snowden's. This is despite recognising that Mr Snowden had been initially asked to advise three years earlier than Mr Caldwell, and therefore much nearer to the relevant time, an important point in the difficult context of a retrospective valuation exercise.
251. My main reasons for finding myself unable to place great reliance on Mr Snowden's opinions are that first, in absolute terms, I found his evidence to be not only superficial as already indicated, but also flawed with careless mistakes to the point, I regret to say, of being sloppy. I give examples below. Second, Mr Snowden was professing an opinion about land values and the state of the market in South Wales in and up to 2006/7, at a time and place of which he had no direct experience at all. In consequence, even the factual evidence which he cited as the foundation for his "opinion" was very largely the reported opinions and retrospective reminiscences of other people. In particular he relied on opinions of general land values expressed to him retrospectively by the Valuation Office Agency, and on conversations with local authority planning officers, as to historic attitudes to planning matters. He placed great weight on both of these. Leaving aside the questionability of relying strongly upon such material for reasons given cogently by Mr Caldwell, Mr Snowden then presented this information bolstered by the description "detailed discussions", when, on being pressed in cross-examination, he admitted that he had had, at most, four, 10 or 15 minute, telephone conversations, all told.
252. Mr Snowden's research into comparable transactions (although I do accept that originally this had been for an "advisory" report and not for the immediate purpose of expert evidence) had consisted of sending a graduate student to search his firm's archives for reports prepared at

the relevant time, to extract references to contemporaneous transactions in them which could be cited as, to some degree, “comparables” (as property professionals understand that term). However, the particulars of these had been quite thin, and there had been no further research or checking of their detail or reliability, that I could see. They were consequently couched in vague and tentative terms such as “it is our understanding that”. Some of his details were therefore not agreed, but Mr Caldwell was, in certain cases, able to speak to this disagreement from the angle that his firm had actually been involved and had direct records.

253. It was not impressive that, on being pressed in the witness box as to the basis of his calculations with regard to the development value of Crosshands, and how many units he was assuming were being constructed, he seemed quite unable to answer this, eventually suggesting that he had (or must have) done so using three – or probably four - different density rates. I was left with the impression that he really did not know what he had done at the time and certainly had not checked this for the purpose of this trial.
254. As regards mistakes, the first thing he did in giving oral evidence was to correct a mistake in his valuation of Plot 15, made in 2010 and never subsequently changed. He stated an opinion that the value represented an 80% discount “on” land with detailed planning consent, reflecting risk and the required affordable housing content, and he applied that discount to produce a value of £75,000. This, he said, had been an error, and the discount should have been a discount “to” 80%, ie a discount, in fact, of 20%, and therefore giving a figure of £300,000 (although this still did not seem to me quite to fit the arithmetic from his undiscounted figure). He had not noticed this mistake and it had survived all further revisiting of his reports, only being spotted shortly before the trial in August, and despite the experts’ meeting in April 2014, their further discussions, and the signing of their joint statement in June 2014. This is quite remarkable because this latter process would have required direct comparison between Mr Snowden’s values and those of Mr Caldwell, who, unsurprisingly (given the parties’ positions in this dispute), was tending to put lower values on the sites than was Mr Snowden. Plot 15 stood out as being the one plot where Mr Snowden’s figure was far lower than Mr Caldwell’s.
255. Mistakes happen, and if this had been the only significant criticism of the meat of his evidence it might not have been of such weight, but there was considerably more. In his 2010 report, he had “noted” that at the relevant value date of December 2005, the Crosshands site had had outline planning permission for residential development, from January 2005. In fact it did not. That was the application date. The permission was not granted until May 2007. That mistake emerged out of the expert meetings, but, and quite extraordinarily to my mind, it did not cause Mr Snowden to alter his valuation. Instead, he relied on the *allocation* to residential development contained in the draft Local Development Plan as being sufficient to support his original values. I found this instant change of reason totally unconvincing, suggesting that Mr Snowden was more concerned to look for justification of his original figure, than dispassionately to consider if it was still justified. Even leaving that point aside, the original mistake was surprisingly careless from a purported expert.
256. In cross examination, Mr Snowden was asked about a hypothetical residual valuation which he had said a prospective developer would do to calculate his bid offer for Plot 15, which relied on the apparent profit which development would be expected to generate. However as Advocate Greenfield pointed out, when one did the arithmetic using his figures, the development would actually appear to generate a loss. Mr Snowden agreed with this, saying that the reason was that he had given the unit price only for affordable housing units rather than also that for open market private housing units, which would have been higher, and which would also have been used. Not only was it plain that he could not have checked this material, but he seemed remarkably unembarrassed about this further error in evidence which he was now presenting to a court as expressing his careful and accurate professional opinion.

257. The core facts of Mr Snowden’s evidence had been contained in the relevant sections of his 2010 report. He had stated that he had “revisited” this and therefore still relied upon the views there stated. I do accept, and make due allowance for, the fact that his earlier report had covered several more sites than the six with which this case is directly concerned, and that it had been advisory rather than drafted as an expert witness report. Nevertheless, that was the material which he did put forward as expressing his opinion as an expert witness in this trial. On several occasions, when pressed as to some apparent mistake or inconsistency with this material, his reason given was that he had not been instructed to “amend” his earlier report. I suppose this could have referred merely to making physical amendment, but it in fact appeared to me to be a euphemistic implication that he had not been offered sufficient fees to carry out a full scale revision. Once again, this is not impressive. If an expert witness has not been received instructions which he is prepared to accept which enable him to give clear evidence complying with an expert’s duty of care, candour and completeness to the court at the time, then his response ought not to be simply to proffer inadequate or unchecked evidence, but to decline the instruction.
258. Mr Caldwell’s evidence, in contrast, did appear to be thorough, well-prepared and efficient.
259. One of the main valuation issues in this case is the way in which the market reacts to “hope value”, which, put simply in this context, is any added element of value which the market may pay, over and above current use value, for the prospect of subsequently achieving a valuable planning permission. Mr Caldwell was accused by Advocate Richardson of being over pessimistic in the discounts that he applied to reflect the fact that, at any stage in the process, an actual planning permission was not yet a certainty, and how that would therefore affect the mind of a purchaser. Mr Caldwell was very firm that this was not a matter to be lightly estimated, and he did so not merely on the basis of an expert’s intuition, but by pointing to two examples, albeit much later (2011) and not therefore comparable in raw figures, of transactions in which offers had been invited on the basis of an immediate purchase or a purchase conditional on obtaining planning permission. This provided some indication of the level of discount being applied by actual players in the market in such a position. Mr Caldwell’s provision of material showing how he felt his opinion was justified therefore gave me confidence both in his approach, and his appreciation of the key issues with regard to assessing value, in a way which Mr Snowden rather failed to do.
260. Mr Caldwell was very sceptical of uncritical reliance on opinions of historic land values obtained from the Valuation Office Agency. His reason was that these referred only to raw data, and were therefore highly generalised averages. They did not and could not deal with the particular characteristics of any particular site, and it was therefore dangerous to draw conclusions simply in reliance upon these. He was also sceptical of the value of opinions now being expressed by planning officers as to what indications with regard to likely planning permission would have been given in the past, citing experience that, at the actual time, planning officers would be cautious about saying anything which might appear inadvertently to commit the planning authority. I found Mr Caldwell’s concerns persuasive.
261. The upshot is that I strongly prefer the evidence of Mr Caldwell to that of Mr Snowden, and where it is simply a matter of conflict between them, I prefer the former. However, that does not mean that I entirely dismiss the views of Mr Snowden, where I feel they give me some assistance. I also have some reservations about Mr Caldwell’s evidence and his underlying approach, which arises from the following.
262. Mr Caldwell values Plots 4 and 8 at £4,500 and £10,000, respectively, in September 2005. There were actual sales of these plots, respectively 3 and 6 months later, at auction, for £9,500 and £12,000. Both valuers agreed that nothing had changed as regards market conditions between September 2005 and December 2005 or March 2006. This therefore appeared to me to present cogent evidence of the actual value of Plots 4 and 8 in September 2005. When I asked Mr Caldwell how he reconciled his valuation with the fact of these sale

prices, he replied that, in September 2005, these facts would not have been known in the market. That, however, seems to me to be pertinent only if the issue is: what would have been a non-negligent valuation of the properties in September 2005? and not: what were their actual values? It does not seem to me to be an answer, either, to say that the actual eventual purchaser could not be assumed to have been at a notional sale in September 2005. First, the market must be assumed to contain all those whom the evidence suggests would be likely to bid, and in any event, an auction sale also implies the presence of an under-bidder at nearly the same price.

263. Mr Caldwell's previous experience of giving expert evidence had been in a negligent valuation case, and I have wondered if this may have affected his view of the exercise he was doing, because I find it quite impossible to dismiss the clear evidence of actual value presented by the two actual sales. This has inevitably led me to wonder if the same influence could have affected Mr Caldwell's approach with regard to the two more valuable sites, where there is no such immediate clear and simple sale evidence against which to test his view. I am not bound to accept either expert's professed opinion of value as conclusive, and I weigh these opinions as part of all the evidence on this topic which is before me. I now turn to my conclusions on this.

Conclusions on value

Plot 4

264. The valuation date is September 2005 when the plot was transferred to Mr Field's company for nil consideration. Mr Snowden values Plot 4 at £10-15,000; Mr Caldwell values it at £4,500. I do not find Mr Brien's remarkable earlier valuation of £35,000 in August 2004, at all helpful. This plot sold at auction three months later for £9,500. Both valuers agree that there was no change in the market between these two dates. I therefore find the sale price to be the best indication of actual value and therefore I find the market value of Plot 4 at the valuation date to have been £9,500.

