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Case No: BL-2019-000144

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
Business List (ChD)

Royal Courts of Justice
The Rolls Building, London WC4A 1NL

Date: 12/01/2021

Before :

HHJ DAVID COOKE

- -

Between :

Martin Jonathan Richards	**Claimant**
- and -	
John Harvey	**Defendant**

- -
- -

James Knott (instructed by **Edwin Coe LLP**) for the **Claimant**
Ian Clarke QC (instructed by **Downs Solicitors LLP**) for the **Defendant**

Hearing dates: 10-14 November 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ David Cooke:

1. In this Part 7 claim the claimant, Mr Richards, seeks damages for breach of a contract said to have been made orally at a meeting between himself and the defendant, Mr Harvey, at a meeting at Mr Harvey's home in Barbados on 4 February 2014 and relating to the sale of units at a development known as Kings Beach Village (KBV) in Barbados. The principal issue is whether whatever was said at that meeting resulted in law in a binding contract made between the two individuals. If there was such a contract, Mr Richards says that Mr Harvey is in breach of it and he is entitled to recover various losses which he puts at just over US$ 6.8m.

Factual background

2. There is a long factual pre- history to the events directly in issue before me, relating to the development of KBV, the various investors who provided funds for that development and their efforts to be repaid. It is necessary to refer to some of that, in outline, in order to understand and evaluate the events that are in dispute, so I begin with a summary.

3. In 1997 Mr Richards acquired, indirectly, the Kings Beach Hotel (KBH or the Hotel) in St Peter, Barbados. The hotel itself was owned by a Barbados company, Kings Beach Hotel Ltd (KBH Ltd) which in turn was owned by a BVI company, Fernhill Properties Ltd (Fernhill). Mr Richards was a shareholder in Fernhill as was a Mr Ian Fletcher. Various banks provided funding for the purchase, by loans to KBH Ltd secured on the Hotel. Mr Fletcher became the manager of the Hotel, while Mr Richards pursued other interests in England.

4. One of the assets acquired was an option to purchase for US$ 1m a 4 acre plot adjacent to the Hotel, on which there was scope to build a substantial development. This option was transferred to another subsidiary of Fernhill, JGL Hotels Ltd (JGL) and Mr Richards obtained finance to enable the option to be exercised. Construction work then begin for a development of 32 villa and townhouse units with a communal pool and bar, which was called Kings Beach Village. This project was also managed by Mr Fletcher.

5. In early 2000 Mr Fletcher negotiated with Mr Harvey for a loan to fund the construction, and on 10 March 2000 Tropical Mist Ltd, a BVI company controlled by Mr Harvey, made an offer by facility letter to lend JGL US$ 4.5m (Bundle B1/Tab 7/p23). The terms stated in that letter were that interest would be charged at 13% pa and would accrue and be paid, together with capital, from the proceeds of sales when the build was completed. The loan had to be authorised for exchange control purposes by the Barbados Central Bank, which gave its approval on 9 May 2000. That approval refers to a two year loan term, which is not stated in TML’s facility letter though it seems likely the Bank would have been told that was the expectation, because Mr Harvey had been told (by Mr Fletcher) that construction would be completed within 18 months and that unit sales already agreed would then realise US$ 5m so that TML would be repaid in full in that timescale.

6. Not mentioned in the loan documentation was a side arrangement by which Mr Fletcher agreed that JGL would pay additional interest at 7% pa in cash to be handed in Barbados to Mr Harvey or his local manager. That "local cash" arrangement was referred to in various emails and in monthly schedules prepared by Mr Fletcher with the interest calculations and was paid over regularly until April 2003, but it was not

disclosed to the Central Bank. Mr Harvey said that these payments were made to him personally and not TML.

7. In fact it seems that JGL initially also paid the 13% interest monthly to TML, but from October 2001 those payments ceased and that element of interest was thereafter accumulated as provided by the facility letter.

8. By 2002 the development was not complete and costs were overrunning. Mr Harvey would not lend more so Mr Fletcher arranged a further loan of US$ 2m from Ms Jo Marks to JGL. This was secured on the Hotel owned by KBH Ltd and on the KBV land. TML agreed to execute a "deed of release" (I deal with this in more detail below) which stated that Ms Marks was intended to have first security over 10 of the 32 plots. Mr Richards was aware of this loan but not, he says, of a further US$ 400,000 that Mr Fletcher arranged to borrow from Ms Marks in November 2002, which was also secured by Ms Marks' charge.

9. In May 2003 Mr Fletcher and his wife disappeared when flying in their light plane. It is presumed that they are dead and that the plane may have been deliberately crashed in the sea, but no wreckage or other proof of such a crash has ever been found. Mr Richards went out to Barbados to take over management of KBV and the Hotel and discovered that Mr Fletcher had diverted millions of dollars from the funds borrowed by the operating companies and instead used them for his own purposes. In addition he had taken substantial deposits (in one case the whole purchase price) from prospective purchasers of units on the KBV site whom he had persuaded to sign purchase contracts without legal advice. According to Mr Richards, forensic accountants he instructed identified approximately US$ 6m of funds misappropriated by Mr Fletcher.

10. According to Mr Richards, in July 2003 Ms Marks proposed that both KBH Ltd and JGL be put into receivership so that she could then buy the assets cheaply and run them in a new company leaving behind other creditors, and offered him $2m and a share in the new company if he would agree. He refused as he considered it unfair to TML and other creditors. Instead he said he raised funds of about US$ 5m himself and arranged for completion of the development, which opened in late 2004.

11. There was however no quick sale of any of the units. Mr Richards gives a number of reasons; the land title had to be subdivided into individual plots which took time, and a sale by JGL was hampered by an injunction obtained by one of the defrauded purchasers which restrained JGL from selling any part of the land. In 2007-8 the properties were extensively marketed by Savills, but no sales resulted. In 2008 four units were however sold by TML as mortgagee, realising just over US$ 1m. In order to do this arrears of local land tax had to be paid of about US$ 200,000, which TML borrowed from (in effect) its Barbados attorney Mr David Gittens and had not repaid. Mr Harvey had at all times since been under pressure to make TML repay that debt, which he was only either willing or able to do from realisations at KBV.

12. Apart from these four sales, since 2004 no units had been sold and nothing had been repaid either to TML or Ms Marks in relation to interest or capital on their loans. Mr Richards occupied 3 prime units himself, rent free. The others were let out, either on a long or short term basis, managed by Mr Richards. All the income was paid either in cash to Mr Richards or through a bank account in his personal name, rather than that of JGL. Mr Richards had paid the costs of running the resort, save for some amounts that he has borrowed personally from Mr Harvey at various times. It has evidently

been a source of some irritation to Mr Harvey and to Ms Marks that, from their perspective, Mr Richards had for such a long period used whatever income there was for his own purposes without returning anything to them. It is also evident that both of them believed that this was a situation Mr Richards was not anxious to bring to an end.

13. From 2006 there were attempts to sell the Kings Beach Hotel. According to Mr Richards, a sale was agreed and contracts exchanged in 2006, but it was thwarted by Ms Marks appointing a receiver over the Hotel. He instituted legal proceedings that eventually removed the receiver, for which he borrowed US$ 300,000 personally from Mr Harvey. In 2010 after further legal disputes the Hotel was sold by the Bank of Nova Scotia, the senior secured lender, for a total of US$ 16m. The balance after paying BNS's debt was about US$ 8m and that sum remained in court until 2015, when $5m was paid out to Ms Marks in part satisfaction of her secured debt. Mr Richards maintains that these proceeds have always been sufficient to discharge Ms Marks's debt in full and so release her security over KBV, but that Ms Marks has prevented this from happening (notwithstanding the receipt of the $5m) by refusing to provide a redemption figure, or at least one that he regards as proper.

14. Mr Richards was declared bankrupt on his own petition in London in 2009. According to him, he has disclosed all his assets including his interests in Fernhill and its subsidiaries, but the Official Receiver as his Trustee "was not interested". There does not appear to have been any transfer back to Mr Richards of any assets that vested in the Trustee as a result of the bankruptcy. Mr Harvey was a creditor in that bankruptcy for about US$ 800,000 that he had at various dates lent to Mr Richards personally, none of which he has recovered.

15. At around that time, there was a serious falling out between Mr Richards and Mr Harvey. Most of the details do not matter, but one aspect related to the cost of installation of a sewage plant. Mr Harvey had lent about US$ 75,000 to Mr Richards personally to pay for a plant, which was installed not on KBV's land but on that of the Hotel. With the Hotel being sold to a third party, it was necessary to provide sewage treatment on the KBV site. Mr Richards complained that Mr Harvey had agreed to fund the cost of a replacement plant but went back on his word and refused to do so, with the result that no treatment facility was in place until, according to Mr Richards, he made different arrangements at his own expense in 2013. Mr Harvey's evidence on this is that in 2009 the Hotel site was not in use and insecure; he had urged Mr Richards to relocate the sewage plant to KBV but Mr Richards failed to do so and the plant was stolen for its scrap metal value. He regarded this as due to Mr Richards' negligence and not something he should pay to put right. He did however eventually accept that he had at one point agreed to pay for a replacement plant "but then I changed my mind".

16. Also in 2009 Mr Harvey was divorced from his then wife Belinda Harvey. As part of the financial arrangements his attorneys in Barbados, Clarke Gittens and Farmer (CGF) gave an undertaking to Mrs Harvey. I have not seen the exact terms, but it is said to include at least an obligation to notify Mrs Harvey of any proceeds received by TML from its loans or security relating to KBV, of which Mrs Harvey would be entitled to be paid one half under the terms of the divorce settlement.

17. In February 2010 TML made demand on JGL for its loans and accrued interest, said to amount to about US$ 12.5m. It appointed receivers on 17 February 2010, but they resigned on the same day. Mr Richards says this was because he challenged the sum

demanded and alleged that TML when dealing with Mr Fletcher had not actually paid all the stated advances to JGL and had received undisclosed cash repayments that it had not accounted for. Mr Harvey however says that the receivers told him they had been met by Mr Richards who showed them a firearm and threatened them, as a result of which they refused to continue unless provided with personal security guards at his expense.

