Neutral Citation Number: [2024] EWCA Civ 571

Case No: CA-2023-001292

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Robin Vos (sitting as a Deputy High Court Judge)
[2023] EWHC 968 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2024

Before:

LORD JUSTICE NEWEY
LADY JUSTICE ASPLIN
and
LORD JUSTICE POPPLEWELL

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Between:

(1) CAREY STREET INVESTMENTS LIMITED (in liquidation) **(2) 245 BLACKFRIARS ROAD PROPERTY INVESTMENTS LIMITED (in liquidation)**	**Claimants/ Appellants**
- and -	
(1) GRANT TIMOTHY BROWN **(2) EQUITY TRUST (JERSEY) LIMITED**	**Defendants/ Respondents**

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Christopher Parker KC and Edward Meuli (instructed by **Gateley plc**) for the **Appellants**
Hugh Norbury KC and Dan McCourt Fritz KC (instructed by **Gowling WLG (UK) LLP**) for the **Respondents**

Hearing dates: 23-25 April 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 22 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. The first defendant, Mr Grant Brown, was formerly a director of each of the claimants. The claimants, which are now in liquidation, allege in these proceedings that Mr Brown failed in his duties as a director in a number of ways, in large part at least as a result of trying to evade tax properly payable by the claimants. The second defendant, Equity Trust (Jersey) Limited ("Equity Trust"), is said to be vicariously liable for Mr Brown's misconduct or itself to have been a shadow or de facto director of the claimants.

2. Mr Robin Vos ("the Judge"), sitting as a Deputy High Court Judge, dismissed the claim in a judgment dated 28 April 2023 ("the Judgment"). The claimants, however, now appeal against that decision.

Basic facts

3. Equity Trust is a trust and company services provider incorporated in Jersey. Until the autumn of 2006, it was the trustee of trusts associated with the family of Mr Simon Halabi. The trusts, to which I shall refer as "Ironzar", owned various properties, each of which was generally held by a separate company belonging directly or via one or more intermediaries to Ironzar. The property empire was overseen by Buckingham Securities Holding plc ("Buckingham"), which was owned by another trust connected with Mr Halabi's family. Buckingham's day-to-day interactions with the Ironzar structure were mostly handled by Mr Harry Sihra, Buckingham's head of finance.

4. In April 2002, Ironzar agreed to buy the first claimant, Carey Street Investments Limited ("CSI"), for a total consideration of £60 million (increased by about £200,000 by the time of completion). CSI, which was incorporated in the United Kingdom, was the owner of a property in Carey Street, London known as "New Court" ("New Court"). The purchase was effected in the name of a newly-formed Jersey subsidiary of Ironzar, New Court Properties Limited ("NCP"). The acquisition was largely funded by borrowing from Société Générale ("Soc Gen"), which had New Court valued by DTZ Debenham Tie Leung ("DTZ") in May 2002. DTZ reported that the open market value of the property was £65 million.

5. Mr Brown joined Equity Trust as an executive director in July 2004. He took over responsibility for the Ironzar structures and the relationship with Mr Halabi in October 2004 and at that stage became a director of both CSI and NCP.

6. In March 2005, Ironzar agreed to buy two properties known together as the "Bankside Estate". One of these was Ludgate House, 245 Blackfriars Road, London ("Ludgate House") and the other was Sampson House, 64 Hopton Street, London ("Sampson House"). The former was held by the second claimant, 245 Blackfriars Road Property Investments Limited ("BRP"), the latter by Angelmist Properties Limited ("Angelmist"). Both companies were incorporated in the United Kingdom.

7. On 18 July 2005, the directors of CSI, who were Mr Brown and Ms Francis Leonard, another director of Equity Trust, agreed to sell New Court to NCP for £65 million. The bulk of the purchase price was funded by a loan facility from Credit Suisse referred to as "Project Ocean". For the purposes of that, Credit Suisse was in the latter part of July 2005 provided by Colliers with valuations of New Court, Ludgate House

and Sampson House. The properties were valued respectively at £72 million (New Court), £80 million (Ludgate House) and £167 million (Sampson House).

8. The purchase of the Bankside Estate was completed on 3 August 2005. BRP was acquired in the name of Ludgate Property Holdings (Jersey) Limited ("LPH"), while Sampson Property Holdings (Jersey) Limited ("SPH") bought Angelmist. As their names suggest, both LPH and SPH were incorporated in Jersey. Mr Brown and Ms Leonard were appointed as directors of BRP and Angelmist.

9. The combined purchase price of the Bankside Estate was £229 million, of which £78.5 million was attributable to BRP/Ludgate House and the balance of £150.5 million to Angelmist/Sampson House. As part of the transaction, the seller provided an indemnity against any corporation tax payable in respect of any gain on a subsequent disposal of the properties. The indemnity was, however, limited so that only gains calculated on a combined disposal price of up to £226 million (£78 million for Ludgate House and £148 million for Sampson House) would be covered if the disposals took place more than 12 weeks after completion of the sale to Ironzar.

10. Also on 3 August 2005, NCP discharged CSI's indebtedness to Soc Gen and CSI declared a dividend of £5,521,846.35. Just under £200,000 remained due to CSI from NCP. This amount was earmarked for payment of tax liabilities of CSI.

11. The original plan was to transfer Ludgate House and Sampson House from BRP and Angelmist to LPH and SPH, the Jersey parent companies, soon after the acquisition of the Bankside Estate. This was to limit exposure to United Kingdom tax on future capital gains on the properties. In the event, the transfers were delayed, and at one stage the possibility of an initial public offering of shares in a company owning Ironzar's wider property interests was raised. However, that scheme, which was known as "Project Gold", did not come to fruition.

12. Around this time, Equity Trust set up a separate corporate real estate group headed by Mr Andrew Pollard, a chartered surveyor. At some point between December 2005 and May 2006, Mr Pollard's team took over responsibility for the administration of the companies in the Ironzar structure and Mr Pollard himself became responsible for the overall relationship with Mr Halabi and Buckingham. Mr Brown's team retained responsibility only for the administration of the Ironzar trusts, not the underlying companies, though Mr Brown and Ms Leonard remained directors of BRP and Angelmist.

13. On 1 August 2006, Mr Brown and Ms Leonard approved the transfer of Ludgate House and Sampson House on behalf of BRP and Angelmist to their parent companies for a total of £226 million. The price of Ludgate House was £78 million, that of Sampson House was £148 million.

