Neutral Citation Number: [2024] EWHC 2740 (Ch)

Case Nos: **CR-2022-000386, CR-2022-000540 and CR-2022-000541**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF:

CFJL PROPERTY PARTNERS LIMITED (in administration)
PORTFOLIO PROPERTY PARTNERS LIMITED (in administration)
P3ECO (BICESTER) HIMLEY LIMITED (in administration)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 4 November 2024

Before:

MR HUGH SIMS KC (sitting as a Deputy Judge of the High Court)

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Between:

(1) MR STEPHEN LOUIS NARDELLI	**Applicants**
(2) MR GRAHAM EDWARD JOHNSON	
(3) BRIGADIER IAN PETER INSHAW DL	

- and –

(1) MR DANIEL RICHARDSON	**Respondents**
(2) MR EDWARD AVERY-GEE	
(in their capacity as joint administrators of the above companies)	

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Mr Mark Watson-Gandy (instructed by public access) for the **Third Applicant** on 18 October 2024, and **Third Applicant** acting in person on 8-10 October 2024
Mr Joseph Curl KC and Mr Jon Colclough (instructed by **Brecher LLP**) for the **Respondents**

Hearing dates: 8-10, and 18 October 2024

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APPROVED JUDGMENT

MR HUGH SIMS KC:

Introduction

1. This case raises a question not frequently encountered by insolvency practitioners ("IPs") acting as administrators: how to exercise their powers, and discharge their duties, where there is a likely surplus after payment of creditors and expenses, and thus a likely return to members, or shareholders, of a company. More unusually, it also involves a lender who was willing to forbear on defaulting loans, and advance further funds in administration, in order to assist in the realisation of assets at a higher price than might otherwise have been obtained on a forced sale scenario. The financial support was not altruistic. The effect of the bargain made in administration increased the share of returns to the lender at the expense of the shareholders. These commercial tensions lie at the heart of the complaints made.

2. By application notices made under paragraphs 74, 88 and 95 of Schedule B1 to the Insolvency Act 1986 ("IA 86") dated 21 September 2023 ("the Removal Application") the Third Applicant challenges the conduct of the joint administrators of CFJL Property Partners Limited ("CFJL"), Portfolio Property Partners Limited ("PPP") and P3ECO (Bicester) Himley Limited ("P3 Eco") (together "the Companies") on the basis that their conduct was in breach of their duties and has caused him unfair harm as member. The remedy he seeks is the removal of the joint administrators and their replacement. This is my judgment following the trial of the Removal Application.

3. The Removal Application was originally brought by all three Applicants, but on 13 September 2024 the First Applicant, Mr Nardelli, and the Second Applicant, Mr Johnson, were adjudged bankrupt. This was on the petition of Desiman Limited ("Desiman"), on the basis of a personal guarantee Messrs Nardelli and Johnson gave to secure certain lending advanced by Desiman to the above-named companies, which loans were defaulted on. This left the Third Applicant, Brigadier Inshaw, as the sole applicant continuing with the Removal Application at trial. However, Mr Nardelli and Mr Johnson continued to feature at trial. The day before trial a notice of change of representation was lodged, and Brigadier Inshaw acted in person for the first 3 days of trial. With my permission, Mr Nardelli and Mr Johnson provided him with assistance, as McKenzie friends, in presenting the Removal Application. Brigadier Inshaw subsequently obtained representation for closing submissions, when he was represented by Mr Watson-Gandy. I should note here my thanks to Mr Watson-Gandy for stepping back in to assist in the circumstances.

4. The Respondents, Mr Richardson and Mr Avery-Gee, both licensed IPs, of CG Recovery Limited, were appointed as joint administrators (hereafter "the Joint Administrators" or simply "the Administrators") in February 2022. All of those appointments were made by Desiman in its capacity as qualifying floating charge ("QFC") holder: it held floating charges falling within the definition under paragraph 14 of Schedule B1 giving it the power to appoint an administrator. Desiman also has a

subsidiary company called Desiman 2 Limited, and where appropriate references to Desiman below should be taken to include Desiman 2.

5. The affairs of the Companies are inter-linked and concern a development of land at Himley, Bicester in Oxfordshire, also known as Himley Village. On 30 January 2020 a section 106 agreement (under the Town and Country Planning Act 1990) was entered into, and outline planning permission was obtained for development on the land for up to 1,700 residential dwellings, a retirement village, commercial development and social and community facilities. This resulted in certain land holdings and rights collected in and held by the Companies becoming much more valuable. As well as being directors, Mr Nardelli, Mr Johnson and Brigadier Inshaw also held (together with other family members or associates) certain shareholding interests in the Companies, and it is in relation to this interest the Removal Application was brought. Whilst not strictly speaking a group undertaking (for the purposes of section 1161 Companies Act 2006 ("CA 06")), there is a commonality of directors, a substantial overlap in shareholders, and the Companies were operated like a group. In addition, as explained further below, CJFL held its principal assets and rights as agent or nominee for P3 Eco and/or PPP.

6. By 2020 disputes involving the Companies, and its lender, Desiman, had arisen. A developer, Brooke Homes (Bicester) Limited ("Brooke Homes" or "Brooke"), had commenced proceedings alleging a breach of contract in relation to a sale of certain of the land and asserting a proprietary claim. That litigation came on for trial, also before me, in October 2021, and I handed down judgment on 11 November 2021 ([2021] EWHC 3015 (Ch) ("the 2021 Judgment")). I awarded damages against the Companies for breach of contract in the sum of £13.4m plus interest and costs, but dismissed the proprietary claim and the claim against Desiman. Much of the background concerning the development at Himley and the Companies' affairs up to October 2021 are set out in the 2021 Judgment.

7. By an order I made on 10 December 2021 Brooke Homes obtained charging orders over certain parcels of the land then held by the Companies. At that time it was in contemplation that certain of the land, forming part of what has been called "Phase 1", would be sold to Countryside Properties (UK) Limited ("Countryside"). In the event, that sale did not progress. In addition to Brooke Homes' claim, an additional claim had been issued against PPP in relation to another parcel of land. On 28 January 2022 Desiman sent letters of demand to each of the Companies in relation to its loans, which were by then in default. The Companies were unable to meet those demands and the appointments of the Respondents as Joint Administrators were subsequently made. At that time the relationship between the Applicants and Desiman was a good one. Following the events which have taken place in the administrations that relationship has deteriorated.

8. As the Companies had no employees, and its assets were property/land or contracts associated with land, the Administrators concluded that the Companies could not be rescued as going concerns and thus "Objective 1" of paragraph 3 of Schedule B1 to

IA86 should not be the objective of their proposals. They concluded that the objective of achieving a better result for the Companies' creditors as a whole than would be likely if the Companies were wound up ("Objective 2") could be achieved and was reasonably practicable. They proposed this objective could be achieved through a process of marketing and sale of the land and rights associated with the land in conjunction with Desiman, the first ranked secured creditor, holding fixed and floating charges. A marketing process was carried out in 2022 and on 6 January 2023 contracts were exchanged with Cala Management Limited ("Cala") for the sale of the Phase 1 land for £40m (also referred to as Lands A, B and C). On the same day a hybrid option and promotion agreement (also termed the "Hybrid Agreement") was simultaneously entered into with Cala in relation to land forming part of "Phases 2 and 3" (also referred to as Lands D, E and F), which was a condition of the Phase 1 sale. The sale facilitated payment under a Conditional Sale Agreement ("CSA") which had been entered into between CJFL (also referred to in the evidence as the "CFJL Agreement", and in some of the documents as the "CFJL Contract") and certain landowners on 31 May 2017 (as subsequently varied) for the acquisition of land to form part of Phases 2 and 3. £10m was required to complete those acquisitions. Phase 2 purchase has already completed (at a little over £5m) and Phase 3 purchase is due to complete at the end of this month (at a little under £5m).

9. As I have foreshadowed, the position of Brigadier Inshaw is that the Administrators have conducted the administrations of the Companies in the interests of Desiman and to the unfair detriment of the other creditors and shareholders. It is alleged their conduct was a breach of their duties as officeholders of the Companies and provides good grounds for their removal. He points to the fact that it was originally estimated by the Joint Administrators in 2022 that the implementation of their proposals would result in a payment in full of creditors, and a "handsome" return to shareholders. A surplus for shareholders of as much as £20m was contemplated. He complains that the effect of the sale, and associated transactions which the Joint Administrators caused or permitted the Companies to enter into in January 2023, and as implemented subsequently, means that the return to the shareholders is now estimated to be less than £1m, and over a longer period of time.

The oral evidence and overall impressions

10. Brigadier Inshaw called Mr Nardelli to give oral evidence on his behalf. Mr Daniel Richardson, who had principal conduct of the matters which this application is concerned, gave oral evidence on behalf of the Respondents.

11. I found Mr Nardelli's oral evidence of little utility beyond the documentary evidence. It was mainly made up of supposition and assertion and I do not conclude it is reliable, unless consistent with the contemporaneous record. Mr Nardelli's evidence

was also coloured by his sense of grievance that having put together and worked on the Himley Village development opportunity for a number of years the likely value return to shareholders had been much diminished by the events leading to and in administration. When confronted with certain documents under cross examination Mr Nardelli made a number of frank concessions in his oral evidence, such that certain of the allegations which had been formulated on the Removal Application appeared to me to be no longer sustainable. I shall refer to these further below. Nevertheless, Mr Nardelli stood by the overall complaint made by Brigadier Inshaw that the Joint Administrators had unfairly acted to the favour of Desiman, failed to discharge their duties to the creditors and shareholders, and should be removed from office. Brigadier Inshaw put the essential thrust of that general case to Mr Richardson, which he denied.

12. Mr Richardson's oral evidence withstood measurement against the documentary evidence and cross-examination. Having heard his evidence I reject any accusation of intentional wrongdoing on his part. I do not accept any suggestion that he acted in bad faith, or in improper concert with Desiman. In my judgment he did not intend any harm to the shareholders' interests. The inferential case of intentional misconduct, which formed a part of many of the allegations, has been put too high, with no cogent evidence to support it. The more engaging aspect of the case is where it sheds a spotlight on the unusual position the Joint Administrators found themselves in.

13. I shall now turn to examine the background and make findings of fact in relation to the events leading to the administration, before turning to consider the relevant legal principles against which the allegations fall to be assessed. The allegations mainly concern events after entry into administration.

Events leading to the administration of the Companies in more detail

14. PPP was incorporated on 22 June 2009, as a private limited company. The nominal capital of the company is £200 divided into 200 shares of £1 each, of which 200 shares are issued and stand as fully paid in the books of the company and held as follows: 102 Shares in the name of Stephen Goldman; 49 Shares in the name of Brigadier Inshaw; 49 shares in the name of Mr Johnson. The directors of PPP are Messrs Nardelli, Johnson and the Brigadier. PPP was incorporated for the purposes of progressing the development potential of land at Himley. PPP was the owner of 24.24 acres of freehold land known as and situate at "land at Middleton Stoney, Bicester" registered at HM Land Registry under title number 0237022 ("the PPP land", also referred to as the "Pains" land and "Land B").

15. P3 Eco was incorporated on 31 August 2010, as a private limited company. The nominal capital of the company is £100 divided into 100 shares of £1 each, of which 100 shares are issued and stand credited as fully paid in the books of the company and held as follows: 25 shares in the name of Laurence Edward Brown; 25 shares in the name of Mr Nardelli; 25 shares in the name of Mr Johnson; and 25 shares in the name of Brigadier Inshaw. The directors of P3 Eco are the same as PPP. Its purpose was

also substantially the same as that of PPP. P3 Eco was the owner of c. 10 (9.3) acres of freehold land known as and situate at "land adjoining Himley Farm, Chesterton, Bicester OX26 1RT" registered at HM Land Registry under title number ON339648 ("the P3Eco Land" and also called “Land A”).

16. CFJL was incorporated on 23 March 2017, as a private limited company. The nominal capital of the company is £200 divided into 200 shares of £1 each, of which 200 shares are issued and stand as fully paid in the books of the company and held as follows: 25 shares in the name of Faye Yvette Birch; 26 shares in the name of Mr Johnson; 12 shares in the name of Susan Mary King; 12 shares in the name of Lucetta Moylan; 50 shares in the name of Jago Nardelli; 50 shares in the name of Mr Nardelli; and 25 shares in the name of Caroline Isobel Wethey. The directors of CFJL are the same as P3 Eco and PPP. CFJL was set up as the vehicle to contract with certain landowners for the conditional sale of certain additional land parcels at Himley under the CFJL Agreement entered into in May 2017, as already mentioned in paragraph 8 above. This provided the opportunity to purchase three further parcels of land, the first to complete the land holdings necessary for phase 1 of the development, and the latter to enable phases 2 and 3. In the 2021 Judgment I held that CFJL was acting as nominee for P3 Eco and/or PPP in connection with an agreement entered into between CFJL and certain landowners (see at [324]-[332]).

17. Overall, therefore, at all material times the Companies have had inter-linked rights and ownerships of land which form part of over a 1,000-acre site as the Northwest Bicester Eco Development (defined in the pleadings as "the Land") which involved the building of a 6000-unit Eco Town. P3 Eco had secured an option in 2010 to purchase approximately 200 acres of land from Mr and Mrs Murfitt and Mrs Henson in the southern part of the Land ("Murfitt Henson Option Land"). PPP had secured an option in 2014 to purchase the PPP Land from the Pains family.

18. On 16th April 2015, PPP and P3 Eco agreed heads of terms with Brooke Homes together with an exclusivity agreement for the purchase by them of the said Himley Village site, subject to payment of a deposit and planning. The agreements provided for the parties to negotiate in good faith and an exclusivity period after planning had been determined. A £250,000 deposit was paid by Brooke, but a final formal contractual agreement was never entered into. By the end of 2018 the Companies were in dispute with Brooke and it had issued proceedings for breach of contract. It also entered certain unilateral restrictions over certain of the land.

19. By the conditional sale agreement dated 31 May 2017 between CFJL and Mr and Mrs Murfitt and Mrs Henson, CFJL was granted rights to buy the Murfitt Henson Option Land ("the CFJL agreement" or the “CSA”). The total purchase price was £15m, the initial £4-5m to finance the remaining part of the Phase 1 land, with £10m required to be paid for phases 2 and 3 land.

20. On 7 March 2018, Desiman advanced funds for the purchase of the P3 Eco Land from Mrs Murfitt (under “Facility A”) and obtained fixed charge security. Further facilities

were granted by Desiman to the Companies to acquire further land within the envelope of the Himley Village site (including under "Facility B", concerning the Pains land), once planning consent had been obtained (including under "Facility C"), to provide working capital, to pay for the cost of litigation with Brooke (under "Facility D") and potentially to acquire the later phases of land under the CSA contract (under what has been called the CFJL Facility). Fixed charge security was obtained in relation to the land acquired. By clause 6.2 of the amended and restated loan facility dated 4 July 2019 P3 Eco and PPP had agreed to pay a sale fee of £1m on the sale of Land A. A fee was also due for the Pains Property (Land B) ("the Pains Property Sale Fee"), defined as being the higher of £2.5m or 25% of the sale price of the Pains Property less the s106 contributions attributable to the Pains Property. This meant the Pains Property Sale Fee was only capable of estimation in advance of a disposal.