18. On 2 August 2012 TML made a revised demand for some US$ 9.3m then said to be due and in February 2013 it commenced possession proceedings in the Barbados court. The sum due by that date was said to have risen to over US$ 9.8m, with further interest accruing at US$ 1,606 per day. Mr Richards disputed those proceedings, making an application for them to be struck out or for security for costs and various applications for adjournments.

19. There was a considerable amount of correspondence about proposals for settlement, all of which is accepted to have been on a "without prejudice" and "subject to contract" basis, though as Mr Clarke points out not all the communications themselves stated those qualifications. These discussions were centred around options for selling KBV as a whole, either by Mr Richards finding a purchaser or by his raising funds to buy it himself. Reading that correspondence, it is fair to say that on Mr Richards' part it is full of optimistic references to purchasers he was in contact with being keen to proceed, or funders having been identified who were imminently to confirm that funds would be provided, but that he did not at any stage identify any of these prospective parties and none of the prospects he referred to came to pass. It is also clear that Mr Harvey and his lawyers were sceptical as to whether these prospects were real or were being talked up by Mr Richards to delay matters. Shortly before an adjourned hearing in November 2013 they demanded in terms to be told who the then prospective purchaser was and be shown proof of funds, but neither point was answered.

20. That hearing, and another listed for 23 January 2014, were adjourned at a late stage on the basis that Mr Richards was unwell or was receiving medical treatment; explanations of which Mr Harvey was also sceptical. Mr Richards was directed to provide medical evidence of the matters he asserted, but never did so.

The meeting on 4 February 2014

21. In late January 2014 Mr Richards and Mr Harvey saw each other by chance at a restaurant in Barbados. Mr Richards invited Mr Harvey to visit the resort, which he had not done for some time, and Mr Harvey did so a few days later, with his partner Ms Polackova. The two men had a discussion at the bar while Ms Polackova looked around some of the properties. Mr Harvey accepts that he was impressed by the condition and presentation of the resort that Mr Richards had achieved, and by the level of occupation and activity at the site. It is accepted they discussed, in outline, the possibility of Mr Richards looking for buyers of the individual units, rather than pursuing a purchaser for the site as a whole as they had been considering during 2013. A meeting was arranged to take place a few days after that, at 10 am on 4 February 2014 at Mr Harvey's house.

22. At 8.54 am local time Mr Richards sent Mr Harvey an email (B3/154) in which he said "… I really would like you to fully properly consider what I touched on when we spoke at the village- which is that we should sell the units ourselves- and straight

away." There were he said three problems with trying to sell the village as a whole, as had previously been the direction explored:

i) There were "possible questions" over the release of TML's security in favour of Ms Marks that might prevent a purchaser being satisfied it would get clear title to the whole site

ii) A purchaser would want to "steer clear" of the present litigation between TML and JGL, and

iii) Any purchaser of the whole would be expecting to make a profit on resale of individual units, the implication being that it would be better to keep this opportunity for themselves.

23. He then set out a 6 point proposal, which in summary was for immediate marketing by him, without an agent, of all the units as individual properties, from which he said he could provide evidence that "there is over 12 million USD to be had… which I propose we split on a 50/50 basis which will mean that you receive 1.75 million more than what we agree[d] on last year" and that "the litigation between us is cancelled so that I can concentrate on selling the units." He ended "Please trust me this can really work. Give me a bit of time to prove it. You have nothing to lose- as it's the quickest way for us both to start getting money in. See you at 10am."

24. Mr Harvey forwarded this email at 9.10 am to Mr Kevin Boyce at CGF asking if Mr Boyce could ring before 10am (B3/155). Mr Boyce replied at 9.35 local time saying he was out of the office but that if Mr Harvey was committed to a meeting:

> "…just ensure that you state that you 'reserve your rights' and that your meeting is 'without prejudice'. Please try to make a note of what is discussed. You should also let him know that you will not enter into any agreement without legal advice… ".

25. Mr Richards arrived for the meeting with Mr Terence Brown, a friend of his who had previously assisted him and provided some funds of his own by way of loan to Mr Richards personally in connection with KBV and KBH. Mr Brown was known to Mr Harvey, though Mr Harvey says he was not forewarned about his arrival. Mr Harvey and Ms Polackova gave evidence that Ms Polackova was present sitting at the table during the discussions, though she did not say anything. Mr Richards and Mr Brown deny that she was present.

26. According to Mr Richards' pleaded case (Particulars of Claim at A/2 para 12ff) "at or before" this meeting Mr Harvey had made four detailed representations as to his ownership and control of TML. No indication is given as to when these representations were said to have been made, and there is no evidence of them being made, though it is accepted that the content is correct.

27. It is then pleaded that the meeting lasted for two hours, in which Mr Richards told Mr Harvey he wanted to enter into a personal agreement, meaning one in which he and Mr Harvey would have personal rights and obligations and were not contracting on behalf of their respective companies. Mr Harvey denies that there was any mention of this topic.

28. Mr Richards then pleads that Mr Harvey asked him to organise a sales and marketing programme for the 28 unsold units and that if any were sold he would cause TML to take possession and sell under its security. Further terms said to have been agreed were:

    i) TML would take no further steps in relation to the existing possession proceedings

    ii) For assisting in the realisations, Mr Harvey would either personally pay Mr Richards or cause him to be paid a commission of 50% of the net proceeds of each sale, and

    iii) At Mr Harvey's request, a local sales agent Mrs Pixie Mahon of Alleyne Real Estate would be employed.

    It is then pleaded that these terms were agreed at the meeting itself so as to constitute an immediately binding contract between the two individuals, on which they shook hands at the conclusion of the meeting.

29. In the Reply (A/4 at para 10) it is pleaded that "the agreed time period for the Claimant to market and sell the 28 KBV properties was two years from the date of the agreement".

30. The Defence (A/3 at para 14ff) pleads that:

    i) The meeting lasted only one hour, not two. That appears likely to be correct; by 11.11 local time Mr Harvey was sending an email to Mr Boyce (B3/157) requesting a "short meeting with you to discuss the offer".

    ii) Prior to any discussions, Mr Harvey had informed Mr Richards that he reserved his rights, the meeting was without prejudice and he would enter no agreement without legal advice. Mr Harvey's and Ms Polackova’s evidence was that he did this by reading the email from Mr Boyce referred to above. Mr Richards and Mr Brown deny this.

    iii) There was then a discussion in which Mr Richards told Mr Harvey that he had lots of interest from potential purchasers of units, that he wanted to buy one himself and that the units in total were worth US$ 12m.

    iv) At the end of the meeting there was an understanding, but not a binding agreement, that Mr Richards would be given a period of 6 months to sell the villas, using Pixie Mahon as agent, that during that period the possession proceedings would be paused, that Mr Richards would immediately purchase one of the villas himself the proceeds of which TML would retain in order to pay the "Gittens debt", ie the $200,000 lent by Mr Gittens, and that thereafter once TML had received US$ 6m its security would be released.

    v) Mr Harvey's evidence is that he told Mr Richards that these points were subject to his having a discussion about them with CGF.

Events after the meeting

31. Before addressing the conflict of evidence about the meeting itself, I resume the general summary of the chain of events. On 7 February Mr Richards emailed Mr Harvey saying:

> "I enjoyed chatting with you the other morning…I hope you have had the opportunity of going over my proposal with [CGF] and moreover they also agree that this is the best route for you and I to take.
>
> Any continuance of the litigation will simply create more cost to us both and it will waste more time and we will end up in a different place. as long as we are on the same side and working together, things can go very well.
>
> I would very much like to put the past behind us… I have taken the opportunity of explaining to Zarina [the lawyer acting for Mr Richards] what I hope we have now agreed on… I look forward to hearing from you…"

He chased on 13 March (B3/161) saying:

> "…What I do need from [CGF] though is a formal notice or application for a Stay of Proceedings between TML and JGL as we have agreed. Can you please ask for that…"

32. Mr Harvey replied on the same day (B3/162) "How are we going on sale of unit to yourself? Be nice to see your commitment, I have confirmed to you stay of proceedings for 6 months…".

33. On 3 April Alleyne Real Estate produced a letter of engagement, providing for a rolling 12 month term, which was signed by Mr Harvey on 20 April and by Mr Richards on 24 May. Arrangements to put up a for sale sign and produce a sales brochure proceeded, but, as Mr Harvey points out, at a very leisurely pace. No sales brochure, for instance, seems to have been available until early July.

34. There was a considerable amount of correspondence in which Mr Harvey or CGF asked Mr Richards what was happening about his own proposed purchase of a unit. Mr Richards and his lawyers sent replies which can be fairly summarised as always optimistic, stating that he had approached mortgage lenders and was hopeful of the outcome but had not yet received a decision. He did not however give any specific information about this process, no mortgage offer appears to have materialised and no sale ever got off the ground.

35. On 14 April Ms Marks made an application to be joined to the possession action (B3/169) supported by a statement that TML had given her no notice of those proceedings despite knowledge of her debenture and, so she said, her entitlement to first security over 10 of the units, which security would be defeated if TML took possession and sold those units. Mr Richards was not notified of this application until 6 June, shortly before a hearing listed on 10 June, when he sent a number of emails to Mr Harvey and CGF complaining that the application was inappropriate as he maintained there were sufficient monies in court from the Hotel sale to pay Ms Marks

in full. On 8 June (B3/187) he suggested to Mr Harvey that Ms Marks's application could be stopped if the possession proceedings were discontinued, as there would then be no claim for her to join.

