



Neutral Citation Number: [2021] EWHC 2550 (Ch)

Claim No. HC-2017-001469

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**CHANCERY DIVISION**

**Before David Holland QC (sitting as a Deputy Judge of the Chancery Division)**

**Between:**

**KENNETH DAVIES**

**Claimant**

**-and-**

**(1) STEPHEN FORD  
(2) RICHARD MONKS  
(3) GREEN BOX RECYCLING KENT LIMITED**

**Defendants**

**JUDGMENT**

**Covid-19 Protocol: This judgment was handed down at a remote hearing on 22<sup>nd</sup> September 2021 and by release to BAILII. The date and time for hand-down is deemed to be 10.00 am on 22<sup>nd</sup> September 2021.**

**Ben Shaw and Chantelle Staynings (instructed by Dentons UK and Middle East LLP)  
appeared for the Claimant**

**The First Defendant appeared in person**

**Alexander Cook and Daniel Kessler (instructed by Cripps LLP) appeared for the Second  
and Third Defendants**

## David Holland QC

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## **INTRODUCTION**

1. In this claim the Claimant, Mr Davies, as assignee of the company Greenbox Recycling Limited (“GBR”) claims relief against the First and Second Defendants (“Mr Ford” and “Mr Monks”), who were directors of GBR, for breach of fiduciary duty owed by them to GBR and against the Third Defendant, Greenbox Recycling Kent Limited (“GBRK”), for knowing receipt.
2. On 26<sup>th</sup> February 2019 a split trial was ordered. At the initial, or liability, trial the following issues were listed for determination:

- (1) whether [Mr Monks] has acted in breach of duty or in breach of contract;*
- (2) whether [GBRK] is fixed with the relevant knowledge to ground a claim in knowing receipt;*
- (3) whether the business conducted by [GBRK] is derived from [GBR];*
- (4) whether [Mr Monks] is in principle entitled to an equitable allowance;*
- (5) whether [Mr Davies'] equitable claims are barred by [Mr Davies'] lack of clean hands or laches;*
- (6) whether the Defendant [presumably Mr Monks] should be relieved from liability pursuant to s. 1157 Companies Act 2006.*

The order added:

*For the avoidance of doubt, the quantum of any equitable or proprietary interest in the Business (as defined in the Particulars of Claim) to which [Mr Davies] may be entitled if he elects for equitable relief shall be the subject of the trial of quantum, not liability.*

3. The liability trial was heard before Adam Johnson QC (as he then was) sitting as a Deputy Judge of the Chancery Division (“the Judge”) in November 2019. In a lengthy

and detailed judgment dated 24<sup>th</sup> March 2020 (the neutral citation for which is [2020] EWHC 686 (Ch)-“the judgment”), the Judge, in summary: entered judgment in default against Mr Ford for breach of fiduciary duty; held that Mr Monks had been guilty of breaches of fiduciary duty; held that GBRK was liable in knowing receipt.

4. The resultant order dated 24<sup>th</sup> March 2020 (but stamped on 3<sup>rd</sup> April 2020) provided as follows:

*Relief Consequential on Judgment*

*1. Mr Monks shall, by 4.00 p.m. on 21 April 2020, pay to Mr Davies the sum of £170,685 in respect of funds belonging to Green Box Recycling Ltd (“GBR”) that Mr Monks converted to his own use, which sum shall be paid subject to partial set-off, as provided in paragraph 14 below.*

*2. Judgment be entered for Mr Davies (i) against Mr Ford and Mr Monks for equitable compensation; and (ii) against GBRK for knowing receipt.*

*3. The nature, extent and quantum of (i) equitable compensation payable by Mr Ford and Mr Monks; (ii) any equitable allowance granted to Mr Monks; and (iii) the proprietary and/or personal remedy to be granted to Mr Davies in respect of the business conducted by GBRK be determined at a further trial (the “Quantum Trial”).*

5. The Quantum Trial was heard before me on 14<sup>th</sup> to 16<sup>th</sup> and 19<sup>th</sup> to 26<sup>th</sup> April 2021 and this is my judgment on the issues on which determination was sought.
6. As summarised in his Closing Submissions, Mr Shaw (who appeared with the assistance of Ms Staynings for Mr Davies) described the relief which Mr Davies sought as follows. He has a primary case and an alternative or secondary case.
7. In his primary case, Mr Davies seeks the following relief against GBRK and Mr Monks:
- (1) As against GBRK as knowing recipient, Mr Davies seeks:
    - i. a declaration that GBRK holds the freehold of the Ashford Site on constructive trust for Mr Davies (as assignee of GBR); and
    - ii. an account of profits extending to the present day and/or equitable compensation (amounting to the current value of GBRK less the value of the Ashford Site);

As will be seen the “Ashford Site” is a reference to the site, now owned by GBRK, from which it trades. I shall refer to it hereafter as “the Site”.

(2) If such primary relief is granted against GBRK, Mr Davies is, he says, prepared to leave out of the order for relief the very significant sums which have otherwise been extracted from GBRK in the form of dividends, remuneration and benefits (save for the specific categories set out below); and

(3) As against Mr Monks, Mr Davies seeks equitable compensation in the form of restoring to Mr Davies the following sums which have been wrongly extracted from GBRK:

- i. sums paid by GBRK to Cripps LLP and/or Counsel acting for Mr Monks/GBRK in connection with the current dispute;
- ii. all sums paid or borrowed by GBRK to finance the acquisition by Boite Verte Ltd (“BVL”) of shares in Caja Verde Ltd (“CVL”) from Alan and Charlene Hogg or John Bennett;
- iii. all GBRK funds used to finance the purchase and development of Mr Monks’ personal property situated at Golford Stables, Golford Road, Golford, Cranbrook (“the Cranbrook Property”).

8. In his alternative case, Mr Davies seeks the following relief against GBRK and Mr Monks, which, he asserts, broadly reflects the commercial intention of the parties in mid- to late 2010, namely that: GBR would take over the trading operations from the Site; Mr Ford and Mr Monks would be entitled to remuneration of £3,000 per month; and that Mr Davies would exit the business in around 5 years.

(1) As against GBRK as knowing recipient, Mr Davies seeks:

- i. a declaration that GBRK holds the freehold of the Ashford Site on constructive trust for Mr Davies (as assignee of GBR); and
    - ii. an account of profits extending to 31 December 2015 and/or equitable compensation (amounting to the value of GBRK at 31 December 2015); and
  - (2) As against Mr Monks, Mr Davies seeks equitable compensation in the form of restoring to Mr Davies all sums which were extracted from GBRK for the benefit of Mr Monks (whether in the form of dividends, remuneration or other unauthorised payments) in excess of the sum of £3,000 per month until 31 December 2015.
9. As against Mr Ford, Mr Davies in any event seeks equitable compensation to restore to Mr Davies all sums which were extracted from GBRK for the benefit of Mr Ford (whether in the form of dividends, remuneration or other unauthorised payments) in excess of an allowance of £3,000 per month until the sale of Mr Ford's shareholding in GBRK on around 6 September 2013.

### **The issues**

10. The parties were agreed as to the issues which I have to determine. They were helpfully set out in an agreed List of Issues as follows:

#### Claims against Mr Ford and Mr Monks

- (1) How much equitable compensation (if any) is payable by Mr Ford and Mr Monks?

In particular:

- (a) Is Mr Monks liable to pay equitable compensation in respect of all business, business opportunities, property, assets, income and benefits

obtained by Mr Ford and Mr Monks for GBRK on or before 18 October 2011 (as asserted by Mr Davies)?

(b) Alternatively to (a), is it open to Mr Monks to assert that he is liable to pay equitable compensation only in respect of the seven matters referred to in paragraph 272 of the judgment or is that issue res judicata (as asserted by Mr Davies)? If that issue is not res judicata, is Mr Monks' liability to pay equitable compensation limited to the matters referred to in paragraph 272?

(c) Having regard to the issues determined at the trial on liability, is it open to Mr Monks to argue at the quantum trial that GBR would not have built a waste management business at the Site (the "Counterfactual Defence") or is that barred by res judicata and/or abuse of process (as asserted by Mr Davies)?

(d) If the answer to (c) is that it is open to Mr Monks to rely on the Counterfactual Defence, is the issue of whether GBR would have built a waste management business relevant to the quantification of the equitable compensation payable by Mr Monks in respect of the seven matters listed in paragraph 272 of the judgment (as asserted by Mr Monks) or is that issue irrelevant to the compensation payable in respect of those matters (as asserted by Mr Davies)?

(e) If the Court finds that it is open to Mr Monks to rely on the Counterfactual Defence and to the extent that the issue is legally relevant, would GBR in fact have built a waste management business at the Site? If so, should the Court impose a restriction on Mr Monks' liability to pay compensation similar to the approach of WARMAN

INTERNATIONAL LTD V DWYER [1995] HCA 18, and if so, what should this restriction be and what award is proper compensation?

(f) Is it relevant how much remuneration and benefits Mr Ford and Monks have received from GBR and GBRK, (as contended by Mr Davies), or is the proper measure of equitable compensation the net profits GBR would have made had Mr Monks performed his duties, without any assessment of Mr Monks' personal benefits (as contended by Mr Monks)? If Mr Davies is correct, how much remuneration and benefits have they received? Have these individuals received any disguised remuneration and benefits (in the form of "fuel" repayments or otherwise)? Has GBRK financed the purchase or acquisition of the Cranbrook Property?

(g) In particular, but subject to 1(f) above, are Mr Ford and Mr Monks liable to pay equitable compensation in respect of the following payments made by GBRK (as alleged by Mr Davies) or are the following payments irrelevant to the determination of equitable compensation (as alleged by Mr Monks)?

- (i) remuneration and benefits received by Mr Ford and Mr Monks;
- (ii) dividends;
- (iii) sums paid to finance the acquisition of shares in GBRK or connected companies;
- (iv) legal fees in connection with these proceedings;
- (v) the sums (if any) paid to finance the purchase and development of the Cranbrook Property.



(h) If Mr Monks is liable to pay equitable compensation, is he entitled to an allowance in respect of services provided by him to GBRK? If so, what is the quantum of that allowance?

(i) How much interest is payable by Mr Monks on the sum of £170,685.88 misappropriated by him from GBR? Is Mr Davies entitled to interest on any other sums due to him from Mr Ford and Mr Monks?

### Claims against GBRK

- (2) Having elected for equitable compensation against Mr Ford and Mr Monks, is it open to Mr Davies to elect for a declaration of constructive trusteeship and/or an account of profits as against GBRK? If so, and if a remedy is awarded against more than one Defendant or if multiple remedies are awarded against one or more Defendants, how should the awards be set off against one another?
- (3) Is GBRK's liability as a knowing recipient restricted to its receipt of pre-existing property transferred to it in breach of Mr Monks' duties to GBR as set out in paragraph 272 of the judgment (as asserted by GBRK) or does GBRK's liability extend beyond paragraph 272 to all business, business opportunities, property, assets, income and benefits received by GBRK in breach of Mr Ford's and Mr Monks' duties as directors of GBR (as asserted by Mr Davies)? On either case, what property was received and when?
- (4) In respect of which (if any) of GBRK's assets is Mr Davies entitled to a declaration of constructive trusteeship? In particular, is he entitled to a declaration that GBRK holds the Site on constructive trust?
- (5) Should the Court refuse an account of profits as a matter of discretion? If Mr Davies is entitled to an account of profits, is he entitled to such an

account from 22 May 2011 to date? If not, is he entitled to an account of profits for a shorter period of time and, if so, what is that period?

- (6) Is it open to GBRK to claim an equitable allowance, having regard to the issues already determined at the trial on liability and directions given by the Court? If so, is an equitable allowance available, as a matter of law, to a knowing recipient? If an equitable allowance is available, as a matter of law, should GBRK be granted such an allowance? If so, what is the quantum of that allowance?
- (7) If Mr Davies is entitled to an account of profits, what is the sum payable by GBRK to Mr Davies?
- (8) If, having elected for equitable compensation against Mr Ford and Mr Monks, Mr Davies elected (or must be treated as having elected) for equitable compensation against GBRK, how much equitable compensation (if any) is payable by GBRK?
- (9) Is Mr Davies entitled to interest on any sums due to him from GBRK?

### **THE BACKGROUND FACTS**

11. In the judgment, the Judge set out the relevant background facts with clarity and in detail. I would refer to the following paragraphs of the judgment: paragraphs 1 to 10 and 25 to 245. I do not intend to repeat that exercise in this judgment.

12. Unless otherwise indicated, I will, in this judgment, adopt the same shorthand as did the Judge.

### **THE JUDGMENT**

13. However, it **is** necessary to refer to and highlight certain paragraphs in the judgment both to put into context the issues I have to determine and because the meaning and effect of certain of them is in issue between the parties before me.

14. In paragraph 68 of the judgment, the Judge records his findings as to Mr Davies' intentions as at Autumn 2010:

*It is thus clear that by this stage, Mr Davies had determined to abandon his plans for sale, and instead had determined to build up the operations at the Ashford Site and look to sell at some future stage, when the operations had grown in scale. For this purpose, as will appear below, Mr Davies wished to make further use of the new brand he had developed-Greenbox Recycling-and make use of the new company he had incorporated back in March 2010 but which so far had not traded, namely GBR.*

15. In paragraphs 82 to 89 of the judgment the Judge deals with the Heads of Terms document which, he finds in paragraph 84, is "important in that it gives an indication of Mr Davies' intentions and his vision for the future". In paragraphs 88 and 89 he finds that the Heads of Terms document was sent to, and received by, Mr Monks on 13 September 2010.

16. He describes the Heads of Terms in paragraph 85 of the judgment as follows:

*The HoT is headed " SUBJECT TO CONTRACT ", and " Proposed creation of new trading company under the name Greenbox Recycling Limited ('Greenbox') and offshore holding company ('BVI Co') and terms of management of Greenbox and allotment of share options in BVI Co". It sets out a proposed new structure for the companies operating from the Ashford Site, and a plan for the development of the business operating from the Site. The main features relevant for present purposes were as follows:*

*i) The existing corporate structure, with KAD Capital as holding company owning all the issued shares in SIK, was to be replaced with a new structure under which an offshore holding company, " BVI Co .", was to be holder of the entire issued share capital of KAD Capital.*

*ii) The trading business of SIK was to be transferred to GBR "for nominal consideration ", and GBR would become the " new trading company of the KAD Capital/BVI Co group of companies ". GBR was to undergo a " rebranding and capital investment exercise." This was to be facilitated by a proposed new factoring arrangement to be entered into by GBR (" [GBR] will seek to secure confidential invoice discounting facilities from HSBC ... .") More particularly:*

*"KD, RM and PF shall agree the terms of the capital investment in [GBR] subject to the availability of the above CID [i.e., Confidential Invoice Discounting Facility] or other banking facilities. The intention of the parties*

*subject to suitable funding is for the business to be rebranded and for the replacement of the 3x18 tonne lorries, the 1x7½ tonne lorry and the 32 tonne RoRo. The replacement programme will be subject to available funding and cash needs of the business."*

*iii) As to the assets presently used by SIK, "The vehicles, plant and equipment used by SIK shall continue to be owned by [Nero]. Nero shall notify all HP or lease purchase companies of the change of operator/user of such vehicles, plant and equipment as required .... "*

*iv) As to shareholdings, the idea was that Mr Davies would be the majority shareholder in the BVI Co, but that Mr Ford and Mr Monks would be given a combination of shares and share options (in the case of Mr Ford), and share options (in the case of Mr Monks), which over time and contingent on the achievement of certain "key performance indicators ('KPIs')", would give each of them a 10% shareholding in the BVI Co.*

*v) In the case of Mr Ford, the KPIs included such matters as the improvement of recycling rates and the weekly verification of vehicle maintenance checklists. In the case of Mr Monks, whose role was described as "sales consultant", the KPIs were all concerned with improving turnover. The ultimate target was £5m turnover for the GBR financial year ended 31 December 2015. The HoT stipulated a deemed turnover for the 2010 financial year of £1m.*

*vi) In addition to his share options, Mr Monks was to be paid an annual consultancy fee of £40,000 plus VAT, on the basis of a 3 day per week commitment.*

*vii) The HoT document stated expressly that they were "not exhaustive and are not legally binding", and were "subject to the entering into of formal binding legal agreements", a number of which were then set out, including constitutional documents for the proposed BVI Co and a business sale and purchase agreement between SIK and GBR.*

17. In paragraph 89 the Judge concludes:

*although the HoT is not a document having contractual force, it also evidences an understanding that, subject to the proposed factoring agreement being put in place, the parties intended to have discussions about further capital investment in GBR.*

18. In paragraphs 94 to 100 the Judge discusses the Handover Note which was provided by Mr Davies to Mr Ford. In paragraph 101 he concludes that Mr Monks "must have been aware at least at the general level of the plans referenced in the Handover Note, some of which related directly to him".

19. Having recited passages from the Handover Note, at paragraph 100 he summarises its effect as follows:

*The basic structure of what was intended therefore seems tolerably clear:*  
*i) GAL was to be left as owner of the Ashford Site, subject to the Barclays mortgage, which was to be reduced during 2011 but in any event serviced by*

*payments each month to come from the income produced by GBR. Mr Ford was left as the sole director of GAL.*

*ii) GBR would take over the trading operations at the Ashford Site (the reference to the "transfer of the trade from [SIK] to KAD C" is somewhat obscure, but I note that the HoT document refers to GBR as the "new trading company of the KAD Capital...group").*

*iii) Also as to GBR, both Mr Ford and Mr Monks were to become minority shareholders. It would fund the acquisition of certain new vehicles and equipment. It would have the benefit of the new factoring agreement, and it would also have the benefit of funds from SIK for a period of about three months, which would be enough to keep it going. Thereafter, SIK would be allowed to become dormant and (presumably) dissolved. GBR would seek to build its turnover, with the assistance of Mr Monks who had a proven track record in that area.*

*iv) Meanwhile, Nero would continue to hold the assets which had previously been used by SIK (and would now be used by GBR) in the business conducted from the Ashford Site. (This of course must be read subject to the points made above as regards ownership of the assets used in the Business, and as regards the relevant hire purchase and other finance arrangements).*

*v) Mr Davies was to relocate abroad. Mr Monks was to email a number of progress reports each month. As to remuneration, for the time being Mr Davies, Mr Monks and Mr Ford were each to receive £3,000 per month (£750 per week) from GBR. There was to be a meetings in Dubai every 3-6 months, and at one of those meetings cash income was to be divided up between them. Mr Davies was to be contactable by mobile or, perhaps more conveniently, by email, if needed.*

20. In paragraph 153 of the judgment, the Judge recites that there had been an issue before him as to the state of Site in late 2010. Having referred to various pieces of evidence before him and, in particular, to Environmental Agency reports, he concludes, in paragraph 154, that there was a "significant problem" with waste at the site by the end of 2010. In paragraph 188, he concludes that the Site was, in early 2011, in a "totally unacceptable state physically and efforts were needed to get it under control".
21. At paragraphs 157 to 164, he considers, and rejects, Mr Monks' evidence as to his lack of knowledge of: the ownership of the Site by GAL; the mortgage to Barclays Bank; the apparent lease of the site granted to GBRK with effect from 1<sup>st</sup> December 2010. He finds (at paragraph 164) that, contrary to the evidence which he gave, Mr Monks took a "close interest" in GAL's activities and actions in respect of the Site.

22. In paragraph 184, the Judge concludes that Mr Davies was “wholly ignorant” of the incorporation of GBRK on 7<sup>th</sup> January 2011.
23. In paragraphs 196, 202 and 209 the Judge concludes that it is “beyond doubt” that a great deal of work was done at considerable expense in the early part of 2011 to clear the Site and to improve the conditions and that GBR’s funds as well as some of Mr Monks’ own funds were used to pay for the cost of this.
24. In paragraphs 229 and 230 the Judge recites that it is common ground that, in January 2011, GBRK took over the hire purchase and finance agreements for most, if not all, of the equipment previously used in the Business.
25. Paragraphs 235 and 237 are as follows:

*Benchmark went on to acquire the Site, and in June 2011 entered into a written Lease for period of 7 years. The tenant was not GBRK, but Mr Monks himself. Among the matters affecting the property described in the Agreement for Lease was "the Existing Lease", defined to mean: "the lease of the Property dated 1 December 2010 between (1) [GAL] and (2) [GBRK]. "The Term Commencement Date" stipulated was "1st December 2010 .... Much later, in 2016, GBRK acquired the freehold of the Ashford Site from Benchmark, with funding provided in part by HSBC, and the remainder from investors or possibly from trading profits.*

Benchmark acquired the freehold to the Site from LPA Receivers appointed by GAL’s mortgagee, Barclays Bank.

26. At paragraphs 249 to 251, the Judge rejects Mr Davies’ case that Mr Monks was in breach of contract.
27. In considering the allegation of breach of directors duties under sections 172 and/or 175 of the Companies Act 2006 (“CA 2006” or “the 2006 Act”), the Judge recited Mr Davies’ position as follows (in paragraph 260):

*Mr Davies' position is simple, and is put broadly. He says that in siphoning off to GBRK the Business at the Ashford Site which was intended to be run through GBR, Mr Monks was obviously in breach of his duties as a director of GBR. He was obviously not acting in good faith in a manner designed to promote the success of GBR, and by incorporating GBRK he placed himself in a position of hopeless and irreconcilable conflict.*

28. He then describes “the State of the Ashford Site” in paragraph 262. He concludes:

i) Site : GBR did not own the Ashford Site. The intention had been for a formal licence to occupy to be entered into, but that had not happened. At the same time, however, as had been the case with SIK, there was an informal arrangement in place under which GBR was entitled to make use of the Ashford Site premises, in return for servicing the mortgage payments to Barclays of £5,000 per month. The position as regards the mortgage account is somewhat unclear, but it seems likely that the account was not in arrears at the beginning of November 2010, and that the expectation (and indeed agreement) was that GBR would continue to make the required mortgage payments on an ongoing basis. At the same time, however, there is some doubt as to what Barclays had been told about the change in arrangements which meant that SIK would no longer be the trading company operating from the Site. In any event, towards the year-end Barclays were signalling their interest in repossessing the Site with a view to marketing it for sale.

ii) WML [a reference to a “Waste Management Licence”]: GBR did not have a WML. At the time the relevant WML was held by GAL. Although historically it had been lawful for the occupier of a site to authorise another party to conduct waste management operations, the law had changed on that point in 2008. Consequently, any arrangement under which GAL subcontracted waste management operations to GBR was irregular and probably unlawful. In any event, the Ashford Site was in a poor state physically, and very likely GAL was in breach of a number of the conditions of its WML, aside from the issue as to the identity of the operator. The regulatory position needed to be updated to reflect the new 2010 Regulations, and the WML replaced with an Environmental Permit.

iii) Goodwill : It had been intended to effect a formal transfer of goodwill from SIK to GBR, but again no steps had been taken to implement any such transfer. Customer information had been provided informally, but in my view, (1) there must be real doubt whether that amounted to an effective transfer of goodwill from SIK, and (2) even if it did, it is unlikely to have had any real value ...

vi) To summarise, therefore, on the question of goodwill, in my view I should proceed on the basis that there was no effective transfer of any valuable goodwill from SIK to GBR. GBR possibly developed some goodwill of its own, but that is also likely to have been of limited value, given both the short time for which it had been operating and the fickle and competitive nature of the waste management industry generally.

vii) Website: There was a website which could be used to advertise the Greenbox brand, but the relevant domain name was registered to Mr Davies personally and was not owned by GBR. Likewise, there is no evidence that GBR itself owned any design rights associated with the "Greenbox " name or brand.

viii) Vehicles, Plant & Equipment : GBR had no vehicles, plant and equipment of its own. Certain of the assets in use at the Ashford Site were owned outright by Nero. The position is unclear, but Nero may also have held some assets under hire purchase and finance agreements. SIK certainly did, and indeed some agreements had been entered into by SIK as late as November and December 2010, at a point after Mr Davies' disqualification as a director, and after the

*change in operations at the Ashford Site which led to GBR becoming the trading company.*

*ix) The intention had been for the previously informal arrangements to be formalised by means of a written licence, but this was never executed. Despite that, GBR had in practice taken over responsibility for paying the relevant finance and HP charges. Consistent with that, GBR's bank statements for December 2010 show a series of payments being made to CAF and Finance & Leasing. However, it appears that the finance houses had not been informed of the intended change of user.*

*x) In any event, certain payments due to London Finance & Leasing were missed over the Christmas holiday period in 2010-2011, and this, together with the change in overall arrangements at the Ashford Site including Mr Davies relocation abroad, gave rise to the risk of termination of the finance arrangements.*

*xi) "O" Licence: Haulage and GAL had lost their appeal in relation to their "O" Licences, and consequently those licences had been revoked with effect from 23:59 hours on 22 December 2010. SIK's appeal had succeeded, but only in the sense that it was given permission to renew its application at a remitted hearing before the Traffic Commissioner. No application was made. Instead, an application had been made in the name of GBR, but without Mr Monks' knowledge. That application was still to be heard, however.*

*xii) Employees : Approximately 10 people were working at the Ashford Site, including Mr Ford, but none of them had employment contracts in place with GBR (although Mr Monks had been provided with copies), and they were being paid at least partly (and perhaps entirely) in cash.*

*xiii) Income : GBR had a bank account at HSBC, which had been opened in September, and had the benefit of a factoring agreement with Lloyds TSB. As from mid-November 2010, income was flowing into the HSBC account under the factoring agreement. In addition, GBR had the benefit – at least in the short-term – of funds from the SIK bank account, which were intended to assist cash-flow until (in particular) Mr Monks' efforts to drive sales began to bear fruit. As to the latter point, as I understood it one of Mr Monks' arguments in his Closing was that the inclusion within the terms of the Barclays' fixed and floating charges of " trade debts " meant that GBR could not safely make use of funds provided to it by SIK, because they represented the proceeds of debts which were subject to Barclays' security interest. If that was the point, I disagree with it. It seems to me that the arrangement under which SIK made funds available for a limited period was more in the nature of an interest free loan to GBR, to aid cash flow. Under the Debenture SIK was prohibited to "sell, transfer, part with or dispose of any Floating Charge Assets except by way of sale in the ordinary course of business ". To my mind, that language does not inhibit its ability to make a loan to a related company with funds derived from customer receipts.*

29. He concludes, at paragraph 263:

*Overall, the picture is a messy one. The state of the operations at the Ashford Site was shambolic. The question of the discharge by Mr Monks of his duties as a director must be looked at in light of that overall assessment.*



30. In paragraphs 264 to 266 he rejects Mr Monks' case that GBR was insolvent as at late 2010. That defence had been described by the Judge in paragraph 247 as follows:

*Is Mr Monks entitled to say that GBR was insolvent and unable to trade in early 2011, and if so and if it was (or was close to insolvent), how does that affect the analysis?*

He had also described Mr Monks' case on this in paragraph 261 (ii) as follows:

*GBR was not in a position to trade at the end of 2010 or in early 2011. In fact, continuing to trade might well have exposed the directors to wrongful trading claims under s. 214 IA 1986. GBR was insolvent or close to insolvency, and therefore the interests of its creditors were paramount. The state of GBR meant that, in taking the steps he did which led to the establishment of GBRK and in operating at the Ashford Site via GBRK, Mr Monks was not in breach of any duty to avoid a conflict of interests. The duty in s. 175 CA does not apply if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest, and that was the position here. Because GBR was not in a position where it was able to trade, it must follow that it was not in a position where it could exploit any property, information or business opportunity coming its way; and consequently there was no "real sensible possibility of conflict" if Mr Monks did so.*

Thus, a key part of Mr Monks' defence to the allegation of breach of fiduciary duty was that, as GBR was insolvent in late 2010 and early 2011, it could not lawfully have traded. Thus, he said, the incorporation and subsequent operation of GBRK was not a breach of his fiduciary duties to GBR.