Plot 8

265. The valuation date is September 2005, when the plot was transferred to Mr Field's company for nil consideration. Mr Snowden values this Plot at £10-12,000; Mr Caldwell at £10,000, so there is in fact little difference. Again, I do not find Mr Brien's valuation of any assistance. This plot sold at auction in March 2006 for £12,000. Both valuers again agree that there had been no change in the market between the valuation and the sale dates. For similar reasons to Plot 4 I therefore find the market value of Plot 8 at the valuation date to have been £12,000.

Plot 13, Crosshands

266. The agreed valuation date is December 2005. Mr Snowden values the combined plots forming this site at £1.5M – 1.75M; Mr Caldwell values them at £505,000.
267. The impugned transaction took place when the sites were transferred by HIL to Carnation for £500,000. Mr Nicholson says that this was all under general pressure from Mr Jefcoate, after the sale of Penallta, to get the rest of the venture wound up.
268. The transfer was made pursuant to a sale agreement made in September 2004, which was originally conditional on the grant of planning permission, but which was in fact completed early by Carnation's waiving this condition. However, this agreement effectively replaced a similar agreement made in May 2004, and probably conceived in January 2004 to transfer the sites to Pinocraven (South West) Limited for a similar figure.

269. Throughout this time the site had an allocation to residential development in the draft local plan for 20 units of housing. The development plan was at the final stages of consultation, being eventually adopted in June 2006. The site was the subject of a planning application lodged in January 2005, which was ultimately granted in May 2007.
270. This delay is noteworthy, but the exact reasons for it – how far it was due to problems with the application or simply slowness by the local authority, are not now checkable. Mr Nicholson emphasises what he says were, at the time, intractable difficulties with the site, and I have carefully read his account of these, and the evidence of several other witnesses, which is supportive of there being difficulties. To reiterate, the site was problematic for development for three reasons, although the last may have emerged only after the valuation date. The most significant was the need to satisfy the requirements of the highways/traffic department with regard to safe highway access, on to a main road as the public highway, incorporating the need for adequate visibility splays, impeded generally by the presence of the corner shop, as to which ransom was being sought. The second was the further potential ransom situation with regard to the frontagers of the existing private access road, although there was more leverage for negotiation, in that the frontagers wanted maintenance responsibility for their road taken over. Mr Nicholson cites “local objections” as a further factor which would be a deterrent to a purchaser, but it seems to me that the public protest meetings and suchlike at about this time, fliers for which were relied on, were directed at getting a proper publicly maintained entrance road, rather than objections to the site development itself. The third difficulty suggested was issues about adequate drainage and the position of a culvert, opposite the site entrance, although these seem to have arisen only late in the day and possibly just in conjunction with the physical access layout solution eventually achieved.
271. Mr Brien purported to value this plot in August 2004 at £60,000. Mr Nicholson describes this as being “cautious” because of the lack of planning permission. I regard it as colourable. It is perfectly obvious that whilst there was as yet no planning permission, the land had hope value.
272. I accept that there were very significant difficulties apparent with regard to getting acceptable access to the property to enable a sizeable development to take place, arising from the need to obtain acceptable access, both in highways and therefore planning terms, and as a matter of legal ability and affordability.
273. Mr Snowden’s valuation was apparently based on a developed value of the site at 2005 values, of nearly £4M, assuming 20 three/four bedroom houses, and cross-checked by “sensitivity analyses” and by further residual calculations at a range of densities done on spread sheets which he had not brought with him. He therefore could not really explain his inputs. From these results, though, but also taking into account the price achieved on a sale of the site to Redrow two years later (£2,250,000) he concludes that the value of the site at the time and circumstance of December 2005 was £1.5-£1.75M.
274. Mr Caldwell also arrives at his valuation by carrying out a residual valuation based on the assumed to density of 20 housing units, but as to which he did give his inputs. This led him to a residual value of the land of £828,000 on the assumption that it then had an implementable planning consent on this basis. He notes that the set of more or less comparable transactions which he has previously considered produce a range of “consented” land values between £117,000 and £270,000 per acre, (he disregards the eventual sale of the subject property to Redrow two years later, which produces an acreage value of £420,000, for being in a later and different market), and finds his resulting value of £180,000 to fit fairly into this range. He then applies a 40% discount to this figure to allow for the uncertainties, as yet, regarding planning and the access difficulties, a figure which he assesses from his own “feel” for the extent to which this would affect a purchaser’s attitude, citing, in support, the two examples of directly comparable conditional and unconditional offers for potential

development land from 2011 which I have mentioned above, and which showed discounts of 55% and 42%, respectively. He comments that this illustrates and supports his view that one must not underestimate the depreciative effect of risk on the price that a purchaser will be prepared to pay for land with hope value but no actual consent. Rounding the arithmetic result slightly upwards to £500,000, he adds £5,000 as a nominal sum for the separate 0.47 acre site, (this not being, in his view, vital for the development) and reaches his conclusion on value, as £505,000.

275. I find Mr Caldwell's evidence generally more persuasive than Mr Snowden's, for reasons which I have already largely set out, and in particular the fact that Mr Snowden's value originally wrongly assumed outline planning permission, his reliance on the price paid two years later by Redrow in a very different market, and my concerns about the sources of his evidence and the reliability and appropriateness of his generalised calculations and assumptions. However, I do not dismiss entirely the fact that his instinct is obviously for a much higher figure than Mr Caldwell's, even if I think it would need to be tempered by the concerns which I have expressed.
276. I have considered all Advocate Richardson's criticisms of Mr Caldwell's evidence, and whilst I do not find force in most of them, I do find force in his criticism of the use of the density figure of 20 units in the calculation upon which he relies for his final figure. Both valuers firmly agreed that the 20 unit density figure for housing allocation in the local plan and used by Mr Caldwell in his calculation, was low, and I also gained the clear impression that it was more than likely to appear so to anyone in the business at the time. Indeed, the negotiation with Hales in 2003-4 assumed 50 – 60 units. I also observe that Redrow eventually obtained planning permission for 65 or 67 units on the site. I am therefore left with the inescapable feeling that, at the valuation date any purchaser's valuation assessment would not have been based on 20 units but on a higher one of more units, although then obviously likely to be smaller in size than 20 could be. Mr Caldwell said in cross-examination, that if he recalculated his valuation based on 30 or 40 units, he would arrive at values of about £1.2M or £1.6M, rather than £830,000. However, he was not then pressed as to the final (discounted) figure that he would have come to assuming that he had used such a density. Even at a 50% discount, though, this would be £600,000-£800,000.
277. Second, it is apparent that as long ago previously as June 2003, Whitchurch was willing to offer Hales a contract at £700,000 subject only to planning permission, and although Hales preferred the alternative option offered, of staggered payment but a higher price (£800,000), this suggests that Whitchurch regarded the former as equivalent. Although this was a conditional contract price, it was at a time when there was actually greater risk as there had been less progress towards resolving the obstacles to development.
278. Third, I consider the evidence about the actual transaction. Partly arising from my impressions of Mr Nicholson, I have the distinct feeling that this site represented very good value at £500,000. Its potential had not been tested in a marketing situation since January 2004 when it was withdrawn from the market by Whitchurch. (Mr Nicholson said that his recollection was that it was Hale's who had "pulled out" of the purchase. If so, this was, at best, erroneous.) This could only be because Mr Nicholson had concluded that a better result could be achieved, and I am satisfied that he had something of an eye on this property.
279. Fourth I do not regard the conditionality of the contract with Carnation as particularly telling, because Mr Nicholson was effectively in control of both sides of the condition, and he would naturally have preferred to defer paying the price as long as possible.
280. Fifth, even taking into account the further length of time it took to secure planning permission finally, I am not convinced that the difficulty of achieving solutions to the admitted problems over access, at reasonable expense, was really so apparently intractable at the time, as Mr Nicholson tries to make out. Even if the eventual highway solution was "radical", it was, in

the event, envisioned and achieved, and I am not satisfied that this result all happened entirely unpredictably and unexpectedly after the valuation date. In fact, I have no doubt that if Mr Nicholson had not seen it as advantageous to secure the property in December 2005, even without final resolution of the problems, Carnation would not have done so.

281. Taking all these circumstances into account, I am satisfied that Mr Caldwell's figure is too low. However, I do accept his general warning that one must not underestimate the depreciative effect of unresolved planning and access problems on the outright bid which a potential purchaser would make for a site. Purchasers always have the option to go for less risky sites or transactions, and a deep discount on potential return will therefore have to be made in order to induce an offer.
282. My conclusion is that the unconditional open market value of Crosshands at December 2005 was between £600,000 and £650,000; but say £625,000. I somehow have little doubt that if Carnation had been expected to pay that price to secure the site, it would have done so.

Plots 15, 16 and 19: Wernos Washery

283. Mr Snowden takes the valuation date as being March 2007, the date of the exercise of the option. Mr Caldwell takes it as being March 2006, the date of the grant of the option. I heard no argument on this point as both valuers were agreed that nothing happened within that year (the only difference being the formal adoption of the local development plan, confirming the land allocations always previously understood) and so nothing turned on the date.
284. Mr Snowden values the combined sites, at £3M -£3.5M. Mr Caldwell breaks them down into separate natural areas, and values them at an aggregate value of £1,050,000. As to the valuation date, in my judgment, Mr Caldwell is really correct, since this was the date when Whitchurch became potentially committed to the disposal of the property at the relevant price. However, it has been assumed that this makes no practical difference, and nothing in the evidence itself suggests that this is wrong.
285. The valuers are largely agreed on the use analysis of the various component plots, some parts of which would have no value beyond existing, agricultural values. Their main points of difference are in two areas.
- With regard to Plot 15, which is agreed to be land with policy support for residential development but no planning permission at the relevant time, (and ignoring Mr Snowden's discount error) their disagreement is simply as to the appropriate rate and discount for uncertainty to be applied to unconsented land with this level of "hope" value.
 - With regard to Plot 16, their only disagreement is with regard to the one acre of possibly developable land, on similar points.
 - With regard to Plot 19, where their disagreement is plainly of a different order of magnitude (£3/3.5M as compared to £800,000) the greater part of their disagreement arises from the fact that Mr Snowden treats the site as having 15 acres of "developable land" as to which "hope value" attaches, and it is therefore worth £200,000 per acre, (being 50% of a consented residential value of £400,000 per acre) with the remaining 160 acres being valued at £2,000 per acre (very poor grazing land value), whilst Mr Caldwell breaks the site down into 5 brackets of which one contained 4.3 acres – only – of land with any significant "hope" value, through being land with policy support for residential development but no actual planning permission, which he values at £100,000 per acre. The remainder he valued in four bands, as to whether it would have no potential at all (106 acres of "tip" land at £750 per acre and 18 acres of rough grazing land at £3,000 per acre) or might have some

highly speculative long term hope value (43 acres at £5,000 per acre), and 1.5 acres with medium hope value at £25,000 per acre.