36. At some point in June Ms Marks began to make approaches to Mr Harvey with proposals. It appears that by 19 June she had proposed that TML should appoint a receiver, but that Mr Harvey was not minded to agree (D/15). CGF were advising Mr Harvey that there was merit in Ms Marks's claim to be joined to the possession claim and to be entitled to prior security (D/17) and suggested that in order to avoid her application the possession claim be amended to exclude the 10 units charged to Ms Marks, a course Mr Harvey agreed (D20).

37. On 8 July Ms Marks emailed Mr Harvey directly (E/21) proposing that they should cooperate to obtain possession of KBV and realise it for their benefit. Mr Richards she said "has cleverly benefitted from a 'divide and conquer' strategy towards all the investors…if Martin had not enjoyed a lavish lifestyle on the rental income he could have continually paid all secured creditors… even if it was in small amounts, but I have never seen a penny and that is just not right… he is purposely increasing the debt and then goes round bragging saying we will all give up and he will end up with the lot…". She proposed a meeting "to explore the option of buying your debt and assigning…". Ms Marks was prepared to offer Mr Harvey US$ 4m to "assign [his] position" and discussed either the purchase of TML or the assignment of TML's debt and security (see email of 27 July at E/26).

38. Mr Harvey did not copy Mr Richards in to his correspondence with Ms Marks, but he did inform Mr Richards that he had received an approach and that Ms Marks was prepared to pay him $4m. On 19 June Mr Richards emailed (B3/193) saying:

> "… the last thing I would want is for you to sell your debenture to Marks… she has been trying to destroy me since 2003… you and I have shaken hands on a deal. You called it a gentleman's agreement with no paperwork, whereby after the first sale the remaining sale proceeds would be split 50/50…I need you to think of me and the deal we have shaken hands on. If you really need and want to be out quickly I will try and raise as much as I can to buy your debenture myself…"

Mr Harvey responded:

> "Martin in the last few years you have had rents and accommodation from the village, I have received nothing in income in fact my investment owes in excess of 10 million dollars including interest and I am prepared to accept 4 million dollars, you have made promises but nothing has happened the sand is running out of the clock…"

39. In further correspondence Mr Richards made a number of offers to buy TML's debenture, but did not match the US$ 4m offered by Ms Marks, nor did he provide any evidence of availability of funds.

40. On 2 September 2014 Mr Harvey emailed Mr Richards saying that he had instructed CGF to reply to an enquiry about his willingness to sell to Ms Marks. He told Mr

Richards "I gave you 6 months to buy single unit or complete purchase your time is up first come first served we met in March I cannot live on air".

41. Mr Richards continued to say he was seeking a purchaser or funding to buy KBV himself, and urging Mr Harvey not to deal with Ms Marks as it would be contrary to a "gentleman's agreement" between them, though he referred to it as having been made at a meeting in March, not February (B4/241). On 19 September Mr Harvey indicated he would accept £2m sterling from Mr Richards to buy TML's shares if Mr Richards also paid CGF's outstanding costs (B4/245). On 22 September Mr Richards told CGF that he and Mr Harvey had agreed "a full and final settlement", presumably on the above terms. No reliance on any such settlement agreement has been made before me and I assume this was simply an overstatement by Mr Richards of what he thought he had agreed in conversation.

42. After further correspondence seeking documentation to demonstrate that TML had advanced the loan amounts it claimed, Ms Marks and TML entered into a written agreement whereby TML agreed to assign to Ms Marks its debt from JGL and the security for it. That document is dated 19 November 2014 (B4/170) and Mr Harvey's evidence is that it was signed on that day (A/19 at para 86). The agreement was subject to conditions and Mr Richards was not immediately told of it, though he did receive a demand on JGL for debt claimed by Ms Marks on 27 November. He continued to seek his own agreement to purchase the TML debt, and on 2 December said he had a offer of finance from Royal Fidelity Bank to pay Mr Richards US$ 4m (B4/278). By 5 December Mr Harvey had evidently told Mr Richards that he had reached an agreement with Ms Marks but his correspondence with Mr Richards continued, apparently on the basis Mr Harvey would see whether he could get out of that agreement and sell instead to Mr Richards.

43. Mr Harvey's evidence is that on 11 December 2014 he was told by Royal Fidelity Bank that contrary to what Mr Richards had been telling him the bank was not in fact going to make any funds available, and he then told Mr Richards he was going to "finalize" his agreement with Ms Marks (A/19 para 91). That, Mr Harvey says, resulted in a threat over the telephone by Mr Richards that Mr Richards would shoot Mr Harvey, his children, Ms Polackova, and Ms Marks. Mr Harvey made a written statement that day to the police detailing this threat. Mr Richards denies making any such threat, and says that the police cannot have believed it because they have taken no action against him and have since renewed his firearms licence.

44. On 12 December Mr Richards sent an email noting that he had been told that the deal with Ms Marks had been "signed off…yesterday" and saying that if it did not work out he would still be interested in pursuing his own offer, for which he maintained he did in fact have the finance available (B5/291).

45. On 30 December 2014 Mr Richards sent a long email (B5/295), drafted by lawyers, which he said was a letter before action and said that any transaction with Ms Marks would be "in breach of (alternatively subject to) the agreement that TML (through Mr Harvey) has reached with me and [JGL]". He set out how he said that agreement had been made at a meeting at Mr Harvey's home, though he appeared to say it had been in or after "the last two weeks in February" and that "[Ms Polackova] was also in attendance for part of that meeting". He went on to say that "in the event that Mr Harvey chooses to renege on our agreement I will sue him for specific performance and damages".

46. Ms Marks appointed a receiver over KBV in early January 2015. She presumably did so pursuant to her own debenture, as the assignment of the TML debenture was only completed, and notice of assignment served, on 14 May 2015 (B5/303).

47. The receiver obtained an injunction against Mr Richards coming on to the property at KBV, approaching or communicating with him or his staff other than in writing to lawyers, or harassing or intimidating them (B5/300). This was on the basis of sworn statements by three staff members that they had been approached by Mr Richards at the premises, when he had shown them his handgun and made strange remarks that, if accurately reported, could certainly be considered as threatening. Mr Richards contends that all this evidence is fabricated as part of Ms Marks's malicious acts towards him.

Relevant legal principles

48. There was no disagreement between counsel as to the legal principles to be applied. The question before me, on the principal issue, is whether any binding agreement was reached at the meeting on 4 February, and if so between which parties and on what terms. This may be approached in two stages; first considering what was said at the meeting and secondly whether that was sufficient to result in a binding agreement. Since the agreement alleged is entirely oral, the court may consider any admissible evidence bearing on these two aspects, including oral evidence.

49. What was said is a pure question of fact. Whether it created a contract is a question of law and to be determined objectively:

> "Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement."

(per Lord Clarke in *RTS v Molkerei Alois Muller* [2010] UKSC 14 at para 45)

50. However although the question is not whether the parties subjectively considered they had made a contract, in evaluating what has been communicated by words or conduct, the court may have regard to evidence of the parties' own subjective understanding of events. It may also take account of evidence of subsequent conduct and in particular of matters that may amount to performance of an agreement, insofar as it sheds light on what was said or done, for instance by being consistent with one party's case as to the existence of an agreement. On the same basis evidence of all the circumstances surrounding the occasion in issue is potentially relevant, including evidence of prior events that may assist evaluation of the likelihood of the events relied on having occurred, or to explain the significance of words used or conduct on the occasion at issue.

51. Words used that on the face of things indicate an intention to create legal relations may nevertheless not do so, if the court finds there was no such intention. This is most obviously so if a discussion is expressly said to be "subject to contract". It is possible in some circumstances to infer that a discussion was intended to be subject to contract even if such words are not used; for example if it occurs in the context of earlier discussions that were so described, but the onus is on the party denying legal relations to prove the absence of intent, and it has been said to be heavy. Further, even if discussions commence on a subject to contract basis, the court may find that by the time they conclude the parties have abandoned that qualification and intended a binding agreement.

52. "Without prejudice" correspondence or discussions are those intended to explore settlement of actual or threatened proceedings, and are privileged from disclosure in those proceedings. That is not the same as “subject to contract" and a legally binding agreement may be concluded during without prejudice discussions. The court may infer that discussions exploring settlement are on a without prejudice basis even if those words are not used. However, such an inference would not assist, any more than would the express use of the phrase "without prejudice", when considering the different question whether the discussions resulted in a binding agreement.

Consideration

53. Bearing those principles in mind, I now turn to consider the key differences between the parties' evidence of the discussions at the 4 February meeting, and aspects of the surrounding circumstances that may assist in determining which account is more likely to be correct. I start with some general observations on the background to that meeting.

Correspondence between Mr Richards and Mr Harvey

54. As a general observation on the correspondence in evidence, both before and after the 2014 meeting, that originating from Mr Richards tends to be much longer, and that from Mr Harvey, and in particular his replies, tends to be much shorter. Mr Richards’ emails, particularly when he is seeking to persuade Mr Harvey of something such as how well the resort is performing or the prospects of success in finding buyers or finance, tend to be expansive and appear designed to present a picture favourable to himself. He is prone to making self serving assertions, for instance that something has been agreed, that later correspondence indicates may have been overstated.

55. It is also apparent that Mr Harvey had been for a long period frustrated that Mr Richards had made no progress in repaying what was due to TML, and that he was sceptical whether Mr Richards had any genuine intention to do so or was just stringing him along and avoiding or deferring any action that might curtail his own enjoyment of residence at KBV and the income it produced. He did not take at face value Mr Richards’ assurances as to likely interest in the market generally, or his statements that he had buyers who had a real interest or funders prepared to lend. There had been many such statements over the years and almost all of them had come to nothing.

56. With this background, it would not in general be appropriate to infer that failure by Mr Harvey to respond to any particular statement in an email from Mr Richards indicates acceptance of what was said. Mr Harvey's communication style was, in my view, to go straight to what he saw as the point most relevant to him, and in particular

to matters that might lead to his being repaid, and so to ignore or not engage with points that he did not consider he had to respond to.