31. As the issue has also arisen in the hearing before me, it is worthwhile quoting at length from the judgment on this issue:

*264. Before moving on, I must deal with Mr Monks' submission that GBR was insolvent in late 2010/early 2011. This was disputed by Mr Davies, on the basis that the evidence relied on by Mr Monks was equivocal and unconvincing.*

*265. On this point I prefer Mr Davies' case. I do not feel able to conclude that GBR was insolvent:*

*i) There is no clear evidence of GBR having substantial creditors. By the end of December 2010, it had had only a short trading life. Mr Smith in his Witness Statement, giving the background to the decision to incorporate GBRK, said that GBR "was too new to have generated any significant creditors". Mr Monks in his oral evidence was able to identify only three creditors, with debts amounting (taken at their highest) to approximately £56,000. On the other hand, in the questionnaire completed by Mr Monks in GBR's liquidation, he confirmed that GBR had no creditors.*

*ii) Mr Monks said that GBR had an enormous potential liability in terms of the waste left at the Ashford Site, but this point was not developed in detail, and I am not satisfied that any such liability was a liability of GBR, rather than a liability of GAL, as the holder of the WML.*

*iii) In any event, as already noted above, there is evidence of income flowing into the GBR HSBC bank account in late 2010 from the Lloyds TSB factoring agreement, and it had use of some funds from SIK – probably by way of loan – for several months, expressly with a view to assisting cash flow, while its own business was built up by Mr Monks. It is true that the HSBC account went into overdraft over the Christmas period in 2010, but the position was quickly rectified.*

*iv) Mr Monks argued that the expenses involved in running a waste management business are significant, and in aid of that referred to the first two months of GBRK's Sage accounts, which indicate expenditure of some £161,525.24; and to GBRK's opening balance (see above at [204]), which but for the balancing item attributable to Mr Monks' directors' loan would have shown a shortfall of £261,000. Again, however, such figures are of limited utility in assessing the solvency or otherwise of GBR at any given point in time (no precise date is specified). Aside from other matters, it is apparent that much of this early expenditure was in connection with clearing the Ashford Site, which happened as a priority exercise in the early part of 2011. I will come back to this below, but for now simply note that it is not obvious to me why the same clearance exercise could not – if necessary with the agreement of the Environment Agency – have been conducted over a longer period, if that was what was required to manage GBR's cash flow successfully.*

*266. Overall in my view, this evidence is too sketchy to justify the conclusion that GBR was insolvent in late 2010, or even that it was of doubtful solvency...*

32. The Judge then deals, at paragraphs 267 to 279, with the allegation that Mr Monks was in breach of his duties as director. As the meaning of certain of these passages (and in particular paragraph 272) is in issue before me, I feel constrained to quote the relevant paragraphs at length.

*267. In my view, the focus in the case as it has developed, on whether something corresponding to the Business was transferred to GBR, has led to a misplaced emphasis, in determining whether Mr Monks was in breach of duty, on the question of what existing corporate assets GBR had, and whether they had been misapplied. To a large extent Mr Monks' case has been to say – GBR had no corporate assets, and therefore nothing to divert, and therefore there was no breach of duty.*

*268. That is a misplaced emphasis because the real focus should be on the duties owed by Mr Monks, by reason of his status as a director of GBR, and whether he was in breach of them. Although a company director may certainly breach his duties to the company by misappropriating its existing assets, that is not a pre-requisite. He may also breach his duties on other ways, not at all dependent on the misapplication of pre-existing corporate assets, for example by putting himself in a position of conflict and thereby making an unauthorised profit.*

33. In paragraphs 269 and 270, the Judge then quoted from the judgment of Jonathan Parker LJ in the case of RE BHULLAR BROTHERS [2003] EWCA Civ 424 (at paragraphs 27 and 28). He then continued:

*271. In light of these comments, in my judgment the proper approach to assessing whether Mr Monks was in breach of duty – and leaving aside for the moment the question of limitation – involves one asking not only whether pre-existing corporate assets of GBR were misapplied, but also, more pertinently, whether his actions were wrongful.*

*272. As will be readily apparent from the narrative above, **the factual background is somewhat confused, and despite my best efforts to decode the evidence, a number of gaps and omissions remain. Notwithstanding that, a number of points are clear, and in terms of what Mr Monks did, they include the following:***

*i) He caused the incorporation of GBRK, with the intention that it would trade as a waste management business from the Ashford Site.*

*ii) With that in mind, Mr Monks caused efforts to be made to clear the Ashford Site of waste.*

*iii) Mr Monks recharged at least part of the cost of clearing the Ashford Site to GBR, even though GBR itself would not have use of the Ashford Site once cleared.*

*iv) Mr Monks engaged in a process which involved the WML (later Environmental Permit) previously held by GAL being transferred to his new company, GBRK. This was tied to the issue of clearing the Ashford Site. Once the transfer was complete, it gave GBRK regulatory authority to conduct a waste management business from the Ashford Site.*

*v) Mr Monks acquired, via GBRK and later directly in his own name, a lease of the Ashford Site. The detail of this is obscure. It seems that GBRK entered into a lease with GAL at some point in early 2011 which was backdated to 1 December 2010; but more significantly, Mr Monks acquired a leasehold interest in his own name in June 2011 from Benchmark.*

*vi) Mr Monks caused GBRK, early in 2010, to enter into new hire purchase and lease agreements in respect of the equipment previously held by SIK, and which had been used by SIK in operating the Business at the Ashford Site. It appears he also caused the transfer to GBRK of certain assets previously owned by Nero, but again used by SIK in the Business .*

*vii) He took over GBR's "O" Licence application, which the Traffic Commissioner was persuaded to treat as an application in the name of GBRK, and procured the issue of a new "O" Licence in the name of GBRK, to be used in the course of the new waste management business to be conducted by GBRK from the Ashford Site.*

*273. In my judgment, and leaving aside for the moment any modification to the orthodox position which might be said to arise from GBR being insolvent or of doubtful solvency, **each of these steps** on the face of it involved Mr Monks in a breach of the duties he owed as a director and fiduciary.*

*274. It is convenient to start with section 175, which in any event was the main focus of Mr Davies' case. It seems to me that **each of the steps identified above** involved a breach by Mr Monks of his duty under CA 2006 section 175. I say that*

*because they each occurred, as Mr Monks well knew, in circumstances where the intention had been that GBR, not GBRK, would operate a waste management business from the Ashford Site. Indeed, Mr Monks had been engaged – initially as a consultant, but latterly as a director – with the remit of building up that business. GBR therefore had its own, one might say equal and opposite, interest in the matters identified above – i.e., in regularising the position at the Ashford Site by clearing it of waste and obtaining an environmental permit which would allow waste management activities to be carried out; in regularising the terms on which the Ashford Site was occupied by entering into a lease or licence; in regularising the position as regards the use of the plant and machinery necessary to permit a waste management business to be conducted; and on obtaining the appropriate licence or licences to permit waste to be transported.*

*275. Consequently, **in taking the steps identified above**, all of which were in the interests of GBRK, Mr Monks was in an obvious position of conflict given his countervailing interest both as a director of, and shareholder in, GBR, which was looking to develop exactly the same trading business, operating from the same premises, as GBRK.*

The words underlined in the quotation from paragraphs 271 and 272 were emphasised by the Judge in the judgment. I have added the emphasis in bold to those and to certain other words as the meaning and effect of the words in paragraph 272 is in dispute before me. To my mind, the word “they” in the phrase “they include the following” more naturally refers back to the words “a number of points are clear” and not to the words “in terms of what Mr Monks did”.

34. The Judge then dealt, in paragraphs 276 to 279, with a point made by Mr Monks that GBR was not itself in a position to exploit the opportunities presented to GBRK. The point made was:

*that the financing companies would not enter into new agreements with GBR because it was a bad credit risk and there was concern about Mr Davies given his relocation abroad; and...that the Traffic Commissioner would not grant an “O” Licence to any business associated with Mr Ford...*

35. The Judge dealt with that point as follows:

*277. Even if taken at face value, however, such points do not help Mr Monks. It is no answer to a claim for breach of duty for a trustee to say that the opportunity he has exploited was not one which could ever have been taken up by the beneficiary. That is an entirely conventional analysis which, as Mr Shaw pointed out, has been the law for at least 300 years, since the trustee in *Keech v. Sandford* was held in breach of duty for taking a new lease in his own name, even though the landlord*

had refused to renew the lease in the name of the infant beneficiary. As Lord King LC commented:

*"This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that the rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to the cestui que use...."*

278. This same point finds expression in CA 2006 section 175(3), which says that the no conflict rule applies in particular the exploitation of any property, information or opportunity, and that:

*" ... it is immaterial whether the company could take advantage of the property, information or opportunity."*

279. Thus, in this case it seems to me immaterial, even if true, to say that GBR may not itself have been in a position to:

i) obtain a WML or environmental permit;

ii) take a lease of the Ashford Site;

iii) enter into hire purchase or other financing arrangements in respect of the plant and equipment previously leased to SIK;

iv) obtain an "O" Licence;

v) continue or renew the factoring agreement with Lloyds TSB, with a view to operating the Business (or at least, a business) from the Ashford Site.

36. In paragraphs 280 to 301 the Judge discusses further Mr Monks' argument that he was not in breach of duty because, in late 2010 or early 2011, GBR was insolvent or close to insolvency. Having earlier rejected the argument as a matter of fact, he dismisses it as a matter of principle and as being contrary to authority. In the course of this discussion, at paragraph 287, he says this (in relation to section 175(4)(a) of the 2006 Act):

*The conflict arises because of the tension between (1) Mr Monks' directorship of, and ownership interest in, GBRK, on the one hand, and (2) on the other, his status as a director of GBR, which gave rise to duties owed to GBR, and which required him to avoid any situation in which he had a countervailing interest – whether or not GBR was itself capable of taking advantage of any relevant property, information or opportunity which might present itself. Thus, it seems to me that Mr Monks was tied in, and in the circumstances unable to take advantage for his own benefit of the situation at the Ashford Site which emerged in late 2010 and early 2011. He might think that unfair, but it is an entirely conventional analysis, and a consequence of the fiduciary obligations he undertook, and which exist for well- established policy reasons, essentially as a deterrent*

37. He concludes, at paragraph 301, that Mr Monks was in breach of his duty under section 175 of the 2006 Act.

38. In relation to the allegation that Mr Monks had breached his duty under section 172 of the 2006 Act, the Judge says this (at paragraph 303):

*Looking once again at the matters described at [272] above, it seems obvious that none of them can be said to have been likely to promote the success of GBR; they are all concerned with promoting the success of GBRK. It follows from my analysis above that, whether GBR was solvent or insolvent, Mr Monks was prevented by his "no conflict" duty from doing so. I therefore do not think he can say that he discharged his duty under section 172 in good faith. In any event, as to the question of Mr Monks' good faith, I incorporate the conclusions as to his honesty at [349] below.*  
(emphasis added)

39. The Judge then turns to deal with whether, and to what extent, Mr Davies' claims against Mr Monks were statute barred with regards to section 21 of the Limitation Act 1980 given that the Claim Form in this case was issued on 22<sup>nd</sup> May 2017. The argument was that claims in respect of events before 22<sup>nd</sup> May 2011 were statute barred.

40. In this regard, the Judge held, at paragraph 307:

*that Mr Davies claim arising from Mr Monks' breach of duty in personally taking a leasehold interest in the Ashford Site on or about 23 June 2011, is not on any view time-barred. This occurred after 22 May 2011 and within six years of the issue of the Claim Form.*

41. Having discussed the Supreme Court case of BURNDEN HOLDINGS V FIELDING [2018] 2 WLR 885, the Judge concluded (at paragraph 313):

*it follows that in cases involving the misapplication of pre-existing corporate assets, the usual six year limitation period will be disapplied.*

42. He then turned to examine cases in which a company director diverts a maturing business opportunity to his own benefit. Having examined a number of authorities, including GWEMBE VALLEY DEVELOPMENT V KOSHY (NO. 3) [2004] 1 BCLC 131, the Judge concluded (at paragraph 319):

*The upshot as it seems to me is as follows. In cases involving a misapplication of pre-existing corporate assets by a company director, LA 1980 section 21(1)(b) will apply, and relevant claims will not be subject to the usual six year limitation period. However, in cases involving other breaches of fiduciary duty by a company director, relevant claims will be subject to the usual limitation period, and will therefore be time-barred after six years unless there is fraud.*

*For these purposes, pre-existing corporate property does not include benefits such as bribes or maturing business opportunities.*

43. At paragraphs 322, 324 to 326, he said this:

*322., in my judgment item (iii), i.e., the use of GBR's funds in order to help clear **Looking back at [272] above** the Ashford Site, in circumstances where Mr Monks was in an obvious position of conflict and where that would benefit GBRK, involved a misapplication of pre-existing corporate property by Mr Monks, and falls within the scope of LA 1980 section 21(1)(b) ...*

*324. Applying the logic of Burnden Holdings, those funds were property of GBR that Mr Monks had previously received, because he was a director of GBR and therefore custodian of its property. No sufficiently clear case has been made out that the funds were paid away for good reason. The funds were converted to Mr Monks' own use, in the sense that they were paid in order to produce a benefit for GBRK, in which he was majority shareholder, the benefit being the clearing of waste from the Ashford Site in a manner which would enable GBRK to obtain a new Environmental Permit and begin to trade free of any regulatory restrictions or liabilities.*

*325. **I do not consider that any of the other matters identified above in paragraph [272] of this Judgment** involved any misapplication by Mr Monks of pre-existing corporate property of GBR. In particular, I do not consider that there was any misapplication or misappropriation of GBR's goodwill. For the reasons already explained above at [262(iii)], it seems to me unlikely that GBR had goodwill of any real value at the time. It is much more likely that GBRK, when it began trading, did so from a standing start but with the benefit of Mr Monks' own contacts. To put it another way, I do not think that Mr Monks' interest in GBR was with a view to diverting its goodwill; his interest was in the Ashford Site and other available infrastructure, as a platform for building up his own business using his own energies and no doubt considerable business development skills.*

*326. It follows, **as regards the other breaches of duty identified in [272] above**, that they will be time-barred unless fraudulent.*  
(emphasis added)

44. Having considered the question of what amounts to fraud for these purposes, he then concludes (at paragraph 338):

*Against that background, I turn to consider the case against Mr Monks. I have come to the conclusion that, **in taking the steps identified at [272] above**, he was acting dishonestly (and therefore fraudulently), and that consequently Mr Davies' claim against him based on those grounds is not time-barred. I say that essentially because, in my judgment, Mr Monks' actions in late 2010 were not inspired as an honest response to the situation he found himself in, but instead by a dishonest desire to take over for himself the opportunity which presented itself to trade from the Ashford Site.*  
(emphasis added)

He adds (at paragraph 349):

*Coming back then to the test for dishonesty...my conclusion is that Mr Monks' subjective intention was a dishonest one. Even if that is wrong, however, and he felt justified in doing what he did, still I would conclude that his conduct was dishonest when viewed objectively. In this regard, it is possible that Mr Monks set the bar too high. He is not to be assessed by reference to the standards of the "patron Saint of Ashford" (see [226] above), but only by the standards of ordinary decent people. I think an ordinary decent person would regard what he did as dishonest.*

45. In the light of this finding, he held, in paragraph 351, that Mr Monks could not rely on section 1157 of the 2006 Act, as he had not acted "honestly and reasonably".

46. He recorded, in paragraph 352, the agreement between the parties that Mr Monks' knowledge was, at all material times to be attributed to GBRK. However he added, at paragraph 353 and 354:

*As to time-bar, it was also common ground that Mr Davies' claim against GBRK in knowing receipt is not a claim against a "trustee" for the purposes of LA 1980, section 21(1)(a) or (b). Accordingly, Mr Davies' claims against GBRK are subject to a six-year limitation period: see Williams v. Central Bank of Nigeria [2014] AC 1189.*

*The practical effect of this, in terms of remedies, will have to be addressed in further submissions (and if necessary at the further trial) in light of the other findings made in this judgment. On any view, however, it follows that any claim by Mr Davies against GBRK relating to the leasehold interest in the Ashford Site taken out by Mr Monks in June 2011 is not time-barred.*

47. He then, at paragraphs 361 and 362, rejected Mr Monks' defence based on laches. In doing so, he said, at paragraph 361 (iii):

*I think the point also needs to be looked at in light of my overall findings as to Mr Monks' motivations and conduct. It seems to me fair to describe Mr Monks as a risk-taker. He was opportunistic and took a risk when he incorporated GBRK in early 2011. He was presented with a situation which he thought he could turn to his advantage. That meant, in part, keeping Mr Davies at bay and hoping he would go away. But there was always a risk that he would return, and Mr Monks pressed ahead with the development of GBRK's business in full knowledge of that risk. The fact that he was willing to do so suggests to me that it is not unconscionable (all other things being equal) to permit Mr Davies to hold him to account, now that the risk has materialised.*



48. At paragraphs 364 to 370, he also rejected Mr Monks' defence based on an assertion that Mr Davies did not come to equity with clean hands. In doing so, I note that the Judge said as follows (at paragraph 368):

*The equity sued for is GBR's entitlement to equitable relief arising from (essentially) Mr Monks' deliberate and dishonest decision to place himself in a position of conflict, in order to take advantage on his own account of the opportunity to exploit the Ashford Site which had presented itself. In other words, the equity sued for is relief arising from breach by Mr Monks of his duties as a director.*

He added (at paragraph 369 (i)):

*Mr Monks is an entrepreneurial and competitive character. It seems to me entirely natural to think that that would have provided his real motivation... To summarise, Mr Monks is an ambitious, intelligent and opportunistic individual, who is willing to cut corners if it suits him to do so.*

49. At paragraphs 371 to 395, he then addressed, and dismissed, Mr Davies' argument that, by reason of the effect of section 1032 of the 2006 Act, Mr Ford and Mr Monks were at all times subject to their directors fiduciary duties (even during those years when GBR had been struck off the Register). Thus, it was argued, the current business of GBRK was held on trust for GBR and (by way of assignment) him. He described the argument thus (at paragraph 379):

*The effect of the deeming provision is that Mr Monks and Mr Ford continued as directors and therefore have committed continuing breaches of duty. Consequently, as Mr Shaw put it graphically in his Skeleton Argument, " Each time [GBRK] fulfils a customer's order, Mr Monks commits a further breach of duty to GBR". In other words, each new breach of duty by Mr Monks gives rise to a new proprietary claim in respect of any benefits received, which Mr Davies can assert against GBRK since it is fixed with knowledge of Mr Monks' breach of duty. For that reason, GBR does not need to trace into GBRK's hands the assets and property diverted from it back in 2010, prior to GBR's dissolution; instead, all of GBRK's current business and assets are held on constructive trust for Mr Davies.*

50. He rejected it. At paragraph 395 he concluded that:

*For all those reasons, I am not persuaded by Mr Davies' argument that Mr Monks and Mr Ford were (and are) subject to continuing duties even today by means of the deeming provision in CA 2006 section 1032(1). Consequently, I do not consider that the question of **what remedy follows from the breaches of***

*duty I have identified* can be answered as easily as Mr Davies would perhaps wish, by saying that the whole of GBRK's current business is held on constructive trust for him. Issues therefore remain which will have to be addressed at a further trial, concerning the form of relief to be awarded and its extent. That gives rise to some further difficult issues as to the scope of a fiduciary's liability to account, in a case where an opportunity has been diverted and a new business built up but with the benefit of the errant fiduciary's efforts and capital investment.  
(emphasis added)

51. At paragraphs 396 to 406 of the judgment the Judge then considered the point as to whether Mr Monks, despite his dishonest breaches of duty, should be entitled to an equitable allowance. At paragraph 397 he said this:

*I do not think there is any blanket rule that a dishonest fiduciary can never claim an equitable allowance. The evaluation must depend on the circumstances of the case, and Mr Monks was able to point to at least one authority where an equitable allowance was permitted even where the breach of duty by the fiduciary was fraudulent.*

52. He then said this at paragraph 401:

*What of the present case? I express no final conclusion about it since it is more properly an issue for the further trial in these proceedings, but there is undoubtedly evidence supporting the view that the efforts and capital investments made by Mr Monks since early 2011 have contributed to the growth and success of GBRK. In those circumstances, I take the view that Mr Monks should in principle be entitled to claim an equitable allowance (see the list of issues in the Order of 26 February 2019 at item (4)). I say nothing more about the scope and extent of that allowance which, given the division of issues in the case, I was not addressed on. It seems to me that the sort of allowance I have in mind does not fall foul of the limitation identified by Lord Goff in Guinness v. Saunders: it does not have the effect of relaxing the scope of the duties owed by a fiduciary or of encouraging a breach of such duties to say that, in the case of a breach, unauthorised benefits should be disgorged but subject to some allowance for the efforts made by the fiduciary in contributing to the development or growth of those benefits.*

53. In paragraph 406 he described his having expressed his conclusion on the equitable allowance question “somewhat tentatively”.

54. Finally he dealt with the position of Mr Ford in paragraphs 407 to 413 of the judgment. He describes how, on the first day of the trial, he had rejected Mr Ford’s application to file a Defence and “intervene in the action”.

55. In paragraph 413 he held that, in the circumstances, Mr Davies was entitled to enter default judgment against Mr Ford.

### **THE PROCEDURAL POSITION OF MR FORD**

56. As with the liability trial in front of the Judge, Mr Ford did not file a Defence in relation to the Quantum Trial and failed to comply with any of the directions.

57. The day before the hearing commenced, he sent an email dated 13<sup>th</sup> April 2021 to the court and attended on the first day. Despite objections from both Mr Davies and Mr Monks and GBRK, I permitted Mr Ford to take part in the trial in a limited way by cross-examining the witnesses and making submissions. This he did in a succinct, restrained and respectful way.

58. In arriving at my judgment on the various issues, I have taken on board the points he has made.

### **THE MAIN PROTAGONISTS: MR DAVIES AND MR MONKS**

59. It is true to say that the Judge was unimpressed with the evidence of both Mr Davies and Mr Monks.

60. In paragraph 13 of the judgment the Judge stated that he did not find Mr Davies to be “an impressive or entirely reliable witness”. He described Mr Davies’ evidence variously as: “unnecessarily obtuse” (paragraph 77); “sketchy and unconvincing” (paragraph 78); “contrived and untruthful” (paragraph 140).

61. At paragraph 15 he concluded that:

*I feel I must treat Mr Davies' evidence with caution, and test it carefully against the (somewhat limited) documentary record, but I do not discount it entirely.*

62. Having heard Mr Davies give evidence myself, I share the Judge’s views as to his (lack of) reliability as a witness. Four examples will suffice:

- (i) In paragraph 15 of his witness statement, he stated that:

*The Traffic Commissioners had expressed no concerns to me about my involvement in any business operating the "O" Licence*

In cross-examination, when faced with the documents, he was forced to concede that this statement was untrue.

- (ii) He accepted in cross-examination that the evidence which he had given to the Judge as to the date when he left England for Saudi Arabia was incorrect: he had told the Judge that he left the country on 5<sup>th</sup> January 2011; he told me that it was on 5<sup>th</sup> or 6<sup>th</sup> February 2011.
- (iii) In relation to whether or not he could personally have put funds into GBR in 2011, he was shown his witness statement put before the Judge in the liability trial in which he had stated that:

*I did not have substantial funds from 2011 onwards*

He was then shown a bank statement from an account in his name at Citibank which showed, as at May 2011, a credit balance of between US\$9428.31 and US\$18,304.70. He then, for the first time, stated that he had another account, the statements for which he had not been able to obtain, and that he had, in his various accounts, in total somewhere in the order of £70,000 or £80,000. This, to my mind, was false evidence and was directly contrary to that which he gave to the Judge.

- (iv) Most tellingly, he was cross-examined on 14<sup>th</sup> April 2021 about the statements, made in paragraphs 24 and 25 of his witness statement, that he was not contacted by either of the finance companies prior, and in relation, to the termination in early January 2011 of the leases of the various items of equipment hired to SIK. He had stated:

*I was not contacted by either of the finance companies...My telephone number had not changed.  
I saw no letters from either of the finance companies regarding the arrears.*

In cross-examination he was shown a letter from a Mr Rodhouse at one of the finance companies, Finance and Leasing, dated 6<sup>th</sup> January 2011 which was addressed to him at his former matrimonial home in Esher and copied to him at his mother's address in Suffolk. He stated that he had not seen either of these letters despite the fact that they had been sent to the two addresses at which he was living at the time. The letter stated that Mr Rodhouse had been trying to call him. When asked about that he initially (on 14<sup>th</sup> April 2021) said that he had changed his mobile number in October or November 2010 and that the original number had been "left with" Mr Ford and Mr Monks. The next day he was taken to a text message sent by Mr Rodhouse on 7<sup>th</sup> January 2011 and aimed at him which again asserted that Mr Rodhouse had been trying to call him since before Christmas. He accepted that the "old" mobile number which he asserted he had changed was not shown as a business number on the website of Green Box and when asked about his assertion in the statement that "my telephone number had not changed" he alleged that this was reference to the new number acquired in October or November 2010. This statement is incredible enough. However he was then shown an email which he had sent to Mr Monks on 10<sup>th</sup> January 2010 in which he had stated:

*No messages have been left on the old number & I have not had any emails.*

When asked what, in the light of his previous evidence (described above), the “old number” he was referring to in that email was, he could give no satisfactory answer. I am quite certain that this evidence is totally fictitious and told in an attempt to maintain the wholly false account (given in his statement) to the effect that he had had no notice that the hire or lease agreements were about to be terminated. I think that Mr Davies: had received the letter dated 6<sup>th</sup> January 2011 at one of the addresses to which it was sent; had not changed his mobile number as he stated in cross-examination; had thus received and ignored the calls and texts from Mr Rodhouse.

63. Thus I feel constrained to treat the evidence given by Mr Davies with caution. I am reluctant to accept anything he says unless it is independently corroborated.

64. If anything, the Judge was even more critical of the evidence given by Mr Monks.

65. Although he described Mr Monks as “an ambitious and clever man with a strong entrepreneurial instinct” (paragraph 17 of the judgment), he concluded that:

*rather like Mr Davies, I found Mr Monks to be obtuse and evasive in giving his evidence.*

66. The Judge described parts of Mr Monks evidence as: “deliberately obtuse” (paragraph 116); given with a “lack of care” (paragraph 117); “not careful” and “cavalier” (paragraph 121); “less than compelling” (paragraph 157); “disingenuous” (paragraph 158); “surprising and evasive” (paragraph 164); “very confused” (paragraph 179); “difficult to follow” (paragraph 180); “evasive” (paragraph 192); “untruthful” (paragraph 193); “sketchy in the extreme” (paragraph 343); “implausible” (paragraph 344). In paragraph 121 the Judge describes Mr Monks as:

*someone who seems unwilling to accept the obvious, and willing to change his story when he believes it suits his purposes to do so.*

67. His conclusion, (at paragraph 19 of the judgment) is this:

*I have determined that I must treat Mr Monks' evidence generally with a high degree of caution, and on a number of points I specifically reject the evidence he gave.*

68. There are also in my view two other findings made by the Judge which are relevant when considering Mr Monks' evidence given to me.

69. The first matter to note is the Judge's conclusion, at paragraphs 226 to 228, as to Mr Monks' motivation and attitude. The Judge described (at paragraph 227):

*Mr Monks feeling a sense of entitlement, in light of the difficulties encountered at the Ashford Site, to act in a manner which suited his own purposes.*

In the next paragraph he describes:

*the same sense of entitlement and a willingness to cut corners if it suited his own purposes to do so:*

It was also clear, from the evidence that he gave to me, that Mr Monks feels very bitter about what he sees as Mr Davies seeking to profit from his (Mr Monks') hard work. He gave evidence of wanting to "put two fingers up to him".

70. The second matter is even more important. It is the Judge's specific finding (in paragraph 349 set out above) as to Mr Monks dishonesty in setting up GBRK. The Judge found that "Mr Monks' subjective intention was a dishonest one".

71. Having heard Mr Monks give evidence, my view of him as a witness is (again) the same as the Judge.

72. There were numerous instances in which his evidence to me was untruthful, vague, contrary to other evidence which I heard and/or less than convincing:

(i) In paragraph 25 of his statement dated 18<sup>th</sup> December 2020 he stated:

*I did not even realise that GBR did not hold a WML until after I became a director.*

Yet this evidence had been specifically rejected by the Judge at paragraphs 115 and 116 of the judgment.

- (ii) In cross-examination, he had to accept that evidence which he had given to the Judge, to the effect that he had not taken any remuneration from GBRK in the months leading up to the liability trial, was false in that he had received £6000 in November 2019.
- (iii) He was, to my mind, deliberately obtuse about whether his annual net benefits package from GBRK, in the sum of £200,000, would gross up to in excess of £300,000 before tax.
- (iv) His account of GBRK's purchase of a Bentley coupe motor vehicle as being for the company's business (to transport clients to and from sporting events) and not for his own personal use, to my mind, lacked credibility.
- (v) His attempt to explain why payments of £22,000 from a scrap metal dealer, H Ripley & Co, were made into his personal bank account and not into GBRK's account, despite the fact that the invoices had come from the company, was wholly unconvincing.
- (vi) He was shown an entry from Appendix 12 to the Report of his own Expert, Mr Hayward-Crouch, which showed that he had on, 30<sup>th</sup> June 2012, received £126,000 as "Scrap metal cash sales for 6 months to 30.06.12". He denied that he had received this sum but was wholly unable to explain the entry.
- (vii) He was asked about payments made from the GBRK bank account into his personal account marked as "Repay MS" "Myles" and "Myles Payment". His account of this was that these were director's fees paid to



Mr Simmons by him in cash which were reimbursed to him by GBRK. However, Mr Simmons, when he gave evidence, made no mention of payments to him of director's fees, speaking only of receiving dividend payments.

