[2019] EWHC 26 (Ch)

IN THE HIGH COURT OF JUSTICE **C30BM120**

BUSINESS AND PROPERTY COURTS IN BIRMINGHAM

BUSINESS LIST (ChD)

Birmingham Civil Justice Centre
The Priory Courts
33 Bull Street
Birmingham
B4 6DS

24 January 2019

BETWEEN

NORTHAMPTON BOROUGH COUNCIL

Claimant

-and-

(1) ANTHONY MICHAEL CARDOZA

(2) DAVID ANTHONY CARDOZA

(3) CHRISTINA LORAINE CARDOZA

Defendants

Representation
James Morgan QC instructed by Osborne Clarke LLP for the Claimant
Mohammed Zaman QC instructed by RadcliffesLeBrasseur for the First Defendant
Emma Edhem instructed by RadcliffesLeBrasseur for the Second and Third Defendants

Hearing dates : 2-6 and 9-13 July 2018, 24 January 2019

JUDGMENT

I direct that pursuant to CPR 39APD6 paragraph 6.1 no tape recording shall be made of this judgment and that copies of this version shall stand as authentic and be treated as the official transcript

HHJ SIMON BARKER QC :

Introduction

The claim

1 By a deed of assignment ('the Assignment') made on 10.12.15 between Northampton Town Football Club Limited ('NTFC'), as assignor, and Northampton Borough Council ('NBC'), as assignee, NTFC assigned to NBC all of its rights, title, interest, and benefit in and to specified debts and claims. The specified debts were said to be owed by 1st Land Limited ('1st Land'), by then a company in administration, County (Oundle) Limited ('Oundle'), and County Developments (Northampton) Limited ('CDNL'), by then a company in liquidation. The specified claims were all and any claim, counterclaim or cause of action, howsoever arising, which NTFC then had or may have had against Mr Anthony Cardoza ('D1'), Mr David Cardoza ('D2') and others, including 1st Land, CDNL and Oundle. In this action NBC, as assignee and by reference to the assigned claims, alleges that (1) D1 and D2 (collectively 'Ds') received or benefitted from payments in breach of their statutory duties as directors of NTFC, and (2) D2's transfer by way of gift of his interest in his family home ('Cheriton') to his wife, Mrs Christina Cardoza ('D3'), on 3.7.15 ('the Transfer') was a transaction at an undervalue for the purpose of putting an asset of his beyond the reach of present or future creditors.

2 The relief sought by NBC against Ds includes (1) an inquiry as to the dealings by D1 with £2.05million received from Oundle and 1st Land over the period 23.9.13 to 2.6.14 and what (if anything) remains of that sum, (2) an account of what is due from Ds in respect of breaches of their fiduciary duties and payment thereof, (3) a declaration that they hold such sums as may be found to be due on trust for NBC, (4) damages or equitable compensation in excess of £1milion, (5) restitution of amounts due as monies had and received, and (6) other relief including interest.

3 The relief sought against D2 and D3 includes (1) a declaration that the Transfer constituted a transaction defrauding creditors under s.423 of the Insolvency Act 1986 (respectively 's.423' and 'IA 1986'), (2) orders to restore the position to what it would have been but for the Transfer including a re-vesting order and a charging order over D2's interest as security for D2's liabilities to NBC, and (3) other relief including interest.

4 In essence Ds' answer to the money claims made and relief sought against them is that they were, or honestly and reasonably believed that they were, entitled to, or entitled to

treat, all monies they received and payments for their benefit as repayments of their respective director's loans to NTFC, and, further, that NTFC suffered no loss as a result of their actions. The essence of D2's and D3's answer to the challenge to the Transfer based on s.423 is that the Transfer was the fulfilment of a long standing arrangement between D2 and D3 and was made at a time when there was no reason to believe any claim would be made against them.

NTFC

5 To the world at large, NTFC is first and foremost a football club, 'The Cobblers'. It was founded as a club in 1897 and incorporated as NTFC in 1922. NTFC men's first team plays in the Football Association's professional leagues. At all material times, the men's first team has played in the fourth tier of professional football, that is League Two. NTFC's home ground and stadium stands on an 11 acre site and is known as 'Sixfields'. At the material times the site included a car park and an athletics track and area ('the Athletics Area').

6 In so far as this litigation concerns NTFC, it is not about football or NTFC as a football club as such. It is about NTFC as a business, the investment opportunity it presented, and the use made of part of sums totalling £10.25million drawn down by NTFC under three loan facility agreements (individually 'the Loan', two or more collectively 'the Loans') which NBC entered into to fund the development of the stadium and facilities at Sixfields and the development of an adjacent 30 acre brownfield site in an area identified by NBC as an enterprise zone ripe for regeneration ('the Adjoining Land'). The development of Sixfields was to upgrade the stadium facilities, to add corporate entertainment boxes and facilities, and to build a hotel. The development of the Adjoining Land was to include a conference centre, a shopping mall or village, and housing. One element of the development proposal was that a proportion of the development profits would accrue to the benefit of NTFC and place it on a secure financial footing.

7 Ds acquired a 65% shareholding in and, thereby, control of NTFC in December 2002. D2 became a director on 14.2.03 and D1 was appointed a director on 12.5.03. At all times when Ds were directors of NTFC until mid-2015 there were three other directors of NTFC. Two were non-executive directors and one was a representative of the supporter shareholders whose shares were held through a trust. During 2015 Ds further increased their shareholding, which by then was some 68%, to more than 75%. Consequently, the supporters' trust shareholding reduced or was diluted from approximately 5% to 3.5%. In June 2015 Ds decided to abolish the supporter

shareholder representative directorship. Ds resigned as directors and sold their controlling shareholding on 25.11.15.

8 Both before and throughout Ds' control of NTFC its financial position was precarious. At its financial year end date of 30.6.02, that is shortly before Ds acquired control of NTFC, NTFC had net liabilities of £2.5million and accumulated losses of almost £4million, having made a loss for the year to 30.6.02 of some £875K. For all but three[1] of the thirteen years that NTFC was under Ds' control, NTFC was loss making. Its net liabilities increased from £2.5million at 30.6.02 to £8.8million at 30.6.15 and accumulated losses increased from almost £4million to £12.2million over the same period.

9 I shall return to Ds' departure from NTFC and NTFC's finances in more detail.

The Claimant

NBC

10 At all material times NBC owned the freehold of Sixfields and of the Adjoining Land. Prior to Ds' acquisition of control of NTFC Sixfields was let to NTFC under a short lease. Until 2004 NBC contributed significantly, that is in the order of £400K annually, to the maintenance and overhead costs of operating Sixfields. One reason for this support was that NBC regarded NTFC as important to the local community. As freeholder NBC was able to require any development project to improve the amenities available to the local community.

11 In 2004 NBC granted a 150 year lease of Sixfields to NTFC at a premium of £1 and a peppercorn rent. Under the lease NTFC took over responsibility for the maintenance and overhead costs relating to Sixfields. NTFC was then under Ds' control. D1 maintained that this arrangement was driven by oral assurances from the then mayor of Northampton and two councillors that NBC would support NTFC's proposal for development of Sixfields and the Adjoining Land. There is no cross-claim by D1, thus whether or not that was so does not arise as an issue in this case. That said, it was asserted by Ds, and not gainsaid by NBC, that throughout the decade during which they controlled NTFC several NBC councillors encouraged Ds to believe that NBC supported the proposals for the development of Sixfields and the Adjoining Land.

[1] y/e 30.6.09, 30.6.11, 30.6.13

12 It would not be unfair to characterise NBC's approach to the development of Sixfields and the Adjoining Land as burdened by bureaucracy. To an extent this may be explained by the need to act with care and caution in deciding how best to apply publicly owned assets and resources and spend public funds. However, it appears to have taken a decade to reach the position of agreeing a conditional contract for the development of Sixfields and the Adjoining Land. There is evidence to suggest that after control of the council shifted to the Conservatives in 2012 the negotiations gathered pace. It also appears that it was not until June 2013 that Ds agreed subject to contract heads of terms ('the Heads of Terms') with development co-venturers for carrying out the development project. It is not obvious, at least not to me, that slow progress with the former necessarily caused the delay to the latter.

13 On 13.9.13 NBC made a conditional agreement for the sale of the Adjoining Land with NTFC and CDNL. CDNL was a special purpose joint venture development company set up and co-owned by Ds and business partners in the development venture including Mr Howard Grossman ('HG'). HG was the leading light of the County Group group of companies. In his written evidence, Mr Francis Fernandes ('FF'), NBC's chief legal officer and Borough Secretary, summarised the conditions as : (1) CDNL obtaining satisfactory planning permission (which required a s.106 agreement to be in place); (2) NBC and NTFC being satisfied that CDNL had both the finances and the capacity to deliver the development; (3) NBC being satisfied that alternative arrangements were in place for the relocation of the Athletics Area and for Rugby and Northampton Athletic Club to have use of the new facilities on similar terms to those contained in their existing licence at Sixfields; (4) NTFC surrendering its leasehold interest in relation to the Athletics Area; (5) NBC having a freehold interest in all of the Adjoining Land; and, (6) CDNL being satisfied that there were no other leasehold interests or third party rights affecting the Adjoining Land which would inhibit the development. In the event, CDNL failed to meet condition (1) and failed to satisfy NBC under condition (2). Accordingly, the development contract never became unconditional.

14 Also on 13.9.13, and in connection with the making of the conditional contract, NBC granted a 150 year lease of the Athletics Area to CDNL for an initial payment of £1 and a peppercorn rent, other obligations, and a legal charge in the sum of £5million to secure CDNL's obligations, once the conditional contract became unconditional, to pay that sum as the development progressed. To facilitate this lease NTFC surrendered its lease over the Athletics Area.

15 On 18.9.13, following on from the conditional contract and the lease to CDNL, NBC entered into the first Loan. This agreement was for a £7.5million facility to be used by NTFC only for the redevelopment of and improvements to Sixfields, excluding any works relating to the development of a hotel at Sixfields. NBC granted full planning permission for the improvement works to the east stand at Sixfields on 28.11.13. The second Loan, dated 14.4.14, was for a further £1.5million facility also to be used only for the same purpose. The third Loan, dated 23.7.14, was for a further sum of £4.5million to be used only for the development of hotel accommodation at Sixfields. NBC sought to protect its exposure under each of the Loans by taking a legal charge over NTFC's lease of Sixfields.

16 Between 20.9.13 and 19.8.14 the sums available under the first and second Loans, totalling £9million, were paid by NBC to NTFC in tranches of £1.5million pursuant to draw down requests from NTFC. On 23.7.14 NTFC drew down £1.25million under the third Loan.

17 On 14.2.14 NTFC, as employer, and 1st Land, as contractor, entered into a JCT design and build contract for works to the east and west stands at Sixfields in the sum of £8.2million, some £0.7million more than the then available facility under the first Loan. By that time NTFC had already drawn down £3million under the first Loan. 1st Land had been incorporated on 16.9.13 and was under the direction of HG. 1st Land was never in a position itself to carry out building works and appears to have been established to receive and distribute monies drawn down by NTFC under the Loans. In oral evidence Ds were unable to suggest any sensible reason for the appointment of 1st Land as contractor. Such works as were carried out prior to NBC terminating the Loans were carried out by Buckingham Group Contracting Ltd ('BGCL') initially under an agreement with 1st Land and, later, under an agreement with CDNL. Notwithstanding NTFC's drawdowns, the works progressed slowly and were interrupted by, amongst other things, BGCL stopping work for non-payment and withdrawing from the site in 2014. CDNL was wound up on 22.10.15 pursuant to a petition presented by BGCL.

18 The extent to which NBC was informed of or monitoring the progress of the works at Sixfields is unclear. There were meetings at which the business plans for the development were described or explained to NBC[2]. However, NBC was monitoring NTFC's compliance with its interest obligations under the Loans. Mr Glenn Hammons

[2] eg C6/2007 2.4.15

('GH'), then NBC's chief financial officer, was closely involved in all financial matters relating to the development of Sixfields and the Adjoining Land, including the Loans. From mid-2014 onwards NTFC, more often than not, failed to pay interest and instalments of principal on the due date. These defaults were initially for a day or so and were tolerated during 2014. During 2015 NTFC's failure to meet its obligations under the Loans on time became acute, with no payment being made on time between March and August inclusive.

19 From the early part of 2015 NBC raised queries with NTFC about the use made of monies drawn down. It appears from the evidence that NTFC, by D2, failed to give satisfactory answers, both in response to emails and at meetings in May and June 2015. NTFC also continued to default on making payments when they became due. On 24.9.15, exercising its contractual termination rights, NBC gave NTFC formal notice of default under the first and second Loans and demanded payment of £10.3million in respect of principal and interest.

20 On 5.11.15 NBC received information that money drawn down had been used for purposes other than development; specific information included that more than £160K had been used to pay interest and instalments of principal to NBC and more than £830K had been paid to NTFC's solicitors. Also in early November 2015 NBC learnt that HMRC had presented a winding up petition against NTFC.

21 The events over the two years leading to the formal demand by NBC appear to have fuelled NBC's interest in Ds both individually and collectively. With NTFC under new control and management as from 25.11.15, and given the impecuniosity of NTFC and the political unattractiveness of pursuing rather than supporting NTFC, NBC decided to adopt other strategies for recovery of loaned monies. These included the Assignment.

22 Having acquired the right to make claims open to NTFC under the Assignment, NBC set about investigating the way in which the draw downs were applied and the conduct of Ds as directors of NTFC. As part of such investigations NBC obtained from NTFC information about payments to Ds from or attributed to monies drawn down under the Loans and details of Ds' director's loan accounts with NTFC. The claims made by NBC in this litigation are the result.

The Defendants

Anthony Cardoza (D1)

23 In 2002 D1 was told that NTFC was for sale. D1 was in his late 50s. He had been retired for 20 years, having worked as a stockbroker for the preceding 20 years and having, as

he put it, "*made a large amount of money over that period from personal investments"* and *"homes in France and Switzerland, as well as a 130 acre farm in West Sussex and a number of personal investments*". D1 said that in 1997 he had also sold an investment in Hong Kong for $13million. In his evidence D1 gave three reasons for deciding to buy a controlling interest in NTFC : (1) the opportunity to translate his life-long passion for football into involvement in a football club, (2) supporting his son, D2, in his business career, and (3) the opportunity to turn NTFC into a profitable business through development of both NTFC's stadium and the acquisition and development of the Adjoining Land. In addition, of course, D1 saw an opportunity for himself and for D2 to make a significant profit.

24 It is not in dispute that over the course of his involvement with the club, D1 made very substantial cash contributions by way of director's loans to NTFC. At its height, D1's balance on his director's loan account to NTFC exceeded £6.7million. Further, when he and D2 sold their controlling shareholdings in NTFC on 25.11.15 for nominal consideration, D1 also wrote off or waived a significant sum outstanding as the balance on his director's loan account. NTFC's audited accounts for the year to 30.6.15, which were signed off on 29.3.16 by the new board that had replaced D1 and D2, referred to balances on directors' loan accounts totalling more than £5.1million net having been waived. A schedule[3] prepared by NTFC's company secretary and financial controller, Mr James Whiting ('JW' and 'JW's schedule') showed the balance waived by D1 as some £4.2million.

25 While a director D1 was keenly interested in the development activities. As both a director and the principal source of funding to keep NTFC afloat and in business D1 was familiar with NTFC's financial affairs. He was also a regular attender at NTFC's matches. D1 was well placed to see for himself, on an ongoing basis, the extent, such as it was, of the progress of development works undertaken at Sixfields.

David Cardoza (D2)

26 In 2002 D2 was then in his early 30s. D2 had worked as a stockbroker for some 15 years, initially in London and then abroad. D2's evidence was that his "*main interest at that point was in running a football club rather than an investment opportunity*". D2 came to NTFC with no established background in business management or property development. There is no evidence before me that D2 was an independently wealthy man at any relevant time.

[3] B1.4 p1481

27 D2 was managing director and chairman from 14.2.03 until his resignation on 25.11.15. D2 had day to day control of NTFC's affairs, albeit in practice subject to the continuing financial commitment and oversight of D1. D2 was present at Sixfields both for matches and to fulfil his day to day duties. D2 was undoubtedly well aware of the development work in fact undertaken at Sixfields.

28 D2 signed a service contract with NTFC on 16.4.03. The terms were operative as from 1.1.03 and were to continue for a fixed term of five years and thereafter until terminated on not less than 12 months' notice. There was a long-stop termination date of the last day of the month in which D2 reached the age of 70 years. D2's duties were to serve NTFC as chairman and managing director and carry out such duties as the board of directors of NTFC may from time to time direct. D2's contractual duties expressly included to (1) devote all of his time (on the basis of a 40 hour week plus such further time as may be required), attention and skill to his employment, (2) properly perform his duties and exercise his powers, (3) comply with the proper and reasonable directions of the board and NTFC's articles, and (4) keep the board fully informed (in writing if so requested) of his conduct of the business, finances and affairs of NTFC. NBC's case includes that D2 did not properly perform his duties or keep the board fully informed.

29 The service contract provided for D2 to be remunerated by payment of an annual salary, accruing from day to day and paid monthly through BACS, of £250K subject to deductions for tax and NI. There was no entitlement to additional director's fees. The service contract also provided that D2 might waive his right to receive such remuneration for any period of time in writing, and that his salary would be reviewed annually. D2 was to be provided with a company car and reimbursed or provided with a credit card to cover properly incurred expenses. In relation to outside interests, D2 was to disclose to NTFC's board all interests in any other business.