Reliability of Mr Richards' evidence- altered emails

57. The defendant has served a notice to prove four documents, all apparently emails sent by Mr Richards, that are contained in the bundle. Three of these (Bundle tabs B2/104 (12 June 2013) B3/192 (13 March 2014) and B5/290 (12 December 2014)) are similar to emails disclosed by Mr Harvey which he accepts he received or sent, but tracked comparisons show numerous differences in the text. The fourth (B3/158, 5 February 2014) has no similar counterpart and Mr Harvey denies receiving that or any email from Mr Richards on 5 February, which of course was the day after the crucial meeting.

58. As to the first three challenged emails, Mr Richards accepted in evidence that these were documents he had forwarded to his solicitors, and that before doing so he had made alterations to the text of the original messages. He had not told his solicitors that he had made these alterations, and the added or altered text is not set out in such a way (eg by being in a different colour or font) that would make the changes apparent. It is fair to say that all of the alterations would tend to strengthen Mr Richards' case or add support to his version of events. He had done so, he said, in order to "translate" or "explain" the words in the original emails. He had no good explanation why he had not told his solicitors this at the time he provided the documents to them. Without that information these documents gave a misleading impression, which would have been conveyed to the court if the defence had not spotted the discrepancies. Mr Knott stated in opening that the claimant would not rely on any of those three emails.

59. Mr Knott did however seek to rely on the email dated 5 March 2014, which would be an important document if genuine. In it Mr Richards says:

> "It was good to see you yesterday morning at your house and to finally shake hands on the agreement reached between us. I fully understand why you don't want the agreement to be in writing… however as you put it a gentleman's agreement is binding on us both…I will advise [CGF] of our agreement reached…"

Thus it would support Mr Richards' evidence that he understood, indeed had expressly been told, that a binding agreement had been reached at the meeting.

60. Mr Richards has not been able to produce the original of this email, either in electronic or paper form. The electronic version had been deleted, he said, and he had only a paper copy that was in such poor condition that he retyped it, at some point in 2019, and gave this retyped version to his solicitors which is what they disclosed. He had, he insisted in cross examination, copied it accurately.

61. I do not accept this account. Firstly, this email would not sit well in the surrounding correspondence. On 7 February Mr Richards sent the email I referred to above to Mr Harvey (B3/159). For convenience I repeat part of the text here:

> "I enjoyed chatting with you the other morning. In many respects we have a great deal in common….

> I hope you have had the opportunity of going over my proposal with [CGF] and moreover that they also agree that this is the best route for you and I to take…
>
> I would very much like to put the past behind us…I have taken the opportunity of explaining to Zarina [his lawyer] what I hope we have now agreed on…"

62. That email, which Mr Richards accepts he sent, is in my view inconsistent with there having been any prior email in the terms of the 5 February document. It makes no reference to any such earlier email, and reads as if it is the first communication after the meeting on 4 February. There is no apparent reason why Mr Richards would have considered on 5 February that he had "an agreement reached…binding on us both" but within two days have apparently downgraded this understanding to a "proposal" that Mr Harvey was to discuss with his lawyers that he "hope[d]" they would agree was the best way forward".

63. Second, there is no trace of any contact between Mr Richards and CGF after the meeting that could amount to him "advising" the lawyers of an agreement he had reached with Mr Harvey. He did send them an email on 27 February (B3/160) in which he said "as you know I have been discussing matters with John directly and I know he is in touch with your firm about that". That message is not consistent with Mr Richards himself having made any earlier contact with CGF about the meeting, and is very far from asserting that an agreement has been reached.

64. Third, there is no apparent reason why the electronic version of this email should have been lost when others were not, nor why, if it was sent, it was not received by Mr Harvey.

65. Mr Richards' evidence about the other three emails challenged shows that he is not above presenting altered documents to assist his case, which is plainly damaging to his credibility. It is his obligation to prove that the 5 February document is genuine, and I am not satisfied that he has done so. It was not, in the end, put to him that it is a complete forgery, so I limit my findings to saying that

    i) This document is not reliable evidence of the text of any email that Mr Richards may have composed on 5 February 2014, and

    ii) I am satisfied that if Mr Richards did compose any email on that day, whether in this or any other form, Mr Harvey did not receive it.

    I attribute no weight to this document on any material issue.

The position in relation to Ms Marks's security

66. On 14 October 2002 Ms Marks entered into a written loan agreement with JGL as borrower (B3/171/1000) providing for a loan by her of some £1.27m, though it contemplated possible further advances. Among the conditions precedent to any advance (Cl 6) were:

    i) The grant of a second charge by over the whole of KBV (the first charge being that already granted to TML), and

ii) Delivery by TML of an executed but undated "release" of its own charge over 10 specified units, to be held in escrow pending satisfaction of certain planning conditions "at which point the release shall be dated and perfected and the [10 plots] shall be fully and effectually released from all charges so that [Ms Marks' second charge] becomes a first security…".

67. The form of release was delivered, signed by Mr Harvey as a director of TML but not apparently bearing a company seal (B2/105/766). It seems from both parties' accounts that Ms Marks was unable to register her charge, or at least register it as having priority over the 10 units, because the release had not been sealed. As long as TML's own security remained registered as the first ranking charge over the whole site, it was entitled to exercise the powers of a first chargeholder, including the right to possession and to appoint a receiver.

68. Mr Harvey appears to have stalled or resisted attempts by Ms Marks to have the release properly executed and registered. In his oral evidence he said that the form of release had been drafted by Mr Richards, and he had later been advised (contrary to his understanding at the time) that its effect was not simply to postpone his (TML's) security over the 10 units to that of Ms Marks, but to release it altogether. Ms Marks would then be the only creditor secured on those units and if her debt was paid they would fall outside TML's security and be released to JGL unencumbered. Prima facie, that would appear to be correct.

69. Mr Harvey was however advised by CGF that as he had signed the form of release, Ms Marks would have a claim in equity on the basis that there was an enforceable agreement to release TML's security. That would appear to have been good advice.

70. Mr Harvey and Mr Richards both proceeded on the basis that as long as TML had the first registered security it would have power to sell and would receive all the proceeds of all 28 units, up to the amount of its debt and interest. No doubt Mr Harvey wished to maintain this position. In April 2013 Ms Marks's lawyers asked CGF if TML would provide a sealed copy of the release, on the basis the copy given in 2002 had "accidentally" not been sealed, but on Mr Harvey's instruction CGF said TML was not willing to do so (B2/105). I am sure Mr Harvey appreciated that on the basis of CGF's advice to him, Ms Marks would have been able to bring an action to enforce compliance with her request, but it was to his advantage to maintain his position as long as he could.

71. Thus it was that all the negotiations and discussions in 2013 and early 2014 proceeded on the footing that TML as mortgagee would be entitled to convey either the whole KBV site or any of the 28 individual units that could be sold. Mr Harvey did not notify Ms Marks of the claim for possession that was made in February 2013, presumably in the hope that he could maintain that position.

72. Mr Harvey accepted that that was what he understood at the time of the meeting in February 2014. He was aware that Ms Marks was in the background but he said he was being assured by Mr Richards that she could not be a problem because she would be paid off in full from the money in court from the Hotel sale. He thus expected, at the time of the meeting, (and no doubt Mr Richards did also) that TML would be in a position to receive and deal with any realisation proceeds from all 28 units, as long as Ms Marks could be kept at bay.

73. There was of course a risk that if Ms Marks's debt was not in fact satisfied from the Hotel sale monies and TML did sell any of the 10 units, Ms Marks would have a prior equitable claim to the proceeds realised, such that TML would be liable to be left out of pocket if it had paid over part of those proceeds to Mr Richards. It is clear from her later correspondence when she made contact with Mr Harvey that Ms Marks strongly denies that the Hotel proceeds were sufficient to satisfy her debt, and disputes Mr Richards' assertion that she had wilfully failed to provide a redemption figure in order to keep her security alive for tactical advantage. I am not in a position to resolve that, though I would observe that Mr Richards had by then had over two years to persuade the Barbados court of his position but had not been able to do so.

74. It does appear however that both Mr Harvey and Mr Richards were aware of this risk. In an email of 25 July 2013, dealing with a proposal at that stage that Mr Richards would seek a buyer for the whole site for c US$ 9m, Mr Richards said that TML would receive the whole proceeds, retain US$ 4.25m itself and hold the rest " 'in trust' on my behalf… you want this to happen until you are satisfied that J Marks can be paid out from the money held in court from the sale of the Hotel and that she is not entitled to make any claim in respect to her collateral charge". There is no reason to think that, whatever he was being assured by Mr Richards, Mr Harvey had discounted this risk in February 2014.

75. When Ms Marks made her application to join the possession claim in April 2014, she produced an escrow letter signed by Mr Harvey on behalf of TML dated 8 October 2002 (B3/171/1039) referring to the undated release, confirming (apparently incorrectly) that it had been duly executed by TML, authorising it to be dated and perfected on satisfaction of the planning conditions and undertaking not at any time to enforce its own security over the 10 units to be released.

76. CGF had not seen this before and it caused them to advise that there was little prospect of denying Ms Marks's entitlement to the release and that the only way of preventing her joining the action would be to abandon the claim to possession of the 10 units (E/18). Mr Richards of course at all times remained strongly opposed to any claim by Ms Marks against the properties. Whatever he may have believed about whether Ms Marks ought to have been paid off from the Hotel proceeds, until her security was actually discharged if Ms Marks obtained control over the properties he could not expect her to agree any deal with him such as he was seeking from Mr Harvey. Mr Richards was, I am sure, very anxious to avoid that happening.

Pressure on Mr Richards

77. I accept Mr Harvey's evidence, and it is in any event in my view apparent from the documents, that he felt that if he was to make progress towards being repaid it was necessary to put pressure on Mr Richards by taking steps to enforce TML's security. Without that, Mr Richards was content to let matters drift while he retained his accommodation and income at the resort. He freely gave assurances and made optimistic noises about potential sales, but since the four sales in 2008, nothing had ever materialised.