(viii) He was asked about an email dated 16<sup>th</sup> June 2016 sent by GBRKs accountant, David Smith of Nash Harvey, to a Mr Thomas at Biffa which contemplated the sale of GBRK's business to Biffa. When Mr Monks was asked about the prospective sale price he refused to give a figure and effectively said that he left everything to Mr Smith. Mr Smith gave evidence and was asked about this email and the various proposals over the years to sell GBRK's business. He was asked whether Mr Monks would have taken his advice as to the sale price. He said effectively: no. He said that Mr Monks knew what he wanted and knew "what figure would be correct for him". In my view this was an attempt by Mr Monks to avoid giving any evidence as to the overall value of GBRK's business. He even avoided giving an answer when I asked him directly whether he could give any indication as to what price he might have been thinking of on any occasion he contemplated selling the business.

(ix) Mr Monks gave evidence that GBRK started trading on 1<sup>st</sup> April 2011. This was despite the fact that it was formed on 7<sup>th</sup> January 2011 and, at some stage, took a lease of the Ashford Site the commencement date of which was 1<sup>st</sup> December 2010. Having given this evidence, he was asked about a letter dated 13<sup>th</sup> September 2017 from Mr Rodhouse of Finance & Leasing (see above) in which he stated that the 7 finance agreements

with SIK had been novated to GBRK on 14<sup>th</sup> January 2011. Mr Monks had no coherent answer as to how GBRK could have made payments under these agreements when, if his previous evidence was correct, that company had not started trading until 1<sup>st</sup> April 2011. In my view, his evidence as to the date when GBRK started trading was a palpable lie.

- (x) He gave evidence that, on the death of a GBRK shareholder, John Bennett, he had met his widow in 2019 or 2020 and purchased the late Mr Bennett's shares in GBRK at a meeting during which he handed over a personal cheque in what he thought was the sum of £125,000. However, the next day he corrected this figure saying that the cheque was in the sum of £75,000. He was then shown bank statements which showed a payment by GBRK into his personal account in the sum of £129,000 and a payment out by cheque from him to Mrs Bennett in the sum of £85,500. He was also shown GBRK's accounts which showed a loan of £125,000 to BVL to purchase Mr Bennett's shares. When I asked him about what had happened to the difference between the sum of £85,500 paid to Mrs Bennett and the £129,000 paid to him or the £125,000 shown in the accounts as paid for the shares, he eventually accepted that he had taken it himself because Mr Bennett had owed him money. I found this explanation wholly unconvincing. It was an attempt to disguise his extraction of money from GBRK.
- (xi) Mr Monks was asked about the purchase by Greenbox Resources Limited ("GRL"), of the Cranbrook Property in 2015. His case, as set out in his witness statement, was that GRL was incorporated to purchase and develop the property and it took out a loan facility from Funding

Circle in the sum of £490,000 to do so. The Funding Circle Loan Document confirms his evidence that the sum advanced for the purchase of the property was £190,000. However it is clear from both the contract of sale and the Land Registry Office Copy Entries that the price paid was £375,000. It was suggested to Mr Monks that payments shown in GBRK's accounting records as being made to GRL in the sum of £124,000 were intended to fund the difference between the £375,000 price and the £190,000 loan. He denied it. However, he then said that he could not remember how the £185,000-odd shortfall was funded. I find that incredible. For example, when asked by Mr Ford whether he could remember a row with him at the Site in 2011, Mr Monks said he could remember it. However he is, apparently, unable to remember the source of the £185,000 obtained by his company, GRL, in 2015 to complete the purchase of the Cranbrook Property. When asked about frequent and regular payments of £250 made by GBRK to GRL in 2016, he denied that these were to fund the development of the Cranbrook property but could give no explanation otherwise as to what they were for. He simply said: "I can't remember". Again I find that very hard to believe. Indeed I do not believe it.

- (xii) He persisted in his denials that: he knew that GAL had a mortgage on the Site; he knew anything about the attempt in March 2011 to market the Site for sale (as evidenced by the letter dated 17<sup>th</sup> March 2011 from GVA addressed to the directors of GAL); he was aware of the lease entered into by GBRK of the Site for 7 years commencing on 1<sup>st</sup>

December 2010 (referred to in that letter). I am afraid that I do not accept his evidence in relation to these issues.

73. My impression of Mr Monks is that, for all his energy, drive and entrepreneurial flair, he is someone who is quite prepared to tell direct lies or to give vague answers to questions when he wants to obscure the truth. I am therefore not prepared to accept his evidence unless it is otherwise corroborated.

74. I will now turn to address the various issues identified by the parties.

### **THE ISSUES:**

#### **ISSUE 1: THE CLAIMS AGAINST MR MONKS**

##### **Issues 1 (a) and (b): the construction of the judgment**

75. There is an issue between the parties as to the meaning of paragraph 272 of the judgment.

76. In his Closing Submissions, Mr Shaw for Mr Davies identifies the issue as follows, namely: whether Mr Davies' right to relief against Mr Monks and GBRK is limited to the seven matters listed in paragraph 272. Mr Cook for Mr Monks and GBRK (hereafter collectively "the Defendants") submitted that the Judge deliberately confined his findings of breach of duty by Mr Monks to the specific matters set out in that paragraph.

77. Mr Davies' case here is that the Judge held that Mr Monks had participated in a dishonest scheme to divert a business opportunity from GBR to GBRK and thus Mr Davies is entitled to seek relief in respect of **all** steps taken by Mr Monks in furtherance of that scheme. Mr Shaw pointed out that the Defendants' case is based on an unduly narrow reading to the judgment. He asserts that the words "they include the following" in paragraph 272 qualify the words immediately preceding it, that is: "what Mr Monks did". He relies on the passages in paragraphs 338 and 368 set out above as support for

his primary submission as to the dishonest scheme. He submits that the Judge was only tasked with considering what he calls “liability issues” and was not asked to identify all the business opportunities diverted to GBRK. He relies on paragraph 395 of the judgment to make good that point. He submits that, if the Defendants are correct, then it would mean that the Judge held that everything else done by Mr Monks to build up the business of GBRK was done honestly and that cannot be right. He also relies on the Judge’s refusal, at the consequential directions hearing on 24<sup>th</sup> March 2020, to take up the Defendants’ counsel’s suggestion that the order for equitable compensation should expressly refer to the breaches listed in paragraph 272. The Judge apparently considered that no modification to the wording was required. He said, at one stage:

*The order obviously has to be really [probably “read”] in the light of the judgment*

78. However, I agree with Mr Cook. I think that, when read in the context of the judgment as a whole, it is quite clear that the Judge was limiting his findings as to Mr Monks breaches of duty to the matters specifically listed in paragraph 272. In my view the judgment cannot be read any other way:

- (i) As I have already intimated, I think that the word “they” in the phrase “they include the following” more naturally refers back to the words “a number of points are clear” and not to the words “in terms of what Mr Monks did”. This, to my mind, is made even clearer by the Judge’s emphasis in paragraph 271 that the proper approach to assessing whether Mr Monks was in breach of duty was the need for the court to ask “whether his actions were wrongful” (original emphasis). Having set that out, he then lists the actions which he found to be wrongful in the next paragraph.

- (ii) I think that the terms of paragraphs 273, 274, 275, 303, 322, 325 326, 338 and 395 which I have quoted above and, in particular, the words which I have highlighted, confirm that the Judge was limiting his ruling as to Mr Monks' breaches to those matters specifically identified in paragraph 272.
- (iii) I also think that the terms of paragraph 395, and the rejection of the argument that Mr Monks and Mr Ford were "subject to continuing duties even today" (whilst addressing a point as to the meaning and effect of section 1032(1) CA 2006) are not consistent with any ruling that everything done by Mr Monks and Mr Ford at the Site between 7<sup>th</sup> January 2011, when GBRK was incorporated, and 18<sup>th</sup> October 2011, when GBR was dissolved, constituted an actionable breach of duty.

**Issue 1(c): Having regard to the issues determined at the trial on liability, is it open to Mr Monks to argue at the quantum trial that GBR would not have built a waste management business at the Ashford Site (the "Counterfactual Defence") or is that barred by res judicata and/or abuse of process (as asserted by Mr Davies)?**

79. Mr Shaw for Mr Davies relies on two separate principles to assert that the Defendants cannot now argue the Counterfactual Defence. The first is the principle of issue estoppel; the second is that enunciated in HENDERSON V HENDERSON (1843) 3 Hare 100.

80. There was little or no dispute between the parties as to the legal principles.

81. The principle of issue estoppel properly so-called was explained by Lord Keith in ARNOLD V NATIONAL WESTMINSTER BANK PLC [1991] 2 AC 93 (at 105) when he said this:

*Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue... It was adopted by Diplock L.J. in Thoday v. Thoday [1964] P. 181. Having described cause of action estoppel as one form of estoppel per rem judicatam, he said, at p. 198:*

*...There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.'*

82. In CARL ZEISS STIFTUNG V RAYNER AND KEELER LIMITED (NO 2) [1967] 1

AC 853, Lord Wilberforce suggested that one way of answering the inquiry of what is

"involved" in a decision is:

*that any determination is involved in a decision if it is a 'necessary step' to the decision or a 'matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision...*

83. So far as Henderson v Henderson abuse of process is concerned, in JOHNSON V

GORE WOOD [2002] AC 1 (at 31) Lord Bingham summarised the principle as follows:

*The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.*

84. More recently, in MANSING MOORJANI V DURBAN ESTATES LIMITED [2019]

EWHC 1229 (TCC) Pepperall J said this:

- a) The onus is upon the applicant to establish abuse.*
- b) The mere fact that the claimant could with reasonable diligence have taken the new point in the first action does not necessarily mean that the second action is abusive.*

- c) *The court is required to undertake a broad, merits-based assessment taking account of the public and private interests involved and all of the facts of the case.*
- d) *The court's focus must be on whether, in all the circumstances, the claimant is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.*
- e) *The court will rarely find abuse unless the second action involves "unjust harassment" of the defendant."*

85. Both parties accepted that it was technically possible for both principles to apply to different stages within the same action such as separate hearings on liability and quantum. However, Mr Cook for the Defendants directed my attention to the comments of Andrew Baker J in GRUBER V AIG MANAGEMENT [2019] EWHC 1676 (Comm) 1676 in which he said (at paragraph 11), in relation to Henderson v Henderson abuse:

*The doctrine is not restricted to cases where the alleged abuse comes in a separate, later action. It is possible to conclude that a claim or defence not initially raised ought properly, if it was to be raised at all, to have formed part of an earlier stage within a single action at which at least some matters were finally determined.*

*It is a strong thing to shut out pursuit of a point not actually decided previously against the party raising it; and it may be an even stronger thing to do so in relation only to different stages within a single action. I would though add, as to the latter, that much may depend on the nature of the stages involved. Here, the parties had their final trial of all issues, not merely, for example, a decision on preliminary issues or a summary judgment decision on some particular claim or defence or a final determination of an individual point as part of dealing with some other interlocutory application. If the doctrine be available, as indeed it is, in the context of a single set of proceedings, the potential for it to apply on the facts where those are the circumstances plainly may arise more readily than during the interlocutory life of the process.*

86. Mr Shaw urges me to hold that the Defendants are prevented from raising the Counterfactual Defence by reason of one or both of these two principles. He submits as follows:

- a. It was a “key plank” in the Defendants’ defence on liability to assert that it was impossible for GBR to trade or take advantage of the business carried on by GBRK, having regard to its alleged financial and regulatory problems (their “impossibility” case). It was, therefore, alleged that Mr Monks and Mr Ford



took a decision in around Christmas 2010 that GBR could not trade. This was pleaded by Mr Monks and GBRK as a complete defence to the claim.

- b. The Defendants' skeleton argument for the Liability Trial invited the Judge to determine all of the issues which were central to the "impossibility" defence.
- c. The Defendants adduced a significant amount of evidence in support of their "impossibility" case at the Liability Trial. This addressed GBR's alleged financial position and the reasons why it would allegedly have been impossible for GBR to carry on the business which was ultimately carried on by GBRK.
- d. There was extensive cross-examination on the "impossibility defence", including of Mr Monks on matters which included: the alleged impossibility of GBR (or a newly formed subsidiary of GBR) obtaining relevant licences; the clearance of the Ashford Site (including the financing); GBR's creditors; the financing of the purchase of the lease from Benchmark; the timing and amount of any loans made by Mr Monks to GBRK; the factoring agreement and customers of GBR; the application for an "O" Licence; and the financing of GBR's business.
- e. At no stage prior to or during the Liability Trial did the Defendants indicate that they reserved a right to re-argue or adduce further evidence on these issues at the Quantum Trial. Nor did they suggest that the same matters might form the basis of an alternative defence that GBR has suffered no loss (and therefore ask the Judge to clarify his findings in the Judgment to the extent that they might be relevant to this).
- f. The pleadings filed ahead of the Liability Trial were, and were intended to be, the parties' entire cases pleaded out in full and raising all defences which they wished the court to try. The direction for pleadings in the Quantum Trial was

intended to clarify the issues to be determined at the Quantum Trial after Mr Davies had made an election as to the form of compensation. It was certainly not intended to give the Defendants a “second bite of the cherry” to reframe their defence or introduce points that could and should have been pleaded at an earlier stage and determined at the Liability Trial.

- g. The Liability Trial was a full trial of nearly 6 days which focused to a large degree on the “impossibility” defence. Evidence and argument were addressed specifically to the question of GBR’s financial position. It is not open, Mr Shaw submits, to the Defendants now to seek to improve upon a case that was rejected, including by filing evidence that replicates or seeks to bolster evidence which was insufficient to prove their case at the Liability Trial.

87. I reject these arguments.

88. I have set out above extracts for paragraphs 247, 261 and 264-266 of the judgment. As I have summarised, the Judge was considering, and rejecting, Mr Monks’ case that, because GBR was insolvent in late 2010 and early 2011, it could not lawfully have traded; thus, Mr Monks had submitted, the incorporation and subsequent operation of GBRK was not a breach of his fiduciary duties to GBR. Mr Monks had sought to rely on authorities (referred to in paragraphs 280 to 301 of the judgment) to the effect that a director’s duty to avoid conflict of interest is not infringed in circumstances in which a company is insolvent and not able lawfully to trade. The Judge rejected Mr Monks’ legal submissions. On the facts, he concluded that, because the evidence that GBR was, in late 2010, insolvent was “too sketchy”, Mr Monks had not satisfied him that GBR was then insolvent or “of doubtful solvency”. Thus, that particular defence to Mr Davies’ claim for breach of fiduciary duty failed. That is all the Judge found. That was

all he was required to find in the liability trial. He was, in my judgment only addressing this, relatively narrow, point.

89. The Counterfactual Defence is quite different and much wider in scope. It is set out in detail in paragraphs 9 to 19 of the Re-Amended Points of Defence. The argument is that, assuming Mr Monks and Mr Ford had **not** been in breach of fiduciary duty as found by the Judge, nevertheless GBR would not have built a waste management business at the Site. It is, as I see it, no part, or no necessary part, of that defence to assert that GBR was insolvent at a point of time in late 2010. I am being asked to determine: (i) whether GBR would have been able to continue trading had it continued to operate a waste management business at the Site from late 2010 onwards; and (ii) if so, at what level of profitability. As Mr Cook points out, the Judge was not asked to determine whether, and to what extent, GBR would have been able to continue to trade past the date of incorporation of GBRK on 7<sup>th</sup> January 2011.
90. Thus, a finding that GBR was insolvent in late 2010 is not a necessary step in establishing the Counterfactual Defence. Nor can it be said that establishing that GBR could not have continued to trade profitably, or at all, after 7<sup>th</sup> January 2011 was a necessary step in establishing whether GBR was insolvent as at late 2010. Whilst, no doubt, some of the same evidence may have been deployed in both hearings in relation to each issue, that does not necessarily, or at all, mean that the principle of res judicata is engaged.
91. Further there is, in my judgment, nothing abusive in the Defendants now raising, in the quantum trial, the Counterfactual Defence. Following the Judge's findings on liability, they are seeking to address the claim for equitable compensation. Standing back, I ask myself whether, in all the circumstances, the Defendants are misusing or abusing the

process of the court by seeking to raise the Counterfactual Defence in circumstances in which it could and should have been raised before? The answer is: no.

**Issue 1(d): If the answer to 1(c) is that it is open to Mr Monks to rely on the Counterfactual Defence, is the issue of whether GBR would have built a waste management business relevant to the quantification of the equitable compensation payable by Mr Monks in respect of the seven matters listed in paragraph 272 of the Liability Judgment (as asserted by Mr Monks) or is that issue irrelevant to the compensation payable in respect of those matters (as asserted by Mr Davies)?**

92. This issue involves an examination of the nature of equitable compensation in these circumstances. As the Judge noted, (at paragraph 258 of the judgment), the question of whether or not his principal could have made a profit is irrelevant on the question of liability for breach of a fiduciary's duty not to make a profit from his position of trust. The question is whether the position is different when it comes to the assessment of equitable compensation for that breach.

93. Mr Shaw for the Claimant submits that:

- a. Equitable compensation is not restricted to reparation for losses but

*“is apt to include a payment made to restore to a claimant the value of assets or funds removed without authority by a trustee or other fiduciary, such as a director”.*

He cites from INTERACTIVE TECHNOLOGY CORPORATION LTD V FERSTER [2018] EWCA Civ 1594 at paragraph 16 and Snell's Equity (34<sup>th</sup> ed.) at paragraph 20-028.

- b. Equitable compensation to recover company funds or property which has been misapplied by the fiduciary is akin to a claim for debt where rules of remoteness of damage do not apply: Snell's Equity at paragraph 7-058 and McGregor on

Damages (21<sup>st</sup> ed.) at paragraphs 1-020 to 1-021. It is only in the context of compensation for loss that it is relevant whether the loss has actually been caused by the breach of fiduciary duty (and therefore the court must determine what would have happened but for the breach of fiduciary duty).

- c. In contrast, “substitutive compensation” does not depend on the loss suffered by the principal, but requires defaults in the disposition of trust property to be “falsified” and the trustee to ensure that the trust assets that were formerly there be reconstituted. In those circumstances, there is no room for the trustee to argue that, had there been no breach, loss would have occurred anyway. Instead, the award is measured by the objective value of the property lost, determined at the date when the account is taken and with the full benefit of hindsight. He relies on INTERACTIVE TECHNOLOGY CORPORATION LTD V FERSTER (at paragraphs 17 to 20).
- d. There is nothing in the authorities to suggest that account should be taken of hypothetical scenarios or hypothetical intervening events. He relies on AUDEN MCKENZIE (PHARMA DIVISION) LTD V PATEL [2020] BCC 316 (per David Richards LJ at paragraphs 30 to 58).
- e. Thus the equitable compensation payable by Mr Monks and Mr Ford in respect of their breaches of duty to GBR (including (i) wrongfully incorporating GBRK; (ii) transferring the WML to GBRK; (iii) acquiring the lease of the Ashford Site; (iv) acquiring plant and vehicles by GBRK; and (v) acquiring the “O” Licence for GBRK) is **not** based on the loss suffered by GBR. Instead, their liability as dishonest fiduciaries is to reconstitute the “trust” (i.e. GBR’s assets) by restoring the value of property that should have been acquired for GBR or which should not have been paid away without authorisation. In those

circumstances, there is simply no room for the concept of loss and causation to operate.

94. Mr Cook on behalf of the Defendants disagrees. He submits that equitable compensation seeks to provide a monetary remedy to place GBR in the position it would have been had Mr Monks performed his duty. This involves an enquiry as to what the performance by Mr Monks of his duty would have entailed. It is not, he submits, a remedy to “*top up*” (Mr Shaw’s words in opening) the account of profits sought against GBRK. This is not the role, he says, of equitable compensation which is concerned with **compensation**, rather than disgorgement of profits or benefits (as an account of profits is).

95. In Snell’s Equity, at paragraph 7-058, the following appears:

*A principal can also claim equitable compensation for loss caused by a breach of fiduciary duty, whether it occurs by reason of a conflict between duty and interest, or a conflict between duty and duty...*

*It has been argued that equitable compensation is not a remedy for breach of fiduciary duty on the basis that:*

*“the primary remedy of a beneficiary is to have the account taken [and] if a trustee or fiduciary has committed a breach of trust or fiduciary duty, Equity makes him account as if he had not done so.”*

*This argument is coherent where there is a fund of which an account can sensibly be taken, such as where the fiduciary is a trustee, but fiduciaries are not necessarily stewards of property from whom an account can sensibly be taken. Where there is no fund of which an account can be taken, it is sensible for equity to make available compensatory relief to ensure that any loss caused by a breach of fiduciary duty is not left unremedied. It will not necessarily suffice here to leave the compensatory task to non-fiduciary duties, as a breach of fiduciary duty can be committed (and potentially cause loss) notwithstanding that there has been no breach of non-fiduciary duty.*

*Where the fiduciary does occupy a steward-like role, such as where the fiduciary is a trustee or a company director, an award of equitable compensation can be made against the fiduciary to recover funds or property which has been misapplied by the fiduciary. This claim is more in the nature of a claim to restore the property than a claim for equitable compensation for loss.*

In the following paragraph (which was approved by Vos J in the case of BANK OF IRELAND V JAFFREY [2012] EWHC 1377 (Ch) at paragraph 290), and under the heading of “Causation”, the learned editors say this:

*Equitable compensation for loss is only available in respect of loss which is shown to have been caused by the breach of fiduciary duty, which requires the court to determine what would have happened but for the breach of fiduciary duty. This can involve consideration of how the principal would have acted if the fiduciary had not acted in breach of fiduciary duty. Compensation cannot, therefore, be recovered where it is clear that the principal would have acted in the same way even if the fiduciary had disclosed all the material facts...*

*The burden of proving that the breach of fiduciary duty caused the loss for which equitable compensation is claimed rests with the principal. The principal (or beneficiary) bears the primary onus of showing that "but for the breach, the beneficiary would not have acted in the way which has caused his loss". If that onus is met, the court may draw inferences (but cannot merely speculate) as to what would have happened if the fiduciary had performed his duty properly, and in the absence of evidence to justify such inferences the beneficiary is entitled to be placed in the position he was in before the breach occurred, unless the fiduciary (on whom the onus will lie) is able to show what the principal (or beneficiary) would have done if there had been no breach of fiduciary duty*

These passages from the leading textbook would tend to indicate that Mr Cook is correct and that, generally, in order to claim equitable compensation for breach of duty by a fiduciary, the principal has to show that the breach of duty has actually caused loss. Generally, the fiduciary is entitled to show that no loss would have been caused even if the fiduciary had not been in breach. However, there may be a different rule in situations in which the breach of fiduciary duty involves the misapplication of existing funds or property held on trust.

96. In the Australian case of WARMAN V DWYER (at 559) the High Court of Australia (albeit in a case involving the taking of an account) said this:

*It is necessary to keep steadily in mind the cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts.*

97. In the case of GWEMBE VALLEY V KOSHY [2004] 1 BCLC 131 the defendant was the managing director of a joint-venture company in Zambia (Gwembe). He arranged finance for the company in US dollars through another company which he controlled and was able in the process to make a very large undisclosed profit on currency transactions for his own benefit. The joint-venture company subsequently sued the

defendant and sought a declaration that the defendant was liable as constructive trustee of the money he had received. Mummery LJ said this (at paragraphs 144 and 147):

*It is, however, necessary to consider the question concerning the place of causation in claims for relief for breach of the fiduciary-dealing rules. We agree that causation has no part to play in determining whether there has been non-compliance by the director with the fiduciary-dealing rules. Non-disclosure is non-compliance. If there has been non-compliance, the company is entitled to seek rescission of the transaction and an account of profits made by the director. In order to establish breach of the rules the company does not have to prove that it would not have entered into the transaction, if there had been compliance by the director with the fiduciary-dealing rules and he had made disclosure of his interest in the transaction... However, when determining whether any compensation, and, if so, how much compensation, should be paid for loss claimed to have been caused by actionable non-disclosure, the court is not precluded by authority or by principle from considering what would have happened if the material facts had been disclosed. If the commission of the wrong has not caused loss to the company, why should the company be entitled to elect to recover compensation, as distinct from rescinding the transaction and stripping the director of the unauthorised profits made by him? There is no sufficient causal link between the non-disclosure of an interest by [the director] and the loss suffered by [Gwembe], if it is probable that, even if he had made the required disclosure of his interest in the transaction, [Gwembe] would nevertheless have entered into it. In our judgment, a director is not legally responsible for loss, which the company would probably have suffered, even if the director had complied with the fiduciary-dealing rules on disclosure of interests.*

Again, these passages would tend to support Mr Cook's submissions.

98. The case of MURAD V AL-SARAJ [2005] EWCA Civ 959 involved an order for an account of profits against a dishonest fiduciary. However, in his judgment (at paragraph 110) Jonathan Parker LJ said this:

*By contrast, however, in addressing a claim for equitable compensation for breach of trust the court may have regard to what would have happened but for the breach (see the passage from the judgment of Millett LJ in Bristol & West Building Society v. Mothew [1998] Ch 1 at 17H quoted by Arden LJ in paragraph 54 above, the passage from the speech of Lord Browne-Wilkinson in Target Holdings Ltd v. Redfern [1996] 1 AC 421 at 436 which she quotes in paragraph 72 above, and Gwembe at para 147 per Mummery LJ).*

99. The next case to which I must refer is AIB V REDLER [2015] AC 1503. That was a case in which a firm of solicitors was engaged by a mortgagee who was lending £3.3



million to borrowers who were, in turn, buying a property then valued at £4.6 million. By mistake, the solicitors failed to redeem one of two prior charges in the sum of £309,000 which charge remained on the title with the extra sum, which should have been used to redeem that charge, being paid out to the borrowers. The borrowers defaulted and the property was sold by the prior mortgagee for £1.2 million of which the mortgagee was paid £867,697. The mortgagee sued the solicitors alleging that they had acted in breach of trust and fiduciary duty as well as in breach of contract and negligently. The judge held that the solicitors had been in breach of trust to the extent that they had released to the borrowers the amount of their outstanding indebtedness to the prior charge and he awarded £273,777 by way of equitable compensation to the mortgagee. The Court of Appeal allowed the appeal to the extent of holding that the solicitors were in breach of trust by paying away all of the funds advanced by the mortgagee as they only had authority to pay any of the funds if they obtained discharge of all of the prior charges and registered the mortgagee's charge as a first charge. However the Court of Appeal upheld the judge's award. The Supreme Court dismissed the mortgagee's appeal.

100. In the REDLER case, the Supreme Court had to consider the meaning and effect of the speech of Lord Browne-Wilkinson in the earlier case of TARGET HOLDINGS V REDFERN [1996] AC 421. Lord Toulson said this:

*36. Lord Browne-Wilkinson cited, at pp 438–439, the (dissenting) judgment of McLachlin J in Canson Enterprises Ltd v Boughton & Co (1991) 85 DLR (4th) 129 and, in particular, the following passage, at p 163:*

*“In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach, i.e. the plaintiff's loss of opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach.” (Emphasis added.)*

*Lord Browne-Wilkinson added [1996] AC 421, 439:*

*“In my view this is good law. Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach.”*

*On that approach Lord Browne-Wilkinson held that Target was not entitled to the summary judgment which the Court of Appeal had ordered.*

He later added:

*66. I would reiterate Lord Browne-Wilkinson's statement, echoing McLachlin J's judgment in Canson 85 DLR (4th) 129, about the object of an equitable monetary remedy for breach of trust, whether it be sub-classified as substitutive or reparative. As the beneficiary is entitled to have the trust properly administered, so he is entitled to have made good any loss suffered by reason of a breach of the duty.*

In his judgment, Lord Reed said this:

*133. Notwithstanding some differences, there appears to be a broad measure of consensus across a number of common law jurisdictions that the correct general approach to the assessment of equitable compensation for breach of trust is that described by McLachlin J in Canson Enterprises and endorsed by Lord Browne-Wilkinson in Target Holdings..*

*134. Following that approach, which I have discussed more fully at paras 90–94, the model of equitable compensation, **where trust property has been misapplied**, is to require the trustee to restore the trust fund to the position it would have been in if the trustee had performed his obligation. If the trust has come to an end, the trustee can be ordered to compensate the beneficiary directly. In that situation the compensation is assessed on the same basis, since it is equivalent in substance to a distribution of the trust fund. If the trust fund has been diminished as a result of some other breach of trust, the same approach ordinarily applies, mutatis mutandis.*

*135. The measure of compensation should therefore normally be assessed at the date of trial, with the benefit of hindsight. The foreseeability of loss is generally irrelevant, but the loss must be caused by the breach of trust, in the sense that it must flow directly from it...*

*(emphasis added)*

It seems to me that, insofar as the Supreme Court was, in that case, asserting that the measure of equitable compensation was substitutive rather than reparative (see immediately below) then the Court was referring to cases (such as that case and the TARGET HOLDINGS case) which involve misapplication of existing trust property.

