Neutral Citation Number: [2022] EWHC 1879 (Comm)

Case No: CL-2020-000620

IN THE HIGH COURT OF JUSTICE
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Sitting at Birmingham Civil Justice Centre
33 Bull Street
Birmingham
B4 6DS

Date: 19 July 2022

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

(1) J T KELLY **(2) LANSDOWNE GROUP LIMITED**	**Claimants**
- and –	
(1) B E BAKER **(2) R J BRAID**	**Defendants**

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- -

Mr Mark Harper Q.C. and Mr Ali Tabari (instructed by **Weightmans LLP**) for the **Claimants**
Mr William Buck and Mr Alfred Artley (instructed by **RPC**) for the **Defendants**

Hearing dates: 9,11,12,13,16,17,18,19,23,25,26 May 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Tuesday 19 July 2022 at 10:30am.

Mrs Justice Cockerill:

Introduction

1. This is an unusual Commercial Court case in modern terms. It is a significant case in terms of size – it concerns a sale of a business worth £100 million, and the claim is for £37 million. However, it is also an intensely personal dispute. The company in question is a part of a business empire based in the Birmingham area created by a single family – the Kelly family – working in harmony over two generations.

2. Tragically, this case has resulted in a major family dispute. The family harmony which created the empire has to all appearances been destroyed. Members of the family appeared as witnesses on opposing sides. One of the documents before me was an unfair prejudice petition which the Claimant ("Mr Kelly") proposes to issue against the family companies and his brother ("Mr Jim Kelly") arising out of his removal from the family firms.

3. What lies behind this is a sale of part of the empire. In essence, by a Sale and Purchase Agreement ("SPA") dated 17 March 2017 the Kelly family sold two companies, Demolition Services Midlands Group Holdings ("DSMGH") and St Francis Group ("SFG"). The transaction ("the Transaction") completed on 31 March 2017.

4. The nature of the sale was a management buy-out ("MBO") to a group of purchasers defined in the SPA. Critically that group was headed up by the Defendants ("Mr Baker" and "Mr Braid"), both of whom had worked in or for the companies for years. The sale was supported by corporate financiers. The price was a little over £100m subject to a series of adjustments set out in the SPA.

5. The claim, in summary, is that Mr Kelly says that he was not told that the sale was an MBO and that the Defendants, whom he trusted implicitly because of the relationship between them, breached fiduciary duties to him and the Second Claimant - a company which he owns and controls. He also says that the Defendants told him - inaccurately and fraudulently - that they would achieve the best possible price for the Kelly family and (later) that the value of the companies was reflected in the sale price. He says that but for these facts the sale would not have gone ahead, and a sale for £200 million would have been achieved. Accordingly, since his share of the sale was £37 million, he says that he lost £37 million by reason of the breaches/misrepresentations.

6. In closing it was realistically accepted by Mr Harper QC for Mr Kelly that the case on fraudulent misrepresentation was unlikely to prevail if the case on breach of fiduciary duty did not succeed. This was an entirely correct concession for reasons which will become apparent.

7. The centre of gravity in this case is therefore the question of whether the Defendants owed and breached fiduciary duties to the Claimants – and in reality to Mr Kelly. There is also a factual issue based on expert evidence, which goes to the quantum of any claim, as to whether the sale price was an undervalue.

The Trial

8. The trial has been conducted over three weeks as a live hearing with remote transcription. Bearing in mind the geographical centre of gravity of the case, which concerns a Birmingham company, with the majority of witnesses in the Birmingham area and a considerable portion of the legal teams based there also, I ordered that the case should be heard in the Civil Justice Centre in Birmingham.

9. The trial has been notable for the co-operation and courtesy with which it has been conducted. It was also pleasing to see that junior counsel were each able to conduct a portion of the advocacy, with Mr Tabari ably introducing and cross-examining some of the witnesses, and Mr Artley assisting me with a clear and helpful reply on the expert evidence in closing submissions.

10. Another notable feature has been the fact that the witness statements generally did (as they should) convey a real sense of the witness's own voice and approach. As such they were more than usually useful to me.

11. All of the witnesses, both factual and expert, were in my assessment generally honest witnesses. The witnesses called for the Claimant were Mr Kelly himself, Mr Dunn, Mr Simpson and Mrs Owens. Of these, the only substantial witness was Mr Kelly. Mr Kelly presented – as perhaps might be expected – as someone who was very much upset by the turn which events have taken. While he did his best to explain his position, his evidence was not always clear. This is possibly because he has a number of grievances some of which, though outside the scope of this trial, he sees as linked to the issues which I have to decide. While I was invited to conclude that he deliberately obfuscated, the impression which I gained was that where his evidence was unclear it in most cases reflected a lack of clarity in his own consideration of the facts.

12. For the Defendants the witnesses were Mr Baker, Mr Braid, Mr Jim Kelly, Mr Currie and Mr Williams. Mr Baker was plainly nervous, but gave his evidence clearly and earnestly. He thought carefully about his evidence, pausing when necessary for reflection. He was an impressive witness. Mr Braid was a down to earth and refreshingly frank witness, whose evidence had the occasional touch of humour.

13. Of the other witnesses, Mr Jim Kelly's evidence had at points a familial resemblance to that of his brother, being less clear and focussed than that of the Defendants. He was up-front about lacking clear recollection of the chronology of events. In the main points of his evidence however he was clear and frank to the point of informality, and on occasion provided compellingly vivid evidence. Mr Currie was a less than enthusiastic witness. It was clear that he would rather not have been present in court and that on occasion he regarded the questions as unrealistic. Having said that, he gave his evidence straightforwardly, if with considerable caution about where he was being led by the questioning. I reject the suggestion that he was less than open. His answers were direct and sometimes either terse or forceful. He was plainly a robust businessman who was prepared to accept and deal plainly with some documents which were difficult for him.

14. Inevitably I have preferred the evidence of one witness over another at certain points, but where recollections differed between the factual witnesses I am entirely persuaded that they did so via the normal processes of imperfect and mutable recollection, which are naturally affected by subjective factors.

15. Where views differed between the experts it was either because of the range of reasonable difference in subjects which permit of a spectrum of answers, or because of such factors as different starting points and exercises conducted. I will deal with key points of difference at the points where they are relevant in the judgment.

16. I shall therefore first consider the circumstances in which a fiduciary duty could arise in this case. As to this point, the critical feature is that it is necessary for Mr Kelly to establish that a duty was owed to him – the Second Claimant's claim being entirely subsidiary to his.

Fiduciary Duties - the Law

17. The parties both accepted as a starting point for this topic the dictum from *Bristol & West Building Society v Mothew* [1998] Ch 1 at 18 that a fiduciary is "*someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence*". The modern iteration of this principle is to be found in *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Kent* [2018] EWHC 333 (Comm) [2018] 1 CLC 216 where at [159], Leggatt LJ explained that "*fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person.*"

18. But this case involves an allegation of fiduciary duty which falls outside this archetype. This is not a conventional case of a director owing fiduciary duties to a company. It is a case of individuals, one of whom was not a director, owing duties to an individual shareholder who was a director.

19. Thus stress was placed by the Claimants on the passage from Snell's Equity, 34th ed. at 7-005 that;

> "the courts have consistently declined to provide a definition, or even a uniform description, of a fiduciary relationship, preferring to preserve flexibility in the concept…[The] 'fiduciary relationship is a concept in search of a principle'."

20. It was accepted on both sides that a fiduciary relationship (i) can arise outside the archetypal circumstances and (ii) need not include an explicit undertaking to act for or on behalf of another. The question is just how far that line extends; however, it is clear that it is not a common circumstance. In *Al Nehayan* Leggatt LJ said in terms that "*it is exceptional for fiduciary duties to arise other than in certain settled categories of relationship.*"

21. The Claimants advanced the argument predominantly by reference to the authorities which establish that a director can owe fiduciary duties directly to the shareholders. In *Peskin v Anderson* [2000] EWCA Civ 326, the Court of Appeal stated as follows:

> "[33] The fiduciary duties owed to the company arise from the legal relationship between the directors and the company directed and controlled by them. The fiduciary duties owed to the shareholders do not arise from that legal relationship. They are dependent on establishing a special factual relationship

> between the directors and the shareholders in the particular case. Events may take place which bring the directors of the company into direct and close contact with the shareholders in a manner capable of generating fiduciary obligations, such as a duty of disclosure of material facts to the shareholders, or an obligation to use confidential information and valuable commercial and financial opportunities, which have been acquired by the directors in that office, for the benefit of the shareholders, and not to prefer and promote their own interests at the expense of the shareholders."

22. At [34] the Court listed several non-exhaustive factors which would point to such special circumstances, namely:

    i) A person having entrusted the care of his property, affairs, transactions or interests to the fiduciary;

    ii) Instances of the fiduciary making direct approaches to, and dealing with, the shareholders in relation to a specific transaction and holding themselves out as agents for them in connection with the acquisition or disposal of shares;

    iii) The fiduciary making material representations to the shareholders;

    iv) The fiduciary failing to make material disclosure to the shareholders of insider information in the context of negotiations for a take-over of the company's business; and

    v) The fiduciary supplying to the shareholders specific information and advice on which they have relied.

23. I did not find the Claimants' approach to the question of law entirely helpful, because the cases concerning directors' duties arise in very different circumstances to the present; and as noted by Jacobs J in *Vald Nielsen v Baldorino* [2019] EWHC (Comm) 1926 at [744]:

> "the mere fact that a director has more knowledge than (or indeed exclusive knowledge compared to) the shareholders of the company's affairs, or that the directors' actions have the potential to affect the shareholders, does not amount to "special circumstances" and does not give rise to a "special relationship" between the directors and shareholders. Such features are "usual, indeed inevitable, features of the relationship between directors and shareholders of a company, since the directors direct and control the affairs of the company, whereas the shareholders do not … The existence of such features is therefore not sufficient to establish that the directors have undertaken (or that they have been entrusted by the shareholders) to act for or on behalf of the shareholders in any particular respect."

24. In terms of the question of where, outside explicit giving and acceptance of the trust, a fiduciary duty will arise, I conclude that the hallmark found in the authorities is one of legitimate expectation.

25. A starting point on this can be seen in *Arklow Investments Ltd v Maclean* [2000] 1 W.L.R 594, where the Privy Council referred at p. 598 to the concept of the duty of loyalty as capturing a "*situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not use his or her position in such a way which is adverse to the interests of the principal*". There an unaccepted offer was insufficient; the Privy Council referred to the need for "*mutuality giving rise to the undertaking or imposition of a duty of loyalty*".

26. Similarly in *Brandeis (Brokers) Ltd v Black* [2001] 2 All ER (Comm) 980 at [36], the Court stated that "*A person will be a fiduciary in his relationship with another when and in so far as that other is entitled to expect that he will act in that other's interests or (as in a partnership) in their joint interests, to the exclusion of his own several interest*."

27. This theme has been taken up in the more recent cases. The Court of Appeal in *Farrar v Miller* [2018] EWCA Civ 172 said (in the context of joint ventures) at [75] that this test of "legitimate expectation" may be "helpful". It was reprised by Leggatt LJ at [166] of *Al Nehayan* [2018] EWHC 333 (Comm). In *Tan Yok Koon v Tan Choo Suan* [2017] SGCA 13 the Singapore Court of Appeal highlighted a the importance of objectivity, noting that:

> "fiduciary obligations are voluntarily undertaken. … the fiduciary undertaking is voluntary in the sense that it arises as a consequence of the fiduciary's conduct, and is not imposed by law independently of the fiduciary's intentions. This is not to state that the fiduciary must be subjectively willing to undertake those obligations; the undertaking arises where the fiduciary voluntarily places himself in a position where the law can objectively impute an intention on his or her part to undertake those obligations."

28. There are then a number of other cases which have explored the circumstances in which that legitimate expectation – grounded in an objective assessment of the facts - is present.

29. Some of the best guidance comes in *Al Nehayan*. There Leggatt LJ noted at [163] that counsel for Mr Kent had placed "*heavy emphasis on the close personal relationship between Mr Kent and Sheikh Tahnoon and on the evidence that, for most of the period at least of their business association, they reposed a high degree of trust and confidence in each other*." Leggatt LJ explained that;

> "the question whether one party did in fact subjectively place trust in the other is not the test. As Dawson J said in the *Hospital Products* case (1984) 156 CLR 41 at 71:

> 'A fiduciary relationship does not arise where, because one of the parties to a relationship has wrongly assessed the trustworthiness of another, he has reposed confidence in him which he would not have done had he known the true intentions of that other. In ordinary business affairs persons who have dealings with one another frequently have confidence in each other and sometimes that confidence is misplaced. That does not make the relationship a fiduciary one. A fiduciary relationship exists where one party is in a position of reliance upon the other because of the nature of the relationship and not because of a wrong assessment of character or reliability.'
>
> The inquiry, in other words, is an objective one involving the normative question whether the nature of the relationship is such that one party is entitled to repose trust and confidence in the other.
>
> It is also necessary to identify more precisely the nature of the trust and confidence which is a feature of a fiduciary relationship..."