78. Mr Harvey was reinforced in this by what he heard from the selling agents. His evidence was (A/19 para 14) that when Savills resigned they told him that whenever they had taken a prospective purchaser to view, they were told the units were not available. There is nothing in the documents to confirm this, but it would be

consistent with what Mr Harvey was told by another firm, Bajan Services, that he wished to instruct in August 2012 (B2/55):

> "I wanted to take [two colleagues] to view the development… I called the office [at KBV] to arrange a viewing and was told that the units were not for sale. Very quickly after that I received a phone call from Martin Richards who advised that he owned the development and the units were not for sale. He also advised that you were no longer involved with the development…"

79. In cross examination Mr Richards said the units were not for sale because he and Mr Harvey had fallen out over the sewage arrangements and they had not communicated since Mr Harvey had appointed a receiver. There were also problems, he said, over the arrangements for a common services company that managed the common areas in the resort. That however was not consistent with his earlier evidence that issues over the service company had been resolved by 2012, and in any event it would not have justified him saying that Mr Harvey was no longer involved with the resort, which was plainly not true. Mr Harvey was justified in regarding this as Mr Richards not only not taking any active steps to sell units but obstructing his own efforts to do so.

80. Mr Richards was vehemently opposed to any measure that might have taken de facto control of the resort away from him. Whenever any such action was taken or threatened he disputed it by any means available. The receivers appointed by TML in 2010 resigned within 3 days. He plainly met the receivers at the property on 17 February 2010, as he wrote the next day (B1/50) saying "the legal advice I have previously received is that [TML] does not have the right to appoint a receiver… consequently I do not consider that you are validly appointed…". He did not set out the basis of the alleged advice.

81. On 19 February he wrote to the receivers (B2/51) thanking them for allowing him to "explain in full.. the historic problems JGL has encountered with [TML] and particularly with Mr Harvey…one of the real issues and concerns…[is] the exact amount of money that [TML] is owed if indeed it is actually owed anything at all now…there is of course a requirement to fully understand why large amounts of cash were also paid to Mr Harvey between 2000 and 2003… you are probably not in a position to tell me why you have resigned…I can only assume you were either (a) not content with the validity of your appointment or (b) unhappy with the merit of the appointment or (c) [Mr Harvey] was unwilling to pay you to sort out his own mess…".

82. On 11 March 2013 Mr Richards wrote to Mr Harvey setting out his figures of what he accepted had been received from and paid to TML (B2/65). Putting his case no doubt at its highest that letter seems to accept that about US$ 1.6m had been advanced and not repaid, without any allowance for interest. His argument there was that the cost of pursuing proceedings that he would fight, and the embarrassment he could cause by raising these issues, made it better for Mr Harvey to settle.

83. To the extent Mr Richards had previously raised these arguments with the receivers and hinted that they might be sufficient to invalidate their appointment, he must have been knowingly exaggerating in an attempt to thwart the enforcement. When the receivers resigned Mr Richards was at best in no position to say what had caused them to do so, and his attempt to put forward his own explanation was designed to

serve his own interests. It led to a submission by Mr Knott that the email from Mr Richards setting out his assumptions was evidence of the true reason for their resignation, but that is no more than Mr Richards attempting to lift himself by his own bootstraps.

84. It is inherently implausible that disputes over the amount of TML's debt would have caused the receivers to resign. There was nothing in what Mr Richards said to raise a realistic possibility (even Mr Richards only hinted at it) that nothing at all was due to TML. Disputes over the exact amount of the secured debt would be common and unlikely to affect the validity of appointment. On the other hand, Mr Harvey's evidence that the receivers complained of firearm threats by Mr Richards and demanded security protection is in my judgment credible. There are two other such incidents alleged; one by Mr Harvey himself of course, but I found his evidence credible and note that he promptly reported it in detail to the police, which would have left him exposed to action if they found it untrue. The other was made by three individuals and led to an injunction (which I have no evidence was ever discharged). I do not consider it likely that three professionals would be prepared to make such a serious false allegation to serve a malicious agenda of Ms Marks.

85. Mr Richards' letter of 11 March 2013 was sent in response to TML's possession claim issued in February 2013. In it he said he would oppose the claim based on disputes over the amount advanced and the cash repayments, though as I have said it can be seen from his own letter that he must have known that whatever uncertainties there were, they could not amount to a complete defence. The same letter makes clear that it was his tactic to stall the litigation while he sought to negotiate a different outcome. The correspondence shows that what he wanted to achieve was either a sale to himself or a sale on terms that TML accepted a reduced amount and any realisations over that were paid to himself personally.

86. In that correspondence, Mr Richards repeatedly held out the prospects for sale, though he provided little if any firm information and nothing came to pass. He also repeatedly pressed for the litigation to be stayed or discontinued altogether; for example:

i) "would it not be more fruitful for both of us to agree to 'park' the litigation for the moment?..." (20 March 2013, B2/71)

ii) On 18 April he told CGF that he had agreed subject to contract with Mr Harvey that the litigation would be stayed for 90 days (B2/84). Mr Harvey did not confirm any such agreement.

iii) "… agreeing a 'stay' of the proceedings. I do feel that this is the best route for both of us…" (29 April, B2/90).

iv) "… please confirm if you have received further instructions in regards to agreeing a stay of the proceedings…" (to CGF on 17 May 2013, B2/92).

v) "will you please instruct [CGF] to agree a stay of the proceedings so that we can concentrate on getting this deal done?..." (22 May 2013, B2/94)

vi) "… let's get the stay or discontinuance agreed. That has to be the next step…" (to CGF on 30 May 2013, B2/99).

vii) "…the buyers…would like to see the stay or a discontinuance order…" (3 June 2013, B2/101).

87. Mr Harvey was advised, and evidently also considered, that he should keep the proceedings on foot. He either did not respond to these entreaties or dissembled. He copied to Mr Richards a letter of advice he had received from CGF on 4 June 2013, which included the advice that it was in TML's best interest to continue the enforcement proceedings until a settlement agreement was executed, and that negotiations themselves did not affect the continuance of the proceedings or the need to comply with court orders. On 12 June Mr Richards again urged Mr Harvey "to instruct CGF to 'discontinue' with the proceedings altogether…" (B2/104). Mr Harvey responded "Martin until Marks case is sorted we are all in limbo. I can assure you when we get the all clear we will hold off court proceedings and proceed with sales as per our agreement asap." It is accepted the "agreement" referred to was subject to contract, and resolving Ms Marks's claim to security was one of the things preventing it being finalised, so this response amounts to a refusal to discontinue, and a refusal to agree even any temporary stay until at Ms Marks's claim had been resolved, whenever that might be.

88. Mr Harvey made clear that he regarded the pressure of proceedings to be what was producing the prospect of progress. On 13 June he wrote in response to a yet further request for a stay: "Martin you must remember the offer for KBV only came when we started proceedings, we will await outcome of Marks it is only a few weeks now." (B2/111). This appears to refer to a hearing listed for 8 July (in separate litigation relating to the Hotel) at which Ms Marks's entitlement to the funds held in court from the Hotel sale would be considered, which if Mr Richards was right might have settled her debt and so eliminated her claim over KBV. That however did not happen, because the hearing was adjourned.

89. In the following months, the correspondence primarily relates to a prospective purchaser Mr Richards said he had for the whole site and to documenting an arrangement, accepted to be subject to contract, by which TML would sell as mortgagee and, once it was clear Ms Marks could not make a claim to the proceeds, keep US $4.25m itself and pay the rest personally to Mr Richards by a secret arrangement outside Barbados. By 6 November 2013 nothing had progressed and CGF wrote to Mr Richards (B3/142) requiring to know the name of the purchaser and to see proof of funds. In default they said a hearing listed for 12 November on the possession claim would proceed.

90. Mr Richards said he was seeking approval to disclose the information, but he never did so. After further emails urging an adjournment of the hearing, on the day before it was due to take place he told the court he was unable to attend through illness and the hearing was adjourned to 23 January 2014.

91. On 10 December CGF told Mr Richards that until there was some tangible progress on the sale Mr Harvey could not be expected to call off the proceedings. Mr Richards responded that his purchaser, still unnamed, would be visiting in January and it was the existence of the litigation that was holding up the sale (B3/147). On 7 January Mr Richards told Mr Harvey "you know I am very keen for the litigation to be cancelled altogether…I have an idea I want to run by you which I think will persuade you to put an end to the court case once and for all" (B3/150). He said he would not be attending the hearing on 23 January as he had an operation planned for some time in the USA, which, he said, he had told CGF about when the date was set. It does not appear

however that CGF were aware of that, and Mr Richards did not tell the court he could not attend until 20 January when he sought a further adjournment. The hearing was adjourned with an order that he provide supporting evidence of the operation, which he never did. The "new idea" was presumably that which was discussed when the two men met at KBV at the end of January, and at the meeting on 4 February. Nothing appears in the documentation at the time to explain why the intended purchaser did not proceed or why Mr Richards proposed a change of sales strategy.

92. By the time of the meeting then, Mr Harvey had pursued a policy for some time, with his lawyer's advice, of keeping pressure on Mr Richards by maintaining the possession proceedings. He considered that it was only that which had produced any proposals for sale of the site, and was clearly sceptical whether even they had any realistic basis. He maintained that pressure despite a constant barrage of representations by Mr Richards that the litigation should be dropped. He had reasonable grounds to think Mr Richards was not as willing as he said he was to see the matter litigated, and was instead seeking to stave the proceedings off by questionable assertions of illness.

What was or was not agreed on 4 February? A two year marketing period?

93. Against this background, I turn to consider what conclusions can be drawn from the evidence about the discussions on 4 February and their outcome.

94. It is not in dispute that Mr Harvey was, by the end of the meeting, prepared at least in principle to agree that Mr Richards should embark on a programme of marketing the units for individual sale. The issues are around what they discussed in more detail about such an arrangement, and how far, if at all, Mr Harvey (or TML) had agreed to be bound by the conclusion of the meeting.