30 In practice, D2 did not follow the remuneration terms. D2 did not at any point expressly in writing waive his entitlement to remuneration; however, he did sign off the annual accounts of NTFC each year without any provision being made for any outstanding or unpaid remuneration due to him as a creditor of the company or for liabilities to HMRC in respect of PAYE and NI. D2's written evidence as to his remuneration was :

" *… I was never paid regularly and I often did not take monthly payments. I always paid myself by way of drawings against my director's loan account, instead of salary. There was no regular pattern*." ….

"*After signing the service agreement, I did not receive any payments of my salary. Instead, when I was in need of money, I took money from the club in part repayment of my directors loans. That was tax efficient as I did not have to pay income tax on the monies which I received. It also benefitted the club as it reduced the value of my directors loan account and therefore NTFC's liabilities. The process was common knowledge at Board level as well as with the club's accountant's, Murphy Salisbury*".

31 The extent of D2's financial support of NTFC is more complex than that of D1 and cannot be conveniently summarised in a sentence or two. At this stage of the judgment it is right to record that D2's position is that he made very substantial loans to NTFC and that he wrote off or waived a significant sum still outstanding as a loan when he and D1 sold their shares in NTFC on 25.11.15. According to JW's schedule the balance on D2's director's loan account waived by D2 on 25.11.15 was in the order of £1million. What is not clear to me is the source of monies loaned or said to have been loaned to NTFC by D2. Save in so far as the same can be identified as a balance by reference to NTFC's audited accounts this adds a further layer of uncertainty to the monetary interaction between D2 and NTFC.

Christina Cardoza (D3)

32 D3's involvement in this litigation is consequential upon being the donee of D2's beneficial interest in Cheriton and thereby becoming its sole owner, subject to then existing charges. There is evidence that from 2009 onwards D3 fulfilled a number of duties at NTFC including ordering players' and supporters' kit and dealing with kit suppliers. The documents in the trial bundle include a reference for D3 written by JW containing a lengthy list of tasks undertaken by D3 at the club and valuing her contribution as worthy of an annual salary of £40K. I have not been referred to any evidence that D3 was in fact paid a salary by NTFC.

D1, D2 and D3

33 Each of D1, D2 and D3 strenuously deny all claims against them and contend that the claims are highly artificial. Both D1 and D2 maintain that they acted honestly and reasonably throughout their tenure of office as directors of NTFC and assert that NTFC suffered no loss as a result of anything that they did. D3 relies on a promise said to have been made by D2 in or about 2008 that he would transfer his interest in Cheriton to her. D2 and D3 maintain that the Transfer, which was executed on 3.7.15 some 5 months before execution of the Assignment, took place at a time long before there was any reason to think a claim might be made against D2.

Approach to evaluating the evidence and findings as to reliability of the witnesses

34 Mr Morgan QC for NBC, Mr Zaman QC for D1, and Ms Edhem for D2 and D3 each submitted that the court was in a position to and would form its views of all of the witnesses. In the event there were only five witnesses who gave oral evidence, FF and GH for NBC and each of D1, D2 and D3.

35 In addition, Mr Tony Sawdon, the son of a now deceased long standing friend of D1, made a very short witness statement referring to loans totalling £125K made by his father to NTFC or D1 in respect of NTFC, and to a loan which he made in 2015, all of which were unsecured because Mr Sawdon and his father trusted D1, and all of which were repaid. Unsurprisingly that evidence was unchallenged. In my view that evidence does not have any significant bearing on the issues in this case and it does not carry weight in the evaluation of D1's reliability as a witness.

36 As to the considerations applicable to evaluating evidence, a useful starting point is Goff J's (as he then was) observation as to resolving conflicts of evidence in Armagas Ltd v Mundogas SA (The Ocean Frost) [1985] 1 LL Rep 1 at p.57

> " … Where there is a conflict of evidence … reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth".

37 Factors relevant to the evaluation of a witness's evidence were identified by Lewison J (as he then was) in Painter v Hutchinson [2007] EWHC 758 (Ch) at [3] when addressing the unsatisfactory nature of the defendant's approach to giving evidence. These included : evasive and argumentative answers, tangential speeches avoiding the question, blaming legal advisers for pleading, disclosure and evidence shortcomings, self-contradiction, internal inconsistency, shifting case, new evidence, and selective disclosure. This was not intended to be an exhaustive list, but it is important and very helpful.

38 A useful recent reminder or guidance on the approach to the evidence of factual witnesses, and expanding on the guidance given by Goff J in The Ocean Frost, was given by Leggatt J (as he then was) in Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm). After noting that human memory is fallible and that the process of litigation and preparing for trial tends to interfere further with the reliability of human memory, particularly where a lawyer has had a hand in drafting a witness's evidence and the witness's memory has been refreshed by reading documents, Leggatt

J concluded that the best approach for a judge to adopt at the trial of a commercial case is to base factual findings on documentary evidence and known or probable facts and the inferences to be drawn therefrom. Witness evidence, written and oral, is not without purpose; but, its principal uses are to subject the documentary record to scrutiny and to evaluate the witness's motivations, personality and working practices.

39 In similar vein, in the recent case of Freemont (Denbigh) Ltd v Knight Frank LLP [2014] EWHC 3347 (Ch) reference was made to an article written by Bingham J (as he then was) entitled "The Judge as Juror : The Judicial Determination of Factual Issues" published in Current Legal Problems 38 in 1985. Bingham J considered the approach to deciding upon the reliability of a witness's evidence and regarded the following to be helpful indicators of where the truth lies : the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred; the internal consistency of a witness's evidence; and, the consistency of a witness's evidence with what (s)he has said or deposed on other occasions. Bingham J considered that the credit of a witness in matters not germane to the litigation was of less assistance, and that the demeanour of a witness was on the whole not a reliable pointer to a witness's honesty.

40 Mr Zaman QC in particular, and Mr Morgan QC to a lesser extent, referred to persons who could have been but were not called as witnesses. Both counsel acknowledged that JW was a person likely to be in a position to give material evidence. Mr Zaman also referred to a number of political figures at NBC, to local MPs at the relevant times, and to NTFC's auditors on the basis that they should have been called by NBC.

41 On the question of absent or silent witnesses, Mr Zaman referred to Wisniewski v Central Manchester Health Authority [1988] PIQR 324 and the substantive judgment of the Court of Appeal given by Brooke LJ at pp.339-340 to the effect that : (1) in certain circumstances a court may draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in the action; (2) if a court is willing to draw such inferences, they may strengthen the evidence on that issue of the other party or weaken the evidence on that issue of the party who might be expected to call the witness; but, (3) there must be some evidence adduced by the other party, i.e. there must be a case to answer on the issue, before inferences may be drawn; and, (4) if there is a reason for the absence or silence of the witness which satisfies the court, no such adverse inference may be drawn.

51 As to JW as a potential witness and his absence as such, Mr Morgan did not dispute that JW might have been a useful witness from the court's point of view, but submitted that to focus on why JW was not a witness and what, if anything, flows from that is to take a wrong turn. Mr Morgan submitted that the correct approach is to focus on what evidence Ds have adduced by way of explanation for any payments shown by NBC to have been made to them. Mr Morgan cited a passage in the judgment of Newey J (as he then was) in GHLM Trading Limited v Maroo & Ors [2012] EWHC 61 (Ch) at [143] – [149]. Newey J there reviewed a number of authorities addressing the question of whether directors who are shown to have received company money are under an evidential burden to show that the payment was proper, including Ultraframe (UK) Ltd v Northstar Systems Ltd & Ors [2005] EWHC 1638 (Ch) at [1513], Gilllman & Soame Ltd v Young [2007] EWHC 1245 (Ch) at [82], Re Mumtaz Properties Ltd, Wetton v Ahmed [2011] EWCA Civ 610 at [16] – [17] and [57], and Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd [2011] EWCA Civ 347 at [34], and concluded that :

> " …. Once it is shown that a company director has received company money, it is for him to show that the payment was proper. In a similar way, it seems to me that, where debit entries have correctly been made to a director's loan account, it must be incumbent on the director to justify credit entries on the account. That conclusion makes the more sense when it is remembered that the director (a) will have been (one of those) responsible for the management of the company's business and (b) will have had a responsibility for ensuring that proper accounting records were kept".

Debit entries on a director's loan account relate to the director as a debtor to the company and justification of the settlement of that debt must be shown by the director. However, Newey J was illustrating the more general point that it is for a director to justify entitlement to company money.

52 Mr Morgan submitted that it was open to Ds to have called JW and/or any other witness to address the propriety of the payments put in issue and, having chosen not to do so, they cannot properly complain that it was for NBC to call JW or anyone else.

53 Mr Zaman submitted that NBC could and should have called JW because at the material times he was NTFC's company secretary and finance controller and since 25.11.15 he has remained at NTFC in a senior management role, namely CEO and company secretary, albeit not as a director. Mr Zaman drew attention to the references to JW in NBC's pleaded case at [15] in relation to NTFC's financial difficulties in 2014-15 and at [18] in relation to D2's instructions as to the accounting treatment of £2.05million paid to and claimed from D1. Mr Zaman further submitted that in such circumstances it would

be wholly inappropriate for the court to take the view that there is no property in a witness.

54 The evidence shows that there is a significant body of email correspondence to which JW was privy, both as a correspondent and on a copied-in basis, in addition it is apparent that he was relied on by D2 as an executive manager at NTFC. JW was responsible for implementing the directors' instructions and referred to D2 throughout as 'chairman'. From November 2015, or possibly earlier, he appears to have become a whistle-blower and to have passed information to NBC.

55 I recognise that JW may well have been a useful witness from the court's point of view. It is the case that there is no property in a witness. Either side might have sought to call JW as a witness. I consider that each side must have had reasons for not calling JW which weighed sufficiently against the advantage to them of calling him. Left in that position by the parties, the course I should adopt is to consider Ds' explanation for receiving the monies shown by NBC to have been paid to them without drawing adverse inferences against NBC by reason of JW not being a witness, while at the same time being open to the possibility that information provided by JW from November 2015 onwards might, at least in part, have been provided with an element of self-interest. Further, JW's schedule, showing movements on D1's and D2's loan accounts over the three accounting years from 1.7.13 to 25.11.15 (when their loan accounts were waived and written off), was referred to both in the course of cross-examination and submissions.

56 My view of JW's position at NTFC during the period that NTFC was controlled by D1 and D2, based on the evidence to which I have been referred and have heard, is that JW, as an employee of NTFC, was a manager and was subservient, answerable to and did the bidding of D2. In terms of authority he was not on a par with D1 or D2 and recognised that he was not in a position to make decisions about the management and affairs of NTFC.

57 To look primarily to D1 and D2 to explain the receipts admitted by or shown by NBC to have been paid to them is consistent with the course identified by Newey J in GHLM Trading and the cases referred to by him. This seems to me to be all the more appropriate where, as in this case, receipts put in issue by NBC were not entered in

NTFC's books, including not recorded in the director's loan account, contemporaneously and possibly not at all, at least not permanently.

58 As to the absence of evidence from NBC's councillors and local MPs at the material times and NTFC's auditors, NBC's case includes that the relevant agreements and the necessary planning permission were matters for NBC's cabinet and its permanent officers, not for individual councillors or local MPs and, further, that Ds knew that. Accordingly, those witnesses could not have added anything of substance by way of relevant evidence. Moreover, the critical events were documented and there is a formidable body of contemporaneous documentation, including email traffic. In my view there is force in these points.

59 As to the auditors, their evidence could have addressed transactions and balances on directors' loan accounts, the deferred creditors in NTFC's balance sheets, and their reasons for expressing uncertainty as to NTFC's ability to continue as a going concern. However, the audited accounts are in evidence and as neutral officers of NTFC it was equally open to either side to call the auditors.

Assessment of the reliability of the witnesses

Francis Fernandes (FF)

60 NBC's first witness, FF, was criticised by Mr Zaman QC for failing to sign NBC's disclosure statement until part way through his cross-examination. That FF would sign NBC's list of documents had been stated as an assurance at the PTR on 14.5.18. Ds' solicitors wrote 5 times chasing such a list, including on the Friday immediately before commencement of the trial. FF agreed that these requests had been drawn to his attention. Central to this criticism was the non-disclosure of a report by a firm of accountants and an assertion by NBC's solicitors, taken to have been on instructions, that there was no expert report to be disclosed. Strictly this was correct but NBC's uncooperative approach and delay in doing as promised understandably encouraged suspicion on the part of Ds and their advisers. Another aspect of disclosure criticism was the late disclosure of hard copy files of NBC officers including its CEO (David Kennedy), chief finance officer (GH), and director of regeneration and planning (Stephen Boyes). FF's answer was that disclosure was based on key word searches and there had not been any suppression of documents by or on the instructions of FF. As to the accountants' report, FF's answer was that the accountants had been engaged as the result of outsourcing the internal audit function and that the accountants were

only looking at the conduct of NBC; if anything, this answer pointed to the likelihood that the report was disclosable.

61 FF was also cross-examined about being interviewed by the police under caution. This followed FF referring to hearsay information from a whistleblower alleging misuse of Loan monies, in particular to fund works for D2 at Cheriton and to make payments (said to be £10K - £30K) to a former leader of NBC, while in office, during 2011-2015. The whistleblower was identified as Stuart Paxton (aka Colin Patterson). Information received had been passed to FF by email in March 2015 and FF had met the whistleblower in April 2015 and subsequently. FF's evidence was that he had passed the information on to the police because it related to potentially criminal activity and was beyond his remit. He understood his interview to have been in this context. My view of FF's approach is that it was appropriate and should not cause me to treat FF's evidence with caution. Any adverse reflection is on the conduct of D2 and others involved in the development through 1st Land and CDNL and companies under the ultimate control of HG.

62 FF was also cross-examined on why NBC had alleged, in Further and Better Information provided under his signature, that NTFC had become insolvent no later than 30.6.13 given that the same criteria for insolvency (fundamental uncertainty, accumulated losses, net liabilities) had all been a feature of NTFC's state of affairs throughout the years 2002-2013. Beyond saying that the selection of the 'no later than 30.6.13' date had been a team effort, FF could not elaborate.

63 Other points with which FF agreed during cross-examination included that the leader of NBC had been told that the trigger points[4] for drawing down tranches of the Loans had all been met and all draw downs were lawful; FF's evidence was that NBC took issue with the use made of monies drawn down. FF also agreed that the writing off of directors' loans when D1 and D2 sold their shares in NTFC was a benefit to NTFC. FF did not agree that the action taken by NBC was a smokescreen to deflect critical attention from NBC itself.

64 The criticisms of disclosure, for which FF took responsibility on behalf of NBC, point to shortcomings in the conduct of NBC during important procedural stages of the case, but they do not justify a finding of suppression of documentary evidence during disclosure

[4] C11/4258

and, in my view, do not impact adversely on FF's reliability as a witness. The answers FF gave during cross-examination and the concessions he made in oral evidence, agreeing with Mr Zaman QC as identified above, were freely and openly given. FF did not seek to avoid answering questions and was not argumentative or evasive. FF took responsibility for shortcomings in disclosure and his own role both contemporaneously and in the proceedings. I regard FF as a reliable witness.

Glenn Hammons (GH)

65 GH's credibility as a witness was challenged in cross-examination on two bases, first, that he was interviewed under caution by the police and, secondly, that he received but did not disclose hospitality. GH's evidence was that he was interviewed under caution three times (once in July 2017 and twice in June 2018) and that he had expected that form of interview in connection with the police's investigations into the Loans. The non-declaration of hospitality related to being the guest of HG at a Tottenham Hotspurs match in London and being a guest at a meal before or after the match. The hospitality was received after the signing of the first Loan but before draw downs. As chief finance officer of NBC, GH was the most senior official on the finance side approving draw downs. In my view, the provision of this hospitality says more about the mindset of those interested in securing the borrowing than its non-disclosure does about GH as a responsible officer of NBC and a reliable witness.

66 GH's cross-examination also covered GH's dealings and relationship with HG, D1, D2 and others; the Loans and that the draw downs were all proper; the formulation of NBC's claim and those with whom GH had or had not discussed the claim; the events leading up to the Assignment; the writing off by D1 and D2 of their loan accounts and acceptance that D1 wrote off a sum in the range £3-£5million which was to the benefit of NTFC; NTFC's financial condition; and, NBC's and GH's contemporaneous knowledge of NTFC's cash flow position (unknown on GH's evidence). Throughout his cross-examination GH answered all questions straightforwardly. I have no hesitation in finding that he was a truthful witness and that I should accept his evidence.

67 Thus, I accept that NBC was not provided with information, such as cash flows, pointing to NTFC's insolvency when considering whether to make the Loans but relied instead on NTFC's business plan. This is relevant to NBC focussing on NTFC's (in)solvency at 30.6.13 rather than a historic review to when NTFC was first insolvent or whether it was ever solvent. I also accept that NBC did not make any representations or give any

assurances that it would take a relaxed attitude to the interest payment obligations under the Loans.

Anthony Cardoza (D1)

68 In his closing submissions Mr Morgan identified examples of (1) serious unreliability in D1's evidence, (2) important omissions from D1's evidence, (3) D1's lack of understanding of his duties as a company director, (4) D1's general propensity to tell lies and mislead, and (5) significant concessions drawn from D1 by persistence in cross-examination.