30. The Claimants placed stress on the fact that in *Sharp v Blank* [2015] EWHC 3220 (Ch) at [13], the Court held that those special circumstances, and the attendant duties, are more likely to exist in cases of:

> "companies which are small and closely held, where there is often a family or other personal relationship between the parties, and where, in almost all cases, there is a particular transaction involved in which directors are dealing with the shareholders, from which the directors often stand to benefit personally. The imposition of a fiduciary duty in such circumstances reflects the fact that directors who have a close family or other personal relationship with shareholders, and are entering into transactions with them, may be tempted to exploit that relationship to take unfair advantage of the shareholders for their own benefit."

31. That is true; but as *Al Neyhan* makes clear, the existence of the close relationship is not the hallmark; it is merely a situation in which it is more likely that (objectively) one party will be entitled to repose trust and confidence.

32. In *Coleman v Myers* [1977] 2 NZLR 255 the issue arose in relation to an old established private company in which many of the shareholders were relatives. Two directors (a father and son) engineered a takeover, persuading other family members to sell. Woodhouse J in the New Zealand Court of Appeal identified the following factors as relevant to the existence of the duty: "*dependence upon information and advice, the existence of a relationship of confidence, the significance of some particular transaction for the parties and, of course, the extent of any positive action taken by or on behalf of the director or directors to promote it*". Cooke J referred to: "*the family character of this company; the positions of father and son in the company and the family; their high degree of inside knowledge; and the way in which they went about the take-over and the persuasion of shareholders.*"

33. Another case referred to in argument was *Brunninghausen v Glavanics* [1999] 46 NSWLR 538, where the Court of Appeal of New South Wales found a fiduciary relationship in circumstances where the claimant did not actually entrust the care of his property, affairs, transactions or interests to the defendant but could be treated as having done so "*in the specially strong context of the familial relationships of the directors and shareholders and their relative personal positions of influence in the company concerned*". *Brunninghausen* was described by Jacobs J at [741] of *Vald Nielsen* as "*perhaps at the outer limit of cases where an English court might be prepared to say that the circumstances replicated the salient features of the well-established categories of fiduciary relationships.*" The case however on its own facts may well be seen as reflecting Leggatt LJ's statement in *Al Nehayan* that the question is whether, objectively, the nature of the relationship is such that one party is entitled to repose trust and confidence in the other. Nothing in these cases affects the conclusion as to the correct approach.

34. Having reviewed the test and the circumstances in which a fiduciary duty could arise, I now turn to the facts of the case and how they relate to those principles. Here the circumstances in which the duty could conceptually arise are either (i) if the pre-existing relationship was such that such faith and trust was placed in the Defendants that a duty arose or (ii) if, even without that relationship, there was a creation of it effectively by an offer or a representation. These represent a slightly wider view of the pleaded case.

35. Both of these potential situations lead to a critical focus on two points in time. The first is the background to the relationship. The second is the start of the Transaction. There are then a number of further points in the timeline at which either breaches were alleged or where factual issues emerged. I shall therefore deal in detail with the two key points in time, and then trace through the timeline dealing with the remainder of the issues.

The Relationships

1978-2006: backdrop

36. The story begins with Mr Pat Kelly and his wife Eileen. In 1973 they set up a company called PJ Murray Haulage. By the mid-80s Pat Kelly was increasingly asked to do demolition and excavation work in Birmingham. He set up DSM in 1988. He worked closely with a gentleman called Robin Powell who acted as Managing Director, though he was never a shareholder in the company.

37. The profits of the company were used to acquire brownfield sites for the company through PJ Murray Haulage, which was later renamed St Francis Group Limited ("SFG"). SFG's business was land reclamation and decontamination as well as property sales. Each individual property sat within a wholly owned subsidiary SPV. The company was 99% owned by Eileen Kelly, the Kelly brothers' mother, and this did not change upon the renaming.

38. DSM worked on the sites owned by SFG, charging its work at cost. The sites thereby became more valuable - becoming what were referred to as "oven-ready" sites - ready for sale to third parties for new development.

39. Pat and Eileen had three sons: John, Jim and Des. They all went into the business on leaving school and became shareholders in the business. Pat gave them increasingly

more senior responsibilities as they grew older. Each of the brothers might be said to have particular strengths or expertise. John was a good originator of "big picture" ideas and good at finding and negotiating demolition opportunities and contracts for DSM. He also had an episodic interest in financial details. Jim was good at spotting projects for development and developing the detail of projects in partnership with legal and financial professionals (though the level of his appetite for the detail was in issue before me). He was therefore very much on the SFG side. Des was an expert in the "on the ground" aspect of demolition, with little interest in the business side and remained almost entirely within DSM.

40. The company was very much a family affair. One of Pat and Eileen's daughters Sally O'Donnell worked in DSM on the financial side dealing with payments. The other daughter, Christine Owens, at one point worked in the company before moving to work with her husband. But the centre of gravity of the business was with the brothers.

41. The brothers worked together harmoniously. One of the witnesses called, Mr Simpson, reflected this evidence, reporting that they worked well as a family and a business and that historically it had been a team effort, though there had certainly been disagreements along the way. It was plain from the evidence of both Mr Kelly and Mr Jim Kelly that they were justly proud of what the family had achieved in building up these businesses.

42. From about 1996 the brothers effectively began to take the lion's share of running the company. By 2008 they were entirely in control. Still matters continued to run smoothly. They would decide jointly on new projects that the companies would pursue; the sites that would be purchased by SFG; the demolition and regeneration that would be carried out at SFG sites; the demolition services which would be offered and provided by DSM at sites owned by the SFG. They also decided together on such matters as what senior staff they would employ in respect of both demolition and regeneration services; which consultants they should employ, and how much they should pay them. None of these decisions were taken formally at board meetings; rather they were discussed and decided informally – not infrequently in the pub.

43. Reflecting this team approach, Mr Kelly was a Director of SFG, DSM and DSMGH at various times prior to the Transaction. Mr Jim Kelly was Managing Director of SFG and Director of DSM and DSMGH prior to the Transaction. Mr Des Kelly and Mrs Sally O'Donnell were also Directors of SFG, DSM and DSMGH prior to the Transaction.

44. While the driving force of the business was the family, they relied also on their team. Mr Kelly has said in his unfair prejudice petition, and effectively also orally in his evidence, that "*the reason the business was successful was that we surrounded ourselves with good guys to fill the roles that we needed which allowed us to carry on winning demolition work, putting the demolition operatives' machinery to work, carrying out the high risk works, and keeping our clients happy*".

45. Two of the "good guys" were the defendants Mr Baker and Mr Braid. They did sterling work for the companies, but until the Transaction they had no share or status in this tight knit family company.

46. Mr Baker is a qualified accountant. Mr Baker, then at HLB Kidsons, first advised Mr Jim Kelly and Mrs O'Donnell in relation to an HMRC inquiry in about 1999. The

majority of HMRC's claims were rebutted and in doing so Mr Baker identified a particular area of significant tax overcharge which resulted in DSM being able to resolve the case with HMRC and obtain a net repayment of a six-figure sum. From then on it appears Mr Jim Kelly thought well of Mr Baker and he kept in touch.

47. When Mr Baker left HLB Kidsons and set up a company known as Baker Taxation and Accounting Services Limited ("BTAS"). Mr Jim Kelly was an early client. BTAS was engaged by DSM to take on certain accounting, audit and tax compliance tasks for the company and certain related businesses. BTAS was paid on a monthly retainer. By around 2000/2001 Mr Baker via BTAS was the tax adviser and auditor to the Kelly Family Companies. By 2005-6 he was preparing the personal tax returns of a number of the Kelly family also - including Mr Kelly. At the same time BTAS did well elsewhere and acquired 50-60 clients.

48. In this role Mr Baker necessarily had a good familiarity with financial information relating to the Kelly brothers, their parents and the family businesses. He had ready access to bank account statements and documents relevant to Mr Kelly's personal and commercial finances. I accept that he was involved in the provision of tax advice in particular to Mr Kelly and other members of the family. He had knowledge about the Kelly Family Settlements. He dealt with HMRC on behalf of the family members and dealt with their tax affairs. He advised Mr Kelly about various incidental issues – such as the rates on his stables. He acted for Mr Kelly in relation to a complaint against Abbey Life for mis-selling. He was seen by Mr Kelly as a keeper of useful information – Mr Kelly asked him for information as to his assets when making a will and as to the location of property title deeds.

49. In 2006, Mr Baker appointed external accountants and auditors, Lancaster Haskins. Mr Baker took responsibility for providing the auditors with instructions on behalf of the family.

50. In about 2007 Mr Baker was asked by Mr Jim Kelly for DSM to allocate a much greater proportion of his time to DSM in order to assist with a proposed disposal of the demolition business, which became known as "Project Derby".

51. He agreed with Mr Jim Kelly as recompense a substantial commission payment for BTAS in the event of a successful disposal of the DSM business. The commission included a 5% share of any sale proceeds over £50m. This was because if he were to spend 90% of his time assisting DSM then BTAS would not be able to support and would have to give up most of its existing clients, whom he had worked hard to obtain. Mr Baker worked with DSM in a semi-detached fashion. He took on a DSM email address and gave up BTAS offices and worked either from home or from DSM's offices. But he continued to work via BTAS. It was alleged that Mr Baker joined DSM as Finance Director; that is not accurate.

52. Mr Braid is a quantity surveyor and was a Director of SFG at the time of the Transaction. Mr Kelly and Mr Braid first met in 1999 when Mr Braid was employed by Balfour Beatty. Mr Kelly and Mr Braid developed a professional relationship of mutual respect through their encounters in the next few years. In 2007 Mr Braid, who was to some extent disenchanted with the rigid corporate structure where he was, joined SFG as a "commercial manager". As such he operated primarily as a quantity surveyor, but also provided wider assistance such as "keeping an eye" on the dealings of certain

trustees and managing the rent collection for the family's rental portfolio. He swiftly established a good working relationship with Mr Jim Kelly and learnt a good deal from him.

2007-2008: Project Derby

53. Between 2005-2007 Mr Kelly and the Brothers entered into discussions to sell the business of DSM in order to concentrate on property ventures. This attempted sale was known as Project Derby. The proposal was a £100m sale to LGV Capital, which did not proceed.

54. By this time DSM's profit margins had risen to a level well above the industry average and that of any of their major competitors. This was as a result of DSM offering a premium service and having a reputation for delivering on time and on budget. But the brothers had an eye on the future; they were getting older and would not be able indefinitely to bring the level of focus and commitment which drove this. They were keen to "cash out" of this business and enjoy the fruits of the family's hard work.

55. PwC were appointed to advise on the sale; Catalyst Corporate Finance ("Catalyst") (later involved in Project Nobel) just lost out to the more established player. However, Mr Currie of Catalyst had forged a connection with Mr Jim Kelly and remained in touch with him. In relation to this project, Mr Baker had a significant role in dealing with these professional advisers on behalf of the family. He dealt day to day with PwC. He received the Vendor Due Diligence Report and decided who else should see it. The Company and Financial Due Diligence Reports were shared with him and Mr Jim Kelly. The offer letter was sent to him. This reflected the fact that more generally Mr Baker frequently explained formal or complex financial documents to the brothers. He was in effect, the family's translator from "professional speak" to real world language.

56. PWC informed DSM that there was no serious interest in DSM from trade buyers. According to PWC, there was some interest in investing from institutional investors but they had major reservations about:

    i) the fact that the company was clearly run by, and all major decisions were taken by, the family (who would be leaving the business) and that there was no substantial senior management structure below that level;

    ii) a lack of internal controls and reporting systems in the business, both financial and operational; and

    iii) the vast difference in profit margins between DSM and every other major competitor, which potential investors put down to the family's influence. The perception was that prospective investors took the view that they would lose these super profits when the family relinquished ownership.

57. PWC therefore advised that internal management had to be strengthened. There were concerns that the success of the company hinged on the brothers, and that a buyer would find themselves with an asset which had lost that key element of value. As a consequence of this advice, the family decided to bring into DSM a new Finance Director (Andrew Chater) and, a little later, a professional Chairman (Rod Bennion) and a new CEO (Richard Hudson).

58. Two offers were received - from LGV and Close Brothers. The Close Brothers deal was not pursued but the LGV offer started to move forward. The initial price posited - north of £100 million - however started to trickle away as due diligence progressed. Ultimately LGV dropped out a few weeks short of completion, as the financial crisis of 2008 worsened. There were some recriminations, with Mr Jim Kelly blaming PwC for slowing things down, and the family pointing the finger at Mr Jim Kelly.

59. With an eye on the potential sale however a restructuring was undertaken. On 4 March 2008 P. J. Murray (Haulage) Ltd was renamed St Francis Group Ltd (SFG). In addition the family's shareholdings in DSM were restructured. By 2008 (following an earlier share buyback), there were 82 ordinary shares in the company in total. Each of the Kelly brothers and their sister Sally O'Donnell owned 18 each, with their parents (Eileen and Pat Kelly) owning 5 each. Following advice from PWC, DSM bought back the 28 shares held by Ms O'Donnell and her parents, so that DSM was then owned in three shares by the First Claimant and his brothers (totalling 54 shares – 18 each).