286. Mr Snowden was asked to identify the 15 acres of developable land which he was referring to, as only 4.3 had been identified by Mr Caldwell. His answer was that he was relying on his conversations with the VOA and the local planning officers in 2010, including the latter's comment that it had been "highly likely" that 15 acres would be allocated to housing, and their stated recollection of a desire to see the site brought forward for this. However, none of this happened. Moreover, Mr Snowden could not identify any specific areas of suitable land making up this acreage. In the circumstances I agree with Mr Caldwell that this is an extremely flimsy foundation for assuming value, and little better than an assertion that there "must be" some such development land on the site, somewhere. For reasons given previously, I therefore prefer Mr Caldwell's evidence to that of Mr Snowden.
287. In this instance, however, I find that there is no other evidence in the background which gives me concern about Mr Caldwell's figures or approach being realistic with regard to this land, the planning situation and the market at the time. This transaction was, I am satisfied, initially at any rate, a transaction with a third party and not with Mr Nicholson, even though Mr Field may have been a business associate, to some degree of Mr Nicholson.
288. The only closely following later sale evidence is the sale to Mr Williams, already described. Mr Caldwell says that in fact one can deduct the loan from the stated consideration figure for this transaction to reach a land value of £152,000. Advocate Richardson disputes that approach. Given the complexity of this transaction I do not feel able to derive any real assistance from it, and, certainly it does not cause me to have doubts about Mr Caldwell's careful and thorough analysis of the land uses and rates, and his valuation rationale.
289. In the circumstances, therefore, I conclude that the open market value of Pots 15, 16 and 19 at the relevant valuation date was £1,050,000.

Undervalue?

290. To conclude, though, I remind myself that the question is whether these plots were disposed of at a material undervalue.
291. With regard to Plots 4 and 8, they were disposed of for no monetary consideration, and I conclude that they were therefore transferred at an undervalue, subject to any justification for their having been disposed of as, in effect a gift. I deal with this in relation to the third Issue, that of breach of trust or duty.
292. With regard to Crosshands, I conclude that it was disposed of at an undervalue, and that this was material.
293. I have had more concern with regard to Wernos Washery. The plots were disposed of for £1M when they were, I have found, worth £1,050,000. This is, though, a mere 5% of their value.
294. Mr Caldwell (and Advocate Ferbrache) draw my attention to the case of *K/S Lincoln v Richard Ellis Hotels Ltd* [2012] EWHC 1156 (TCC) at [180] – [183], elaborating on the well-known case of *Singer & Friedlander Limited v John D Wood & Co* [1977] 2 EGLR 84 at 85H-J, with regard to the appropriate tolerances to be accorded to valuers and valuations, given that valuation is an art rather than a science, and indicating that a margin of error is permissible and normal between individual valuers. The judgment finds that the degree of such tolerance rises with the singularity of the property, and may be as high as 15% or more in exceptional circumstances.

295. Advocate Ferbrache further referred me, in particular to *Sheila McAteer v Walter Lismore* [2012] NICH 7 and *Richards v Wood and Wood* [2014] EWCA Civ 327. The former case emphasises that it is for the Plaintiff to prove, on balance of probabilities, that any breach of duty of care by a Defendant trustee caused loss, and also to prove the proper measure of loss which the court should order the Defendant to restore to the trust. In the *Richards* case, the issue was whether a private sale effected by lay trustees at £102,000 was a sale at an undervalue. The expert witnesses agreed the market value at £108,000, but also agreed that £102,000 was within the reasonable range of tolerance (which would be a 10% margin), especially as it would be achieved net of estate agent's fees of 1.5%. The judge therefore found that there had been no sale at an undervalue. The Court of Appeal upheld this conclusion. In giving judgment, Lewison LJ rejected the submission that the experts' view that the actual sale price was within the permissible degree of tolerance from their own valuations was not relevant to the issue whether there had in fact been a sale at an undervalue, saying that

“it would be extraordinary if a lay person... were to be held to be at fault for accepting an offer of £102,000, but that a professional valuer would not be at fault in recommending acceptance.”

296. I find this helpful. Given my acceptance of Mr Caldwell' figure, as to which he warns that he would expect a tolerance with regard to other reasonable valuation advice, I conclude that it would be wrong to regard the option and sale for £1,000,000 of these three properties, as a sale at an undervalue. I also note that in the circumstances this sale was achieved without agent's fees being incurred, which although they would not amount to £50,000, reduces the apparent shortfall still further. In the circumstances, I conclude that the disposition of the Wernos Washery sites did not amount to a sale at a material undervalue, so that even if it were carried out in breach of any duty by the Defendants, no consequent loss is proved.

Issue 3 – Breach of trust or duty

297. I have already described the corporate and shareholding structure set up in this matters. It is convenient, therefore to deal here with the claims made against the Second to Fifth Defendants, because, in my judgment, they must obviously fail. This is because in none of these cases did the relevant Defendants owe any duty to the Plaintiff, even insofar as he might, as a beneficiary, be treated as standing in the shoes of STC as trustee of the LS trust.

Fourth and Fifth Defendants

298. The Fourth and Fifth Defendants, CNL and SNL were the nominee shareholders of HIL. In Paragraph 13 of the Amended Cause, it is claimed that they thereby owed the same duties as STC to administer the LS trust carefully and conscientiously, as pleaded in detail in Paragraph 12 of the Amended Cause, but also additional duties

“to account for any dealing in the trust property inconsistent with the terms of the trusts on which they knew they were held” and, in addition, allegedly pursuant to the law of Guernsey,

“to preserve and enhance so far as reasonable the Trust Property” and

“not to derive directly or indirectly any profit from their respective trusteeships”.

299. No specific particulars of breaches of these alleged duties appear, but in my judgment this does not matter, because I accept Advocate Greenfield's submission that no such duties fell upon SNL and CNL at all. They were merely nominee shareholders, for their principal, STC. As such, they were bare trustees, but again for STC. Their only duty, in such a case, was to comply with any apparently lawful instructions given to them by STC with regard to

dealing with the shares in HIL or any rights attached to such shares. The allegations made against them are not within such description. The claim against them, as formulated, is thus basically misconceived and will be dismissed.

Second and Third Defendants

300. The Second and Third Defendants, CSL and SSL, were the corporate directors of HIL appointed by STC (though no doubt technically through CNL and SNL as legal shareholders). Paragraph 14 of the Amended Cause pleads the nature of duties owed by directors *to the company of which they are directors*. Paragraph 15 of the Amended Cause then pleads that

“as directors of each company they were trustees of the company’s assets as were in their possession and control and therefore required to safeguard such assets and property”

Insofar as this relates to a director’s power to deal with the company’s assets on behalf of the company, it adds nothing to the duties of a director, as previously pleaded. Insofar as it suggests that a director is personally in possession or control of the company’s assets simply through the office of being a director, it is misconceived.

301. It is then pleaded that insofar as the First (or Fourth and Fifth) Defendants

“are unwilling to pursue the Second and Third Defendants in respect of breaches of duty set out below, or dispute the right or ability of the Plaintiff to enforce such duties, the Plaintiff will seek the permission of the Royal Court to bring a derivative action against the Second and Third Defendant”

The pleaded response of the corporate Defendants in their Defences was that this was “noted”.

302. However, no such permission has ever been sought. The corporate Defendants therefore take the point that the claim against CSL and SSL must fail in this action even on the face of the cause, because the only duties pleaded to be owed by those Defendants are not, and are not even pleaded to be, owed to the Plaintiff; they are/were owed to HIL, and there is no derivative action on foot to support any claim by the Plaintiff.

303. The Plaintiff has objected that the Defendants should not be permitted to take this point, as they did not do so in their Defences, nor make an application at an earlier stage, but have simply ambushed the Plaintiff at the trial with it. Alternatively it is submitted that the Plaintiff should now be given permission to bring a derivative action or to proceed as if it had done. The Defendants say they would object to this course.

304. I agree with the Defendants on both counts. The pleaded case does not support any direct claim by the Plaintiff against these Defendants, and this position has not been cured. There has been no misleading of the Plaintiff about this. It was up to the Plaintiff to ensure that any claims he wished to pursue were properly founded and if necessary, therefore, to make any application which was necessary or appropriate to secure this. He has not done so, and it is far too late to do so now. The claim against the Second and Third Defendants therefore also fails.

First Defendant

305. This leaves only the claim against the First Defendant, STC, which is obviously the central claim in any event.

306. I remind myself, at this point, of the arrangements which STC was fully aware of between the material parties, and which I reviewed above. The known aim of the Welsh portfolio venture

was to realise profit from the Welsh properties as effectively (including “cost effectively”) as possible and to distribute this between the two, and latterly three, trusts in the agreed shares. STC was the trustee of each of those trusts. Plainly in conducting the affairs of each trust it was obliged to perform its duties as trustee towards that particular trust, and to look out for that trust’s interests. The proportionate shareholding in HIL was only the mechanism by which the profit sharing was to be effected. STC was not, therefore, acting as a trustee of an overarching trust in which several parties were interested through sub-trusts. It was acting in separate capacities as trustee of each trust, but in the context that their *aggregate* interests were intended to coincide with the interests of the general body of shareholders of HIL.