69 It is not necessary to recite more than a few of the examples : (1) D1 was unable to explain why he asserted in his written evidence that NTFC was able to pay its debts as they fell due and was therefore not insolvent until he withdrew his support in October 2015 beyond saying that he did not understand what insolvency was and his statement, or that passage, had been written by his solicitors; (2) D1 failed to address the £2.65million "Exclusivity Fee"[5] agreed with County Group in June 2013; (3) D1 regarded himself and D2 and their interests as indistinguishable from NTFC and NTFC's interests and, as he acknowledged, he gave no thought to NTFC's creditors; (4) D1 accepted the proposition that in business dealings, including with NBC, HG, and others he would suppress material information to create a false picture; (5) D1 also accepted that he had no answer to the proposition that in business he would lie to suit his own purposes, indeed he openly averred that that was how he conducted business; and, (6) eventually D1 was driven to concede that even on his best case not all of the £2.05million received by him from draw downs as part of the Exclusivity Fee or key money paid by Oundle and 1st Land for County Group or HG for the opportunity to participate in the joint venture through CDNL was surplus to NTFC's requirements.

70 On the last point, the payment of £2.05million to D1, D1's evidence that these payments were treated as repayment of his director's loan and increased NTFC's net assets is false on both points. The £2.05million was accounted for through D1's director's loan account as shown in specially prepared management accounts in connection with a litigious dispute with County Group and a statutory demand by 1st Land against D1, but management accounts are no part of a company's books and records and there is no evidence that the payments were formally entered and retained in NTFC's books and records as loan repayment to D1. Moreover, they are not entered on JW's schedule.

[5] Also referred to by D1 in oral evidence as 'key money'

71 D1's evidence included all the features of unsatisfactory evidence identified in Painter v Hutchinson. After being caught out in lies, D1 accepted that his approach to giving evidence was that he would make a statement or give an answer that he thought suited his position irrespective of the truth and, if it was not accepted, he would attempt to try something different if given the opportunity. This admission suffices to undermine any reliance on D1's word when not supported by an independent reliable document or other independent reliable evidence. D1's responses to Mr Morgan's cross-examination more than justify my conclusion that, unless consistent with undisputed facts or supported by independent documents, D1's evidence was, and is to be treated by me as, unreliable.

72 D1's demeanour as a witness was urbane and engaging. However, his demeanour is a front for a person who, at least in business and in litigation, is thoroughly untrustworthy and unreliable.

David Cardoza (D2)

73 D2 is proud to be viewed as a man in his father's image. He readily admitted that, like his father, he believes that lying and suppressing the truth is part and parcel of doing business. In his evidence, he too ticked all the Painter v Hutchinson boxes.

74 Mr Morgan's characterisation of D2 in closing submissions was that he (1) had no concept of his duties as a director of NTFC; (2) did not hesitatate to lie or tell half-truths to suit his purposes; (3) failed to give relevant and important evidence in his witness statements; (4) avoided questions and hedged his bets in oral evidence until he had been shown documents; (5) blamed others for events, omissions and for shortcomings in his evidence; and, (6) was consistent only in being seriously unreliable.

75 Mr Morgan's first line of questioning struck at the core of these criticisms. D2 started by agreeing that Barclays Bank (NTFC's banker) was an important creditor and asserted that he had been honest in all dealings with the bank "*as far as I know*". D2 was then taken to documentary evidence showing that he had disregarded a bank instruction that the NTFC overdraft facility was not to be used for repayment of directors' loans. In that opening exchange D2 was also driven to accept that his attempt to disguise payments to himself as other NTFC expenditure was not honest and he volunteered that he "*would do whatever it took to keep the business ticking over and keep certain creditors happy*". By "*happy*" meant not driven to the point of litigation or initiating insolvency process. The

point was driven home (if that were needed) by reference to an email from D2 to a fellow director, Mr Barry Hancock, referring to a payment of £20K being filtered through NTFC's then lawyers and a further receipt of £75K from a transfer fee also being paid to Mr Hancock. D2 accepted that this was a dishonest deception of NTFC's banker and asserted that this dishonesty was "*just one isolated incident*", a bold and untrue statement.

76 As to Mr Morgan's six submissions and submission (1), Mr Morgan fairly relied upon D2's (a) disregard of his duties under his service contract, including in particular the duty of disclosure of interests (which did not happen in relation to the development project or diversion of monies or its value to cover the costs of works to Cheriton), (b) view that his personal interests were entirely aligned with and the objective of the interests of NTFC (he had no compunction about "*fast forwarding*" payments to himself with the result that pressing creditors were left unpaid), and (c) disregard for the interests of creditors (he regarded creditors as a source of working capital only to be paid as little as possible when he or JW, acting on his instructions, were no longer able to fob them off).

77 As to (2), when being cross-examined about a business plan submitted to NBC in the context of negotiating for the development and the Loans, D2 started by asserting that he had always been honest with NBC. He was then taken to the business plan and manipulated figures which showed a position that could not be achieved. D2 justified the unrealistic business plan on the basis that that was what happened in business and any business would do that. As to negotiating with NBC, D2 denied that NBC was entitled to be told the full and true facts in order to make an informed decision, and he regarded it as legitimate to exaggerate costs in order to hide the profit expected to be made from developing Sixfields and the Adjoining Land.

78 As to (3), at [52]-[53] of his witness statement D2 gave evidence about the four payments from draw downs of the Loans totalling £2.05million paid to D1 over the period 23.9.13 to 2.6.14. The impression his witness statement sought to give was that, contemporaneously, D1 asked D2 to account for those payments through NTFC's accounting records as repayments of his director's loan and that during the litigation with County Group it became apparent that that had not occurred. For the purposes of the litigation with County Group and 1st Land, management accounts were prepared for the year ended 30.6.14 falsely showing that the £2.05million had been accounted for as repayment of D2's loan account. These entries were never put through NTFC's books.

D2's evidence that they should have been was undermined by Mr Morgan's cross-examination to the effect that at each year end and before D2, as a responsible director, signed off NTFC's accounts JW would talk D2 through the year end accounts. D2 signed NTFC's annual accounts to 30.6.14 which did not show any part of the £2.05million as a repayment to D1 of his loan account.

79 As to (4), as D2's cross-examination progressed, he realised that oral evidence he was giving was repeatedly contradicted by documents. As a result, he sought to avoid giving direct answers and, at times, asked if there was a document he could be shown. In other words, he became more guarded and defensive as his oral evidence progressed.

80 As to (5), D2 blamed JW for matters concerning NTFC's business, his lawyers for shortcomings in his written evidence, and NBC whenever he could. As to NTFC's business, D2 said that JW lied to creditors on a regular basis to keep NTFC's "*doors open*". What the documentary evidence, in particular email dialogues between D2 and JW, shows is D2 instructing JW to lie and complimenting him as a good learner on a rare occasion when he took that initiative of his own accord.

81 As to (6), in his closing submissions Mr Morgan gave a lengthy list of valid examples. One suffices here. On 3.6.13, D1 and D2 for NTFC and HG for County Homes Ltd (a County Group vehicle under HG's control) signed the subject to contract Heads of Terms for a joint venture to acquire and develop Sixfields. Express provision was made for certain payments. An undocumented term was that £750K of work would be carried out at Cheriton at the expense of the venture. Funding was to come from the Loans and, thus, be borne at least indirectly by NTFC and was a misapplication of NTFC's monies to the detriment or loss of NTFC. D2 struggled to explain the reason for and the suppression of this term, which was implemented at least in part. In an email of 1.10.14 to his lawyer in connection with the County Group litigation D2 said that £750K, of which £630k had been spent by 1st Land, was part of the price for HG to buy into the joint venture and they would have to ask HG why the term was not in the Heads of Terms. In his re-amended defence D2 stated that HG did not see the relevance of adding this term to the Heads of Terms. In his witness statement D2 said that HG did not want that term in the Heads of Terms but wanted to have a separate and specific agreement. When taken back to the 1.10.14 email D2 was visibly uncomfortable and unable to provide an answer to the question why he had lied to his lawyer.

82 Ms Edhem re-examined D2 at some length. However, the impact of Mr Morgan's cross-examination was not diminished and some of D2's answers emphasised his unsuitability for the position he held as managing director and chairman of NTFC. In relation to his evidence as to his unfamiliarity with and failure to read his service contract, in particular his ignorance of and failure to comply with the disclosure of interests clause, and contracts generally, D2 said that "*It has become clear that is how I have done things*". In relation to NTFC's finances, D2 said that he did not review management accounts month by month, he regarded that as detail and relied on JW to give him an overview, while he concentrated on "*strategy*". This answer left me none the wiser. On another point relating to accounts he said that he was not familiar with accounting concepts and left that to JW. I am driven to the conclusion that D2 took no interest in and, therefore, had no real understanding of NTFC's financial position or the year end accounts that he signed year after year; I also conclude that D2 was content to proceed as managing director and chairman of NTFC without troubling to take an interst in NTFC's finances beyond staving off the most pressing creditors. In connection with the joint venture for the development of Sixfields and the JCT contract for the development works, D2 said that he left everything to County Group and its lawyers, "*it was left to County to make this happen and get NTFC's stand built as well*", which prompted D2 to add "*I should not have signed the JCT contract. I was naïve*".

83 My conclusion is that truth is a concept of no value or significance to D2, even when on oath. As with D1, unless consistent with undisputed facts or supported by independent documents, D2's evidence was, and is to be viewed as, unreliable.

Christina Cardoza (D3)

84 D3's credibility was challenged on the issue of whether any promise was made in or around 2008 by D2 to transfer his interest in Cheriton to her.

85 In her witness statement, which was signed on 21.5.18, D3 said, in the context of going through discussions over the years with D2 about Cheriton and friction caused by charges put on the property, "*At some stage, I can't remember exactly when but I believe it must have been around 2008 [D2] told me not to worry any more and promised me that he would give his share in Cheriton to me. He repeated that promise several times over the years and I always expected that Cheriton would be mine*".

86 D3 had made a witness statement earlier in the proceedings, on 13.5.16. She was then living in Canada with the children as a result adverse press and supporter hostility

towards D2. She had returned to the UK earlier that month. The witness statement was made in opposition to NBC's application for an interim injunction to restrain D3's proposed sale of Cheriton or preserve the proceeds. In a lengthy paragraph explaining the circumstances in which Cheriton was transferred to her, reference was made to D3 having "*been long complaining to [D2] that he was putting large legal charges on [Cheriton] in order to secure debts owed by [NTFC]*" and tied Cheriton's transfer in with the sale of D2's interest in NTFC in mid-2015. No mention was made of any earlier promise, whether in 2008 or at any time. The only explanation for this omission that D3 could proffer was that in 2016 her then lawyer had not asked her about the promises and had not talked her through what needed to be in her statement.

87 D2 also made a witness statement opposing the interim injunction. He referred to D3 having been concerned about charges over Cheriton to secure NTFC debts. The explanation given for the transfer was "*In June 2015 I had an offer for the sale of my stake in [the joint venture] and [NTFC]. I wanted to get to the position where, when [NTFC] and [the joint venture] were sold, [D3] would have peace of mind that I would never again charge the house that we were living in. The house was for her security and the future of our children. That is why we agreed to transfer [Cheriton] into her name*". The ordinary and natural reading of this passage points to an agreement made in June 2015.

88 As noted in Gestmin, human memory is fallible, litigation tends to interfere with the reliability of human memory, particularly where a lawyer has had a hand in – or talked a witness through what needed to be said when – drafting a statement.

89 On the material before me at trial and having heard and observed D2 and D3 giving evidence, I accept that it is possible, even likely, that D2 would attempt to soften the blow of extracting D3's agreement to a charge with an assurance that Cheriton was her and their children's home, but that is quite different from promising a transfer of his equitable interest to secure her agreement or in the context of the charge being granted. Had that occurred in 2008 and subsequently, it is highly unlikely that it would have been forgotten and omitted from their evidence in 2016.

90 On this point I find D3's evidence to have been unreliable.

Uncontroversial findings of fact

91 Before considering the issues, I shall refer to some uncontroversial and basic facts drawn from the submissions of Mr Morgan QC, Mr Zaman QC and Ms Edhem.

92 Mr Zaman QC submitted, and Mr Morgan QC did not dispute, that (1) NBC does not bring this claim as a creditor of NTFC; (2) NTFC has never entered any insolvency process; and, (3) the claim is not brought by an office holder under a provision in the IA 1986.

93 Mr Morgan submitted, and there is no dispute, that at no relevant time did D1 and D2 comprise the majority of NTFC's directors and D1 and D2 were never holders of 100% of NTFC's issued shares. Thus, the Duomatic[6] principle (that failure to comply with formalities may be overlooked provided that all members, being aware of the relevant facts, prospectively or retrospectively either give their approval or conduct themselves in such a way as to be tantamount to giving their approval) was not engaged. D1 and D2, whether severally or jointly, were not entitled to take important decisions in respect of NTFC, all the more so where they were in a position of conflict with regard to the subject matter of the decision.

94 Further facts, not expressly common ground but readily apparent from the evidence, should also be noted here.

95 It is common ground that over the period 2003 to 30.6.13 D1 and D2 made significant loans to NTFC. At 30.6.13 the balance due by NTFC to D1 and D2 as directors' loans exceeded £6.3million[7]. The directors' loans were recorded as deferred creditors, which would have been understood by any reader of NTFC's accounts to mean that they were not repayable within the ensuing 12 months. This was important to NTFC's banker as the provider of a significant overdraft facility. The majority, if not the great majority, of the funding came from D1. D2 gave no direct evidence of means or funding of NTFC by a loan account but it is not in dispute that he made loans to NTFC which totalled materially more than £1million.

96 Further, there is documentary evidence - JW's schedule - that the balance on D1's loan account at 1.7.13 was £4,764,598 and on D2's loan account was £1,843,501. The aggregate of these figures, £6,608,099, is in line with, but does not accord precisely and

[6] Re Duomatic Ltd [1969] 2 Ch 365

[7] £6,356,880 according to the audited accounts (£6,659,035 deferred creditors less £302,155 shown as secured third party loans). This is consistent with a schedule prepared by JW on or about 5.2.13 showing the balance as £6,374,804.

has not been reconciled with, the aggregate balance in the audited accounts, £6,356,880. JW's schedule appears in the evidence as an exhibit to a witness statement made by NBC's solicitor who described it as "*A summary of a version of [D1 and D2's] loan accounts*" without endorsing it as reliable. I am not in a position to make findings as to the precise loan contributions up to this point by each of D1 and D2 to NTFC but recognise that it is common ground that D1 was the principal source of directors' loans to NTFC and it is not disputed that D2 made not insignificant contributions. Further, in the context of D2's director's loan account, NBC adopted JW's schedule in its own pleading by averring that as at 1.7.14 the credit balance on D2's loan account owed to him by NTFC was £1,629,970.

97 Moving forward from 1.7.13, in the year to 30.6.14, JW's schedule shows D1 as having made a further net loan of almost £600K, of which £100K was capitalised on the issue of further shares. However, as from 1.7.14 until 25.11.15, the schedule shows D1 as having made net withdrawals, by way of capitalisation to fund an increase in his shareholding in NTFC, of some £225K. JW's schedule also shows that on 25.11.15 almost £4.3million was written off by D1 on his loan account.

98 For D2, JW's schedule shows that in the year to 30.6.14, D2 made net withdrawals in excess of £210K, in the year to 30.6.15 net withdrawals in excess of £845K, and in the period to 25.11.15 a net inflow of £216K being derived from a payment in of £291K from CDNL. JW's schedule of D2's loan account shows, in the year to 30.6.15, a receipt of £175K from Artefact (a company connected with D1 and D2 to which draw downs from the Loans had been paid) and receipts of £600K from 1st Land in July 2014 which were paid in November 2014 to D2's then solicitors. The balance shown on JW's schedule as written off his loan account by D2 on 25.11.15 was £1,000,907.

99 The aggregate of the balances written off according to JW's schedule, £5,290,955, is also in line with NTFC's audited accounts for the year to 30.6.15, signed off after D1 and D2's departure, which recorded as a post balance sheet event that directors' loans of £5,109,670 had been waived.

100 In the light of the status of audited accounts as documents of record and the fact that, through to and including the year to 30.6.14, they were signed off by D2 on behalf of the directors and therefore cannot realistically be challenged by him or D1, I shall base my findings where relevant on the figures and statements shown in NTFC's audited

accounts. The aggregate sum written off or waived by D1 and D2 on their loan accounts is included in the audited accounts for the year to 30.6.15. Given that all parties referred to and placed at least some reliance on JW's schedule, to the extent that it is consistent with the audited accounts I shall also place some weight on the allocation between D1 and D2 and the movements noted on JW's schedule but I am not in a position to find that it is wholly reliable.

The Issues

(1) The Assignment

101 When the issues were formulated at the outset of the trial, there were a number of challenges to the Assignment, specifically : (1) whether the subject matter thereof was capable of being assigned; (2) whether it is necessary for D1 to plead matters of law; (3) whether champerty / maintenance is (or should be) pleaded; (4) whether the Assignment is void; (5) whether D1 was given proper notice of the Assignment; and, (6) whether NTFC is a necessary party to proceedings if the Assignment takes effect as an equitable assignment. When making closing submissions, Mr Zaman QC made clear that the challenge to the Assignment is not pursued by D1 and Ms Edhem did likewise for D2.

(2) Whether the 13.1.15 Deed bars any claims that NTFC may have had against D1 and D2 as at 13.1.15?