60. A new company, DSM Group Holdings Ltd ("DSMGH"), was then incorporated as a holding company for DSM. 54 ordinary shares were issued in the new company, 18 to each brother, which they then exchanged for their shares in DSM (again as advised by PWC). Thus the outcome of this process was that DSM became a wholly owned subsidiary of DSMGH, and DSMGH was owned in three equal shares by the three brothers. Each of the brothers were directors of DSMGH and SFG.

61. In April 2008 Mr Baker became Company Secretary of DSMGH. He also acted as company secretary of SFG, while also being the director and sole shareholder in BTAS.

2011-2013: Project Forest

62. From 2011 a second unsuccessful attempt was made to sell DSM. This was known as Project Forest. This was another abortive sale, which Mr Baker said he felt to have been pursued somewhat half-heartedly. Its main interest is that during the process of Project Forest Mr Baker got to know Mr Currie of Catalyst, though his primary point of contact was Mr James England.

63. In early 2012 Catalyst scheduled a number of meetings with private equity funders and there was some interest from Great Lakes, a US corporation involved in lake dredging, which asked for the initial documentation but did not take it any further.

64. There were some meetings in May and August with private equity funders. In late August Mr Jim Kelly asked Mr Currie for an update. Mr Currie responded that the combination of the family's requirement to "cash out" on day 1 and management succession were two amongst a wider portfolio of issues making the offering unattractive.

65. At this point Mr Baker made an enquiry about him being issued with shares in the company; but Mr Jim Kelly responded that this was not a possibility, owing to opposition from Mr Kelly and Mr Des Kelly.

66. Despite a number of further meetings in 2012 and into early 2013, Mr Currie informed Mr Jim Kelly that there was no trade buyer, and no private equity funder for an

acquisition of DSM. From that point onwards efforts were focused on the possibility of borrowing funds within DSM to finance expansion within SFG.

67. Mr Jim Kelly apparently came in for some criticism within the family for what was perceived as a repeated failure on his part to bring about a successful sale.

68. From about this period Mr Kelly assumed an oversight role with regard to the companies' financial affairs, seeking from Mr Baker detailed summaries of balances and payments. He also sought ad hoc requests for information as and when his consideration of the business seemed to him to require them.

69. It remained the case that while Mr Baker did extensive work for the companies he was never actually employed by DSM or SFG; all his work was done pursuant to BTAS's engagement letters, even though some of it was in reality outside of the companies' business, such as the personal affairs of the family members.

Conclusions: the relationships by October 2015

70. I shall start by recording my conclusions about the personal relationships at the heart of the dispute. There were pleaded issues about these, and they form part of the basis for the argument on fiduciary duties. The Claimants identified as key factual issues the questions of:

    i) The role of Mr. Baker vis-à-vis the Family;

    ii) The influence that Mr. Baker and Braid had over the Family.

71. It was a key part of the pleaded case on fiduciary duties that the Defendants were in a position of trust – not *ex officio*, but because of the reality of their relationship with the Kelly family over a number of years. Mr Kelly feels strongly that the Defendants were within his circle of trust, and that they betrayed that trust.

72. So far as Mr Braid is concerned, on one level everyone spoke with the same voice. It seems that all the Kelly family liked and trusted him. He felt a loyalty to them. But he did not see himself as an intimate or as a friend. As he said, while he saw a lot of them at work, they did not socialise outside work.

73. Mr Braid is technically in a slightly different position than Mr Baker because he became a director of SFG and subsidiary companies. As such Mr Braid owed SFG fiduciary duties; although it is fair to say that his evidence was that at the time he was appointed a director he did not really think about or fully comprehend the implications of the appointment. Further his evidence was that his role within the company did not change when he attained this position.

74. As regards Mr Baker the position was more complicated. Mr Jim Kelly liked and trusted him. So (it appears) did Mr Des Kelly. It seems however that Mr Kelly never took to Mr Baker in quite the way that the other brothers did. He did not assert that Mr Baker was a friend. His evidence regarding Mr Baker was frequently punctuated by disparaging remarks. In turn, Mr Baker's written and oral evidence was clear and entirely consistent with this: he certainly felt that Mr Kelly was far from sympathetic and far from acting as a friend in relation to his domestic issues or in the way Mr Kelly

dealt with him at work. Mr Kelly felt Mr Baker absented himself from the office too much. Mr Baker's evidence was that the way that Mr Kelly treated him led to him working away from the office rather more than he would otherwise have done. The result is that while Mr Baker had an operationally close relationship with Mr Kelly and did (as already noted) decode complex financial documentation for him, it was a purely functional trust.

75. On one level Mr Baker was indeed the family's "go to" man by this period and in the months which followed. However when one looks at the questions of trust and influence, this is one of the areas where perspective and the difference between subjective and objective perceptions is key; and also where the somewhat blurred lines of the Kelly businesses' management structures has in part created a situation where very different subjective perceptions could co-exist.

76. In general terms the informality of the businesses seems to have created an appearance of intimacy which has fed into Mr Kelly's perception. The Kellys did not think twice about asking Mr Baker and Mr Braid to step outside the role which was on the face of it theirs – for example in Mr Baker doing work for the family personally when he was really retained by the companies or asking Mr Braid to do work which was outside the remit of his quantity surveying role. Similarly occasions such as the use of Kelly businesses in assisting Mr Baker or Mr Braid with domestic works may well have fuelled a subjective perception on Mr Kelly's part that there was closeness. That sort of informality underpinned Mr Kelly's evidence, which I accept he believed, that the Kellys and Messrs Baker and Braid were close and/or friends.

77. But that appearance was not the same as the perceptions of Mr Baker and Mr Braid and actually belied the objective realities. The reality of the situation was that the Defendants were outside the circle of power and outside the circle of real trust. All meaningful decisions within the businesses were taken by the Kellys, with others in the management team not invited. They also had very limited visibility of the companies' businesses, the companies being run on a somewhat "need to know" basis. Their requests to be allowed a share in the business were rebuffed. Their careers did not develop. There was a sense that the Kellys, while good bosses, regarded those who worked for/with them as being truly subordinate. A telling example was Mr Robin Powell, who after years of service, was not given a share in the business. He was instead "looked after" by a substantial *ex gratia* payment. Mr Kelly likewise gave evidence that it was his expectation that the family would "look after" the Defendants. Mr Braid said that even after he became a director of SFG his impression was that Mr Kelly regarded him "*first and foremost as simply a quantity surveyor working in the property department of his family business*". I accept that evidence.

78. As regards Mr Baker specifically, outside of Mr Baker's operational role Mr Kelly did not place trust in Mr Baker. Mr Baker cannot be said to have exercised any influence over Mr Kelly save in that limited respect.

79. I therefore conclude on the evidence which I have read and heard that the allegation that "*Mr Kelly was accustomed to following any advice, recommendations or directions given by Mr Baker and/or Mr Braid, in whom he reposed trust and confidence in all such matters, and whom he allowed to have significant control and influence over financial and business affairs concerning Mr Kelly*" is not made out. Nor is the allegation that they had a power over the decision-making of the Kellys.

80. Linking the facts back to the authorities, there is no set of circumstances remotely akin to the quasi-familial closeness which in some of the cases has been found to exceptionally create a fiduciary relationship. Further I note that even if such a relationship of closeness had been made out that would not have created a fiduciary relationship as regards this particular transaction – here one must have in mind the dicta in such cases as *Vald Nielsen* (at [744]) as regards the scope of the duty.

81. In the circumstances the factual basis which would be necessary to establish a fiduciary relationship between Mr Kelly and either or both of the Defendants is not made out. It follows that so far as the case is based on a relationship it must fail.

82. However that leaves the question, which while not separately pleaded clearly emerged during the course of the trial: whether there was a fiduciary duty which was created in relation to this particular transaction. In essence did something happen in the course of the Transaction which gave rise to a legitimate expectation of fiduciary behaviour? The potential breaches pointed to indicate the times and circumstances in which such an expectation might be said to have been created. In closing it was said that the Defendants had breached duties in that they:

    i) Did not act in the interests of the Family. They had no intention of securing/trying to secure the Family the best price and they did not inform the Family of this nor did they advise the Family to seek advice and representation in this regard;

    ii) Failed to disclose their conflict of interest as well as their involvement on the buy-side of the Transaction and their proposed benefits consequential upon the successful completion (e.g. roles, remuneration, shareholdings etc);

    iii) Failed to disclose that a 30% discount had been applied to the JLL Valuations/that the sale was at an undervalue;

    iv) Failed to obtain the informed consent of the Family to them (through their wives) receiving £4.4 million by way of loan from the completion proceeds and thereby benefiting from the Transaction.

83. So far as the first two points are concerned the primary answers lie in the early parts of the Transaction, which was known internally as "Project Nobel".

The key events at the start of the Project Nobel process

Was Mr Kelly told in October 2015 that there was to be an MBO?

84. In March 2015 Mr Kelly approached DNA Corporate Finance with a view to raising £100 million of finance. He got Mr Baker to provide DNA with financial information about DSM and SFG. There was some discussion about an engagement letter and the provision of further financial information, but matters were moving rather slowly.

85. At about the same time Mr Braid asked about the possibility of him acquiring a stake in the business, reflecting his experience and involvement in the business over the years and his commitment to developing it in future. Like Mr Baker, the answer which he received was in the negative: equity had to stay within the family.

86. Mr Baker and Mr Braid began to discuss the possibility of some form of business acquisition. Mr Baker was aware that Mr Kelly was talking to DNA and hence that the sale of the business could again be an option. He suggested that they talk to Mr Currie.

87. Mr Currie was broadly encouraging. What was discussed was a management buy out in a broad sense. Mr Baker and Mr Braid could not finance the purchase themselves; they would have to be part of an acquisition team where the majority share was, to start with, in the hands of a finance party. Mr Currie saw that this was a possibility. But, aware of the problems which had emerged with Project Forest, he made clear that he needed to know two things: did the pair have the family's authority to discuss a sale, and how much did the family want. Even so he sounded a note of caution: the problem of the strength of the management team and whether it would attract serious investors.

88. On 13 October 2015 Mr Braid attended a meeting with Mr Jim Kelly. Over lunch afterwards he seized the day and reiterated his interest in obtaining equity in the business. Mr Jim Kelly was sympathetic, but indicated that his brothers were unlikely to be in favour. It was at this point that the concept of an MBO emerged into the open. While the phrase itself may not have been used, I conclude on the evidence that the essentials – a purchase and involvement on the buy side by both Mr Baker and Mr Braid were explained. Mr Jim Kelly was content for this to happen. He indicated his brothers would need to be on board. And he was not prepared to make the running. He had tried leading the process twice, without success and had gained nothing other than criticism for it.

89. The subsequent meeting between Mr Braid and Mr Kelly was of course undocumented, though it was common ground that such a meeting took place. What was hotly in issue is what was said. At the start of the case it was Mr Kelly's case that he was unaware that what was proposed was an MBO. During the evidence the picture which emerged was less black and white. Mr Kelly understood the phrase "management buy out" to mean a buy out where the management were buying outright or possibly buying a majority share. He did not consider a structure whereby a company's management team combines resources with the support of a financier to acquire a part of the company they manage to qualify as an MBO.

90. There were two elements to the evidential dispute here. The first was, were the words "management buy out" used? Mr Kelly denied that the words "management buy out" were used; Mr Braid disagreed. He was convinced he had used the words because it was a phrase Mr Currie had used. To the extent that it matters (and I do not consider that it does) I do accept Mr Kelly's evidence that the phrase was not used. It appeared to me that he genuinely had a visceral dislike of the concept of a management buy out (as he understood it), for reasons which he explained and which plainly seemed good to him. I do consider that if the phrase had been used there would have been a strong negative reaction from him. I make clear however that I do not think that Mr Braid's evidence here was untruthful. My sense is that he may well have used the words to Mr Jim Kelly, but not to Mr Kelly. Further for him the words and the concept were merged in his mind; there was no magic in the phrase. His evidence that he used the phrase to Mr Kelly is a simple example of misremembering.

91. The second (and more significant) question is whether Mr Braid told Mr Kelly that he and Mr Baker were to acquire an interest and were to be "buy side". Here the disagreement is fairly limited. Mr Kelly accepted that what was put to him was a plan

whereby Messrs Braid and Baker would continue in the business as management. He also accepted that he fairly swiftly knew that they would get a share in the companies. This makes perfect sense in a world where (as the foregoing account has explained) previous attempts by the family to "cash out" had been impeded in large part by the absence of management involvement in the future of the companies. Mr Kelly accepted that there had been a theme that one of the problems was "*the absence of proper management in place*".

92. The dispute really in the end resolved into one as to the extent of Mr Kelly's knowledge as to the Defendants' being on the buy side and whether they said something which translated to him as a representation that they were on the sell side – that they were selling for the family, and their interests were aligned with the family. It was this subjective viewpoint which underpinned the pleaded representation (not ultimately pursued) that the Defendants represented that they would get "*the best price on the market*". It is also this subjective viewpoint which magnetised the use of the phrase "selling for us".