In any event the Supreme Court emphasised that, whatever measure of equitable compensation was applied, there had to be a causative link between the loss for which compensation was claimed and the breach of trust or fiduciary duty.

101. Mr Shaw pointed me to the case of INTERACTIVE TECHNOLOGY CORPORATION V FERSTER [2018] EWCA Civ 1594. That case involved a director of a company who had dishonestly caused the company to pay substantial unauthorised remuneration to him of at least £4.48 million in excess of his salary. The judge had ordered that the defaulting director pay equitable compensation for the company's losses resulting from the payment by the company of the unauthorised remuneration. The question for the Court of Appeal was whether that was limited to the losses suffered by the company as a result of the director's actions. The company submitted, and the Court of Appeal agreed, that equitable compensation, both generally and specifically in the judge's order, was not confined to compensation for losses (so-called "reparation claims") but can include recovery of compensation for money or assets disbursed without authority (so-called "substitutive claims" or "substitutive performance claims").

102. In the course of his judgment, David Richards LJ said this:

*17. The position is stated in Underhill and Hayton: Law Relating to Trusts and Trustees (19th ed., 2016) at para 87.11:*

*"Equity recognises two types of compensation claim against trustees, which will be termed substitutive performance claims and reparation claims. Substitutive performance claims are claims for a money payment as a substitute for performance of the trustee's obligation to produce trust assets in specie when called upon to do so. Claims of this sort are apposite when trust property has been misapplied in an unauthorised transaction, and the amount claimed is the objective value of the property which the trustees should be able to produce. Reparation claims are claims for a money payment to make good the damage caused by a breach of trust, and the amount claimed is measured by reference to the actual loss sustained by the beneficiaries. Claims of this sort are often brought where trustees have carelessly mismanaged trust*

*property, but they lie more generally wherever a trustee has harmed his beneficiaries by committing a breach of duty."*

18. *In the same work, the means by which these two types of equitable compensation are given through an accounting process are explained at para 87.7:*

*"As discussed below, there are two types of compensatory claim which can lie against trustees: substitutive performance claims and reparation claims. These are mediated through proceedings for an account in different ways. In the case of a substitutive performance claim where the trustees have made an unauthorised distribution of trust property or used trust funds to purchase an authorised investment, the court will not permit the trustees to enter the distribution or expenditure into the accounts as an outgoing because it will not permit the trustees to say that they acted in breach of duty. Instead, they will be treated as though they have spent their own money and kept the trust assets intact. The accounts will be falsified to delete the unauthorised outgoing, and the trustees will be ordered to produce the relevant trust property in specie or pay a money substitute out of their own pockets. Reparation claims are brought into the scheme of the accounts in a different way. The loss claimed by the beneficiaries is translated into an accounting item by surcharging the trustees with the amount of the loss as if they had already received this amount for the beneficiaries. They must then pay this sum into the trust funds out of their own pockets."*

19. *These claims for equitable compensation were described with characteristic lucidity by Lord Millett NPJ in Libertarian Investments Ltd v Hall [2014] 1 HKC 368, a decision of the Court of Final Appeal of Hong Kong. At [168], he referred to substitutive compensation:*

*"Once the plaintiff has been provided with an account he can falsify and surcharge it. If the account discloses an unauthorised disbursement the plaintiff may falsify it, that is to say ask for the disbursement to be disallowed. This will produce a deficit which the defendant must make good, either in specie or in money. Where the defendant is ordered to make good the deficit by the payment of money, the award is sometimes described as the payment of equitable compensation; but it is not compensation for loss but restitutionary or restorative. The amount of the award is measured by the objective value of the property lost determined at the date when the account is taken and with the full benefit of hindsight."*

20. *At [170], Lord Millett addressed reparative compensation:*

*"If on the other hand the account is shown to be defective because it does not include property which the defendant in breach of his duty failed to obtain for the benefit of the trust, the plaintiff can surcharge the account by asking for it to be taken on the basis of 'wilful default', that is to say on the basis that the property should be treated as if the defendant had performed his duty and obtained it for the benefit of the trust. Since *ex hypothesi* the property has not been acquired, the defendant will be ordered to make good the deficiency by the payment of money, and in this case the payment of 'equitable compensation' is akin to the payment of damages as compensation for loss."*

*21. Insofar as the judge in the present case treated "equitable compensation" in the December order as necessarily referring to compensation for loss, as a result of the general meaning or ambit of that remedy, he was, in my judgment, wrong.*

He added, at paragraph 35:

*In paragraph [38] of the February judgment, the judge records that [counsel for the director] was content with the terms of paragraph 9 of the December order, subject to it being clear that he would be able to argue his points on causation, and that [counsel for the company] did not suggest otherwise, although he had of course said they were unsound. While the merits of any such points are not before us, I find it difficult to see that they could prevail as an answer to a claim, by way of equitable compensation, for payment of sums dishonestly taken as "remuneration" without authority. The facts bear no relation to those in cases such as Target Holdings Ltd v Redfems [1996] AC 421 and AIB Group (UK) plc v Mark Redler & Co [2014] UKSC 58, [2015] AC 1503.*

(emphasis added)

103. It is, in my view, important to note that the claim in that case was (as indicated by the emphasis added above) for misappropriation of existing trust property. As is made clear in the passages from Underhill and Hayton cited by David Richards LJ, substitutive equitable compensation is apposite in that type of claim “where trust property has been misapplied in an unauthorised transaction”. Reparation claims, on the other hand, are appropriate in cases in which the fiduciary or trustee has (per Lord Millett) “failed to obtain [property] for the benefit of the trust” and where “ex hypothesi the property has not been acquired”.

104. The final case to which my attention was drawn was AUDEN MCKENZIE V PATEL [2019] EWCA Civ 2291. In that case a director had caused a company to pay out over £13 million on sham invoices raised by companies which were controlled by him or his sister. When the company sued for equitable compensation, the director argued that, if the payments had not been made unlawfully, then they would have been made lawfully as the company’s shareholders at the time (the director and his sister)

could have caused the same amounts to be made lawfully. Thus, he argued, the company had suffered no loss. The Court of Appeal allowed an appeal by the director from an order granting summary judgment to the company.

105. In his judgment, David Richards LJ said this:

*31. Equitable compensation is the personal remedy (as opposed to a tracing or proprietary remedy) available against trustees, or others in a fiduciary position, whose acts or omissions amount to a breach of trust or fiduciary duty. Breaches of duty may take many forms, but in broad terms they are often with good reason analysed as falling within one of three main categories: first, transactions involving the unauthorised payment or disposal of or damage to trust assets, causing loss to the trust; second, breaches of duties of loyalty, involving the trustee in making profits at the expense of the trust or by the use of information or opportunities available to the trustee in that capacity; third, breaches of duties of skill and care, resulting in loss to the trust. In the case of breaches in the second category, an account of profits may be the appropriate remedy, and is the only remedy where the trust could not itself have made the profit.*

*32. The present case clearly falls within the first category. Using his fiduciary powers as a director, Mr Patel dishonestly caused the company to make the payments for the personal benefit of himself and his sister. On the face of it, the loss to the company was the amount of the payments, being the amount by which its cash assets were depleted. If an account in common form were ordered to be taken, the payments would be disallowed (or “falsified”) as legitimate expenditure and Mr Patel would be ordered to make good the loss. Subject to any question that might be relevant to the ascertainment of that loss, which lies at the heart of the present appeal, and assuming no other expenditure was falsified, the order would be to pay a sum equal to the payments plus interest.*

*33. This order to make good the loss would be a form of equitable compensation...*

*35. The use of the phrase “equitable compensation” in this context has attracted some controversy, principally because it has been suggested that it detracts from the basic purpose of the remedy to make good the deficit in the fund...*

*36. The present appeal is concerned with equitable compensation in this sense. It is not a case concerned with compensation for loss caused by a breach of duties of skill and care. Nor is it a case involving a claim to profits made by Mr Patel and his sister...*

*37. The issue that therefore arises on this appeal is whether, in a case of equitable compensation of this kind, the loss to the company resulting from the payments stands to be reduced or eliminated by reference to the hypothetical payments of lawful dividends or other benefits to the shareholders.*

He added later in his judgment:

*58. Where a director causes a company to make unauthorised payments for which the company receives no value, the director is liable to the company to pay compensation equal in amount to the payments...*

*59. The above analysis provides grounds for concluding that Mr Patel is not entitled to rely on the assumed fact that dividends equal to the payments would have been paid to his sister and himself in response to the claim for equitable compensation. However, the order below was for summary judgment, not judgment on a preliminary issue, and we must be satisfied that Mr Patel's defence is unsustainable in law.*

Despite David Richards LJ's clear views, he and the rest of the Court of Appeal allowed the appeal on the grounds that it could not be said, on an application for summary judgment, that the director's argument was unsustainable as matter of law. This was again a case involving the misappropriation of existing trust property.

106. To my mind, what these authorities show is that equitable compensation for breaches of fiduciary duty which involve the misappropriation of existing trust property is generally assessed on the substitutive basis. In such instances, the aim is to restore to the trust what has wrongfully been paid away and it is not open to the trustee or fiduciary who has been in breach to argue the counterfactual, that is that the trust property would have been lost or paid away even if he or she had not been in breach. AIB V REDLER, INTERACTIVE TECHNOLOGY CORPORATION V FERSTER, and AUDEN MCKENZIE V PATEL were all cases of this type.

107. However, in cases of breach of trust or fiduciary duty which do **not** involve the misappropriation of existing trust property, such as (per David Richards LJ in the PATEL case) breaches of duties of loyalty, and those which involve the trustee in making profits at the expense of the trust or the use of information or opportunities available to the trustee in that capacity or breaches of duties of skill and care, resulting in loss to the trust, equitable compensation will be assessed on the reparative basis. This requires the court to determine what would have happened but for the breach of fiduciary duty. The breaching trustee or fiduciary **is** entitled to argue the counterfactual. The court can be asked to consider how the principal or company would have acted if

the trustee or fiduciary had not acted in breach of duty. The GWEMBE VALLEY case is an example of this type of breach.

108. This seems to me to be a principled approach as, with the latter type of breach, the court is not seeking to replace property or assets which already belonged to the trust or company and were wrongfully diverted away, but rather to assess sums or profit which the trust or company did not make because the opportunity to make the profit was wrongfully diverted away.

109. In this case, the Judge has already addressed the issue as to the nature of the breaches of fiduciary duty perpetrated by Mr Monks, albeit in the context of the Defendants' limitation defences. At paragraph 319 of the judgment (quoted above) he distinguished between cases involving a misapplication of pre-existing corporate assets by a company director, (to which he held section 21(1)(b) of the Limitation Act 1980 would apply) and cases involving other breaches of fiduciary duty by a company director (to which he held that the six year limitation period would apply unless there is fraud). Importantly, he held that, for these purposes, pre-existing corporate property does not include benefits such as bribes or maturing business opportunities. He held, at paragraphs 322 to 325, that, apart from the funds belonging to GBR which were diverted for the benefit of GBRK (and which he ordered to be repaid), Mr Monks' breaches of duty did not involve the misapplication of pre-existing corporate assets.

110. Given that finding, this is a case in which equitable compensation falls to be assessed on the reparative basis. As such it is, in my judgment, open to the Defendants to raise the Counterfactual Defence.



**Issue 1(e) If the Court finds that it is open to Mr Monks to rely on the Counterfactual Defence and to the extent that the issue is legally relevant, would GBR in fact have built a waste management business at the Ashford Site? If so, should the Court impose a restriction on Mr Monks' liability to pay compensation similar to the approach of Warman International Ltd v Dwyer [1995] HCA 18, and if so, what should this restriction be and what award is proper compensation?**

111. On this issue I heard evidence not only from Mr Davies and Mr Monks but also from: David Monks (Mr Monks' father); James Moore and Myles Simmons (both friends of Mr Monks who had invested in GBRK) as well as from two forensic accountants: Mr Douglas Hall (for the Claimant) and Mr Kevin Hayward-Crouch (for the Defendants). I also read the (unchallenged) evidence of Mr Davies' brother, Terence Davies. I shall discuss their evidence where relevant below.

112. The Defendants' primary case is that, if Mr Monks had performed his duties rather than breached them, GBR would ultimately have ceased trading entirely due to: (i) GBR's financial position; and (ii) regulatory constraints. Accordingly, no compensation (or, in the alternative, very limited compensation) is due. By contrast, it is said, GBRK overcame these difficulties principally through:

- a. the exclusion of Mr Davies from control of the company; and
- b. Mr Monks' financing of GBRK from his own resources, and those of his close personal contacts. It is said that it formed no part of Mr Monks' duties as a director to provide (or seek) the same funding for GBR, and his evidence is that he would not have done so.

113. A necessary part of this argument is the proposition that a **hypothetical** director is under a duty to take reasonable steps to procure finance for their company, but that this director is under no duty to place their personal resources at risk. This point is

accepted by Mr Davies. Put another way, it is said that a director of a company is not in breach of duty if he refuses to give a personal guarantee. There is also, it is said, no duty to ask one's parents to re-mortgage their house to provide funding for that company, or approach them with any other proposal designed to elicit funds from them. Thus, it is said that it formed no part of Mr Monks' duties as a director of GBR to approach friends or business associates to seek funds from them.

114. Mr Cook points out that, if Mr Davies was seeking an account of profits against Mr Monks, the Court would seek to disgorge Mr Monks of the benefit he has received from his breaches of duty. It would ignore the fact that GBR could not or would not have continued to trade, and would treat Mr Monks' contributions to GBRK over and above his duties as a director as part of his equitable allowance. By contrast, however, with a claim for equitable compensation, GBR is only entitled to compensation which puts it in the position in which it would have been in had Mr Monks acted as a reasonably diligent director performing his duties.

115. Mr Cook further submits that, even if I was against him on his primary case, GBR would then be entitled to compensation for loss of profits (i.e. the profits it would have received but for Mr Monks' breaches of duty). I have to determine the profits GBR would have made had Mr Monks performed his duties. The Defendants' position is that:

- a. even if GBR would somehow have managed to commence trading, it would have been significantly less profitable than GBRK (owing at least to the investments which Mr Monks brought to GBRK and his supererogatory contribution to its success); and, in any event
- b. the Court should impose a restriction similar to the approach of WARMAN v DWYER where the Court considered that, after two years following the

diversion of a business opportunity, the causative part of the breach of duty was spent.

116. I start with some preliminary points.

117. Firstly, the burden is on the Claimant to show that Mr Monks' breaches of fiduciary duty caused the loss for which equitable compensation is being claimed—see KEYSTONE HEALTHCARE V PARR [2019] 4 WLR 99 (at paragraph 16) and Snell's Equity at paragraph 7-059. However, as Mr Shaw points out, given that all of this arises from breaches of fiduciary duty by Mr Monks, the court should adopt:

*a robust approach, relying on the presumption against wrongdoers, the onus of proof, and resolving doubtful questions against the party whose actions have made an accurate determination so problematic*

see LIBERTARIAN INVESTMENTS V HALL [2014] 1 HKC 368 (at paragraphs 138-140).

118. Secondly, so far as the duties of directors are concerned, by section 172 of CA 2006, it is provided that:

*(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—*  
*(a) the likely consequences of any decision in the long term,*  
*(b) the interests of the company's employees,*  
*(c) the need to foster the company's business relationships with suppliers, customers and others,*  
*(d) the impact of the company's operations on the community and the environment,*  
*(e) the desirability of the company maintaining a reputation for high standards of business conduct, and*  
*(f) the need to act fairly as between members of the company.*

Whilst by section 174 it is provided that:

*(1) A director of a company must exercise reasonable care, skill and diligence.*  
*(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with—*  
*(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and*  
*(b) the general knowledge, skill and experience that the director has.*

Mr Cook submitted, on behalf of Mr Monks, that it was no part of Mr Monks' duty, in the counterfactual world, to do more than act with reasonable diligence on behalf of GBR. In particular he was only required to act with reasonable diligence to obtain funding and was not required to put his own money at risk. He cannot have been required on behalf of GBR to go "above and beyond the call of duty" as he did for GBRK. Any consideration of Mr Monks' supererogatory contribution as director of GBRK would provide over-compensation to GBR.

119. Whilst this was not specifically disputed by Mr Shaw, he (correctly in my view) pointed out that Mr Monks was (as the Judge held) "an ambitious and clever man with a strong entrepreneurial instinct". He had a successful track record in the waste management industry. Indeed it was these very factors which had led Mr Davies to appoint Mr Monks as director of GBR. I also have to bear in mind the very dim view I have taken of him as a witness of truth and the fact that, in addition, his evidence on this aspect of the case is deeply self-serving and unsatisfactory.

120. It is also the case that (as I shall discuss in more detail below) in October 2011 Mr Monks clearly thought that the business of GBRK at the Site had significant potential. At that time he persuaded both his parents and his friend, Mr Simmons, to invest substantial sums of money (£98,500 and £200,000 respectively) in what was, at the time, probably an insolvent or nearly insolvent company. This view has turned out to be accurate as GBRK now operates a substantial and profitable business.

121. In the judgment, at paragraphs 262 and 267-8, the Judge held that, as at late 2010, GBR had few if any actual assets such that it was wrong to focus on "whether something corresponding to *the Business* was transferred to GBR" (original italics). What GBR had was what Mr Monks effectively stole through GBRK, that is the

business opportunity of conducting a waste management business at the Site. In a crucial piece of evidence, and in answer to questions from me, Mr Monks said this:

*“THE DEPUTY JUDGE: But how was GBRK in any different position from GBR?”*

*A. Because GBRK -- because as a 10 per cent shareholder, your Honour, I was not prepared to take the risk of borrowing the money*

*THE DEPUTY JUDGE: So, from the bank's point of view, there is no difference. Both are newly set up companies with no assets and no business; isn't that right?*

*A. Well, with the security that I could offer personally from a past - - I had obviously funds because I had sold a company before, in 2008, and the particular bank manager that was looking at it was my previous bank manager, not the manager that GBR had.*

*THE DEPUTY JUDGE: But you were a director of both companies.*

*A. Yes, I was a director of GBR, but only a 10 per cent shareholder.*

*THE DEPUTY JUDGE: That is the difference. The only difference between GBR and GBRK is the shareholding, isn't it?*

*A. That is absolutely right, your Honour. And I wasn't prepared to go and borrow the money for a 10 per cent shareholding, and I don't believe I had to.*

*THE DEPUTY JUDGE: That is as I understood it.*

*A. Yes, that's correct.”*

Thus the only difference between GBR and GBRK as at the date of the latter's formation was that Mr Monks was an 80% shareholder in the latter but only a 10% shareholder in the former.

122. Thus it seems to me that one can and should use, or at least start with, GBRK and the business it had in 2011 as a proxy for GBR and the business it would have had in the counterfactual world.

123. Between November 2010 and June 2011, there were substantial payments into GBR's bank account totalling £450,531, of which £396,300 came from the factoring agreement set up by Mr Davies in 2010. From that total: £170,686 was paid to GBRK; £73,950 was withdrawn as cash; and £205,703 used to pay others.

124. The (admittedly unaudited) Financial Statements show that, in its first year of trading (to the year ended 31<sup>st</sup> December 2011), GBRK made an operating profit of

£171,000 and profit after tax of £140,000 on a turnover of £1,825,000. The Balance Sheet for the same period shows net assets of £439,000 (down from a figure of £907,257 shown in the Assets nominal ledger as at 30<sup>th</sup> June 2011 and a figure of £775,061 as at 18<sup>th</sup> October 2011).

125. For the period to 1<sup>st</sup> February 2011 Mr Monks' Director's Loan account shown on the Opening Balance Sheet prepared by GBRK's accountant Mr Smith, is in the sum of £261,000 (owed to Mr Monks). By 31<sup>st</sup> December 2011 this had risen (in the Financial Statements) to £316,823 although the net figure owed was stated in the company's Sage Accounting Records to be £109,000.

126. Mr Cook for the Defendants mounted a sustained attack on Mr Davies' case here.

127. His first point was that one could not have assumed that GBR could have traded at all because GBRK required substantial investment from Mr Monks personally which he would not have been obliged to provide for GBR. It is also said that Mr Monks provided personal guarantees for GBRK in relation to: the novation of equipment from SIK to GBRK; a bank loan of £85,000 from HSBC; the acquisition of other fixed assets; the re-financing of a piece of specialist machinery called the "trommel system".

128. Mr Cook submits that, on the evidence before the court, Mr Davies was in no position to provide this finance and would not have been an acceptable guarantor being: disqualified as a director; resident abroad; with no assets in the UK.

129. I accept that Mr Davies would not have been able to provide any substantial finance to GBR out of his own personal resources. His evidence to the contrary lacked credibility. I do not accept any suggestion that finance could have been obtained by re-mortgaging the freehold of the Site. However, I think that I am entitled to take into account the unchallenged evidence of Terence Davies, to the effect that he could have

lent his brother money in 2010 and indeed would have stood as guarantor. Thus, had Mr Monks fulfilled his duties towards GBR in 2011 as he should have and discussed the need for further finance with Mr Davies, then I think it likely that some further finance would have been forthcoming from sources available to Mr Davies. I accept, however, that it would probably have been unlikely that this would have provided all that GBR would have required in the counterfactual world (given the sums that were required by GBRK in the real world). Ultimately one does not know, but that is because, instead of fulfilling his director's duties to GBR, Mr Monks breached them.

130. However I do not accept Mr Monks' case. He was and is a resourceful intelligent and skilful businessman with a proven track record in the waste management business. He had been brought in specifically to build up the business of GBR at the Site. As the Judge held (see paragraphs 144 and 145 of the judgment) he clearly saw that there was a significant business opportunity (which is why, of course, he effectively stole it from GBR). He was so committed to it in the real world that, when GBRK required finance in October 2011, he persuaded his parents to mortgage their house to put funds into it.

131. If, as I clearly think he did, he took the view that the conduct of a waste management business at the Site was one that had significant potential to be successful, then he **was** duty bound to act in the way he considered, in good faith, would be most likely to promote the success of the company. He was duty bound to be reasonably skilful and diligent in the pursuit of any necessary funding for GBR. Thus, although it is (of necessity and due to Mr Monks' breaches of duty) a matter of some conjecture, I think I am entitled to assume that Mr Monks would have been able to source funding from third parties.

132. Nor do I accept Mr Monks' case that he would not have put his own money into GBR. I accept that, as a matter of law, he was not required to do so. I accept that he was

a majority shareholder in GBRK but not in GBR. However he is a witness who, as I have discussed earlier in this judgment, is, in my view, prone to dishonesty. His evidence in this regard is wholly self-serving and I reject it. If the business opportunity presented to him at the Site was as good as I believe that he thought it was, then I think he would have gone to great lengths to preserve and exploit it. He was, for example and as the Judge held (at paragraphs 113 and 144 of the judgment), well aware of the state of the Site before he became a director of GBR. He must therefore have contemplated that it would have to be cleaned up or cleared in order to comply with Environmental Agency requirements and that this might potentially be an expensive process. I think that, had he been acting honestly and in accordance with his duties as director of GBR, if he had failed to obtain finance from third parties, he would have put the necessary funds in himself from his own money. He clearly had money to invest and, in my judgment, he would have been prepared to invest it into GBR. It may have been that he would have persuaded Mr Davies to increase his shareholding in GBR in return for such investment. This last point is, to a degree, speculation but it is speculation required by Mr Monks' own dishonest breaches of fiduciary duty. As a result, I am not minded to speculate much in his favour.

133. So far as the various guarantees are concerned, I take the same view. Given the tone of the correspondence from Mr Rodhouse of Finance & Leasing addressed to Mr Davies in early January 2011, I am fairly sure that Finance & Leasing would have been content to allow the various agreements to be novated to GBR with the existing Guarantor for SIK, Mr Davies, standing as guarantor for the new company. In any event, I take the view, that, if Mr Monks had been unable to persuade the bank and the finance companies to have the overdraft and the various finance agreements guaranteed



by Mr Davies, his brother or Mr Ford, then Mr Monks would, as director of GBR, have been prepared to guarantee them himself.

134. So far as the regulatory hurdles prayed in aid by Mr Cook are concerned, I do not think that they would have been insurmountable for GBR.

135. So far as the “O” Licence is concerned, I note paragraphs 220 to 228 of the judgment. There is nothing there that would indicate that, had the position been honestly explained to the Traffic Commissioner, then such a licence could not have been granted to GBR as opposed to GBRK. Mr Davies had nothing to do with the day to day running of the business (being neither a director nor resident in the country) and Mr Ford could have been allotted other duties. To the extent to which Mr Monks said otherwise in his evidence before me, I reject that evidence.

136. I note from paragraph 226 of the judgment (in what the Judge describes as a telling response) Mr Monks’ answer to the question why he had chosen to take the “O” Licence out in the name of GBRK rather than GBR:

*So, in everything that I had gone through in them four months, hardly heard from the guy that owns the company, the other guy is virtually nothing to do with it, what you would like me to do is be the patron saint of Ashford: is that what you are telling me? Absolutely ridiculous.*

Of course what Mr Monks is **not** recorded as saying is that he did not seek a licence in the name of GBR because he did not think that the Traffic Commissioner would grant a licence to that company as opposed to GBRK.

137. Nor do I accept Mr Monks’ evidence that he would not have done what he did for GBRK in the period before the grant of the new “O” Licence as recorded at paragraph 228 of the judgment. I think that he would have done the same for GBR.

138. So far as the Waste Management Licence is concerned, there is nothing in any of the Environment Agency Reports dated 21<sup>st</sup> January 2011, 4<sup>th</sup> February 2011 and the

letter dated 22<sup>nd</sup> February 2011 which would indicate that a licence could not have been granted to GBR. If the concern genuinely was the day to day involvement of Mr Davies, then Mr Monks could truthfully have told the Environment Agency that Mr Davies had no day to day involvement in running the company or the Site and indeed that he was resident abroad. As set out above, I also think that GBR would have been able to acquire the necessary funds, whether through Mr Monks or elsewhere, to clear and clean the Site as required by the Agency. My impression from reading the reports and the letter is that the Agency was looking for clear signs of steady improvement and was prepared to accept a realistic, as opposed to rapid, timetable for the clean-up.

139. Thus my view is that, in the counterfactual world, GBR would have been in exactly the same position logistically and financially as GBRK was in the real world, at least until October 2011. However, in my judgment, this I as far as I can go because it seems to me that the situation changed at or around that time.

140. It is accepted that, in early October 2011, Mr Monks' parents invested £95,000 into GBRK whilst a friend and business acquaintance of Mr Monks, Mr Simmons, invested £200,000. Mr Monks' parents invested their money in return for 20 shares, which they were told was "10% of the company". Mr Simmons £200,000 was invested in exchange for 50 shares, which (he was told) was 20% of the issued share capital.