102 The joint venture for the development of Sixfields agreed, at least in principle, on 3.6.13 between D1 and D2 on the one hand and HG, with his son, Marcus Grossman ('MG'), and a business associate, Simon Patnick ('SP'), on the other was not without disputes and litigation. The disputes were the subject of a 12 party deed of settlement ('the 13.1.15 Deed'). 1st Land was not a party to the 13.1.15 Deed because it had been placed in administration on 2.1.15. On the Cardoza side the parties were D1, D2, NTFC and Ticket Globe Limited ('TGL'); TGL was a new company with one issued share owned by D2 which had been formed in connection with the 13.1.15 Deed for the purpose of acquiring the shares in CDNL. On the Grossman side the parties were HG, MG, SP, two MG connected companies (Margro Properties Limited and Margro Developments Limited), one SP connected company (Simpa Investments Limited), Oundle, and CDNL.

103 The 13.1.15 Deed identified the disputes between the parties and 1st Land in recitals or a background narrative as (1) a dispute between NTFC and 1st Land as to the value of works actually carried out; (2) a dispute between NTFC on the one hand and 1st Land, HG, Oundle, MG and his connected companies, and SP and his connected company

on the other as to whether the funds transferred by NTFC to Oundle and 1st Land had been used for their intended purpose; (3) a dispute between 1st Land and D1 as to the payment of £2.05million and whether those payments were key money paid to NTFC to enable 1stLand (a County Group, and therefore an HG, vehicle) to take part in the development venture or were a loan to D1; (4) a dispute between 1st Land and NTFC as to a payment of £600K by 1st Land to NTFC and whether the payment was compensation for 1st Land's failure to carry out construction work at Cheriton; (5) a dispute between 1st Land and D2 as to which of them should bear responsibility for £22,355.60 paid to an architect in respect of the design for the construction work at Cheriton; and (6) a dispute between HG, MG, SP and D2 as to whether certain statements made by D2 in or before October 2014 were defamatory. In addition, the background set out in the 13.1.15 Deed referred to BGCL's claim that it was owed more than £2.1million by 1st Land for works undertaken at Sixfields and BGCL's application which caused 1st Land to be placed into administration. The parties' objective was that CDNL would sell the Adjoining Land, with or without the benefit and burden of the 13.9.13 conditional contract with NBC, or that TGL would sell CDNL's shares. The background section of the 13.1.15 Deed concluded with the statement "*The Parties have agreed to settle their various disputes on the terms set out below*".

104 The passages in clauses 11 and 13 relied on by D1 and D2 are :

"*11 The provisions of this Deed are in full and final settlement of the Claims and, without prejudice to the particularity of the foregoing, all and any other actions, claims, rights, demands and set-offs (but for the avoidance of doubt not including those which are based on an occurrence of an event, act or omission that arises after the date hereof) whether in this jurisdiction or in any other, whether or not presently known to the Parties or to the law, and whether in law or equity … that any Party … its assignees, transferees, representatives, principals and agents or, as the case may be, any of them, ever had, may have, shall have or hereafter can, shall or may have against any other Party … or any of its assignees, transferees, representatives, principals or agents, as the case may be, arising out of or connected with the disputes referred to in this clause ('Other Claims')";* and,

"13 Each Party agrees, on behalf of itself … its assignees, transferees, representatives, principals or agents or, as the case may be, any of them, not to sue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against any other Party … or its assignees, transferees, representatives, principals or agents, any action, suit or other proceeding concerning the Claims or the Other Claims in this jurisdiction or in any other".

105 Although not expressly defined in the 13.1.15 Deed, it is clear from clause 8 ("*Paragraphs 6 and 7 above comprise the Claims*") that "*the Claims*" is a reference to the claims referred to at clauses 6 and 7 which are :

(1) NTFC['s] claims against HG, Oundle, MG and his two connected companies, and SP and his connected company in the Commercial Court (2014 Folio 1392), which proceedings were to be the subject of a consent order on a walk away basis; and,

(2) HG, MG and SP's defamation claims against D2 which were to be withdrawn with D2 being released from an undertaking given by solicitor's letter.

That being said, the background narrative to the 13.1.15 Deed identified other disputes which involved 1st Land which were not compromised because 1st Land was in administration.

106 D1 and, following permission to amend his case given at trial, D2 contended that the terms of clauses 11 and 13 gave rise to the widest possible form of compromise and covered any and all payments to D1 and D2 before 13.1.15. Thus, the effect of clauses 11 and 13 of the 13.1.15 Deed was that there was no possible claim at the suit of NTFC against either or both of D1 and D2 capable of assignment by NTFC to NBC, and NTFC had compromised any entitlement to pursue the claims now pursued by NBC. NBC could not acquire any rights which NTFC could not assign and, accordingly, no claim or cause of action against D1 and/or D2 extant on 13.1.15 capable of existing at the suit of NTFC could have been or was assigned to NBC.

107 The counter argument, advanced by NBC, was that, properly construed, the 13.1.15 Deed was not intended to and did not compromise any claims by NTFC against D1 and/or D2.

108 The approach of a court to construing a document is that summarised by Lord Neuberger at [15] in Arnold v Britton [2015] UKSC 36 :

> "The meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [document], (iii) the overall purpose of the clause and the [document], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions".

109 Advancing D1's case, Mr Zaman QC, whose submissions were adopted by Ms Edhem for D2, referred to undeniable propositions of law drawn from Arnold v Britton and not affected by Wood v Capita Insurance Services Limited [2017] UKSC 24. Referring to Lord Neuberger's speech at [17] – [23] in Arnold v Britton, Mr Zaman emphasised the

following propositions : (1) loyalty to the text of a document is important and commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision being construed; (2) the clearer the natural meaning of the words the more difficult it is to justify departure from it, conversely the less clear the words to be construed, the more ready the court may properly be to depart from their natural meaning, but the court may not search for or construct drafting infelicities to facilitate a departure from their natural meaning; (3) commercial common sense is not to be invoked retrospectively to salvage a bad or disastrous outcome according to the natural language, commercial common sense is only relevant to how the parties or reasonable people in the position of the parties would or could have perceived matters at the date the contract was made; (4) further, the court should be slow to reject the natural meaning of a provision as correct simply because it appears to have been a very imprudent term for one party to have agreed, even ignoring the benefit of wisdom of hindsight, the court's purpose is to identify what the parties have agreed not what it thinks they should have agreed; and, (5) the factual matrix is limited to those facts or circumstances which existed at the time and were known or reasonably available to all parties.

110 Applying this guidance to clause 11, Mr Zaman submitted : (1) the words " *… and without prejudice to the foregoing*" enlarges the scope of the compromise beyond "*the Claims*"; (2) the words defining "*Other Claims*" as "*all and any other actions, claims, rights, demands and set-offs (but for the avoidance of doubt not including those which are based on an occurrence of an event, act or omission that arises after the date hereof) whether in this jurisdiction or in any other, whether or not presently known to the Parties or to the law, and whether in law or equity … that any Party … its assignees, transferees, representatives, principals and agents or, as the case may be, any of them, ever had, may have, shall have or hereafter can, shall or may have against any other Party … or any of its assignees, transferees, representatives, principals or agents, as the case may be, arising out of or connected with the disputes referred to in this clause*" is widely drafted and includes claims (a) at that time unknown to the parties, (b) both at law and in equity, and (c) past, present and future; (3) that text is clear, certain and unambiguous; (4) "*the Claims*" expressly included or related to £2.05million and £600K both of which are claimed in this action; and, (5) drawing attention to the addition of the phrase "*or connected with*" to the phrase "*arising out of*" and by reference to the judgment of Moore-Bick LJ in Nasser Kazeminy v Kamal Siddiqi [2012] EWCA Civ 416 at [99], the latter phrase is apt to encompass rights and obligations having only the most tenuous link with the subject matter of the disputes referred to.

111 Based on the propositions drawn from [17] – [23] in Arnold v Britton, Mr Zaman submitted that (1) the language is clear, certain and unambiguous, (2) it would not be legitimate for the court to search for drafting infelicities to facilitate a construction departing from the natural meaning of the words; (3) the court may not employ hindsight as an aid to interpretation of the clause; (4) any imprudence in failing to reserve or preserve claims is not a matter for intervention by the court in the face of the clearest possible words; and, (5) there were no facts known to only one of the parties in this case, thus NBC is not assisted by this proposition.

112 Addressing the counter argument of NBC, Mr Zaman submitted that loyalty to the text makes it plain that NBC's claims fall within the scope of the 'full and final settlement' clause at clause 11 of the 13.1.15 Deed, and what NBC seeks to do is re-write the 13.1.15 Deed to preserve NTFC's claims against D1 as at 13.1.15. In particular, Mr Morgan QC's argument that the words "*the disputes referred to in this clause*" referred back to "*the Claims*" and was intended to wrap up disputes between parties who were in dispute, not parties who were not in dispute, was an attempt to re-write the clause not to interpret it. Moreover, conduct after 13.1.15, such as D1 insisting that he was still owed his director's loan, is neither relevant nor admissible when construing the clause. It is impermissible to rely on the proposition that D1 and/or D2 were in breach of their duties under s.177 of the Companies Act 2006 (respectively 's.177' and 'CA 2006') because the validity of the 13.1.15 Deed is not in issue and therefore it falls to be construed as written.

113 Mr Zaman submitted that it was wrong for NBC to submit that, reading the 13.1.15 Deed as a whole, the only disputes being settled were "*the Claims*" because those were not the only matters being resolved; rather, express provision was made as to what should happen in respect of the possible outcomes of disputes with 1st Land at clauses 14 and 15 of the 13.1.15 Deed. Thus, the phrase "*arising out of or connected with the disputes referred to in this clause*" is not limited to "*the Claims*" but extends also to any and all disputes, including those with 1st Land referred to at clauses 14 and 15 of the 13.1.15 Deed where provision was made for an account in the event of litigation about the payments by 1st Land to D1 and/or D2.

114 Addressing propositions in Lewison on The Interpretation of Contracts, 6th Edition, relied on by NBC at [404] that a contract will be interpreted as far as possible in such a manner as not to permit one party to it to take advantage of his own wrong and at [409] that

where the words of a contract are capable of two meanings, one of which is lawful and the other unlawful, the former interpretation should be preferred, Mr Zaman submitted that, in relation to the first proposition the relevant wrongdoing must be a breach of a duty owed under the terms of the contract, and that the second proposition concerns construction of the language of the contract itself not the importation of extraneous duties or conduct.

115 Rounding up on the construction issue, Mr Zaman submitted that the word "*disputes*" is not limited to "*the Claims*" as a defined term but embraced and, by clause 11, compromised existing and potential claims, whether known or unknown. Even if that was wrong, there was no doubt by reference to the background narrative in the 13.1.15 Deed that the payment of £2.05million to D1 and the payment of £600K to D2 or D1 were in the contemplation of the parties to the 13.1.15 Deed and were caught by the phrase "*arising out of or connected with the disputes referred to in this clause*". It was nothing to the point that NTFC had not advanced a claim against D1 and/or D2 or that NTFC might not have known whether it would advance any such claim.

116 Ms Edhem adopted these submissions on behalf of D2.

117 Mr Morgan QC also referred to and relied upon the passages from Arnold v Britton and Wood v Capita relied on by Mr Zaman QC. In relation to Nasser Kazeminy v Kamal Siddiqi, Mr Morgan drew attention to the particular language of the phrase under consideration in that case " … *arising out of or in any way connected with* .. " as having additional expansive words to the phrase in the 13.1.15 Deed.

118 Mr Morgan referred to BCCI v Ali [2002] 1AC 251 for guidance on the interpretation of 'full and final settlement' clauses in the context of unknown claims. At [10] Lord Bingham noted that a long and salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware. Lord Browne-Wilkinson expressly agreed with Lord Bingham's speech. Lord Nicholls acknowledged at [27] – [28] that part of the object of a general release was to extend to claims which may later come to light in order to achieve finality, and that the party giving the release accepted that risk; but, however widely the release may have been drawn, the circumstances in which the release was given are relevant because they may suggest that the release was to apply to known and unknown claims relating to a particular

subject matter. Thus, the court must consider what was the type of claims at which the release was directed. The court looks at what was in the contemplation of the parties at the time the release was entered into in order to focus on whether the subject matter of the later claim was under consideration. At [32] Lord Nicholls expressly distinguished the situation where one party to the release knew that the other party had or might have a claim; in such a case, the law would be defective if it permitted advantage to be taken of sharp practice. Lord Hoffmann, at [41] emphasised that even where the parties use very wide language in a release, it would go without saying that they were not intending to include claims of an altogether different nature.

119 Factoring this guidance into the principles and propositions in Arnold v Britton, and applying them to the 13.1.15 Deed, Mr Morgan submitted that any dispute between NTFC and its directors was wholly outside the contemplation of, and not under consideration by, the parties when entering into the 13.1.15 Deed.

120 Developing the argument, Mr Morgan emphasised that, for the purposes of the 13.1.15 Deed, the interests of NTFC and D1 and D2 were to be taken as aligned and the disputes being compromised were those, known and unknown, with the other parties to the 13.1.15 Deed. Paragraph 17 of the background narrative confirms this "*The Parties have agreed to settle their various disputes on the terms set out below*". Disputes between NTFC and D1 and/or D2, whether or not known, were of an altogether different nature, not under consideration by, and outside the contemplation of, the parties. References to "*the Claims*" and "*the Other Claims*" had to be read together and in the context of the 13.1.15 Deed as a whole and the actual factual background as known or reasonably available to the parties at the time.

121 NTFC was under the control of D1 and D2. They were its controlling mind. They had not imparted any suggestion that there might be claims against either or both of them and had not disclosed any fact from which independent directors, with D1 and D2 not participating, could have contemplated or considered such claims. These claims arose out of mismanagement of NTFC's internal affairs and breaches of duties by D1 and D2. The disputes concerning £2.05million and £600K related to the basis on which Oundle and 1st Land paid that money not the rights of NTFC as between itself and its directors.

122 In my judgment, acceptance of Mr Zaman's construction would be tantamount to (1) disregarding the true factional distinction between the parties and the disputes as clear

from the circumstances at the time of executing the 13.1.15 Deed, the background narrative recited in the 13.1.15 Deed, the structure and language of the 13.1.15 Deed itself (particularly [6] – [8] and [11] and [13] – [15]), and (2) sanctioning sharp practice to embrace claims neither contemplated or under consideration. Put another way, acceptance of Mr Zaman's submissions would be to extend and twist the meaning of the ordinary language of the 13.1.15 Deed to encompass an uncontemplated circumstance and reach an artificial conclusion. This approach will not result in departure from the ordinary language of the 13.1.15 Deed read as a whole, rather it will reinforce the natural meaning; nor will this construction bring about an improper solution or by unnatural construction overcome an imprudent agreement; as a consequence, but not as a purpose, acceptance of Mr Morgan's submissions will mean that facts known to only D1 and D2 but not disclosed to NTFC do not disadvantage NTFC.

(3) Whether it was an implied term of each Loan that NBC would not call in the loans due to minor defaults as to payment of interest

123 There is no dispute that £10.25million was drawn down under the Loans by NTFC between 20.9.13 and 23.7.14. It is also common ground that the Loans included terms as to repayment of capital and regular payment of interest, and further that the terms of the Loans included that NBC was entitled to give notice of default and claim the full balance in the event that interest was not paid on time. D2, by his pleading, asserted that it was an implied term of the Loans that NBC would not give notice of default and claim the full balance of capital and interest in the event of non-material and minor delays in payment of interest. The basis for the implied term is said to be past conduct and dealing between the parties alternatively business efficacy.

124 This point was not developed in argument by Ms Edhem. As Mr Morgan pointed out in his submissions, it is misconceived. Each of the Loans expressly provided that (1) failure to pay a sum payable when due would, except in two inapplicable instances, be an event of default; (2) the occurrence of an event of default, while continuing, entitled NBC to give notice to NTFC that all outstanding advances and accrued interest and other amounts were immediately due and payable; (3) any amendment of the terms of the Loan had to be in writing and signed by or on behalf of both parties; and, (4) no delay or failure to exercise a right operated as a waiver.

125 In addition, Mr Morgan referred to Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742. Lord Neuberger, at [14] – [21], adopted

and added comments on the principles formulated and approved in the Privy Council decision in BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266 that :

"for a term to be implied, the following conditions (which may overlap) must be satisfied : (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that it 'goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract".

The comments added by Lord Neuberger included that necessity for business efficacy involves a value judgment and 'absolute necessity' is not required.

126 The first and most obvious point is that terms will not be implied in contradiction of express terms. In this case, there was no evidence of previous conduct prior to the Loans and it was expressly agreed in relation to the Loans that delay or failure to exercise a right on the part of NBC was not to amount to a waiver. Business efficacy did not require the implication of the terms contended for by D2 and, in any event, could not require the implication of a term in contradiction of express terms. The proposed term as formulated in D2's pleading was vague, and not clearly expressed. In my judgment this issue raised by D2 is hopeless.

(4) The scope of D1's and D2's duties as directors of NTFC

127 There is no dispute as to the duties of a director or, by application of the law, the scope of the duties owed by D1 and D2 as directors of NTFC. The disputes are as to fulfilment of those duties; the consequence, if any, for D1 and/or D2 of a breach of duty and the remedy, if any, available to NTFC; and, whether D1 and D2, if otherwise liable, should be excused from liability under s.1157 CA 2006. In his oral submissions Mr Zaman identified remedy as the key issue in this case.

128 A statement of a directors' duties is now embodied in ss.171 – 177 CA 2006. Directors owe fiduciary duties to act within their powers (s.171); to act in the way the director considers, in good faith, would be most likely promote the success of the company (s.172); to exercise independent judgment (s.173); to avoid conflicts of interest, whether actual or potential and direct or indirect (s.175); not to accept benefits from third parties (s.176); and, to declare any interest, direct or indirect, in proposed transactions (s.177). The hallmark of these fiduciary duties is acting in the interests of and showing loyalty to the company. There is a further duty to exercise reasonable care, skill and diligence (s.174). In relation to the company's assets the directors are in a position akin to trustees and they must account for any assets they receive.