14. Soon afterwards, on 11 October 2006, Equity Trust was replaced as the trustee of the Ironzar trusts by another professional trustee in Jersey, Volaw. Mr Brown and Ms Leonard ceased to be directors of CSI, BRP, LPH or SPH.

15. The global financial crisis in 2008-2009 appears to have had a significant impact on the Ironzar structure. HM Revenue and Customs ("HMRC") petitioned for the winding up of CSI, BRP and Angelmist and winding-up orders were subsequently

made against all three companies (in, respectively, November 2009, October 2009 and April 2010). In June 2010, New Court was sold by receivers for £60 million. In the following month, Ludgate House was sold, also by receivers, for £56 million.

16. Angelmist, through its liquidators, brought a claim against Mr Brown, Ms Leonard and Equity Trust in July 2012 in respect of the transfer of Sampson House to SPH. Angelmist applied for summary judgment and, in a judgment dated 30 June 2015 ([2015] EWHC 1858 (Ch)), Master Bowles found that, although there was no suggestion of dishonesty, Mr Brown and Ms Leonard had breached their duties as directors. He ordered them to make an interim payment to Angelmist pending a full hearing as to the extent of their liability.

17. No order was made against Equity Trust. The Master doubted whether Equity Trust had vicarious liability for the actions of Mr Brown and Ms Leonard but, being unaware of any authority on the particular point, considered that this was not an issue which should be resolved on a summary judgment application. Likewise, he took the view that the question whether Equity Trust could be treated as a shadow director of Angelmist should also be left to a full trial.

18. The present proceedings were issued in 2020. By them, CSI and BRP, by their liquidators, alleged that Mr Brown acted in breach of his duties as a director by authorising the transfer of New Court and Ludgate House for substantially less than market value with a view to avoiding tax; by authorising CSI to pay the dividend of about £5.5 million to NCP; by agreeing that CSI would pay NCP management charges; by agreeing to the payment of interest on money which NCP had lent CSI; and by allowing £766,000 of the price payable on the transfer of Ludgate House to LPH to remain outstanding. As already mentioned, CSI and BRP further contended that Equity Trust was also liable, either vicariously or as either a shadow or a de facto director of CSI and BRP.

The scope of the dispute

19. There is no dispute but that, having been issued so long after the relevant events, the claim is statute-barred unless section 21 of the Limitation Act 1980 applies. Pursuant to that provision, the limitation periods for which the 1980 Act provides do not apply to a claim against a director for fraudulent breach of fiduciary duty.

20. The thrust of the defendants' case before the Judge was to a great extent to the effect that, whether or not Mr Brown might be said to have failed in his duties as a director, there was no dishonesty and the claim should be dismissed for that reason. As was explained to us by Mr Hugh Norbury KC, who appeared for the defendants with Mr Dan McCourt Fritz KC, the defendants proceeded on the footing that, were dishonesty proved, that would in one way or another serve to undermine any other defence that might have been advanced. They also conducted the case on the basis that, in this context, no meaningful distinction falls to be drawn between the test of dishonesty propounded in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, [2018] AC 391 (where it was explained in paragraph 74 that, when dishonesty is in question, the first step is to "ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts" and, that having been established, "the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people") and that adopted in *Armitage v*

Nurse [1997] Ch 241 (where Millett LJ accepted at 251 that a trustee is dishonest if he intends "to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not"). Further, the defendants did not dispute either that "blind eye" knowledge would suffice to satisfy section 21 of the 1980 Act or that dishonesty vis-à-vis HMRC would do so. Nor again did the defendants quarrel with the proposition that Mr Brown would have acted dishonestly if he had caused New Court or Ludgate House to be transferred for less than what he believed to be the market value of the property regardless of whether the figure was one at which the property could reasonably have been valued.

21. We must approach the appeal in a similar way. I would not myself regard it as at all clear that a director who causes his company to transfer a property to its parent for a figure at the bottom end of the range of reasonable valuations in circumstances where the company is undoubtedly solvent and has ample distributable profits commits any breach of his duties to his company, let alone a dishonest one, even if he knows that it will be represented to HMRC that the price was market value when his own personal belief is that the property is worth more. It could, I think, be plausibly contended that, in such a case, there would be no breach of the duty to act in what the director sees as the interests of the company or, at any rate, that the director's conduct could be authorised or ratified by the parent, which, after all, would on the face of it be no worse off. In fact, I should have thought that there would be scope for argument that the director would have no liability to the company in such circumstances even if the director was well aware that the transfer was at an undervalue.

22. Given, however, the manner in which the case has developed, it is not appropriate for us to consider such issues further. As the Judge said at the end of the Judgment, in paragraph 353, he dismissed the claims on the basis that "there was no fraudulent breach of duty by either defendant" and "[t]he extended limitation period in s 21 Limitation Act 1980 does not therefore apply". On this appeal, our principal concern must be with whether there was dishonesty rather than with whether there was breach of duty.

Some legal principles

23. There are of course only limited circumstances in which an appellate Court should interfere with a finding of fact made by a trial judge. Thus, in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600 Lord Reed (with whom Lords Kerr, Sumption, Carnwath and Toulson agreed) said at paragraph 67:

> "in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

A little earlier, in paragraph 62, Lord Reed had said:

> "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

24. In *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29 ("*Fage*"), Lewison LJ identified in paragraph 114 a number of reasons for the approach which the Courts take. As he explained, they include the fact that "[i]n making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping" and that "[t]he atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence)".

25. The position is comparable with evaluative assessments. An appellate Court will not interfere merely because it might have arrived at a different conclusion. It will do so only if it considers the decision under appeal to have been an unreasonable one or wrong as a result of some identifiable flaw in reasoning, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion" (see e.g. *R (R) v Chief Constable of Greater Manchester* [2018] 1 WLR 4079, at paragraph 64, and also *In re Sprintroom Ltd* [2019] 2 BCLC 617, at paragraphs 76 and 77).

26. In *Fage*, Lewison LJ also commented on what a judgment must contain. He said in paragraph 115:

> "It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see Customs and Excise *Commissioners v A* [2002] EWCA Civ 1039; [2003] 2 W.L.R. 210; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] U.K.C.L.R. 1135."