141. Mr Monks Senior said this in his statement:

*My wife and I were asked by Mr Monks to invest in GBRK because it was struggling financially. We determined that GBRK needed the money and thought it was a reasonable long-term investment because we knew from experience that Mr Monks was a successful businessman. Whilst our investment nominally valued the company at £985,000, we did not believe GBRK was actually worth this amount - it seemed to be insolvent - but Richard asked us for support and so we agreed. The decision to invest was not taken lightly because it required my wife and I to re-mortgage our family home... We would not have invested in any other company, nor would we have invested in GBRK if Mr Monks was not the majority shareholder. It was therefore not a commercial decision; rather we wanted to help our son.*

In answer to questions in cross-examination he said this:

*I didn't have £100,000, unless I re-mortgaged, which my wife had to do because of my age, and I had a chat with my wife and she was a bit in between, and I said, no, we would do it because he is in trouble, and so that is what we did. And we had the mortgage. You know, if it hadn't have been my son, I wouldn't have done it with anyone else.*

In answer to the question:

*When you agreed to invest, you presumably knew that Mr Davies would not be involved; is that right?*

He answered:

*Yes, I wouldn't have invested if Mr Davies had been involved*

He also said:

*So I would not have invested if it had been two other people in it -- I wouldn't have been interested, because my wife is a little bit...*

142. Mr Simmons told me:

*I am a minority shareholder of GBRK following my investment in the business of £200,000 in October 2011, in exchange for 50 shares (20% of the issued share capital)...I recall thinking that GBRK was a good long-term investment because of Mr Monks' proven track record in the industry and my opinion that waste management is a generally stable industry - there is always waste to collect. I had understood at the time of my investment that GBRK was struggling financially. It seemed insolvent and needed cash to continue trading but Mr Monks asked for my help, so I agreed to invest. While my investment nominally valued the company at £1,000,000, I did not believe GBRK was actually worth this amount but I trusted Mr Monks' skills and ability to make GBRK profitable. My investment therefore reflected the 'hope' value I had in Mr Monks (and by extension, GBRK). I would not have invested in any other high risk small to medium enterprise, waste management company or in fact GBRK, if Mr Monks was not in control as majority shareholder. I knew that Mr Monks was the owner of GBRK and that Mr Ford was also involved in GBRK at the time of my investment.*

The following passages appear in his cross-examination:

*Q. Let's talk about the number of shares to start with. How did you arrive at 50 shares for £200,000?*

*A. I left that side of it to Richard. Obviously, when we first started out, it was like a 10 per cent on my money, and I was happy with that.*

*Q. But, I mean, Mr Simmons, you are a businessman. If Mr Monks had said to you, "Myles, give me £200,000 and I will give you one per cent of the shares", what would your reaction have been?*

*A. I would just as well have put my money in the bank.*

*Q. So, you would have refused the offer, wouldn't you?*  
*A. I would have refused the offer for 1 per cent, would you not?*  
*Q. So how did you get to 20 per cent?*  
*A. This is what Richard said I would have on my money, on my investment.*  
*Q. As I understand your answers, are you saying that all you were interested in was the return on the 200,000, just the monthly return on the money?*  
*A. No, it's -- that's not all of it. I would be interested on the return, and I would be interested in the longer terms, you know, the long -- it was a long-term investment and, from starting from nothing, to see where the business is now, do you not think that has done its job?...*  
*Q. What I am exploring with you is how you ended up with the percentage of equity that you ended up with? I am suggesting to you -- I am sure it was done in a friendly way, but I am suggesting there was a negotiation and that -- I don't know, did you go in and say, "I want 40 per cent of the equity", and Richard said, "No, I am not give giving you that much. I will give you 10", and then you had a negotiation.*  
*A. No, it was 20 per cent, and that is what we agreed on. That was a good investment, a good return on my money.*  
*Q. So, on that basis, you believed, if you thought 20 per cent was worth 200,000, it would follow the company was worth 1 million, wouldn't it?*  
*A. The company wasn't worth a million because there wasn't -- there was a company, but work-wise, you know, the money I put in was to get him on the ladder, to get him going. The money I put in was to buy new skips or new lorries, and whatever the company wanted to actually start.*  
*Q. Yes. I mean, you were investing in Mr Monks' skills and experience; is that fair?*  
*A. Yes, definitely. I did invest in Richard, through his skills and experience in the waste industry. And why --the man has achieved an enormous lot in his life.*

143. Mr Haywood Crouch asserts that, before the £295,000 invested into GBRK by Mr and Mrs Monks and Mr Simmons in early October 2011, that company was effectively insolvent (see paragraphs 4.44, 5.1 and 5.8 of the Joint Statement). In the Joint Statement and in his oral evidence, Mr Hall would only accept that Mr Haywood-Crouch had indicated that the company was “balance sheet insolvent” but not necessarily that it could not pay its debts as and when they fell due. He did not necessarily accept that it was insolvent at that time. For what it is worth, it seems to me that Mr Haywood Crouch is right on this point. The company bank account was, at that time, overdrawn by £30,000. Mr Haywood-Crouch’s view also tallies with the evidence of Mr Monks and, more importantly, with that of both Mr Monks Senior and Mr

Simmons who all say that that GBRK was, at that time, “struggling financially”. Whilst the evidence from Mr Monks Senior and Mr Simmons can only come from what they had been told by Mr Monks, it would tally with the fact that they were being asked to invest in GBRK at all.

144. Thus, I am prepared to accept that, as at early October 2011, GBRK was, if not insolvent, then in a sufficiently serious financial situation to require an urgent injection of cash (which is what the investors provided).

145. The thrust of the evidence from Mr Monks Senior and Mr Simmons is that they would not have invested had Mr Monks not been “in control” of the company. I feel constrained to accept that evidence which, to my mind, has the ring of truth about it. Both his parents and Mr Simmons were investing in the skills and proven track record of Mr Monks. I accept, because it seems to me to be overwhelmingly likely, that they would not have invested if Mr Monks had been only a minority shareholder in the company and therefore capable of being dismissed by the majority shareholder, Mr Davies, at any time. Further, given that he had, up to that point, put his own money into GBRK, it seems to me that I cannot hold that Mr Monks would either have put further funds of his own into GBR or found investment from any other source.

146. Thus, in my judgment, the investments made in October 2011 by Mr and Mrs Monks and by Mr Simmons were both necessary to keep GBRK afloat and were investments which GBR could not have obtained. Thus it seems to me, and I find, that in the counterfactual world, GBR could not have traded past mid-October 2011.

147. One can say that, as a matter of causation, Mr Davies has not shown that GBR was caused any loss by reason of Mr Monks’ breaches of fiduciary duty past early to mid-October 2011.

148. Alternatively one can apply the principle set out in the Australian case of WARMAN INTERNATIONAL V DWYER (a case involving an account of profits ordered against a director who had taken a business opportunity offered to his company). In that case (at page 561 of the report) the High Court of Australia said this:

*In the case of a business it may well be inappropriate and inequitable to compel the errant fiduciary to account for the whole of the profit of his conduct of the business or his exploitation of the principal's goodwill over an indefinite period of time. In such a case, it may be appropriate to allow the fiduciary a proportion of the profits, depending upon the particular circumstances. That may well be the case when it appears that a significant proportion of an increase in profits has been generated by the skill, efforts, property and resources of the fiduciary, the capital which he has introduced and the risks he has taken, so long as they are not risks to which the principal's property has been exposed. Then it may be said that the relevant proportion of the increased profits is not the product or consequence of the plaintiff's property but the product of the fiduciary's skill, efforts, property and resources. This is not to say that the liability of a fiduciary to account should be governed by the doctrine of unjust enrichment, though that doctrine may well have a useful part to play; it is simply to say that the stringent rule requiring a fiduciary to account for profits can be carried to extremes and that in cases outside the realm of specific assets, the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff.*

Applying this principle, in my judgment, any sums generated by GBRK since the loans made by Mr Monks' parents and Mr Simmons, were due entirely to Mr Monks' own efforts and it would not be just or equitable to award compensation for, or in respect of, any period after mid October 2011.

**Issue 1(f): Is it relevant how much remuneration and benefits Mr Ford and Monks have received from GBR and GBRK, (as contended by Mr Davies), or is the proper measure of equitable compensation the net profits GBR would have made had Mr Monks performed his duties, without any assessment of Mr Monks' personal benefits (as contended by Mr Monks)? If Mr Davies is correct, how much remuneration and benefits have they received? Have these individuals received any disguised remuneration and**

**benefits (in the form of “fuel” repayments or otherwise)? Has GBRK financed the purchase or acquisition of Mr Monks’ personal property situated at Golford Stables, Cranbrook (the “Personal Property”)?**

**Issue 1(g): In particular, but subject to 1(f) above, are Mr Ford and Mr Monks liable to pay equitable compensation in respect of the following payments made by GBRK (as alleged by Mr Davies) or are the following payments irrelevant to the determination of equitable compensation (as alleged by Mr Monks)? (i) remuneration and benefits received by Mr Ford and Mr Monks; (ii) dividends; (iii) sums paid to finance the acquisition of shares in GBRK or connected companies;(iv) legal fees in connection with these proceedings; (v) the sums (if any) paid to finance the purchase and development of the Personal Property.**

149. These issues along with the last part of issue (e) require me to assess the amount of equitable compensation, if any, which I am prepared to award and the basis on which such compensation is to be assessed.

150. It is worth reminding myself what Mr Davies’ case is against the various Defendants.

151. Mr Davies’ primary case against GBRK is for: (i) a declaration that GBRK holds the freehold of the Site on constructive trust for Mr Davies (as assignee of GBR); and (ii) an account of profits extending to the present day and/or equitable compensation (amounting to the current value of GBRK less the value of the Site). In its alternative case against GBRK as knowing recipient, Mr Davies seeks: (i) a declaration that it holds the freehold of the Site on constructive trust for Mr Davies (as assignee of GBR); and (ii) an account of profits extending to 31 December 2015 and/or equitable compensation (amounting to the value of GBRK at 31 December 2015).

152. As against Mr Monks, Mr Davies seeks equitable compensation in the form of restoring to Mr Davies the following sums which have been wrongly extracted from GBRK: (i) sums paid by GBRK to Cripps LLP and/or Counsel acting for Mr Monks/GBRK in connection with the current dispute; (ii) all sums paid or borrowed by GBRK to finance the acquisition by BVL of shares in CVL from Alan and Charlene Hogg or John Bennett; (iii) all GBRK funds used to finance the purchase and development of the Cranbrook Property. In his alternative case against Mr Monks, Mr Davies seeks equitable compensation in the form of restoring to Mr Davies all sums which were extracted from GBRK for the benefit of Mr Monks (whether in the form of dividends, remuneration or other unauthorised payments) in excess of the sum of £3,000 per month until 31 December 2015.

153. However, I have held:

- a. In answer to Issue (c), that the Defendants are not barred by reason of issue estoppel or the principle in Henderson v Henderson from arguing the Counterfactual Defence.
- b. In answer to Issue (d), that, in assessing equitable compensation, the Defendants are, as a matter of law, entitled to raise the Counterfactual Defence.
- c. In answer to Issue (e), that, in the counterfactual world, whilst GBR would have been able to trade in the same way as GBRK from January 2011 until mid-October 2011, it would not have been able to continue trading without the injection of funds which GBRK received from Mr Monks parents and Mr Simmons and that those funds would not have been available to GBR.

154. In particular, in discussing the nature of equitable compensation under Issue (d), I have held that it falls to be assessed on the reparative basis: that is what GBR actually



lost by reason of the breaches of fiduciary duty (there having to be a causative link between the breaches and the losses).

155. What GBR lost was the business that was stolen from it through GBRK between January and October 2011. It seems to me therefore that the appropriate measure of equitable compensation is the value which that business would have had in October 2011 and, in my judgment, that is equivalent to the value which GBRK actually had in October 2011. Applying the “robust manner” which the court is encouraged to adopt in these circumstances, in the counterfactual world, and but for Mr Monks’ breaches of duty, GBR would in October 2011 have had a business which it could have sold for value.

156. Both parties appear to agree (albeit in their respective alternative cases) that, in the circumstances, if I am to award equitable compensation, I should assess it by reference to the value of GBRK (albeit at different dates).

157. In his written Closing Submissions, Mr Cook summarised the Defendants’ case in this regard as follows. He submits

- a. Firstly that GBR does not require compensation for loss of trading profits, because it would not have been in a position to make those profits.

I have rejected that submission.

- b. In the alternative, he submits that GBR’s profits can be estimated based on GBRK’s profits, having made adjustments for its higher cost of borrowing. GBR’s profits would have been much lower than those which were in fact made by GBRK.

I have rejected that submission as well.

- c. Moreover, he submits that, if Mr Monks had worked for GBR, he would not have worked for free. Any equitable compensation should be reduced to reflect what is agreed to be the fair remuneration to a director, and so a reduction must be made of £90,000 per annum.

I will return to consider the question of any equitable allowance below.

- d. Furthermore, and in the alternative, he submits that the Court should impose a cut-off period of one or two years' profits to reflect Mr Monks' equitable allowance and/or to reflect the fact that profits generated thereafter are attributable to the work of Mr Monks and GBRK, and have no bearing on Mr Monks' breaches of duty to GBR several years earlier (in circumstances where, as the Judge found, you are "*only as good as your last skip*").

I have effectively agreed with that, in that I have held that there is a "cut-off point" as at mid-October 2011.

- e. If, contrary to the foregoing, the Court were minded to award equitable compensation based on GBRK's market value on 18 October 2011, then he submits that I should find that GBRK was worthless as GBRK was insolvent.

I agree with him that the award of equitable compensation should be assessed on the basis of the value of GBRK as at 18<sup>th</sup> October 2011. That was the date when GBR was struck off the register, but it seems to me to be an appropriate date in all the circumstances. It is one of the dates which the experts have addressed. It is, however, after the injection of funds into GBRK by Mr Monks' parents and by Mr Simmons and I will have to take that into account.

158. In his alternative claim against GBRK, Mr Davies seeks equitable compensation for either the current value of GBRK or, in the alternative, the value of GBRK as at 31<sup>st</sup> December 2015. I am not prepared to award equitable compensation on either basis. However, I am prepared to award it against Mr Monks on the basis of the value of GBRK as at 18<sup>th</sup> October 2011.

### **The value of GBRK as at 18<sup>th</sup> October 2011**

159. As stated, I heard from two expert forensic accountants: Mr Hall for the Claimant and Mr Hayward Crouch for the Defendants. Both of them were asked to give, and gave, their views as to the value of GBRK as at 18<sup>th</sup> October 2011. This was the date on which GBR was struck off the register.

160. Both of them adopted a net asset valuation for GBRK as at that date.

161. Mr Haywood Crouch assessed the value at that date as £280,000. He took the view that, at that date, the company had a negative equity or enterprise value: despite the company being profitable, it was, he said, highly indebted. In cross-examination, he stated that the majority of the value of GBRK as at 18<sup>th</sup> October 2011 came from the £298,000 which had just been invested into the company by Mr and Mrs Monks and Mr Simmons. In arriving at his valuation, he started with GBRK's Balance Sheet as at 31<sup>st</sup> December 2011 which showed total net assets of £439,000. He then took from that sum the figure of £60,500 stated to be the value of "intangible acquired goodwill" (which he said was of no actual value). He then made various adjustments for assets which he worked out had been disposed of by the company prior to 31<sup>st</sup> December 2011. His view was that the net asset position as at 31<sup>st</sup> December 2011 had been overstated in the Balance Sheet.

162. Mr Hall valued GBRK as at 18<sup>th</sup> October at £400,000. He used 31<sup>st</sup> December 2011 as a proxy for the earlier date. That approach was criticised by Mr Cook for the Defendants but Mr Hall, when questioned, gave what, to my mind, was a convincing and cogent explanation for it. He said the figure for assets he used was that stated in the accounts prepared for GBRK by its accountants under the Financial Reporting Standards for Smaller Entities which were signed by the director Mr Monks as being an accurate picture (“a true and fair view of the Balance Sheet”) at that date. The “raw data”, being the company’s financial records, would have been the subject of careful adjustments by the accountants following discussion with Mr Monks to arrive at the figures in the accounts. Mr Monks owed statutory duties in signing those accounts. It would be very odd, he said, to start (as Mr Hayward Crouch has done) by assuming that the figures were inaccurate and false as the assets were overstated.

163. Thus I would have preferred Mr Hall’s view as to the value of GBRK as at 18<sup>th</sup> October 2011 had I not thought that there was a better and more reliable valuation available on the evidence.

164. However, it seems to me that there is contemporaneous evidence as to what someone considered was the actual value of GBRK as at early to mid-October 2011: that is what Mr Simmons actually invested for what he was told and considered was a 20% (in fact a 25%) stake in the company.

165. Both experts agreed that the investment made by Mr and Mrs Monks Senior was not an arm’s-length transaction and could not therefore be relied upon for valuation purposes. In accounting terms (IVS104) Mr and Mrs Monks were parties who had a “particular or special relationship” with GBRK and Mr Monks.

166. However the experts agreed that Mr Simmons was not technically such a party.

167. In his Report dated 2<sup>nd</sup> March 2021, at paragraph 10.7.15, Mr Hall said this:

*Despite what Mr Simmons states, in my opinion the fact that he acquired his shares in what appears to have been an arms-length transaction implies the market value of all of GBRK's shares at the date they were acquired in October 2011 was £800,000.*

In the experts' Joint Statement dated 31<sup>st</sup> March 2021 (at paragraph 4.45), he notes that whether or not Mr Simmons' investment was an arm's-length transaction is a question of fact for me. In answer to questions in cross-examination (on 19<sup>th</sup> April 2021) he said this:

*The other guide to its value is the value at which 20 shares were subscribed to, because those are market transactions, but I guess we will come on to that, at some stage.*

He later said:

*The market value, I would suggest, is better informed by the price at which shares were bought around that time.*

When commenting on Mr Hayward Crouch's valuation, he said this:

*One credibility check, which is explored in the joint statement, to his estimate of the market value of net assets of £280,000 is that that is just after the investments totalling £298,500 were put into the company. So his adjusted net asset valuation of 280 implicitly means that before those investments, the company had no value as a going concern, i.e. no value based on its earnings, and had negative net assets. Now, I just question whether that really was the case and, if it was the case, bluntly, I would say why did Mr Monks continue trading and why did those investors put money in? It is just a credibility check*

In answering further questions the next day, he said this:

*Well, I can only -- this will be for the court. But whereas it is pretty obvious to me that it could not have been an arm's length transaction when Mr Monks' parents invested, in the case of Mr Simmons, it is not that clear. Okay, they knew each other, but that doesn't necessarily mean that he would have made an investment on a non-commercial basis. This is what this is really about. If you look at Mr and Mrs Monks, it appears that because they are his parents, that they would invest in the company to support him personally, rather than as a standalone investment. In the case of Mr Simmons, okay, he knew Mr Monks, I think for some years, but the question is whether he made the investment on a commercial basis or a non-commercial basis; that is what the question of an arm's length transaction is all about.*

*Q. Yes, but all I am saying is -- I am asking you why on earth you are saying here -- you are trying to draw a distinction between the position of Mr Simmons, based on the fact that the definition mentions commercial relationships, and I think you have agreed that you are not suggesting that a personal relationship wouldn't count?*

*A. I am not aware of Mr Simmons having any commercial relationship with Mr Monks.*

*Q. No.*

*A. He was a friend, as I understand it, but that doesn't rule out it being an arm's length transaction.*

*Q. Well, in any case, I think you said in your evidence earlier this is a matter for the court.*

I then interjected:

*THE DEPUTY JUDGE: As he said, it is a matter for me. I have heard the evidence of Mr and Mrs Monks, and I have heard the evidence of Mr Simmons. The question I have to decide is whether what they invested, as they admit, is any reflection on the value of the company, which is where this is relevant. I think that is it. I think Mr Hall accepts that. So whether or not it is a (Inaudible) transaction as a matter of accountancy is technically irrelevant.*

*A. Absolutely, my Lord. In fact, that is why I said what I said in the joint statement. I ended by saying it will be a matter for Mr Simmons' evidence, i.e. the court would hear what Mr Simmons had to say about it.*

168. Mr Haywood Crouch's view (as expressed in paragraphs 11.41 and 11.42 of his Report dated 2<sup>nd</sup> March 2021 and in paragraphs 4.41 and 4.45 of the Joint Statement) was that Mr Simmons "had the traits of a special purchaser". He pointed to the different valuations to be derived from the investments made by Mr and Mrs Monks, on the one hand, and Mr Simmons, on the other, despite the fact that each was made on the same day. However, in the Joint Statement, he accepted that whether or not Mr Simmons investment was an arm's-length transaction was ultimately a question of fact for me.

The following passage appears in Mr Haywood Crouch's cross-examination:

*Q. Yes. I think the point I am trying to make is that the very best evidence of what something is worth is what somebody in the market actually pays for it. So, the only way that you can -- the only accurate way of doing it is to market something and find out how much somebody is in fact prepared to pay. Without*

*that, all you can do is try and anticipate what that person would be willing to pay; do you accept that?*

*A. Yes*

The following passage appears later in his cross-examination:

*Q. I think what I am putting to you is that -- I am suggesting that one should approach it from the other end, if you like. What you have just said is that you cannot support the price paid by Mr Simmons through the valuation methodologies that you have adopted. But what I am suggesting to you is that, if you are valuing this company, you should attribute significance to the fact that somebody was prepared to pay £200,000 for a quarter of the equity. That is a source of information which is available to you as a valuer. What I am suggesting to you is that you should take it into account.*

*A. Neither Mr Hall nor I do. Ultimately, it will be, obviously -- and I agree with Mr Hall, it is a matter for the court. But neither of us do.*

169. I have already set out Mr Simmons' evidence at some length. He told me that he had known Mr Monks:

*“for long time as a result of our mutual involvement in the waste management industry and mutual friendships. I no longer work in the waste management industry and I am now a director of a transport company”*

170. A number of things are clear from his evidence. Firstly, although in 2011 he was a friend and business acquaintance of Mr Monks (he described himself as a “good friend”), this friendship appears to have arisen out of their prior business dealings. The relationship was nothing like as close as that between Mr Monks and his parents. Mr Simmons was looking to invest money in the long term: he wanted income and capital growth. He **was** interested in the share of GBRK which he was getting for his money. He was getting shares and he told me that he would not have invested his £200,000 if he had only been offered 1% of the company. Tellingly, his evidence was that the 20% figure was suggested by Mr Monks himself. He said “that was what we agreed upon”. Although he knew that the company was short of cash and thought the investment was high risk, I think that he was prepared to invest his money because: he thought that the waste management business was a stable industry and thus a good investment; Mr

Monks had a proven track record in that industry; he was getting what he thought was 20% of the company's shares; if GBRK was successful, he would get a return by way of income and capital growth.

171. My clear view is that, whilst Mr Monks approached Mr Simmons because of their pre-existing friendship, Mr Simmons' investment was clearly an arm's-length one. Mr Simmons was, and is, clearly a businessman in his own right and, although he knew of the company's financial state and the risks involved, he was clearly investing a significant sum for a future return. His investment was a commercial one on commercial terms.

172. Thus, despite Mr Simmons indicating that he did not think GBRK was worth £1 million at that time, his investment is clearly evidence of what both Mr Monks and an independent third party thought GBRK was worth at the time. This is despite what I have already concluded was the parlous state of its finances in October 2011. To my mind this is unsurprising. As I have already stated, Mr Monks clearly thought that the conduct of a waste management business at the Site was one that had considerable potential. He had effectively stolen that business from GBR. He had invested considerable amounts of his own time and money. He had persuaded his parents to re-mortgage their house to provide cashflow. He offered Mr Simmons 20% (in fact 25%) of the equity for an investment of £200,000. GBRK made a trading profit in its first year.

173. In those circumstances, and noting in particular the comments of Mr Hall in his evidence, I agree with the submission made by Mr Shaw in his written Closing that the best evidence shows that the value of GBRK as at October 2011 was £800,000.

174. However, it seems to me that, in arriving at a figure for equitable compensation based on the value of GBRK as at mid-October 2011, I have to give the Defendants



credit for the sum of £170,685 which the Judge held had been taken from GBR by GBRK (see paragraph 272 (iii) of the judgment) and which he ordered to be repaid. It has been repaid. Thus, absent any allowance, the sum of equitable compensation which Mr Monks ought to pay is £629,315.

175. For the avoidance of doubt and because I have held that, in the counterfactual world, GBR would not have been able to trade beyond mid-October 2011, then I do not think that the Claimant is entitled to any of the other heads of equitable compensation which he seeks but which all arise from events or transactions after October 2011. I would, in any event, have required a good deal of persuasion, particularly in the light of the Judge's ruling (in paragraphs 371 to 395 of the judgment) that the whole of GBRK's present business was not held on trust for GBR, that the various payments made by GBRK to and for the benefit of Mr Monks were recoverable as equitable compensation. If the measure of such compensation is the value of GBRK at any given time, then it seems to me that the ability of the company to make such payments will be taken into account in the overall valuation and it would amount to double recovery to order that those payments be specifically repaid.

**Issue 1(h) If Mr Monks is liable to pay equitable compensation, is he entitled to an allowance in respect of services provided by him to GBRK? If so, what is the quantum of that allowance?**

176. In paragraphs 396 to 406 of the judgment, the Judge held that Mr Monks should "in principle" be entitled to claim an equitable allowance as:

*...there is undoubtedly evidence supporting the view that the efforts and capital investments made by Mr Monks since early 2011 have contributed to the growth and success of GBRK*

However, he expressed his conclusions "somewhat tentatively" and added:

*It seems to me that the question of the proper scope of any equitable allowance may well be linked to the question of the proper scope of any account, and that the two will probably need to be examined further together before any definitive conclusion can be expressed.*

177. The parties instructed a joint expert, Mr Paul Grainger, who gave unchallenged evidence as to “the market rate for the remuneration and/or benefits of a director of Green Box Recycling Kent Limited for the period January 2011 until June 2020”. In his view the relevant market rate for January 2011 was £89,815 (comprising a salary of £81,650 and a bonus of £8,165).

178. Mr Cook for the Defendants points out that the Judge rejected Mr Davies’ claim that Mr Monks had signed a contract of employment (see paragraphs 105-106 and 249-251 of the judgment). In relation to the Handover Note (in which it was recorded that Messrs Davies Monks and Ford had agreed to “take out” £3,000 per month-see paragraphs 99 to 100 of the judgment) the Judge held that Mr Monks had never seen that document (paragraph 101).

179. However, I note the Judge’s conclusion was in fact that:

*That is not to say, however, that he must have been completely ignorant of the matters reflected in the Handover Note, and it seems to me he must have been aware at least at a general level of the plans referenced in the Handover Note, some of which related directly to him.*

The proposal that each of Mr Davies, Mr Ford and Mr Monks would only receive £3,000 per month was clearly a matter which related directly to Mr Monks. I cannot therefore accept that Mr Monks was unaware of the fact that he was, at least initially, only to receive £3,000 per month from what was a newly incorporated company.

180. I also note in this regard that, in paragraphs 4.27 and 5.8 of the Joint Statement, Mr Hall (in evidence that was not challenged) asserted that GBRK’s financial records show that Mr Monks in fact received payments from GBRK in the period to December 2011 of £78,000. Whilst this, of course, does not necessarily directly affect the question

of whether and to what extent Mr Monks is entitled to an allowance in respect of equitable compensation which he is ordered to pay GBRK, it does at least show that he was in fact remunerated for his efforts in the real world. Further, the receipt by him of such sums would, in my view, have to have been taken into account in the valuation of GBRK as at October 2011 as it would have been a factor contributing to the financial state of GBRK as at that date. So, to an extent, an award of equitable compensation based on the value of GBRK has already taken into account certain payments made by that company to Mr Monks.

181. The Judge in the relevant section of the judgment has already cited extensively from the judgments of Arden and Jonathan Parker LJ in the MURAD V AL-SARAJ case. In that case, at paragraph 88 Arden LJ said this:

*It would, however, be open to Mr Al-Saraj to apply to the court for an allowance for his services and disbursements, as indeed he did. The order of 12 July 2004 makes an allowance for his remuneration for managing the hotel. It is well established that, on the taking of an account, the court may make an allowance for the skill and efforts of the defaulting trustee: see, for example, Re Jarvis, dec'd [1958] 1 WLR 815, Boardman v Phipps [1967] 2 AC 46. This is common ground. The grant of an allowance is discretionary: see, for example, Poppet v Shonchhatra [1997] 1 WLR 1367 and the Warman case at page 562.*

In the passage cited from the WARMAN case the High Court of Australia had said:

*It is for the defendant to establish that it is inequitable to order an account of the entire profits. If the defendant does not establish that that would be so, then the defendant must bear the consequences of mingling the profits attributable to the defendant's breach of fiduciary duty and the profits attributable to those earned by the defendant's efforts and investment, in the same way that a trustee of a mixed fund bears the onus of distinguishing what is his own .*

*Whether it is appropriate to allow an errant fiduciary a proportion of profits or to make an allowance in respect of skill, expertise and other expenses is a matter of judgment which will depend on the facts of the given case. However, as a general rule, in conformity with the principle that a fiduciary must not profit from a breach of fiduciary duty, a court will not apportion profits in the absence of an antecedent arrangement for profit-sharing but will make allowance for skill, expertise and other expenses.*

182. On the facts here, I am prepared to grant Mr Monks an allowance to recognise the skill and effort which he displayed in building up the business of GBRK. However,

in my judgment it would be wrong to allow Mr Monks anything more than the £3,000 per month which I find was contemplated by the agreement described in the Handover Note. Whilst he had not seen the Handover Note itself, he has not proved that he was unaware of those parts of the arrangement that related to him. I would be very surprised indeed if he was unaware of the fact that his remuneration was, at least initially, intended to be £3,000 per month. Further, and in any event, he was being brought into GBR by Mr Davies specifically to use his skill and experience to grow the business. It is reasonable to anticipate that he would initially receive less than the market rate for the job he was doing in the expectation that his salary and the value of his shareholding would grow in time.