129 D1's and D2's conduct and possible breach of duty in relation to directors' loan accounts and certain specific sums are raised under Issue (6). It is convenient to consider D1's and D2's attitude to their duties and conduct as directors at this point.

130 The evidence as to D1's and D2's conduct as directors points only to them, at all times, treating NTFC as their own corporate vehicle and disregarding NTFC's status as a separate legal entity owed duties extending beyond furtherance of D1's and D2's personal interests. They regarded their majority control, D1's funding and D2's position as sufficient justification to behave as they thought in their best interests when directing NTFC's affairs and business and when dealing with NTFC's assets, including in particular money.

131 There is little evidence of them taking an interest in, consulting, or having regard to the views of fellow directors and investors. In their own evidence they made very little reference to so doing beyond generalised oral assertions that the other directors knew or must have known what they, D1 and D2, were doing. What mattered to D1 and D2 was what they wanted to do, and that was determined by their view of their own best interests. On the evidence before me, neither D1 nor D2 ever considered whether or how their interests might not coincide with or might be different from the interests of NTFC; nor, for that matter, did they give any independently minded thought to what the interests of NTFC might be. Neither D1 nor D2 had any sensitivity to, in the sense of acting with regard to, personal conflicts of interest with the interests of NTFC.

132 For example, the Heads of Terms, which were agreed ostensibly between NTFC, by D1 and D2, and County Homes Ltd, by HG, referred to D1 and D2 as "the Owner" and made no express reference to involvement or entitlement on the part of NTFC. This vagueness and exclusion of NTFC itself as an independent entity was consistent with D1 and D2's disregard of significant conflicts of interest on their part. These included (1) an undocumented agreement for the provision of works at Cheriton to the value of up to £750K without disclosure to or the agreement of NTFC; (2) the decision that profits from development of Sixfields and the Adjoining Land would be split between the Owner (D1 and D2) rather than NTFC and a co-venturer entity; and, (3) payment of an Exclusivity Fee to D1 and D2 personally. Further conflicts arising as the joint venture progressed included that D1 and D2, not NTFC, became shareholders in the joint venture company,

CDNL. It is difficult to view such conduct as being in accordance or consistent with fulfilment of their fiduciary duties.

133 D2 was cross-examined about the steps he took to ensure that monies drawn down by NTFC under the Loans were applied for the purposes of the Loans, and about how NTFC had proposed to and had funded the cost of interest and repayment. D2's answers were to the effect that all of that was delegated to or the responsibility of others. To him it was immaterial and irrelevant that the Loans were not to be used for agreed purposes.

134 There are other examples relating to both D1 and D2 which point to a total disregard for the interests of NTFC and their duties as directors. A straightforward illustration is over the ordering and payment structure for a Bentley motor car for HG and a Porsche Cayenne for each of D1 and D2 in 2013. D2 was entitled to a company car under the terms of his service contract; whether such an expensive car was appropriate given NTFC's financial position at all times may be debatable but D2 was unquestionably entitled to a car provided and run at NTFC's expense. D1 had no such contractual entitlement. HG was not even an officer of NTFC. Both D1 and D2 knew and approved of the arrangement for the provision of a Bentley to HG through NTFC. D2's evidence in cross-examination was that HG had asked that the car be provided through NTFC because it was a company with a balance sheet and able to get finance. If true that may speak volumes about HG and his associates. The fact that HG arranged for reimbursement of at least some instalments relating to the Bentley at a later stage is nothing to the point. However, whether or not true, D2's explanation emphasises his disregard of his duties as a director of NTFC. D1 also had no satisfactory answer for the provision of a Bentley to HG through NTFC and considered himself entitled to the provision for his benefit of a car and running expenses by NTFC. In cross-examination D1 said that he charged everything that he could to NTFC.

135 The issues raised under Issue (6) below concern further instances of alleged breaches of duty.

(5) Whether (and, if so, when) the interests of NTFC's creditors were engaged

136 This is relevant to the duty to promote the success of the company, which is generally for the interests of the members as a whole. However, s.172(3) provides that in certain circumstances, the directors are to consider or act in the interests of creditors.

137 NBC does not bring the claim as a creditor but as an assignee of the company, NTFC. Thus, NBC is not bringing the claim pursuant to a right conferred on creditors.

138 It is part of NBC's case that, at the time when the payments sued for by NBC were made to a director of NTFC, NTFC was or was on the verge of becoming insolvent.

139 A company is insolvent if it is unable to pay its debts. S.123 IA 1986 provides that a company is deemed unable to pay its debts if it is proved to the satisfaction of the court either that the company is unable to pay its debts as they fall due (s.123(1)(e)) or that the value of the company's assets is less than the amount of its liabilities taking into account its contingent and prospective liabilities (s.123(2)). The s.123(2) test disregards contingent assets. There is no requirement to disregard off-balance sheet assets (commonplace examples are goodwill and intellectual property rights which are frequently not recorded through a company's accounting books) provided they are actual and not contingent, however, for such assets to be taken into account there must be sufficiently cogent evidence as to their existence and value.

140 Both Mr Morgan and Mr Zaman referred to BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc [2013] UKSC 28. Mr Zaman cited from the speech of Lord Walker, with which Lord Mance, Lord Sumption and Lord Carnwarth JJSC agreed, at [37], [39] and [40] and Mr Morgan cited from [42]. The test under s.123(1)(e), the cash-flow test, is not concerned only with presently due debts but also with debts falling due from time to time in the reasonably near future (which itself depends on all the circumstances but especially on the nature of the company's business). The test under s.123(2), the balance sheet test, is the only sensible test when insolvency is considered in a context beyond the reasonably near future, which renders the cash-flow test too speculative to be a measure of (in)solvency. The balance sheet test itself is not exact and the burden of establishing insolvency rests on the party asserting it. Lord Walker rejected the proposition that the balance sheet test is aimed at deciding whether the company has reached the point of no return. Rather the court makes a judgment whether the evidence as to the company's assets and liabilities, after making proper allowance for its prospective and contingent liabilities, establishes that it cannot reasonably be expected to meet those liabilities. By way of guidance and reflecting on the facts of the case before the court, Lord Walker added that in a case where certain liabilities could be deferred for many years (30) and, without a permanent increase in

borrowings, the company was paying its debts as they fall due, a court should exercise the greatest caution before deciding that the company was balance sheet insolvent.

141 It is not insignificant that Lord Walker referred to what the company actually is doing when considering the balance sheet test.

142 The difficulties inherent in the task of the court asked to decide whether a company is or was insolvent at a particular time is well illustrated by an extract from a judgment of Briggs J (as he then was) in Re Cheyne Finance plc [2008] BCC 182 at [51] where the judge cautioned that cash-flow insolvency is not to be ascertained by a slavish focus on debts at the relevant date because, on the one hand, a momentary inability to pay may reflect only a temporary illiquidity soon to be remedied, and, on the other hand, a current ability to pay debts for months to come may mask a fatal shortage of working capital which is bound to result in failure of the business.

143 The above cases and others, see for example Re HLC Environmental Projects Limited (in liquidation) [2013] EWHC 2876 (Ch) and the judgment of Mr John Randall QC at [88] – [89], make clear that current inability to pay debts or current excess of liabilities over assets are not the sole criteria for assessing insolvency and that being close to or on the verge thereof may be viewed as insolvency. In all such cases the interests of creditors are engaged under the common law duty preserved by s.172(3) and relevant to the duty of directors to promote the company's success. Once triggered, this duty spills over into the fulfilment of the directors' duties more generally, for example only exercising powers for the purposes for which they are conferred (s.171(2)) and avoiding conflicts of interest (s.175). In Re HLC at [99] Mr Randall QC expressly held that once directors are to take account of the interests of creditors then, when exercising the power to deal with the company's assets in the course of trading, the directors must do so with advancement of the interests of creditors in mind.

144 NBC's pleaded case is that NTFC was, or was on the verge of, insolvency no later than 30.6.13. Later dates in and from July 2014 are also pleaded and it is pleaded that NTFC was, or was on the verge of, insolvency at all relevant times. Mr Zaman submitted that D1 and D2 had been disadvantaged by not being told a date on which NTFC was, or was on the verge of, insolvency. As I read the pleadings and further information, it is evident that the thrust of NBC's case was fixed at a date which covered all payments the subject of these proceedings and therefore pre-dated 23.9.13. The logical date, and

one asserted by NBC was 30.6.13. It does not follow from this that NBC contended, or even impliedly asserted or admitted, that NTFC was solvent until 30.6.13; rather, NBC had no need to assert or prove insolvency prior to that date. NBC's claim does not require a finding that NTFC was insolvent at a particular date or at all.

145 Further, and given NBC's reliance on the inapplicability of the Re Duomatic principle, NBC's case does not require that the interests of NTFC's creditors were engaged. As I understand it, it is more in the nature of an aggravating feature in NBC's case that D1 and D2 were in breach of their duties as directors.

146 NTFC's accounts for the year to 30.6.13 include the following : (1) a note in the auditors' report, by reference to the level of net current liabilities and overall net liabilities, that there was a material uncertainty which may cast significant doubt on NTFC's ability to continue as a going concern; (2) increased creditors (by more than £200K to almost £2million) and increased net current liabilities (by £100K to £817,542) over the course of the financial year; (3) slightly reduced secured third party creditors (by £30K to £302K); (4) increased directors' loans, recorded as deferred creditors (by £245K to £6.35million); and, (5) in that year NTFC had traded at a small profit (£86K). There was no additional information as to prospective and contingent liabilities. There was no actual evidence as to off balance sheet assets. Reference was made by D1 and D2 to the value of players but that was essentially uncorroborated assertion by D1 in oral evidence. NTFC had the benefit of a 150 year lease over Sixfields at a peppercorn rent but that carried with it annual outgoings in the order of £400k. There was no evidence as to the value of the lease of Sixfields and the development underway, but the development was a contingent asset very far from fruition and it would have to be disregarded.

147 The pattern of NTFC's financial position while under D1 and D2's control was ever worsening from 2002 until 2008 and more or less constant from 2009 onwards. NTFC's annual accounts show :

30.6. year	£million loss/*[profit]*	£million net liabs	£million net current liabs	£million deferred creditors
2002	0.87	2.49	2.06	0.52
2003	0.95	3.26	1.63	1.79
2004	1.68	4.46	1.41	3.26

2005	1.77	6.00	1.31	4.84
2006	1.21	7.21	0.85	6.42
2007	0.67	7.73	0.62	7.14
2008	0.15	7.77	0.68	7.14
2009	*[0.28]*	7.49	0.77	6.72
2010	0.25	7.71	0.68	7.04
2011	*[0.25]*	7.43	0.76	6.70
2012	0.22	7.57	0.71	6.86
2013	*[0.086]*	7.47	0.81	6.66 .

It is evident that in the year to 30.6.13, when NTFC made a modest profit, it also incurred an increase in net current liabilities but a reduction in deferred creditors. This was the case in other years when profits were made. This indicates that trade creditors were being used as working capital to improve trading results and deferred creditors, which included directors' loans, were being repaid.

148 Pausing here, JW's schedule and the notes to NTFC's audited accounts for the year to 30.6.14 refer to the sum of £749,625. On JW's schedule this sum was debited against the credit balance on D1's loan account to reduce the amount waived by him on 25.11.15. Hitherto, and from an unspecified point in the year to 30.6.06, that sum had been treated as a debtor receivable by NTFC thereby increasing its current assets set against current liabilities to arrive at net current liabilities. In fact, that debtor was Premier Sports Stadia Limited, a company controlled by D1 and D2. The persistent carrying of a deferred debtor on NTFC's balance sheet as a current asset (that is an asset becoming cash in less than one year) set against current liabilities distorted the true net current liabilities position which was, at all times from 30.6.06 onwards, some £750K worse that stated on NTFC's balance sheet. A corrective adjustment would have the effect of doubling the net current liabilities on the balance sheets from 2006 onwards and would have a material adverse effect on the current ratio or 'acid test' over the eight years 2006 to 2013.

149 It is also necessary to consider the value to be attributed to the directors' loan accounts as deferred creditors. These balances should not be left out of account altogether, not least because they were operated and treated as current accounts, especially by D2, notwithstanding NTFC's banker's stipulation to the contrary. D1 and D2 were expecting to be repaid out of profits from the development, but there is no evidence that they would

have written off their loan accounts or treated them as deferred for the benefit of other unsecured creditors had NTFC entered an insolvency process. Further, neither D1 nor D2 took any formal steps to defer their loan account balances to third party unsecured creditors. The labelling of the loan accounts as deferred creditors did serve the useful purposes of appeasing NTFC's banker and apparently improving its current ratio, but the labelling did not reflect a legal deferment and would have had no legal effect in the event of NTFC entering an insolvency process. Mr Morgan established during cross-examination of D2 that he had no compunction about fast-forwarding or accelerating payments to himself in priority over pressing creditors. In my view, for the purposes of assessing NTFC's solvency, D1's and D2's loan accounts should be taken at face value.

150 In April 2013 BTG Financial Consulting undertook a cash flow review for NTFC's banker. The report drew attention to a catalogue of financial pressure points : inability to stay within overdraft limits, withdrawals to repay unsecured loans in priority to trade creditors, significant HMRC arrears (PAYE and NI), unfulfilled assurances by D2 of directors loans, no further receipts entered in 3 month prospective cash flow forecast, and breach of Football League rules. The report concluded that without cash funding from directors NTFC was insolvent on a cash-flow basis. I regard this as independent objective evidence on which to base a conclusion that, by April 2013, NTFC was already insolvent and required rescuing. NTFC's position did not improve thereafter during D1's and D2's tenure of office.

151 In oral evidence D2 acknowledged that NTFC's cash flow was, as a matter of routine or norm, precarious to the point of being "*scary*" and that by 2013 both he and D1 had concerns about whether they would get their money back.

152 Also in his oral evidence D2 agreed that trade creditors were generally used as a source of working capital whereby the maximum credit would be extracted, promised payments would not be met in full, and payments were made on the basis of the minimum to stave off litigation or to extract increased credit. What this points to is a policy of not paying creditors as they fall due and only paying the minimum necessary to avoid litigation and insolvency process.

153 The Loans and draw downs were not intended to, and in fact did not, improve NTFC's cash flow or balance sheet position. To the contrary it worsened as from September

2013. The equivalent figures for the year to 30.6.14 drawn from NTFC's audited accounts were ;

30.6. year	£million loss/*[profit]*	£million net liabs	£million net current liabs	£million deferred creditors
2014	0.85	8.22	4.08	14.70.

This reflected a change of accounting treatment in that the development at Sixfields, both asset and obligations, was written into NTFC's books. The balance on directors' loan accounts carried within the deferred creditor of £14.7million was £6.7million. For the reason noted above, net current liabilities continued to be understated by £750K.

154 Mr Zaman drew attention to D2's account of NTFC's finances and D1's defence which included the statement that D1 and D2 made loans ensuring that creditors were paid as the debts fell due. That was emphatically not the case, unless – as D1 and D2 may well have done – 'falling due' was taken to mean at the last possible moment, and then only in the minimum amount necessary to stave off legal or insolvency process. Mr Zaman submitted that non-payment on time was not the yard-stick; rather, what mattered was when creditors took action, and that was not until 2015. I reject that submission. The phrase 'as they fall due' is not a term of art but an ordinary phrase in ordinary English language usage. It does not mean 'when overdue and as necessary to stave off legal or insolvency process', 'as they fall due' means what is says, namely or in other words 'when they become due for payment'.

155 On the evidence before me it would be unrealistic and artificial to regard NTFC as being other than on the verge of, if not actually, insolvent at 30.6.13 and at all material times thereafter (i.e. up to the point of Ds' departure from NTFC on 25.11.15).

(6) Whether D1 and D2 breached their duties or are otherwise liable, including the following :

a. if any sums were received by D1 and D2 as repayment of their directors' loans, were such repayments a breach of fiduciary duty?

b. (D1's formulation) was the payment of £2.05million appropriated to D1's account? Or

c. (NBC's formulation) was the payment of £2.05million debited to D1's account / did NTFC agree to it?

d. (D1's formulation) if so, was the appropriation reversed?

e. (NBC's formulation) if so, was the debit reversed?

f. (D1's formulation) if the appropriation was reversed, what was the effect of the reversal?

g. (NBC's formulation) if the debit was reversed, what was the effect of the reversal?

h. (D1's formulation) Were the payments of £600K and £140K appropriated to Ds' loan accounts?

i. (NBC's formulation) Were the payments of £600K and £140K debited to Ds' loan accounts / did NTFC agree to them?

156 The specific sums of money the subject of these issues (£2.05million, £600K and £140K) were all received by D1 and D2 directly or indirectly from NTFC during the period 1.7.13 to 25.11.15.

157 As to the detail of D1's loan account during this period between 1.7.13 and 25.11.15, Mr Morgan and Mr Zaman are, save for a difference of £3K odd, agreed as to the payments to D1 and payments by D1 to NTFC. During this period NTFC made draw downs on the Loans. It is common ground between Mr Morgan and Mr Zaman that during this period D1 received more than £2.1million in excess of the sums he loaned to NTFC, i.e. D1 made net drawings of £2.1million. The majority of that total comprises the £2.05million the subject of NBC's claim which D1 received as follows :

23. 9.13	£900K from Oundle
4.12.13	£700K from 1st Land
4. 3.14	£250K from 1st Land
2. 6.14	£200K from 1st Land.