21. In January 2020, outline planning permission was granted to PPP over the Murfitt Henson Option Land and the PPP Land for 1700 houses and a range of mixed uses ("the Himley Village site"). This rendered the land and rights held by the Companies significantly more valuable. However, there was a planning condition (called a "Grampian condition") that no more than 500 homes could be built before substantial highways work had been carried out, including the building of a tunnel under the railway. This meant that the development involving the initial 500 homes – referred to as Phase 1 – could progress to a sale and development more easily than Phases 2 and 3 (involving the remaining 1,200 homes). The Companies were not in a position to develop the Land on their own.

22. On 23 October 2020, Desiman advanced further sums to the Companies to purchase 59.85 acres of the Murfitt Henson land (registered at HM Land Registry under title number ON360325, and also referred to as "Land C"), which formed the bulk of the Phase 1 land. Agreements were entered into by which: CFJL agreed to buy and Mrs Henson and Mrs Murfitt agreed to sell the land (registered at HM Land Registry under title number ON360325) to CFJL; CFJL then resold the land (registered at HM Land Registry under title number ON360325) to Desiman 2 (a wholly owned subsidiary of Desiman) for £4 million to be held as security; and CFJL were granted an option to buy back the land from Desiman 2 Ltd for £ 19,047,23. It was agreed that £19,047,238.23 was the aggregate sum owed to Desiman and Desiman 2 Ltd by the Companies at that time. As I noted in the 2021 Judgment at [38] this was a curious transaction; Desiman accepted it was only intended to be a security.

23. In short, contrary to what might otherwise be assumed from the title register and certain other formal documents, CFJL held the rights under the CFJL Agreement as a nominee and trustee for P3 Eco and PPP, and the land (registered at HM Land Registry under title number ON360325) was held by Desiman as mortgagee only: the equity of redemption was vested in the Companies. At this time, also on 23 October 2020, Desiman obtained debentures to secure the indebtedness and liabilities of P3 Eco and PPP, in addition to its fixed charge security.

24. The PPP Land, the P3Eco Land and the land (registered at HM Land Registry under title number ON360325) was Phase 1 of the development. Phase 2 and Phase 3 of the development were the balance of the land to be acquired under the said CFJL Agreement (and referred to, in places, as Land D (ON245151), Land E (ON318263) and Land F (ON245153).

25. I have already referred in paragraphs 4 and 7 above to the circumstances in which the Joint Administrators came to be appointed in February 2022, off the back of certain litigation, including that involving Brooke Homes. Shortly before entry into administration a sale to Countryside was in the offing. Part of the allegations made by Brigadier Inshaw was that the Countryside deal was destroyed by Desiman, and reference was made to an email sent by Desiman to Countryside on 9 February 2022. However, my reading of this email is that Desiman had become frustrated by a lack of progress on the part of Countryside and had lost confidence in them. They later came to submit a bid in the administration. Shortly after entry into administration, in March 2022, the directors prepared and signed statements of affairs for each of the Companies summarising their assets and liabilities. The Joint Administrators have not adjudicated on these numbers, but they provide a convenient starting point, if not end point, for the analysis.

26. So far as CFJL is concerned, it was stated to have assets estimated to realise £63.2m, mainly comprised of land, together with PPP and P3 Eco, forming part of the Phase 1 development (held in Desiman 2's name) estimated to realise £18m (using the sale price then agreed with Countryside as a guide), and the value of rights under the CFJL Agreement in relation to phases 2 and 3, subject to acquisition costs being found of £10m, of £45m (i.e. assuming a sale price of £55m for those rights). The deadlines for payment of the additional payments were £5m for Phase 2 by end October 2022 and £5m for Phase 3 by the end of October 2024. The summary of liabilities shows the liabilities to Desiman broken down as follows: the Facility C Loan at £5.9m (used to acquire the initial tranche of land under the CFJL Agreement, and acquired in Desiman 2's name); a settlement facility – referred to on certain redemption statements of Desiman as Facility D – and showing in the sum of £6.7m odd (the use of these funds is considered further below); cross-guarantee liabilities (for the liabilities of PPP and P3Eco) in the sum of £11.8m odd, and £530k owing under what has been described as the CFJL Facility, an agreement entered into on 23 December 2021. Overall, therefore, at this time the debt to Desiman was estimated at £25m odd.

27. CFJL entered into a debenture and cross-guarantee with Desiman on 11 June 2021 at a time when the Brooke Homes claim was coming to trial, and after Desiman became aware it was being joined as co-defendant. The CFJL debenture and the CFJL Facility became the focus of some of the complaints made in these proceedings, in part due to their proximity in time to the administrations, and also due to the rights or potential rights they conferred or purported to confer on Desiman. In particular, in the 11 June 2021 debenture CFJL assigned its right to acquire Land D, E and F (Phase 2 and 3 land) for a further £10m to Desiman by way of security. The CFJL Facility (also sometimes called "Facility E") was made at a time when a sale to Countryside was in

contemplation, and also provided for a "mezzanine" payment to Brooke Homes. It also provided for a "Phase 2/3 Property Sale Fee", being 20% of the net sale proceeds of the land forming part of those phases.

28. The only monies seemingly drawn under the Facility E/CFJL Facility was c. £500k, which appears to have been used by/for the directors.

29. After Desiman's security (securing monies advanced before the order I made on 10 December 2021, whereby Brooke acquired certain rights as secured creditor after Desiman), Brooke Homes was also owed substantial sums by reason of its judgment debt, which then stood at c. £14m. The unsecured creditors, other than inter-company debts to P3 Eco and PPP (in the sum of £113k and £160k respectively) comprised HMRC (owed c. £77k as unsecured non-preferential creditor) and one other small creditor (accountancy fees).

30. Overall, the estimated total surplus as regards members, after taking into account the sums of the assets estimated to realise and the estimated liabilities, was £23.8m.

31. As regards P3Eco the main asset identified in the statement of affairs was the P3Eco Land (ON339648) forming part of Phase 1, which was estimated to realise £10.8m (applying certain assumed apportionments across the Companies). Its liabilities substantially overlapped with that of CFJL: the same sums are noted for Desiman (c. £25m) and Brooke (c. £14m). In addition, a liability of c. £6m is showing as owing to Cassadian (some questions have been raised over this liability, or where it lies, but it is recorded on the statement of affairs so I include it here). The overall net estimated deficiency to members is showing as £34m. However if the Companies' assets and liabilities are considered together, as in my judgment they need to be (having regard to the basis on which CFJL was holding its assets), P3Eco might be viewed as balance sheet solvent, by potentially as much as £5m (if the Desiman and Brooke liabilities are removed).

32. Finally, turning to PPP, its main assets were the Pains land, which comprised both residential and commercial land, which the statement of affairs estimated to realise £9.5m and £7.2m respectively (based on sale terms agreed with Countryside, and apportionment based on certain historic valuations). The total assets estimated to realise were £17.1m, though this included some intercompany balances, directors' loan accounts (estimated to realise nil), and other relatively modest sums – the land value was estimated at £16.7m in total. I should interpose here to note that the Joint Administrators have commenced proceedings for the recovery of outstanding directors' loan accounts and other related sums (including advances to the directors arising from the CFJL Facility), though those proceedings have not been determined (and in part are now stayed, given the bankruptcies of Mr Nardelli and Mr Johnson).

33. Again, in relation to PPP, the liabilities are substantially the same as CFJL and P3 Eco, comprising the Desiman (£25m) and Brooke Home (£14m) liabilities. There are a number of other more modest unsecured creditors in the region of £400k odd

(including HMRC stamp duty liabilities). The overall net estimated deficiency to creditors is stated to be £22m. Nevertheless, PPP may be viewed as balance sheet solvent, taking a holistic approach to the position of the Companies, by potentially as much as £16m (where the Desiman and Brooke liabilities are removed).

34. The statement of affairs of the Companies, viewed together and overall, shows six main headline facts and figures as follows:

    34.1 CFJL was perceived as being balance sheet solvent by some margin;

    34.2 when taken with P3 Eco and PPP, the total return to shareholders of all three of the Companies was estimated at c. £45m;

    34.3 Phase 1 land/rights were viewed as being worth £45.5m (£18m plus £10.8m plus £9.5m plus £7.2m), with Phase 2/3 land rights worth £45m (net, assuming an additional £10m could be found to make the purchases under the CFJL Agreement);

    34.4 the liabilities to Desiman, as secured creditor, with both fixed and floating charges, were recognised in the sum of £25m, though this did not appear to account for any 20 per cent profit share fee which formed part of the CFJL Facility and assumed the minimum sum for the Pains Property Sale Fee of £2.5m;

    34.5 the liabilities to Brooke and Desiman, both of which had security, formed the bulk of the liabilities, with the possible exception of the Cassadian claim;

    34.6 whether or not the estimated realisations and surpluses were obtained heavily depended on the success, or otherwise, of the contemplated marketing and sale process in the administrations.

The legal principles

Objectives and duties

35. Administrators hold an office created by statute, and the IA 86 sets the framework for their powers and duties. Their core functions are to get in, realise and distribute the assets in accordance with the stakeholders' rights relative to one another, and within each class rateably, according to the *pari passu* principle. In this respect the administrators are acting as a fiduciary. The order of priorities was summarised by Lord Neuberger PSC in *Re Nortel GmbH (in administration)* [2013] UKSC 52 at [39] as follows: fixed charge creditors, expenses, preferential creditors, floating charge creditors, unsecured creditors with provable debts, statutory interest, non-provable liabilities, and last shareholders. An administrator may dispose of property the subject of a floating charge (paragraph 70 Schedule B1) but may not do so in relation to fixed charge assets absent consent of the fixed charge holder or an order of the court (paragraph 71 Schedule B1). Administrators are not bound to realise property the

subject of a fixed charge: see *Carvill-Biggs v Reading* [2014] EWCA Civ 1005 at [7] per Snowden LJ. In my judgment Desiman was therefore a necessary party to any sale process undertaken by the Joint Administrators, in that it would necessarily include land which was held by Desiman subject to fixed charges, as well as under floating charges.

36. The starting point for the analysis of what objectives administrators should aim for in using their extensive powers is paragraph 3 of Schedule B1 to the IA 86, which provides as follows:

"(1) The administrator of a company must perform his functions with the objective of – (a) rescuing the company as a going concern, or (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or (c) realising property in order to make a distribution to one or more secured or preferential creditors.
(2) Subject to sub-paragraph (4), the administrator of a company must perform his functions in the interests of the company's creditors as a whole.
(3) The administrator must perform his functions with the objective specified in sub-paragraph (1)(a) unless he thinks either – (a) that it is not reasonably practicable to achieve that objective, or (b) that the objective specified in sub-paragraph (1)(b) would achieve a better result for the company's creditors as a whole.
(4) The administrator may perform his functions with the objective specified in sub-paragraph (1)(c) only if – (a) he thinks that it is not reasonably practicable to achieve either of the objectives specified in sub-paragraph (1)(a) and (b), and (b) he does not unnecessarily harm the interests of the creditors of the company as a whole."

37. There are two points worth identifying when considering this "cornerstone" provision (per Snowden J, as he then was, in *Davey v Money* [2018] EWHC 766 (Ch), [2018] Bus 22 LR 1903, at [323]). The first is that the interests of the creditors as a whole are relevant whichever objective is pursued, whether rescue under Objective 1 ((1)(a)), or an Objective 2 case of a better return than liquidation (under (1)(b)), or with a view to achieving the objective of a return just to the secured creditor/s (under (1)(c) (an "Objective 3" case). The second point is that there is a recognition that in an Objective 3 case the sole objective may be to secure a return to a secured creditor. However, the administrator may not pursue such an objective if it will unnecessarily harm the interests of the creditors as a whole. Thus, it may be pursued even if it does harm their interests, but not if it unnecessarily does so. Together with consideration of the role played by paragraph 74 of Schedule B1, and concept of unfair harm, which I consider further below, this provides relevant insight into how to approach the question of what duties are owed when shareholders' interests are engaged by reason of there being a likely or potential return to shareholders.

38. In *Re Hat & Mitre PLC (in administration)* [2020] EWHC 2649 (Ch), a case which considered the position of a balance sheet solvent company, Trower J stated as follows at [204]:

"In my view, where a Company in administration is balance-sheet solvent, the Administrators have a duty to have regard to the interests of the Company's members as a whole when deciding on the appropriate course of action. Paragraph 74 of Schedule B1 itself makes this plain. It is drafted in a way that gives members a remedy where the acts of the administrators cause unfair harm to them and it contemplates that the interests of the members as a whole are central to the question of what if any relief should be granted. That duty will be particularly significant where the position of creditors is unaffected by the decision that they take. It follows that, if there is more than one alternative way forward, but there is no material difference between them in either achieving or failing to achieve the first statutory objective (paragraph 3(1)(a)), I think that administrators should normally adopt the course of action which is most likely to be in the interests of the members as a whole."

39. Thus, save in an Objective 3 case where sub-paragraph (4) applies, an administrator must perform his functions in the interests of the creditors as a whole. However, where the company is balance sheet solvent, or a return to shareholders is likely, there is a duty to have regard to the interests of members as a whole, including the concept of not causing them unfair harm. The weight to be attached to that interest is likely to be particularly significant where the position of creditors is unaffected by the decision that they take. Where the position of creditors is or may be affected by the decision they take, an administrator will ordinarily be expected to give primacy to the interests of creditors as a whole. This may involve some harm to the interests of members.

40. Therefore, the position of an administrator of a balance sheet solvent company is significantly different from that of a director of a solvent company, where the duty is to promote the best interests of the company for the benefits of its members as a whole. The jurisprudence concerning the duties of directors where a company is or is likely to become insolvent is illuminating, however, since in that scenario the directors have a duty to consider the interests of creditors: *BTI 2014 LLC v Sequana SA* [2022] UKSC 25, [2024] AC 211.

41. Pulling the threads together, in a case of a balance sheet solvent company, in administration, or an administration where a return to shareholders is likely (even if a rescue or Objective 1 administration is not possible), the administrator:

    41.1 retains the duty to perform his or her functions in the interests of the creditors as a whole;

    41.2 should have regard to the interests of members as a whole too;

    41.3 where both creditors and shareholders interests may be affected, but potentially be in conflict, to give primacy to the interests of creditors; and

    41.4 where creditors interests are not affected either way by the decision, to perform their functions in the best interests of members as a whole.

42. I also have in mind that where a creditor, including a secured creditor, may have an interest in a capacity different to that qua creditor, this interest is not an interest which the administrator has a duty to have regard to, or protect. I observe that it formed no part of the Joint Administrators' role to favour Desiman in respect of its interest in acquiring further benefits by the advance of further lending to the Companies in administration.