95. If any such arrangement was to be put in place, it would clearly have to entail some agreement as to what would happen to TML's possession proceedings. It is not suggested by either side that it was expected that TML would obtain an order for possession but that marketing by Mr Richards would proceed notwithstanding. Plainly, Mr Richards' proposal was put as an alternative to TML obtaining possession, so the question is what would happen to the proceedings during his marketing. Although Mr Richards had consistently sought to have those proceedings discontinued, it is not his pleaded case or his evidence that any agreement was made at the meeting that they would be immediately brought to an end.

96. If there was to be no discontinuance, the only alternative could be a formal or informal stay for some period while marketing took place. It is necessary therefore to enquire what if any period or terms of such a stay might have been agreed. Unless such terms had been agreed, if TML was free at some point to pursue the proceedings and obtained possession, any agreement for Mr Richards to seek buyers would necessarily come to an end. It is not suggested that it was agreed that if TML did obtain possession after any agreed stay expired it would nevertheless either allow Mr Richards to continue marketing or, whether or not he did so, pay him any share of proceeds if the properties were sold thereafter.

97. Mr Richards' case therefore depends to a significant extent on establishing that it was agreed at the meeting that the proceedings would be paused by some means for the two year period he pleads, in order to allow him the opportunity to find buyers.

98. The only evidence of any discussion of a two year period is from Mr Richards himself. His witness statement (A/22 at para 71(b):

> "Secondly we agreed that the selling process would proceed for two years. The season for selling in Barbados is usually from December to April. It was too late to catch the tail end of the season and thus we'd be looking at marketing from early autumn 2014… (e)…John said he would not agree to withdraw the Part 15 proceedings but he would instruct CGF to apply for a stay of the proceedings for an extended period of time."

99. Mr Richards' witness Mr Brown did not mention a two year term. His witness statement (A/23 at para 44) says:

> "John agreed to continue delaying the court proceedings. Martin pressed him to withdraw them but John refused. While I did not feel this adequately protected Martin, Martin seemed happy to agree this term."

100. Mr Richards' proposal by email did not ask for a two year marketing period, but only for "a bit of time to prove it", ie to prove that his marketing proposal could achieve results. The suggestion in his witness statement and his oral evidence that a two year period was agreed to be necessary because he and Mr Harvey knew that it was too late in early February to take advantage of a selling season that ran until April does not fit well with his proposal that the units should be sold "straight away" or with his email two days after the meeting (B2/159) when he said "…I am really keen to start [the sales] process. We have a very busy couple of months ahead and this time of year is the best time to sell villas."

101. Nor did Mr Richards mention any two year period for a long time after the alleged agreement, even when it would have been relevant to do so- for instance, when he asked on 13 March for "a formal notice or application for a stay of proceedings… as we have agreed" (B2/161) he did not mention anything about the length of any stay, and when Mr Harvey responded on the same day "I have confirmed to you stay of proceedings for 6 months…" (B2/162) Mr Richards did not retort that two years had been agreed, or that six months was not the "extended period" he says he had been promised. Nor, later when Mr Harvey said he had given Mr Richards 6 months and time was now up did Mr Richards assert that he had been promised two years (or any longer period) rather than 6 months.

102. Mr Richards' correspondence is replete with his assertions that an agreement had been reached and what he said were its terms. He referred to terms that he wished to emphasise, such as his own 50% share of proceeds. But even this self-serving documentation does not assert any two year or other minimum marketing period.

103. Mr Richards did not mention any two year period in his "letter before action" written with legal advice on 30 December 2014 (B5/295), or in the more formal letter before action written by his solicitors in 2017 (C/1), or in his Particulars of Claim. Insofar as the Particulars of Claim plead that it was agreed that Mr Harvey "would cause TML to take no further steps in relation to [the possession claim]" it has not been submitted that this meant TML would abandon or permanently stay the proceedings, and such an interpretation would not be supported by Mr Richards' own evidence. The two year period was not alleged until Mr Richards served his Reply on 22 August 2019.

104. In these circumstances and having regard to my general observations about Mr Richards' reliability as a witness and his tendency to make self serving statements to bolster his case, I do not accept Mr Richards' evidence and find that there was no discussion of a two year marketing period, or indeed any specific period for marketing beyond six months, at the meeting on 4 February. If there was any agreement reached at that meeting, it did not include any such term.

Was there a binding agreement reached on 4 February?

105. In my judgment it is clear from the surrounding correspondence that neither party understood that the meeting on 4 February had the effect of reaching a binding agreement.

106. Mr Richards' email proposal urged Mr Harvey "to consider the following", and then set out six points including that the litigation be "cancelled". He concluded by saying "I really hope we can agree on this today John", which certainly suggests he was looking for a concluded agreement. But it was followed by "Please trust me this can really work. Give me a bit of time to prove it. You have nothing to lose…" which suggests that he anticipated at best being given a short period of time to demonstrate that sales could be achieved and implies that if sales were not made Mr Harvey (or TML) retained the right to enforce.

107. After the meeting however, Mr Richards' own correspondence is not consistent with his having been given any firm promise, at the meeting itself, of even that period of time. He plainly knew that Mr Harvey intended to take advice on what had been discussed from CGF; he said in his email of 7 February (B2/159) "I hope that you have had the opportunity of going over my proposal with [CGF] and, moreover they also agree that this is the best route for you and I to take..." and that he had explained to his own lawyer "what I hope we have now agreed on". This it seems to me can only be consistent with whatever expression of accord had been given during the meeting being understood by Mr Richards to be subject to discussion by Mr Harvey with his lawyers and not to be binding unless Mr Harvey was content, having been so advised, to go ahead with it.

108. Similarly, when Mr Richards wrote to CGF himself almost two weeks later on 27 February he said to them only that "I have been discussing matters directly with John and I know he is in touch with your firm about that". He was not asserting that any agreement had already been reached, though perhaps prompting for an indication that matters that had been discussed could now be confirmed as agreed.

109. Mr Harvey's own email to CGF immediately after the meeting is consistent with this. He wanted a meeting "to discuss the offer", not to report that he had agreed terms.

110. It would be surprising if Mr Harvey would have been prepared to reach a binding agreement at all at such a meeting, let alone one that that committed him to abandon, or not to pursue for any extended period, the possession proceedings. The correspondence and chain of events preceding this meeting, which I have gone into in some detail above, shows how sceptical he was of promises and assurances from Mr Richards, and how he considered, and had been advised by CGF, that having the proceedings current was the only thing that had produced any indication of real progress towards any repayment of the sums lent over 10 years before. It is not likely that he would have abandoned that approach in a short meeting with Mr Richards, whatever blandishments he received about the likelihood of sales. It is Mr Richards'

own evidence that Mr Harvey refused to "cancel" the proceedings, as he had been asked to do, which suggests he would not have been willing to commit himself as to what would happen to those proceedings before discussing it with his lawyers.

111. Further, Mr Harvey had been specifically advised by CGF not to give any such commitment, immediately before the meeting itself. Although of course in principle he could have decided not to follow that advice, it must be unlikely in practice that he would have sought advice for the specific purpose of the meeting and immediately overridden it. There was nothing new, or urgent, or so immediately and overwhelmingly attractive in what was discussed at the meeting to make it plausible that Mr Harvey would have abandoned his own instincts and ignored the advice he had just received.

112. On the contrary I am satisfied that it is more likely that he would have told Mr Richards the advice he had received, and accordingly that he and Mr Richards were both working on the basis that whatever degree of accord they might reach at the meeting, it was an "in principle" discussion only that would not lead to a binding agreement unless and to the extent confirmed after Mr Harvey had spoken to CGF. By the end of the meeting, not only had Mr Harvey not changed his mind about that, but I am satisfied that Mr Richards left having been told that Mr Harvey intended to consult CGF about what they had discussed, and understanding that he would only commit himself to it once he had done so. It was for that reason that he asked Mr Harvey a few days later if he had spoken to CGF about his "proposals" and expressed his hope that they would agree he should proceed with them.

113. In the circumstances, I think it more likely than not that Mr Harvey did, as he said, read out to Mr Richards the short email he had received from CGF giving him that advice, and I therefore find, on the balance of probabilities, that he did so. Mr Richards and Mr Brown gave evidence that he did not read out that email, but it is conceivable that it would not have been something they were focussing on, unlike Mr Harvey. But even if he did not, I am satisfied that by whatever words used Mr Harvey conveyed that it was his intention not to commit himself until he had spoken to CGF, and that Mr Richards understood that.

114. In the circumstances it is not necessary to resolve the dispute as to whether Ms Polackova was present at the discussion, but I am inclined to prefer the evidence that she was, as indeed Mr Richards himself originally said in correspondence.