Each payment to D1 followed shortly after a Loan draw down of tranches of £1.5million by NTFC from NBC and a payment by NTFC to Oundle or 1st Land.

158 The difference in the wording between pairs of issues (b/c, d/e, f/g and h/i) is based on whether were these payments debited (Mr Morgan) or appropriated (Mr Zaman) to D1's loan account, and, whether debited or appropriated, whether they were received in breach of fiduciary duty.

159 The terms of the Loans were clear that the monies drawn down by NTFC in tranches of £1.5million were to be used for a specified purpose; payment to D1 was not a specified purpose; this much is not in dispute.

160 It is part of NBC's case that when deciding upon disbursement by NTFC and considering payment to D1, whether as part of the Exclusivity Fee or key money under the joint venture or otherwise, D1 and D2 were in a position of conflict. As to this, the evidence includes an email from D1 to SP on 20.9.13 directing payment of the first £900K to D1's account at Coutts on the basis that until the development was completed and the site sold it was to be treated as a loan to him. Thus, it was clearly regarded by D1 as an advance of his share of the Exclusivity Fee or key money payable by HG and his associates for the opportunity to participate in the development project through a joint venture. The use of drawn down Loan monies caused some disharmony within HG's camp. The documents at trial included an email exchange between SP and HG, copied contemporaneously to D1, in which SP complained that D1 should not receive any money in advance of completion of the development. As later payments evidence, HG did not agree. The emails, which were put to D1 in cross-examination, and D1's answers (lapse of memory and reading the documents differently from Mr Morgan) provided no exculpatory explanation and leave me in no doubt that D1 expected and knew that the payments would be made from tranches as they were drawn down from the Loans by NTFC and paid to Oundle and 1st Land.

161 Further, the premature payment of tranches by NTFC to Oundle and 1st Land, immediately after draw down and irrespective of work done, was a necessary feature of this arrangement and one that could not have occurred without the knowledge and direction of D1 and D2.

162 It was in NTFC's interests (and a fortiori those of its creditors) that the money should remain with and be under the control of NTFC until disbursed for an authorised purpose. Payment by Oundle and 1st Land to D1 would not be known to NTFC unless expressly disclosed and approved or recognised formally. It is clear that that did not happen contemporaneously and these payments were not formally recorded either in NTFC's books and records or, by year end adjustment, in its annual accounts drawn from those books and records. Thus, £2.05million was diverted and misapplied by D1 which amounted to unlawful exploitation of company property in breach of s.175 CA 2006. For an analogy, Mr Morgan referred to Goldrail Travel Limited (in liquidation) v Aydin and others [2014] EWHC 1587 (Ch) and the judgment of Rose J at [64].

163 Mr Morgan drew attention to the 25.11.15 Share Purchase Agreement between D1, D2, NTFC and others by which Ds and others sold their shares in NTFC for a total consideration of £1 ('the SPA') and the waiver and release at clause 9.1 of all claims against NTFC, except as to £195K due as a VAT refund. Mr Morgan submitted that this precluded D1 and D2 from claiming to be able to re-write their loan accounts and make retrospective adjustments to those accounts. This point goes to both the issue of breach of duty and the issue of remedy. Mr Morgan submitted that the directors' loan accounts stand as finalised in the notes to NTFC's accounts signed off after D1 and D2 resigned as directors and sold their shares on 25.11.15 in a transaction which included writing off the balances on their loan accounts except as to £195K.

164 Mr Morgan further submitted that D1 is liable to return or restore the monies diverted to himself, irrespective of whether or not NTFC was insolvent, by reason of the breach of fiduciary duty on his part. Mr Morgan added the concession that to the extent that D1 can show that he made net repayments of these monies he would be entitled to credit, but that would be a matter for an account or inquiry with the onus of proof on D1.

165 Mr Zaman submitted that NBC's claim is misconceived for a number of reasons. Mr Zaman's starting point was that any cause of action under the Assignment at the suit of NBC must be based on a cause of action open to NTFC. That is common ground.

166 Relying on Knight v Frost [1999] BCC 819 and the judgment of Hart J at p.834D-E and Re Continental Assurance Co of London (No. 4) [2007] 2 BCLC 287 and the judgment of Park J at [418]- [420], Mr Zaman submitted that where, outside the statutory period under s.239 IA 1986, a director prefers himself to other creditors, the director is not liable to replace the money at the suit of the company because the company has suffered no loss. Mr Zaman also referred to Dickinson v NAL Realisations (Staffordshire) Limited and others [2017] EWHC 28 (Ch), which he described as a case where (a) the company was insolvent or on the verge of insolvency, (b) the director had extracted £2.5million in assets, and (c) the interests of the creditors were engaged. Mr Zaman referred to the decision of HHJ Cooke, at [118], that the authorities do not justify a finding that the general duties of directors require them to give priority to the interests of creditors simply because there is a recognised risk of adverse events that would lead to insolvency.

167 In my judgment, these cases are not applicable to the claim in this case in relation to the £2.05million because D1's receipt of that money was entirely outside NTFC's accounts, including D1's loan account, and there was no question of D1 preferring himself to other creditors when transactions entered by the company are analysed. Put another way, at the time when D1 received the £2.05million he regarded that as, or as an advance on, the Exclusivity Fee or key money due to him under the joint venture with HG and his associates and D1 had every intention of being repaid the then full balance on his loan account in due course and in addition to the £2.05million. D1's attitude to the £2.05million remained constant. Had the development come to fruition he would have expected repayment of his loan account in full and without any deduction for the £2.05million or any part thereof.

168 The principles identified by Newey J, as he then was, in GHLM Trading Limited v Maroo and others [2012] EWHC 61 (Ch) are more applicable. At [148] – [149] Newey J observed :

> "[148] …. The close analogy between directors and trustees suggests, to my mind, that, much as a trustee "must show what he has done with [trust] property", it is incumbent on a director to explain what has become of company property in his hands".
> "[149] … once it is shown that a company director has received company money, it is for him to show that the payment was proper".

Newey J's reasons for so concluding included that the director will have been responsible for management of the company's business and will have had a responsibility for ensuring that proper accounting records were kept. D1 was a director of NTFC and bore those responsibilities but he has not shown that he accounted properly, or at all, to NTFC for the receipts totalling £2.05million.

169 Later in his judgment in GHLM Trading Newey J considered Knight v Frost and Dickinson v NAL and, at [168] – [169] concluded that questions of breach of duty and remedy need to be distinguished. Where creditors' interests were relevant the director's duty was to have regard to the interests of creditors as a class and the fact that all the statutory conditions under s.239 IA 1986 were not met would not necessarily lead to a conclusion that there had been no breach of duty. Whether there was a remedy for a director preferring himself where s.239 did not apply was likely to require proof that (a) the company had suffered a loss, (b) the director had profited, or (c) the transaction was

not binding on the company. I shall return to this when considering any remedy for any established breach of duty.

170 Mr Zaman also contended that, irrespective of what NTFC's books and records may or may not have shown or show, the payments totalling £2.05million were appropriated by D1 to his loan accounts as part repayment thereof.

171 Appropriation as an ordinary word refers to the assignment or allocation of something to a particular purpose. For authority as to the meaning of appropriation, Mr Zaman referred to Seymour v Pickett [1905] 1 KB 715 and the judgment of Vaughan-Williams LJ, at pp.723-4, citing from the speech of Lord Macnaghten in The Mecca [1897] AC 286 at p.293 :

> "When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply the money accordingly. If the debtor does not make any appropriation at the time when he makes the payment, the right of application [sic] devolves on the creditor. … it has long been held and is now quite settled that the creditor has the right of election 'up to the very last moment'".

172 Mr Zaman submitted that appropriation is a matter of fact. He drew attention to D1's witness statement in which he said that he regarded these payments to him as part repayments of his loan account and that he asked D2 to record them in NTFC's accounts in that way. I have already made clear that D1's word, without independent corroboration, is unreliable; this is particularly so where his self-interest is at issue. There is no corroborative contemporaneous email evidence and, as a director, D1 was responsible for the accuracy of NTFC's annual accounts, which made no such adjustment to his loan account. The temporary adjustment through management accounts, neither drawn from nor reflecting NTFC's books and records, in or about October 2014 was an artifice employed solely for the purpose of creating evidence for use in the disputes with HG and his associates. There was no genuine assignment or allocation. Moreover, and as I have already made clear, until confronted with NBC's claim and the need to explain himself, including when waiving the balance due on his loan account in November 2015, D1 had every intention of keeping the monies diverted from NTFC via Oundle and 1st Land without disclosure to NTFC (in so far as represented by independent directing minds, i.e. disregarding D2).

173 Further, the legal concept of appropriation is of no application to the facts of this case. The debtor in this context for the purposes of Mr Zaman's submission, NTFC, ostensibly

made the payment to Oundle/1st Land in connection with building works at Sixfields, it did not make any payment to D1. The payment to D1 was based on an arrangement to which NTFC was not a party, at least not as an informed and independent party, so the right of election to bring about an appropriation was and is simply not in play.

174 Mr Zaman also submitted that once appropriated, reversal would only be available with D1's consent and further that any submission that the auditors reversed the appropriation to D1's loan account could not have unilateral effect to D1's detriment. That may be so in theory. However, on the evidence before me, no formal contemporaneous book-keeping entry was made in NTFC's books and records in respect of the payments totalling £2.05million to D1, or any of them, thus there was nothing to 'reverse' out of the books and records. JW had treated the £2.05million as income in management accounts supplied to D1's then solicitors; however, this was artificial and gave rise to other consequences with the result that the sum was not recorded in NTFC's books and records. Moreover, even if there had been a formal record and a reversal had occurred, NTFC's annual accounts for the year to 30.6.14, which covers the period when D1 received the payments totalling £2.05million, were approved as accurate by the board, including D1, and signed off on behalf of all the directors by D2 on 30.3.15. Those payments to D1 did not feature as a debit reducing the creditor balance on directors' loans in NTFC's accounts.

175 Had D1 genuinely intended to reduce his directors' loan account by drawing or appropriating sums totalling £2.05million, there was a straightforward and honest route. The only finding realistically open to me is that the payments totalling £2.05million to D1 over the period 20.9.13 to 2.6.14 were deliberately routed through Oundle and 1st Land so as to avoid having to record them as reductions in D1's loan account and were at all relevant times regarded by D1 as part of the Exclusivity Fee or key money payable by HG and his associates for the opportunity to participate in the development joint venture. D1 knew and intended that the payments came from Loan draw downs. Each of the sums received by D1 totalling £2.05million was received in breach of duty as a director of NTFC.

176 As to D2, D2 was neither ignorant of nor uninvolved in this diversion and misapplication of NTFC's monies for D1's benefit. D1 and D2 were close and like-minded, and both were to benefit financially as consideration for providing the joint venture opportunity. At the very time that D1 received £900K from the first draw down he and D2 were

discussing NTFC's cash flow by email and when they would each get paid. D1 had no income entitlement from NTFC. Further, D2 was cross-examined about the NTFC board meeting on 11.12.13 and the fact that the minutes do not reflect the payments to D1, which by then totalled £1.6million. D2's answer was that the board knew that D1 was to receive substantial sums. This sits unhappily with D2's denial that he knew how much D1 had received or when he had received monies. D2 had his own undocumented benefit arrangement and he knew that D1 was to receive key money equivalent to 50% of his investment in (loans to) NTFC tied to draw downs under the Loans. He knew when D1 was to receive money and, given the close relationship between D1 and D2, I reject as untrue D2's evidence that he did not know the precise details of D1's receipts from draw downs routed through Oundle and 1st Land.

177 Premature disbursement by NTFC to Oundle and 1st Land was an essential element of the diversion and misapplication of these monies. This could not have been achieved without D2's knowing complicity and express authorisation of the disbursement. As managing director of NTFC it was D2's responsibility to ensure that those sums were applied for the benefit of NTFC in accordance with contractual obligations it had under the Loans. D2 failed so to do, not through management error but through disregard of his duties to NTFC, including the duty to promote the success of NTFC.

178 The final pair of issues concerns the payments of £600K and £140K. NBC's case is that on 29.7.14 £140K was paid to or for the benefit of D1 and on 26.11.14 £600K was paid to or for the benefit of D1, and further that these monies came from monies drawn down by NTFC pursuant to the Loans.

179 On 23.7.14 NTFC paid £1.25million to 1st Land and, on the same day, 1st Land paid £600K back to NTFC. On JW's schedule £600K is shown as a loan by D2 to NTFC on 23-24.7.14 and then repayment by NTFC to D2 on 16.11.14; thus, D2's loan account is neutral as to the £600K. There is no entry on JW's schedule to show payment of £600K to D1 as a repayment of D1's loan account. There is correspondence between 1st Land's solicitors and solicitors instructed by D1 and D2 in which 1st Land's solicitors contended that the payment of £600K to NTFC was a loan. On instructions which can only have come from D1 and/or D2 the solicitors they instructed in the name of NTFC asserted that the £2.05million and the £600K had been used "*for the benefit of the football club*". 1st Land issued a statutory demand for that sum. NTFC responded, on D1's and D2's instructions, by issuing proceedings. On 23.1.15 D2 sent an email to D1 with a schedule

attached which, in D2's words, showed how the £1.5million drawn down on 19.8.14 had been spent. No part of the money had been spent on building works. More than £250K had been applied to interest and capital on loans from NBC; almost £235K had been spent on legal fees; and, on 26.11.14 £600K had been transferred to solicitors to be held by them; none of these payments were authorised purposes under the terms of the Loans. As a result of the £600K transfer to solicitors, NTFC's current account at Barclays went from being in funds (£135K) to overdrawn (£465K). To put this in the context of building works at Sixfields' stadium and the development of Sixfields and the Adjoining Land as at November 2014, (1) it is common ground that the value of the work done was far short of the monies drawn down and paid out by NTFC; (2) also at that time, solicitors then instructed had advised D2 that NTFC had no defence to a claim issued by a creditor of NTFC for £320K (referred to as the Centreplate claim); and, (3) there was no concluded deal to develop the Adjoining Land. Further, D1 and D2 ignored the Centreplate claim when it came to disbursement of the £600K.

180 In his witness statement D1 had said that the £600K was repaid to him at a time when he was confident that NTFC had sufficient funds for its own cash flow purposes. D2 said in his witness statement that JW had confirmed that the money was not needed for NTFC's cash flow purposes. That is not my reading of NTFC's financial position and neither D1 nor D2 provided any elaboration or documentary evidence to support their assertions. In cross-examination D1 said he had been told the money was surplus to requirements but did not, and could not, say by whom or on what basis. Pressed in cross-examination, D1 accepted that he could not say what other monies NTFC actually had at the time. D1 accepted that the £600K had come from a draw down from NBC and said that its use had been "*redesignated*". D1 agreed with Mr Morgan that he regarded the £600K as his money to do with as he wished, which at least implicitly contradicted his written evidence. D1 said that he directed that this money be paid to his daughter in repayment of a loan she had made to him in 2005-6. D1 accepted that the use he made of the money had not been approved by NTFC's directors. In my judgment, D1's conduct in relation to the £600K was a blatant abuse of his position as a director and a breach of his fiduciary duty as a director. Similarly, by authorising and instructing JW to make the payment, D2 was in breach of his fiduciary duty as a director of NTFC.

181 The final sum in issue is £140K. NTFC paid D1 £140K on 29.7.14. This payment was not entered on JW's schedule as repayment of part of D1's loan at any time. The only

entry of £140K on JW's schedule was as a repayment to D2 on 29.7.14. In 2015 D2 sent an email to JW stating that that payment had made been to D1. JW replied that, after checking the bank statements, he agreed and had made a cancelling entry in D2's loan account. This entry was dated on or as at 27.2.15 on JW's schedule. No corresponding entry appears on JW's schedule under D1's loan account. D1's Coutts bank statements show a receipt of £140K from NTFC on 29.7.14. D1 said in his witness statement that £140K was repaid to him by NTFC as part repayment of NTFC's debt.

182 On the evidence before me, it is clear that on 29.7.14 D1 received £140K from NTFC which was neither contemporaneously nor subsequently entered against his loan account as a partial repayment. D1, as a director, approved the signing of NTFC's accounts on that basis. In each of the accounting years to 30.6.14 and 30.6.15 NTFC made a loss in excess of £1million, had current liabilities in excess of £2million and trade debtors slightly in excess of £200K. The idea that any part of the £140K paid out to D1 was surplus to NTFC's requirements is fanciful. In taking these sums and the other sums (£2.05million and £600K) considered under this issue, D1 acted without regard to the interests of NTFC, contrary to the duty to promote the success of NTFC and in complete disregard of the conflicting interests of himself and NTFC. None of the repayments was approved, in any meaningful and independent sense, by NTFC. These circumstances lead inevitably to the conclusion that the monies were taken in breach of D1's fiduciary duty to NTFC. As managing director of NTFC it was for D2 to ensure that NTFC's funds were not misapplied; it is inconceivable that this payment was made without his knowledge and approval and by authorising or permitting the payment D2 was in breach of his fiduciary duty.