43. For Brigadier Inshaw, Mr Watson-Gandy drew my attention to the helpful summary of the duties of administrators by Norris J in *Green v SCL Group Ltd & Others* [2019] EWHC 954 (Ch) at [27]. He stated there (including the most relevant sub-paragraphs below):

"*Upon appointment administrators were bound:*

(a) To review their opinion about the objective of the administration;
(b) Having decided upon seeking a better return for creditors than would be achieved by an immediate liquidation, then to perform their functions in relation to that objective in the interests of the company's creditors as a whole;
(c) To perform their functions as quickly and as efficiently as was reasonably practicable;
(d) *Recognising that acting in the interests of the company's creditors as a whole may involve the balancing of competing sectional interests, to avoid acting so as unfairly to harm the interests of any particular creditor or group of creditors*…"

44. I note that where an administrator decides to sell an asset, they have a duty to obtain the best price reasonably obtainable. In this respect they owe a duty of reasonable skill and care; whether or not they have discharged such a duty is a question of professional competence or negligence, to be assessed by reference to the standards to be expected of ordinarily competent IPs: see Millett J (as he then was) in *Re Charnley Davies Ltd (No 2)* [1990] BCC 605 at 618D-E. Whenever an IP is involved in a realisation process they can reasonably be expected to take suitable advice on the best way to realise that asset and will not normally be criticised if they follow that advice, at least where it is ostensibly reasonable and rational advice and the relevant information has been provided to that person, even if the advice turns out to be wrong: see *Davey v Money* above at [447], [450]-[451].

45. The court will also be mindful, when being asked to examine their conduct, that they are licensed IPs, and officers of the court, who are delegated the responsibility, under statute, to make often difficult decisions as regards the strategy and approach to take. This will involve commercial judgment making and an exercise of discretion. The courts are generally reluctant to intrude into what are essentially commercial decisions for the IP to make and will ordinarily give them a degree of latitude: *Re Longmeade Ltd* [2016] EWHC 356 (Ch) at [66] (per Snowden J, as he then was); *Re Lehman Brothers International (Europe) Ltd* [2009] BCC 632 at [45].

46. Before turning back to consider the paragraphs in Schedule B1 to IA86 relied on in the Removal Application, it is also useful to remember that as fiduciaries administrators must guard against conflicts, including self-interest or self-review conflicts, and must be mindful when instructing third parties of any conflicts which might arise.

Paragraph 74 of Schedule B1 and unfair harm

47. The first paragraph in Schedule B1 to IA86 which is relied on by Brigadier Inshaw in his application notice, is paragraph 74, the material part of which provides as follows:

> *"(1) A creditor or member of a company in administration may apply to the court claiming that—*
> *(a) the administrator is acting or has acted so as unfairly to harm the interests of the applicant (whether alone or in common with some or all other members or creditors), or*
> *(b) the administrator proposes to act in a way which would unfairly harm the interests of the applicant (whether alone or in common with some or all other members or creditors).*
> *(2) A creditor or member of a company in administration may apply to the court claiming that the administrator is not performing his functions as quickly or as efficiently as is reasonably practicable.*
> *(3) The court may—*
> *(a) grant relief;*
> *(b) dismiss the application;*
> *(c) adjourn the hearing conditionally or unconditionally;*
> *(d) make an interim order;*
> *(e) make any other order it thinks appropriate.*
> *(4) In particular, an order under this paragraph may –*
> *(a) regulate the administrator's exercise of his function;*
> *(b) require the administrator to do or not do a specified thing;*
> *(c) require a decision of the company's creditors to be sought on a matter;*
> *(d) provide for the appointment of an administrator to cease to have effect;*
> *(e) make consequential provision."*

48. It is apparent from paragraph 74(4)(d) that these provisions may be used to secure removal. It is also evident, as noted above, that showing harm on its own is not enough: what must be proven is unfair harm. At one time it was thought that paragraph 74 was concerned with unfair harm to individual creditors or shareholders as compared with the treatment of other members of that class: see Norris J in *Re Coniston Hotel (Kent) LLP* [2013] EHC 93 (Ch), [2013] 2 BCLC 405 at [36]-[37]. Norris J took the view it was not there to provide a remedy for a person who complains there has been a breach of duty involving loss to the class as a whole. In the later case of *Hockin v Marsden* [2014] Bus LR 441 at [19] Nicholas Le Poidevin QC concluded the requisite unfairness does not necessarily need to be unjustifiable discrimination amongst a class, and this was followed *In re Meem SL Ltd (in administration)* [2018] Bus LR 393 at [33]-[34] (David Halpern QC). Following the

later decisions, I proceed on the basis unfairness is not restricted to unjustifiable discrimination between members of a class, and a lack of commercial justification for a decision causing harm to a class or creditors or members as a whole may be unfair within paragraph 74. Lack of commercial justification or a decision which does not withstand logical analysis may justify the court's interference: *Loveridge v Povey* [2024] EWHC 329, HHJ Richard Williams, at [58]. That said I doubt whether the complaint of unfair harm, under paragraph 74, adds much in this case since the allegations said to constitute unfair harm are the same allegations which form the basis of the application to remove, under paragraph 88 of Schedule B1 to IA86. This is also evident from the fact that the pleader of the Points of Claim does not seek any relief other than removal.

Paragraph 88 of Schedule B1 and removal

49. Turning therefore to the main provision relied on, paragraph 88 of Schedule B1 provides that "*The court may by order remove an administrator from office.*" The jurisdiction and discretion of the court to remove is apparently unfettered according to those words, though case law shows that due cause or good reason must be shown for removal: *Sisu Capital Fund Ltd v Tucker* [2006] BCC 463 (Warren J), *Clydesdale Financial Services Ltd v Smailes* [2011] 2 BCLC 405 (David Richards J, as he then was); and *Finnerty v Clark* [2011] EWCA Civ 858, [2012] 1 BCLC 286 at [33]. At [37]-[38] in *Finnerty v Clark* Mummery LJ discussed the inquiry in the following terms:

"[37] I also agree with the Chancellor that, if an administrator is unbiased and entitled on the material before him to reach a relevant decision, such as a decision not to bring legal proceedings, his decision should be respected until the court concludes otherwise and the fact that another administrator might reach a different conclusion may be a reason to challenge the decision, but cannot be a reason to remove the administrator altogether.
[38] In this case the respondents knew and understood the wishes of the appellants as the majority of unsecured creditors and their status as investors and guarantors; received and took account of submissions from them and their advisers; received independent specialist advice from two firms of solicitors; properly investigated the matter of possible proceedings; weighed up the prospects; and decided against bringing s.244 proceedings."

50. Good cause does not require anything amounting to misconduct or personal unfitness, whilst those, or a breach of duty may justify removal, but instead is to be measured by reference to the interests of the insolvency process engaged and the purpose for which the office holder is acting: see Etherton J in *Re Buildlead Ltd (In Liquidation) (No 2)* [2005] BCC 138 at [168]-[169]. The court needs to be "*satisfied that it is for the general advantage of those interested in the assets of the company that the [office-holder] be removed*"; *Re Adam Eyton Ltd* (1887) 36 ChD 299, cited in *Sisu Capital* above at [84].

51. In considering the interests of the insolvency proceedings, the court may be concerned only with the future and not the past (*Sisu Capital* at [86]). It will have regard to but not be bound by the wishes of majority interests in deciding whether to remove (*Sisu Capital* at [86]). Some of these cases refer to the fact that the court will not lightly remove its own officer and must pay due regard to the impact on any removal on professional standing and reputation: see *Re Edennote Ltd* [1996] 2 BCC 718 (CA) per Nourse LJ at 725H, referred to in *Sisu Capital* above at [86] and also referred to in *Re VE Interactive Ltd (in administration)* [2019] BPIR 438 at [35]. I have my doubts as to whether "*the impact on any removal on professional standing and reputation*" is a factor to take into account, or should be given significant weight, and it does not seem to me to be part of the ratio of the decision of the Court of Appeal in *Re Edennote* (which was to focus on whether or not the office-holder was acting under advice; see at 726C-D). It did not feature in *Re Keypak Homecare Ltd* (1987) 3 BCC 558 where Millett J (as he then was) took the view the office holder had been guilty of complacency. Nor in any of the cases I have read does it appear to have been decisive. Instead, it seems to me that even if removal may resound to the discredit, to some extent, of an office-holder, the court should not shy away from making the order if satisfied there are good grounds for doing so; see Neuberger J in *AMP Music Box Enterprises Ltd v Hoffman* [2002] BCC 996 at 1001H. Office-holders have an important function which they should conduct with independence and professionalism.

52. Whilst removal of an office-holder is not necessarily based on fault, most cases will involve some degree of challenge or criticism of their conduct. It is important to have in mind, however, that if the court takes the view the office-holder has generally been effective and honest it should consider carefully before removing and replacing him, and in particular it should not be seen to be easy to remove an office-holder simply because in one or possibly more than one respect their conduct has fallen short of ideal: per Neuberger J in *AMP Music Box* above at 1001H.

53. If the court considers there is good cause for removal then it may replace the officeholder on the application of, amongst others, the directors, if it is satisfied that the QFC holder is not taking reasonable steps to make a replacement, or that for another reason it is right to make the replacement: paragraph 95 Schedule B1. Mr Curl KC, leading Mr Colclough, was right to submit this emphasises the apex position of the QFC holder (referring also to *Re Zinc Hotels (Holdings) Ltd* [2018] BCC 968 at [54]), but it is clear from paragraph 95(b) that circumstances may exist where the court considers it right to make a replacement irrespective of the wishes of the QFC holder. Where, as in this case, the complaint concerns allegations of unfair or improper conduct involving the QFC holder, Desiman, should the court be satisfied that there is substance in those allegations, or even matters which require independent investigation, the court may consider there would be reason to make an appointment irrespective of or independent of the views of the QFC holder.

54. My attention was drawn to what was said on the important role played by pleadings by Dyson LJ in *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041 at [21]:

"[21] ...It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness."

55. Mr Curl emphasised that in this case, the parties have set out their respective cases in Points of Claim, Points of Defence and Points of Reply, and having done so those statements of case should set the boundaries for the dispute. By contrast, he submitted, it is not the Brigadier's case that there is a need for independent officeholders to investigate whether the Administrators have acted in breach of duty so as to consider whether claims can be advanced against them.

56. He submitted this difference was important because if the Removal Application had been predicated on the need for independent investigation, then: (i) the Administrators would have responded to the application on that basis; and (ii) the application could, and may well have been, resolved at an early stage by the appointment of a conflict administrator to investigate those matters.

57. Mr Watson-Gandy submitted that the allegations of breach of duty were made out but in any event it was enough for me to conclude that there was a serious issue for consideration and investigation by an office-holder and given their closeness to the events in question the Respondents could not be expected to conduct an independent review; see *Clydesdale Financial Services Ltd v Smailes* above at [29]-[30] and *Re VE Interactive* above at [18].

58. Mr Curl referred me to a discussion in Insolvency Practitioners, Appointments, Duties, Powers and Liability (Edward Elgar,2nd Edn), a text of which I am a co-author, at para 6.191. This draws a distinction between "pre-pack sale" cases of the type under consideration in *Clydesdale* and *Re VE Interactive*, which give rise to particularly obvious issues of independence when the sale is being challenged, which may readily justify removal where the issue requires investigation, and those where an office-holder may have had a prior relationship, or some prior engagement with their appointee creditor, but this was not a bar to their independence and did not involve any real self-review threat (such as in *Zinc Hotels*). I do not go so far as to disagree with something I have authored (cf. the passage from the judgment of Megarry J in *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9, 16-17, and see more recently HHJ Matthews in *Pickett v Balkind* [2022] 4 WLR 88 at [79]), but where

allegations of conflict are involved, whatever generic category a case may be said to fall within, or outside, this is no substitute for a sharp focus on the detailed facts.

59. Turning back to the statements of case point, in my judgment *Al-Medenni v Mars* was ordinary adversarial litigation involving a personal injuries claim, but administration is a class remedy (*Re Longmeade* at [52], *Re Hat & Mitre* at [146]). Observations in *Al-Medenni v Mars* cannot be automatically translated across to removal applications which engage wider class interests. In my judgment if in the course of considering allegations of breach the court concludes that there is insufficient evidence to show a breach of duty, but a good reason why matters require investigation, then the jurisdiction to remove is potentially engaged. And if that issue falls within the overall purview of matters raised by the allegation, then I see no injustice to the office-holder in considering it as a ground. The fact, however, that this may be said to arise at a lower level than the allegation advanced, and investigation was not itself advanced as a ground, may have an impact on whether or not the court considers it appropriate to remove, or, as suggested by Mr Curl, whether some other course, such as the potential appointment of a conflict administrator, may be more appropriate. Moreover, the way the case is put may also have an impact on the issue of costs.

60. Having regard to the above case law, where, as in this case, the focus is on conduct which may justify removal, in my judgment applications may be conveniently disposed of by a three-stage process: first, an examination of the allegations made and findings on those allegations; second, consideration of whether findings on those allegations results in good or sufficient grounds for removal (including the notion, in this case, of unfair harm); and, third, if so, whether the court should exercise its discretion, and grant removal relief, having regard to all the circumstances, including the interests and wishes of other stakeholders. This third stage may include consideration of whether any concerns may be addressed by something falling short of removal, such as an offer to co-operate in the appointment of an independent conflict administrator, or an offer to step down in due course, or not seek to take up a future appointment as liquidator. In short there is no "one-size" fits all. The court must consider the particular circumstances and features of the administration at the date of the hearing.

Stage 1 - The allegations and my findings on the allegations

Summary of the allegations

61. The allegations of misconduct said to give rise to breaches of the duties owed by the Joint Administrators may be grouped under 3 main headings having regard to the allegations set out in the Points of Claim and Mr Nardelli's first (and main) witness statement:

    (1) That the Joint Administrators failed in their duties as regards attempts to refinance Desiman, and redeem the liabilities, which, if successful, would have resulted in the Companies being rescued ("The Refinance and Redemption Allegations");

(2) That there were failings in the marketing and sales process in relation to the assets of the Companies, and in particular that a sale with Cala was chosen because it benefited Desiman but was to the detriment of the general body of creditors and shareholders ("The Sale Allegations");
(3) That there were failings on the part of the Administrators in their decision to grant Desiman an increase in profit share on the Phase 2/3 land from 20% to 65% and then to 75% ("The Increases in Profit Share Allegation").

(1) The Refinance and Redemption Allegations

Introduction

62. The allegations in relation to attempts to refinance, and redeem the liabilities, focussed in particular on a refinance offer from Arrow Global Adviser Limited ("Arrow") from in or about June 2022. It was said that the Administrators failed to determine the debt due to Desiman which frustrated redemption. These allegations also included the complaint that the Administrators should have challenged the 20% Phase 2/3 Property Sales Fee which formed part of the CFJL Facility, and which was seemingly secured by the CFJL June 2021 Debenture, but which was also, it was said, susceptible to challenge.