183. That is all I intend to allow him: £3,000 per month for 10 months, that is £30,000. For the avoidance of doubt, this sum is in addition to any sums which (as set out above) Mr Monks might actually have received from GBRK in the relevant period.

#### **Equitable compensation payable by Mr Monks**

184. In the circumstances, I award Mr Davies equitable compensation against Mr Monks in the sum of £599,315 (being £800,000 less the sums of £170,685 and £30,000).

185. I will return to Mr Ford later in this judgment.

**Issues 1(i) and 9: How much interest is payable by Mr Monks on the sum of £170,685.88 misappropriated by him from GBR? Is Mr Davies entitled to interest on any other sums due to him from Mr Ford and Mr Monks?**

**Is Mr Davies entitled to interest on any sums due to him from GBRK?**

186. On the question of interest there are four separate issues:

- a. Whether, as invited to do so by Mr Davies, I should adjourn all questions of interest;
- b. The period of time for which interest should be awarded;
- c. Whether interest should be simple or compound;
- d. The appropriate rate of interest.

187. In his closing submissions, Mr Shaw for Mr Davies asks me to adjourn the question of interest until after I have handed down my judgment on all the other issues. He submits that his client's approach to interest "is likely to be dependent on the appropriate date of valuation of GBRK selected by the court".

188. Mr Cook for the Defendants, on the other hand, opposes any delay in the assessment of interest. He submits that:

- a. These proceedings have been ongoing since 2017 and no further delay should be countenanced.
- b. The calculation of interest has a potentially significant effect on the overall quantum of any award. If I was, for example, to award compound interest at a substantially higher rate than base rate, then the sum awarded by way of interest might make up a very substantial percentage of the overall sum which his client might be ordered to pay.
- c. Questions of interest are, he submits, closely connected to question of the principal award. He cites the case of VYSE V FOSTER (1872) 9 Ch App 309. That was a case in which an account was sought from defaulting executors of the profits attributable to a deceased partners share that had been left in a business and not distributed. The Court of Appeal determined to award interest on the capital sum to reflect the benefit of its use because it was unable to

determine what share of the profits made by the business by the retention of the funds.

189. In my judgment, it would be wrong to adjourn the question of interest essentially for the reasons advanced by Mr Cook. This case has been ongoing for some years and this is the second substantial judgment which it has required. This judgment is intended to deal with questions of quantum and that must, in this context, include interest. Interest was an agreed quantum issue for me to determine and I see no reason why I cannot or should not deal with it in this judgment. So I propose to do so.

190. Mr Davies seeks compound interest at an unspecified rate for an unspecified period. The Defendants suggest that I should award simple interest at the rate of 1.5% above base rate for a period terminating on 18<sup>th</sup> October 2011.

191. My attention was drawn to a number of authorities and a number of arguments were raised by Mr Cook.

192. Mr Cook's first point was that I should not award interest beyond 18<sup>th</sup> October 2011 because GBR was dissolved on that date. Upon its dissolution, he says, GBR would have distributed its remaining assets to its shareholders. No compensation is required for the loss of money from 18 October 2011 onwards because GBR would not have used these funds at all. He says that section 1032 of CA 2006, which provides that, upon restoration, a company is deemed to have been in existence as if it had not been dissolved, does not apply to invalidate this analysis. The effect of the section (which deems a state of affairs to exist which did not in fact exist) is not to limit the Court's objective of providing compensation by ignoring what actually happened. He points both to the Judge's analysis of the operation of section 1032 in paragraphs 374 to 395 of the judgment and to the decision (also cited by the Judge) of Cockerill J in BRIDGEHOUSE V BAE SYSTEMS [2019] BCC 1127.

193. I do not agree with Mr Cook's point here.
194. I am deciding whether or not to award interest under either section 35A of the Senior Courts Act 1981 or under the inherent equitable jurisdiction of the court. I have a discretion whether or not to award interest and, if I do, for what period I will award it. I do not think that, in the exercise of this discretion, the court is trammelled by any technical limits to the effect of section 1032 CA 2006.
195. I am considering the award of interest on a sum of equitable compensation which I am awarding to GBR (or its assignee) to compensate it for the theft from it of a business opportunity between January and October 2011. As at the date of dissolution of GBR, it did not actually have that business because of the breaches of duty by Mr Monks and it thus could not have distributed any value in this respect to its shareholders. It could not have sold or otherwise disposed for value of the business which it was meant to have had at the date of its dissolution because Mr Monks, though GBRK, had stolen it. GBR was restored to the register in January 2017 and wound up, its liquidators assigning its claims to Mr Davies. It would be unjust, it seems to me, in those circumstances to limit any award of interest to the period before its striking off. GBR did not receive, and had not yet received, any compensation for the business it should have had in October 2011 and it would be wrong in my view to award interest on the basis that it **did** have such sums in October 2011 and was able to distribute them.
196. Further, it seems to me that, if it is relevant, section 1032 **does** have effect to allow me to award interest which I might not have been able to award otherwise. In the case of HOUNSLOW BADMINTON ASSOCIATION V REGISTRAR OF COMPANIES [2013] EWHC 2961 (Ch) Vos J held:

*When a decision is taken either by the Registrar or by the court, in my judgment it matters not which, to restore the company to the Registrar [sic], the authorities make clear that the effect of sections 1028(1) and 1032(1) is very*

*extensive indeed. Everything that would have happened, had the company continued in existence, is effectively deemed to have happened.*

197. That case was cited by Cockerill J in the BAE case. That case, in turn, involved a company which had entered into a contract and then been struck off. The contract allowed the other contracting party to terminate the contract on the happening of an “event of default” which included the company being struck off. Following the company being struck off, and before its restoration, the other contracting party served notice terminating the contract. The High Court, on appeal, held that the contract had been validly terminated despite the subsequent restoration of the company and the terms of section 1028 CA 2006 (which are to the same effect as section 1032). Whilst acknowledging the wide effect of these sections, Cockerill J held that there was a difference between direct or automatic consequences of dissolution and secondary or indirect consequences of dissolution: whilst sections 1028 and 1032 have the effect of undoing direct or “automatic consequences” they will not undo other consequences.

She said this:

*108 As Vos J puts it neatly in Hounslow [2013] EWHC 2961 (Ch) at [43]: “Everything that would have happened, had the company continued in existence, is effectively deemed to have happened.” That is consistent with the statutory purpose, so far as it can be discerned, and with the wording of the section. **It is also very different from saying: everything which has in fact happened, including acts by third parties in reliance on their knowledge of the then status quo, must be deemed not to have happened and unpicked.***

*109. In my judgment the authorities indicate ground for caution when one moves outside this territory. Firstly, they indicate that the deeming is directed towards the doing or undoing of “incidents, which if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it” or “consequences which followed from the company having been struck off or dissolved”. It is directed to the direct or automatic effects of the removal from the register...*

*115. I have reached the conclusion that this line between direct and indirect consequences is the line which the statute and the authorities indicate needs to be drawn. The deeming provision will have very wide application indeed. It will be (as it has been in the authorities) taken to undo the automatic consequences of a removal from the register or dissolution which is later undone in circumstances to which the deeming provision applies.*



*116. But there will be situations where consequences arise which are not automatic. A lease will become forfeit not because of the fact of the dissolution, but because, either consequent on that dissolution or independently of it, the lessee does not pay its rent. A contract will be repudiated for a similar reason and that repudiation will be accepted-as happened in Contract Services . Or, as in this case, a contractual party will have a choice as to whether to terminate a contract simply because of the removal from the register. The termination will not flow from, or be automatically a consequence of dissolution. It will occur where the party decides to make that decision and takes the step necessary to bring about that termination. Such consequences are, in my view, outwith the deeming provision.*

(emphasis added)

198. Thus she was effectively holding that the deeming provisions did not have effect to undo acts by third parties who had validly exercised rights on the basis of the “then status quo” which was that the company had been struck off. That is not the case here. In my view when it comes to considerations as to the award of interest, the wide ambit of the deeming provisions will apply to allow the court to award interest in favour of a company which has been restored to the register for a period during which the company was dissolved having been struck off.

199. Nor do I think that the Judge’s ruling in paragraphs 374 to 395 of the judgment has any relevance on this point. The Judge was specifically addressing the point set out at paragraph 387 of the judgment which he described as follows:

*...we are not concerned with the question of the existence or non-existence of the company (GBR) as such. Nor are we concerned with the validity and effectiveness, as against the company, of acts undertaken in relation to it. Instead, we are concerned with the position of (and indeed liability of) other parties who, although officers of the company, are separate legal persons. The liability of such persons is not obviously a matter falling within the scope of the deeming provision in s.1032(1) .*

Having reviewed the authorities, including the BAE case, (at paragraph 395) he rejected

Mr Davies’ argument:

*that Mr Monks and Mr Ford were (and are) subject to continuing duties even today by means of the deeming provision in CA 2006 section 1032(1)*

200. Again, it seems to me that this ruling has no application here. By reason of section 1032(1) CA 2006, GBR is deemed to have continued to exist in the period between its dissolution and its restoration. It seems to me that this is sufficient to allow it to claim interest for that period on sums to which it was, as I have held, entitled on the date of its dissolution.

201. Thus, I can, if I see fit, award interest for a period from January 2011 and beyond 18<sup>th</sup> October 2011.

202. Nor do I think that I am limited in my discretion to award interest by the fact that, having been restored to the register on 23<sup>rd</sup> January 2017, GBR was placed into liquidation. It still technically exists and, more importantly, it has assigned its (as yet unsatisfied) claim to Mr Davies. Mr Cook did not seek to persuade me otherwise.

203. In paragraph 153 of his Written Closing Submissions, Mr Cook made the following observations:

*The Court has “undoubtedly wide discretion” to decide the rate of interest, the length of time it should be paid, and whether it be simple or compound. The aim of interest is not to punish the defendant, but to compensate a claimant for the loss of the use of the money.*

The quotation is from the judgment of McCombe LJ in the Court of Appeal in the case of WATSON V KEA INVESTMENTS LTD [2019] 4 WLR 145 (at paragraph 24).

204. On the question of whether I should award simple or compound interest and the rate of interest, Mr Cook drew my attention to a number of authorities.

205. The general principles, certainly so far as commercial cases are concerned, were summarised in the Court of Appeal in the case of CARRASCO V JOHNSON [2018] EWCA Civ 87. That was a case in which a Claimant sued for recovery of unpaid loans and the question before the Court of Appeal was whether the judge was correct to award

statutory interest at “only” 3% per annum. Having had cited to him a number of cases (some of which have been cited to me), Hamblin LJ said this (at paragraphs 17 and 18):

*The guidance to be derived from these cases includes the following:*

*(1) Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as compensation for damage done or to deprive defendants of profit they may have made from the use of the money.*

*(2) This is a question to be approached broadly. The court will consider the position of persons with the claimants' general attributes, but will not have regard to claimants' particular attributes or any special position in which they may have been.*

*(3) In relation to commercial claimants the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers.*

*(4) In relation to personal injury claimants the general presumption will be that the appropriate rate of interest is the investment rate.*

*(5) Many claimants will not fall clearly into a category of those who would have borrowed or those who would have put money on deposit and a fair rate for them may often fall somewhere between those two rates.*

*Challinor and Reinhard are examples of cases which were held to fall within that mid-category, justifying a blending between rates, and in both cases interest was awarded at 3% over base rate.*

In paragraph 26, Hamblin LJ dealt with a number of the specific grounds of appeal in that case. He said this:

*Dealing with each of the specific grounds of appeal, as elaborated in argument:*

*(1) The actual cost of borrowing - the court is concerned with the general attributes of a claimant, not what the particular claimant actually did or otherwise would have done or, in this case, the claimed actual cost of borrowing...*

*(3) The commercial rate - although borrowing rates for individuals may be higher than for businesses, that is one of the reasons why, having regard to general attributes, it is often unrealistic to approach the issue on the basis that the money would all have been replaced by money borrowed. A blended rate may well result in rates comparable to the commercial rate, given the much lower deposit rate.*

*(4) Overall fairness – interest is awarded to compensate the claimant for being kept out of money rather than for damage done, such as alleged lost investment opportunities, or to punish or to call the defendant to account for his use of the money. The merits of the underlying case are not relevant to the award of interest, but delay in the prosecution of that case may well be ....*

The court upheld the award of interest at the rate of 3% per annum

206. As stated, that was a commercial case involving statutory interest. It appears that different considerations may apply in cases involving breach of trust, where of course the court's inherent jurisdiction is also involved.

207. WATSON V KEA INVESTMENTS was a case involving a successful claim against a company, S, for return of sums held by it as constructive trustee following the setting aside by the court of joint venture agreements on the grounds of deceit and breach of fiduciary duties on the part of the defendant. The judge, Nugee J, held that the claimant was entitled, as against S, to compound interest under the equitable jurisdiction of the court at the rate of 6.5% per annum. The defendant was held liable to pay to the claimant equitable compensation assessed as the balance of the sum (including the interest) owing by S to the claimant but which S was unable to pay.

208. In his judgment at first instance (quoted at paragraph 19 of McCombe LJ's judgment), Nugee J said this:

*45. First, none of the recent cases have been concerned with the question I am concerned with, namely what is the appropriate rate of interest to be awarded against a defaulting trustee...*

*46. Second, I do not see any reason to adopt a rate based on the cost of borrowing in such a case. There appears to be no historical precedent for it, and I do not see any logical justification for it. Unlike the case of a trading business or commercial claimants (where the general presumption, as referred to by Hamblen LJ in the Carrasco case, that they would have borrowed less seems a realistic one) it seems entirely unrealistic to assume that a conventional trust fund would borrow at all. It is not the practice of such settlements to borrow to fund their investment activities, and there is therefore no logic in a presumption that they would have borrowed less.*

*47. Third for the reasons I have given above it seems to me both logically correct in principle, and consistent with the early cases, that the rate should reflect the fact that by depriving the fund of capital, the defaulting trustee also deprives the fund, until the capital loss has been made good, of the income that such capital would have earned. That points to a rate based on a suitable investment return...*

*49. I conclude that in the ordinary case of a defaulting trustee who is liable to make good a capital loss to the fund, the equitable interest to be awarded can be regarded as a means of compensating the fund for the income that has been lost to the fund; and that the rate of interest to be awarded can therefore be one that acts as a proxy for the investment return that trust funds with the general*

*characteristics of the fund in question could expect to make. That is indeed the view I expressed in the main judgment, but I have approached the matter afresh in the light of the authorities cited to me and the arguments put forward; having done so, I see no reason to take a different view.*

209. The judge's reasoning was approved by the Court of Appeal. In paragraphs 71 to 73 of his judgment McCombe LJ said this:

*In my judgment, in dealing with questions of interest on equitable compensation in trust cases, the courts have consistently tried to make awards that were suited to investment of trust funds and the economic realities of the times...later cases (even at common law-see the Carrasco principles) debate the relative merit of borrowing rates and deposit rates in various types of case. There can be no doubt, however, that the courts have sought to find, in each individual case, a suitable proxy rate for the general characteristics of the claimant entitled to the equitable remedy. As Nugee J pointed out, in para 50 of the Interest Judgment, quoted above, this is entirely in accord with the approach to the interest award, in different circumstances, in Carrasco v Johnson [2018] EWCA Civ 87: see para 27 of Hamblen LJ's judgment. A borrowing rate is simply not the realistic proxy in a case of this sort. It is unrealistic to assume that the deprived fund would have borrowed to invest; it would not have done so. It is unrealistic to assume that the trust fund, duly replaced, would have been placed (in breach of trust, one might add) on deposit with no regard to capital accretion; it would not have been so placed. That is simply not the real world of trustee investment and it is also unlike the world in the 19th century when trustees' investment powers were substantially more restricted.*

In a brief concurring judgment, Hamblen LJ (who, of course, had given the lead judgment in the CARRASCO case) said this (at paragraphs 78 and 79):

*...I agree that Carrasco v Johnson [2018] EWCA Civ 87 did not concern interest in relation to equitable compensation or the liabilities of defaulting trustees and that the principles I there summarised did not address such cases. I was initially troubled by the idea that a claim for interest could include any element of capital return, as reflected in the total return figures used in this case. As explained by McCombe LJ, however, interest awarded against a defaulting trustee is awarded as a proxy for profit. If, as the case law shows, interest is meant to reflect the return that should have been obtained on the trust funds then, in the modern world of trustee investment, there is no reason why in an appropriate case it should not reflect total return.*

210. As stated, however, that was a case involving interest on money effectively paid away in breach of trust and held by the recipient as constructive trustee. It was thus equivalent to a case involving the misapplication of existing trust property in which (as I have discussed in relation to Issue 1(d) above) the court will award equitable

compensation on the substitutive rather than the reparative basis: an existing fund has been paid away and must be restored. Thus, it appears that interest is assessed in the same way: it is payable on the basis that the fund had the relevant sums at all material times and would have invested them.

211. Again as stated in relation to Issue 1(d) above, I think that this case does **not** involve the misapplication or deprivation of an existing trust fund or trust property. It is, as I have held, a case in which equitable compensation falls to be assessed on the reparative basis. What GBR lost was a business opportunity not an existing fund. As the Judge held (in paragraphs 262, 267-6, 319 to 326 of the judgment), apart from the funds belonging to GBR which were diverted for the benefit of GBRK (£170,685-which he ordered to be repaid), Mr Monks' breaches of duty did **not** involve the misapplication of pre-existing corporate assets.

212. As such, in my judgment, when I consider the exercise of the "wide discretion" which I have in relation to the award of interest (whether statutory or equitable) I should, apart from the £170,685, treat this case as equivalent to a common law damages claim to which the principles set out in the CARRASCO case apply and in which interest is assessed by reference to the rate at which the relevant party, here GBR, could have borrowed the sum awarded.

213. Mr Cook drew my attention to a number of other cases in which the appropriate rate of interest was discussed. In LINDSAY V O'LOUGHNANE [2010] EWHC 529 (QB) (at paragraphs 142 and 143), FIONA TRUST V PRIVALOV [2011] EWHC 664 (Comm) (at paragraphs 13 to 16) and KITTCATT V MMS [2017] EWHC 786 (Comm) (at paragraph 5) there is mention of the "conventional" figure of 1% above Bank of England Base Rate traditionally awarded in the Commercial Court. However, it is also pointed out in those cases that this is only a presumption and that in cases involving

individuals or small businesses (who may not be able to borrow at such favourable rates as larger companies) a higher rate may be appropriate. I also note that, as the courts have repeatedly emphasised:

*The fashioning and calculation of a representative or proxy rate is more art than science; and it is more in the nature of “one size fits all” than “made to measure”. It is an exercise of discretion rather than of settled rules. The Court must do its best to fashion a proxy which suits the nature of the case and the claimants as a whole, though it does not and cannot reflect the individual financial position of each claimant.*

(per Hildyard J in CHALLINOR V BELLIS [2013] EWHC 620 (Ch) at paragraph 38).

214. I heard no evidence in relation to interest.
215. Dealing with the claim against Mr Monks, I rule as follows.
216. I think that GBR in this context is akin to an individual or small businessman who would not have been able to borrow money as easily as a larger, longer established and better resourced company. Thus so far as the rate of interest is concerned, doing the best I can, I think that a rate of 2% above Bank of England Base Rate from time to time is the appropriate rate of interest to award.
217. So far as the period for which interest should be awarded, given the basis of the compensation I have ordered Mr Monks to pay, I see no reason why it should not be payable from 1<sup>st</sup> November 2011, that is a number of weeks after the date on which I have held that GBR would have ceased to trade, at which date it ought to have had a business which it could have sold.
218. As I have stated, this case is more akin to a claim for damages at common law, where damages are assessed on the reparative basis than to a case of breach of trust, such as KEA INVESTMENTS, in which equitable compensation is assessed on the substitutive basis. Thus I see no reason to award other than simple interest on the sum of £599,315.

219. However the sum of £170,685 was different. That was a sum which belonged to GBR and was paid away by Mr Monks in breach of fiduciary duty. It seems to me therefore that the principles set out in the KEA INVESTMENTS case ought to apply to that sum. I have heard no evidence as to what rate of return could have been achieved had that sum been invested in October or November 2011. However, in recognition that any interest ought to include an “element of capital return” and to stand as “as a proxy for profit”, and again doing the best that I can, I will award compound interest on the sum of £170,685. Interest will be at the rate of 2% above Bank of England Base Rate from 1<sup>st</sup> November 2011 until the capital sum was paid, compounded annually on 1<sup>st</sup> November of each year.

220. Having made those rulings on interest in the context of the claim against Mr Monks, I will return briefly to the question of interest when I come to deal with the claims against Mr Ford and GBRK.

### **THE CLAIMS AGAINST GBRK**

**Issue 2: Having elected for equitable compensation against Mr Ford and Mr Monks, is it open to Mr Davies to elect for a declaration of constructive trusteeship and/or an account of profits as against GBRK? If so, and if a remedy is awarded against more than one Defendant or if multiple remedies are awarded against one or more Defendants, how should the awards be set off against one another?**

221. As set out above, Mr Davies seeks equitable compensation from Mr Ford and Mr Monks but, in his primary case, seeks an account of profits from GBRK. Mr Cook for the Defendants however asserts that as a matter of law:



- a. having elected for, and received, equitable compensation against Mr Monks, Mr Davies is not entitled to claim the inconsistent remedy of an account of profits against GBRK;
- b. GBRK is, or ought effectively to be, liable to pay the same compensation as Mr Monks, but the claim against GBRK is entirely time-barred; and
- c. in any event, however, Mr Davies can only claim up to the higher of the two inconsistent remedies.

222. Mr Shaw submits that, whilst the court's overarching concern is to prevent double recovery, there is no legal inconsistency between Mr Davies choosing to sue Mr Monks and Mr Ford for breach of fiduciary duty and to claim equitable compensation whilst at the same time suing GBRK for knowing receipt claiming an account of profits: the remedies are different, the parties are different and so are the causes of action. He acknowledges that, whilst Mr Davies cannot claim against GBRK a declaration of constructive trusteeship in respect of any property or assets acquired by it prior to 22<sup>nd</sup> May 2011, he claims that all of the business opportunities, property, assets, income and benefits carried on or acquired or earned by GBRK between 22<sup>nd</sup> May and 18<sup>th</sup> October 2011 were carried on or acquired or earned for the benefit of GBR.

223. There were a number of relevant authorities cited to me on this point.

224. The general principle is set out in the case of TANG MAN SIT V CAPACIOUS INVESTMENTS [1996] 1 AC 514, in which the Privy Council said this (at pages 520-1):

*..their Lordships accept the defendant's submission that there is an inconsistency between an account of profits, whereby for better or worse a plaintiff takes the money the defendant received from the use he made of the property, and an award of damages, representing the financial return the plaintiff would have received for the same period had he been able to use the property. These remedies are alternative, not cumulative. A plaintiff may have one or other, but not both. (Strictly, the claim for damages might be more accurately formulated as a claim for compensation for loss sustained by a*

*breach of trust. In the present case nothing turns on the historic distinction between damages, awarded by common law courts, and compensation, a monetary remedy awarded by the Court of Chancery for breach of equitable obligations. It will be convenient therefore to use the nomenclature of damages which has been adopted throughout this case.)...*

*The law frequently affords an injured person more than one remedy for the wrong he has suffered. Sometimes the two remedies are alternative and inconsistent. The classic example, indeed, is (1) an account of the profits made by a defendant in breach of his fiduciary obligations and (2) damages for the loss suffered by the plaintiff by reason of the same breach. The former is measured by the wrongdoer's gain, the latter by the injured party's loss...*

*Faced with alternative and inconsistent remedies a plaintiff must choose, or elect, between them. He cannot have both. The basic principle governing when a plaintiff must make his choice is simple and clear. He is required to choose when, but not before, judgment is given in his favour and the judge is asked to make orders against the defendant.*

Thus it is clear that a claimant cannot have both an account of profits and equitable compensation or damages against the same breaching fiduciary; but what about the situation where (as here) the claimant seeks damages from the breaching fiduciary but an account of profits from another defendant who is guilty of knowing receipt?

225. It appears that there is only one case in which that question has been directly addressed. That is the decision of Cockerill J in FM CAPITAL PARTNERS V MARINO [2018] EWHC 2905 (Comm). In that case, the claimant, an asset management company, invested in financial products offered by a bank which paid introductory commissions to the first and second defendants, directors of the claimant. The claimant subsequently brought claims against those two defendants, among others, alleging breach of fiduciary duty, dishonest assistance and bribery. At the trial, the judge found the first defendant liable for breach of fiduciary duty, dishonest assistance and bribery. As to remedies, the claimant elected for an account of profits in respect of the breaches of fiduciary duty and dishonest assistance and restitution in respect of the bribes. It was common ground that, as against each defendant, the claimant could not claim both an account and compensation but was required to elect between liability to

account and damages for actual loss prior to final judgment. Moreover, the claimant accepted that there could be no double recovery and “made clear that recoveries from one defendant by way of profit would go in fact to reduce loss against the other”. However, the judge rejected the defendants’ submission that the claimant had to exercise any right of election between remedies consistently as against all defendants.

226. The judge in that case recorded the defendant’s submission as follows (paragraph 74):

*where a claimant has claims against more than one defendant arising out of the same facts (and in particular, where the claimants are jointly liable), the claimant must exercise any right of election between remedies consistently as against all defendants.*

In conclusion (at paragraphs 88 to 92) she said this:

*88. The authorities on election between remedies are based on there being a **real inconsistency in pursuing both remedies**. That will plainly be there vis a vis a single defendant. **I can actually see that there may be circumstances where if there are joint tortfeasors, both of whom breached essentially the same fiduciary duty, there would be a similar inconsistency in electing for different remedies as between them. But the argument becomes strained when one advances, as here, into the territory of joint and several liability and still more so when the basis of the liability between the two defendants is essentially different (breach of fiduciary duty versus dishonest assistance).***

*89. This seems to be consistent with the passage from the judgment of Arden LJ (as she then was) in Ramzan v Brookwide [2011] EWCA Civ 985, [2012] 1 All ER 903 at paragraph [63], speaking of Tang Man Sit v Capacious Investments Ltd [1996] AC 514 (and albeit that it is directed to the single defendant scenario):*

*"Lord Nicholls's judgment demonstrates that the matter is not as complex as it might seem. The principle is that damages must be awarded on a consistent basis. Once the claimant has elected to receive compensatory damages for a particular wrong, he may not also claim an account of profits or vice versa. If, however, there are, for instance, separate wrongs, the claimant may be able to make a different election for each wrong."*

*90. Thus...it is clear that a genuine inconsistency which makes it inappropriate for both remedies to be granted must be discernible. On the facts of the present case, and in particular given the different underpinning of the relationship which gives rise to the election, as well as the essentially different nature of the key liability of each defendant I do not consider that recovery of one remedy against one defendant and a different one against the other offends against principle.*

91. ...*The temptation is to conclude that if inconsistent election vis a vis joint tortfeasors is permissible it becomes something of a cherrypickers' charter. Yet having considered the matter I conclude that this argument is a red herring. As was noted in the claimant's submissions, these sorts of oddities are inherent in the position of a defendant in a claim featuring multiple defendants and overlapping rights. A successful claimant will often choose not to seek recovery of losses in a way which is equitably spread over the defendants, but go for one more attractive target first. And, too, recovery of profits made dishonestly may be seen as prioritised for policy reasons.*  
(emphasis added)

227. There is thus no reported case in which a party has been prevented from claiming equitable compensation against one defendant and an account of profits from another defendant. Mr Cook however submits that the outcome of the MARINO case was due to the fact that the two defendants had different roles, and took different actions, in respect of the wrongdoing, as one would expect from two individuals. Here, he submits, while GBRK and Mr Monks have legally distinguishable bases of liability (and indeed that against GBRK is, at least partially, time-barred), they have no distinct liabilities on the facts. This analysis is, he says, supported by Soole J who, in WILLIS LTD V JARDINE LLOYD THOMPSON [2016] EWHC 723 (QB), distinguished between causes of action and wrongs. At paragraphs 26, 27 and 30, he said this:

*If I am wrong on that, the question arises as to whether the election embraced the claim for an account of profits for breach of fiduciary duty. Willis acknowledges that an election against one joint tortfeasor would equally amount to an election against the other joint tortfeasor. However, Willis argues that this claim is in respect of a discrete non-tortious claim for breach of fiduciary duty against the third and fourth defendants alone.*

*[Counsel's] response is that this is wrongly to conflate the wrong with a cause of action, and that if the claims arise from the same wrong, then election against one is election against all. Support for that conclusion is found, as I accept, in the Court of Appeal decision in Ramzan, and the judgment of Arden LJ. It is set out in various passages, but it is also implicit in her sentence at paragraph 63: "If, however, there are, for instance, separate wrongs, the claimant may be able to make a different election for each wrong."*

...