27. A passage from *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672, [2021] IRLR 1016 is of relevance, too. Popplewell LJ, with whom Lewison and Lewis LJJ agreed, said at paragraph 58:

> "where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be

> slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision."

The transfers of New Court and Ludgate House

The Judgment: New Court

28. The Judge identified the issues which needed to be determined in relation to the transfer of New Court as follows in paragraph 91 of the Judgment:

> "91.1 Did Mr Brown have available to him an up to date, independent valuation of New Court when he approved the sale by CSI to NCP at a price of £65m?
>
> 91.2 If not, did he nonetheless consider that the transfer price of £65m reflected the market value of the property?
>
> 91.3 Even if he did, did he have a firmly grounded suspicion that the market value was higher than this but deliberately refrain from obtaining an up to date, independent valuation so that his suspicions were not confirmed?"

29. So far as the first of these questions is concerned, the minutes of the meeting on 18 July 2005 at which CSI's board approved the transfer of New Court to NCP stated that CSI "had received valuation advice from [DTZ]" and that "such advice was tabled". The defendants suggested that the advice was to be found in a draft letter dated 20 June 2005, but the Judge "had no hesitation" in concluding that that letter was not available to CSI's board on 18 July and that it was "more likely than not" that the DTZ advice tabled at the meeting was the valuation DTZ had prepared in May 2002: see paragraph 98 of the Judgment.

30. Turning to the second question, the Judge explained that:

    i) DTZ valued New Court at £60 million in January 2002 (paragraph 105 of the Judgment);

    ii) NCP acquired CSI (and therefore New Court) for about £60 million in April 2002 (paragraph 105);

    iii) DTZ valued New Court for Soc Gen at £65 million in May 2002 (paragraphs 19 and 105);

iv) it was to be inferred that Mr Sihra, on whom Mr Brown "relied … for advice in relation to valuation issues", advised in March 2005 that "£65m was an appropriate value to use for the purposes of the transaction [i.e. the transfer of New Court to NCP]" (paragraphs 109 and 117);

v) at about the same time, a schedule listing Ironzar assets showed the value of New Court as £70 million (paragraph 110);

vi) on 24 June 2005, Mr Brown signed on behalf of CSI a covenant compliance certificate in favour of Soc Gen which impliedly confirmed that New Court was worth £65 million (paragraph 111);

vii) on 18 July 2005, CSI sold New Court to NCP for £65 million;

viii) on 20 July 2005, Colliers provided a draft valuation for Credit Suisse in which the value of New Court was put at £72 million (paragraph 116);

ix) on 26 July 2005, a member of Mr Brown's team at Equity Trust emailed Buckingham referring to her understanding that Buckingham was to provide details of who had valued New Court at £65 million so that the details could be inserted into CSI's board minutes (paragraph 100.3). Buckingham replied on the same day that its understanding was that the property had been valued by DTZ and that confirmation of the value of £65 million was being chased (paragraph 100.3); and

x) on 7 September 2005, Mr Brown signed accounts for CSI for the period ending 31 December 2004 which showed the value of New Court as £65 million but with the comment in a note that the directors "consider that the cost of obtaining a professional valuation of the company's property would outweigh any benefits obtained by the members" but were "satisfied … that should such a valuation be commissioned the property would have a value in excess of its historical valuation" (paragraphs 114 and 115). Mr Sihra had been sent a draft of these accounts on 14 July 2005 (paragraph 114).

31. It had been the consistent advice of Olswang, from whom Equity Trust obtained legal advice, that New Court "should be transferred at market value both for insolvency and banking reasons and also on the basis that any tax liability would be calculated based on the market value of the property, irrespective of the price used" (paragraph 106). On 11 July 2005, Olswang "reiterated the need for an independent valuation" and "noted that the capital gains tax base cost of New Court was approximately £64.5m and so corporation tax would be payable on any gain if the market value of the property on transfer was in excess of this figure" (paragraph 113).

32. Mr Brown's team at Equity Trust was aware of "the potential tax liability on any gains to the extent that the transfer price exceeded CSI's base cost of approximately £64.5m", of "the likelihood that HMRC would challenge a 'low' valuation and that independent evidence would be needed to support any valuation not only for tax purposes but also from the point of view of solvency and their lenders" and that "the use of a £65m valuation could adversely impact the Project Ocean refinancing" (paragraphs 118 and 119 of the Judgment). The Judge commented in paragraph 120 that it was "apparent therefore that there was a tension between setting a value for the

transfer of New Court to NCP which would minimise any liability to tax on capital gains and ensuring that the Project Ocean refinancing was successful".

33. Arriving at his conclusions, the Judge said:

> "123. In my view, the only reasonable conclusion to be drawn from these facts is that, whilst Mr Brown was aware that a higher valuation was possible and that a lower valuation was preferrable from a tax perspective, based on guidance provided by Buckingham, a transfer price of £65m was a justifiable market value. In these circumstances it cannot be said that Mr Brown acted in a way which he knew was contrary to the interests of CSI, nor can he be said to have been reckless as to whether his actions were contrary to the interests of CSI as he clearly turned his mind to the question as to what the appropriate transfer price should be.
>
> 124. In cross examination, Mr Brown accepted that Buckingham were not valuation experts. However, as he pointed out, they were nonetheless property specialists. In these circumstances, it does not in my view follow (as the claimants have suggested) that Mr Brown could not have honestly believed that the transfer price was an appropriate market value for the purposes of the transaction.
>
> 125. [Counsel for the claimants] draws attention to the 2004 accounts for CSI which Mr Brown signed in September 2005, approximately six weeks after the transfer of New Court. As I have mentioned, those accounts contained a note to the effect that the directors believed the value of New Court to be in excess of £65m.
>
> 126. However, in my view, little can be read into this. Mr Brown clearly could not recall his thinking and the circumstances in which those accounts were signed. As noted above, Mr Sihra was asked to comment on the value used in the accounts and, it is to be inferred, approved the proposed wording. Given that the concern in relation to the accounts clearly related to the Project Ocean borrowing, the statement in the accounts is perhaps not surprising given Mr Sihra's apparent use of a range of values. It does not therefore follow from this that Mr Brown must have thought that, in July 2005, when the transfer took place, a figure of £65m was below the market value of New Court.