The refinance proposals

63. The directors of the Companies had been in discussion with Arrow for some time to secure refinance. On 16 June 2022 Max Lewis of Arrow sent an email to Mr Richardson, and others, enclosing a letter of the same date outlining the terms of an offer, subject to contract, to provide £50m to repay the current creditors and enable the Companies to leave administration. Mr Lewis asked for time to have an initial conversation in relation to the proposed refinance, called Project Blue. Mr Richardson attended the requested call on 20 June 2022 and spoke to Mr Lewis.

64. It is apparent that Desiman were not keen on the refinancing proposal, for a number of reasons. These are set out in an email from Marc Atkinson of Desiman to Mr Richardson, dated 21 June 2022 and sent at 09:21, copying in also Mr Fellows of Desiman and others. One of the reasons was they considered they had reached a verbal agreement with Mr Nardelli and Mr Johnson, acting on behalf of the shareholders, to maximise the project value and share profits on a 50:50 basis over and above repaying Desiman and Brooke. He also expressed concern about the extent to which Mr Nardelli and Mr Johnson could be trusted to be held to their promises, noting the findings in previous proceedings (such as in the Brooke Homes' litigation) and the absence of a copy of any offer. Desiman felt the marketing process through Savills (which by then had commenced) should continue until a certain way forward was found.

65. On 23 June 2022, Mr Richardson emailed Desiman noting that whilst Desiman's "*primary focus*" had been to enhance the future value of the sites for all parties,

despite this the shareholders/directors "*are seeking to pursue the refinance in order to take the companies out of Administration, and the various parties are looking to finalise the figures involved. If the funds are available to repay all creditors in full, then in reality we are not in a position to look beyond that and how the future would look for the shareholders and any other interested parties in how the sites are conducted from when the Administrations end*". Again in this respect Mr Richardson was clearly discharging his duties as administrator in exploring the potential opportunity to rescue the Companies via a refinance proposal. He also went on to note that "*Given the level of interest that is accruing across all the companies' debts we cannot be seen to be being obstructive, even though it has taken them 7/8 months to get it to this stage with this particular funder. Therefore, I would be grateful if you could produce a redemption statement*."

66. Mr Watson-Gandy submitted the phrase "*we cannot be seen to be being obstructive*" was a curious turn of phrase. It is perhaps a little unfortunate on Mr Richardson's part, since it might be read as suggesting he was more concerned about appearances than substance, but I do not think this is a fair reading overall of what Mr Richardson was saying or doing at this time, and there was no evidence he was in fact being obstructive or conniving with Desiman to be obstructive to assist Desiman in his objectives. Mr Nardelli accepted in his oral evidence that it would appear from this email that Mr Richardson was seeking to do his job properly, and he had nothing to complain about in relation to the conduct of Mr Richardson thus far.

67. Following the initial call between Mr Richardson and Mr Lewis, on 26 June 2022 Mr Lewis wrote again to Mr Richardson, and others, letting him know that Desiman had made contact to suggest a meeting with Arrow. In the email Mr Lewis went on to state that he had informed the shareholders of this, and agreed with the shareholders they would be happy to have a call with Desiman to discuss a pathway forwards. Mr Nardelli, Mr Johnson and the Brigadier were all copied in. Mr Nardelli accepted in his oral evidence that he could have no complaint about the Administrators' conduct in this respect, though he would have much preferred for Arrow to be speaking to Mr Richardson rather than have direct discussions with Desiman. Mr Nardelli realistically accepted however that Desiman, as the QFC holder, held the whip hand, and would have to be involved in communications one way or another.

68. In an email from Mr Fellows of Desiman to Mr Lewis of Arrow on 27 June 2022, in advance of a planned call, Mr Fellows explained the desire to see Arrow's proposal. He explained in this email that he understood that Desiman would be expected to release all security in return for payment of its capital and interest but then deferring all fees, sale fees and profit share. He explained this would not be acceptable. He indicated the ballpark figure Desiman would be looking for was of the order of £60.2m. Mr Nardelli gave evidence that this stance effectively wrecked the attempt to refinance. It seems to me the figure Mr Fellows was referring to here was not purely a redemption figure, but also based on an allegation that there was a binding verbal agreement for a 50:50 profit share with shareholders in return for Desiman's ongoing support. If that was indeed the case then it can be seen why Desiman would have

adopted the stance they did, and the figure of £60.2m may have been justified. However Mr Richardson persisted in requiring a redemption statement and obtained one from Desiman in July, as the correspondence which I shall now turn to shows.

69. On 12 July 2022 the solicitors then acting for the shareholders, VwV, referred to the discussions with Arrow and asked for details of costs and a break down of the figures owed to creditors. By email of 15 July 2022 Mr Richardson asked for a copy of the offer from Arrow and noted that he would request an up-to-date redemption statement from Desiman and prepare a list of creditors. He noted there may be some difficulties in ascertaining the liabilities in relation to creditors, referring to litigation involving Dekra and Cassadian's proof.

70. On 21 July 2022 Mr Richardson wrote again to VwV confirming that he had chased Desiman for their redemption statement, asked for comments from the shareholders as to the two creditors he had mentioned, and asked for a copy of the Arrow offer and the valuation obtained in support of the same. When questioned about this in evidence Mr Nardelli stated he knew that this valuation report had been commissioned, but realistically recognised that the email of 21 July 2022 indicated Mr Richardson was discharging his duties properly.

71. On 28 July 2022 Mr Richardson sent a further chaser email to VwV noting he had not received a response to his emails of 15 and 21 July, and enclosing a copy of the redemption statement which had by then been provided to him by Desiman. He indicated that once he had received comments from the shareholders on his queries he would look to finalise an overall list of creditors. This showed a total of £43.5m owed to Desiman, including the 20% Phase 2/3 Property Sale Fee (based on an assumed sale price of £120m for phases 2 and 3) of £15.2m and the Pains Property Sale Fee of £2.5m (being the minimum sum). Taken with the Brooke Homes secured debt of £14m odd this still provided challenge to the notion a £50m refinance could achieve an exit. If the 20% Phase 2/3 Property Sale Fee could have been removed in its entirety then the numbers looked more achievable, since the Desiman redemption sum would fall to c £28.3m. I will return to the 20% Phase 2/3 Property Sale Fee below.

72. On 2 August 2022 the solicitors acting for the shareholders, VwV, finally replied to Mr Richardson, apologising for the delay in responding and indicating that she was taking instructions on the point raised and would revert as soon as she could. She does not seem to have received any instructions to do so during August 2022. The next material communication in August from Mr Nardelli was on a different question, concerning the incentivisation to Desiman in supporting the administration process. In an email he sent to Desiman, copying in Mr Johnson and the Brigadier, on 10 August 2022 he stated:

"*I understand from my call with Marc [Atkinson] this morning that we are at a crucial stage of the administration process and you are doing all you can to make sure the benefit of the balance of the Murfitt Henson land is not lost to both P3 and Desiman.*

If you are able to secure that position and avoid a forced sale, as I'm sure you will, in good faith CFJL will increase your benefit in the existing contract from 20% to 50%."

73. I conclude Mr Nardelli had in mind that the Phase 2 land purchase deadline was looming at the end of October 2022 and that Desiman's support was required to avoid a forced sale of the existing assets and bring in and realise the Phase 2 and 3 land for the benefit of all concerned. The email is slightly inaccurate in referring to an agreement with "CFJL" which Mr Nardelli had no power to give (CFJL by this time being in administration), but the willingness on his part to agree to this provides relevant context both to the complaint about the Administrators in relation to the refinance, and also the allegations concerning the increases in Desiman's profit share. As regards the former it is relevant as showing that any delay in progressing the refinance process does not appear to be due to the Administrators, or any failure by them to determine Desiman's claim. Moreover, the shareholders' actions (in failing to respond promptly to queries raised of them) do not show they considered they were proximate to a refinance deal.

74. Ultimately a substantive response from VwV was not sent to Mr Richardson until early September: on 1 September 2022 Ambuja Bose of VwV wrote raising certain queries in relation to the July redemption statement, which was also contrasted with an earlier March redemption statement. Each of the facilities were then considered and points raised about them. The overall position stated at the end of this email indicated that, subject to proper corroboration, the total payable to Desiman should be no more than £27m odd. This is to be compared with the redemption statement advanced by Desiman of £28.3m, excluding the 20% Phase 2/3 Property Sales Fee under the CFJL Facility Letter. In that respect VwV stated the position was entirely hypothetical, but reserved the rights of their client in relation to it. Mr Nardelli accepted that ignoring the argument about the 20% Phase 2/3 Property Sales Fee the sums involved were not that different, and he indicated in oral evidence he did not have any substantial complaints about it.

75. Notwithstanding this frank concession by Mr Nardelli in the witness box, it seems to me that a commercially interested party might have cause to enquire into some of the numbers in more detail. I have not seen any clear audit trail in relation to the numbers for the Facility D use. This Facility was not used for settlement of the Brooke Homes claim. Some of this Facility was used as reductions of capital and interest on the other Facilities, and this can be seen as credits on the redemption statements, though not the entire sum. Brooke Homes, the second secured creditor, has commenced its own proceedings seeking an account from Desiman in relation to the proceeds from the Cala homes sale. In an application before Joanna Smith J in February 2024 counsel for Desiman confirmed his instructions at that time was that the total amount secured was likely to be in the region of £35m. In context this may well be referring to what is secured ahead of Brooke Homes (given it obtained its security on 10 December 2021, before the CFJL Facility on 23 December 2021). But measured against the redemption statement calculated to March 2023 (see paragraph 78 below) suggests Desiman may subsequently have recognised some adjustments were required (since

the March 2023 statement, excluding the 20% Sales Fee, is £36.9m). There has been no final ruling on the subject to date. As the next person down the priority line/waterfall Brooke Homes can take such points as it thinks fit in relation to these calculations, including as regards any default interest that may have been charged, and how Facility D has been used.

76. Of most relevance for present purposes, however, is that the refinance with Arrow was unlikely to work without a challenge to the 20% Phase 2/3 Property Sales Fee, even if some adjustments needed to be made to Desiman's redemption statements. Mr Nardelli pointed to this difficulty in his evidence, stating at paragraph 28 of his statement:

"Accordingly, if the Phase 2/3 Property Sales Fee was valid, CFJL was left in a situation where the Murfitt Henson contract [i.e. the 2017 CSA] had been assigned to Desiman subject to a sale fee since, until that sale occurred, the sum required to pay for the redemption could not be calculated and we were stuck in administration. This is of fundamental importance to other creditors as well as the shareholders. The sales fee has been utilised by Desiman as a serious block on the equity of redemption and preventing refinancing to the disadvantage of all parties except Desiman and delaying the point at which other creditors can be paid and we would come out of administration."

77. This passage in Mr Nardelli's evidence underlined the difficulty in an exit via refinance whilst the 20% Phase 2/3 Property Sales Fee remained in place. It is not entirely true that the Companies were stuck, but either further negotiation or litigation was likely to be required with Desiman.

78. By September/October 2022 the parties seem to have become more focussed on the deadline looming in relation to the Phase 2 payment required under the CSA/CFJL Agreement, and at the same time the sales process had advanced and appeared to offer reasonably positive returns for all stakeholders. Mr Nardelli had been personally involved in discussions with the landowner of the Murfitt Henson land who confirmed to him they would be willing to extend the date for completion of the phase 2 purchase for a further 3 months, as set out in an email sent by Mr Nardelli to Mr Richardson on 13 October 2023. I shall return to those points below, but I note that Mr Richardson continued to request updated redemption statements from Desiman, and provided them to the shareholders. For example, on 18 October 2022 he provided an updated redemption figure which showed forward calculations to March 2023, seemingly to allow some time for anticipated completion, which showed an increased calculation to then of £53.6m. This was in an email where Mr Richardson also advised the shareholders that work was progressing with an exchange on the sale of Phase 1 of the land and with the intention of entering into a promotion and option agreement with the same buyer. He indicated that they were considering a proposal from Desiman to facilitate this and at that time he was of the view that the action would achieve the best outcome for the assets and return for all creditors and shareholders.

79. Brigadier Inshaw accused Mr Richardson of providing misleading material, because the redemption statement showed only a 20% fee whereas what had been agreed in principle with Desiman by this time was an increased fee of 65%. In my view this is not a fair allegation to make against Mr Richardson because it ignores the fact that one scenario was referring to the existing position, a refinance which would enable the administration to be exited, whereas the other was looking to the position if no refinance occurred. It also ignores the fact that the directors/shareholders knew they had already offered 50% of any "CFJL" shareholder return to Desiman to keep their support. There are indications this enhanced profit share had been discussed for some time before June 2022, but it was evident Mr Nardelli had confirmed this in writing in August 2022. Mr Richardson stressed in the email of 18 October 2022 that if funding was available then the shareholders should urgently present the same. They did not.

80. The Applicants did not adduce evidence to show that, in October 2022, they had a proceedable offer which would have enabled an exit from administration at that time. In one of the many pieces of litigation which have arisen in relation to these Companies, Arrow have sued Mr Nardelli and Mr Johnson for a termination fee in relation to the facility agreement, by claim form dated 7 November 2023. This refers to an engagement letter dated 9 May 2022 and contemplated a 6 month exclusivity period whilst Arrow would complete outstanding due diligence. It is possible this might have produced an offer capable of being proceeded with by October 2022 but no evidence was adduced to show this was obtained. If there was no proceedable offer in place this would explain why VwV were not provided instructions to respond to the emails from Mr Richardson in July 2022 against which the viability of the proposed refinance could be assessed. In any event, even if there was an offer capable of being proceeded with in the Autumn of 2022, there was the hurdle of the 20% Phase 2/3 Property Sales Fee.

81. I note that Brigadier Inshaw raised concern in his email of 1 November 2022 to Mr Richardson that he had failed to respond to the points raised in the VwV letter/email of 1 September, and this included enquiries about where the Facility D funds had gone, how the Pains Property Sale Fee had been calculated, and question about the interest rates applied. These are fair points to raise so far as they go, but even if they had shifted the numbers by the maximum stated in this letter (a reduction to £29m according to the letter), they are unlikely to have made any difference if the 20% Sales Fee remained in place. If this 20% Sales Fee is put back into the redemption calculation the figure is £45.7m (taking the 20% Sales Fee for Phases 2/3 at £16.7m, according to the calculation in the latest redemption statement, which took a figure of £101m for the sale price for phases 2/3). Together with the Brooke Homes judgment this was significantly in excess of the £50m Arrow refinance proposal. And the next biggest difference on the numbers seems to be the calculation of the Pains Property Sales Fee – originally Desiman had put down £2.5m on its July redemption statement, but by the March 2023 redemption statement it was calculating this as £7.7m odd. If the difference - £5.2m – is added to £45.7m, the revised difference (according to the calculations provided by VwV) is between £50.9m and £53.6m. Therefore the

arguments raised by VwV on the redemption statement, concerning the calculations relating to interest and ensuring there was a clear audit trail for all the sums, was under £3m, and therefore not likely to be decisive to strategy.