93. I should deal here with a passage of evidence upon which the Claimants leant heavily. In answer to an open question in cross examination Mr Jim Kelly's evidence was this:

> "I don't know exactly what he said to me, but what I recall he said to me, and I was a bit shocked by it initially, was that, would we consider him and Brian and the management having a go at trying to sell the business … for us…"

94. In my judgment rather more weight was put on this passage of evidence than it can properly bear. It ignores the fact that the initial recollection did not include those words "for us", which were added as an afterthought. But more significantly it rests on an assumption that selling and buying were a true dichotomy.

95. So far as this is concerned I am quite prepared to accept that Mr Braid may have used the phrase "sell it for you" either to Mr Jim Kelly or Mr Kelly – or indeed both. But at the same time I also accept his evidence that it was clear that what was proposed was that Messrs Baker and Braid would take some share on the buy side. As Mr Jim Kelly said, that was the reality of how the family were going to sell, given the reactions of the market on previous occasions: "*it would have to be the management involved.*"

96. It was also clear that Mr Jim Kelly was shocked by his proposal – which only makes sense if the proposal was a buy out (there would be nothing radical about a sale per se – it had been tried twice). The involvement of management as part of the buy side was the departure from history – and would prove the key which unlocked the sale.

97. To Mr Kelly Mr Braid spoke about funders and about continuing within the business. He asked if Mr Kelly was happy for him to talk to funders and see if the deal was viable. I accept that he made clear that he and Mr Baker wanted to be part of the new (buying) team.

98. Key to all of this and key to the absence of a buy-sell side dichotomy was the structure which Mr Currie had posited: the setting of a figure by the family. If that were put in place, both parties would be working towards the same goal and the Defendants could lead a process which served everybody's aims; in buying at the family's price the

Defendants would be selling the company "for" the family as much as they were buying it for themselves. I accept that this structure was understood by Mr Kelly and that he said words to the effect of: "*that is fine, so long as the family gets the right price*". I also accept that Mr Jim Kelly and Mr Kelly discussed the proposal after Mr Braid spoke with Mr Kelly.

99. That of course does not answer the question of whether such a price was set (to which I turn below). But the evidence indicates that (i) the first discussions took place against the background of Mr Currie having asked the Defendants to get approval and a price and (ii) the first step taken was to get approval for a buy out involving the Defendants - if the family's price could be achieved. The allegation that the Defendants failed to disclose their involvement on the buy-side of the Transaction and that they proposed to benefit by having a shareholding is not made out on the evidence.

100. Some challenge was made to the conclusion that there was such a disclosure on the basis of the family underwriting the professional fees and the payment of a commission in relation to the transaction. This was said to be only consistent with the Defendants being seen as sell-side. However that is, in essence, contrary to the evidence of both the Kelly brothers who gave evidence. Mr Jim Kelly was absolutely clear that he understood that the Defendants would be obtaining an equity stake; and as I have noted (and will note further below) Mr Kelly's own evidence was ultimately that he knew that they would have some equity participation.

101. Further such payments are consistent with the fact that the Kellys (rightly) saw the Defendants as taking a good deal of risk in taking on a transaction whose price was effectively dictated by the Kellys themselves, not by the market. Mr Braid's evidence was that Mr Des Kelly's reaction to their proposal was "*are you sure you really want to do that*?"

102. Nor do I see the absence of a written record at this point as contradicting this conclusion. This was an early stage discussion in the context of a very informally run business where the parties were in contact largely in person, dropping into and out of each other's rooms. There is nothing in the least incredible about this.

103. Finally it was suggested that the dispensing with DNA's services (as was done in short order) was only consistent with the Claimants' case. However that is not correct. DNA had been advising on a financing deal, not on a sale. If the decision was taken in principle to pursue a sale there would be no need for financing, and Mr Braid's evidence "*I said to John that we could not be talking to two different corporate finance firms simultaneously about different projects and with different agendas*" rings entirely true. Parenthetically however it is also consistent with the paradigm under discussion being a sale at a price to be set by the family.

104. I therefore accept the thrust of Mr Braid's evidence on this point. I do not however agree with the submission made for the Defendants that Mr Kelly's evidence was untrue. I consider that hindsight and a degree of confusion has coloured his recollection.

105. I conclude that Messrs Baker and Braid proposed a sale of DSM and SFG. They did not offer to take responsibility for the sale or to get the best price available in the market. They proposed a sale to a team of which they would be part, supported by finance if it could be obtained – and at a price to be dictated by the family.

Was a price of £140 million set by the family in November/December 2015?

106. This is the second of the main factual issues focussed on by the Claimants. On this there was a clash of evidence between Mr Kelly and Mr Jim Kelly.

107. Mr Jim Kelly said that the price of £140 million was set early on. The Defendants placed that event within a month after the original conversations with Mr Braid and Mr Jim Kelly seemed to agree with this.

108. I was urged to treat Mr Jim Kelly's evidence with caution – and I certainly do as regards his witness statement. His witness statement said that because of the intimated claim against him he restricted his evidence to commentary on key parts of the Defence and Counterclaim. While I understand the reasons for limiting the evidence given, taking a statement from a witness by explicit reference to one party's pleaded case is not a process designed to elicit genuine recollection and runs a serious risk of memory modification.

109. More compelling was his oral evidence, which was that there was effectively a figure that was already common currency in the family, in that the family would not infrequently, when gathered together on a Sunday, have a bit of a debate about what the business was worth. As Mr Jim Kelly said:

> "… well, DSM, on average, were doing an EBITDA of around 10 million, multiples, on a good day five, a bad day three and a half/four, so the demolition business is worth anywhere between 35 million to 50 million. We have paid, probably, 50 million to 60 million for the property we own, so it is worth in excess of 100 million with some profit. And that, you know, we would be happy with 140/150."

110. Although Mr Jim Kelly's oral evidence at certain points lacked clarity, this passage of evidence was clear and credible and I accept it. By contrast Mr Kelly's evidence, which posited a complete absence of family discussions of price in circumstances where on any analysis a sale was being discussed, is simply not credible.

111. Despite being offered opportunities to give a more sensible answer, including in answers to my questions at the close of his evidence, he declined to do so. His evidence was out of step with the other evidence in particular (i) Mr Currie's evidence as to his requirements (ii) the evidence of the Defendants as to the deal for which they sought approval and (iii) Mr Jim Kelly's compelling description. His evidence also flies in the face of the common sense test: it is simply contrary to human nature to believe that any family which had been interested in selling a company and received an indication of interest would not have a discussion – of some sort - about price. Here cross reference may be made to the evidence of Mrs Owens (at paragraph 153 below) regarding the later discussions, which entirely cohered with Mr Jim Kelly's evidence as to the type of discussions which the family had. Mr Kelly's refusal even to accept such discussion suggests to me that his evidence on this point is not accurate and is probably not candid.

112. I am therefore satisfied that the family did discuss and reach a landing point on a figure around £140 million. As to date, Mr Jim Kelly's oral evidence did not so clearly tie in the communication of that figure and it is fair to say that the documentary record does

not record any such communication. However on balance I conclude that there was a communication, albeit it may have been a tentative rather than set in stone figure.

113. The driver for this conclusion is essentially that I have accepted Mr Currie's evidence as to needing a price to move forward and that the matter did move forward, exactly in line with the date indicated by the evidence of the Defendants' witnesses. Mr Currie struck me in his evidence as an experienced and pragmatic businessman. He had seen attempted sales of DSM wither on the vine. He was not interested except on certain conditions. Nothing happened during the period when the Defendants and Mr Jim Kelly say that preliminary steps were being taken. But at almost exactly the point where they say Mr Jim Kelly told the Defendants of the family's price, Catalyst moved into action.

114. On 30 November 2015 an agenda was circulated for a meeting between management and Catalyst, with Mr England indicating that he had put together some slides. On 2 December 2015 a management meeting was held with Catalyst at DSM's offices. In early January Catalyst had moved sufficiently far as to put together a "teaser" document which had plainly involved a good amount of work. That document referred to an agreed price. Further when offers began to emerge one of them effectively referenced the price of £140million.

115. I was invited to find that this narrative was seriously challenged by the absence of a written note of the target price. I decline to do so. The reality is that the figure was so simple that there was no need to write it down.

116. Giving me some pause for thought has been the fact that it was submitted that "*contemporaneous correspondence to interested parties positively contradicts [the] case that there was a fixed price*". However the emails referred to are not contemporaneous with the date asserted for the communication of the fixed price at all, but considerably later. The documents relied on in closing were documents of June and July 2016 – some six to seven months after the price is said to have been fixed by the Kelly family.

117. I have nonetheless considered carefully the fact that some of the emails in June and July 2016 on one reading indicated no fixed price. So on 27 July 2016 (in an email referred to at 161 below) Mr Currie was saying "*He didn't say yes and he didn't say no to £140m …*". Other emails in July and August referred to values in somewhat tentative terms. But in the end I have formed the view that all of these emails are rather later in the day and reflect the changing picture then, to which I will come below. They are also consistent with the hurdle price being set provisionally, as I have indicated above, with a view to seeing how the deal developed.

118. A key part of the case as seen by Mr Kelly and advanced in the Particulars of Claim was that:

> "In order to induce Mr Kelly to agree to the proposed sale, Mr Baker and Mr Braid advised and/or expressly and/or impliedly represented as follows, namely that:
>
> (1) they would use their best proactive endeavours to act in Mr Kelly's interests to achieve the best net sale price for the sale of

> the business and subsequently the business of SFG when that sale became a possibility."

119. As I have indicated, this case was not really urged in closing, and rightly so. The case on representations was not consistent with the evidence as it emerged. The representation would have made no sense against the background of the way the deal evolved, with the plan being for the family to name a price, effectively for the Defendants to shoot at. Both Mr Baker and Mr Braid were perfectly clear in their evidence on this. As Mr Braid put it, in answer to a clear question:

> "I didn't know if it was a proper price. I knew it was an absolutely difficult price, difficult deal to do, and it was what the family had presented as being what they required."

120. That evidence was given straightforwardly and candidly and I accept it without reservation. There was no "best price" representation.

121. It follows that the allegation that there was a breach of duty in failing to disclose a conflict of interest, or failing to attempt to get the best price for the family fails. The Defendants, having disclosed their buy-side position, sought and obtained a target price from the family.

122. In essence even if the case for the existence of a fiduciary duty had been made out these conclusions would render it impossible or next to impossible for the Claimants' case to succeed.

The remaining issues and factual disputes

123. The remaining issues are mostly ones which either hinge on or are informed by the previous conclusions. However numerous factual points were made, and there are allegations of breach of fiduciary duty later in the narrative. These are best dealt with against the backdrop of the factual story as it developed.

Early 2016 – the deal progresses

124. The next few months contained a number of events which were largely not contentious. However they form a part of the story and the backdrop for the next contentious issue and individual events were also relied upon as chiming with the main issues dealt with above.

125. The first point concerns Catalyst, whose work now started in earnest. On 8 January 2016 Catalyst's "teaser" document was circulated by Mr Baker to Mr Braid, Mr Gareth Williams (SFG's Development Director) and Mr Andrew Fletcher (DSM's Commercial Director). Both of these latter were also to be part of the management team involved in the buy-out. On 22 January 2016 a meeting took place with Mr Baker and Catalyst. On 27 January 2016 Messrs, Baker and Braid met with Catalyst.

126. There was an issue as to whether the family - and in particular Mr Kelly - knew that Catalyst was acting for the "buy-side" as opposed to for the family. In the circumstances, as I have noted, this was something of an artificial distinction. However it is clear that Mr Kelly did know that Catalyst were not acting for the family, but for

the buyers. He knew there was no retainer between Catalyst and the family; the only possible retainer could have been that which existed in relation to Project Forest. But that was a transaction which was now some years ago and entirely new work would be needed. I do not consider that Mr Kelly can realistically have thought there was a continuing retainer in place.

127. Further in late October 2015 he had made sure to instruct Mr Baker to copy him with everything Catalyst were sent, which best makes sense if he appreciated that they were not acting for the family. Some reliance was placed by the Defendants on a January 2017 email in which Mr Baker said this to John Kelly:

> "you need advice on this because although Catalyst are doing the calculations and trying to be fair they are in reality acting for the buyers. Your lawyers Squire Patton Boggs have recommended that you do appoint separate advisers for this task!"

That is consistent with an understanding on both sides that Catalyst were not looking after the family's interests. At the same time the lack of an orthodox buy/sell side dichotomy, as already discussed, makes sense of both the absence of any perceived need for separate advice at this stage and of the evidence of Mr Dunn that Mr Kelly had told him that Catalyst were selling DSM for the family.

128. On 4 February 2016 Catalyst sent Mr Baker a revised draft of the Introduction document "Project Nobel". This document contained the following passages relied on by the Claimants in support of their case as to the influence and status of the Defendants within the businesses:

> "DSM and SFG were founded and are still owned 100% by the Kelly Family, who have gradually reduced their operational involvement. Together, DSM and SFG are run by an experienced, ambitious Management Team.
>
> The Kelly family have, for the first time, agreed to sell both businesses to the management team. The latter are therefore seeking investment to effect an MBO….
> Management Team …
> Rob Braid Group CEO … (effective) CEO of SFG since 2010
> Brian Baker Group CFO … Currently CFO of both DSM and SFG".