307. The way the system worked in practice was that decisions as to what transactions should be implemented by HIL were actually taken by STC in the personification of Mr Schreiberke. This was effectively admitted by Mr Schreiberke himself, and in any event, I so find. Where Mr Schreiberke had decided that it was appropriate for HIL to carry out a particular transaction, the invariable practice was for him to request, either directly or through Mrs Giles his assistant, that SSL and CSL acting, through their appropriate personnel, as directors of HIL, should record the holding of a Board meeting of HIL for the purpose of approving its entering upon the relevant transaction, and later, when it came to the execution of the formal documentation such as contract documents, or Land Registry Transfers, should provide the necessary corporate signatures.

308. There was no suggestion, nor evidence, of any independent consideration or scrutiny of Mr Schreiberke’s requests or directions, on the part of the appointed directors of HIL. STC, in the person of Mr Schreiberke, effectively ran this part of HIL’s enterprise, but it was still doing so, it seems to me, in its separate capacities as trustee of each of the three trusts. It was therefore, in my judgment, obliged to do so in accordance with the duties which it owed to each trust individually. With regard to transactions with third parties, then, as Mr Schreiberke agreed in the course of his evidence so long as the transaction was considered and implemented with a view to the interests of the general body of HIL’s shareholders in accordance with company law principle, that would automatically maintain the required balance of interests between the three individual trusts to which STC owed separate duties. However, where the transaction was not, or there were otherwise conflicting or differing interests, STC would have to act so as to reconcile and perform its individual duties. Mr Schreiberke also agreed that, in a situation where beneficiaries in a trust disagreed as to the right way to develop trust assets, then the only real solution was for one party to buy out the other party, at proper value. That is not, of course this case, but it is obviously appropriate thinking.

309. The allegations of breach of trust – the LS trust - against STC are pleaded at great length in the Amended Cause. The Plaintiff summarises them broadly as being

- (1) failing to consider, *en bon pere de famille* how to achieve the best return, with the result that the plots were sold at an undervalue, and
- (2) failing (in breach of trust and also of express actual agreement with Mr Jefcoate), to keep Mr Jefcoate sufficiently informed of dealings and to seek his consent to them.

in any case, being alleged to amount to gross negligence.

310. The second dual-limbed complaint is not a matter which in itself causes loss, and even if a breach of duty, could, in my judgment, amount to no more than an element of the first complaint. I have to say that I could also see no evidence of any agreement outside the trust deed, to supply information to Mr Jefcoate, and the terms of the trust deed are more limited. Complaints under this banner were not, in the end, pursued independently from the first and

plainly central complaint, namely that of negligently effecting or permitting sale at undervalue.

311. (I should add that there is also a surviving allegation of negligence by STC in failing to appoint Mr Nicholson as project manager. This was really quite bizarre, bearing in mind the accusations which the Plaintiffs were and are in effect made against Mr Nicholson. The rationale for this allegation was never really explained, and it did not appear to be seriously pursued. In any event, I could not see how it could have been argued to have caused any loss. I have not considered it further.)
312. STC identified the case against itself broadly along the lines noted above, but distilled six elements of greater detail from the particulars pleaded against it in Paragraph 30 of the Amended Cause, as follows. It is said that STC
- i. failed to satisfy itself of the values of the properties before transferring them;
 - ii. failed to take reasonable steps to market them;
 - iii. failed to identify the existence of valuable mineral resources, (specifically sandstone under Plot 8);
 - iv. failed to identify the possibility of planning permission and obtain it in respect of Wernos Washery;
 - v. failed to obtain funding from Mr Jefcoate to obtain planning permission for Wernos Washery; and
 - vi. transferred the properties at an undervalue.

The third point was never pursued. Apart from the fifth point, the others are all, again, aspects of a complaint of selling at undervalue.

313. STC contests the detail of each of the above live allegations, but its main defence is, in essence that
- (1) All the decisions which it (Mr Schreiberke) took were responsibly and independently considered, in the light of the scenario and objectives with which it was presented and the wishes of the participants in the agreed arrangements.
 - (2) STC was providing trust administration services, not property management, property development, or property valuation services, in which it had no expertise. It could therefore only act on advice, and, as a trustee, was entitled to do so.
 - (3) It was reasonable for it to take advice and recommendations from Mr Nicholson because (a) he had such expertise, and (b) his being the prime mover with regard to exploiting the properties' value was part of the scenario with which it had been presented. However, and in any event, it did not confine itself to taking advice from Mr Nicholson, but employed also other agents as appropriate (Mr Brien, Mr Hambly, Mr Sandy, Chestertons, DTZ, etc).
 - (4) Neither did it just routinely follow Mr Nicholson's recommendations or proposals unquestioningly. Mr Schreiberke actively considered each such matter and made his own independent decision. This included the decisions to give effect to the four challenged transactions.
 - (5) Mr Schreiberke understood and reasonably understood, from all the circumstances, that Mr Jefcoate approved this course, and either the transactions themselves or the general principle of Mr Nicholson's being the driving force with regard to strategy

and progress. It was reasonable for him to take it that Mr Nicholson would not mislead him about Mr Jefcoate's position.

- (6) Mr Jefcoate was never denied any information which he sought from Mr Schreiberke, but there could be no formal agreement that he must "approve" transactions carried out by the trustee because that would jeopardise the tax-saving effects of having an enterprise which was managed off shore from the UK.

314. Having carefully considered all the evidence, I am quite satisfied that, initially, Mr Schreiberke both appreciated the balancing exercise which he was required by STC's trust obligations to the different trusts to perform, and also that he did so fully, independently and conscientiously. One example of his looking out for HIL's independent interests is, I accept, that he indicated to Mr Nicholson in late 2003 that any offer which he (or any company of his) made for the Penallta site would be considered only upon its merits, although this does not appear to me to go so far as a rejection of an offer by Mr Nicholson, as Advocate Greenfield submitted it did. I also accept that there was an occasion when Mr Schreiberke insisted that a loan to Whitchurch from Mr Jefcoate's trust must carry interest rather than be interest free, thereby, protecting the financial interests of the LS trust as against the other participants – although I also observe that this might also have been thought necessary in order to maintain the independence of Whitchurch from any appearance of connection with Mr Jefcoate. In addition, in the early days, Mr Jefcoate had, visibly to Mr Schreiberke, clearly been involved in agreeing or approving transactions. I am satisfied that this was the case with regard to the disposal of the Celtic Energy site to Carnation, in 2000.

315. However, whilst this was the situation to begin with, I am also satisfied that it gradually changed over the years. Mr Schreiberke was, over time, exposed to far greater contact with Mr Nicholson than with Mr Jefcoate, and on a relatively frequent basis. Mr Nicholson encouraged and cultivated their close relationship, and also, I think likely, a bit of distance in Mr Schreiberke's relations with Mr Jefcoate by, for example, dropping, in early 2004, that Mr Jefcoate might be thinking of moving his funds to Switzerland. In addition, Mr Nicholson was usually accompanied by Mr Piper, which gave the reassuring appearance that the latter was concurring in whatever was said or proposed, albeit keeping an eye open for possible adverse tax effects. I am satisfied that, a result of all this, Mr Schreiberke became less independently vigilant on behalf of the individual trusts, finding it more and more natural to accept what Mr Nicholson said, or was proposing, as being appropriate. As already mentioned, I found it significant that Mr Nicholson began naturally to talk of decisions with regard to HIL using the word "we" and even "I", and I am satisfied that that is largely what it became in practice, certainly in the aftermath of the successful achievement of the Penallta sale.

316. By the time of the transactions with which I am concerned, I find that Mr Schreiberke had, in practice, come to give only cursory consideration to proposals from Mr Nicholson with regard, in particular to steps for the final stages of the project, and had taken his eye off the ball with regard to any need to examine them from the independent perspective of the individual trusts, and in particular, for present purposes, of the LS trust, as Trustee of that trust. Whilst he may well have asked about Mr Jefcoate's attitude, I find that he was soothingly assured by Mr Nicholson that Mr Jefcoate had been informed, and that he knew and was (or would be) happy with what was proposed. Mr Schreiberke accepted this.

317. It is against this general background that I consider the consequences of the transactions which I have found, above, to be at least *prima facie* dispositions at an undervalue.

Plots 4 and 8

318. The particulars of the negligence alleged to have been causative of loss in these two particular cases clearly boil down to disposing of the properties at an undervalue. None of the other

particulars given adds anything to this basic complaint. They are: failing properly to satisfy itself of the properties' value, failing to keep the parties "sufficiently informed" about them, failing to take reasonable steps to market the property, and in the case of Plot 8, allegedly selling [sic] to a party related to Mr Nicholson and failing to identify a sandstone resource on the site. This last has been abandoned.