82. The final communication relied on by Mr Nardelli in his evidence was an email he sent to Mr Robertson, one of the members of staff working for the Administrators, on 18 April 2023. This email was following the sale of the Phase 1 land to Cala Homes on 6 January 2023, for the sum of £40m, and in it Mr Nardelli confirmed that the shareholders had funders who were willing to fund any shortfall required to redeem Desiman upon receipt of completion monies. This email did not disclose the identity of the funder, and no evidence was adduced by the Brigadier which would enable me to know how proceedable this offer was. The additional complication is that not only had the sale of Phase 1 taken place, but the sale formed part of a wider set of transactions which have been acted on. I will consider those in further detail below when considering the Sale, and Increase in Profit Share, Allegations.

83. Having regard to all of the above communications, from June 2022 to April 2023, I conclude they do not support the allegation that the Joint Administrators have failed to engage with the Arrow refinance, failed to determine Desiman's debt, or de facto delegated the discussions to Desiman. The allegation that the Respondents failed to engage in their duties, and left matters solely to Desiman, is not in accordance with a fair or realistic reading of this sequence of communications, as Mr Nardelli largely accepted in his oral evidence. Nor is it right to suggest that the redemption figures provided by Desiman were "entirely inaccurate", which was one of the allegations. Mr Nardelli also accepted this in his oral evidence.

The 20% Phase 2/3 Property Sales Fee

84. In my judgment the only remaining element of the refinance related allegations in the Points of Claim capable of being sustained following a careful review of the contemporaneous documents, and oral evidence, was the contention that the Administrators failed to "*engage with or consider the Applicants' representations that Desiman was not entitled to a 20% Property Sale Fee of 20% of the Net Proceeds of Sale of the Phase 2 or Phase 3 land under a facility agreement dated 23 December 2021 between CFJL and Desiman*". In Brigadier Inshaw's Amended Points of Reply the point was also raised as to the validity of the 11 June 2021 Debenture, which was also a point Mr Nardelli referred to in his evidence. I will now proceed to consider those two allegations.

85. Even though the primary allegation advanced by Brigadier Inshaw concerns the CFJL Facility entered into in December 2021, it is useful to first mention and consider the 11 June 2021 CFJL Debenture. The June 2021 Debenture defines "Secured Liabilities" as "*including all present and future monies, obligations and liabilities of [CFJL] to [Desiman], whether actual or contingent…under or in connection with the Facility Agreement or this deed*". It is not apparent to me that there was any Facility Agreement at the time with CFJL, and the part of the debenture which should have

identified this is not clear as to the Facility Agreement being referred to. At the same time as the June 2021 Debenture CFJL did enter into a cross-guarantee (the CFJL Guarantee dated 11 June 2021). It seems most likely to me that this debenture was seeking to tie up CFJL as part of the overall security package for the lending advanced by Desiman (it was signed in the context of negotiations taking place in relation to the Brooke Homes litigation). Under clauses 3.2, 3.3 and Schedule 2, CFJL assigned its right to acquire Land D, E and F (i.e. Phase 2/3) for a further £10m, to Desiman by way of security, as a fixed charge, or by way of equitable assignment. Clause 3.4 then provided a sweep up provision, in order to provide for floating charge security of the property was not effectively charged or assigned under clauses 3.1 to 3.3.

86. This cascade in the drafting reflects the potential for argument as to whether or not the assignment by way of security might be re-characterised as a floating charge, in accordance with the principles considered in *Re Spectrum Plus Ltd (In Liquidation)* [2005] 2 AC 680. A security document might create a floating security if, despite other features, it has the third feature identified by Romer LJ in *Re Yorkshire Woolcombers Association* [1903] 2 Ch 284 – i.e. that it is contemplated that until some future step is taken by the lender the company may carry on its business in the ordinary way as regards the class of assets in question. The class of assets is the receipt of any contractual benefits arising under the CSA/CFJL Agreement, whereby land would be acquired into CFJL from the landowners. While I can see potential scope for argument on this point, it was not a point developed by Brigadier Inshaw, or Mr Watson-Gandy acting on his behalf in closing. The point was raised as to whether or not section 245 IA 86 rendered the floating charge in the June 2021 Debenture invalid, because of its proximity in time to the administrations, save for the fresh cash in fact advanced by the lender after this date (of c £500k), but this assumes the security is floating rather than explaining why it should be so characterised. There is also the further complication in this case that the CFJL assets were held for P3 Eco and PPP such that their earlier debentures might come into play too, even if the CFJL Debenture might be said to invalid to some extent. In those circumstances I see no reason to criticise the Administrators in proceeding on the basis that rights under the CFJL Agreement, or arising "*in connection*" with it, including contingent liabilities, were, or were potentially, secured. The 20% Sale Fee arising in relation to the Phase 2/3 sale concerned the land to be acquired under the CFJL Agreement. The question still remains however as to the position in relation to the rights to the 20% Sale Fee under the CFJL Facility, entered into on 23 December 2021, how this should be interpreted, and whether this transaction might be challenged or set aside on the basis of being a transaction at undervalue.

87. Clause 9.5 of the CFJL Facility provided that the 20% Sale Fee would become payable on a disposal of the whole or part of the Phase 2/3 Property. It concluded by stating that "*For the avoidance of doubt the Phase 2 / 3 Property Sale Fee will be payable irrespective of whether the Phase 2 / 3 Property Facility and/or the Brooke Facility are drawn down, recognising that the Lender has had to block the use of funds elsewhere so as to be able to commit to making the Loan available to the*

Borrower when required." Again, like the Pains Property Sale Fee, the Phase 2/3 Property Sale Fee was only capable of estimation in advance of a disposal. Given the anticipated potential value of the Phase 2/3 land, it was potentially a very significant sum. However, by this time the Companies were in a vulnerable position: they had a judgment debt which was unsatisfied and other litigation loomed. This clause was clearly part of the overall package offered by the Companies to secure the continuing support of Desiman via the CFJL Facility Letter.

88. The first point taken by Brigadier Inshaw in relation to this fee is a contractual interpretation point. The argument runs as follows: "*The 20% was predicate [sic] on Desiman having to block the use of the funds to fund a payment of £5.5 million to be utilised as part payment of a judgment obtained by Brooke Homes (Bicester) Limited and £ 11 million to purchase the Phase 2 and Phase 3 land. In fact, no sales fee was due as Desiman never was required to block funds and neither £5.5 million nor £11 million were ever drawn down nor advanced under the facility. Moreover the funds could not be blocked or paid over as it was a condition precedent to the funds being drawn down that a contract for sale of Tranche 1 of the Land had been concluded with Countryside Properties (UK) Limited ["Countryside"] and Desiman terminated contractual discussions with Countryside, purportedly on behalf of CFJL but without the authority of the directors of that company*."

89. Brigadier Inshaw's argument therefore is to place emphasis on the second part of the last sentence, after the comma, in clause 9.5, and the words "*recognising that the Lender has had to block the use of funds elsewhere so as to be able to commit to making the Loan available to the Borrower when required*". Brigadier Inshaw's point is that Desiman did not have to block the use of funds elsewhere, and in particular was not at risk of having to make funds available, until the Countryside contract for sale was entered into, which never happened.

90. The Respondents' primary defence to this contention focusses on the first part of the last sentence in clause 9.5, before the comma, which I have quoted from above, which expressly states that the Fee would be payable irrespective of whether or not there was any draw down of the Phase 2/3 Property Facility and/or the Brooke Facility. It was not a contractual obligation that it "block the use of funds", but instead that Desiman would make available the Loan and it anticipated needing to block funds to be able to do so.

91. The "Loan" is defined as "*the principal amount of the loan made or to be made by [Desiman] to [CJFL] under this agreement*…" The conditions precedent set out in clause 4, including matters concerning receipt of funds under the Countryside contract, applied to the Phase 2/3 Property Facility and the Brooke Facility, save in respect of the "Initial Tranche" forming part of the Phase 2/3 Property Facility. Under clause 5.1 an "Initial Tranche" in the sum of £500k could be drawn down separately. At least in this more modest respect it would seem contemplated by the parties Desiman would need to have been ready to provide funds. A complication with this argument however is that it was expressed to be a sum which could only be drawn

down "*during the Availability Period*", which is defined to mean "*the period from the date of payment by Countryside of £13,500,000.00 (being the first deferred payment payable to the seller pursuant to the Countryside Contract) to the Lender at the direction of P3eco until the date prior to the Repayment Date*". This is somewhat at odds with what was seemingly intended to happen, and did happen, in that the sum of £500k was intended to be available for draw down, and was drawn down, even though the Countryside contract did not occur, and funds were not received from them.

92. A potential weakness in the argument advanced by the Respondents is that the explanation provided as to the justification for the Phase 2/3 Property Sale Fee is not expressed in the future tense – that it "anticipated needing to block funds" – but in the past tense, that "it has had to block use of funds". Save perhaps for the argument concerning the Initial Tranche of £500k, it does not seem it had to block use of funds. However, even if it might be said to be inaccurate to say "*the Lender has had to block the use of funds elsewhere so as to be able to commit to making the Loan available to the Borrower when required"*, the fact this was inaccurate does not mean the parties intended the Sale Fee to be contingent on blocking having occurred.

93. In short, as soon as the Facility was signed this was expressed to become a contingent liability, in contrast to the position in relation to interest under clause 6, which does seem to be expressed by reference to draw down, or availability of draw down upon the Countryside contract providing funds to draw down.

94. I also note that the genesis for this clause is set out in an email from Desiman sent on 28 November 2022 at 6:28, and explains as follow:

"Loan Fee
In addition to the Interest and exit fee as above, upon onward sale of the new land phases, Desiman will receive 20% of the net sale proceeds (for the avoidance of doubt net of the completion figure paid for the purchase and any associated deductions as may be made for s106 costs), apportioned pro-rata should those lands be broken up and sold piecemeal. In order for us to commit to such substantial loans, we have agreed that in such case as the P3 parties did not require to draw Desimans loans, the Loan Fee will still be due, as if the funds had been drawn. For instance, if an early onward sale of a future phase came about, thus facilitating a back to back to provide adequate funds to complete the land purchase and pay Brooke, meaning that the Desiman loan funds were no longer required, the Loan Fee would be considered due, but not the interest or exit fee."

95. This background matrix of fact evidence supports my initial impression that the Sale Fee was to be treated differently from interest, and drawn down or availability of draw down following a Countryside deal was not an implied condition precedent to it.

96. Reading the relevant words in clause 9.5 in the context of the overall agreement, and having regard to orthodox principles as to interpretation of contracts which I need not cite here, I prefer the construction that does not introduce a further contingency. In my

judgment the argument raised by Brigadier Inshaw, whilst not misconceived, fails because the words after the comma in the last sentence are providing an explanation as to the justification for the Phase 2/3 Property Sale Fee not being subject to a contingency of draw down. That explanation, even if not wholly accurate, does not thereby introduce a further contingency on the Phase 2/3 Property Sale Fee becoming payable beyond that which is stated as part of its definition. Comparing with clause 6, and the interest provision, the parties could have said the Phase 2/3 Property Sale Fee would only potentially become due and owing if the Countryside contract was completed, and funds became available for drawn down even if not drawn down, but they did not do so. Brigadier Inshaw is inviting me to imply a contingency or restriction which is not expressly there. The implication of a term is not part of his case, and the contextual indicators do not obviously support such an approach, in my judgment.

97. Whilst not clearly emerging from the Points of Claim as an allegation, in his evidence Mr Nardelli also sought to emphasise the hypothetical nature of the Phase 2/3 Property Sale Fee – it might become payable at some point in the future but was not due for some time. That may be so but if a contingent liability is secured then a borrower cannot redeem without making provision for that liability; see *Re Rudd* [1986] 2 BCC 98955 and more recently see *Kendall v Morley* [2020] EWHC 3052 (Ch). A possible exception to this applies if the court were to conclude that in some way the provision in question was an unconscionable "clog" on the equity of redemption. This is a high threshold requiring terms to be imposed in a morally reprehensible way – showing the term was unreasonable is not enough: see *Multiservice Bookbinding Ltd v Marden* [1978] 2 All ER 489, [1979] Ch 84 at 110. Given Mr Nardelli, Mr Johnson and Brigadier Inshaw negotiated the terms as a way of dealing with the Brooke Home judgment, and providing the ability to preserve value in the Phase 2/3 land, and presumably considered the CFJL Facility would assist the Companies overall, this is a difficult point for them to make. In my judgment there is not the evidence to show morally reprehensible conduct of the order required – the mere fact that the Countryside contract did not proceed, and Desiman decided to trigger its contractual rights and appoint administrators does not provide a basis to so conclude. There is no evidence to show that this was part of some pre-planned strategy by Desiman in advance and that in some way naivety on the part of the Companies was exploited.

98. The final allegation made is that the Administrators should have challenged the CFJL Facility (or Facility E) as being a transaction at an undervalue within the meaning of s238 IA 1986. In order to show this it would need to be demonstrated that the value incoming under the CFJL Facility was significantly less than the value going out under it. Where there is sale of an asset for a price assessing incoming and outgoing value is relatively straightforward conceptually. Where the transaction in question is a loan facility, which involves, as in this case, some immediate benefits or potential benefits but also some potential future, or contingent, liabilities, the task is more complicated. In addition, as stressed by Mr Curl, the court cannot make an order under s238 if it is satisfied both that (a) the company entered into in the transaction in

good faith and for the purpose of carrying on its business and (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company. Whilst the Countryside transaction did not proceed, and whilst it might be thought with the benefit of hindsight the CFJL Facility contained imprudent terms, this is not the test the court would apply. It is difficult for Brigadier Inshaw to contend that there were not reasonable grounds for believing that the transaction would benefit the company at the time or that it was not entered in good faith for the purpose of carrying on its business: he was a director of the Companies at the time, along with Mr Nardelli and Mr Johnson.

99. Perhaps most importantly however, when considering these three heads of challenge to the Sale Fee (i.e. construction arguments, the hypothetical nature of the contingency and a transaction at undervalue challenge), Mr Richardson's evidence was not that he had not considered the potential to impugn or challenge the Phase 2/3 Property Sale Fee. His evidence was, instead, that having sought and obtained legal advice, in respect of which he had not waived privilege (citing sensitivity grounds vis a vis any future claim which might be made against Desiman), the Administrators concluded they should not bring proceedings. He emphasised that they only litigate when they consider there is likely to be a real benefit in doing so. They do not litigate speculative and expensive proceedings against third parties. Therefore this is not a case where the opportunity to challenge the Sale Fee was missed or ignored, but a case where it was assessed, with the benefit of legal advice, and a commercial judgment made not to pursue it.

100. In my judgment this allegation also needs to be understood in the context of the lack of other options open to the Administrators. The Companies held no significant funds in 2022. Desiman was willing to support the estate in return for a share in the value preserved or generated by that. In addition, as explained further below, the shareholders recognised the grant to Desiman of a greater share in Phase 2/3 realisations was a reasonable *quid pro quo* for their involvement and present and future support, including fresh lending in administration. Whilst the Applicants reserved their position on the Sales Fee they did not positively suggest an action should be brought, or directions from the court sought. Nor did they offer the Administrator any funding or indemnity to bring such a challenge; quite the opposite as at this time they were offering a 50% share of the Phase 2/3 profit. Moreover, if a challenge to this Sale Fee had been brought it could reasonably be expected that Desiman would have withdrawn its support, and its offer to provide further lending, and would have proceeded with a "forced" sale. Some other lender or option would need to found if a "forced sale" was to be pursued, in circumstances where the matter could become protracted and expensive.