129. The evidence on this document was that both Mr Baker and Mr Braid had noticed the inaccuracy of the CFO/CEO wording and had raised this with Catalyst, not being entirely happy with it. Mr Braid said this:

> "I had explained to me how previous propositions for sale hadn't been successful and the importance of having a second-tier management, strong second-tier management. And I wasn't particularly comfortable with the CEO description, but I discussed it with Catalyst, they convinced me that it was the right thing to do…

> I looked at it and thought, "There isn't a CEO in our business, there is no role for it at the moment", it wasn't too much of a massive step to be changing and I just took the view, you know, with myself, that, you know, the family wanted me to do that, wanted me to be that sort of person and it was going to help get things going."

130. I accept that evidence, which was consistent with the other evidence as to the way the business was run and as to the way in which Catalyst were trying to attract buyers. It does not in context offer any real support to the role/influence argument.

131. Thereafter the document was circulated by Catalyst to potential finance partners. It appears that seventeen debt equity and hybrid funders were approached. There is no issue as to the thoroughness of the job done by Catalyst; Mr Taub accepted that this was a significant number of potential funders.

The entry of JLL and the restructuring

132. The representation case as originally formulated rested heavily on the JLL valuation, which it was said Mr Baker and Mr Braid contrived to ensure was an undervalue and then represented to be an accurate valuation. In closing large parts of this case were no longer maintained, but were never explicitly withdrawn.

133. In March 2016 JLL were commissioned to value the SFG sites that would be included in the Transaction Portfolio. For the final version of the report, the engagement was then extended to one of the buyer companies, DSM SFG Group Holdings Ltd. JLL's fees were ultimately paid by the purchasers. (Prior to completion JLL also extended its duty of care to the Vendor Loan Note holders, as their lending was to be secured against the property assets transferred). Within SFG, Gareth Williams led on the valuation process, and was JLL's main point of contact though Mr Baker and Mr Braid did raise some comments on the work as it progressed.

134. On 9 March 2016 Mr Baker met with PWC. On or about 15th March 2016, Mr Baker then had a meeting with Karl Harriman, a partner in the UK Tax team of PWC in connection with a potential restructuring of the Demolition group "*to facilitate a future divergence of [the Kelly family's] business interests and tax efficient disposal*" as well as a proposal for restructuring SFG. The sole shareholder of SFG had previously been Eileen Kelly. Due to her failing health, a restructuring of SFG had been envisaged for a substantial period of time; Mr Baker was aware of the intended restructure, and was heavily involved in the discussions surrounding it from at least March 2016 onwards. None of this however was an extension of his responsibilities so as to affect the position on role and influence.

135. Throughout March work progressed on many fronts. On 18 March 2016 Catalyst circulated a draft Business Plan. On 22 March 2016 Gateley PLC were approached and appointed as the solicitors for the buyers. On 23 March 2016 Squire Patton Boggs were approached to act as solicitors for the family. On 30 March 2016 Mr Baker provided the latest management accounts for Catalyst. On 1 April 2016 PWC provided a proposal for due diligence services.

136. On 4 April 2016 PWC held a meeting with Mr Baker to discuss the restructuring proposal. PWC requested details of any assets within DSM that were to be extracted from the core trading business on the re-organisation, which were provided by Mr Baker the next day.

137. On 19 April 2016 PWC provided an engagement letter to SFG and DSMGH relating to the proposed restructure of the businesses and detailed tax analysis. Mr Baker was to be the point of contact. The engagement letter was signed by Mr Jim Kelly, on or about 17th May 2016 on behalf of both companies.

The Terra Firma and Metric offers emerge

138. By mid-April 2016 such interest as had been generated by the teaser document and Catalyst's efforts began to emerge.

139. It appears that of the seventeen potential funders approached, about eight progressed to the point where initial meetings were diarised. An update on the status of meetings with funders to date was provided to Mr Jim Kelly on 20 April 2016, in the form of the forwarding of an email from Catalyst to Messrs Baker and Braid. This was typical of the way in which the negotiations progressed. While it was not "open book" in the sense of every single email being sent on to the Kellys, it was "open book" in the sense that regular unexpurgated communications from Catalyst/Messrs, Baker and Braid were sent on to the Kellys.

140. The first meeting, on 14 April 2016 was with Metric Capital ("Metric").

141. On 26 April 2016 Catalyst provided information ahead of a meeting with Terra Firma Capital Partners Limited ("Terra Firma"), a private equity funder. A deal of £150m was referenced. The meeting with Terra Firma took place on 27 April 2016. On 29 April Terra Firma sent their initial expression of interest. Within minutes of responding to it, Mr Baker forwarded on the email he had sent to Terra Firma – keeping Mr Jim Kelly in the loop: "*Thought you might be interested in latest on Terra Firma, as set out below. Early days, but positive*".

142. Similarly the detailed questions which Terra Firma asked were sent on by Mr Braid to Mr Kelly within the day.

143. A number of the meetings went less well. Mr Baker gave unchallenged evidence on another meeting with a team who were very abrupt and with whom it was immediately clear there would be no deal.

144. Meanwhile Catalyst and the buy-team worked on a Final Business Plan at meetings on 30 April 2016 and again on 5 May 2016.

145. The first approximation to an offer came when Terra Firma sent an email on 13 June 2016 expressing an interest to work with management to make an offer of up to £150m. That offer said this:

> "SUBJECT TO DUE DILIGENCE AND CONTRACT
>
> …. This e-mail sets out where we are re: Company, Offer Price, Management Package and Next Steps and I hope that

management and you would agree that our proposal looks to satisfy all parties.

Company

- Terra Firma is keen to support management in the execution of their accelerated business plan. Specifically

o On SFG, we would look to put in a 50% loan to value debt package and would hope, in time, that we might be able to invest more monies that has currently been envisaged as Gareth hires two more employees to help originate and assess future deal flow

o On DSM, we are wanting to introduce Rob to a former member of BPs executive committee to see if they could help him in assessing the best path forward in developing the decommissioning business. In the meantime our understanding is that we might pursue additional M&A to expand into the South of England. Our current assumption is that this business could only be levered at 2x 2016 EBITDA given the performance bond guarantees, notwithstanding the fact that they have never had a claim

- On the basis of the above, I would hope that management and TF could deliver on building a great land investment vehicle in SFG and continue to expand on the services of DSM.

Offer Price

- The General Partnership approved the deal team to work with management in making an offer of up to GBP150m to the family. It was suggested that the family may wish to "trade" around the initial offer and that we should consider whether we wanted to make a lower offer and allow the family to talk us up but that gets to deal tactics which we would look to discuss with Rob and you at a later date assuming that we were the preferred party.

Management Package

- We propose to provide management with a long term incentive plan that would enable them to get a share of the equity upside provided we met certain investment return hurdles. While we are still working through the detail, our intent is that the management incentive plan would have c. GBP20m if they were to deliver on the five year accelerated plan that we were discussing and we were able to monetise our investment.

- It is worth noting that this incentive plan is to reward management for growing the value of the equity and would need them to remain within the business for a period of time after our exit so that we could get full value on the sale rather than have

> the prospective purchaser be concerned about the key man risk that we perceive there to be within the business
>
> Next Steps
>
> - Catalyst / Management to evaluate the various offers and determine their preferred partner
>
> - We would hope to be management's preferred (exclusive) partner, assuming that we were would look to have more detailed discussions on the key assumptions of the business plan that we are looking to invest in along with negotiating a term sheet with management and agreeing the DD scopes / potential advisers
>
> - Once management terms have been agreed we would look to discuss best route for approaching family to confirm their appetite to transact at the given price
>
> - Upon agreed of a "in—principal" deal with the family we would like to conduct background checks on key management / family to ensure there are no governance issues
>
> - Once that is satisfied we would conduct due diligence to confirm the investment case
>
> …. From our perspective our offer is as firm as any other financial investor at this stage in the process. We have a great deal of confidence in Rob and his team and would hope that we could work together to grow the business."

146. This offer – complete with its reference to how to "trade" the price with the family – was forwarded by Mr Braid to Mr Jim Kelly. This – a "buy side" email which would not be expected to be sent on in a case where there was a buy/sell side dichotomy – demonstrates the "open book" approach and reinforces the conclusion I have reached above as to the structure of the proposed deal.

147. On 14 June 2016 SFG and DSMGH engaged solicitors, Squire Patton Boggs ("SPB") to act for them in the transaction.

148. On the same day a meeting was held with Metric, with an initial offer letter following two days later. That offer was entitled "*Heads of terms with respect to funds advised by Metric Capital Partners LLP ("we", "Metric", "MCP", the "Fund" or the "Investor") providing capital for the acquisition of DSM/SFG (the "Group") together with the Group's current senior management team (the "Management") (the "Transaction")*". It went on to say:

> "The purpose of this document (the "Heads of Terms" or the "Letter") is to outline the main terms for the Transaction and the process and steps to completion. This document sets out the intention of the relevant parties but is subject to contract and not

intended to create any legally binding obligations or commitments.

2. Transaction - overview

We would propose that the Transaction values the Group at GBP 130 million based on current financial performance and the expected valuation of land and real estate holdings to remain with the Group at closing.

MCP hereby confirms the Fund's commitment to invest, subject to the terms and conditions specified herein, up to c. GBP 65 million of capital (the "Metric Investment"), pursuant to the terms set forth in the Summary of Terms attached hereto as Exhibit A. The Metric Investment aims at i) providing the existing shareholders of the Group (the "Existing Shareholders") a significant monetization of their interest in the Group, while allowing them to retain some exposure to future value creation, ii) allowing the Management to participate in the future value creation under their leadership of the Group …

It is proposed that at closing the proceeds from the Senior Facility together with the proceeds raised from the Metric Investment will be utilized as follows:

- A consideration of GBP 100 million for 100% of the ordinary shares of the Group, payable to the Existing Shareholders; and

- Circa GBP 3 million to pay for fees and expenses related to the Transaction; should fees and expenses exceed GBP 3.0 million, the incremental amount will be funded by incremental Senior Facility and/or Metric Investment.

Furthermore, as part of the closing, the Existing Shareholders would receive:

- A minimum of GBP 15 million related to the sale of certain assets to be mutually determined (the "Asset Sale Consideration"). We would like to explore the most optimal structure to ensure that the Existing Shareholders will receive the maximum proceeds from the sale of a pool of assets with a current valuation of c. GBP 15 million. We would welcome the input and advice from the Existing Shareholders on how to maximize the disposal value of these assets over the next 12-24 months so as to optimize the proceeds available.

- A "Vendor Loan Note" of GBP 15 million. The Vendor Loan Note would effectively represent the Existing Shareholders re-investment of a small part of their total consideration as part of the Transaction. The Vendor Loan Note will carry a fixed maturity as well as a fixed yield (guidance of 5 years and 5.0%

> per annum), which represents an attractive return profile for this instrument. Furthermore, the Vendor Loan Note will benefit from warrants over [5.0%] of the ordinary equity of the Group at Exit, which allows the Existing Shareholders to continue to participate in the continued success of the Group.
>
> In consideration for the Metric Investment, the Fund will receive ordinary shares over 65% of the Group, with the remaining 35% available for Management and "sweet equity" incentive scheme for employees of the Group."

149. The letter went on to set out further conditions and timeline as well as a proposal for exclusivity. One feature of the deal was immediately seen by Mr Baker and Mr Braid as a problem – it was the idea that the family retain an interest post sale, with a vendor loan back and deferred consideration.

150. This letter, bringing the total of credible offers (or quasi-offers – Terra Firma's was not a firm offer) to two, was plainly a significant moment. Mr Baker and Mr Braid wanted to meet with Mr Kelly (who had Mr Des Kelly's proxy) and Mr Jim Kelly to discuss the offers. In the end it proved impossible to make one meeting, so sequential meetings were organised with the two brothers. The meetings were brief – apparently disappointingly so to Mr Baker and Mr Braid, who had anticipated a proper discussion. What happened was that each brother took the documents, expressed brief interest and said he would look at them, before departing. This again reflected the Kelly family approach of excluding the non-family members from the inner circle.

151. I pause to note that Mr Kelly was reluctant to accept that he did attend such a meeting, but it is clear to me on the evidence that he did do so. Mr Baker and Mr Braid were clear on this. Mr Jim Kelly said that he understood both that such a meeting was to take place and that it had taken place. I also accept the evidence that at that meeting he was handed a copy of the Metric offer letter.

152. That is a significant point because had Mr Kelly read the letter it would have resolved any lack of clarity in his recollection or understanding as to the nature of the deal – as can be seen from the text above, the letter made it absolutely clear that the deal proposed was a financed acquisition on which Mr Baker and Mr Braid were on the buy side. To the extent that the point was persisted in, I do not accept Mr Kelly's evidence that he did not understand this at the time. I conclude that having been given the offer, with the Terra Firma offer also, he was aware of and read both communications, and consequently understood that the offers were ones in which Mr Baker and Mr Braid were to be part of a buy-out financed by (depending on outcome) either Terra Firma or Metric.