115. Mr Richards relies on various matters which, Mr Knott submits, support the inference that a binding agreement was intended:

i) The meeting was convened to discuss, and did discuss, Mr Richards' proposals, which was a business purpose. No doubt, if it were established that what was said produced a clear apparent accord as to terms, without more an objective observer could consider there was an intention to be bound. But the evidence does not go far enough to establish the exact words used, and whatever those words were, the surrounding facts indicate that there must have been other things said such that neither participant understood that a binding agreement had yet been reached, and nor could any objective observer.

ii) It was a new proposal, a break from what had been discussed the previous year under an (albeit not constant) express "subject to contract" qualification. But it was not in fact very different; the only significant variations being that Mr

Richards would now seek buyers for individual units rather than the site as a whole, and he would be assisted by a selling agent, which was not the case in 2013. The substance of the proposals was more a continuation with variations of what had been discussed before, supporting an inference that the discussions had resumed on the same basis, ie being understood to be subject to contract, rather than the opposite.

iii) The parties shook hands at the end of the meeting. By itself this is no more than a common courtesy.

iv) The proposals, he submits, made commercial sense for both parties. But even if that were so, it does not give rise to any very strong inference that Mr Harvey would have committed himself to them immediately, rather than wanting to take advice on them. The factors indicating that he took the latter course are much stronger.

v) The fact that Pixie Mahon was subsequently jointly instructed and commenced a marketing process. No doubt that indicates that something was agreed at some point that the parties considered sufficient to warrant the instruction, but it is of no assistance on the question whether a binding agreement was reached at the 4 February meeting itself, or on any specific terms other than as related to her own instruction. Much was sought to be made of the fact that her terms provided for a minimum 12 month appointment, but there is no evidence that either party was aware of that at the time, and it would have been perfectly possible for her instructions to continue even if TML took possession and therefore control of the sales process for itself.

vi) The fact that the possession proceedings were not, Mr Knott submits, in fact pursued for some period afterwards. But there was no formal stay, and no indication to the court that TML had agreed to discontinue or to stay for any specific period. In fact the proceedings became bogged down with Ms Marks's application to join, and so far as can be seen TML far from indicating that it intended to abandon the proceedings, did what was necessary to maintain them. These events say nothing about whether any agreement was reached on 4 February or afterwards.

vii) Mr Harvey's expressed wish that the agreement not be put in writing. It is said that this was because he did not want to disclose the terms to his former wife, and there are various references in the correspondence from Mr Richards to his willingness to "assist" in dealings with Mrs Harvey. Much was made of an email exchange between CGF and Mr Harvey on 26 February 2014 in which his contact at CGF said "we are working on the format for the agreement to allow for the proposed sale process" and Mr Harvey replied "I do not want an agreement, as I said I want nothing in writing, I will have a meeting with Richards and report back…". But this correspondence seems to indicate that CGF understood a written agreement would be required to put the "proposed sale process" into effect, not that they had been told that that process had already been agreed in binding terms. The fact Mr Harvey did not want them to commence drafting does not of itself indicate he considered he had already made a binding agreement; it would be equally consistent with there being no agreement yet, and his instructions that if there were any agreement reached in future, as to which he was to "report back", he did not want to put it in writing. The suggested rationale, ie so that there would be nothing to show to Mrs

> Harvey, makes little sense. If sales were made, it was clearly envisaged that CGF would be acting on them and it is accepted that CGF would then have been obliged to report the receipt of proceeds to Mrs Harvey. Since she was entitled to half the net proceeds, if there was any arrangement that TML was to hand over half of what it received to Mr Richards it would be to Mr Harvey's advantage to have evidence of it, in order that Mrs Harvey should not claim the whole of the remainder. That indeed had been Mr Richards' own suggestion when a similar arrangement had been discussed in 2013. If Mr Harvey was unwilling to have a written agreement that might at best be not inconsistent with a binding oral argument having been made, but it is not any significant support for the case that there was such an agreement.

116. It was suggested that if Mr Harvey had reserved anything at the end of the meeting until he had discussed it with CGF it was only the question whether the proceedings were to be stayed, and that all other matters were therefore immediately binding. But that makes no sense at all; as I have said above it is not suggested that any marketing by Mr Richards would continue after TML obtained possession, so there would be no purpose in Mr Harvey having agreed that Mr Richards could conduct any marketing before he had confirmed that the proceedings would be suspended while he did so.

117. The conclusion that no binding agreement was reached at the meeting on 4 February 2014 might be sufficient to dispose of the claim, since no such agreement is pleaded to have been reached at any other point in time. Nor did the Claimant rely at trial on any binding agreement having been reached after 4 February. However, having heard the evidence I propose to make further findings to explain what, I am satisfied, in fact happened arising from the discussions at that meeting.

118. Mr Harvey's evidence was that he had told Mr Richards that in principle and subject to speaking with CGF he was agreeable to allowing Mr Richards a period of six months to demonstrate that sales could be achieved. He said in cross examination that if there had been any such sales but the whole village had not been sold, he would have agreed an extension of that period, but of course in the event there were no sales.

119. Mr Richards denies that any period of six months was mentioned at the meeting itself. I consider it most likely that it was, but in any event even if the period had been left open at the meeting itself it is clear from Mr Richards' own evidence that Mr Harvey did not agree to discontinue the proceedings but only to pause them for a period, and Mr Harvey made clear no later than his email of 13 March 2014 (B3/162) that the length of pause that he would agree was six months. At most, therefore, by that date a binding agreement had been reached that Mr Richards could market the properties during that six month period. An agreement coming into effect from the time of that confirmation would be consistent with Mr Richards' various subsequent references in correspondence to an agreement made "in March". He sought in evidence to pass these off as mistaken and intended to refer to the meeting in February, but that seems unlikely.

120. As to other terms, it is not disputed that Pixie Mahon was to be instructed as sales agent, and that any sale would be made by TML as mortgagee. It is also accepted now that TML would retain the whole of the proceeds of sale of the first unit sold, in order to be able to repay the CGF debt. Though the units had different prices, it is not suggested that the retention was subject to any maximum amount. These were matters accepted to have been discussed on 4 February and so would have become terms

incorporated at the point Mr Harvey confirmed that the proceedings would be stayed to allow marketing.

121. It is also accepted that at the meeting Mr Harvey said he wanted to get the first unit sold as quickly as possible as he was under pressure to repay CGF. There is a dispute whether, as Mr Harvey says, Mr Richards said at that meeting that he would buy a unit himself in order to enable that repayment to be made, or whether this is something he offered afterwards. The first mention of it is in Mr Harvey's email of 13 March when he says "How are we going on sale of unit to yourself? Be nice to see your commitment…". Thereafter there are various assurances from Mr Richards as to his activity in seeking a loan and prospects of getting one, but nothing comes to pass. Clearly by 13 March Mr Harvey is chasing something on which he has been expecting to have seen some progress already, which tends to support his evidence that it was an assurance he had been given at the meeting itself. There is certainly no written evidence of it being added afterwards, though if Mr Richards was offering it as an additional inducement or comfort it might be expected that he would have stressed this at the time as an indication of his good faith.

122. I think it more likely then that this was a matter discussed at the meeting. Although it is pleaded as a term which, if there was a binding agreement, Mr Richards has broken, I do not make any such finding. No specific unit had been identified, and it is not realistic, in my view, to think that Mr Harvey believed Mr Richards was committing himself to buy an unspecified unit at a price that was not agreed and irrespective of whether he could obtain mortgage funding.

123. There is a significant divergence between the parties as to whether the division of proceeds, after the sale of the first unit, was to be on the basis that all proceeds would be split equally (as Mr Richards says) or that TML would retain the first US$ 6m and Mr Richards would have the rest (as Mr Harvey says). On this point, I am inclined to accept Mr Richards' version of events. His written proposal was for an equal split, and his evidence that this was agreed, subject to the point about the first sale, is supported by Mr Brown. The issue does not seem to have been referred to in the subsequent correspondence until Mr Richards' email of 19 June 2014 (B3/193) when he said "You and I have shaken hands on a deal…whereby after the first sale the remaining sale proceeds would be split 50/50…". Mr Harvey did not address that in his response. Nor did he engage with any other detail in Mr Richards' message. As stated above his responses tended to be terse and to focus on the main issue, which at the time was that Mr Harvey had seen no progress on any sales at all and was telling Mr Richards he was minded to consider the alternative approach from Ms Marks. It may be said that he would have seen no need to address everything Mr Richards had said, even if he disagreed with it. On balance however I think that if this point had taken Mr Harvey by surprise he would be likely to have mentioned it- the thrust of his message to Mr Richards was that despite warm words Mr Richards' proposal had not made any concrete progress and he was therefore receptive to Ms Marks' approach. If he had also now been told that Mr Richards was seeking to make a material change to his proposal, significantly to Mr Harvey's detriment so that the prospects of recovery were going backwards, he would probably have said so and it would further have strengthened the attractiveness of Ms Marks's proposal.

124. For the reasons given above though, any accord on that subject did not amount to a binding agreement on 4 February. I do however consider that once Mr Harvey had indicated that he would pause the possession proceedings for six months, he was also

accepting that if any sales were achieved, the net proceeds would be divided according to the 50/50 formula.

125. There is also an issue as to whether, if any binding contract was created, the parties to it were Mr Richards and Mr Harvey personally, or their respective companies JGL and TML. This is a legal issue that, I am satisfied, the individuals taking part in the meeting and correspondence did not address in terms. I regard Mr Richards' pleaded case that Mr Harvey told him he wanted to enter an agreement under which he (Mr Harvey) would have personal obligations as implausible. I see no reason why Mr Harvey, who had taken care to conduct his dealings through a corporate vehicle, would volunteer personal responsibility.

126. Mr Richards' evidence does not descend to details of the particular words used; he does not say for instance that Mr Harvey said "I will procure that TML pays you…" or anything similarly denoting an intention to be personally bound. He says only that they shook hands "which meant…he and I were agreeing on a personal basis… he referred to 'an old fashioned gentleman's agreement' which meant that our handshake was enough to bind us personally". Mr Harvey denies that he used the phrase "Gentleman's agreement", but even if he did it does not take Mr Richards far. It is ambiguous whether it means an agreement that is legally binding even though not written down, or an agreement that is not binding in law but only in honour. It indicates nothing about whether the agreement is made on behalf of an individual or a company he represents, and nothing about the terms that have been agreed.

127. As to the inferences to be drawn from the surrounding circumstances, I do not consider any great weight can be placed on the fact that oral or written exchanges frequently employed personal pronouns- "we should sell the units ourselves…" and "the net proceeds of sale will flow directly to you…" and so on. The two men were accustomed to deal with matters through corporate vehicles and no doubt regarded those vehicles as entities closely identified with themselves, so may be expected to have used "you" and "I" as convenient shorthand. Mr Richards no doubt knew that neither of the individuals could personally sell any of the units and used "we" as shorthand to indicate that the sales would be a joint project that he and Mr Harvey would be engaged in but that would be actually implemented by the corporations, so that for instance any sale would be of the title held by JGL but achieved by TML selling as mortgagee.