101. Overall, therefore, whilst another officeholder or court might have taken a different approach, if a challenge had been brought before the January 2023 transactions, there is no basis to conclude the Administrators took the approach they did out of bias, bad faith, lack of commercial justification or ignorance. Even if it might be said that a competent administrator should have taken a different approach -

for example because the Phase 2/3 Property Sale Fee should have been interpreted as only becoming payable on exchange or completion of the Countryside contract - these allegations do not, in my judgment, provide a good reason to justify removal of these Administrators now (cf. *Finnerty v Clark* above at [19]). If Brigadier Inshaw or the other shareholders wished to challenge the Phase 2/3 Sales Fee they should have done so in 2022 and sought a ruling from the court then. I infer they did not because they considered, on the information then available, something had to be given to Desiman to secure their support, and to enable a sale to proceed other than on a forced sale basis. This was a commercial decision made at the time based on the knowledge then available. It is incongruous for them to now criticise the Administrators for taking a similar approach. That is especially so in circumstances where the Administrators did have firmly in mind in their estimated outcomes analysis of the sale, the position with and without the Phase 2/3 Property Sale Fee.

(2) The Sale Allegations

Stymy of the Countryside deal

102. One of the allegations made by Brigadier Inshaw concerns the suggestion that Desiman stymied the deal with Countryside. I have already considered some of the material communications in paragraph 25 above. I am not persuaded that Desiman was hostile to a sale to Countryside and I have seen no evidence that Desiman was looking to use the administration for an improper purpose. Nor does this allegation support a complaint of misconduct on the part of the Administrators, who were not appointed until a later date.

The marketing and sale process

103. On 23 March 2022, the Administrators and Desiman instructed Savills to market the Land for sale. The selection of Savills as agent is not criticised and it is common ground such a joint instruction made sense given Desiman was a fixed charge holder in relation to the land owned by P3 Eco (Land A) and PPP (Land B), that legal title of much of the Phase 1 land was in the name of Desiman 2 (Land C), as security, and the CJFL Agreement in relation to Phases 2 and 3 (Land D, E and F) had been assigned to Desiman as security. Indeed, on one view (*Carvill-Biggs* above at [7]) the Administrators were not bound to be involved in the marketing exercise at all, but they were.

104. Brigadier Inshaw contends the Administrators erred in presuming what was in the best interests of the creditors and shareholders was also in the best interests of Desiman. In my judgment the Administrators made no such presumption. The contemporaneous documentation shows that all parties wanted to achieve the best price reasonably obtainable, and as soon as reasonably practicable. In addition, the Administrators sought and acted on professional advice from Savills when deciding which offer to proceed with, and carried out modelling to test which of the offers was likely to be in the best interests of creditors as a whole and shareholders as a whole.

This modelling included consideration of the position including and excluding the Phase 2/3 Property Sale Fee at 20%.

105. One of the allegations made under this heading was that the Administrators erred in causing or permitting Underwoods, the solicitors who had previously and continued to act for Desiman, to be jointly instructed on the sale process for not only Desiman but also the Companies/the Administrators. However it is not apparent to me what conflict there was in relation to the efforts to achieve the best possible terms out of the buyer in relation to the transaction and conveyancing process. It may have been this complaint was tied up with an allegation that the sale receipts were apportioned in an inappropriate manner so as to secure a higher Pains Property Sale Fee for Desiman. However it is apparent from the final documents entered into on 6 January 2023 that this allegation is not sustainable as the minimum fee of £2.5m was agreed for the Pains Property Sale Fee in the final agreement. So apportioning a greater share of the sales receipts to the Pains Property did not result in a higher Pains Property Sale Fee. Mr Nardelli accepted this in his oral evidence and instead placed emphasis on the increases in the Phase 2/3 Profit Share. This engages a different issue as regards how those terms were dealt with commercially as between the Companies/the Administrators and Desiman; this is the focus of the Increases in Sale Share Allegations, which I will consider separately below.

106. There appear to have been two main aspects to the allegations in relation to complaints concerning the sale process. The first relates to the relative merits of the two main shortlisted bids, which were from St Congar and Cala, with the allegation being the St Congar offer should have been taken over the Cala offer. The reason for this appears to be because St Congar was a "back-to-back" sale, and such a sale would have enabled Desiman to be taken out/redeemed immediately. It is argued this would have been for the benefit of the creditors and shareholders, and would have overcome the problem with the 20% Share Sale Fee which I have already discussed. The second allegation concerns the failure to engage with an offer from Places for People ("PfP"), which, on the face of it, seemed to offer the prospect of a much higher sum and at an earlier time. To put those allegations in context it is useful to consider the offers in more detail and what advice was given by Savills.

107. Having carried out an initial period of "soft marketing" (which included the consideration and rejection of an offer from Countryside in May 2022), the formal marketing process by Savills commenced on or around 8 June 2022. The land was divided into four lots and bids were invited. There is no criticism of this lotting. Savills set up a substantial data room and all or nearly all of the major national housebuilders, as well as others, accessed the data room. Savills engaged with 65 potential purchasers and interested parties were then given a deadline of 3 August 2022. Ten offers were received. The offers were complex as not all the parties were bidding for the same land and the structure of the deals, timing of payments and conditionality varied. On 7 August 2022 Savills provided the Administrators and Desiman with an initial analysis of the offers and advised negotiations be continued with five potential purchasers, including Cala and St Congar, though not, at this time,

PfP on the basis that they had placed conditionality on their offer, which was viewed as being unattractive.

108. On 31 August 2022 interviews were carried out with the shortlisted bidders, which interviews/meetings were attended by Savills, led by Ms Fenton, Mr Richardson on behalf of the Administrators, and representatives of Desiman. On the same day PfP emailed to Savills a further offer, which removed much of the conditionality it had previously included, and ostensibly offered a headline sum of £100m for the whole site. Mr Richardson confirmed this was discussed with Savills at the interview, and their advice was that it was still subject to conditionality that was not acceptable, and they had doubts about PfP. In Savills' report in September (referred to further below as regards the other offers) they said as follows in relation to PfP:

"*Places for people- Whilst the headline terms appear strong financially, having reviewed the details a number of conditions that they stipulate just simply won't be achievable or indeed desirable from the landowners perspective (particularly in relation to delivering infrastructure or the energy centre). For those reasons alone, I don't see how this offer could be progressed further unless those conditions were removed entirely. The need to be asked as to whether they are willing to consider these conditions be removed.*"

109. It transpired that there were further communications between Savills and PfP between 31 August 2022 and 22 September 2022, when this report was produced, which indicated PfP were willing to remove much if not all the conditionality, and make an upfront payment, but these were not, or not all, relayed on to either of Desiman or the Administrators. This caused some later consternation and frustration on the part of them both (considered further in paragraphs 118-122 below).

110. Savills summarised their views of the offers from what they perceived to be the three front runners, St Congar, Cala and Crest Nicholson, in a report and recommendations on 22 September 2022. The overall position may be summarised as follows:

a. The St Congar offer was for £82.5m for the whole site, deferred over two years. Savills advised that the "level of discount" applied by St Congar in relation to Phases 2 and 3 was "substantial";
b. The Cala offer was for £48m for Phase 1, deferred over two years, including the provision of a link road required under the section 106 agreement. Cala also offered a hybrid promotion and option agreement on Phases 2 and 3, which was considered likely to deliver more overall value than the St Congar offer. It was structured so that 25% of the residual land would be taken to market to set a purchase price for Cala then to have the option for on the remaining 75%;
c. The Crest Nicholson offer was for Phase 1 residential only at £31.2m.

111. Savills recommended that Cala be given preferred bidder status since they considered it provided the best financial bid for the proportion of the site deliverable at that time (ie Phase 1, involving 500 residential houses), the offer had regional board approval and was known to their main board, could be progressed quickly, and thus enabling exchange before 21 October 2022, being the deadline for the Phase 2 purchase under the CJFL Agreement. They also considered the offer from Cala allowed for Phases 2 and 3 to be promoted to ensure they are delivered as housing and this offered the best value for the land. This advice was accepted by the Administrators and Desiman.

112. Mr Richardson also carried out his own modelling on the Cala offer and concluded that in relation to Phases 2 and 3 it offered a prospective value of £84m, albeit the precise date when this would be realised was uncertain. If taken with the Phase 1 sale price this course was assessed as having the prospect of delivering a total of c. £132m, albeit with a substantial part of that value not likely to come in for some time, and perhaps for many years, due to the fact that Phases 2 and 3 were not presently deliverable.

113. Mr Richardson also carried out modelling and estimated outcomes in order to assess the merits of the St Congar and Cala offers in terms of their potential return to creditors and shareholders. The version which included CGT shows that the St Congar offer showed a likely nil return to unsecured creditors, or with unsecured creditors being paid and a small return to shareholders (of the order of £812k), if the 20% Phase 2/3 Sales Fee could be challenged or avoided. The Cala offer showed a return to shareholders of the order of £13.7m odd. This was also based on a Desiman Phase 2/3 Sales profit share of 65%.

114. Two final points raised by Mr Watson-Gandy in closing was that Mr Richardson's estimated outcome calculations was not comparing like with like because they included default interest on the St Congar bids of £2.5m or £1.5m and they also wrongly included a further deduction of £2.7m on the one which was supposedly excluding the Desiman 20% profit share. As for the latter point it was accepted by Mr Richardson in evidence this latter deduction was in error (such that his notes wrongly suggested a return of some £2-3m lower on one permutation of the St Congar bid). As for the former point Mr Richardson was not questioned on it, however the question of how much interest Desiman would be charged depended on when the sale took place and how much of the consideration was being deferred and in this respect the two bids were not precisely alike. There is some justification in the point that a comparison of St Congar and Cala bids is not precisely comparing like with like. But in my judgment the estimated outcomes were drawn up in good faith and served their purpose by comparing the commercial merits of the two different bids. Both of them offered the prospect of immediate pay down of all or most of the debt owed to Desiman out of Phase 1 proceeds, or the overall proceeds. Both of them would have involved an element of deferred consideration. The Cala bid was much more so, because it contemplated a realisation process in relation to Phase 2 and 3 land before its value was set. The Cala bid offered the prospect of a positive return to

all shareholders but involved greater delay. Which to accept was ultimately a commercial judgment call.

115. In an internal memo prepared by Mr Richardson dated 27 September 2022 he recorded his consideration of the sale process and the question of entering into a new sale fee agreement with Desiman. I will return to consider this document in further detail when considering the Increases in Profit Share Allegation, but I note here that Mr Richardson records the view of the directors and shareholders of the Companies that they do not want a quick sale of the whole site now and preferred a structured sale of the CFJL land. This also supported the Cala offer.

116. In these circumstances Mr Richardson's decision to proceed with the Cala offer was not irrational or perverse. His decision is supported by a number of factors: Firstly, it was Savills' recommendation; secondly, it seemingly offered the prospect of the best return to creditors and shareholders; and thirdly it appeared to be the course that, at that time, the shareholders preferred.

117. Unfortunately, before the Cala contract was finalised economic conditions deteriorated. On 23 September 2022 the new Chancellor delivered his "*mini-budget*" and within a short time interest rates had increased and the housing market began to fall. On 10 October 2022 Cala informed Savills that it had not taken proper account of the costs of the link road it was required to build. Cala sought to renegotiate the price, and on 21 October 202 communicated a reduced price of £40m. In the meantime Mr Nardelli had managed to negotiate an extension on the Phase 2 completion deadline to January 2023, which relieved some of the pressure from that point of view. Savills reported on the deterioration in market conditions in their letter of 7 November 2022. The Administrators and Desiman were not happy with this turn of events and Savills were asked to go back to the two other unsuccessful bidders – St Congar and Crest Nicholson. However, those bidders, on being re-approached, also made clear that their terms would be reduced. The indications were that St Congar would reduce its offer to £50m and Crest Nicholson ultimately dropped out. Savills recommended against going back to the market and how this might be perceived by the market.

118. Before a final decision was made on proceeding with Cala the issue of the PfP offer arose again. Desiman and Mr Richardson became aware of more information in relation to PfP's offer, having been alerted to this by a statement of Mr Doyle of Brooke Homes dated 5 December 2022, who exhibited an email chain between PfP and Savills on 12 and 13 September 2022. Those emails from PfP were not forwarded to Desiman or Mr Richardson. Ms Fenton did not call them, contrary to what she had told PfP, according to the evidence of Mr Richardson.

119. In an email from Derek Clarke for PfP he referred to his email of 31 August 2022 and stated:

"if we removed all conditionality save for

- *Subject to contract and Board Approval*

- *Legal due diligence*

Would our offer of £100m be of interest?"

120. In a later part of the email chain, on 12 September 2022, Mr Clarke confirmed that he had regional board approval, with only full board approval being required.

121. When Mr Richardson became aware of the emails from Mr Clarke of PfP in December 2022 he followed it up with Savills asking what had happened, including by an email he sent to Ms Fenton on 11 December 2022. Mr Richardson and Desiman were frustrated and irritated with Savills for not passing this information on to them. This is apparent in some of the email exchanges between Mr Fellows of Desiman and Ms Fenton and Mr Atkinson in mid-December 2022, which were sent on to Mr Richardson. Mr Fellows noted at this time it appeared from the emails that PfP had withdrawn all conditions and bearing in mind the Cala deal looking "*less attractive at every turn*" they were questioning whether they needed further expert input.

122. Mr Richardson explained in his evidence that after he had followed matters up with Ms Fenton. She explained that in her phone call with PfP they did not state that their deferred payment terms of the £100m had been removed. She stated if this was a serious offer then she anticipated it would have been followed up beyond the emails, including by senior management reaching out to people within Savills. She explained that Savills had a relationship with PfP and were speaking with them on another opportunity after the emails and her call of 12/13 September 2022 and at no point did PfP raise the issue of their unsuccessful offer. Ms Fenton was clear that if she thought there was a serious offer of £100m payable on completion then she would have made both the Administrators and Desiman aware of this. This is consistent with the email she sent to Mr Richardson on 12 December 2022.

123. Savills produced a further report dated December 2022, sent under cover of an email of 19 December 2022. In this report it is recorded by Savills that they sought to revisit discussions with both Crest Nicholson and St Congar. During his questioning of Mr Richardson Brigadier Inshaw pointed out that this document records Desiman having engaged directly with St Congar rather than Savills (contrary to what had been previously pleaded in the Respondents' PoD). That may be so, but the evidence overall suggests this was done in conjunction with Savills. In any event there does not appear to be any evidence to suggest that what is recorded is untrue, namely that by November/December 2022 St Congar were only willing to offer £50m for the site as compared with their previous offer of £84m. Ultimately Savills' advice was to accept Cala's revised offer, given the response from the underbidders, the worsened market conditions, and the fact that the existing planning consent expired on 30 January 2023 (that is unless it was deemed that a reserved matters application had been submitted in time). It was noted that Cala had done a lot of work on the planning position and if a decision was taken to look to another party this would likely lead to further delay. Savills reiterated their view that the offer presented by Cala for the first 500 dwellings, and the commercial land, still presented the most credible and deliverable

option for Desiman and the Administrators and represented best value, with a potential capital receipt of £124m on offer if the hybrid/option agreement contracted at a minimum value of £70k per plot.