*As I say, I agree with [counsel's] general proposition of the distinction between wrongs and cause of action, but I consider that the right time to consider that distinction is at the true time for election, namely at the time of judgment. For these reasons, I dismiss the application to the extent based on the point of law.*

Mr Cooks submits that, whether the cause of action is in knowing receipt or for breach of fiduciary duty, here, the underlying wrong is the same.

228. In response, Mr Shaw submits that, whilst Mr Davies could not, for example, claim an account of profits against Mr Ford and equitable compensation against Mr Monks (as both had been guilty of the same breach of fiduciary duties), he **could**, as here, claim equitable compensation against Mr Monks and Mr Ford and an account of profits against GBRK as the latter's liability is different. He gave an example of a director who steals £100 from company A and gives it to company B which then uses it to make another £100 in profit. Company A would have a claim for an account of profits in the sum of £200 against company B as a knowing recipient and a claim for the same amount by way of equitable compensation for breach of fiduciary duty against the breaching director.

229. I agree with Mr Shaw for the reasons he gives. The claim against GBRK is as knowing recipient whilst that against Messrs Ford and Monks is for breach of fiduciary duty. Applying the words of Cockerill J in the MARINO case, the basis of the liability between the two sets of defendants is essentially different and there is no real inconsistency in pursuing different remedies. Put another way, the wrong committed by Mr Monks and Mr Ford is different, both legally and factually, from that committed by GBRK: Mr Ford and Mr Monks had different roles, and took different actions, in respect of the wrongdoing than GBRK.

230. That does not of course mean that: the court will not be astute to avoid any double recovery; Mr Davies is otherwise entitled to the sums he claims. I am simply here ruling that Mr Davies is not, as a matter of law, prevented from seeking to recover equitable damages from Mr Ford and Mr Monks whilst at the same time claiming an account of profits against GBRK.

**Issue 3: Is GBRK’s liability as a knowing recipient restricted to its receipt of pre-existing property transferred to it in breach of Mr Monks’ duties to GBR as set out in paragraph 272 of the judgment (as asserted by GBRK) or does GBRK’s liability extend beyond paragraph 272 to all business, business opportunities, property, assets, income and benefits received by GBRK in breach of Mr Ford’s and Mr Monks’ duties as directors of GBR (as asserted by Mr Davies)? On either case, what property was received and when?**

Claimants submissions

231. In this regard Mr Shaw submitted as follows:

- a. The relief sought against GBRK is based upon the following key findings in the judgment:
  - (1) Mr Monks was a director of GBR from his appointment on 30<sup>th</sup> November 2010 to the dissolution of GBR on 18 October 2011. In diverting the business and opportunities to GBRK, Mr Monks acted in dishonest breach of his duty to GBR under section 175 CA 2006 to avoid conflicts of interest and his duty of good faith under section 172 CA 2006 (paragraphs 300-303 and 338-349).
  - (2) The fact that GBR had been dissolved does not absolve Mr Monks of ongoing responsibility in relation to his former status as a director (paragraph 393);
  - (3) GBRK is liable in knowing receipt on the basis that it was fixed with knowledge of Mr Monks’ breaches of duties (paragraphs 352-354); and
  - (4) It is common ground between the parties that knowing receipt claims against GBRK are subject to a six-year limitation period.
- b. He, thus, accepts that Mr Davies cannot claim against GBRK a declaration of constructive trusteeship in respect of any property or assets acquired by GBRK between the date of incorporation (7<sup>th</sup> January 2011) and 22<sup>nd</sup> May 2011 (what he calls the “First Period”). However, he submits that all business opportunities,

property, assets, income and benefits carried on, acquired or earned by GBRK in the period between 22<sup>nd</sup> May 2011 and 18<sup>th</sup> October 2011 (what he calls the “Second Period”) were carried on, acquired or earned by GBRK for the benefit of GBR.

232. Mr Shaw further submits that the Defendants are wrong to advance a defence that a claim in knowing receipt: (i) requires GBRK to have received pre-existing property of GBR; and (ii) requires there to have been a direct causal link between GBRK’s acquisition of the corporate assets and Mr Monks’ breaches of duty (see the Re-Amended Points of Defence, at paragraphs 44 to 45). These assertions are wrong as a matter of law and unduly limit the scope of the remedy in knowing receipt against GBRK.

- a. Trust property for the purposes of knowing receipt is not limited to “pre-existing property” of GBR. It includes any property which the fiduciary has acquired for his own benefit but which, consistently with his fiduciary duties, he ought to have acquired on behalf of the company. He refers me to ULTRAFRAME (UK) LTD V FIELDING [2005] EWHC 1638 (at paragraphs 1487 to 1494). In particular, such property can include a “corporate opportunity” which has been diverted in breach of fiduciary duty: he refers me to COOK V DEEKS [1916] AC 554
- b. As the Judge held in paragraph 270 of the judgment, even in cases not involving the misapplication of pre-existing corporate property, the appropriate remedy may be a proprietary one: see IN RE BHULLAR BROS. LTD [2003] EWCA Civ 424.
- c. The remedies available to a beneficiary against a knowing recipient are the same as those available against an ordinary express trustee. In particular, the court

may order an account of profits against a knowing recipient, even where no corresponding loss has been suffered by the beneficiary: see NOVOSHIP (UK) LTD & ORS V NIKITIN & ORS [2014] EWCA Civ 908 (at paragraphs 82 to 93) and FIONA TRUST & HOLDING CORPORATION & ORS V PRIVALOV & ORS [2010] EWHC 3199 (Comm) (at paragraph 62).

- d. While there must be a reasonable relationship between the fiduciary's breach of duty and profit for which an account must be ordered, there is no need for the breach of duty to be the direct cause of the profit. He relies on PARR V KEYSTONE HEALTHCARE LIMITED (at paragraphs 15 to 19).
- e. The fact that GBR was dissolved on 18 October 2011 and restored on 23 January 2017 does not affect GBRK's liability in knowing receipt to the extent that it is attributable to breaches of duty by Mr Monks in the period prior to GBR's dissolution.

233. The result of all this, Mr Shaw submits, is that GBRK is liable in respect of its knowing receipt of **all** property acquired by it in breach of Mr Monks' duties to GBR. It follows, he submits, that, as at 18<sup>th</sup> October 2011 (the date of dissolution of GBR), the **entirety** of GBRK's business, assets and undertaking belonged in equity to GBR. This is because everything that Mr Monks had acquired for the benefit of GBRK by that date (including the Site, the waste management licence (WML), the vehicle operator's licence ("O" Licence), customers, plant and equipment) was acquired in dishonest breach of Mr Monks' duties as a director of GBR. Put shortly, everything that GBRK received should have been received by GBR. As at 18<sup>th</sup> October 2011, therefore, GBRK held the entirety of its business, assets and undertaking as constructive trustee for GBR.



234. If GBR (or Mr Davies, as GBR's assignee) had brought proceedings against GBRK before 7<sup>th</sup> January 2017 (i.e. within six years of GBRK's incorporation), GBR would have been entitled to a declaration of constructive trusteeship in respect of GBRK's receipts of property in both the First and Second Period. As indicated above, however, Mr Davies accepts that his claim against GBRK in knowing receipt is confined to receipts in the Second Period. However, referring to the expert accountants evidence, he invites me to find on the facts that that: (i) GBRK received substantial benefits as a result of Mr Monks' dishonest breaches of duty in the Second Period; and (ii) the receipt of such benefits, including, in particular, the right to occupy and use the Site, enabled GBRK to carry on trading after the dissolution of GBR on 18 October 2011.

#### The Defendants' submissions

235. Mr Cook takes issue with these submissions. In response, he makes the following points:

- a. He reminds me that the elements of a claim in knowing receipt are:
  - (i) receipt of the claimant's assets by the defendant;
  - (ii) such receipt arising from a breach of fiduciary duty owed to the claimant by a third party; and
  - (iii) knowledge on the part of the defendant that that property is trust property and has been transferred in breach of trust, sufficient to make it unconscionable for him to retain the benefit of the receipt.
- b. Knowing receipt must be the receipt of **property**, as opposed to a mere opportunity. Whereas a company has a claim against a fiduciary who profited from an opportunity "belonging" to the company, it has no such claim against a

third party: FHR EUROPEAN VENTURES LLP V MANKARIOUS [2014] Ch1 (at paragraph 57); COMMONWEALTH OIL & GAS CO LTD V BAXTER [2009] SCLR 898 (at paragraphs 94-95); and FARAH CONSTRUCTIONS PTY LTD V SAY-DEE PTY LTD [2007] HCA 22 (at paragraphs 118-120).

- c. Moreover, importantly, the disposition of property must, itself, be a breach of trust or breach of fiduciary duty: see COURTWOOD HOLDINGS S.A. V WOODLEY PROPERTIES LIMITED [2018] EWHC 2163 (Ch) (at paragraph 190).
- d. Mr Monks' breaches of duty are limited to those specifically set out in paragraph 272 of the judgment. All of these, bar one (that described in paragraph 272 (v)) took place within Mr Shaw's First Period and thus any claim in respect of any property received by GBRK as a result of these specific breaches is statute barred.
- e. He submits that, in any event, on the facts as made clear by the expert accountants: no pre-existing assets of GBR were received by GBRK in the Second Period; no material profits were made using any opportunities "received" in the Second Period; any profits made in the Second Period were, in any event too remote.

### Discussion

236. Where a person is not himself a fiduciary, he may become mixed up in a breach by another of a fiduciary duty. He may be liable in one of two ways: (i) as a knowing recipient of trust property or its traceable proceeds; or (ii) as a dishonest accessory to the fiduciary's breach of duty. The former is known by the shorthand "knowing receipt"

and the second by the shorthand “dishonest assistance”. However, a knowing recipient is not himself a fiduciary. The remedies available against a knowing recipient include an account of profits. This follows from the premise that the defendant is held liable to account as if he were truly a trustee to the claimant. See NOVOSHIP V NIKITIN (at paragraphs 67-8, 70-1 and 75) and FIONA TRUST V PRIVALOV (at paragraph 62).

237. The ingredients of knowing receipt were described by Hoffmann LJ in EL AJOU V DOLLAR LAND HOLDINGS [1994] BCC 143 (at 154) as follows:

*For this purpose the plaintiff must show, first a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets are traceable to a breach of fiduciary duty.*

This formulation of the elements of the claim was approved by the Court of Appeal in BROWN V. BENNETT [1999] BCC 525 (at 530), in which the Court of Appeal stressed that the receipt “must be the direct consequence of the alleged breach of trust or fiduciary duty of which the recipient is said to have notice”. See ULTRAFRAME V FIELDING (at paragraphs 1478-9) and FIONA TRUST V PRIVALOV (at paragraph 60).

238. In COURTWOOD HOLDINGS V WOODLEY PROPERTIES LIMITED (at paragraph 190) Nugee J said this:

*In my judgment therefore the ratio of Brown v Bennett is that it is a prerequisite of a claim in knowing receipt that the disposition to the recipient is "in breach of trust", that is that the disposition is itself a breach of trust (or breach of fiduciary duty). It is not enough that the disposition follows, and is caused by, other breaches of trust or fiduciary duty...*

239. Property belonging to a company is trust property for the purpose of knowing receipt where the company's property has been alienated by its directors in breach of their fiduciary duty. What counts as the company's property for these purposes was discussed by Lewison J in the ULTRAFRAME case (at paragraphs 1487 to 1494). He

identified a number of different categories or classes of property belonging to a company which could be subject to a claim in knowing receipt:

- a. Property which is vested in the company, both legally and beneficially, before any disposition in breach of fiduciary duty, will count as trust property.
- b. Property will also count as the company's property if it is property which the fiduciary has acquired for his own benefit but which, consistently with his fiduciary duties, he ought to have acquired on behalf of the company. The principle is that: "property acquired by a trustee innocently but in breach of trust and the property from time to time representing the same belong in equity to the *cestui que trust* and not to the trustee personally". Lewison J cited both A-G OF HONG KONG V REID [1994] 1 AC 324 and KEECH V SANDFORD (1726) Sel. Cas. Ch 61 as examples of this category of property.
- c. Property can consist of choses in action, for example the benefit of a contract with a third party, or a debt.
- d. Lewison J also noted that, in SATNAM INVESTMENTS LTD V. DUNLOP HEYWOOD [1999] 3 ALL ER 652, the Court of Appeal was prepared to assume that confidential information could count as trust property.
- e. So far as "corporate opportunity" cases are concerned, Lewison J said this:

*a director who diverts a corporate opportunity away from the company and towards himself holds any resulting chose in action (e.g. a contract enabling him to exploit that opportunity) on trust for the company, provided that there is a sufficient nexus between the property acquired and the breach of duty. It is possible that the corporate opportunity itself may be regarded as trust property, in the sense of being an intangible asset of the company*

240. However, at paragraphs 1492 to 1494, Lewison J then discussed the House of Lords case of CRITERION PROPERTIES V STRATFORD LTD [2004] 1 WLR 1846 in which Lord Scott had said:

*The word “receipt” in the expression “knowing receipt” refers to the receipt by one person from another of assets. A person who enters into a binding contract acquires contractual rights that are created by the contract. There may be a “receipt” of assets when the contract is completed and the question whether there is “knowing receipt” may become a relevant question at that stage. But until then there is simply an executory contract which may or may not be enforceable. The creation by the contract of contractual rights does not constitute a “receipt” of assets in the sense that a “knowing receipt” involves a receipt of assets. The question whether an executory contract is enforceable is quite different from the question whether assets of which there has been a “knowing receipt” are recoverable from the recipient. To confuse these two questions is likely to lead, and in the present case has, in my opinion, led, to further confusion.*

Thus, said Lewison J, Lord Scott distinguishes between rights held under an executory contract with the company, which do not count as trust property (or assets), and benefits received under a completed contract, which do. Lewison J then concluded that a licence agreement was not held on trust for a claimant company by reason of knowing receipt.

241. Mr Cook pointed me to the Scottish case of COMMONWEALTH OIL & GAS V BAXTER. That case involved a claim by the pursuer (claimant), COGL, that a contract (referred to as “the memorandum of understanding”) entered into by the second defender (defendant) company, Eurasia, with a third party was held on constructive trust for the former as it had been negotiated and facilitated by the first defender, Mr Baxter, who was a shareholder in the second defender, but in breach of his fiduciary duties to COGL. The court held that Mr Baxter was in breach of fiduciary duty. It was submitted that Eurasia was liable in knowing receipt. The Lord President in the Inner House of the Court of Session (the Scottish equivalent to the English Court of Appeal), having considered a slew of both English and Scottish authorities, said this (at paragraphs 94-5):

*It appears to me to be clear from the authorities quoted above that knowing receipt depends in the first place on the prior existence of an asset which is subject to a trust in favour of a beneficiary. It is the disposal of that asset, in breach of fiduciary duty, and receipt of that asset by the recipient in knowledge of that breach, which together give rise to a constructive trust over that asset in the hands of the recipient...It is equally clear, in my opinion, that the assets*

*constituted by the rights granted by the memorandum of understanding did not exist until they were granted to Eurasia (as it was soon to be named) on the date of execution of the memorandum of understanding on 7 December 2005. **There is a nebulous concept, found in some passages in COGL's pleadings, and reflected in some of counsel's submissions before us, that there was a 'commercial opportunity' which pre-dated the memorandum of understanding and which in itself constituted an asset. While the prospect of entering into the memorandum of understanding may, in business terms, properly be regarded as a commercial opportunity, it is in my view erroneous to think of it as an asset, let alone one capable of being impressed with a trust.** It was not until the memorandum of understanding was entered into that legal rights were created; and those rights were conferred immediately on Eurasia. While no doubt those rights may be regarded as assets — or, more broadly, the memorandum of understanding may be regarded as an asset — they were never the property of anyone other than Eurasia. It makes no difference that the memorandum of understanding was executed by Mr Baxter: it was executed by him as agent for and on behalf of Eurasia, and not in any other capacity. This being so, the memorandum of understanding never constituted an asset forming the property, or part of the property, of a trust in favour of COGCL to which it could lay claim as beneficiary.*

*There being, in my opinion, no receipt by Eurasia of an asset capable of being described as trust property, the claim against it based on knowing receipt falls at the first hurdle...**I observe, however, that the authorities relied upon by counsel for COGCL in this regard serve to reinforce the view I have already come to that knowing receipt depends upon the prior existence of an asset capable of being regarded as trust property.** In the passage quoted from Belmont Finance Corp v Williams Furniture Ltd (No 2) Buckley LJ spoke of the misapplication by directors of the funds of their company “so that they come into the hands of some stranger to the trust”. This presupposes the prior existence of the funds. Similar expressions may be found elsewhere. This is as might be expected, because knowing receipt is predicated in the first place upon receipt.*

*(emphasis added)*

This case is authority (albeit Scottish authority) for the proposition that a contract entered into by company B with company C cannot be an asset capable of being impressed with a trust at the suit of company A, even though the contract results from a breach of fiduciary duty by a director of company A. In those circumstances company B will not be liable to company A as a knowing recipient as there is no pre-existing asset of company A which could be received by company B in breach of fiduciary duty. Further, a “commercial opportunity”, that is the mere prospect of contracted business for company A with company C, is not an asset of company A which can be impressed

with a trust such as to make company B a knowing recipient if it is company B which actually enters into the contract and does the business with company C.

242. Mr Cook also drew my attention to the case of FARAH CONSTRUCTIONS PTY LTD V SAY-DEE PTY LTD in which the High Court of Australia said this (at paragraph 120):

*But it does not follow under the law as it stands that the information which third parties obtain from a fiduciary is trust property, or that land bought by suing that information is trust property.*

243. Mr Shaw relied on COOK V DEEKS. That is a decision of the Privy Council. Messrs Deeks and Hinds were the directors of the Toronto Construction Company. They negotiated a lucrative construction contract with the Canadian Pacific Railway. During the course of the negotiations, they decided to enter into the contract personally. However, they incorporated a new company, the Dominion Construction Company, to carry out the work. It was that company that made the profit under the contract. The Privy Council held that Messrs Deeks and Hinds were guilty of a breach of duty in the course they took to secure the contract, and must be regarded as holding it for the benefit of the Toronto Construction Company. The Board added, at p 565:

*Their Lordships have throughout referred to the claim as one against the defendants GS Deeks, GM Deeks, and TR Hinds. But it was not, and it could not be, disputed that the Dominion Construction Company acquired the rights of these defendants with full knowledge of all the facts, and the account must be directed in form as an account in favour of the Toronto Company against all the other defendants.*

As the Court of Appeal noted in the NOVOSHIP case (at paragraph 83), the Dominion Construction Company was ordered to account for the profit that it had made. The Dominion Construction Company was not a fiduciary. COOK V DEEKS is thus a case in which an account of profits was ordered against a non-fiduciary who became mixed up in a breach of fiduciary duty. To use the nomenclature in the preceding paragraph:

The Dominion Construction Company was company B which was held liable to the Toronto Construction Company, which was company A.

244. However it is important, in my view, to look carefully at the facts of that case. It is quite clear that the breaching fiduciaries, Messrs Deeks and Hinds, entered into the contract themselves before it was “taken over” (in the words of the Privy Council) by the Dominion Construction Company. The contract had been entered into by Messrs Deeks and Hinds as contracting parties and in breach of their fiduciary duties as directors of the Toronto Construction Company. The contract was thus, at the date it was entered into and at the date on which it was “taken over” by the Dominion Construction Company, a chose in action held on trust for the Toronto Construction Company. It was thus, as Lewison J pointed out in the ULTRAFRAME case, property belonging to the Toronto Construction Company which was trust property for the purpose of knowing receipt.

245. Thus I do not think that COOK V DEEKS is authority for the proposition advanced by Mr Shaw that trust property for the purposes of knowing receipt is not limited to “pre-existing property” of GBR such that all business opportunities, property, assets, income and benefits carried on, acquired or earned by GBRK in the Second Period were carried on, acquired or earned by GBRK for the benefit of GBR. In my judgment the authorities show that, in order to be trust property for the purpose of knowing receipt, there has to be either: (i) a pre-existing asset belonging to GBR (which can include the benefit of a contract entered into by it); or (ii) an asset (including the benefit of a contract) acquired **by the fiduciary** (here Mr Monks) in breach of duty which has subsequently been transferred or assigned to the knowing recipient. The latter was the case in COOK V DEEKS. In either case, the asset or property will be impressed with a trust in the hands of the recipient for the benefit of the company.



246. Thus I think that the passage in the COMMONWEALTH OIL & GAS case cited above and the propositions derived from it represent the law in England as well as that of Scotland. A mere “corporate opportunity”, that is the uncontracted prospect of business, cannot constitute the property of a company for the purposes of knowing receipt. I do not think that anything said by Lewison J in the ULTRAFRAME case detracts from that.

247. Thus, property acquired directly by GBRK, or contracts entered into directly by GBRK cannot be assets capable of being described as property or assets received by GBRK on trust for GBR. Further, the mere fact that GBRK entered into contracts and subsequently did business with third parties which contracts could have been entered into by GBR, does not make the prospect or expectation that GBR had of entering into those contracts an asset of GBR which can be knowingly received by GBRK.

248. Further, I agree with Mr Cook when he submits that the disposition of the relevant property must, itself, be a breach of trust or breach of fiduciary duty. I do not accept Mr Shaw’s submission there is no need for the breach of duty to be the direct cause; that a “reasonable relationship” is all that is required. The law is clearly set out by Nugee J in the passage from the COURTWOOD HOLDINGS case set out above. The KEYSTONE HEATHCARE case relied on by Mr Shaw was not a case of knowing receipt by a non-fiduciary and nothing there said, in my judgment, supports Mr Shaw’s argument.

249. Thus one cannot, in my judgment, simply assert, as Mr Shaw does, that everything that GBRK had acquired by 18<sup>th</sup> October 2011 was acquired in dishonest breach of Mr Monks’ duties as a director of GBR. In order to make good a claim in knowing receipt the claimant has to point to specific assets or property acquired as a result of a specific breach or breaches of duty.

250. I have already held that the Judge confined his findings of breach of duty by Mr Monks to the specific matters set out in that paragraph 272 of the judgment. Thus, any claim in knowing receipt would have had to focus on assets or property received by GBRK as a result of those specific breaches. However, as Mr Cook points out, apart from the breach described in paragraph 272 (v), all of these breaches occurred within the First Period. Thus any remedy for receipt of the property or assets which GBRK derived from those breaches is time-barred (see paragraph 353 of the judgment). It is worth here recalling the Judge's conclusions (at paragraphs 262, 267 and 268 of the judgment) to the effect that, as at late 2010, GBR in effect had few if any actual assets in any event. Insofar as it could be said that property, such as plant and machinery, which had belonged to GBR was received by GBRK then any such receipt was in the First Period. As such, as any trust imposed on a knowing recipient is "purely remedial" (see e.g. the NOVOSHIP case at paragraph 70 and, further, below), then no trust will arise in regard to such property and its proceeds.

251. I do not agree with Mr Shaw when he submits that, as at 18<sup>th</sup> October 2011, the entirety of GBRK's business, assets and undertaking belonged in equity to GBR. I note that (as I have already recorded) the Judge declined, albeit in a different context, to hold that the entirety of GBRK's business was held on constructive trust.

252. Thus, in my judgment, any claim in knowing receipt against GBRK is limited to receipt by that company of assets or property which result from Mr Monks' breach of duty identified by the Judge at paragraph 272 (v) of the judgment.

**Issue 4: In respect of which (if any) of GBRK’s assets is Mr Davies entitled to a declaration of constructive trusteeship? In particular, is he entitled to a declaration that GBRK holds the Site on constructive trust?**

253. In his closing submissions, Mr Shaw confined Mr Davies’ claim in this regard to one that GBRK holds the freehold of the Site on constructive trust for him.

254. By way of reminder, the relevant facts are these.

- a. Prior to June 2011 the Site was owned by Greenbox Assets Ltd (“GAL”) (formerly known as Skip It Property Investments Ltd) subject to a mortgage and charge in favour of Barclays Bank.
- b. The Judge held (at paragraph 262(i) of the judgment) that there was no formal arrangement in place for GBR to occupy and trade from the Site. He held (at paragraphs 94 to 101 of the judgment) that, as set out in the Handover Note supplied by Mr Davies to Mr Ford, it was intended that GAL would remain the owner of the Site and that the Barclays mortgage would be serviced by payments to come from the income produced by GBR (which would take over the operations at the Site and fund the acquisition of new vehicles and equipment). A draft Licence Agreement to allow GBR to occupy the Site was produced but never formally entered into (see paragraph 108 of the judgment).
- c. Although Mr Monks was not a director of GAL, the Judge held that he must have been aware of the Barclays mortgage and the ownership of the Site (see paragraphs 157 to 164 of the judgment).
- d. At some stage prior to 17<sup>th</sup> March 2011, GBRK took a lease of the Site from GAL. Mr Shaw calls this the “the First Lease”. In the judgment at paragraphs 160-164, the Judge records a letter dated 17<sup>th</sup> March 2011 from a property consultancy, GVA, addressed to the directors of GAL. This refers to a lease

granted by GAL to GBRK for a term of seven years (less one day) commencing on 1<sup>st</sup> December 2010. The GVA letter noted that “*the lease has been entered into without the consent of the charge holder...*”. It would appear, therefore, that the First Lease was granted to GBRK without the consent of Barclays. Mr Shaw submits that it is to be inferred that the terms of the Barclays mortgage excluded GAL’s right, as mortgagor, to grant leases under section 99 of the Law of Property Act 1925.

- e. On 23<sup>rd</sup> June 2011, receivers acting on behalf of GAL sold the Site to Benchmark Realty Limited (“Benchmark”) for £527,000. It is accepted that Benchmark was not connected in any way with the Defendants and that the purchase and subsequent grant of the Second Lease by Benchmark (see below) were arm’s-length transactions. See paragraphs 232 to 237 of the judgment.
- f. On the same date, 23<sup>rd</sup> June 2011, Benchmark granted a lease of the Site to Mr Monks for a term commencing on 1<sup>st</sup> December 2010 and terminating on 29<sup>th</sup> November 2017. Mr Shaw calls this “the Second Lease”. The Second Lease was expressly made subject to the First Lease. Thus, on that date, GBRK became a sub-tenant of Mr Monks.
- g. The rent under the Second Lease was £60,000 per annum for the first three years (rising to £75,000 per annum for the next two years and then to £85,000 per annum). According to the Joint Valuation expert, Mr Monkhouse, this was, if anything, above the market rent at the time (which, he says, was £45,000 per annum).
- h. In paragraph 272(v) of the judgment, the Judge held that, in taking the Second Lease, Mr Monks had acted in breach of his fiduciary duties to GBR.

- i. Mr Monks assigned the term in the Second Lease to another company, GRL, on 24<sup>th</sup> November 2015. Mr Monks was a 50% shareholder in, and director of, GRL. He executed the Deed of Assignment on his own behalf, as assignor, and on behalf of GRL as assignee.
  - j. On the same day GRL entered into what was called a “*Renewal Lease by Reference to an Existing Lease*”. Mr Shaw calls this the “Third Lease”. The Third Lease was a reversionary lease of the Site. It was to commence immediately on the expiry the term of the Second Lease on 30<sup>th</sup> November 2017 and end on 29<sup>th</sup> November 2025.
  - k. On 1<sup>st</sup> July 2016, GBRK purchased the freehold interest in the Site from Benchmark for £800,000 subject to the Second and Third Leases. By a Deed of Surrender entered into on the same day, GRL surrendered both the Second Lease and the Third Lease. Thus GBRK is now the registered freehold proprietor of the Site.
  - l. For what it is worth, it is Mr Monkhouse’s view that the market value of the freehold interest in the Site as at 1<sup>st</sup> July 2016 was £490,000 with the benefit of the various leasehold interests and £565,000 with vacant possession. Thus the price paid by GBRK on that date appears to have been greater than market value.
255. Mr Shaw asserts that GBRK holds the freehold of the Site on trust for GBR and thus Mr Davies. His argument proceeds in a number of stages:
- i. As Mr Monks caused GBRK to enter into the First Lease in dishonest breach of his duties as a director of GBR, as a knowing recipient, GBRK took the First Lease as constructive trustee for GBR.