> 127. The documentary evidence makes it clear that it was anticipated that, following the hive up of New Court to NCP and the subsequent refinancing (Project Ocean) which took place shortly afterwards, CSI would be put into solvent liquidation. Taking this into account and looking at the interests of the members of CSI as a whole, this reinforces my conclusion that Mr Brown did not believe that his actions were contrary to the interests of CSI …."

34. With regard to the third of the issues listed in paragraph 28 above, the Judge recorded in paragraph 129 of the Judgment that "Mr Brown was aware of the possibility that New Court could be valued at a price in excess of £65m" and that his "suspicion was firmly grounded on specific facts known to him". However, the Judge "reject[ed] the suggestion that Mr Brown deliberately refrained from arranging for CSI to obtain an independent valuation for fear that this might confirm his suspicions" (paragraph 130). The Judge considered that "the documentary evidence makes it clear that it was always intended that a valuation should be obtained to support the £65m value" (paragraph 130). "The reality", the Judge said in paragraph 131 of the Judgment, "is that Mr Brown considered that a value of £65m was justified based on his team's discussions with Buckingham and that the question of obtaining independent, supporting evidence was left until later".

35. In paragraph 136 of the Judgment, the Judge said that he viewed it as "inconceivable that … Mr Brown would put his career and his reputation on the line for the client by dishonestly assisting CSI to evade tax". He continued in paragraph 137 that "an examination of Mr Brown's motivations supports my conclusion that Mr Brown did not act in a way which he knew was contrary to the interests of CSI" before saying in paragraph 138:

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

36. Having heard expert evidence as to the value of New Court and Ludgate House, the Judge found in paragraph 340 of the Judgment that the value of New Court as at 19 July 2005 was £65,179,584.

The Judgment: Ludgate House

37. The Judge noted in paragraph 206 of the Judgment that the claimants said that "Ludgate House was transferred at a significant undervalue and that Mr Brown either knew this to be the case or that he had blind eye knowledge". As the Judge went on to explain, the claimants relied on Mr Brown's "acceptance that he needed an up to date valuation" and submitted that "no such valuation (or at least no independent

valuation) was obtained". In the circumstances, the Judge identified the issues with which he needed to deal as follows in paragraph 207:

> "207.1 Did Mr Brown have an up to date, independent valuation of Ludgate House when he approved the sale by BRP to LPH at a price £78m?
>
> 207.2 If not, did he nonetheless consider that the transfer price of £78m reflected the market value of the property?
>
> 207.3 Even if he did, did he have a firmly grounded suspicion that the market value was higher than this and deliberately refrain from obtaining an up to date, independent valuation so that his suspicion was not confirmed?"

38. The Judge answered the first of these questions in the negative. He said in paragraph 215 of the Judgment that "the only possible conclusion is that no independent valuation of Ludgate House was obtained for the purposes of the transfer from BRP to LPH".

39. Moving on to the second question, the Judge referred to documents which stated or implied over the period between July 2005 and April 2006 that Ludgate House was worth £80 million, £77.85 million, £77.775 million, £106 million and £75.775 million (in chronological order). In paragraph 230 of the Judgment, the Judge mentioned advice which SJ Berwin gave in relation to Ludgate House and Sampson House in a letter of 18 July 2006 at the request of Mr Pollard's team in these terms:

> "Since the UK Companies do not have distributable reserves my understanding is that the property needs to be transferred up to the Jersey Company at market value; however a price above £148m will not be protected by the SPA and this should be considered in determining the relevant market value.
>
> In relation to Ludgate, the property can be transferred up for a value of up to £78m in circumstances where tax up to that level should be protected by the SPA. The original loan (including unpaid interest) was £76,985,535. Again, to the extent that the property is transferred up for more than this there will need to be an outstanding loan of money owed by the Jersey Company to the UK Company …."

40. In paragraphs 231 to 233 of the Judgment, the Judge made reference to correspondence in which:

    i) in an email to Mr Sihra dated 26 July 2006, Mr Pollard said, "I had an idea you were going to provide the valuation";

    ii) Mr Sihra replied the same day that he would "need some guidance as to which side of the range to 'err' on";

iii) in an email dated 27 July 2006, SJ Berwin asked Mr Sihra and Mr Pollard about their availability for a conference call the next day; and

iv) in an email dated 31 July 2006, Mr Pollard briefed Mr Brown and Ms Leonard on the proposed transfers of Ludgate House and Sampson House, noting that valuation advice had been provided by Buckingham.

41. The Judge concluded in paragraph 234 of the Judgment that it was "more likely than not that Buckingham gave advice on the value which should be used for the purposes of the transaction" and, in paragraph 242, that it was "more likely that Mr Sihra did indeed advise that £78m was an appropriate market value to use for the purposes of the sale to LPH". In the preceding paragraphs, the Judge had observed that "the question of tax on capital gains was firmly in everyone's minds at the time the discussions relating to the proposed transfer of Ludgate House to LPH took place" and that "the need to set the price for the transfer of Ludgate House by reference to market value was also firmly in people's minds".

42. Having expressed the view in paragraph 246 of the Judgment that Mr Pollard "was clearly somebody who expected things to be done properly", the Judge said in paragraph 248 that "it would be very surprising if Mr Pollard was willing to recommend to Mr Brown and Ms Leonard a sale of Ludgate House at a price of £78m if he did not think that this was justified as being the market value". The Judge continued:

> "249. Turning to Mr Brown, he was not directly involved in the preparatory work relating to the proposed transfer of Ludgate House to LPH. However, he received the briefing from Mr Pollard which confirmed that valuation advice had been received from Buckingham and that the transfers of Ludgate House and Sampson House should take place at a combined value of £226m. He would of course have understood this to be £78m for Ludgate House at £148m for Sampson House, as confirmed in the board minutes. Mr Pollard's comment was 'I see no reason not to proceed'.
>
> 250. It is accepted on both sides that Mr Brown would have discussed the position with Mr Pollard who would no doubt have informed him of his discussions with Mr Sihra and SJ Berwin. I accept that the question of tax on capital gains is likely to have formed part of that discussion but, in line with the findings I have made, Mr Sihra's advice that £78m was an appropriate figure for the market value would also have been relayed.
>
> 251. In the light of this briefing, it cannot be inferred that Mr Brown knew that the market value of Ludgate House was in excess of £78m despite his knowledge that the total purchase cost had been £78.5m and his general understanding that prices had been increasing

> over the previous year. Although, as I have said, Mr Brown accepted in cross-examination that Buckingham were not valuers, he certainly took the view that they were significantly more qualified than he was to express an opinion on values.
>
> 252. There is no evidence that, in August 2006, Mr Brown had in mind the Colliers valuation of March 2006 which valued Ludgate House at just under £76m. However, he was clearly aware of the existence of the valuation and in the absence of any clear recollection of events on the part of Mr Brown, this is in my view a relevant factor to take into account in determining whether it is right to infer that Mr Brown knew that the transfer price was less than the market value of Ludgate House. I do not however place any great weight on this point as the other evidence in my judgment provides sufficient grounds for inferring that Mr Brown did believe the transfer price of £78m to reflect the market value of Ludgate House."