153. This conclusion can be reached more firmly when one takes into account not only Mr Jim Kelly's clear evidence that the offers were given to him, not only the clear evidence of Mr Baker and Mr Braid on this point, but also Mrs Owens' compelling evidence about the family's excitement and discussions which took in the relative sizes of the offers at this time:

> "I just remember it was a very exciting time for everybody and I just remember the talk about that. You can imagine it was the talk of the household. …
>
> Q. .. they were all busy chatting away, were they, about it?
>
> A. Yes.
>
> Q. Can you recall … were you just aware there were offers there and the family was very excited?
>
> A. Just that there were offers…. I heard "Metric" and just that it was an American company. Again, that just stuck with me. It was American and, again, it was exciting. I knew there was other offers, but not any details….. I knew there was a higher offer but I don't know who said it."

154. The second point of relevance of this initial offer is that it provides context for one of the emails relied upon by the Claimants against the setting of the £140 figure at the outset. Against this background one can now see that offers were coming in which effectively negotiated down from the £140 million figure. Terra Firma looked for help to negotiate downwards. Metric pegged their offer at £100 million plus £15 million + £15 million (i.e. £130 million).

155. Against this background comes the email of 17 June from Catalyst on which the Claimants relied in the context of the "no set price" argument:

> "David/Ilkka
>
> Just thought I would drop you a quick note summarizing where we are:
>
> 1. Whilst we have received other proposals from funders the discussions are more advanced with you than any others and you are management's preferred partner (and we have been impressed with your understanding of the business and responsiveness to date).
>
> 2. This is a great opportunity in our view and both businesses are performing very well as you know.
>
> 3. Following the discussions on Friday with the family (and Andy Currie also spoke to Jim) whilst clearly we don't want Newco to overpay it feels like the family will require a £140m headline price, although my understanding is that there wasn't significant pushback around the cashout number. Therefore we will need to think further around the deferred/rollover structure.
>
> 4. Our collective sense is that the family are unlikely to feedback further this week and will wait for us (Catalyst) to put forward a formal proposal on behalf of Brian/Rob in the next 10 days.

> 5. We would like to recommend to the family that they award you guys exclusivity however to do that there are a number of points that will need to be covered off/thought about:
>
> a. Can you move the headline price to £140m?….
>
> 7. We are all keen to make this deal happen!"

156. In other words the email was, quite clearly, a negotiating pushback, effectively reiterating the family's pre-set price of £140 million. It supports, rather than undermining, the case that the price was set by the family at the outset.

157. The email also records Metric as the preferred bidder; this reflects Mr Baker and Mr Braid's evidence that they felt that Metric better understood the merits of the SFG/DSM business and that they felt optimistic that, in the light of that understanding, Metric would come up to scratch on price. On the face of it Terra Firma's proto-offer was better both for the family and for the management who would get a bigger management equity upside; and Mr Currie of Catalyst presented it to Mr Jim Kelly in a meeting at the end of July as the better offer. But Mr Baker and Mr Braid felt greater connection to and faith in the prospects of Metric reaching the finishing line. As it turned out, their perception was correct.

158. Before moving on to the progress of negotiations I should here record my finding that in the light of the evidence, I reject the submission (made in opening, and not pursued with any vigour in closing) that Messrs. Baker and Braid decided that Terra Firma and then Metric were the "partners" for them and that, without seriously seeking further indications of interest or marketing, they proceeded with the Transaction with Metric. DSM and SFG were properly marketed. Indications of interest were pursued. Terra Firma and Metric were the only parties who expressed an interest. It is for this reason - and not because of any personal preference - that Messrs Baker and Braid focussed on those players.

The deal falters

159. Although two deals had now emerged, all was not plain sailing. Both offers were plainly slightly sceptical on price. At the same time there was uncertainty created by the result of the Brexit referendum, which emerged on 23 June. Metric tended to be downbeat about the effects of Brexit on timeline for future land sales. The perception for a while became that Terra Firma would be more likely to pursue the deal.

160. A further meeting with Metric took place on 18 July 2016. It did not go well. The next day, Mr Baker, with whom Mr Braid agreed, summed it up thus:

> "A few thoughts for discussion now that yesterday's events have had time to sink in:
>
> 1. John's behaviour in the meeting was odd, bordering on rude;
>
> 2. I read from his attitude that he no longer has any appetite for this unless he can acquire at a 'steal' and completely de-risk it for Metric;

> 3. We are over £100m with NRV's, so offering £100m now and the balance of £40m when Metric have doubled their money will, I believe, be seen as derisory/insulting by the family;
>
> 4. This particularly as John's answer to my question about further funding to buy further land now at the right price was less than convincing, meaning that it will be harder to achieve/exceed budget;
>
> 5. The majority of management's share now seems to sit behind Metric first making double their money, which, subject to running the numbers through a model, seems on the face of it to have reduced significantly unless the business is incredibly successful (and see my comment at '4' above);
>
> The only way I can see this going anywhere at all is if the family get £100m out on day 1 as payment for xx% of the equity, and that post completion Metric/Family/Management have agreed % of equity in Newco. Family would no doubt want a seat on the Board. Not an ideal solution, but would at least be something that we could put to the family as an alternative to what we might be able to achieve with TF."

161. On 27 July came another email on which the Claimants placed some stress in the context of the £140 million price.

> "Good meeting with Jim. Key points are:
> 1 He didn't say yes and he didn't say no to £140m but
> 2 He did say to crack on with re engaging on FDD, LDD and tax
> 3 Agreed focus was on next week's meeting
> 4 He liked that the deal can get done by end Sept
> 5 He said it would take him 24 hours to get a yes or no from the family once we have a formal offer…"

162. As noted, in context this email reads clearly as referring to an offer of the £140 million with the 100/40 split which was now in discussion. It provides no support, when the full context is taken into account, for the submission that a price of £140 million was never set.

163. On 28 July one of Mr Currie's assistants drafted an email for him to send to Terra Firma. It said:

> "On Wednesday we had a good conversation with Jim Kelly, who as you know is acting as the conduit between us and the rest of the family. We discussed the proposals with him and whilst not agreeing to a number in the meeting our takeaway was that the family would transact at £140m EV, with 100% of the consideration payable on completion.
>
> This is a good outcome for Newco as we believed a number of weeks ago that the EV may need to be £150m or higher for the

> family to agree to a sale. We have managed to agree a lower EV despite the fact that the performance of both DSM and SFG continues to improve month on month (with DSM forecast Ebitda for FY16 increasing from (X) to (Y). On top of this the JLL report has fed back that the NRV's of the inherited sites are c£105m, considerably higher than the £80m initially presented.
>
> You could argue therefore that Newco has therefore secured an additional £40m of value as a result of agreeing an EV of £140m.
>
> This therefore provides us and Management clarity as to the family position and Jim pushed the ball back into our court to work with Management to confirm their preferred funder and then following that to agree with the family a period of exclusivity till the end of September to complete the deal.
>
> Rob/Brian enjoyed the session last Thursday with you, the team and Justin. You continue to show real appetite and understanding of the business and the opportunity. Assuming that we can agree on their behalf an equitable Management deal they would like (assuming the session is positive next week with Guy and the team) to recommend to the family that Terra Firma be granted exclusivity to complete the deal. The chaps believe that Terra Firma would be a strong partner for the business and help deliver not only the base plan discussed last week but also the significant other tangible opportunities that exist."

164. This document was said to provide evidence that the value ultimately agreed was below market value. However I accept Mr Currie's evidence that this was "*positioning with a private equity house*" – or as a lawyer might call it "commercial puffery". Mr Currie was trying hard to get one deal to the wire at the right price, while the other potential partner was seeming like it was backing off.

165. JLL was working on a schedule of values – with a first full draft of its report emerging on 29 July. This document was not prepared for the family, but rather as a document to attract potential financiers. Its role was to give an independent and credible aggregate value of SFG's land bank, since that would be the collateral security for the financing. It was needed to deliver the financing to achieve the family's price.

166. The draft, with some riders from Mr Baker suggesting that the valuation was very much on the low side for a number of the assets, was sent to both Terra Firma and Metric very early in August. Again this intervention by Mr Baker is incompatible with the case originally advanced against him, that he was trying to "lowball" the valuation. The draft was also sent to Mr Jim Kelly whose PA printed it out for him. It was not sent to Mr Kelly, and it appears he did not see it at this stage.

167. Also on 29 July Catalyst were discussing the deal with Terra Firma:

> "In summary, we had a good meeting with the family earlier this week. We have worked hard to manage their expectations and it has been agreed that we will meet up again post Thursday and

> make a final decision as soon as possible. A key output of the meeting is that subject to price, the family will go with our (being us and management) recommendation as to who we move forward with. We have not agreed a finite number yet, but we are confident that we can do this within the range we are all comfortable with.
>
> …In terms of agreeing the way forward, it is important to understand how we have arrived where we are. As we have said a number of times, we have sought to position this as a mid-90s off market buy out - we at Catalyst could have advised the family on the sell side, but we always believed that the right solution here was a management led one and we would always rather buy with management rather than sell to them. Rob and Brian have then worked hard (with Jim) to keep a lid on expectations - compared to three months ago, DSM is significantly more profitable and the JLL report has come in with a number higher than expected. If the family had a sell side advisor, they would be looking (irrespective of Brexit) to get value for these items so we think that the way the deal has been run has significantly benefitted Newco on day 1. This is good news for all."

168. This document was relied on particularly in two contexts. The first was as evidence of influence. As to this, I have made clear my conclusions on this above. This document has to be seen as part of a process whereby Catalyst are aiming to sell the deal, and the Defendants as business partners, to Terra Firma. It was also relied upon as evidence that the deal later put to the family was not the best deal available: the Terra Firma deal was, say the Claimants, better. But in context I am quite clear that it is better read as a spirited attempt to move one of the deals nearer the line. In the context of this period Mr Braid was asked about the movement in the JLL valuation figures and the absence of sell side advisers. He was clear that getting to the figure was a struggle:

> "The family had set a price that was extremely difficult for us to .. achieve. In fact, if they had have had sell side advisers, they might have been looking for a lower price. You know, it was extremely difficult…"

169. Further the Claimants' approach is to neglect or airbrush out of existence what happened next.

170. On 4 August Mr Braid and Mr Baker flew to Guernsey to meet with Mr Guy Hands of Terra Firma. Up until this point the contact between Terra Firma and Catalyst and Messrs Baker and Braid had been at a more operational level within Terra Firma. Because the person in question was called a "Managing Director" they had had the impression that Terra Firma was interested at the decision-making level. It was their clear impression at the meeting however was that it was Mr Hands alone who was the decisionmaker and he was not attracted by the deal. A case had been put to him by his operational people, but he was not convinced. He was sceptical of the JLL valuations, which had perhaps been slightly rushed to be available for the meeting and lacked the granularity he wanted. But fundamentally he was not happy about the risks of cleaning

up what he saw as "dirty land". Unlike Metric he did not "get" the business. As Mr Baker put it: "*the Terra Firma proposal was going nowhere*".

171. Although attempts were made after this to sell the proposal to Terra Firma (Mr Baker, for example, analysed forecast result into site types in order to demonstrate potential levels of profit, tagging it thus: *"£2 for every £1 spent is what we expect"* – and again attempting to increase rather than decrease the price) the real hope of landing this deal had gone. Terra Firma were not "put off" by Mr Baker or Mr Braid (or Catalyst), as was alleged. Those at operational level in Terra Firma saw merits in the proposal, but the person who needed to be sold on the deal was not.

172. I should mention here an email upon which reliance was placed by the Claimants which was drafted by Mr Baker on 5 August. It said this:

> "… It was … a pleasure to meet Guy … this all confirmed our belief that Terra Firma are the right partner for the management team.
>
> …Our interests are now clearly aligned in aiming to produce an offer containing terms that will first and foremost enable us to buy the business at the right price, but that is at a level that management can support (bearing in mind the alternative offer) and use our influence to ensure is accepted so that we can, as soon as possible, move into a period of exclusivity".

173. This was said to show the Defendants indicating that they would use their influence to keep the price down. However read in context – particularly with the reference to the right price – it can be seen to be simply an attempt – despite the perceived failure of the meeting – to keep Terra Firma in the mix.

174. By 19 August confirmation of the Defendants' perception came through:

> "Text from Alex .....Dear Rob, I hope that you and family are enjoying your holiday. I regret that we will not be able to meet the 135m hurdle. Firm likes the business but is struggling on price. Am on my mobile if you would like to discuss."

Although there was a later flurry of activity, no formal offer was ever made by Terra Firma.

175. Meanwhile Mr Baker and Catalyst were pursuing Metric. On 10 August Mr Baker sent Metric the JLL report, with his own comments indicating that he thought that JLL had underestimated the values:

> "I do want to add a few comments to the JLL report, as we don't agree with everything they say. You will see that their final values do not agree with the draft schedule that was sent to you on 3rd August. In that draft schedule we had highlighted the three sites that we had fundamental disagreements on, and shown what we believe the value should be. JLL have reverted in the

> final report to their valuations. I have set out below the differences, and why we disagree with them:…"

176. Again this demonstrates clearly Mr Baker trying to increase rather than decrease the price. He went on to urge Metric to renew their offer:

> "Other Matters/The Way Forward
>
> We have intimated to you previously that you are our preferred partner in this venture. This has not changed. …
>
> …. As I indicated to David in our call yesterday, I believe that Andy has spoked to Jim separately, and following that conversation Andy felt that having £40m resting on the actions of others (with no influence) will be unattractive to the family. Knowing the family well as we do, Rob and I concur with that view. They do like to be in control, which is understandable!
>
> It is still our wish to pursue this opportunity with you, and use our influence with the family to encourage them to accept your offer. I know that Andy has spoken to John and asked whether, given the positive land valuations and good news coming from the trading business, there is anything that can be done to make the conditions surrounding the deferred £40m become more palatable for the family. I believe that, if that could be done, we may have a chance of convincing the family to move forward. I'm not sure exactly what that might look like, but Rob and I would be happy to have a call to discuss it if you think this might be helpful. Please let me know if/when you want to do this."