183 D2's approach to his director's loan account and to NTFC's money was similar to that of his father. Against that, D2 had an income entitlement from NTFC, an annual salary of £250K gross accruing daily and payable monthly in arrears. However, on his own evidence, D2 did not draw his salary, nor did he cause any provision to be made for his salary or the related tax liabilities in NTFC's books and records or accounts. Thus, whether and, if so, on what basis D2's salary entitlement should be taken into account is not straightforward. As to D2's attitude to NTFC's money, in cross-examination, and in answer to questions about emails in October 2014, D2 agreed that he contemplated charging the building works for his home to NTFC and that he did not discuss that plan with the independent directors.

184 The starting point though is to consider D2's director's loan account and, in so far as ascertainable, the entries in that account. On JW's schedule, in the year to 30.6.14 D2 made net withdrawals from his director's loan account of almost £214K and in the year to 30.6.15 of almost £845K of which £400K related to capitalisation of his loan account in exchange for shares. Thus, over a two year period D2's net withdrawals from NTFC exceeded £650K. These withdrawals certainly exceed D2's annual salary entitlement in each year. He knew that NTFC was under financial pressure constantly, even to the point of being "*scary*" as a norm.

185 D2 explained his view of his loan account and salary entitlement in his witness statement; he referred to not drawing a salary but drawing from his loan account because that was tax efficient for him (no NI or income tax) and beneficial to NTFC as its liability to D2 was reduced. D2 also said that if there were cash flow difficulties he would advise JW to pay creditors in priority to himself; this is not borne out by and is contradicted by emails in the trial bundle. D2, or his advisers, have calculated his gross salary entitlement for the period 1.7.13 to 30.11.15 as £604,166 and have acknowledged that he drew down £728,600 in that period. Of course, had he taken his salary entitlement, it would have been paid net of NI and tax and have been in the region of £350K. On either basis, over this period selected by D2, he drew substantially more from NTFC than his salary entitlement.

186 In cross-examination Mr Morgan focussed on a shorter period, namely entries from 29.7.14 to 14.8.15. In the six months July to December 2014 D2 withdrew a net sum in excess of £311K. At this time NTFC was under very significant pressure in relation to the stadium works and cash flow generally. In response to a question asking D2 how he justified these payments to himself he said that he was "*fast forwarding*" or "*accelerating*" his salary and that Mr Morgan had only looked at the second six months of 2014. Mr Morgan asked D2 if he would like to look at the first six months, to which D2 said '*No*'. In response to questions about paying interest and capital to NBC on the loans and creditors generally, D2 said that he could not say whether NBC was ever paid on time but so far as he was aware no third party creditor was ever paid on time; it was nevertheless appropriate that he fast forward payments to himself according to his needs. On 29.7.14, D2 received three payments from NTFC which totalled £166,500. Immediately prior to making those payments NTFC had funds in its bank account totalling almost £360K. That sum was the remaining balance of £600K repaid by 1st Land from a £1.25million draw down under the Loans on 23.7.14. These payments to

D2 together with the payment of £140K to D1 on the same day all but exhausted NTFC's current account balance; within two days, on 31.7.14, NTFC's overdraft was in excess of £135K. The money from the draw downs was not intended or agreed by NBC or approved by NTFC for payment to D2 or D1 in repayment of their director's loan accounts.

187 Mr Morgan challenged D2 on other withdrawals. First, net withdrawals totalling £128,750 in the period 10.10.14 to 22.12.14 which D2 knew or must have known were funded or derived from the last tranche drawn down by NBC on the Loans in August 2014. At that point work on the stadium at Sixfields had ceased due to non-payment of the contractor carrying out the works. Mr Morgan also drew attention to D2's withdrawal of £52K in in the week 7-14.8.15. On 6.8.15 NTFC's overdraft exceeded £660K and during the day it rose to more than £920K before a receipt from the Football League reduced the overdraft to £590K. The overdraft was at this level again after the later payments to D2 on 14.8.15. Mr Morgan also cross-examined D2 about these payments totalling £52K made at a time when NTFC's financial difficulties were severe and NTFC was not paying interest and instalments due on the Loans. D2 was of the view that he was entitled to prioritise his own needs and interests. Mr Morgan submitted that D2 was consciously misusing funds available to NTFC when its finances were in a very critical state and at a time when NBC had been seeking answers to questions about the use of monies it had loaned for works to Sixfields which D2 had avoided and failed to give.

188 In re-examination, Ms Edhem asked D2 to explain his approach to his salary. He candidly acknowledged that he had never considered the operation of his service contract, rather he had focused on the fact that he had a mortgage and other commitments and requirements which he needed to have paid. Ms Edhem produced a schedule recreating D2's loan account over the period 1.7.13 to 30.11.15. In her schedule, Ms Edhem took into account D2's gross salary and the balance written off when D2 ceased to be a director. It is not disputed by NBC that, even ignoring the salary net of deductions for NI and tax, D2 had a balance due to him on his loan account which was written off when he and D1 sold their shares for £1. NBC contended that that is not the issue; the issue is whether D2 was entitled to act as he did when drawing money from NTFC.

189 In closing submissions Ms Edhem submitted that for years D2 worked for NTFC for free and ploughed huge quantities of money into NTFC, and NBC wants even the sums he

sought to take back. Moreover, D2 made a business judgment to reduce his own loan to NTFC rather than take a salary. Further, D2 relied on JW for all matters relating to his drawings and the movements on his loan account were accepted by NTFC's auditors. In addition, Ms Edhem criticised Mr Morgan's approach of concentrating on a two year period rather than looking at D2's financial involvement with NTFC in the round. Looked at in the round, NTFC was always indebted to D2; D2 capitalised a substantial part of his loan account by converting the debt into shares, thereby truly deferring it to third party creditors. Moreover, in the schedule prepared by Mr Morgan, he ignored both £175K introduced into D2's loan account in February 2015 from Artefact (a connected Cardoza family company) and a further £291K introduced as a loan from D2 which derived from CDNL.

190 As I see it, there is a factual difference between the position of D2 and D1 in relation to director's loans in that the payments to D2 in question were all entered through D2's loan account and, thus, accounted for in striking the balance on that account for the purposes of NTFC's annual accounts. Even without adjustment for his salary, at all times NTFC owed D2 money under his loan account. D2's error or wrongdoing was to treat his loan account, which was formally treated in NTFC's accounting records as a deferred creditor, as a current account available for day to day drawing. This was in defiance of NTFC's banker's requirements and at odds with the way in which directors' loan accounts were presented to the world at large by D2 in NTFC's accounts. It was for D2 to establish with his fellow directors and interested third parties, for example NTFC's banker, the use to be made of his director's loan account if other than as a deferred creditor. He failed to do that. He also put himself and his own wants before NTFC's interests, including pressing creditors, and had no regard for NTFC's creditors as a class. His sole, or at least overwhelming, concern was his own self-interest. This is not the conduct of a director mindful of his position and duties as such.

191 The facts that an appropriate arrangement could have been made and that in the event of NTFC being wound up D2's loan account would have ranked with other unsecured creditors are not an answer to the question of breach of duty, although they may go to remedy.

192 By unhesitatingly and unfailingly putting his own interests above those of NTFC (which included the timely payment of its debts), making payments to himself which exceeded any income entitlement he had, and disregarding the stipulated criteria for his loan

account, D2 exercised his powers as managing director for his own benefit and for the benefit of D1. D2 disregarded his duty to act as he considered, in good faith, to be most likely to promote the success of NTFC, failed to exercise independent judgment, and took no notice of conflicts of interest. In short, he treated NTFC as his own unincorporated solely owned business and acted in breach of his fiduciary duty as a director of NTFC.

(7) If so, the appropriate relief (if any). In any claim for an account, damages, equitable compensation, restitution, or the taking of an account of profit :
a. are the payments from D1 and D2 relevant to the remedy?

b. is the value of the write off of the directors' loan account (by the share sale agreement dated 25.11.15) relevant to the remedy?

193 The relief sought by NBC against D1 and D2 in respect of the claims following the Assignment is :

(1) an inquiry as to what dealings from time to time have been effected by D1 in respect of the sum of £2.05million and what (if any) remains of that sum;
(2) an account of what is due to NBC from D1 and D2 in respect of breaches of their fiduciary duty together with payment of the appropriate sum;
(3) a declaration that they hold sums found to be due or their traceable proceeds on trust for NBC;
(4) damages or equitable compensation in excess of £1million;
(5) restitution of amounts due as monies had and received;
(6) interest; and
(7) further and other accounts, inquiries and directions as appropriate.

194 Mr Morgan submitted that the basic remedies available against a defaulting director, and sought by NBC in this case, are (a) restoration of the trust fund where it has suffered loss or been depleted by misapplication of its money, (b) if that is not possible, compensation to put the trust fund back in the position it would have been, or (c) disgorgement of profits. Mr Morgan also reserved for NBC the right to pursue tracing remedies.

195 Mr Morgan referred to GHLM Trading at [169] Where Newey J said :

"It seems to me that a company seeking redress in respect of a 'preference' to which s.239 does not apply is likely to need to show : (a) that it has suffered loss, (b) that the director has profited (so that the 'no profit' rule operates), or (c) that the transaction in question is not binding on the company. In a typical case, the first of these may be impossible: if the 'preference' involved the discharge of a debt, the company's balance sheet position is likely to be unaffected. The second

might well also be problematic if the company has not entered an insolvency regime: if, say, the 'preference' involved the discharge of a debt owed to a director, it could be hard to say whether or to what extent the director was better off than he would have been had he still been owed the money by the company".

196 Mr Morgan also referred to Northampton Borough Council v Anthony Cardoza and others [2017] EWHC 504 (Ch), a summary judgment application in this litigation which was decided by Newey J, and Newey J's judgment at [30] to [32] :

At [30] Newey J referred to Re HLC Environmental Projects Limited (in liquidation) [2013] EWHC 2876 (Ch), which was decided by Mr John Randall QC sitting as a Deputy High Court Judge, and indirectly to Target Holdings Ltd v Redferns [1996] AC 421. In HLC Mr Randall QC noted that appellate authorities support the proposition that a company is to be treated as in an equivalent position so far as its directors are concerned to that of a trust fund so far as its trustees are concerned. Target Holdings was referred to for the passage in the speech of Lord Browne-Wilkinson at 434C-E :

"The equitable rules of compensation for breach of trust have been largely developed in relation to such traditional trusts, where the only way in which all the beneficiaries' rights can be protected is to restore to the trust fund what ought to be there. In such a case the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss. Courts of Equity did not award damages but, acting in personam, ordered the defaulting trustee to restore the estate: see *Nocton v Lord Ashburton* [1914] AC 932, 952, 958, per Viscount Haldane LC. If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed: *Caffrey v Darby* (1801) 6 Ves. 488; *Clough v Bond* (1838) 3 M & C 490".

At [31] Newey J noted that in HLC Mr Randall QC had ordered the director to repay money he himself had received subject to being permitted to prove in HLC's liquidation and had ordered repayment of money paid as a preference in discharge of a genuine liability subject to an adjustment to allow for the distribution due to the genuine creditor, referred to by Mr Randall QC as "qualified by a suitably adapted version of the *West Mercia* proviso".

Then at [32] Newey J concluded that :

"… the remedies that should be granted where a director has acted in breach of duty by causing the company to prefer a particular creditor may be affected by, among other things, whether the company is in liquidation (as was the case in *West Mercia* and *HLC*, but not, much more unusually, *GHLM*), whether the preference consisted of the simple payment of a debt (again,

West Mercia and *HLC*, but not *GHLM*), whether the creditor whose debt was to be discharged was the director himself (certain of the *HLC* payments), and, where that is not the case, whether relief is being sought against the relevant creditor (*GHLM* where Brocade was a defendant). What matters for present purposes, however, is that nothing in the cases casts any doubt on the common sense proposition that, if money paid by a company in discharge of a debt is recovered from the payee, the company will (once again) be indebted to the payee to that extent".

197 Returning to GHLM Trading at [169] in the light of the above and to the observation that it may be impossible to show a loss where the balance sheet is unaffected, I do not understand Newey J to have meant that in all cases where the balance of assets net of liabilities remains unchanged by reversing a preference the company is unlikely to have suffered a loss. For example, the net assets figure may remain the same after restoration and a compensating adjustment to reinstate a liability to a director but the distribution of assets, notional or actual, to those entitled to receive them (creditors and contributories) may be very materially different. For example, restoration of cash to an otherwise illiquid but solvent (at net book values) balance sheet may have a significant effect on the company's ability to pay creditors and continue trading. Further, the sense in which the word 'loss' is used may include assets which ought to, but do not, form part of the trust estate because they have been misapplied, for example by disbursement without authority. The remedy available to redress this 'loss' is restoration, which may be by compensation to restore the value of the assets to the trust estate.

198 Mr Morgan submitted that NTFC had suffered a loss because monies paid to it and intended for use in furtherance of NTFC's legitimate business objectives had been diverted to and for the benefit of D1 personally. Further, restoration or compensation by D1 would not lead to the reinstatement of a liability on the part of NTFC to D1 because the monies claimed were not paid through D1's loan account or entered in NTFC's books as such.

199 Mr Morgan also submitted that neither D1 nor D2 plead either (1) circularity of action or facts to the effect that NTFC would become liable to them again under their loans if they restored monies to NTFC or (2) set-off.

200 Mr Morgan also submitted that, by reason of clause 9.1 in the SPA, D1 and D2 are precluded from raising circularity of action and/or set-off as a claim against or obligation of NTFC. Clause 9.1 of the SPA provides, that save for a claim to a VAT refund of £195K and guarantee claims which do not arise, and in so far as relevant :

"*9.1.1 the Sellers [which includes D1, D2 and a connected company] hereby waive in full and release any claim they or any person Connected to them may have against [NTFC] and any obligation owed to the Sellers or any person Connected to them by [NTFC] as at the date hereof and confirm that as at the date of this agreement following the waiver and release referred to above in this clause 9.1.1:-*

9.1.1.1 neither they nor any person Connected with them has any claim against [NTFC] on any account whatsoever;

9.1.1.2 there are no agreements or arrangements under which [NTFC] has any actual, contingent or prospective obligation to or in respect of any of the Sellers or any person Connected with any of them".

201 Mr Morgan submitted that clause 9.1.1 is in very wide terms. It covered and wiped out both the directors' loan account balances in NTFC's books and, by the word "*may*", any contingent claims existing at the date of the release. Clause 9.1.2 reinforced this proposition. Mr Morgan further submitted that, at the time of entering into the SPA, D1 and D2 were aware that NBC was concerned and seeking explanations about the use made of the Loans as drawn down and that NTFC might have claims against them, as to which it was evident that the SPA does not contain a waiver of claims by NTFC against D1 and D2.

202 Mr Morgan also submitted that given the state of NTFC's affairs, the most that D1 and D2 could have expected would have been reinstatement of such sums that are to be restored to the extent that they had actually been debited against their loan accounts and then rank alongside other creditors in an insolvency process.

203 Mr Morgan submitted, in the alternative, that D1 and D2 had profited by receiving monies that they would not have received had they acted in accordance with their duties as directors.

204 Mr Morgan further submitted that, whilst it is true that NTFC did not enter into an insolvency procedure, that was because NBC agreed to write off NTFC's indebtedness under the Loans. That is put forward as a factor relevant to holding both D1 and D2 liable to compensate NBC.

205 Mr Zaman also referred to GHLM Trading at [169] and submitted that NTFC had not suffered a loss because its balance sheet was unaffected by the payments.

206 Mr Zaman submitted that all equitable remedies are subject to the principle in Vyse v Forster (1872) LR Ch App 309 that a court of equity is not exercising a penal jurisdiction.

The remedy is restorative giving restitution or awarding equitable compensation. Where a trustee is charged with more than he has received the reason is that the trustee made more and holds additional monies had and received to the use of the beneficiary. Mr Zaman also referred to Target Holdings and the speech of Lord Browne-Wilkinson at 439 that equitable compensation for breach of trust is designed :

"to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach".

207 Addressing equitable compensation, Mr Zaman referred to Swindle v Harrison [1997] PNLR 641 and the judgment of Mummery LJ at p.675 to the effect that although compensation is not damages, it is still necessary to show that the loss suffered has been caused by the relevant breach of fiduciary duty. Mr Zaman submitted that in this case there is neither loss nor causation.

208 As to restitution, Mr Zaman submitted that there was no void or voidable transaction in this case, in fact there was no transaction between D1 and NTFC and therefore nothing to restore in restitution, merely the payment of a debt due to D1.

209 Turning to the remedy of an account, Mr Zaman referred to Ultraframe (UK) Limited v Fielding [2005] EWHC 1638 (Ch) and the judgment of Lewison J, as he then was, at [1588] :

"The governing principles are, in my judgment, these:

i) The fundamental rule is that a fiduciary must not make an unauthorised profit out of his fiduciary position;

ii) The fashioning of an account should not be allowed to operate as the unjust enrichment of the claimant;

iii) The profits for which an account is ordered must bear a reasonable relationship to the breach of duty proved;

iv) It is important to establish exactly what has been acquired;

v) Subject to that, the fashioning of the account depends on the facts".

210 Mr Zaman submitted that the amendment to the Particulars of Claim at paragraphs 25c and 36A showed that NBC had only lately, and as a result of losing the summary judgment application heard by Newey J, come to focus on profit by D1 and D2 as well as loss to NTFC. This revealed their claim for what it was, namely entirely artificial or a construct which is not saved even by the amendments. The critical facts in this case are that sums materially in excess of those claimed by NBC were waived by D1 and D2 and

written off by NTFC, and that any liability on their part would be matched £1 for £1 by reinstatement of NTFC's liability to them, which would give rise to circularity.