43. With regard to the third of the questions he had identified in paragraph 207 of the Judgment, the Judge said in paragraph 254 of the Judgment:

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

44. The Judge concluded as follows in paragraph 257 of the Judgment:

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

45. The Judge found in paragraph 352 of the Judgment that the value of Ludgate House as at 1 August 2006 was £87,665,000.

Were the Judge's findings open to him given the way in which the defendants had put their case?

46. The claimants contend that the Judge's findings were not open to him. In the light, it is said, of admissions made in the pleadings and evidence, the sole issue which the Judge had to decide in relation to the propriety of the transfers of New Court and Ludgate House was whether Mr Brown had obtained independent valuations confirming their market value. With the rejection of Mr Brown's evidence to that effect, the Judge should have concluded that Mr Brown had been dishonest.

47. As for the pleadings, the defendants introduced their response to the claim in paragraphs 1-17 of the defence before going on to respond to specific paragraphs of the particulars of claim. In paragraph 14 of the defence, the defendants pleaded that Mr Brown was "not liable as alleged or at all" and then stated that he "was aware of the need to obtain an updated valuation" of each property and did so. Later in the defence, the defendants referred back to paragraph 14 more than once and again asserted that contemporaneous valuations had been obtained. In answer to paragraph 16(1) of the particulars of claim, in which it had been alleged that Mr Brown had authorised the transfer of each property "at a price which was substantially less than the market value of the property in an effort to minimise the tax that the property holding company paid on the capital gain", the defendants pleaded in paragraph 27 of the defence:

> "As regards Mr Brown, subparagraph (1) is denied:
>
> (1) Mr Brown authorised the relevant transfers because, having exercised independent judgment, he considered it in good faith to be in the interests of the property holding company for him to do so;
>
> (2) Further or alternatively, Mr Brown believed the consideration payable … for New Court and Ludgate House to reflect the value of those properties. Paragraph 14 above is repeated."

The defendants also, in paragraph 28(1) of the defence, said in unqualified terms that Mr Brown "believed that the properties were being transferred at their market value", and in paragraph 29(5) they confirmed Mr Brown's belief in the truth of representations to HMRC that "the purchase price paid … was believed to be equal to the market value of the property acquired" and that "the transfer at that price had been in the interests of the transferor company".

48. In a witness statement dated 24 November 2022, Mr Brown stated that he "would not have transferred New Court or signed minutes that referred to a valuation being tabled if there had not been a valuation" (paragraph 58), that he "would not have approved the transfer of Ludgate House … without a valuation of a similar nature to the valuation for New Court" (paragraph 87) and that he "would definitely have needed to see it before approving the hive up" (paragraph 88). Mr Brown also, however, explained that he had "very limited memory of the specific events relevant to these proceedings" and did "not remember having seen at the time any of the documents [he had] been provided with since these proceedings were commenced" (paragraph 6).

49. In preparation for the trial, the parties sought to agree a list of issues. The defendants' draft included issues as to whether Mr Brown "honestly believed the consideration payable" for each property "to reflect the property's market value" and whether the defendants were, "as the Claimants contend, limited to asserting that Mr Brown … held such belief by reason of" relevant valuations. The claimants objected to the defendants' draft and no agreement on a list of issues was ever reached. The claimants can, however, have been left in no doubt that the defendants maintained that Mr Brown could have derived an honest belief that the transfer prices reflected market value otherwise than by reason of the valuations referred to.

50. Mr Norbury returned to the subject when opening on the first day of the trial, voicing "objection to the way in which it seems the claimants are trying to limit how the defendants can argue our case". The Judge was not asked to rule on the point at that stage, and he did not do so.

51. Mr Brown's oral evidence reflected in this respect his witness statement. He confirmed that valuations had been needed and obtained. As already mentioned, the Judge did not accept that evidence. However, he "did not form the impression that [Mr Brown's] evidence was dishonest" (paragraph 78 of the Judgment): his conclusion was that, "whilst Mr Brown's evidence was unreliable, it was not dishonest" (paragraph 82). The Judge observed that, "[n]ot surprisingly, given the events in question took place over 15 years ago, there was much that he could not remember" (paragraph 73).

52. In paragraph 63 of the Judgment, the Judge noted that it was being contended that "it is not open to Mr Brown to maintain that he was honest if the Court were to find that he did not have an up to date valuation before him given that he has not, in his pleadings or his evidence, put forward any other explanation for his honesty". The Judge rejected the submission. He said:

> "64. … Read as a whole, it is quite clear from the pleadings that the key question in issue is whether Mr Brown acted honestly. Although I accept the CPR (Rule 16.5) requires a defendant, in their defence, not only to deny an allegation but also to put forward their own version of events where appropriate, the failure to do so cannot relieve the claimant from having to prove their case. As Mr Norbury pointed out, if Mr Brown had simply denied dishonesty (and had not referred to any up to date valuation) it would still be up to the claimant to prove, based on the available evidence and on the balance of probabilities, that Mr Brown had been dishonest.
>
> 65. Although a finding that Mr Brown did not have an up to date valuation available to him would be a significant factor to take into account, it cannot in my view be conclusive as to whether or not Mr Brown acted dishonestly which must be judged in the light of all of the relevant circumstances."

53. When refusing permission to appeal on 13 June 2013, the Judge said in relation to this topic:

> "this was a point which was canvassed as part of the opening submissions. It was therefore open to the claimants to tailor their cross-examination of Mr Brown accordingly and to deal with any necessary issues in their closing submissions (and indeed they did so)."