177. Again a submission was made that this shows the Defendants parading their influence. The question of influence is one I have already dealt with. Nothing in this changes that conclusion. The Defendants were (understandably) trying to sell the deal, and their value, to prospective partners.

178. Following this exchange, on 16 August Metric put forward a revised proposal. However this still involved an element of equity retention by the family. Metric were not prepared to move from this. Mr Baker attempted to rouse Terra Firma's interest with updated financial information on individual sites but met no answering enthusiasm. As at 19 August the Kellys and the Defendants had gone from two promising deals to no deals.

179. It follows that in its original shape the hurdle price which the family had set could not be achieved, despite considerable efforts on the part of Catalyst and the Defendants.

180. Ultimately the deal changed shape so as to become viable. The issue of how that happened forms the second major factual issue in the case.

The revised deal: the idea of Mr Baker or Mr Jim Kelly?

181. As to that issue its significance arises only if one reaches the conclusion either that there was another deal available, or that the values involved were inaccurate. As I have made

clear above there was no other deal available. The revision of the deal was a necessity to keep the possibility of the deal alive. As I will also explain below, the conclusion which I reach on value is that the values set out by JLL and upon the basis of which the parties were operating were not understated. They were close to right; and certainly in the right ballpark. It follows that this issue, though much focussed on, is not really of any significance.

182. To the extent that it could have significance, I am not persuaded that the answer to this is as simple as the one posited by the parties. Mr Kelly would suggest that Mr Baker effectively came up with the new structure, derailing an otherwise promising offer from Terra Firma. As I have made clear above, there was no offer from Terra Firma to derail. By 18 August what there was an impasse as regards the Metric offer, which was the only live offer.

183. The Defendants' case was that the revised deal shape was the brainchild of Mr Jim Kelly. I am also not persuaded that this was the answer either, because:

i) As part of his earlier work trying to break out profitability of the landbank sites, to attract Terra Firma Mr Baker had been looking at sites in categories of Core, Legacy and Investment;

ii) Late on 18 August 2016, in an effort to clear his desk before holiday, Mr Baker was grappling with a spreadsheet, sent to him following a conversation with PwC some weeks earlier which engaged with what properties were to be kept by the family after any sale.

184. It was against that background that Mr Baker and Mr Jim Kelly met. I conclude that the overall shape of the proposal was suggested to them by the documents which Mr Baker had been looking at, but that Mr Jim Kelly was the driving force in identifying the split. This was something which Mr Baker, who did not really understand the broader business, could not sensibly do.

185. As soon as he returned home he sent an email to Mr Jim Kelly: "*As we discussed, I've listed below the properties (additional to the original list) that you would keep: … The ones that would go are …*" It appears that at this point the primary thought was to try to tempt Terra Firma, by removing properties to which they were struggling to attribute value. Some thought was also being given to re-engaging with other bidders (contrary to the submission that no regard was had as to whether the shareholders would be better served by seeking other offers), but there was no other party who had expressed a real interest. From early September, as people returned from holiday, work commenced on the possible new model for the deal.

186. I should deal briefly with the submission made in closing that at the time the final Metric offer came in Terra Firma was still interested. This was not made out on the documents. One of those relied on was the 19 August 2016 email. The others were an email of 27 August 2016 where Mr Williams of Terra Firma (the main contact but not the decisionmaker) contacted Mr Braid, essentially acknowledging that the previous meeting had gone badly, saying he would like to do some more work "*so that [Guy Hands and other main decisionmakers] can have a more constructive meeting*". He followed up with a fairly extensive shopping list of early-stage questions which he needed answering to move matters forward. He then seems to have gone quiet until

mid-September, by which stage the Metric offer was almost agreed. It follows that after the refusal to bid in August Terra Firma's position was one of generic and at best lukewarm interest from a non-decisionmaker. As Mr Currie put it – their moment had passed.

187. While the Claimants suggested that this narrative was not credible, I have had no difficulty accepting it. Nor, against the background I have outlined, do I consider it significant whose was the original idea. The bottom line is that the revised deal was a plan hatched between Mr Baker and Mr Jim Kelly – again reflecting the "open book" and common cause nature of the deal.

188. Nor is it at all clear why the Claimants placed such stress on this point, because it is clear, and was conceded in oral evidence by Mr Kelly, that he was quickly in the loop as regards the proposal. On 7 September 2016 Metric responded with a revised offer:

> "Dear Brian, Rob – as discussed earlier by phone, we would like to confirm our commitment to further pursue the transaction with you. A lot of the key parameters are already described in the termsheet we shared some weeks ago but in the interest of time, and in preparation of your meeting tomorrow, let's summarise the updated structural terms:
>
> - GBP 100m consideration for 100% of the family's shareholding
>
> - c. GBP 24m of assets to be carved out of the current 'landbank' and to remain with the family
>
> - 40m bank financing to be sought as part of the transaction/ 60m of MCP financing (transaction costs to be financed between bank and MCP financing)
>
> There is a solid foundation for a potential transaction here and we look forward to working towards completion together."

189. Within 30 minutes that email was forwarded on to Mr Kelly. He accepts he read it.

190. The final offer letter from Metric was received on 20 September 2016. This was forwarded to Mr Kelly and Mr Jim Kelly from Mr Baker. The offer was to purchase the businesses of DSMGH and SFG (after the identified properties of SFG had been moved out of the company) for the sum of £100m. It again made clear that the nature of the deal was an MBO - the letter was entitled: "*Heads of terms with respect to funds advised by Metric Capital Partners LLP … providing capital for the acquisition of certain subsidiaries, assets and rights of DSM/SFG (together, the "Group") together with the Group's current senior management team (the "Management")*".

191. Pausing here, I should deal with Mr Kelly's case that – notwithstanding the various points which I have highlighted thus far - he remained ignorant of the nature of the deal. Mr Kelly accepted in his evidence that he received and read this letter at the time. In his statement he said that he did not understand this because he thought he was part of the management. I cannot accept that evidence, which made no sense; it did not actually

provide any sensible reason why he would not know as a result that the Defendants would be part of the future management team (and would therefore benefit from the deal accordingly. In oral evidence Mr Kelly himself appeared uncomfortable with it, refusing to endorse it in terms and resorting to the evasion "*that is the way I have written it*". I therefore find that even had Mr Kelly been ignorant of the nature of the deal before 7 September 2016, he was aware that the proposed deal was a management buyout involving the Defendants from that time. Nor do I accept his evidence that he was told that the assets had been valued and based on those values, the price was a proper price or the best price available. That evidence was not consistent with the surrounding evidence and materials and the features which I have already noted.

192. The decision was then taken by the family – without advice from the Defendants – to accept the offer. This was in line with their established model of making decisions. It is apparent from the documentary record that their legal advisers SPB raised only a couple of minor queries and that Mr Jim Kelly was to sign the offer letter and a draft exclusivity letter within a day or so of the offer being received.

193. The deal was not firm however – the essence of it was a headline value of £100m, with £60m to be provided by Metric and £40m of debt funding to be sourced against DSM and SFG. This, together with the SFG sites that it was agreed would remain with the family, bridged the value gap between £100m and the original family ask of £140m. There was therefore a deal in theory – but there was a £40 million funding gap.

Progress towards the line

194. A Draft Restructuring Paper was then sent to Mr Baker on 23 September 2016 setting out the assumed enterprise values; (£100m for SFG and £39m for DSMGH). The JLL Report was revised with the reduced number of sites. This was forwarded to Mr Baker.

195. On 10 October 2016 PWC issued a Letter of Engagement in relation to Financial Due Diligence with Mr Baker and Mr Braid.

196. On the advice of PWC for *inter alia* tax purposes, a new company, Lansdowne (known as JTK Holdings) was incorporated on 21 October 2016 as a corporate vehicle for Mr Kelly's business interests. This entity is the Second Claimant.

197. On 4 November 2016 Eileen Kelly gifted her shares in SFG equally to Lansdowne and the two similar corporate vehicles established by the Kelly brothers. There was then a shareholding restructure at DSMGH, Each brother held 1/6 of the shares as did each of their corporate vehicles. A reorganisation of DSMGH's share capital then took place.

i) A new share class of 'A' ordinary shares was created (one issued for each existing ordinary share). Existing ordinary shares were assigned a preferred capital right capped at £39m, based on "*the Directors' initial appraisal of the market value of DSMGH*". The new 'A' ordinary shares then had an entitlement to capital above the existing ordinary shares' £39m capped right.

ii) Each of the Kelly brothers exchanged their 'A' ordinary shares in DSMGH for one ordinary share in their investment companies.

198. Consequently, each of Mr Kelly and his brothers, together with their respective investment vehicles, held 1/3 of the shareholding in DSMGH and SFG.

199. On 16 December 2016 Mr Baker forwarded the first draft of the SPA and a copy of the updated draft Restructuring Report of PWC on the proposed sale of the shares in the subsidiaries of DSMGH and SFG to Mr Kelly, Mr Jim Kelly and Ms Sally O'Donnell. The restructure was completed on 19 December 2016.

200. One significant part of the case made by the Claimants (here and in the draft unfair prejudice petition) was that Mr Baker did not send a working spreadsheet which they say revealed that a 30% deduction to the JLL value was being applied. Put another way, it is said that this document revealed that the Transaction was at an undervalue and that fact was not disclosed to the family, including Mr Kelly.

201. I am not persuaded that this document shows what Mr Kelly thinks it shows. This is because this document (and the JLL valuation) was not about reaching the ultimate transaction value. That valuation traced back to the family's requirements, as I have already explained. What this document was doing (albeit by a mechanism which applied a 30% discount to the JLL valuations) was to allocate the agreed consideration in the context of an attempt to create a tax efficient transaction (in other words, to minimise the tax bill for the family - including Mr Kelly). As Mr Baker put it:

> "PwC requested that they be able to split the consideration between the individual assets to give the best end tax position for the vendors. Having discussed that with Metric, we decided that, actually, it didn't really matter to us and, therefore, we were comfortable for them to go away and allocate the proceeds in any way that they wanted to. …they came up with a methodology where that is what they did unless there was a good reason not to."

202. This evidence was robust and clear. I did not consider the challenge made to it was effective. It follows that the case that the Defendants breached a duty because they failed to disclose that a 30% discount had been applied to the JLL Valuations fails, quite apart from the question of duty.

The December 2016 meeting and the Och Ziff document

203. Front and centre of the Claimants' opening was a document prepared by Catalyst in December 2016 and provided to a potential funder, Och Ziff. That document said, *inter alia*:

> "Project Nobel is an opportunity to acquire two class leading businesses which have an ever increasing working relationship which will enable each to continue to differentiate itself from its peers. A deal has been agreed with the current owners that is well below market value and thus creates the platform for all participants in Newco to make market leading returns.
>
> The Management Team have a close and effective working relationship with the Vendors. As a result of this relationship,

> they have been able to agree a deal that is highly attractive…As Appendix A shows, the entry price is considerably below a pragmatic market valuation of these businesses."

204. Appendix A of the document said that it showed "the improving deal economics" and a "revised deal 2" (the current position at that time) which sets out that Newco had a day 1 value of £204m against an expected price of £100m, a consequential benefit to Newco of £104m. The Claimants say that this is powerful evidence that Catalyst and the Defendants knew as at December 2016 that the valuation being put on the business in the Metric deal was below market value. They submit that I should conclude that, whatever allowance one makes or "over-egging" the evidence as bait for funders, this document represents the view of Catalyst (and therefore Catalyst's principals, Mr. Baker and Mr. Braid) at the relevant time.

205. Mr Baker however gave clear evidence, which I accept, that he knew nothing of this document. He described it as bearing no relation to reality, in that it suggested a value on day 1 which "clearly wasn't there". Mr Braid very frankly said he could not recall the slides. I accept that neither Mr Baker nor Mr Braid saw this document and that they never believed the Transaction was one at an undervalue. Nor have I seen any evidence to support the contention in this document that the value of DSM and SFG had or was understood by those involved to have materially increased since December 2015. On the contrary one might well say that the nervousness caused by Brexit tended to decrease rather than increase the value, since it affected the appetite of the prospective buyers.

206. Mr Currie's evidence was that this was a document put together in haste and in some desperation to try to catch the eye of someone (Och Ziff) who might be a potential back up funder if the Metric deal fell through. That was a concern because an exclusivity period had just expired and the deal was still not done. His evidence was that it was not accurate, that it was a fairly blatant attempt to gild the lily and that he was embarrassed by it. The Claimants submitted that that explanation did not stand up to scrutiny because Catalyst would not issue and rely on a document which was going to be capable of being shown to be wrong. Having carefully observed and considered Mr Currie's evidence I do however, despite its unattractiveness, accept it. Catalyst's business plainly involves attracting interest and some gilding of the lily may on occasion occur. This document went considerably beyond that; but one can see the issues which were current, and the timeline. There was real pressure to close the deal and Catalyst were using every means to ensure it did not fail.