- ii. Mr Monks committed a further breach of his duties as a director of GBR in taking for himself the Second Lease on 23<sup>rd</sup> June 2011. Mr Monks therefore took the Second Lease as a trustee for the benefit of GBR.
- iii. Further, GBRK received a real, valuable and significant benefit as a result of Mr Monks entering into the Second Lease. This is because, prior to the Second Lease, GBRK's position as tenant under the First Lease was vulnerable due to the fact that Barclays Bank had not given its consent to the First Lease. Under the Second Lease, however, GBRK's occupation and use of the Site was secured: the existence of the First Lease was expressly acknowledged in the Second Lease and it is to be inferred that Benchmark's lender consented to both leases. In Mr Monks' words during the course of his oral evidence, the Second Lease;

*“secured the site to trade from, definitely. That is what it did. It secured the site, yes”*

For this reason, Mr Shaw argues, GBRK should be regarded as having received (or re-received) its rights as tenant under the First Lease on 23<sup>rd</sup> June 2011. The grant of the Second Lease made GBRK's occupation under the First Lease lawful so far as any mortgagee was concerned. The receipt of such a benefit on 23<sup>rd</sup> June 2011 means that GBRK is fully accountable as a knowing recipient in respect of its occupation and use of the Site. It held, or continued to hold, the First Lease on constructive trust for GBR.

- iv. GRL took the assignment of the Second Lease on 24<sup>th</sup> November 2015 with notice that Mr Monks held the Second Lease as trustee for the benefit of GBR. The fact that GBR may have been dissolved some four years earlier is irrelevant, he submits. Mr Monks had full knowledge of the facts giving rise to his dishonest breach of fiduciary duty in taking the Second Lease for himself on 23<sup>rd</sup> June 2011. Given Mr

Monks' position as a director of GRL, his knowledge is to be imputed to GRL, as assignee. GRL therefore took the Second Lease subject to GBR's beneficial interest.

v. As a trustee of the Second Lease, GRL was not entitled to profit from that trust (at least without the fully informed consent of GBR). GRL therefore took the Third Lease as trustee for GBR. This is a straightforward application of the principle in KEECH V SANDFORD: "*the trustee is the only person of all mankind who might not have the lease*".

vi. In relation to the events of 1<sup>st</sup> July 2016, Mr Shaw relies on two separate strands of authority:

a. The first is the principle exemplified by cases such as PROTHEROE V PROTHEROE [1968] 1 WLR 519 and THOMPSONS'S TRUSTEE V HEATON [1974] 1 WLR 605 which was described by Pennycuik V-C in the latter case as follows:

*It is well established that where someone holding a leasehold interest in a fiduciary capacity acquires a renewal of the leasehold interest, he must hold the renewed interest as part of the trust estate...It is also, I think, well established that where someone holding a leasehold interest in a fiduciary capacity acquires the freehold reversion, he must hold that reversion as part of the trust estate: see Protheroe v. Protheroe [1968] 1 W.L.R. 519, where Lord Denning M.R. says, at p. 521:*

*"The short answer to the husband's contention is this: although the house was in the husband's name, he was a trustee of it for both. It was a family asset which the husband and wife owned in equal shares. Being a trustee, he had an especial advantage in getting the freehold. There is a long established rule of equity from Keech v. Sandford (1726) Sel.Cas.Ch. 61 downwards that if a trustee, who owns the leasehold, gets in the freehold, that freehold belongs to the trust and he cannot take the property for himself."*

b. Secondly, he relies on the principles said to be exemplified in cases such as GILFORD MOTER COMPANY V HORNE [1933] Ch 935 and JONES V

LIPMAN [1962] 1 WLR 832. These cases are explained by Lord Sumption in PREST V PETRODEL [2013] 2 AC 415 (at paragraphs 28 to 30) as examples of two separate but related principles:

*...the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant...The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement*

vii. Mr Shaw submits that if GRL had acquired the freehold reversion of the Site on 1<sup>st</sup> July 2016 then, as it held its interest in the Second and Third Leases on trust for GBR, it would have acquired the freehold on trust for GBR. However GBRK acquired the freehold as apart of a series of linked transactions: GBRK acquired the freehold and then GRL immediately surrendered the Second and Third Leases. Mr Monks, as the controller of both companies, should not be permitted to escape the strictures of the KEECH V SANDFORD doctrine by use of separate corporate vehicles. Equitable self-dealing rules would prevent GRL from acquiring for itself the freehold reversion and Mr Monks should not be allowed to avoid the consequences of the equitable rule by causing another of his companies, GBRK, to acquire the freehold instead of GRL. Put another way, GBRK should not be permitted to benefit from GRL's breach of trust in surrendering the Second and Third Leases.

256. I reject Mr Davies' claim essentially for the reasons advanced by Mr Cook for the Defendants. There are a number of points to make at the outset.



257. The first is that the claim against GBRK is purely in knowing receipt: it has been pleaded and argued as such (see for example: paragraphs 49 and 50 of the original Particulars of Claim dated 25<sup>th</sup> July 2017; paragraphs 352-4 of the judgment; and paragraph 2 of the Order made on 24<sup>th</sup> March 2020 following the judgment). Three points follow from this. Firstly, GBRK was and is not itself a fiduciary. Unlike Mr Monks and Mr Ford, it owed no fiduciary duties to GBR; its liability is purely ancillary, as an accessory: see e.g. WILLIAMS V CENTRAL BANK OF NIGERIA [2014] AC 1189 (at paragraph 9). Secondly, the three elements of a claim in knowing receipt (disposal of assets in breach of fiduciary duty; receipt by the defendant of those assets; requisite knowledge on the part of the recipient: see above) have to be made out. Thirdly, as the COURTWOOD HOLDINGS case makes clear, there has to be some causative link between a breach of duty by a fiduciary and the receipt of the property.

258. The Judge has already held that Mr Monks and Mr Ford ceased to owe fiduciary duties to GBR after the date of its dissolution on 18<sup>th</sup> October 2011. As recited in paragraph 379 of the judgment, Mr Davies had argued that:

*The effect of the deeming provision [i.e. section 1032 CA 2006] is that Mr Monks and Mr Ford continued as directors and therefore have committed continuing breaches of duty. Consequently, as Mr Shaw put it graphically in his Skeleton Argument, " Each time [GBRK] fulfils a customer's order, Mr Monks commits a further breach of duty to GBR ." In other words, each new breach of duty by Mr Monks gives rise to a new proprietary claim in respect of any benefits received, which Mr Davies can assert against GBRK since it is fixed with knowledge of Mr Monks' breach of duty. For that reason, GBR does not need to trace into GBRK's hands the assets and property diverted from it back in 2010, prior to GBR's dissolution; instead, all of GBRK's current business and assets are held on constructive trust for Mr Davies.*

The Judge rejected that argument in paragraphs 387-395 of the judgment. In doing so he noted CA 2006 section 170(2) , which provides expressly:

*A person who ceases to be a director continues to be subject –*  
*a. to the duty in section 175 (duty to avoid conflicts of interest) as regards the exploitation of **any property, information or opportunity of which he became aware at a time when he was a director**; and*

*b. to the duty in section 176 (duty not to accept benefits from third parties) as regards things done or omitted by him before he ceased to be a director.*

*To that extent those duties apply to a former director as to a director, subject to any necessary adaptations.*

(emphasis added)

259. I do not think that GBRK held the First Lease on constructive trust for GBR. As Mr Cook points out, the constructive trust imposed on a knowing recipient is a remedial device: see WILLIAMS V CENTRAL BANK OF NIGERIA (at paragraph 9 to 11), NOVOSHIP V NIKITIN (at paragraph 70) and paragraph 316 of the judgment. As is not in dispute, the grant of the First Lease must have taken place in the so-called First Period. As such there is no cause of action against GBRK in respect of the First Lease (it being time-barred) and thus there can be no remedial constructive trust imposed.

260. Whilst I agree that, under the KEECH V SANDFORD principle, Mr Monks held the Second Lease on trust for GBR, I do not think that, as a result of the grant of the Second Lease, GBRK obtained any relevant benefit qua tenant under the First Lease. If the grant of the First Lease was precarious, having been granted without the mortgagee's consent, the fact that, after 23<sup>rd</sup> June 2011 the First Lease became more secure had nothing to do with the grant of the Second Lease; it was due to the freehold of the Site being purchased by Benchmark which company was, together with its mortgagee, content to allow the First Lease to continue (albeit as a sub-tenancy underneath the Second Lease). Thus the supposed benefit to GBRK derived not from the grant of the Second Lease, but rather from the prior transfer of the freehold to Benchmark. Further, and in any event, I do not think that the supposed benefit or advantage of gaining greater security can possibly constitute an asset or property the receipt of which can found a claim for knowing receipt.

261. Thus I do not think that the First Lease was ever held on trust by GBRK for GBR. On this basis, it can be said that GBRK received no relevant property until it purchased the freehold on 1<sup>st</sup> July 2016. Certainly the assignment of the Second Lease and the grant of the Third Lease on 24<sup>th</sup> November 2015 involved no receipt of property by GBRK.

262. Further, as Mr Cook points out, by 24<sup>th</sup> November 2015, GBR had been dissolved for over four years and thus, as the Judge held, Mr Monks could not be guilty of any fresh breach of fiduciary duty. As Mr Davies concedes (see paragraph 22.3 of the Amended Points of Reply in relation to Quantum Issues), Mr Monks did not commit any further breach of his directors duties owed to GBR when he assigned the Second Lease. The highest that can be said is that the Second Lease remained impressed with a trust in favour of GBR as a result of Mr Monks previous breach of duty in taking the lease in the first place.

263. I cannot see how the Third Lease is of any relevance. It was not granted to GBRK. It was granted to GRL which itself was not a fiduciary. It was a reversionary lease which did not immediately take effect and, indeed, never took effect. I do not think that the grant constituted any breach of fiduciary duty by Mr Monks.

264. So far as the acquisition of the freehold is concerned, in my judgment there is no causative link between any breach of duty by Mr Monks and the acquisition, for value, of the freehold by GBRK. As I have stated, at that time GBRK held no property on trust for GBR. The Second Lease was held on trust for GBR by GRL. However that does not appear to have had anything to do with GBRK's acquisition of the freehold.

To repeat the words of Nugee J in the COURTWOOD HOLDINGS case:

*the disposition...itself [must be] a breach of trust (or breach of fiduciary duty). It is not enough that the disposition follows, and is caused by, other breaches of trust or fiduciary duty*

I do not think that Mr Monks was in breach of any fiduciary duty still owed to GBR by causing GBRK to purchase the freehold. The freehold (which had of course been purchased by Benchmark in the meantime), as opposed to the Second Lease, was not “*any property, information or opportunity of which he became aware at a time when he was a director*” within the purview of section 170(2) CA 2006. There could be no new breach of fiduciary duty as GBR had been dissolved for 4 ½ years.

265. Given the price paid by GBRK compared to the valuations given by Mr Monkhouse, it is difficult to see how it can be said that GBRK or Mr Monks was in any sort of “strong bargaining position” (as alleged by Mr Shaw) by reason of the First, Second or Third Leases when it came to the purchase of the freehold; the opposite appears to have been the case.

266. As Mr Cook points out, the principle described in the cases of PROTHEROE V PROTHEROE and THOMPSON’S TRUSTEE V HEATON involves the acquisition of the freehold by a person holding a leasehold in a fiduciary capacity. GBRK, who gave value for the freehold, did not hold any leasehold in the Site as a trustee or fiduciary.

267. So far as GILFORD MOTOR COMPANY V HORNE [1933] Ch 935 and JONES V LIPMAN [1962] 1 WLR 832 are concerned, as Lord Sumption makes clear in PREST, the relevant principles are not engaged unless there is evidence that the company is being used as a “mere cloak or sham” or specifically for the purpose of defeating or circumventing a right that would otherwise arise against the company’s principal. However, as Mr Cook points out, there is no evidence here that this was the case. It was never suggested to Mr Monks that the freehold was acquired by GBRK specifically to avoid liability on the part of either GRL or him personally to GBR.

268. The surrender of the Second and Third Leases following the transfer of the freehold did not, in my judgment, result in GBRK receiving any property which could be impressed with a trust. A surrender of a lease results in the term being extinguished (see e.g. BARRETT V MORGAN [2000] 2 AC 264 at 270). As Mr Cook submits, the destruction of property cannot serve to transfer an equitable interest-see Lewin on Trusts (at paragraph 44-118) and ALLEN V ROCHDALE BC [2000] Ch 221 (at paragraphs 14-17).

269. This outcome is not one which I reach with any regret. I asked Mr Shaw to what extent, if any, I could reflect the fact that (at least) a market rent had been paid under the Second Lease (£60,000 per annum rising to £85,000 per annum) and that £800,000 had been paid for the freehold. His answer was that this was “irrelevant” as the property belonged to GBR. He said it would be inappropriate to give GBRK any credit for the £800,000 price it had paid because it had been part funded by a mortgage loan and the rest and come from trading income which derived from a business which, at all times, effectively belonged to GBR. I found this submission wholly unpersuasive. If I had been minded to declare that the Site was held on trust for GBR/Mr Davies, I would have had to find a way of giving credit to GBRK for the sums spent in acquiring the freehold and none was suggested by Mr Shaw.

**Issue 5: Should the Court refuse an account of profits as a matter of discretion? If Mr Davies is entitled to an account of profits, is he entitled to such an account from 22 May 2011 to date? If not, is he entitled to an account of profits for a shorter period of time and, if so, what is that period?**

270. Mr Davies’ primary case against GBRK is that he is entitled not only to a declaration that it holds the Site on trust for him but also to an account of profits

amounting to the current value of GBRK less the value of the Site. His alternative claim is for the same declaration but with an account of profits amounting to the value of GBRK as at 31<sup>st</sup> December 2015 less the value of the Site.

271. Mr Shaw submits that GBRK was only able to build a valuable business as a result of Mr Monks' dishonest scheme to divert business from GBR. It would be manifestly unjust, he says, to allow Mr Monks/GBRK to keep the profits of that business. The Court has considerable flexibility to fashion an account of profits so as to achieve an equitable result. The key point here, he says, is that GBRK is still exploiting GBR's asset, namely, the Site. This justifies an account of profits from 22<sup>nd</sup> May 2011 until the present day. He says that the business conducted by GBRK after GBR's dissolution on 18<sup>th</sup> October 2011 was attributable to business conducted before that date: as a result of Mr Monks' dishonest conduct, GBRK was given a "springboard" that enabled it to conduct business after that date.

272. I remind myself that:

- a. In relation to Issue 1(e) above, I have held that, in the counterfactual world in which Mr Ford and Mr Monks were not in breach of their fiduciary duties, GBR would have traded as did GBRK but only until mid-October 2011.
- b. In relation to Issues 1(f) and (g) above, I have held that Mr Davies is entitled as against Mr Monks, to equitable compensation assessed as at the value of GBRK as at mid-October 2011.
- c. In relation to Issue 3 above, I have rejected Mr Davies' case to the effect that as at 18<sup>th</sup> October 2011, GBRK held the entirety of its business, assets and undertaking as constructive trustee for GBR and have held that any claim in knowing receipt against GBRK is limited to receipt by that company of assets

or property which result from Mr Monks' breach of duty identified by the Judge at paragraph 272 (v) of the judgment.

- d. In relation to Issue 4 above, I have rejected Mr Davies' claim that GBRK holds the Site on trust for him.

273. In the ULTRAFRAME case, under the heading "Remedies against the knowing recipient" (and at paragraphs 1577, 1579, 1580 and 1588) Lewison J said the following:

*In addition to the proprietary remedy (if it is still available) the claimant has a personal remedy for an account against the knowing recipient. Obviously, the personal remedy depends on establishing knowing receipt, but it does not depend on retention. Indeed it is needed precisely where the recipient has not retained the property. In addition, the personal remedy requires the knowing recipient to account for any benefit he has received or acquired as a result of the knowing receipt. However, a knowing recipient is not, in my judgment, liable to account for a benefit received by someone else...The ordering of an account is an equitable remedy. It is not discretionary in the true sense. It is granted or withheld on the basis of equitable principles. But one of those principles is that of proportionality...It seems to me, therefore, that one of the grounds on which an account may be withheld is that the taking of an account would be a disproportionate response to the gain that appears to have been made, or to the nature of that which has been misused...The governing principles are, in my judgment, these:*

- i) The fundamental rule is that a fiduciary must not make an unauthorised profit out of his fiduciary position;*
- ii) The fashioning of an account should not be allowed to operate as the unjust enrichment of the claimant;*
- iii) The profits for which an account is ordered must bear a reasonable relationship to the breach of duty proved;*
- iv) It is important to establish exactly what has been acquired;*
- v) Subject to that, the fashioning of the account depends on the facts. In some cases it will be appropriate to order an account limited in time; or limited to profits derived from particular assets or particular customers; or to order an account of all the profits of a business subject to all just allowances for the fiduciary's skill, labour and assumption of business risk. In some cases it may be appropriate to order the making of a payment representing the capital value of the advantage in question, either in place of or in addition to an account of profits.*

274. In the NOVOSHIP case, having held (at paragraph 93) that the remedy of an account of profits was available against a dishonest assister even if the breach does not involve a misapplication of trust property, the Court of Appeal emphasised that a

fiduciary was in a different position legally from that of a non-fiduciary guilty of accessory liability. The Court said this (at paragraphs 107-109):

*Where a claim based on equitable wrongdoing is made against one who is not a fiduciary, we consider that, as in the case of a fiduciary sued for breach of an equitable (but non-fiduciary) obligation, there is no reason why the common law rules of causation, remoteness and measure of damages should not be applied by analogy. We recognise that these rules do not apply to the case of a fiduciary sued for breach of a fiduciary duty; but that is because the two cases are different. The common law does not usually apply a simple “but for” test of causation. The common law distinguishes between a breach which is the effective cause of a loss and one which is merely the occasion for the loss. How to distinguish between the two is a question of the application of common sense: Galoo Ltd v Bright Grahame Murray [1994] 1 WLR 1360. Common sense, as we have seen, also plays its part in determining the extent of equitable compensation.*

*The question of causation has a bearing on the fashioning of the account. Even in the case of a fiduciary the cases stress the importance of identifying as precisely as possible the extent of the benefit or profit attributable to the breach of fiduciary duty.*

They added (at paragraph 119):

*We consider that where a claim for an account of profits is made against one who is not a fiduciary, and does not owe fiduciary duties then, as Lord Nicholls said in the Blake case [2001] 1 AC 268, the court has a discretion to grant or withhold the remedy. We therefore agree with Toulson J in the decision in the Eyffes case [2000] 2 Lloyd's Rep 643 that the ordering of an account in a non-fiduciary case is not automatic. One ground on which the court may withhold the remedy is that an account of profits would be disproportionate in relation to the particular form and extent of wrongdoing: see the decision in the Satnam case [1999] 3 All ER 652, 672B-C; Walsh v Shanahan [2013] EWCA Civ 411; [2013] 2 P & CR D18. In our judgment that is the case here.*

275. I decline to order an account of profits against GBRK.
- a. Firstly, as Lewison J indicated, the personal remedy of an account depends on establishing knowing receipt. I have held that any claim in knowing receipt against GBRK is limited to receipt by that company of assets or property which result from Mr Monks' breach of duty identified by the Judge at paragraph 272 (v) of the judgment. I have held that there was no receipt by GBRK of any property as a result of the grant of the Second (or indeed the First) Lease. Thus there is no relevant knowing receipt.



- b. I have declined to hold that GBRK held the entirety of its business on trust for GBR as at 18<sup>th</sup> October 2011 or indeed at subsequent other date.
- c. Further, and in any event, I have already held that Mr Davies is entitled to receive equitable compensation from Mr Monks in the sum representing the value of GBRK as at mid-October 2011, the date beyond which I have held that, in the counterfactual world, GBR would not have been able to trade. In my judgment, to order an account of profits against GBRK in addition to the equitable compensation would, in the circumstances, be to grant Mr Davies double recovery or to enrich him unjustly. The value of GBRK as at mid-October 2011 gives him all that to which, in my judgment, he is entitled as a result of Mr Monks' breaches of duty. The value of GBRK as at that date takes into account the profits which that company had made in the relevant period. Thus I would, in any event, decline to grant him the discretionary remedy of an account against GBRK.

**Issue 6: Is it open to GBRK to claim an equitable allowance, having regard to the issues already determined at the trial on liability and directions given by the Court? If so, is an equitable allowance available, as a matter of law, to a knowing recipient? If an equitable allowance is available, as a matter of law, should GBRK be granted such an allowance? If so, what is the quantum of that allowance?**

276. As I have declined to order an account of profits against GBRK, this issue does not arise for consideration.

**Issue 7: If Mr Davies is entitled to an account of profits, what is the sum payable by GBRK to Mr Davies?**

277. As I have declined to order an account of profits against GBRK, this issue also does not arise for consideration.

**Issue 8: If, having elected for equitable compensation against Mr Ford and Mr Monks, Mr Davies elected (or must be treated as having elected) for equitable compensation against GBRK, how much equitable compensation (if any) is payable by GBRK?**

278. I have held in relation to Issue 2 above that Mr Davies is entitled to elect to claim equitable compensation against Mr Ford and Mr Monks whilst at the same time seeking an account of profits from GBRK. However, Mr Davies having made that election, I have dismissed his claim for an account of profits against GBRK. It thus seems to me that this issue does not arise. Having made that election, Mr Davies is not entitled as against GBRK to claim equitable compensation. As discussed in relation to Issue 2, the two are inconsistent remedies and the claimant must elect to claim one or the other.

279. In any event, I have held that there is no relevant knowing receipt by GBRK so that Mr Davies would be no more entitled to equitable compensation than he is to an account of profits.

280. Finally, for what it is worth, the most which I would have awarded by way of equitable compensation against GBRK would be the same amount that I have ordered Mr Monks to pay. However, in the circumstances, there is no reason to suppose that Mr Monks will be unable to pay any sum which he is ordered to pay thus Mr Davies would appear to have lost almost nothing as a result of the dismissal of his claim against GBRK

**Issue 9: Is Mr Davies entitled to interest on any sums due to him from GBRK?**

281. As I have declined to order GBRK to pay any sum to Mr Davies, this issue also does not arise for consideration.

### **THE POSITION OF MR FORD**

282. In his Closing Submissions Mr Shaw stated that Mr Davies seeks equitable compensation in the sum of £143,804 from Mr Ford. Mr Hall has identified a total of £230,804 which was paid to Mr Ford or his family from April 2011 of which £221,610 is agreed by Mr Haywood Crouch. According to the company's accountant Mr Smith, Mr Ford transferred his entire shareholding in GBRK to Mr Monks on 6<sup>th</sup> September 2013. In the absence of evidence to the contrary, it is to be inferred, Mr Shaw says, that Mr Ford's involvement in GBRK had ceased by this point by the latest. On the basis that Mr Ford was entitled to remuneration of £3,000 per month from 1<sup>st</sup> April 2011 to around the end of August 2013, Mr Davies gives credit for the sum of £3,000 per month for 29 months (a total sum of £87,000), resulting in Mr Ford being liable to pay equitable compensation in the sum of £143,804.

283. There is, in the judgment, comparatively little detail concerning Mr Ford's involvement with GBR and GBRK. That is perhaps unsurprising given his complete failure to comply with any directions (including filing a witness statement) and the Judge's refusal to allow him to participate in the trial. There was a similar lack of evidence in the trial before me as to what, if anything, Mr Ford did or did not do.

284. A number of things are clear:

- a. Mr Ford became a director of GBR on 28<sup>th</sup> September 2010 and remained as such until the company was dissolved on 18<sup>th</sup> October 2011. He was also a 10% shareholder.

- b. He was a director of GAL, the company which owned the Site until it was sold to Benchmark.
- c. He featured in the Heads of Terms document of 2<sup>nd</sup> September 2010 (see paragraphs 83 to 89 of the judgment) and was the addressee of the Handover Note dated 30<sup>th</sup> September 2010 (see paragraphs 94 to 100 of the judgment).
- d. His behaviour appears to be one of the key reasons as to why the “O” Licence was originally removed (see paragraphs 133 to 135 of the judgment).
- e. More importantly, along with Mr Monks, he attended the meeting with Mr Smith in early January 2011 (see paragraphs 170 to 174 and 184 of the judgment).
- f. He was a director of GBRK on its incorporation on 7<sup>th</sup> January 2011 but resigned on 25<sup>th</sup> January 2011. He was initially a 50% shareholder in GBRK but his shareholding became diluted as further investors paid into the company. As stated, he transferred his entire shareholding to Mr Monks on 6<sup>th</sup> September 2013.
- g. He appears to have been at the Site on one or two occasions in early 2011 when the Environment Agency inspectors visited (see paragraphs 189 to 192 of the judgment).
- h. However, there is a dearth of evidence as to what if anything, Mr Ford was doing thereafter. In contrast to Mr Monks, there are no express findings made by the Judge as to specific breaches of duty by Mr Ford.
- i. The experts are agreed that, between January 2011 and September 2013, Mr Ford and his family received at least £221,610 from GBRK.

285. My overall impression is that Mr Ford's involvement in GBRK was short-lived and relatively minor. This is confirmed by Mr Monks who, when it was suggested to him in cross-examination that he was in business with Mr Ford in January 2011, stated:

*We were in business together for a short time that's correct.*

In the passage from his oral evidence quoted at paragraph 226 of the judgment, Mr Monks says that one of the factors in his taking the "O" Licence out in the name of GBRK rather than GBR was that, at that stage, "*the other guy is virtually nothing to do with it*". The reference to "the other guy" must be a reference to Mr Ford. This would again tend to indicate that (at least so far as Mr Monks was concerned) Mr Ford's involvement was comparatively minor.

286. However, it can at least be said that Mr Ford:

- a. Made no attempt to stop, and indeed facilitated, Mr Monks "takeover" of the business intended for GBR.
- b. Failed to report what was happening to Mr Davies.
- c. Continued to work at the Site during at least Spring 2011.
- d. Briefly became a director of, and (less briefly) a shareholder in, GBRK.
- e. Drew money from GBRK which was operating a business that should have been operated by the company of which he was a director, GBR.

287. Thus Mr Ford can certainly not be absolved from blame. He has been in breach of fiduciary duty to GBR.

288. However, I do not think that Mr Davies is entitled to claim from him the sums which Mr Shaw seeks. In seeking the restoration of sums derived by Mr Ford from GBRK, Mr Davies is effectively seeking a substitutive remedy by way of equitable compensation. As discussed in relation to Issue 1 (d) above, I do not think that Mr

Davies is entitled to such a remedy. In dealing with Issue 1 (e) above, I have awarded a sum based on reparative principles against Mr Monks. To enable Mr Davies to recover an additional award from Mr Ford would, in my judgment and in the circumstances, constitute double recovery.

289. In order to reflect both his breaches of fiduciary duty and his relatively minor role in GBRK, I intend to make Mr Ford jointly and severally liable to Mr Davies for a percentage of the sum which I have awarded against Mr Monks. I have awarded the sum of £800,000 in respect of which Mr Monks has been given credit for the sums £170,685 (which he has already paid) and £30,000 (by way of allowance). I think a just result would be that Mr Ford should be liable for 10% of the sum which I have held is the correct figure for equitable compensation (£80,000) but that he should be given the same allowance as Mr Monks for the same period (£3,000 per month for 10 months: £30,000-that having been the figure set out in the Handover Note).

290. Of the net sum by way of equitable compensation which I have held that Mr Monks is liable to pay (£599,315), I will order that Mr Ford is to be jointly and severally liable to Mr Davies for £50,000. That sum will be subject to the same simple interest at the same rate as I have ordered.

## **CONCLUSION**

291. In summary, I order that:

- a. Mr Monks is liable to pay equitable compensation to Mr Davies in the sum of £599,315.
- b. Mr Davies is entitled to recover simple interest on that sum at the rate of 2% above Bank of England Base Rate from time to time from 1<sup>st</sup> November 2011.

- c. Mr Ford is jointly and severally liable (along with Mr Monks) to Mr Ford for £50,000 (of the £599,315). For the avoidance of doubt, interest is recoverable at the same rate for the same period against Mr Ford.
- d. Mr Davies is entitled to an additional sum against Mr Monks which is interest on the sum of £170,685 at the rate of 2% above Bank of England Base Rate from time to time from 1<sup>st</sup> November 2011 until the date the sum was paid following the order of 24<sup>th</sup> March 2020, such interest to be compounded annually on 1<sup>st</sup> November each year (from 1<sup>st</sup> November 2012).
- e. I decline to order an account of profits, or indeed any relief, against GBRK.

292. I invite counsel to confer with a view to agreeing a suitable form of order reflecting the terms of this judgment. If there are disagreements as to the terms of the order (including on consequential issues such as costs) then I will list an oral hearing to deal with them.

293. Can I finally thank all counsel involved for their extremely able and helpful submissions.