124. Mr Richardson confirmed in his evidence that if he had been advised there was a serious bidder, whether PfP or someone else, who was offering an unconditional bid of £100m for the whole site payable over a limited period of time then he would almost certainly have accepted it. I note that at this time it might have been possible to go back to PfP to see if they were interested but it would appear that both Mr Richardson and Desiman ultimately accepted the advice of Savills in relation to this, albeit they were not happy with it.

125. Mr Richardson also revisited his financial modelling and estimated outcome calculations. These now showed a shortfall not just to unsecured creditors but also a likely shortfall to Brooke Homes on the sale to St Congar. This was so even if the 20% Phase 2/3 Property Sale Fee was removed. The Cala offer was still projected to result in a payment in full of the creditors, and a return for shareholders, but the return to shareholders was now down to £809k. A large part of the difference was the £8m price chip from Cala. In addition the profit share for Desiman Phase 2/3 Sales Fee had, in this calculation, now been increased to 75%. I shall consider the increase in the Sales Fee separately below, but it is apparent that the combination of these factors had eroded shareholder value.

126. The unenviable position created by the worsened market conditions, Cala's reduced offer, and Desiman's requirement for an increased profit share was noted by Mr Robertson of Brechers, the solicitors acting for the Administrators, in an email of 19 December 2022. They also noted that the substantial ongoing interest charges of Desiman militated against further delay. In a further email exchange with Mr Robertson of Brechers dated 22 December 2022 Mr Richardson confirmed the basic analysis being that whilst there had been a reduction in the amount to be received the projections were still that creditors would be paid in full. It was "only the shareholders return" which was being reduced, but that without the process they "would expect to receive nothing".

127. It is difficult to contend that Mr Richardson was not giving proper consideration to the interests of creditors when making the decision to proceed with the Cala offer notwithstanding the reduced offer from it. He had in mind the need to consider the interests of creditors and preferred the offer which appeared to offer the prospect of the best return to creditors. It could not be said creditors interests were not engaged or that their position was not affected whichever decision was made. Even though return to shareholders was eroded he was not blind to this. He placed less emphasis on it, but in my judgment this was consistent with his duties as summarised above. Overall therefore, I conclude that this decision to proceed with Cala does not disclose an unfair bias on the part of Mr Richardson towards Desiman to the detriment of the creditors as a whole. It is also clear that Brigadier Inshaw's allegation that no other option was considered when Cala reduced their offer is not correct. Mr Richardson

did revisit the underbidders with Savills and Desiman and he also revisited the PfP bid.

128. Overall, in my judgment the allegation that there were failings in the marketing and sales process in relation to the assets of the Companies, and in particular that a sale with Cala was chosen because it benefited Desiman, but was to the detriment of the general body of creditors and shareholders, are not supported by the evidence. This was a commercial judgment call by Mr Richardson based on professional advice which he followed. The Administrators deliberations, including in their contemporaneous memo, shows a clear commercial justification and rational reasoning.

(3) The Increases in Profit Share Allegation

Introduction

129. In order to consider the allegations relating to the complaint concerning the increase in profit share it is useful to consider the transactions which were entered into on 6 January 2023 and then re-trace in time to see the evolution of the profit share, in order to see how and why the figures ended up where they did.

130. Three transactions/documents were entered into on 6 January 2023.

131. The first was the sale contract to Cala for the sale of Phase 1 land for £40m. £5m was paid on exchange, with completion set for 21 June 2023 when a further £15m was due to be paid, and then two further deferred payments of £10m on 21 February 2024 and 21 February 2025.

132. The second was a new facility agreement entered into between CFJL and Desiman in which Desiman agreed to provide the funds needed to purchase the Phase 2 and 3 land under the CFJL Agreement, and a 75% Property Sales Fee. In addition, under this facility interest was reduced from 1.983% per month to 1.5% per month, which Mr Richardson calculated as a saving of £50k per month (the amount accruing per month to Desiman in the Autumn of 2022 appears to have been of the order of £350k a month). In addition, the Pains Property Sale Fee was reduced to the minimum of £2.5m, which offered a potential saving of somewhere in the region of £2.7 to £3.7m.

133. Thirdly, the hybrid option and promotion agreement, between Desiman and Cala, was also entered into in relation to Phases 2 and 3. Under this agreement Cala took on a promotional role in relation to Phases 2 and 3 in order to maximise the value through the promotion (and satisfactory reserved matters permission, where appropriate) for 1,200 residential homes. This is to be aided by Cala being obliged to deliver the link road through the site. After satisfaction of the Grampian condition a parcel of land was to be taken to the open market to achieve the best market price to set the market value and conditions, with Cala having an option in relation to 75% of the 1,200 homes having regard to market price. A minimum price provision of £70k

per blended plot is set, which should deliver an overall minimum price on 1,200 dwellings of £84m.

134. In addition, a side letter from Desiman to the Companies was signed on the same day. This also appears to provide Desiman with a 75% share of any overage gain, as well as the agreement to the minimum Pains Property Sale Fee referred to above, and the fact that from the date of completion of the Cala sale the default rate of interest would cease to be payable and replaced by the standard rate.

The first increase from 20% to 65%

135. Focussing on the profit share in relation to the Phase 2/3 land, and tracing back, the starting point for this is the 20% fee agreed in the CFJL Facility in December 2021, before the Administrators were appointed. Brigadier Inshaw can hardly complain about this figure given it was negotiated by him and his fellow directors. Clearly it was considered by them at the time to be a reasonable inducement or reward for Desiman's ongoing support.

136. As I have already noted in paragraph 64 above, there is evidence that by June Desiman thought they had reached a verbal agreement with Mr Nardelli and Mr Johnson, acting on behalf of the shareholders, to maximise the project value and share profits on a 50:50 basis over and above repaying Desiman and Brooke. As set out above I believe this likely influenced Desiman initially suggesting it wanted in excess of £60m. Whether or not 50% had already been agreed however, as noted in paragraph 72 above, the shareholders had offered to increase the Phase 2/3 Sale Fee from 20% to 50% to secure Desiman's continued support. The directors/shareholders confirmed on a call on 16 September 2022 that they were willing to agree to this to avoid a forced sale and secure a longer-term enhanced realisation. Critically, CFJL did not have the money to fund the purchases of Phases 2 and 3 without external support.

137. In my judgment the complaint concerning the first increase in Desiman's profit share, to 65%, must be assessed in this context, and by considering whether or not it was appropriate to agree to an increase from 50%. It is evident from communications between Mr Johnson and Mr Richardson in early September that there were further discussions between Desiman and the shareholders where Desiman had referred to an increase in profit share above 50% (see email exchange between them on 9 September 2022 at 22:19). The directors/shareholders were not happy about this, but it ultimately fell to the Administrators to decide how best to proceed. Desiman subsequently sent an email to the Administrators on 14 September 2022 at 12:13 setting out the reasons why they required a 65:35 split as condition of their support.

138. In the internal memo I have already referred to in paragraph 115 above, Mr Richardson set out his consideration of the sale process and the question of entering into a new sale fee agreement with Desiman at 65%. The material part of the memo concentrating on the sale fee share stated as follows:

"The P3 Group directors have confirmed to the Administrators they are prepared to give Desiman 50%, Desiman want 65%, a difference of 15%. Based on the EOS prepared, the additional profit that would be given to Desiman with a 65% split rather than 50% would be c.£8,000,000. But as it stands, the only option for a phased sale requires Desiman's full cooperation which they have advised comes with the 65% profit split.

A sale of the whole site in one go to St Conger [sic] would result in no return to the P3 Group shareholders. If certain elements of the Desiman redemption were challenged i.e. the sales fees and profit share interpretation, then the return to the shareholders could be c.£11,000,000. This would be contested by Desiman and they would likely refuse to release their security on this basis, though the Administrators could pursue this under Para 71 IA1986. The fallout would be costly and time-consuming litigation, which would delay distributions to all creditors, as well as theP3 Group shareholders. In addition, any sale would be frustrated and may ultimately fail. Any post-completion delay in distributing funds whilst the Desiman redemption figure was litigated would be to the detriment of the subsequent creditors.

The sale to Cala even with a 65% fee share for Desiman appears to provide a return to the P3 Group shareholders of c.£18,500,000, with the further prospect of an overage payment of £1,837,500 on the Phase one mixed use site, this being 35%of the potential overage for an additional 150 units at £35,000 per unit. So a total return of in excess of £20,000,000 to shareholders.

In addition to the 65/35 split of the overage payment, Desiman are proposing to reduce the Pains Property sale fee to £2,500,000. Based on the last redemption statement, this suggests a saving of c.£5,000,000 to the P3 Group.

The Administrators have considered the overall position, and the Cala deal is by far the best outcome, and prevents a sale of the whole site now at a significant discount which would have resulted in no return to the P3 Group shareholders and little/no return to unsecured creditors. It will achieve a repayment of all creditors, with an agreed mechanism in place, as well as provide a significant profit on the CFJL land.

The Cala deal can only occur with Desiman's support. This support comes at a considerable risk to Desiman, not only having capital tied up in the deal for at least another 5 years, but that the option with Cala does not complete and an alternative sale of Phases 2/3 has to be negotiated, which could be at a lower price. There is the added loss of profits on the funds that could have been lent to other deals. It is for these reasons that Desiman will only provided their continued support for a new profit share of 65%.

It is for the reasons set out above that the Administrators believe that the overall benefit for creditors and shareholders are being achieved by considering the new

facility agreement on behalf of CFJL, and new sales fee on P3Eco and PPP for the overage agreement."

139. The reasoning of Mr Richardson, in summary, therefore was that: (1) he recognised there was the option of sale of the whole site via a back-to-back arrangement which would take out Desiman, but based on his modelling this would result in a shortfall to creditors, unless the earlier 20% profit share fee was challenged (in his modelling this showed a potential £11m return to shareholders, or £13m odd if an error was corrected); (2) Desiman's support was required in relation to the Cala option and to acquire the Phase 2 and 3 land to unlock the value in those phases; (3) whilst Desiman was requiring a higher share, and this would on the numbers result in a deterioration of the shareholder return by some £8m, this was commercially justified on the basis of their capital being tied up for longer, opportunity costs and the risks they were agreeing to take as part of the deal; (4) the shareholders could still realistically expect a return of some £20m (though with CGT it would seem this expectation was tempered to more like £14m, but then so was the St Congar offering of reduced value), and (5) there were no other realistic options, short of potentially expensive and costly litigation (and the refinance proposals having not progressed). Undoubtedly the stance taken by Desiman was unusual for a lender. It can also be said they were seeking to drive a hard commercial bargain. But it cannot be said Mr Richardson unthinkingly agreed to their requirements, and nor there is any indication from the documents he was acting in bad faith or failing to test the commercial merits and justification for the decisions he was taking.

140. Mr Richardson also took the precaution of consulting with solicitors, Brechers, seeking their advice on the proposed increased profit share in favour of Desiman, by email of 27 September 2022. He provided further information and documents to Brechers on 3 October 2022. Brecher replied with some initial advice on 4 October 2022, stating that the Administrators must act in the best interests of the creditors as a whole and "*must not act with obedience to Desiman*". Brechers confirmed that based on what they had seen what was proposed did demonstrate that it would be to the benefit of creditors and whilst the shareholders would bear a cost in paying increased profit they too would make a return whereas there would be no return without Desiman's support. This email emphasised that whilst Mr Richardson's concern should not be on the shareholders, the outcome appeared to have wider benefits (i.e. to the shareholders). This advice was questioned by Mr Richardson who pointed out that the Companies or one of them might be balance sheet solvent. On becoming aware of this Brechers confirmed in their later email advice on 11 October 2022 that Mr Richardson should not just consider the interests of creditors but also shareholders. They also warned him of a potential challenge to his decision making under paragraph 74 of Sch B1 to the IA 86. Ultimately however it is apparent that Brechers were not advising Mr Richardson that the Administrators could not or should not proceed: instead, their advice was reassuring to Mr Richardson that he was doing the right thing.

141. Whilst not directly concerning the increase to 65% it is apparent that in negotiating the new commercial terms with Desiman Mr Richardson did, with legal assistance, seek to challenge some of the provisions which Desiman wished to include. I refer in this respect to the email correspondence on 14 October 2022 from Brechers, on behalf of the Administrators, to Desiman, which pushed back on certain terms. Desiman responded by instructing Underwoods to write to Brechers by letter dated 17 October 2022 stating that the commercial terms set out in the drafts reflected what Desiman required if the proposed Cala sale was to proceed. This also threatened litigation.

142. Whilst it is right to observe that the Administrators agreed to the increase to 65% without consulting with or agreeing with the shareholders, they were not required to do so. Instead, they were required to consider what was in the best interests of creditors overall. And if they considered that one option could well result in a worse return for the creditors they were entitled to prefer the other option, even if that resulted in shareholder value being eroded. To put it another way, this was not a decision-making process where the interests of creditors were not affected either way. In addition it would seem that the Administrators had some reason to be cautious about how much they shared with Mr Nardelli and Mr Johnson by October 2022. Not only had some doubt been cast on the integrity of Mr Nardelli in previous findings of this court, but there was a suggestion he might have been willing to enter into an agreement to by-pass Brooke Homes. Mr Fellows of Desiman had suggested that Mr Nardelli had indicated an interest in exploring a new structure which might avoid the Brooke Homes debt. Mr Nardelli was cross-examined on this by reference to a transcript of a call on 10 October 2022 and firmly denied this was so. I arrive at no conclusions on this point, as it seems to me the transcript is open to interpretation either way, and Mr Fellows has not been called. In these circumstances I do not consider it would be fair on Mr Nardelli to arrive at any conclusions on the point. However, it does provide relevant context to why Mr Richardson would reasonably have been somewhat cautious about how much he shared. Whilst in other cases administrators might be better advised to be more transparent with shareholders and directors, it can be said that some confidentiality as to the terms has some justification in this case.

143. It is also useful to stand back and compare the position at this stage with that set out by the directors in the Statements of Affairs of the Companies. As noted in paragraph 34 above, the combined effect of those documents, and stripping out duplication and inter-company figures, is a total return to shareholders of all three of the Companies was estimated at c. £45m as at March 2022. However, as noted above, this made no allowance for the Phase 2/3 Profit Share Fee of 20%. If one applied a 50% profit share on the Phase 2/3 projected profit, and using the numbers then being used in the CFJL Statement of Affairs for the contingent asset that is the Phase 2/3 land, the figure would come down to c. £22.5m. It seems to me, if these figures were delivered, the shareholders could hardly complain. The 65% deduction can also be rationally linked to these figures, with a return to shareholders of some £14m odd (on

the basis of a c. £8m deduction for the increase from 50 to 65%). Even though this was harm to the shareholders it was not commercially unjustified or irrational.