54. In my view, the Judge was justified in approaching matters in the way he did. More specifically, I do not think the fact that the Judge found that Mr Brown did not have up-to-date independent valuations of New Court and Ludgate House available to him when approving their transfers required him to conclude that Mr Brown was dishonest. It is true that the defendants pleaded in their defence that updated valuations were obtained, but the defence also included assertions in more general terms that Mr Brown considered the transfers to be in the interests of the claimants and that the properties were being transferred at their market value. That it was the defendants' position that Mr Brown could be found to have been honest without updated valuations having been obtained was, moreover, made clear by the debate about the list of issues and what was said by Mr Norbury in opening. The claimants had, therefore, had ample notice of the defendants' stance by the time they came to cross-examine Mr Brown, who was the only witness of fact. As the Judge said, the claimants were able both "to tailor their cross-examination of Mr Brown accordingly" and "to deal with any necessary issues in their closing submissions".

What did the Judge decide?

55. It was the claimants' case that Mr Brown was dishonest unless he believed that New Court and Ludgate House were being transferred at their market value. For Mr Brown to have been honest, the claimants maintained, Mr Brown had to have considered each price to be equal to *the* market value of the property and not merely to a figure within the range of values that could reasonably be placed on it. In particular, it was the claimants' position that Mr Brown would have been dishonest if for tax reasons the properties had been transferred for less than what he personally saw as their market value.

56. The defendants did not dispute this analysis. It was therefore incumbent on the Judge to determine whether the transfer prices accorded with Mr Brown's perception of the properties' market value. The defendants contend that, on the Judge's findings, that was the case. The claimants, however, disagree. They submit that the Judge decided no more than that the figures adopted were within the *range* of possible valuations and that it is implicit in the Judgment that they were influenced by tax considerations.

57. Mr Christopher Parker KC, who appeared for the claimants with Mr Edward Meuli, relied in support of this submission on various passages in the Judgment. He pointed out, for example, that the Judge spoke of £65 million being "a justifiable" and "an appropriate" market value for New Court and of the figure being "justified". Similarly, the Judge referred to Mr Sihra advising that £78 million was "an appropriate" market value for Ludgate House and of the need to set the price of that property "by reference to" market value. If, Mr Parker submitted, the Judge had concluded that Mr Brown had believed each transfer price to be equal to *the* market

value of the property, and not just to "a justifiable" or "an appropriate" figure, it would have been easy enough for him to say so in terms. The position is rather, Mr Parker argued, that the Judge found that Mr Brown had thought the figures to be within, if at the lower end of, the range of possible values.

58. On the other hand, a transfer price could, of course, have been deemed "justifiable", "appropriate" and "justified" because it accorded with what Mr Brown believed *the* market value to be, and a figure thought to represent *the* market value could be described as set "by reference to market value". There are, moreover, other indications that the Judge was focusing on what Mr Brown saw as *the* market values of the properties. Thus, the Judge said that it did not follow from the note in CSI's 2004 accounts that Mr Brown must have thought that £65 million was below "*the* market value" of New Court (emphasis added). In a similar vein, the Judge observed that it would have been surprising if Mr Pollard had been willing to recommend a sale of Ludgate House for £78 million if he did not think that this was "justified as being *the* market value" (emphasis added). Likewise, the Judge said that it could not be inferred that Mr Brown knew that "*the* market value" of Ludgate House was in excess of £78 million and referred to whether it was right to infer that Mr Brown knew that the transfer price was less than "*the* market value" of Ludgate House (emphasis added in each case). The Judge further spoke of there being sufficient grounds for inferring that Mr Brown believed £78 million to reflect "*the* market value" of Ludgate House and of Mr Brown having had a suspicion that the transfer price was less than "*the* market value" of Ludgate House (emphasis added in each case). It is significant, too, that the Judge identified the issues which he needed to determine as including whether Mr Brown considered that each transfer price reflected "*the* market value" of the property (emphasis added). To echo what Popplewell LJ said in *DPP Law Ltd v Greenberg*, the Judge can be expected to have answered those questions unless the contrary is clear from the language of the Judgment, which it is not.

59. The Judgment could, with respect, have been expressed rather more clearly. Even so, it is, I think, apparent from it that the Judge found that the prices at which New Court and Ludgate House were transferred to NCP and LPH equated to what Mr Brown believed the market values of the properties to be. The Judge is therefore to be taken to have made findings of fact to that effect.

Can the Judge's findings be impugned?

60. As mentioned earlier, there are only limited circumstances in which an appellate Court should interfere with a finding of fact made by a trial judge. Supposing, however, that the Judge found (as I consider him to have done) that Mr Brown believed the transfer prices to equate to market value, Mr Parker argued that his findings are susceptible to challenge. Mr Parker referred to the Judge having arrived at perverse conclusions, ignored evidence and wrongly assumed that it was "inconceivable" that Mr Brown would have acted dishonestly.

61. With regard to the last of these points, the Judge commented in paragraph 136 of the Judgment that, in his view, it was "inconceivable" that Mr Brown would dishonestly assist CSI to evade tax. The use of the word "inconceivable" was, as it seems to me, unfortunate. Looking at the Judgment as a whole, however, it can be seen that the Judge was not proceeding on the basis that there was no possibility of Mr Brown having been dishonest. The Judge himself explained in paragraph 137 that he

regarded "an examination of Mr Brown's motivations" as *supporting* his conclusion that Mr Brown did not act in a way which he knew was contrary to the interests of CSI. That it was permissible for the Judge to take into account as one factor the inherent likelihood of Mr Brown having acted dishonestly is apparent from a passage from *Armitage v Nurse*, in which Millett LJ said at 263 that "a charge of fraud against independent professional trustees is, in the absence of some financial or other incentive, inherently implausible".

62. So far as Ludgate House is concerned, Mr Parker stressed that the transfer prices for both that and Sampson House exactly matched the upper limits in the tax indemnity given by the seller of the Bankside Estate (as to which, see paragraph 9 above). That regard was had to the indemnity was, Mr Parker argued, confirmed by the contemporary correspondence and the fact that there is no other obvious source for the £148 million price at which Sampson House was transferred. Among the other matters to which Mr Parker made reference was Mr Brown's knowledge that property prices were rising during this period.