319. These two plots, as already indicated were effectively a gift to Mr Field of, in practice, some £21,500 less auction expenses, although I accept that if the value of the gift had been assessed at the actual time, it would probably have been predicted to be less, since Plot 4, in particular, did better at the subsequent auction than would have been foreseen.
320. The justification for making this gift was said to be three-fold. First, the sites were said to be worthless (and according to Mr Nicholson "not the sort of trades we were interested in"); attempts at exploiting or marketing them had been made by Mr Sandy, and produced no results. Second, it was now in HIL's interests to divest itself of the responsibilities of ownership, it no longer being necessary to "hold" sites in order to appear to be an investment company; Mr Schreiberke was concerned about maintenance liabilities. Third, and now emphasised as the main reason, it was necessary to appease Mr Field for his grievance over not getting enough commission out of the Penallta deal, so as to retain his goodwill in seeking other opportunities for HIL.
321. I do not find the first two reasons convincing. They do not demonstrate why giving the property away was to be preferred to simply putting it up for auction. This course commended itself instantly to Mr Field, and should have been just as obvious to STC. Mr Sandy's pessimistic previous comments were now long out of date. Even after expenses, there was surely something to be made. Furthermore, if Mr Schreiberke had had Mr Brien's valuations in mind, the property being given away was worth between £35,000 and £50,000 – although I do not, in fact, think that Mr Schreiberke took Mr Brien's valuations seriously, at all. In the end, therefore, it is only the third reason which might provide justification for the gift.
322. It requires a good reason in terms of a *quid pro quo* of benefit, to justify giving away trust property, and in my judgment this is so even if the property is of relatively low value. However, the reason of appeasing or gratifying Mr Field by giving him more commission in the shape of these plots, and what would be the reciprocal benefit to HIL or the combined interests of the trusts in return for this, does not seem to have been expressly considered anywhere - and clearly not so far as to merit a written record.
323. I really have some difficulty in seeing how this further gift could be justified. Mr Field had received £100,000 as a "commission" for introducing UVES to carry out remediation work on the Penallta site, after his own company, Domen, had not performed under its own lease. On 26 June 2004, after the Penallta deal was signed up, Mr Field had submitted an invoice for £125,000 from Domen. Mr Schreiberke and Mr Nicholson both said that this was seen as "commission" for his part in negotiating the Penallta deal, even though the invoice was described as being for land remediation work (which Domen never did), with Mr Field explaining that this was just loose expression, because it had really been compensation for Domen's having spent money on equipment to do the supposed remediation work (again, even though it never did it). On 7th September 2004 Mrs Giles was able to inform the accounting arm of the Spread group that JF Enterprises Ltd had earned commission for introducing Redrow without a formal agreement and was "paid in full for its services". In those circumstances, I cannot see the justification for giving Mr Field, as JF Enterprises Ltd, yet more value as supposed "commission" for work already done and paid for, or at all.
324. I am not at all convinced that any such further payment was reasonably necessary to secure the continuation of valuable services (if any) from Mr Field for the benefit of HIL, or was seen as such, - as contrasted, possibly, with Mr Nicholson personally retaining Mr Field's

goodwill. In any event there is simply no evidence that evaluation of this, as being more beneficial than simply putting the properties into an auction, was ever considered.

325. In my judgment, failing to do so amounted to lack of due care, and was negligent and I find that, on balance of probability, it resulted in the value of those properties, less any concomitant fees, being lost. There was therefore no share of proceeds to pass up to LS. Mr Schreiberke, I find, simply agreed to what Mr Nicholson proposed, without, in this case giving any critical thought to the implications.

326. It is suggested that this claim cannot be pursued because Mr Jefcoate in fact knew about and approved the payment of commission to Mr Field. It is certainly correct that at a meeting with Mr Schreiberke, attended by Mr Nicholson and Mr Piper and this time also by Mr Jefcoate on 17th March 2004, Mr Jefcoate asked about payments due out of the sale proceeds of Penallta, and was told that there was commission due to Mr Field. The figure given in the typed notes of the meeting was £135,000, but it appears from other evidence that this was a typing error for £125,000. There is certainly no evidence or suggestion that the apparent £10,000 difference was intended to be taken into account by a gift of property. I am satisfied that Mr Jefcoate did not know of these transfers for nil consideration.

327. However, the matter does not end there, as STC prays in aid, if necessary, the standard form of Trustee exoneration clause contained in the LS Trust Deed which exempts a trustee from liability in respect of

“...any mistake or omission made in good faith or of any other matter or thing except wilful and individual fraud and wrongdoing on the part of the trustee who is sought to be made liable”

In Guernsey law, a trustee may not rely upon an exoneration clause to excuse him from liability for fraud or wilful misconduct or gross negligence: *The Trusts (Guernsey) Law 1989* as amended by *The Trusts (Amendment) (Guernsey) Law 1990, s 34 (7)*. There is of course no accusation of fraud or wilful misconduct. In order to succeed notwithstanding the exoneration clause, the Plaintiff would have to persuade me that the relevant breach of trust was not merely negligent, but grossly negligent.

328. “Gross negligence” denotes negligence, but of a particularly serious order.

“The terms negligence and gross negligence differ only in the degree or seriousness of the want of due care they describe”

Spread Trustee v Hutcheson [2012] 2 AC 194 at [117].

A working test is, I think, whether as a matter of impression, the degree of negligence excites astonishment, or whether one has the feeling that, careless though it is, it is understandable, or readily explicable.

329. Not without some hesitation, I am not persuaded that STC’s negligence with regard to simply giving away these properties when the option of putting them up to auction should have been reasonably obvious, was “gross” in this instance. My primary reason for doing so is that these were, on any basis, low value properties, not unreasonably seen as “Cinderella” properties and a very, very small part of the total portfolio, even at this stage. Previous indications were that they would realise little more than the costs of sale, and their subsequently demonstrated value would not have been apparent at the time. (As previously indicated, I do not regard Mr Brien’s valuations as being realistic, and I do not think anyone else did, either, with perfectly good reason). Added to this is the fact that this course was being recommended by Mr Nicholson who had come to be generally in charge of strategy, and whilst in my judgment, relying quite uncritically on Mr Nicholson’s proposals and any

supposed reason given by him was negligent, I do find that the circumstances temper the degree of negligence somewhat, in connection with such a relatively small matter.

330. In short, I find that STC, through Mr Schreiberke was in negligent breach of trust in disposing of Plots 4 and 8 in the manner in which it did, but that it is entitled to invoke Clause 23 of the LS Trust Deed and is excused liability. It is worth mentioning that, if I had concluded that these disposals were the consequence of gross negligence, I would have found the measure of damage to the LS trust to be less than £10,000 (47.5% of £21,500 less something for sale costs).

Plot 13 Crosshands

331. Again, the particulars of negligence boil down to selling at an undervalue, although in this case the allegation that the sale was to “a party related to [Mr Nicholson]” is accurate.

332. I have already found that the disposal of this plot to Carnation in December 2005 was, at the time, at an undervalue of some £125,000. The question is therefore whether, in all the circumstances, it was a negligent breach of trust for STC to authorise this transaction.

333. First, STC cannot, in my judgment, rely on Mr Brien’s valuation of the property in September 2004 at £60,000. In the context of the interest which had been shown previously in the site, its calculable prospective value as a consented development site, and its favourable local plan status, this value was absurdly low. Moreover, I have no doubt that this was well-understood by Mr Schreiberke and everyone involved. Whilst Mr Schreiberke points out this valuation in his witness statement, he was actually careful not to state in terms that he had relied upon it. I can see no evidence at all that this valuation was solemnly considered and found to be justification for selling the property to either Pinecraven or to Carnation for £500,000. No other valuation was obtained.

334. Next, Mr Schreiberke was aware of earlier and serious interest from other parties, in fact at a higher figure. It appeared from his witness statement, that he recalled the failure of this transaction to be because the potential purchaser had pulled out. In fact, and in correspondence of which he must have been aware at the time, it was Whitchurch who withdrew, obviously on Mr Nicholson’s instructions. The deal offered to Hales had been either at £800,000 with stage payments as units were sold, or £700,000 on receipt of planning permission. Hales had preferred, and was proceeding on, the former, but as Whitchurch had offered either, it can be inferred that Whitchurch regarded them as financially equivalent. The agreement with Carnation, over a year later (and it has not been suggested that the market was declining over this period, if anything the opposite) was at £500,000 subject to planning permission, rather than £700,000. This is a notably large discrepancy between the two figures. It surely required some consideration and explanation, if Carnation’s offer could fairly be regarded as open market value.

335. Yet none appears to have been sought by Mr Schreiberke, or offered. It could not have been that this was a transaction entered into for the purpose of generating cash flow for the project, since it was not intended to produce any immediate payment. Neither could it have been that there was time pressure on achieving a sale, even at a lower price, because of Mr Jefcoate’s wish to “retire” from the whole project and see it all closed down. This wish was only allegedly expressed once the Penallta deal had been secured, and this transaction was conceived in principle before that.

336. Mr Schreiberke relies on the difficulties with planning. Whilst I accept that these were known, and were greater than the norm, I again cannot see any evidence of their being evaluated in connection with an appropriate price for Carnation to pay. In fact, I formed the view that Mr Schreiberke’s evidence about having expressly considered the elements justifying this transaction at the time was more rationalisation than recollection.