128. The question is, what would an objective observer consider to have been intended by such exchanges? Would he or she understand that when Mr Harvey agreed that something should be done by TML he was doing so on behalf of TML, or was giving his personal commitment irrespective of whether TML was ultimately able to comply?

129. It was well known to both parties that all of the matters that Mr Harvey was being asked to agree to would have to be performed by TML. These were, in essence, the pausing of the legal proceedings that TML (and not Mr Harvey personally) was bringing, in order that the units could be marketed, and the distribution of sales proceeds, which TML (not Mr Harvey personally) would receive. In my judgment, in such circumstances and unless the circumstances showed some other factor that clearly implied acceptance of personal responsibility, the objective observer would conclude that Mr Harvey was making any agreement on behalf of TML.

130. It is not enough, in my judgment, that the companies concerned were under the sole control of an individual. If it were, directors or owners of such companies would find themselves routinely personally liable for anything done by or through such companies. None of the other matters called in aid by Mr Richards is sufficient to support the inference of intention to undertake personal liability.

131. I find therefore that any commitments that Mr Harvey did make were made on behalf of TML and did not engage his personal responsibility, either on a "I will procure that" basis or as surety.

132. For completeness I should say that I am satisfied that the objective observer would conclude on the other hand that Mr Richards personally was intended to be at least one of the parties to the agreement. There can be little doubt that both individuals understood that Mr Richards intended any share of proceeds to flow to himself personally and not to the company whose asset was being sold, whether or not that would have been consistent with his duties as director of that company.

133. I summarise my conclusions as to the contractual effect of the oral and written discussions as follows:

    i) There was no binding agreement of any kind made at the meeting on 4 February 2014.

    ii) A binding agreement did however come into effect no later than 13 March when Mr Harvey sent his email saying "I have confirmed to you stay of proceedings for 6 months."

    iii) By that agreement TML was bound not to take any active steps in the possession proceedings for 6 months in order to allow Mr Richards to seek purchasers for the individual units. If a sale was agreed as a result, it was also bound to pay Mr Richards personally 50% of any net proceeds in its hands.

    iv) TML was not however bound to extend the stay of proceedings beyond 6 months. There was no agreement to allow a sales period of two years. It follows that TML was not bound to continue to allow Mr Richards the opportunity to seek buyers after the six month period.

    v) Nor, I should say, was TML obliged to agree to any particular sale that Mr Richards might have proposed, for instance if it did not consider the price sufficient.

    vi) Mr Harvey was not personally bound by that agreement.

134. It follows then that this claim must be dismissed, because:

    i) It is brought only against Mr Harvey personally and not TML.

    ii) If it had been brought against TML (or if, contrary to my conclusion, Mr Harvey personally was a party) there was no breach of contract. The proceedings were effectively stayed for six months as agreed but there was no obligation to continue that stay or allow Mr Richards' marketing to continue thereafter. TML (and/or Mr Harvey) was entitled to bring that opportunity to an end by TML disposing of its interest to Ms Marks as it did.

Loss and damage

135. In the circumstances it is not necessary for me to express any conclusions on the damages claimed, but in case the matter should go further I will deal with these briefly.

136. I am not satisfied on the evidence that, on the balance of probabilities Mr Richards would have achieved any sales that would have resulted in a share of proceeds being payable to him, even if he had been allowed a two year period to do so. There is no expert evidence of the likelihood of such sales. He pleads that he would have realised at least US$ 12m, but that is plainly fanciful. It is based only on his own market evaluation, and the fact that Pixie Mahon was prepared to market the properties at prices that would total that amount if all the units were sold. It is said that it accords with the values on which land tax was charged, but they do not seem to have resulted from any formal valuation process and it was Mr Richards' own evidence that these tax values were often too high. The taxable value says nothing about the likelihood in practice of buyers being willing to purchase, either at all or at the price stated.

137. Any finding as to potential realisations would be purely speculative, given the factors weighing against Mr Richards, such as:

i) On the evidence, it is more likely than not that Ms Marks would have been entitled to assert a first charge over the 10 units, so preventing any sale of those units by TML and requiring TML's charge over them to be released. I am completely unable to determine on the evidence how much Ms Marks would have been entitled to receive by virtue of her security; she is not a party and I can place no weight on Mr Richards' often stated belief that her debt should have been fully discharged from the Hotel proceeds. Even if it were satisfied, whether from the Hotel monies or from proceeds of the KBV units, on the face of things those 10 units would then be the unencumbered property of JGL which would be entitled to any proceeds if they were sold, so there would be nothing that TML could share with Mr Richards. He does not put his claim on the basis that he would personally have received any proceeds that were legally owed to JGL.

ii) It was accepted that if any sales were made, any entitlement of Mr Richards would be subject to exclusion of the first sale and deduction of agents costs, land tax and other outgoings on any others, none of which he had allowed for in his claim.

iii) However, during the six month period, and thereafter until TML finally sold its interest, no sales were actually achieved, nor even any offers to buy. This was despite Mr Richards apparently canvassing all present and past occupiers and whatever marketing was achieved by Pixie Mahon. It is even the case despite Mr Richards apparently offering a discount of around 40% on the asking price to present occupiers, who might be expected to be the most likely to want to buy. Mr Richards asserts that things would have been different if selling had continued for longer, but he has no expert evidence that this would be so and I can place little weight on his assertions given how little had come from the similar optimism he had expressed continually since the sales in 2008. His assertion that the six month period he was allowed was not peak selling season is contradicted by his own representations to Mr Harvey.

iv) If as Mr Richards repeatedly said the background existence of the litigation was a deterrent to buyers, that would have continued to be the case as Mr Harvey had made clear TML would not discontinue it.

v) Even if offers were received TML was not obliged to accept them, at least if they were significantly below the marketing valuations that were discussed at the February meeting and which might perhaps be said to have been agreed as acceptable. Mr Richards would not therefore have been able to increase the prospect of sales by massively discounting the asking price, unless TML agreed.

138. Mr Knott submitted that I could conclude from the fact that the whole site was sold by receivers in 2015 for US$ 5m that Mr Richards could have achieved sales of at least that amount. But that does not follow at all; the receivers sold the whole site, which was not what Mr Richards says he had contracted to do; they were presumably in a position to sell free of any complications of the rival securities which were by then all in Ms Marks' hands, and they no doubt set out to achieve a quick sale to an investor which says nothing about the willingness of individual purchasers to buy in the same timescale. I have no information about the buyer; Mr Richards suspects that Ms Marks was seeking to engineer a sale to herself and if he is right that would be even less indication of any general marketability.

139. The degree of speculation involved is such that in my judgment it would be inappropriate to arrive at any figure, even on the basis of a loss of opportunity, for value that Mr Richards might have received within two years.

140. Further, as Mr Clarke submitted, it would appear at least highly likely that if a 50% share of proceeds were paid personally to Mr Richards it would be received by him in breach of duty to JGL, leaving him exposed to a claim by a liquidator to recover it. JGL is not owned by Mr Richards, its shares being vested (indirectly) in his Trustee in Bankruptcy, and a potential liability to JGL cannot be ignored simply on the basis that Mr Richards has apparently up to now made free use of the company's property and income for his personal benefit with impunity. It is also true as Mr Knott submitted that there is no pleaded case of such a breach of duty, but the onus is on Mr Richards to establish loss, which would require him to show that he can both receive and retain the benefit he relies on.

141. Another head of loss was based on loss of income from rentals at KBV. That was based on amounts received in past periods, as evidenced by payments into Mr Richards' personal account that, he said, represented such rents. However:

i) In some cases, it is not clear from the descriptions on the bank statements that payments were in fact rent.

ii) Even if they were, Mr Knott was obliged to accept that the rent would be due to JGL and not to Mr Richards personally, notwithstanding it was clear from his evidence that he had in the past treated all such receipts as his personal income.

iii) By his Reply, Mr Richards pleads that the sums he claims (other than rent) represented salary that would have been paid to him by JGL, but it was his own evidence that he had not been paid any salary in the past and there is no evidence from which I could find that JGL would have been able to do so after

2014. It was initially said that the sums Mr Richards had claimed as lost rent were for net profit from rental, ie after paying the expenses of running the resort, but it became clear that this was not so and they were in fact based on the gross rentals received without any allowance for costs. Mr Richards' evidence was that he had not prepared any accounts of JGL that might show whether it made any profit, and if one takes at face value what he said to Mr Harvey when it was suggested that he had made a good living from the rentals, he had spent everything received on maintaining and running the resort, so there would have been no profit remaining from which he could personally have been paid any salary.

142. Other heads of loss were based on income that Mr Harvey said he received from matters such as running the bar on site, or commissions on car rentals, or fees charged to owners for maintenance services. But I agree with Mr Clarke that all these sources of income would in fact be due to JGL and not Mr Richards personally, notwithstanding he had in the past treated them as his personal income.

143. Mr Richards said in evidence that he had been entitled to pay himself money from JGL's funds and that such payments were not salary (hence he had not been accountable for any tax) but were repayments of sums due to him on director's loan account by virtue of what he had previously lent to JGL. But he had no accounts or other evidence showing any such loans, and he accepted in cross examination that to the extent they existed they had arisen before 2009. It would follow that the benefit of any such loans would now be vested in his trustee as assets of his bankruptcy estate, and not therefore provide any entitlement for him to be paid personally now out of funds of JGL.

144. Accordingly, even if I had found any breach of contract, I would not have found that Mr Richards had established any loss that he personally would have been entitled to recover.

145. For all those reasons, the claim is dismissed.

146. I will list a date at which this judgment will be deemed handed down without attendance by releasing the approved final version to the parties and to BAILII. I invite the parties to agree the order resulting. If there are any matters arising I will if possible deal with them by written submissions, to be received no later than 12 noon on the day before the handing down.