63. By the time, however, that Ludgate House was transferred to LPH, Mr Pollard's team had taken over responsibility for the administration of the companies in the Ironzar structure and the relationship with Buckingham. Consistently with that, Mr Brown was not included in the correspondence mentioned in paragraph 40 above or the conference call which appears to have taken place on 28 July 2006. As the Judge noted in paragraph 249 of the Judgment, Mr Brown was not directly involved in the preparatory work relating to the proposed transfer of Ludgate House. The position was rather that he was told by Mr Pollard, someone who "expected things to be done properly", that Mr Sihra, who was a property specialist, had advised that figures of £78 million and £148 million were appropriate for the transfer of Ludgate House and Sampson House. I do not see that the coincidence with the tax indemnity figures, an absence of explanation for the £148 million or Mr Brown's "understanding that property prices had increased" made it perverse for the Judge to conclude that Mr Brown believed the market value of Ludgate House to be £78 million. Nor, in my view, is there any other basis for impugning the Judge's finding. A different judge might or might not have made the same finding, but that is not what matters. Equally, there is, in my view, no basis on which we would be entitled to interfere with the Judge's rejection of the contention that Mr Brown "consciously refrained from getting an up to date, independent valuation for fear that it might confirm his suspicion". The Judge was, as it seems to me, entitled to take the view that, "[o]n the contrary, [Mr Brown] was told that valuation advice had been obtained from Buckingham and he relied on that advice".

64. Turning to New Court, Mr Parker's best points appeared to me to arise from the minutes of the meeting of CSI's board on 18 July 2005. As already mentioned, these recorded that CSI "had received valuation advice from [DTZ]", that "such advice was tabled" and that the advice was "to the effect that … the market value of the Property is £65 million". The Judge, however, concluded that a draft DTZ letter dated 30 June 2005 did not come into existence until later in the year and, hence, that what was tabled at the meeting was DTZ's May 2002 report.

65. Mr Parker argued that there can be no honest explanation for this minute. While Mr Sihra may have advised that £65 million was "an appropriate value to use for the purposes of the transaction", the minutes purported to justify the price not by

reference to any such advice but on the basis that there was an up-to-date valuation from DTZ supporting £65 million. In fact, there was not. The minutes thus reflected a recognition that there needed to be such a valuation and, there being no such valuation, showed that Mr Brown was willing to confirm the accuracy of untruthful minutes.

66. Against that, eight days after the board meeting Buckingham was asked for details of who *had* valued New Court at £65 million and replied that it was its understanding that DTZ had valued the property and that *confirmation* of the value of £65 million was being chased: see paragraph 30(ix) above. That exchange is consistent with CSI's board having understood at the time of the 18 July 2005 meeting that New Court had been professionally valued at £65 million not only in the May 2002 report but recently, albeit that written confirmation of that was not yet available. Even on that basis, the minutes would be inaccurate, but they would not of themselves show that the Judge was wrong to find that Mr Brown believed the market value of New Court to be £65 million, the more so when by the time the minutes were being prepared it was understood that it was DTZ that had vouched for the £65 million value.

67. In all the circumstances, it seems to me that there is no sufficient basis for us to interfere with the finding that Mr Brown believed the market value of New Court to be the £65 million for which it was transferred. Nor, in my view, are we entitled to go behind the Judge's rejection of the suggestion that Mr Brown deliberately refrained from arranging for CSI to obtain an independent valuation for fear that this might confirm that New Court was worth more than £65 million. Once again, a different judge might possibly have arrived at conclusions different from those of the Judge, but that is not to the point.

Conclusion

68. I would dismiss the appeal so far as it relates to the transfer of New Court to NCP and that of Ludgate House to LPH.

The dividend

69. As mentioned in paragraph 10 above, CSI declared a dividend of £5,521,846.35 on 3 August 2005. The Judge explained in paragraph 140 of the Judgment that the intention was that no cash should be left in CSI and that that company should in due course be put into liquidation. With that in mind, it was proposed that:

    i) NCP would pay the balance due from CSI to Soc Gen of approximately £56 million;

    ii) part of what was due to CSI from NCP in respect of the transfer of New Court would be set off against the debt due from CSI to NCP which had been incurred at the time of the original purchase of New Court in 2002. By this time, that debt was approximately £3.6 million;

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

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

70. Olswang prepared the documents required to implement the plan. These included a cashflow statement from which the precise amount of the dividend was calculated. Olswang advised that, to ensure that CSI remained solvent, Equity Trust should enter into a share subscription agreement under which it undertook to subscribe for shares in CSI for an amount equal to any United Kingdom corporation tax liabilities of CSI.

71. The Judge found that Mr Brown had had available to him when the dividend was declared "interim accounts" within the meaning of section 270 of the Companies Act 2005 but that there "seem[ed] little doubt that … the interim accounts … were defective" because they failed to make any provision for corporation tax in respect of the sale of New Court to NCP even though some £150,000 would have been due even on the basis of the £65 million transfer price. The Judge concluded, however, that Mr Brown did not appreciate that the interim accounts were deficient, commenting in paragraph 168 of the Judgment that Mr Brown "was clear in his evidence that, given the existence of the share subscription agreement, the position was, in his mind, neutral".

72. The Judge went on to address what the position would have been if Mr Brown had known that New Court was being transferred to NCP at an undervalue. The Judge said:

> "171. I should also note that the claimants make the point that, if Mr Brown knew that the transfer of New Court to NCP was at an undervalue, there would be an additional corporation tax liability on the increased gain. This is of course correct, but the comments made above apply in exactly the same way. Mr Brown would still not have appreciated that the omission of any provision for the tax from the balance sheet was a problem given his expectation that the liability would be met through the mechanism of the share subscription agreement.
>
> 172. Even if I am wrong and Mr Brown knew that the interim accounts available to him at the board meeting on 3 August 2005 were defective, I do not in any event consider that he acted dishonestly for the purposes of s 21 Limitation Act 1980. It was clearly everybody's understanding and expectation that CSI would end up in a position where it could be put into solvent liquidation. This was the entire purpose of the share subscription agreement which had been put in place on the advice of Olswang."

73. The claimants challenge the Judge's conclusions in respect of the dividend on the footing that Mr Brown withheld from his advisers his knowledge (actual or "blind eye") that the market value of New Court was greater than £65 million. That being so,

it is argued, the deficiency in the accounts was not innocent but rather arose from an attempted fraud on HMRC.

74. However, the claimants accept that this ground of appeal depends on a finding that Mr Brown had at least "blind eye" knowledge that the transfer of New Court to NCP was at an undervalue. Since I have concluded that findings by the Judge to the contrary should stand, this ground of appeal must fail.