211 Mr Zaman noted that NBC has conceded that D1 should receive a credit against his liability for sums actually paid back by him and submitted that that must also embrace the loan account written off. On this point Mr Zaman submitted that NBC's evidence, by GH was that NBC's write off of the Loans was to the advantage of NTFC and that, the write off of D1's and D2's directors' loans pursuant to the SPA was also to the advantage of NTFC. Both improved NTFC's balance sheet. Thus, if the court ordered D1 and D2 to pay the sums now claimed it would be punishing them and over compensating NBC as assignee of NTFC's claims. NTFC had no right to insist on the write off of the directors' loans and such write off conferred a £1 for £1 monetary benefit on NTFC. Thus, irrespective of whether or not there was a breach of fiduciary duty by either or both of D1 and D2, there is no available remedy.

212 Ms Edhem adopted Mr Zaman's submissions on behalf of D2 and drew attention to D2's salary entitlement in addition to the credit balance on his loan account at all times until written off and thereby benefitting NTFC. Ms Edhem further submitted that NBC sought to present a skewed view of D2's director's loan account by limiting its focus to a narrow period of time rather than viewing the account in the round. Ms Edhem further contended that notional adjustments should be made for D2's salary entitlement.

213 My findings of fact on breach of director's fiduciary duty by D1 and D2 have included that (1) D1 received sums totalling £2.79million which were not accounted for through his director's loan account and were received by him in breach of fiduciary duty; (2) D1 was able to receive at least the £2.05million because D2 authorised or instructed the payments by NTFC to Oundle and 1st Land knowing that the monies paid would be applied partly in making payments of key money to D1; (3) D2 was also in breach of his fiduciary duties by authorising, instructing or permitting further payments to D1 totalling £740K; (4) D2 withdrew monies from his director's loan account, which was classified by NTFC as a deferred creditor, over a period (1.7.13 to 25.11.15) when NTFC was insolvent and there were pressing current liabilities. The sums withdrawn by D2 exceeded his remuneration entitlement over the relevant period which, over the duration of his tenure of office, D2 in any event chose not to draw; and, (5) by an unwritten agreement or arrangement made contemporaneously with the Heads of Terms D2 was

to receive the benefit of £750K of works to Cheriton which would be funded from monies drawn down by NTFC from NBC under the Loans.

214 In relation to the payments to D1, D1's breach of fiduciary duty needs no further comment. D2's involvement in the payments to D1 potentially exposes him to the prospect of liability for the sums paid to D1. However, I am conscious that Ms Edhem did not address any such claim in her submissions and clearly did not understand NBC to be seeking a remedy in respect of these sums from D2. If such a remedy is sought, and it appears to be, it should be considered further after this judgment has been handed down.

215 The focus of Mr Morgan's submissions on the appropriate remedy was restoration to the trust estate (originally NTFC and by assignment NBC) of the value of assets (here monies) misapplied or diverted by the directors in breach of their fiduciary duties. In short NBC seeks restorative compensation as the primary remedy.

216 In this case, the taking was more subtle than direct misapplication by D1 to himself. However, the routing of payments through third parties cannot defeat the obligation to compensate.

217 As to Mr Zaman's submission, by reference to GHLM Trading at [169], that NTFC had not suffered a loss because its balance sheet was unaffected by the payments, I have explained my understanding of the sense in which the word 'loss' is to be understood. Reversing the depletion of cash assets by misapplication in the case of an illiquid company may alter the ability of the company to continue its business. In other words, the complexion of or picture of financial state of affairs painted by the balance sheet may be fundamentally different even though the net total of assets less liabilities on the balance sheet remains unchanged. In any event, and as Mr Morgan pointed out, reversing the misappropriation of £2.05million, which was never recorded in NTFC's books, would not leave NTFC's net assets unchanged.

218 I agree with Mr Zaman that any remedy should not result in punishment of D1 or D2. That said, they are bound by and must take the consequences of their own conduct. The fact that the waiving and writing off of their respective directors' loan account balances benefitted NTFC is not an answer to the claims against them.

219 D1 might have made straight forward requests for repayment of his loan account whilst still a director, but he did not. Instead he misapplied NTFC's funds by orchestrating unauthorised payments to himself or for his benefit. In so far as he did make further payments to NTFC and thereby restored NTFC's estate to what it should have been, NBC has acknowledged that credit should be given. However, in relation to the loan account balance written off, once D1 had finalised his loan account write off, without disclosing the misapplication of NTFC's monies to himself or for his own benefit and without reserving any right to reopen the loan account, the opportunity had passed. This does not result in punishment of D1. It does no more than require D1 to account and compensate for monies he caused to be misapplied from NTFC's estate by restoring those monies, or compensation of equivalent value, to the estate (now assigned to NBC).

220 D2's position regarding his drawings is different. There is good documentary evidence that the payments to him were all processed through his loan account. In that sense NTFC's funds were not misapplied. The breach of duty was treating his loan account, which was established as a deferred creditor account, as if it was a current account and preferring himself at a time when NTFC was insolvent. If he had caused his director's loan account to reverse so that he became a debtor to NTFC rather than remaining a creditor of NTFC there might well be scope for awarding a remedy. The use of hindsight being permitted, it is also relevant that, apart from NBC, other third party creditors came to be repaid. I note that NBC wrote off the Loans; as to that, the evidence before me was that NBC was alive to the political disadvantages of taking steps to place NTFC in insolvency process and NBC does not bring this claim as a creditor but as an assignee of NTFC's claims.

221 Bearing in mind the principles referred to by Lewison LJ in to Ultraframe (UK) Limited and the caution in Vyse that equity is not a penal jurisdiction, an order requiring D2 to restore, albeit to NBC, monies drawn from his director's loan account would, in my view, be unjust or a form of punishment. It might be otherwise if NTFC had gone into insolvency process and/or NTFC's bank had been disadvantaged by D2's drawings from his loan account, but that did not happen. D2's breach of duty in relation to drawings from his director's loan account does seem to me to be a breach which, in the particular circumstances, does not give rise to a remedy at the suit of NBC pursuant to the Assignment.

222 In reaching this conclusion I have not had regard to notional adjustments for D2's salary entitlement and would not have done so had it been relevant. That is because D2 chose not to claim his salary and no reserve was ever made in NTFC's accounts for any such liability.

223 However, like D1, D2 sought to divert money to himself outside NTFC's accounting records through the side arrangement in relation to Cheriton. To the extent that funds were diverted from NTFC through premature payment to Oundle and 1st Land and misapplied by expenditure on work, including professional fees, at Cheriton D2 is in the same position as D1. He is liable to compensate NBC as NTFC's assignee.

224 The precise fashioning of remedies, including accounts, to arrive at the compensation due by each of D1 and D2 to NBC, and the pursuit of any tracing remedies, are matters for the hearing at which this judgment is given.

(8) Whether Ds should be granted relief in whole or in part under s.1157 of the Companies Act 2006 (respectively 's.1157' and 'CA 2006')?

225 So far as relevant, s.1157 CA 2006 confers on the court a discretion to relieve a director, either wholly or in part, from liability for breach of duty or breach of trust where, notwithstanding that the director would otherwise be liable, he has acted honestly and reasonably, and, having regard to all the circumstances of the case (including those connected with his appointment), he ought fairly to be excused.

226 Thus, there are three points to be considered. First and secondly, the director must establish that he acted honestly and reasonably. Thirdly, having regard to all the circumstances, the court must consider it fair to relieve him of liability.

227 Mr Zaman submitted first that D1 had acted honestly and had made full disclosure of all payments to JW. Further, on any realistic basis, NTFC was only able to continue trading because of D1's support. As a result, NTFC traded for more than a decade throughout which it maintained its place in the professional football league and provided employment to its employees. Over the course of his involvement, D1 paid more than £6.5million into NTFC and at the conclusion of his involvement he wrote off more than is being claimed from him. Had NTFC been placed in administration D1 would have been one of its major creditors.

228 Ms Edhem adopted Mr Zaman's submissions as equally applicable to D2.

229 Mr Morgan submitted that neither D1 nor D2 acted honestly or reasonably and that the discretion under s.1157 is not engaged.

230 I do not accept that D1 disclosed the payments routed to him through third parties with a view to their being entered into NTFC's books and records as repayment of his loan account. That is at the core of D1's lack of candour. What he did was orchestrate the diversion of money to himself via Oundle and 1st Land with the express intention that it was not to be accounted for as repayment of his loan account. If the rhetorical question is posed : for what honest purpose were the payments totalling £2.05million made in the way that they were? No answer realistically founded in honesty would be given. As the three conditions for engagement of the discretion under s.1157 are cumulative, that suffices to dispose of the point.

231 That said, I do not consider that it would be fair to relieve D1 of liability. D1 did write off a loan account balance in excess of the sum for which he has been found liable and that did benefit NTFC. However, he chose not to disclose his arrangements and not to seek an adjustment to the loan account before waiver and write off. Taken as a whole, the circumstances of the case do not justify granting relief from liability.

232 D2's conduct likewise was neither honest nor reasonable. Like D1, he was focussed on his own interests and had no regard for the interests of NTFC. In relation to D2's involvement in payments to D1, D2's conduct was plainly not reasonable. In my view it was also not honest; applying the lay objective standards of ordinary decent people to D2's knowledge and conduct in authorising, instructing or permitting payments to D1 leads inevitably to the conclusion that D2 did not act honestly. Relief under s.1157 is not available to D2.

(9) Transfer of Cheriton :

a. whether it was a transaction defrauding creditors within the meaning of s.423 of the Insolvency Act 1986 (respectively 's.423' and 'IA 1986')?

b. if so, the appropriate relief (if any)

233 The provisions of s.423 become operative where a person enters into a transaction at an undervalue, such as by gift or for no consideration, for the purpose of putting assets beyond the reach of a person who is making or may make a claim against him. In such a case the court may make an order restoring the position to what it would have been if the transaction had not been entered into. The right to make such an application is limited by s.424 IA 1986 and includes a victim of the transaction. The term victim is defined at s.423(5) as "a person who is, or is capable of being, prejudiced by [the transaction]".

234 Mr Morgan drew attention to Clydesdale Financial Services v Smailes [2011] 2 BCLC 405 for the proposition that the definition does not limit victims to creditors, and to Sands v Clitheroe [2006] BPIR 1000 for the proposition that the debtor (here D2) need not have a particular victim in mind when entering into the transaction.

235 Referring to the particular circumstances of this case, Mr Morgan submitted that, if and to the extent that D2 is held liable to pay a sum of money to NBC, NBC would be a creditor of D2 who was prejudiced by the transfer of Cheriton and is a victim in the same way that NTFC was a victim up to the point of the Assignment.

236 Mr Morgan submitted that the crucial question is the purpose for which the transfer was made. Mr Morgan referred to IRC v Hashmi [2002] BCC 943, in particular the judgment of Arden LJ (as she then was) at [23], as establishing that there was no requirement to show that the statutory purpose of putting assets beyond reach was the dominant purpose; and, to JSC BTA Bank v Ablayazov [2018] EWCA Civ 1176, in particular the judgment of Leggatt LJ at [14] with whom Gloster and Coulson LJJ agreed, as establishing that the word "purpose" is not to be understood to be qualified by any qualitative adjective, such as substantial. Thus, there may be a number of purposes for which the transaction was entered into, but provided putting assets beyond the reach of creditors or prejudicing their interests was a purpose the criteria under s.423 are met.

237 Thus, the applicability of s.423 is fact sensitive.

238 Mr Morgan drew attention to a number of facts and matters as relevant : (1) Cheriton had been in joint names for many years; (2) on the evidence Cheriton is D2's only substantial asset; (3) the transfer was for no consideration; (4) the transfer took place long after the alleged promise in 2008; (5) in 2013 D2 was concerned whether he and D1 would recover their investment in (loans to) NTFC and NTFC's financial position did

not improve; (6) in 2013 D2 and D3 agreed to an extension of the Barclay's loan facility to NTFC being secured over Cheriton; (7) in the early part and summer of 2015 D2 was being pressed by NBC for answers as to what had become of monies paid to NTFC under the Loans and D2 also knew that the actual work done fell far short in cost and value of the monies drawn down by NTFC; (8) D2 had not provided to NBC, and could not provide, satisfactory explanations in relation to the use of monies drawn down under the loans; (9) by 24.6.15 (6.6.15 on D2's evidence) D2 knew that planning permission for development of the Adjoining Land would not be granted to the joint venture in which he was involved and further that he and D1 would have to sell their interests in NTFC, and, because any sale would be linked to development of Sixfields and the Adjoining Land, the purchaser would have to be approved of by NBC; (10) in addition, NTFC was under severe financial pressure; (11) despite the Transfer D2 continued to behave as if joint owner of Cheirton, for example in communications with D3 about raising money on Cheriton to finish building works; (12) in her witness evidence at the interim application for an order to restrain sale of Cheriton or preserve half the proceeds of sale, D3's evidence was that Cheriton was to be transferred to stop D2 charging business debts against the family home but no mention was made of an agreement or promise by D2 in 2008 or otherwise prior to the transfer; and, (13) in his witness statement at the interim application stage a natural reading of D2's evidence was that the agreement was made in 2015 not in or shortly after 2008.

239 Mr Morgan submitted that NBC had established that, on the facts, the Transfer and the position of NBC met the criteria for a transfer at an undervalue. Mr Morgan referred to a half share in the net proceeds of Cheriton as having been almost £366K. If D2 is found liable, NBC will seek an order that D3 is to pay that sum, possibly increased for any uplift in value as a result of investment in another property, and an interim charging order over the new property.

240 Ms Edhem referred to Papanicola v Fagan [2008] EWHC 3348 (Ch) and the finding of HHJ Raynor QC that the purpose of the transfer by a husband to his wife in that case was to protect the matrimonial home against debts and liabilities that might arise from the husband's alcoholism and gambling and that the transfer was not caught by s.423.

241 Ms Edhem submitted that at the time of the transfer discussions were ongoing with a view to D1 and D2 selling their interests in Cheriton and, after 3.7.15, D2 only raised

borrowing against Cheriton in the context of paying for further works to get Cheriton into a saleable state.

242 Ms Edhem referred to and relied on D3's evidence in cross-examination that, like any other football club, there would always be a buyer for NTFC and NTFC was always going to be sold. D3 further acknowledged that D2 had been the subject of substantial adverse public comment and said that they were trying to put the whole NTFC saga behind them. Ms Edhem also drew attention to the fact that there was no evidence of D2 personally considering an insolvency process for NTFC before or at the time of the transfer, or even in the period after the transfer. The evidence was of others, specifically HG's associates, looking into placing NTFC in administration. What D2 was doing in the summer and autumn of 2015 was trying to find a buyer and extricate himself from NTFC.

243 Ms Edhem drew attention to D3's concern about the exposure of the family home to D2's business transactions and to the evidence of D2 and D3 that the purpose of the transfer was to stop charges by D2 in the future. As to D2's intentions, Ms Edhem drew attention to an attendance note of a meeting with NBC officers about Sixfields on 12.6.15 at which D2 said he was talking to five potential buyers of NTFC and to other evidence supporting ongoing attempts to find a buyer for NTFC.

244 Ms Edhem further submitted that the transfer was the implementation of a promise made by D2 to D3 some years earlier, in 2008.

245 When considering D2 and D3 as witnesses I rejected D2's and D3's evidence that the Transfer was in fulfilment of a long standing promise to such effect by D2 to D3.

246 I accept that D3 was, certainly in 2015 and probably for some years before that, concerned about her and her family's welfare and that that concern included doing what she could to ensure that there was a home for the family. However, the critical intention and purpose is that of the transferor, D2.

247 By mid 2015 D2 was aware that NTFC was under severe financial pressure. He was also aware that NBC was pressing for answers to questions about the monies drawn down under the Loans. D2 knew that he had no satisfactory answers. D1 was looking for a way to exit from NTFC. D2 knew that he and D1 would have to sell their interest in NTFC and that there was no prospect of the development through their joint venture

with HG and his associates coming to fruition. There is evidence of press and fan hostility towards D2. I accept Mr Morgan's list of relevant facts and matters and agree that it does shed light on D2's purpose. D2 will also have been aware that his and D1's arrangements for cash as key money and works to Cheriton to the value of £750K would be at risk of being challenged if they came to light. I do not doubt that D2 intended to accommodate D3's request. However, I also consider that he was alive to the possibility that claims might be made against him personally and that this informed and contributed to his decision to act. This explains why D2 decided to act in the summer of 2015, having not acted over the preceding years.

248 I am satisfied that D2's transfer of his interest in Cheriton on 3.7.15, which was entered into on terms that provided for him to receive no consideration, (1) was a transaction entered into at an undervalue and (2) was entered into for the purpose of putting assets beyond the reach of a person who may at some time make a claim against him personally.

249 I therefore find this head of claim established against D2 and D3. In consequence NBC is entitled to the declaration sought and other appropriate relief.

Conclusion

250 My findings include that (1) both D1 and D2 acted in breach of their fiduciary duties as directors of NTFC; (2) D1 is liable to pay NBC £2.79million (subject to reduction for amounts shown to have been repaid) by way of compensation under the claim assigned by NTFC to NBC; (3) D2 is liable to compensate NBC for the cost or value of works carried out at Cheriton effectively funded by NTFC and further submissions may be made as to his liability for the sums for which D1 is liable; (4) NBC is entitled to compensation under the principle of restoring to the trust estate monies misapplied by the trustee (in this case a director); (5) neither D1 nor D2 qualify for the court to grant relief from liability under s.1157 of the CA 2006; (6) the transfer by D2 of his interest in Cheriton to D3 on 3.7.15 was an actionable transfer at an undervalue.