The increase from 65 to 75%

144. I turn now to consider the second increase in the profit share, from 65 to 75%. In November/December 2022, during the currency of the renegotiations with Cala and off the back of a worsened deal, Desiman sought to improve its own commercial position and renegotiate the Phase 2/3 Property Sale Fee for a second time. By email of 29 November 2022 from Mr Atkinson of Desiman to Mr Richardson it was stated that Desiman required a 75% land sales fee together with 75% of any overage or similar profits derived from ransom strips. They noted in this email that Desiman had negotiated for the inclusion of these features in which CFJL would also share. They stated that they believed this still offered the prospect of a return to shareholders, particularly if the future housing market conditions improved.

145. As already noted above a change from 50 to 65% was modelled in September 2022 to take about £8m from the shareholders. However, Cala chipped their offer by £8m and this, combined with Desiman's pushing for a 75% share, would all but wipe out the shareholder value (subject to market conditions improving and better prices being achieved for Phase 2 and 3 sales). This was something Mr Richardson was alive to, and he produced a revised estimate outcome calculation showing the position, including an updated evaluation of the comparison with the reduced offers from St Congar and Cala. He also considered the position further with Brechers. He satisfied himself that creditors were still projected to get paid in full should the proposed revised terms with Cala and Desiman be proceeded with. As noted in paragraph 126 above, Mr Richardson satisfied himself that creditors would still be paid in full. Whilst the phrase it was "*only the shareholders return that is being reduced*" may read as unfortunate from the perspective of the shareholders, it seems to me this was simply Mr Richardson reflecting his understanding of the need to give primacy to the interests of creditors. It would be wrong to conclude that Mr Richardson did not consider the interests of the shareholders at all: clearly he did as his model considered what returns they could expect to receive on different scenarios. The prosaic reality is that the shareholders' value was eroded by the deterioration in market conditions which resulted in both Cala and Desiman adjusting their positions.

146. A further point of complaint, connected to the increases in profit share allegations, concerned the fact that Phase 2 and 3 land was being acquired in the name of Desiman, and Desiman was the contracting party to the Hybrid Agreement (i.e the promotion and option agreement). Desiman justified this approach on the basis that CFJL's interest in any equity or equity of redemption was protected via the new Facility Agreement. In the recitals to the Facility Agreement dated 6 January 2023 at (D) it is stated that the Phase 2 and 3 land is being acquired by Desiman as mortgagee for CFJL. Recital (G) makes the same point and that this is subject to an equity of redemption upon discharge of all liabilities and obligations. Ultimately these points were considered by Mr Richardson, including with Brechers acting for the

administrators, but this structure was one which was required by Desiman. The Administrators, and Brechers acting for them, were alive to the fact that it would have been more preferable to have the land acquired in the name of the Companies, but the recitals to the Facility Agreement do record the position; Desiman remains as lender.

147. A yet further aspect of the allegations pursued in connection with the increases in profit share was the fact that the profit share term was drafted on terms, as set out in clause 9.5 of the revised facility agreement entered into in January 2023, which meant that it was due and owing even if Desiman did not advance the £10m to enable the Phase 2/3 land to be purchased. Mr Richardson accepted in cross-examination this was so. I accept that it may have been better if the drafting had avoided this possibility. It is not evident to me that Brechers directly advised on this point, and it may be this is an area where the Administrators could, with the benefit of hindsight, have done more to protect the interests of the creditors, and shareholders, other than Desiman. But I note that Desiman have in fact advanced the £10m and the drafting work was principally for the lawyers rather than the Administrators.

148. In conclusion, I do not accept that the Administrators' acted without commercial justification or irrationally in relation to their decision to grant Desiman an increase in the profit share in return for their continued support and further fresh lending. Desiman undoubtedly acted in a commercially self-interested way, but the Administrators were aware of this. They were not acting as Desiman's puppets on my reading of the documents. It might be said that other administrators would have done more to challenge the position of Desiman, or to make an application to court, but that is not the same as a conclusion that all reasonably competent, or rational, administrators would have done so. The court would not have been willing to re-write the security package Desiman had acquired, and the prospects of a successful challenge to the Phase 2/3 Property Sale Fee was uncertain.

Overall

149. I have considered and rejected the allegations of breach of duty or unfair harm under the three main headings identified above. For the avoidance of doubt I have also considered all the allegations of breach of duty set out in the Points of Claim, and summarised at paragraph 55 thereof, but I am not persuaded any of them are proven. In particular (and by reference to the same sub-paragraphs as set out in paragraph 55) in my judgment, on the evidence before me at trial, the Administrators:

a. reviewed the objectives to be pursued in administration and considered the interests of the shareholders as part of their proposals and their implementation of those proposals;
b. considered the redemption statements put forward by Desiman and whether or not the Phase 2/3 Profit Share could be challenged. They were not under a strict obligation to determine the sums themselves and nor were they obliged to litigate the point;

c. did not delegate their duties when dealing with Arrow to Desiman; Arrow asked to speak directly with Desiman and the Administrators remained engaged in procuring redemption statements from Desiman;
d. did not owe a duty to oversee Desiman's communications with Arrow, but nevertheless remained involved in the refinance discussions and chased up relevant parties;
e. did not delegate their duties as administrators to Desiman when dealing with Savills; they participated in all the significant discussions and decisions;
f. kept themselves informed and participated in the decision making relating to the sale and marketing of the Land;
g. did not permit themselves to be excluded from information and decision making relating to the sale and marketing of the Land;
h. did consider that Desiman's interests were in some respects adverse to that of the creditors and shareholders;
i. did instruct their own solicitors, Brechers, on points where a conflict with Desiman was identified;
j. did revisit the decision to proceed with Cala when they reduced their offer and did reconsider other offers and did revisit, with Savills and Desiman, the position of underbidders;
k. did not chose to sell to Cala in preference to offers for more money and did consider the benefits of a back-back sale arrangement, as presented by St Congar's bid, but rejected that in favour of a bid which offered the prospect of a return to shareholders; they were not motivated to deliver a deal which would provide Desiman with ongoing interest charges and instead were focussed on ways of ensuring the debt to Desiman was paid down and reduced;
l. were aware of the possibility of an extension to the CFJL Agreement, but further extensions from January 2023 would have resulted in greater interest accruing to Desiman, and would also have needed consideration from a planning perspective;
m. were open to refinance proposals, but there was no other obvious candidate, and Desiman's support was likely to be required to avoid a forced sale scenario, with no other new funder likely to accept a position behind them in the security waterfall;
n. were alive to the long-term nature of the deal with Cala, and that this might affect the ability to deal with or dispose of the development for many years, but this route offered the best prospect of the highest return to creditors and shareholders;
o. were also conscious that the Cala offer required further finance, but further finance was required to obtain Phase 2 and 3 land and avoid a forced sale of what was already in the hands of the Companies;
p. considered whether a back-to-back sale would result in the general body of creditors being paid in full, but rationally concluded this was not so, and instead that they were likely to suffer a shortfall;
q. considered whether the Cala deal would lead to a lower return for creditors and shareholders than other available options but rationally concluded it would

not;

r. performed their functions reasonably efficiently and as quickly as reasonably practicable;
s. obtained legal advice and had regard to it;
t. responded to and considered enquiries from creditors and shareholders, but were not obliged to respond to everything nor share all details with them at all times;
u. did not act to the unfair harm of the creditors or shareholders; their actions were at all times supported by commercial justification and rational analysis;
v. considered the potential for claims by the Companies against Desiman but rationally concluded against pursuing those claims; and
w. did not fail to undertake their functions with reasonable care and skill in relation to the significant matters identified and reviewed by me. Where any potential shortcomings have been identified they are not such as to have been shown to have resulted in any loss on the evidence before me.

Stage 2 – Grounds for challenge, removal and replacement?

150. Having regard to the conclusions I have reached under stage 1 of the analysis I am not satisfied the allegations are made out. The evidence adduced did not support the allegations made. In these circumstances it is unnecessary for me to address two further points raised by Mr Curl, namely that: (i) Brigadier Inshaw lacked standing under paragraph 74 of Schedule B1 because he was not a member of CJFL; (ii) the court should decline to exercise its discretion on the Removal Application because it was reactive to demands by the Administrators to make payment to the Companies. On the first point, suffice it to say here in circumstances where CFJL's assets are held for PPP and P3 Eco it does not seem to me the fact that Brigadier Inshaw was not a member of CFJL means he could not bring allegations even if they concerned CFJL. It was rightly conceded he probably had a sufficient financial interest in the outcome of the Companies overall to seek an order under paragraph 88 of Schedule B1 anyway, so the point taken in relation to paragraph 74 is rendered largely academic. As regards the latter point, I do not consider it helpful for me to determine that point in the abstract, and much would have depended on the precise findings I had made. I would however have been cautious about drawing the conclusion that, even if part of the motivation for bringing these claims was ill-feeling generated by the directors being themselves a claim target, that this necessarily meant they were abusive. Moreover, the mere fact of removal would not result in those claims not being continued since a replacement administrator could reasonably be expected to consider and continue any meritorious claims which have a prospect of delivering a return to the Companies.

151. Mr Watson-Gandy nevertheless submits, even though the allegations are not made out, that there are remaining serious issues which require investigation. I am not persuaded there are, or that there is due cause or good grounds for the removal of the Administrators. It is not obvious to me what matters require further investigation which have not already been investigated in these proceedings and during the course

of trial. It is incumbent on the person making the application to adduce evidence to show there is due cause and the court will not grant an application to remove lightly.

152. One of the concerns emphasised by Mr Nardelli in his oral evidence was the lack of disclosure. I can see how the shareholders have some cause for concern about the manner in which they have become aware of the terms of deals after the event, and in circumstances where the shareholders' interest is affected by that. However, the role of the IP does sometimes require them to proceed with deals without consulting with all interested parties. They are licensed professionals who are required to consider the interests of all stakeholders when they do so. This confidentiality or secrecy has fuelled the concerns of the shareholders in this case, though the disclosure, including specific disclosure provided as a result of an order I made before trial, shows that the Administrators were recognising their duties to both creditors and shareholders. They were seemingly doing their best in the difficult and unusual circumstances that presented itself by these administrations. In other cases IPs who do not fully consult with all stakeholders may find themselves the subject of reasonable criticism if they do not have good reason for not consulting. However, in my judgment in this case the IPs did: see paragraph 142 above.

153. I understand the frustration of Mr Nardelli, Mr Johnson and Brigadier Inshaw. They have contributed much to the Himley Village project over the years and, from their perspective, the thanks they get is a claim against them from the Administrators, and, in the case of Mr Nardelli and Mr Johnson, being adjudged bankrupt. Moreover, being adjudged bankrupt on a petition from the lender (Desiman) who persuaded the Administrators to do a deal which was still said to promise them handsome returns. There is still a prospect they (or their trustees in bankruptcy) may obtain some of those returns should, as I understand Mr Nardelli's evidence to be the case, the market conditions for housing have improved from the minimum set in the January 2023 transactions. They, or their trustees in bankruptcy, do however, have a long wait, as the Phase 2 and 3 developments could take a number of years, and similarly the Cala option runs for many years.

Stage 3 – Should relief, removal and replacement be ordered?

154. If I had concluded that some aspect of the allegations were made out, or that there were serious concerns about the January 2023 sale transaction which warranted further investigation, the question would then have arisen as to whether or not I should grant an order for removal, or some other order.

155. This does not arise, but it does not seem to me the obvious remedy in this case would have been removal. Now that the Cala contract has concluded, and is largely complete, the Administrators functions are much reduced. It is possible that the court may have been persuaded to remove, or consider the appointment of an additional conflict office-holder, if it had been persuaded there was a conflict or a real issue needing further investigation and requiring an independent person to do so, possibly on terms that such an office-holder be funded by the party wishing them to be

appointed in order to save the wider estate from that additional cost. I would not have concluded Desiman had the trump card in any such appointment, but I would have concluded that Desiman should be given the opportunity to make representations on the issue of any replacement.

156. The wider views and interests of other creditors would also have been of relevance in relation to removal and replacement. I note here that of those creditors who have expressed a position: Desiman has confirmed their support for the Administrators; Brooke Homes expressed their support for the proposed application in an email sent to Mr Nardelli before the application was made, though that was some time ago and I have not been advised of their up to date position; and Cassadian have confirmed their support for the Administrators. There is no evidence before me other creditors have been provided with a copy of the Removal Application, contrary to the requirements of rule 3.65 of the Insolvency (England and Wales) Rules 2016 (and notwithstanding the recital to the order I made on 20 September 2024 reminding Brigadier Inshaw of this requirement). I do not know therefore the position of other unsecured creditors, though on the evidence available to me it would appear that the largest secured and unsecured creditors have made their views known to me. There is also no evidence before me as to the wishes of the shareholders other than those of Brigadier Inshaw (Mr Nardelli and Mr Johnson's trustees in bankruptcy having adopted a neutral position, and the position of other shareholders is not known). I would have considered whether or not further enquiries should be made of members if I had been giving consideration to removal or other relief, but this does not arise given my conclusions set out under stages 1 and 2 above.

Conclusion

157. Brigadier Inshaw complains that the Joint Administrators made a bad bargain with Desiman which has caused him to suffer loss as a member. Showing loss or harm however is not enough. The bad bargain complaint is mainly concerned with the price of finance provided by Desiman, the secured lender, in administration. However in my judgment: (i) the bargain was reached by the Administrators exercising their commercial judgment, with commercial justification, and there is no evidence to support the conclusion they were acting in bad faith; (ii) the January 2023 transactions were intended to produce a better return for all stakeholders, but in any event offered a prospect of payment of creditors in full over time; (iii) there was no conflict or real conflict between creditors and shareholders vis a vis the sale, as the higher the price the greater potential return for all concerned; (iv) administrations, and distributions in administration, have to recognise proprietary rights, and in this case Desiman had proprietary rights and the sale process had to be made in conjunction with it; (v) there was no evidence of other available finance, such that the Joint Administrators did not have a strong position from which to bargain for a lower share than which Desiman required for its support; (vi) the Joint Administrators were entitled to conclude they should not engage in potentially difficult and costly litigation, especially when this related to arrangements the Applicants had put in place before administration, and they had no funds or an offer of funds to do so from the Applicants or any other party;

(vii) the Joint Administrators chose the bidder which offered the best prospect of the highest return to creditors and shareholders; (viii) they were also entitled to choose the option which was best for creditors, even if this harmed the position of shareholders, and (ix) the Administrators consulted with professional agents, and lawyers, where appropriate, and followed their recommendations. There is no evidence to support a conclusion of breach of duty or unfair harm.

158. The Removal Application shall be dismissed. I invite the parties to agree consequential orders.

159. Finally, I should express my thanks to all counsel, and those who instructed them, for the assistance they provided before and during trial.