Management charges and interest

75. On 23 June 2004, Mr Sihra sent Equity Trust a document in which, under the heading "Points needing clarification", he said:

> "1. The loan from [NCP to CSI] is effectively a low-ranking junior loan and should accrue interest at 12% p.a. The fact that the loan agreement says it is interest-free should be assumed to be an error which should be rectified retrospectively by both parties.
>
> 2. We should accrue management charges from [NCP] to [CSI] of £150,000 p.a. for provision of investment and financial advice relating to the property, the tenant, future prospects and development opportunities (and also for the provision of directors and officers for the company, admin servicers, etc.)"

76. On 2 November 2004, CSI and NCP entered into a property management agreement under which NCP was appointed to manage New Court with effect from 27 May 2002. The fee was stated to be £150,000 for the period to 31 December 2002 and thereafter as agreed from time to time. CSI's board, with Mr Brown in the chair, had resolved to approve the agreement at a meeting on 26 October 2004.

77. On 11 November 2004, CSI and NCP agreed that NCP's lending to CSI should "bear interest from the date of the original Agreement on 27 May 2002, at the rate of 12% per annum until the loans are repaid in full". CSI's board, with Mr Brown in the chair, had resolved to approve the change at a meeting on the same day.

78. CSI subsequently paid NCP £993,000 in respect of interest and, according to the particulars of claim, £541,967 in respect of management fees.

79. The claimants alleged that, in agreeing to the payment of the management charges and interest, Mr Brown acted in dishonest breach of duty. They pointed out, among other things, that Buckingham had previously undertaken to Equity Trust, by an agreement made in December 2003, that it would provide management functions in relation to New Court (and for a fee of £130,000 for the first year) and that the loan from NCP to CSI had been understood to be interest-free.

80. So far as interest is concerned, the Judge found in paragraph 200 of the Judgment that, "whilst Mr Brown could and should have investigated the position and … he was … no doubt in breach of his duties as a director in failing to do so, he was not in fact aware of the original arrangements and simply relied on Mr Sihra's advice that the

original documentation of the loan as being interest free was an error". The Judge had "little doubt that, given the timing of the proposals made by Mr Sihra, Mr Brown would have been well aware that the main purpose of charging interest on the loan retrospectively was to reduce the taxable profits of CSI", but the Judge considered that "it does not follow from this that Mr Brown considered that charging of interest was unjustified or that he was reckless as to whether it could be justified": paragraph 202. The Judge concluded in paragraph 205:

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

81. The Judge took a similar view in relation to the management charges. While he accepted that Mr Brown "is likely to have been aware that Mr Sihra's purpose in raising the issue of a management fee was to reduce the taxable profits of CSI" (paragraph 182 of the Judgment) and that there was evidence of a failure by Mr Brown to take proper care, the Judge considered it "more likely than not that Mr Brown believed that the management fees were justifiable costs payable by CSI for the services which had been provided by Buckingham" (paragraph 185) and that there was "no evidence that Mr Brown knew or suspected that the amount of the fee was not justified in relation to the services which had been provided" (paragraph 191). The Judge saw it as "implicit that Mr Brown considered the fee to be appropriate" even if "little (if any) independent thought was given by Mr Brown to the amount of the fees", Mr Brown and the team at Equity Trust having "relied on the advice from Mr Sihra and acted accordingly": paragraphs 191 and 192. Overall, "whilst Mr Brown may well have been in breach of his duties, he did not knowingly or recklessly act contrary to the interests of CSI and so any breach was not fraudulent for the purposes of s 21 Limitation Act 1980": see paragraph 193.

82. Mr Parker argued that no judge could reasonably have failed to find that Mr Brown acted dishonestly in relation to the management charges and interest. Mr Brown was aware that Mr Sihra, on whom he was relying, was seeking to reduce CSI's taxable profits. In following Mr Sihra's advice, therefore, Mr Brown was not acting in CSI's interests and was dishonest.

83. However, the Judge made findings to the effect that Mr Brown in fact considered both the interest and the management charges to be justified, the documentation showing the loan from NCP as interest-free to have been "an error" and the amount of the management fees to be appropriate. The Judge further found that Mr Brown did not "knowingly or recklessly" act "contrary to the interests of CSI" in relation to either the interest or the management charges.

84. I do not think we are entitled to interfere with these findings. Doubtless, it would have been open to the Judge to arrive at different conclusions. However, on the totality of the evidence and having had the benefit of seeing him in the witness box, the Judge concluded that Mr Brown had not knowingly or recklessly acted contrary to CSI's interests. The Judge did not consider that being aware of Mr Sihra's wish to reduce CSI's profits *necessarily* meant that Mr Brown, who had only very recently assumed responsibility for the Ironzar structures, acted dishonestly in relying on Mr Sihra, and that view does not seem to me to be one that we can say that no reasonable judge

could have reached. It was surely logically possible for Mr Brown to perceive Mr Sihra as both desiring to reduce CSI's profits *and* believing the interest and management charges he was suggesting to be "justified" and "appropriate". I agree with Mr Norbury that it was open to the Judge to attribute Mr Brown's behaviour to lack of care rather than dishonesty.

Leaving £766,000 of the transfer price of Ludgate House outstanding

85. When Ludgate House was transferred to LPH, £766,000 of the transfer price was left outstanding as an unsecured loan to LPH. The claimants alleged that, in making a decision to this effect, Mr Brown committed a breach of duty. The Judge, however, decided otherwise, explaining in paragraph 262 of the Judgment:

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

86. The claimants take issue with this decision as part of the present appeal, but Mr Parker accepted that the challenge depends on Mr Brown having had at least "blind eye" knowledge that the transfer to LPH was for less than the property's market value. If, as seems to me to be the case, the Judge's finding that Mr Brown lacked knowledge that the transfer of Ludgate House was at an undervalue cannot be impugned, this ground of appeal must fail.

Other matters

87. Other grounds of appeal involve challenges to the Judge's conclusions as to the value of New Court and Ludgate House and whether Equity Trust was vicariously liable for any wrongdoing on the part of Mr Brown or was itself a de facto or shadow director of CSI or BRP. The conclusions I have arrived at thus far make it unnecessary for me to address these matters.

Conclusion

88. I would dismiss the appeal.

Lady Justice Asplin:

89. I agree.

Lord Justice Popplewell:

90. I also agree.