337. I am satisfied that, from January 2004 when Whitchurch ceased negotiations with Hales, the position was that it had been decided, and thereafter it was simply accepted and assumed, that Mr Nicholson was going to purchase this property out of the joint venture through one of his companies. It was of course known that the site had some difficulties with planning, but in the end, this acceptance, meant that Mr Nicholson was largely able to name his price, secure in the knowledge that it would not be closely scrutinised, at least by Mr Schreiber, so long as it was not patently ridiculous.
338. It is submitted that it was reasonable for Mr Schreiber to rely on Mr Nicholson with regard to the appropriateness of prices for the relevant properties because Mr Nicholson had property expertise, Spread did not have such expertise and did not profess to do so, and obtaining outside advice would cost money, which was either simply unavailable, or was not favoured by the parties and in particular not by Mr Jefcoate. I would be inclined to accept this proposition with regard to arm's length transactions with third parties. However, this was not such a transaction. The possibility of conflict of interest, and the price proposed being self-serving on Mr Nicholson's part, rather than a detached assessment of market value, was very obvious, and in its capacity as trustee of LS's 47.5% interest in the project, it was STC's duty to be on guard against this.
339. It is submitted that in view of the history it was not unreasonable for Mr Schreiber to rely on assurances from Mr Nicholson as to Mr Jefcoate's position and agreement with his proposals, and that he could assume that Mr Nicholson would not mislead either of them. I can again accept that submission up to a point, but it depends greatly, once again, on whether the matter involves a transaction with a third party and at least apparently at arm's length, or a self-dealing transaction by one of the participants. It also depends on the significance of the transaction, and this transaction was plainly very significant.
340. The relations between Mr Jefcoate and Mr Nicholson were not a partnership; they were merely in a form of loose joint enterprise. There were no fiduciary duties between them, merely the duty of honest business dealing. Whilst, therefore, it was acceptable, at least in principle, for either party to purchase a property opportunity from the joint venture, this had to be at proper market value, to ensure that the purchasing party did not obtain an uncovenanted advantage.
341. This was both a major transaction in itself, and was also in relation to one of the properties which had been expressly envisaged at the outset as a profit generator for the equal benefit of both (major) participants. The transaction was being conducted with one of the participants, and upon his advice. In those circumstances, it seems to me that STC owed a clear duty to protect the interests of the other participants, but particularly the major one, the LS Trust, for whom it was trustee. In principle, that would involve obtaining independent advice to the effect that the transaction was properly at open market value.
342. Mr Schreiber did not do this. I can see that this would cost money, and that that might be a practical impediment to taking his proper course. If so, then the next best thing would obviously be to check directly with Mr Jefcoate, independently, that he understood and agreed to the transaction proposed with Mr Nicholson, and did so on the basis of apparently full information about it. This seems to have happened in the previous case of the Celtic Energy site, although in that case, and perhaps significantly, Mr Nicholson had had to offer more than an apparently low-end suggested market value to persuade Mr Jefcoate to allow him to purchase – a fact which I doubt was lost on Mr Nicholson. In my judgment it was not reasonable for Mr Schreiber simply to assume that Mr Jefcoate had been consulted and was fully informed, or to accept, as I think he effectively did, assurances from Mr Nicholson to this effect, without confirming the position directly to his own independent satisfaction.

343. Advocate Greenfield made the point that even obtaining such an assurance directly from Mr Jefcoate would not fully protect STC, because there were others who were interested in the LS Trust. I quite agree. However, it would go a very long way towards doing so. Mr Jefcoate was the major beneficiary, the provider of a Letter of Wishes, the original participant in the relevant project and the creator, therefore, of the asset in the trust, and he had a similar interest in this regard, to that of all the other beneficiaries of this trust. If he had independently approved the transaction, it would have been very difficult for any other beneficiary to claim that it was carried out in breach of trust. Throughout Mr Schreiberke's evidence, the question why he had not, at least, had a direct discussion with Mr Jefcoate about Crosshands was large in my mind, and I remain baffled as to why it did not occur to him to do so. In fact, this point seems to me to underline the extent to which he had come to look only to Mr Nicholson with regard to the Welsh properties, and to overlook that STC was supposed to be supervising the operation of this venture for the benefit of the Jefcoate interests as well.
344. I conclude, therefore, that STC was in breach of trust in transferring Crosshands to Carnation for £500,000, that there was consequent loss, and that this was caused by STC's negligence, in all the circumstances. The question, therefore, is whether this was, or was not, gross negligence.
345. Not without some hesitation, I have come to the conclusion that it was. I accept, of course that there was no fraud or deliberate breach of duty by STC, merely a failure to carry out the duties of skill and care required of them as trustee and administrator of the LS trust. I remind myself that the Welsh portfolio was not the only aspect of the interest of the LS trust, and Mr Jefcoate's companies, which they were administering, and must be seen in context. However, to my mind the obviousness of the danger of conflict of interest, and the simplicity of steps needed to obviate it (ie, to obtain an independent confirmatory valuation or, at least, to obtain clear concurrence from Mr Jefcoate) is so clear that the failure to do either is both very surprising and really very serious.
346. This may appear harsh, because I do accept that Mr Schreiberke is conscientious. I can see how in all the circumstances, starting simply to look to Mr Nicholson and to accept his information, advice and recommendations pretty well as a matter of course could be said to have been an easy mistake for Mr Schreiberke to slip into, because of the relationship which had developed between him and Mr Nicholson. However, that, and its potential for disadvantage to the LS is the very thing which, in my judgment it was part of STC's duty as trustee of the LS settlement to guard against. This is the more so given the evidence, which I accept, that Mr Jefcoate had previously raised questions about self-interested actions by Mr Nicholson (regarding expenses) even if this was in relation to Yolanda Limited.
347. I also add that I am satisfied that Mr Jefcoate did not contribute to Mr Schreiberke's lapse in this respect. Whilst I accept that he will have indicated to Mr Schreiberke that he did not want or expect to be involved in day to day management decisions, and was content for Mr Nicholson to deal with these, I am also satisfied that Mr Jefcoate never went so far as reasonably to lead Mr Schreiberke to believe that he (Mr Schreiberke) could assume Mr Jefcoate's agreement to Mr Nicholson's proposals with regard to significant property disposals even and especially to (in effect) himself.
348. I therefore conclude that STC cannot rely on the exoneration clause in the LS Trust Deed in this respect.
349. STC has two further arguments if this is the case. The first is reliance on the alleged knowledge and acquiescence of Mr Jefcoate in relation to the transaction. I have already found that assertion not to be made out on the facts. The second is an appeal to the jurisdiction of this court under s.55 of The Trust (Guernsey) Law 2007, to relieve trustees of liability where they have acted honestly and reasonably. Whilst I am satisfied (and the contrary is not alleged) that Mr Schreiberke acted honestly, I have held that the degree of

negligence involved in not ensuring that the disposal by HIL was at a proper current open market value was sufficiently serious as to amount to gross negligence. In those circumstances, it seems to me that it is impossible to find that the trustee acted reasonably. That is enough to dispose of this point.

350. As regards the measure of loss to the LS, whilst 47.5% of £125,000 is £59,375, I round this down to £55,000, to take account of the likelihood of expenses being incurred in securing either a fully arm's length sale, or an improved offer from Carnation.

Plots 15, 16 and 19, Wernos Washery

351. Since I have concluded above that the option granted to Landview Ltd was not granted at an undervalue, the question of breach of trust does not require to be considered. I therefore comment only briefly.

352. I am satisfied that Mr Field was never a "front" for Mr Nicholson, and this allegation was never even put to him. Whilst STC did not take any better steps than with Plot 13 to obtain independent assessment or confirmation of the value of these sites before agreeing to enter into the option agreement with Landview Limited on Mr Nicholson's advice, the difference in this case is that this was a transaction with a third party (unlike Plot 13) was not at an obvious undervalue (unlike Plots 4 and 8), and was not in circumstances exciting possible suspicion about its being for full value (again unlike Plot 13). In this case also, Mr Schreiberke did give Mr Jefcoate some information as to the transaction, at least shortly after the option was granted in March 2006, at a meeting on 24th May 2006, even though this was plainly simply accepted by Mr Jefcoate.

353. In those circumstances, whilst STC did not take any better steps to obtain independent confirmation of the value of these properties, and whilst I might well regard their conduct as negligent, I would not have considered it to be grossly negligent. However, since any negligence did not result in loss to the LS, this point does not arise.

354. I should record that, in relation to these sites, the original particulars of negligence included allegations that STC had failed to obtain planning permission for the properties and failed to approach Mr Jefcoate for funding for this purpose. This was not, in the event, pursued seriously at the trial. Apart from the two small areas of land on Plots 15 and 19, referred to above, where policy favoured the grant of residential permission, the prospects of gaining any worthwhile planning permission for this land in the reasonably foreseeable future were I am satisfied, very remote – as has subsequently been confirmed to be the case. This means that the complaint that Mr Jefcoate was not approached to provide finance falls away. I have already indicated that the nature of the rather rudimentary agreement between Mr Jefcoate and Mr Nicholson might well have raised difficult questions with regard to how (or if) any further funding would be obtained, but in the circumstances these questions are hypothetical.

Conclusions on breach of trust or duty

355. In summary, therefore, my conclusions with regard to the allegations of breach of trust or duty are that the claims fail entirely against the Second to Fifth Defendants, but that STC was in negligent breach of the LS trust with regard to authorising the disposals of Plots 4, 8 and 13. With regard to Plots 4 and 8, they are excused liability by the exoneration clause contained in the Trust Deed. As regards Plot 13, the fault was gross negligence in all the circumstances, and they are not entitled to rely on the exoneration clause, and nor can they or should they be excused under the court's statutory powers to grant relief to trustees. The damage sustained by the LS in consequence of this negligence can be assessed at £55,000, and the claim against STC succeeds to this extent.

Issue 4 – Reflective loss

356. This brings me to the fourth issue, namely the “reflective loss” point. This was played as a trump card by the corporate Defendants at trial, because, if it is correct, it means that even if the Plaintiff’s claim is otherwise a good claim, the court will not grant him a remedy.
357. The point was not foreshadowed in the Defences, but it is *prima facie* a pure point of law and so there is no requirement that it should be. It was not included in negotiations about the list of issues. The Plaintiff first became aware of the point, I understand, on receipt of the Defendants’ skeleton arguments. Advocate Lund therefore objected to the point now being taken, on this ground.
358. However, since it is a point of law, I reject that argument. The Defendants are entitled to take any point of law which the pleaded facts will sustain, although plainly the Plaintiff must have a fair opportunity to be able to deal with it. This has been afforded in this case, given the time which the hearing took. At most, the late but permissible introduction of a point of law might possibly have an effect in costs.
359. I have outlined the point in listing the main issues of the case in Paragraph 13 (4)(iii) above. The argument is this. It is accepted that Stuart Jefcoate, although a mere discretionary beneficiary of the LS trust, is entitled to make a claim for loss on behalf of the LS trust, against STC as its trustee, for damages for breach of trust, and the remedy would be to require the trustee to restore the trust fund accordingly. However, Stuart’s claim is for the restoration of LS’s proportionate share of the loss which was suffered on the disposal of the properties by HIL, who owned them; that share would have come to LS, ultimately by declaration of dividends from HIL to the intermediate holding companies including Tulip, and thence up to LS. The underlying loss, though, has been suffered by HIL, who would thus have a claim against those responsible, in damages. If such claim were made and met, LS would therefore receive its share. Thus, LS’s claim simply corresponds to, and thus “reflects”, the loss suffered by HIL. In those circumstances, neither LS nor, therefore, Stuart Jefcoate can recover, because his claim is barred by the doctrine of “no recovery for reflective loss”.
360. The Defendants submit that it is well established that reflective loss is not recoverable by a shareholder in a company alleging diminution of the value of his shares, relying on *Johnson v Gore Wood (a Firm)* [2002] 2 AC 1. They say that the principle is equally applicable to a beneficiary of a trust of shares seeking to recover for a loss to the value of shares held by his trustee, citing *Ellis v Property Leeds (UK) Ltd* [2012] EWCA Civ 32 at [17] and *Sukhoruchkin v Van Bekstein* [2013] EWHC 193, at first instance (Morgan J). The Plaintiff’s claims are therefore misconceived as a matter of law; any claim in respect of the underlying losses suffered could and should have been brought by HIL and, without launching a derivative action, which he has not done and now cannot do, Stuart is barred from any remedy.
361. By a supplemental skeleton argument Advocate Lund points out that there is no Guernsey authority on this topic and that this court is not bound by English authority. She contests the application of *Johnson*, *Ellis* and *Sukhoruchkin*, noting that this last, first instance, decision was reversed on appeal at [2014] EWCA Civ 399. She points out that in *Freeman v Ansbacher Trustees (Jersey) Ltd* [2009] JRC 03, 12 ITELR 207 the Royal Court of Jersey (Birt DB) held that it was at least arguable that the doctrine of “no recovery for reflective loss” should not and did not apply in Jersey law to a discretionary beneficiary seeking to sue in respect of losses suffered through the negligence of the trustee who was acting as director of a company which was wholly-owned by the trust, which she submitted was no different in principle from this case. She suggested that the cases of *Hotung v Ho Yuen Ki* [2010] HKCA 385 and the Jersey case of *A v D* [2014] JRC 032 showed support for the principle of direct recovery by beneficiaries in this kind of situation.

362. She argued that the reasons why the Plaintiff should not be barred from recovery in this case were, first, that the rule is an exclusionary rule, preventing a party with an otherwise good claim from making recovery, and therefore it should be applied cautiously, and only with good reason and where clearly just. She argued, second, that the policy reasons given in *Johnson v Gore Wood & Co* (ie, avoidance of double recover from potential defendants, and potential defeat or prejudice to the company’s creditors) do not apply on the facts of this case and, third, that the countervailing policy reasons advanced by Birt DB in *Freeman v Ansbacher*, for suggesting that the rule should not be applied, were forceful and should be followed in Guernsey.

363. In a further skeleton argument, Advocate Greenfield responded to these arguments, submitting that the Guernsey Court ought to look for guidance from English authorities on company law, and citing Talbot LB in *Jackson v Dear* (Royal Court, unreported, 26th March 2013) that:

“since [the importation of the concept of a limited company] into Guernsey law in the late 1880s it has naturally been appropriate to look to English law to help in the solution of problems concerning companies which are not covered by Guernsey statutes or customary law”

He points out that Lord Millett in *Johnson v Gore Wood & Co* stated that the principle of “no recovery for reflective loss” is a matter of principle as to which “*there is no discretion involved*” see [62]. He submits that this is because the principle arises inexorably from the fundamentals of company law and the separate identity of a company from its shareholders. He emphasises Gibson LJ’s statement in *Ellis* that the principle applies to a beneficiary of a trust which holds shares in a company, just as it does to an ordinary shareholder.

364. Advocate Greenfield goes on to refer to *Shaker v Al Bedrawi* [2003]1BCLC 157, in which the argument was that a claim by a beneficiary against an alleged trustee for an account of profit gained from shares held on a claimed constructive trust was not caught by the “no reflective loss” principle. He refers to the judgment of Peter Gibson LJ, that

“the Prudential principle [ie the “no recovery for reflective loss principle”] does not preclude an action brought by a claimant not as a shareholder but as a beneficiary under a trust against his trustee for a profit, unless it can be shown by the Defendants that the whole of the claimed profit reflects what the company has lost and which it has a cause of action to recover” (page 223H-224A),

from which he argues that the principle plainly does cover such a claim if, as he submits is the case here, the Defendants can show such a correspondence of loss. He points out that this case was endorsed in *Gardner v Parker* [2004] EWCA Civ 781 and refers to the judgment of Neuberger LJ (as he then was) at [37] to [46] and in particular that

“even when a claim is brought against a trustee for breach of fiduciary duty, it can be barred by the rule against reflective loss” at [43].

Shaker v Al-Bedrawi had been followed in in *Barnes v Tomlinson* [2006] EWHC 3115 where Kitchen J repeated the principle at [81].

365. Advocate Greenfield accepted that the first instance decision of Morgan J in *Sukhorchkin* had been reversed on appeal, but pointed out that this was not on the main point of principle, but rather on its applicability at an interlocutory stage before the facts were sufficiently ascertained.

366. He lastly submitted that there were good policy reasons to be wary of following the decision of Birt DB (as he then was) in *Freeman v Ansbacher*. First, it was only at the interlocutory stage; the learned Deputy Bailiff of Jersey held only that it was arguable that the “no

reflective loss” principles did not apply, in Jersey law, to a case where a beneficiary was suing a trustee directly in respect of losses sustained through the trustee’s negligence as director of a company owned by the trust. Second, it was inconsistent with a now well established line of English authority, and its attempt to distinguish those cases which had by then been decided – it had obviously not reviewed the later ones - were not sound. Third, the consequences of following the approach of Birt DB would leave the law “in a mess” rather than improving it, as it would (it was suggested) create unprincipled distinctions. Fourth, and in any event, it had been mooted only in relation to the case where the company in question was wholly-owned by the trust, which was not the fact of this case.

367. Advocate Greenfield also submitted (and I accept) that the Plaintiff’s reliance on *Hotung* and *A v D* as support in another jurisdiction for Birt DB’s approach would not, on examination, bear the weight sought to be placed upon it.

368. Finally, he referred to the policy considerations behind the rule and suggested that they applied in this case, and that this was not harsh, as the Plaintiff’s remedy lay in his own hands; he could and should have sought to bring a derivative action on behalf of HIL, but had simply not done so.

Discussion and conclusion on this issue

369. With a little hesitation, I have come to the conclusion that even insofar as the rule of “no recovery for reflective loss” may be held to be a part of Guernsey law - and I am far from entirely satisfied that it needs or ought to be - that does not require it to be applied in this case, and I do not do so.

370. I should say at this point that I am not fully convinced that the basis for applying the “no reflective loss” rule necessarily exists in the first place. The claim which I have upheld is against STC for negligent breach of trust in respect of the LS. This negligence happens to have brought about a sale of a property owned by HIL at an undervalue. However, that sale was actually implemented by the Second and Third Defendants acting as directors of HIL. They were under no separate duty to the LS, and STC’s duty to guard the LS’s individual interest is a significant part of the basis upon which I have held STC to be liable to the Plaintiff. A claim by HIL would *prima facie* be brought against its directors, and STC was not such a director. As I have already indicated, the directors of STC were accustomed to act in accordance with the expressed wishes, virtually amounting to instructions, of STC in the shape of Mr Schreiber, but I have heard no argument or analysis of the situation on the basis of the concept of STC as a “shadow director” of HIL and how far and to what extent that is a part of Guernsey law. Whether, therefore, HIL would have a claim against STC in the situation in which I have found Stuart Jefcoate to have such a claim is not necessarily a foregone conclusion. Although I think it has been suggested in the English cases that the rule against reflective loss can apply even when the prospective defendants would not be the same persons, it again does not seem to me that this is entirely settled, and since the major justification for the rule against recovery of reflective loss appears to be that of double recovery against defendants, rather than potential unjust enrichment of the Plaintiff (see *Gardner v Parker* at [2004 2BCLC 566 at [49]) that again seems to make such a claim somewhat questionable. I note the reasons given by Neuberger LJ in *Gardner v Parker* for declining to depart from the reasoning of *Shaker v Al-Bedrawi* as a “recent clear, unanimous and fully-reasoned conclusion” of the same court in “a difficult and developing topic” (see 2004 2BCLC 566 at [46]). These reasons, though, appear to me to owe much to a policy of promoting consistency where law is currently developing. That, though, is in England, and this is not (or more accurately not yet on this point) a consideration in Guernsey, which is free to develop its own rules and limits on any such doctrine as appear to be most appropriate.

371. In principle, and untrammelled by authority, I would find the argument that a claim by a beneficiary against a trustee for breach of trust referable to a duty which is not identical with

the duty of care imposed on a director to the relevant company, would be sufficiently different from the loss suffered by the company to mean that any principle of “no recovery for reflective loss” did not obviously apply. However, in the circumstances, I do not treat that as a reason for rejecting this argument at the first hurdle, and I proceed on the assumption that the facts surrounding the loss in this case *prima facie* fall within the qualifications for being classed as “reflective loss”.

372. On this basis, first, I accept Advocate Greenfield’s point that the “no reflective loss” rule as it is applied in English law does extend to claims made by beneficiaries of trusts. However, that does not take the argument much further, since this seems to me to be “does” only in the sense of “can”. *Ellis* for example, was a case where the company’s claim was in negligence against a third party and the shareholders’ had claimed in respect of the diminution in value of their shares. The point made was simply that the rule applies equally to claimants who hold shares directly, or who hold interests in trusts which hold shares. Likewise, authorities such as *Shaker* and *Gardner* establish that in England, the rule can apply even where a claim to recover can be formulated as a proprietary claim, rather than as a claim for damages. The point to be extracted from these cases seems to me to be that, in the very many different factual situations which may require to be considered, it is the practical effect of the challenged claim, and whether in practical reality it corresponds to a claim by the company, which is regarded as the key factor, and not what the nature of the cause of action might be. The English authorities are mostly, therefore, concerned with deciding where the rule can apply, and not so much with laying down precise rules and situations as to where it inevitably does apply. They emphasise that whether the rule does apply can be highly fact specific, because the issue whether a claimed loss is totally reflective of a loss for which the company can claim is a fact specific situation.
373. Turning to general approach, Guernsey law is not automatically to be assumed to be the same as English law. Guernsey is an independent jurisdiction, and its laws have a different origin from the common law. It is free to find and formulate its own laws in ways which are consonant with the underlying principles of Guernsey law, completing the detail in the way which best suits its small jurisdiction and the characteristics of its law and economy.
374. Whilst I accept the logic of Talbot LB’s proposition in *Jackson v Dear* (above) that, having imported the concept of a limited company from English law into Guernsey law, it is “natural” to look to English law to “help with solutions” to any problems arising in that area, the operative word is “help”, not “dictate”, and this does not require slavish following of English decisions as authoritative in all aspects. Whilst Guernsey law may have imported the concept of a limited company from English law in 1880, that does not, in my judgment, require that it must also be taken to have imported every detail of the law of companies as developed in England, where developments may have become over-complicated or over-refined. In such a case, Guernsey law is free to find its own solutions.
375. The “no reflective loss” rule is recognised to be exclusionary. It prevents a plaintiff who otherwise has a recognised good claim against a defendant from making any direct recovery from that defendant. It is accepted, even in the English authorities, that it should therefore be applied cautiously, and only in the cases where it ought, according to its rationale, clearly to be invoked, and I accept Advocate Lund’s submission to this effect. In my judgment, therefore, the proper approach must be to have close regard to the principles behind the rule to see whether, in any particular case, Guernsey law also must view that principle as being applicable. This is not to suggest that the application of the rule is a matter of discretion in the sense of a judgment as to reasonableness, but merely that the precise parameters within which it applies may justifiably be found to differ in Guernsey law from English law. The rule is stated in the highest English authority, *Johnson v Gore Wood* to be one of “policy”: see Lord Millett, at [62]. This suggests, in any event, that in an appropriate case it may cede to any other policy which the court judges ought to carry greater weight. In fact, it appears to

me that this is implicitly recognised in the judgment of Neuberger LJ in *Gardner v Parker (supra)* as it is accepted that the rule can be “disapplied” in appropriate circumstances.

376. Against this background, I also accept Advocate Lund’s submission that neither of the policy reasons for imposing the “no recovery for reflective loss” rule appears to apply to this case, because the possibility of the situations against which it is supposed to guard occurring in practice is unrealistic and impractical, even to the point of being fanciful. HIL is no longer in existence, having been struck off the register of companies in 2008. Its demise was the natural end to its existence, as it was then seen as having completed its functions. There is no suggestion that it was insolvent or had creditors unpaid at the time, and I find the balance of probabilities to be strongly against this possibility, bearing in mind that it was being administered by a responsible group of trust administration companies. In those circumstances, the objection that creditors might be prejudiced by diversion of monies if the Plaintiff is allowed to recover in this action does not apply.
377. Furthermore, given the nature of the relationship between the parties, and the subject matter of the claims made, the prospect of HIL itself ever being resuscitated and bringing a claim against, or involving, STC, so as to bring about a double recovery against STC, is also to my mind, vanishingly small. In any event, in the remote possibility that anyone thought it worthwhile to revive HIL and then procure it to pursue a claim against STC in respect of the undervalue at which I have found Crosshands to have been sold, I have no doubt that any order for recovery against STC and in favour of HIL could, as it then plainly should, be devised so as to prevent any unjust double recovery against STC by the LS. If necessary STC could join LS as a party to any such action, in order to ensure this.
378. Neither can it be suggested that allowing direct recovery by the Plaintiff in this case will prejudice the rights of other shareholders in HIL, who will somehow be “deprived”, to the advantage of LS. LS will recover nothing that would otherwise have gone to either Paraguay or Genoa. In all the circumstances, also, Mr Nicholson could scarcely complain, and Mr Piper showed no inclination to do so.
379. In those circumstances, I find that the policy reasons for applying the rule of “no recovery for reflective loss” in this case are really theoretical only, and simply of no weight in practice. I do not see that merely pursuing conceptual consistencies for their own sake should be a principle which trumps practicality. The law of Guernsey is practical and in those circumstances I conclude that the “no reflective loss” rule does not apply, or will not be applied, on the facts of a case such as this.
380. Put another way, in my judgment the dissolution of HIL, before this action was ever brought, renders the alternative remedy of a derivative action sufficiently “unavailable”, in Guernsey law, to override the doctrine of “no recovery for reflective loss” as it might otherwise apply. I find that Guernsey law looks to sensible practicality as an underlying facet of customary law. This is apparent in, for example, the approach it takes to the principles of *empechement d’agir* in the context of prescription. In those circumstances, I find that Guernsey law will consider “availability” in a practical, rather than a theoretical or conceptual way.
381. I have considered whether a second reason why I should reach this conclusion is that I should follow the arguments of Birt DB in *Freeman v Ansbacher* (see 12 ITELR 207 at [97], pages 241-248) as to why the “no reflective loss” rule should, at least “strongly arguably” not apply in Jersey law, certainly the complaint is of maladministration of the affairs of a company which is wholly-owned by the trust and run by the trustee. I find that argument to be rather persuasive, and it seems to me that the same considerations which impelled the learned Deputy Bailiff of Jersey (as he then was) to that view, apply similarly to Guernsey. In particular, I am impressed with the force of the argument that it is inconvenient, unnecessary and does not reflect well on a system of justice for litigants with a simple and obvious claim for breach of trust against a trustee to be compelled by rules of process to take cumbersome

and indirect court proceedings in order to vindicate their claims, such as having to bring a derivative action. This is all the more so given the huge costs of all litigation these days, a burden which is compounded where for example, the pursuing of claims by some other route may involve other defendants, or reviving a company which has since been dissolved.

382. I was not dissuaded from that basic view by most of the cautionary objections made by Advocate Greenfield as regards following Birt DB's approach. Whilst *Freeman v Ansbacher* may have been only an interlocutory decision, that does not detract from the force of the points made. The answer to any objection that the approach is inconsistent with a well-developed line of English authorities is simply that Jersey and Guernsey, law are independent jurisdictions. The argument that, having taken advantage of a trust and corporate structure, the Plaintiff is fixed with the consequences of that choice, beg the question; the Plaintiff (more accurately Mr Jefcoate, in fact) chose a Guernsey trust and corporate structure and is therefore fixed only with the consequences of that choice as they are found to operate in Guernsey law.
383. However, I did find one objection to have more force, and this is the consideration of the potential anomalies and distinctions which Advocate Greenfield suggested could result from applying Birt DB's approach to any but, at most, the case of a company which was a wholly owned subsidiary of the trust, and with the beneficiary seeking simply to obtain reconstitution of the trust fund. Those arguments appeared to have some substance. With this being but one of a large number of issues in this case, they were not examined in great depth in argument before me. Whilst, as mentioned, I respectfully find the arguments advanced by Birt DB in *Freeman v Ansbacher* to be very attractive and persuasive, I am therefore cautious about applying them to this case as a general principle of law. I therefore prefer to rest my decision on the first, and narrower, basis set out above, namely that, neither of the two policy reasons for applying this exclusionary rule in fact operate on the facts of this case, that it is a rule of policy rather than a rule of legal principle, and that otherwise the Plaintiff is, in practical terms, without any remedy, and was so at the time of commencement of the action.
384. I should just add, finally, that I have given careful consideration to whether this conclusion is inconsistent with my earlier holding that the Plaintiff is not entitled to succeed against the Second and Third Defendant because he cannot bring any claim against them in the absence of a derivative action, which he has failed to launch timeously, in effect through his own fault. However, I do not think it is in fact inconsistent, and certainly not to a degree that ought to preclude my arriving at this conclusion. It is not obvious that even if permission to bring a derivative action had been sought, and sought timeously, it would have been granted. Denying the Plaintiff a right to recover upon his claim in this action if otherwise appropriate, *only* because he failed to try to launch a derivative action to obtain a different remedy when he might have done, would seem to me to be simply punitive, and therefore unjust. I do not consider that any general principle as to maintaining regard for the separate personalities of a company and its shareholders, or the consequent "Prudential" rule, requires going that far.
385. I would add that, if I had upheld this point in favour of the Defendants, I would have been inclined to listen sympathetically to any argument that, having won on this point without having foreshadowed it before the time of skeleton arguments, the Defendants should face some sanction in costs. Whilst it may have been a pure point of law, and therefore could be taken without being expressly pleaded, it was a point which challenged the very basis of the Plaintiff's claim. It is not consistent with the overriding objective of dealing with cases justly that such a point should only be revealed at the actual trial, if it could and should have been raised earlier, in order to enable the opposing party to consider his position, and to save the costs of investigating other aspects of his claim if it were going to be held to be fundamentally misconceived. Of course it may be anticipated and feared that the effect of raising the point earlier might be to enable the opposing party to prepare better to resist the challenge, but in that case, whilst a defendant may succeed on a point of law raised late in the day, there seems to me to be a strong argument that he should not then also recover the further costs which he

was willing to cause in order potentially to gain that advantage. I have heard no evidence about this, and I emphasise that I am not finding that this is what happened here. However, I make this observation in order to encourage litigants to be frank about the basis of their cases, and reduce wasted costs and time in and about litigation.

FINAL DECISION

386. The ultimate result of this case is, therefore, that the Plaintiff's claims against the Second to Seventh Defendants are dismissed. The Plaintiff's claim against the First Defendant succeeds to the extent that the First Defendant will be ordered to restore £55,000 to the LS Trust. I will hear Advocates further on the form of order and any other outstanding matters, including costs.

HH Hazel Marshall QC
Lieutenant Bailiff