207. On 21 December 2016 Mr Kelly (along with Mr Jim Kelly and their sister Mrs O'Donnell) attended a meeting with PWC and SPB. Prior to the meeting Mr Baker sent an email referring to the need to "*agree what changes need to be made to protect/enhance your best interests*". Although some reliance was placed on this and the it was submitted that Mr Baker was meeting with SPB as a form of acknowledgement of a duty to protect the Kelly family's best interests, this is far too much of a stretch, and it was rightly not heavily relied on. Mr Baker's explanation was clear: as the person familiar with the companies and family's tax structures going back to 2008 he was the only person who was able to give SPB the information they needed to make sure that the tax implications for the family were not damaging: "*it was absolutely vital that I passed on that knowledge to both PwC and Squire Patton Boggs so that they could do that work correctly.*"

208. At that meeting the family and their professional advisers reviewed drafts of the SPA and the tax paper which PWC had prepared. The tax paper was sent to Mr Kelly in advance of the meeting. It again made the MBO nature of the deal abundantly clear: "*the family have received a joint offer from Metric Capital Partners ("Metric") and Management…*". Though Mr Baker was asked by the family and their advisors to attend the initial part of the meeting, his presence was to verify certain information was accurate and to ensure that the corporate structure of the Kelly family's interests was understood. Once those tasks were completed he then left.

Final Steps

209. It appears that it was shortly after this that the idea emerged of the Kellys providing Vendor Loan Notes to bridge the financing divide. Despite an attempt to suggest this was something that came from Mr Braid, the weight of the evidence suggests that it was actually Mr Baker and Mr Kelly (probably inspired by the original Metric offer) who came up with the idea, with which Mr Jim Kelly agreed. As Mr Kelly put it in evidence, he asked Mr Baker:

> "How's the deal coming along? and he said 'oh I have been set a task to raise money' and he explained to me about the 30 million, the need to raise 30 million. It was his suggestion; he said to me 'what are you doing with your money from the sale?' I said 'I am not too sure yet' and he says 'would you like 10 per cent interest?' I says 'I will have a bit of that'."

210. However this exchange is significant also as regards Mr Kelly's understanding as to the Defendant's participation on the buy side of the deal. First it is even more plain at this point that Mr Kelly knew, before the sale completed, that Mr Baker and Mr Braid were on the buy side – why else would they need funds? He accepted in terms that he knew that Mr Braid, Mr Baker and "a gang of them" would get shares, and that they would carry on in management roles. But the lack of surprise and the matter-of-fact reaction to this proposition also supports the conclusion to which I have come above: that Mr Kelly knew they were on the buy side before early 2017.

211. On 11 January 2017 PWC issued an Engagement Letter regarding tax advisory and due diligence service which was amended to include the Kelly brothers. This was signed on 8 February 2017. PWC advised that DSMGH should be liquidated shortly after the Transaction completed to minimise tax liabilities, and a separate PWC team were appointed for this purpose.

212. On 17 January 2017 SPB provided a quote to Mr Baker for SPB to act for the family in connection with the £30m loan facility. Mr Kelly then gave detailed instructions to SPB as to the terms of these agreements and instructed SPB to use the JLL values for the purposes of the VLN providing the JLL report to them for this limited purpose.

213. On 25 January 2017 Mr Kelly was sent the draft of the Vendor Loan Agreement.

214. On 31 January 2017 an email from Sally Graham of PWC was received by Mr Baker stating that she could not accept instructions solely from Mr Baker on behalf of the Kelly family. Mr Baker then proposed Mr Jim Kelly as a point of contact.

215. A separate PWC team were engaged to advise the vendors on working capital issues, following advice from SPB. Mr Kelly was initially reluctant to incur further professional fees, and asked Mr Baker to source alternative quotes. Mr Jim Kelly and Mrs O'Donnell remained adamant they wished to use PWC, and as Grant Thornton's quote was even higher and Springboard were seen as too small. Mr Kelly agreed to continue using the services of PWC.

216. The engagement letter with the PWC sell side team, dated 15 February 2017 were between PWC and Mr Kelly and his brothers personally. This PWC team too were well aware of the Transaction's structure, and initially had some reservations about dealing with Mr Baker given his role on the buy side; but once they understood that substantive instructions would come from Mr Jim Kelly, Mr Kelly and Mrs O'Donnell, they were content to proceed and did so. Mr Baker expressly highlighted that PWC should only contact him for "administrative issues" and was aware that PWC were subsequently dealing with the Mr Kelly and his siblings directly without reference to him.

217. The JLL 2017 Report for the Purchasers which shows the valuations of 22 sites owned by subsidiaries of SFG was updated and the final version sent on 24 February 2017. These were provided to Catalyst on 28 February 2017.

218. The incorporation of St Francis Group 1 Ltd, St Francis Group 2 Ltd and DSMSFG Group Holdings Ltd took place on 21 February 2017. Mr Baker and Mr Braid were appointed directors of other buyer companies. At the same time Mr Braid was appointed director of Nobel Midco and was made Group CEO of the Nobel Companies.

219. On 25 February 2017 Mr Kelly had a meeting with Geoff Perry of SPB at DSM's offices. This meeting lasted around three hours.

220. A final version of the JLL Report was produced on 7 March 2017. An exchange then took place at Gateley's Offices which was attended by Mr Kelly, Mr Jim Kelly, Mr Baker, Mr Braid, Metric and other advisors.

221. The final version of the PWC Restructuring Paper was produced on 17 March 2017. DSMGH and SFG sold their shareholdings in the subsidiaries identified in the SPA to the Buyers. A Facility Agreement between Lansdowne and the Brothers' corporate vehicles lending St Francis Group 1 Ltd 30m was signed.

222. The final version of the PWC Transaction Paper was produced on 29 March 2017.

223. On 30 March 2017 a Funds Flow document was prepared by Mr Baker and sent to PWC and Squires.

The Thomas Guise loans

224. The final distinct point is that the Claimants submitted that the Defendants failed to obtain the informed consent of the family to them (through their wives) receiving £4.4 million by way of loan from the completion proceeds and thereby benefiting from the Transaction.

225. I do not consider this submission to be sustainable – even if there had been (as there was not) a proper link to the Claimants to found a breach of fiduciary duty argument.

226. This point was in my judgment misconceived. At the time of the Transaction, Mr Jim Kelly agreed to personally provide a form of "completion bonus" to be paid to both Defendants in order to provide them and their families with a measure of security if the businesses did not prosper. This was effectively (despite the Defendants' roles in the new ownership) a reiteration of the bonus which had been contemplated in relation to earlier sales. It was agreed that, lest such payments were seen as breaches of warranties to Metric, the payments should be made by way of loans to the Defendants' wives.

227. These payments were recorded in formal loan agreements drawn up by Thomas Guise (a firm of West Midlands solicitors whom Mr Jim Kelly had used previously). As the documentation makes clear, these were not loans from SFG or either of the Claimants which could arguably provide a link capable of grounding a breach of fiduciary duty claim by the Claimants; rather the lender was Mr Jim Kelly personally, with funds paid out to Thomas Guise on his instructions. They were on the face of the relevant documentation personal arrangements between Mr Jim Kelly and the Defendants' wives; Mr Kelly agreed that this was the position.

228. The facts are as follows. On 6 February 2017 Mrs Sian Baker and Mrs Sarah Braid retained Thomas Guise Solicitors to act for them in relation to proposed loans of £2.4m each from Mr Jim Kelly. A meeting then took place on 9 February 2017 at Gateley's offices to discuss SPA and general transactions. Messrs, Mr Baker and Mr Braid signed Engagement Letters with Gateley on 13 February 2017. SFG and DSMGH through Mr Jim Kelly as the point of contact agreed to underwrite Gateley's fees. Plainly therefore the family in the form of Mr Jim Kelly were well aware of these loans.

229. To the extent relevant, I conclude that Mr Kelly was also aware of these agreements prior to completion. He asked Mr Braid what he planned to do with the money prior to completion. The ultimate destination of the Thomas Guise payments was discussed at a family meeting prior to exchange and Mr Kelly was later vexed that his own funds did not arrive so speedily. As Mr Jim Kelly recounted it: "*I categorically remember John ringing and berating me and saying, 'Why the [fruity language] did they get their money and we didn't get ours?*'". He would hardly have done this had he not already known of the loans.

230. In the end the main relevance of this point, which featured only in passing in the closing submissions, seemed to be to found a submission that in line with *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] 4 WLR 112 at [48] – [49] I should disbelieve Mr Baker and Mr Braid's evidence on other matters because they used this route to circumvent the provision in their deal with Metric that they should not benefit from the Transaction. This is not a submission which finds favour with me. I have carefully evaluated the evidence of Mr Baker and Mr Braid against the contemporaneous documents. As I have recorded above their evidence coheres on all the major points with the documentary record. That cross-checked credibility is reinforced by the candid and clear way in which they in general gave their evidence.

231. I should also note for completeness that an allegation that Mr Baker altered the Sage accounts in 2018 in relation to these loans was not sustainable. As became clear from the Sage accounts spreadsheet as it was considered in evidence, the adjustment made to apportion the loan between the Kelly siblings was not made by Mr Baker: if he had done so, the username in column W for the relevant rows (1257 to 1261) would show

the username "Brian" as earlier entries do, rather than "MANAGER", as is in fact recorded.

Completion

232. On 31 March 2017 the Transaction was completed. It was structured as follows;

i) SFG sold 100% of the share capital in a number of its subsidiaries, plus its fixtures, plant and motor vehicles, to new companies incorporated by the buyers. There was never the sale of any shares in SFG; thus the Second Claimant remained a one-third shareholder of SFG post the Transaction (and it is understood continues to be so).

ii) DSMGH sold 100% of the share capital of two of its subsidiaries to the buyers' companies; those subsidiaries being DSM and DGH (Bolsover) Ltd. Again, there was no sale of any shares in DSMGH. Each Claimant therefore continued to hold their one-sixth shareholdings in DSMGH, as they had held before the Transaction.

iii) The Transaction was almost entirely funded by Metric, who took a preferential majority stake in the resultant business (together with control over it). It was only an 'MBO' in the sense that existing members of the management team (including, but not limited to, the Defendants) took a minority equity stake in the new business. Metric's interest in the buyside holding company, Nobel Topco Limited, was 65%, with the Defendants by contrast only taking 7% each; and where 11 other members of the existing management team took smaller equity interests (though for some reason they are not being sued by the Claimants), with 9% of the equity reserved for future allocation or new management. Despite taking a controlling equity stake, Metric's £65 million investment was structured in the form of debt secured on the company's assets, such that the management team would not receive any upside on their equity investment until Metric had recouped double their initial investment.

iv) Metric's offer was based on a headline consideration of £100m, set by the Kelly family. Under clause 4 of the SPA, this figure was subject to a number of significant adjustments. These included an adjustment for working capital and "Additional Payments". The latter included giving the vendors credit for certain items of plant and machinery and additional costs on certain sites which had been paid by the vendor companies during the time that had elapsed since Metric's offer in September 2016. The total consideration paid under the SPA had therefore been calculated at £102,312,680. Additional to this figure, the vendors benefited from a "cash sweep"" of DSM and SFG by way of a dividend prior to completion estimated to be around £7.353 million, and are understood to have received a further £3.3 million from funds relating to the Chivenor site, owned by a subsidiary of SFG. This represents a total of approximately £112,965,680 in value transferred to DSMGH and SFG.

v) Following completion, SFG used the sale proceeds to repay its intercompany debt due to DSMGH. Cash not earmarked for reinvesting in new developments through SFG would have been available to be extracted by its then shareholders, including the Second Claimant. The Second Claimant would also have been

entitled to one-third of the amount received for settling the completion accounts, plus a one-third share of any deferred consideration. From the proceeds it received, the Second Claimant loaned £10 million back to St Francis Group 1 Limited (a new company incorporated by the buyers) under the terms of the £30 million VLN which had been the First Claimant's idea in the first place in order to ensure the Transaction proceeded.

vi) For its part post completion, DSMGH appointed liquidators in early April 2017 Upon liquidation, distributions were made to the ordinary shareholders on 6 April 2017, on which date the First Claimant would have received £13 million (being the capped sum he was entitled to receive).

233. Following the completion of the transaction Mr Baker ceased his position as Company Secretary and Finance Director of DSMGH and SFG. Mr Braid ceased his position as director of SFG and its subsidiary companies and Mr Kelly ceased his position as director of DSM.

234. It is important that I set out clearly what the effect of the Transaction was for the Defendants, not least because it seems very possible that some of Mr Kelly's subsequent unhappiness with the deal, which has led to this unfortunate piece of litigation, has its roots in a considerable misunderstanding of this point.

235. As to this I find:

i) Under the terms of Clause 3 of their Investment Agreement with Metric the Defendants were each issued with 7% of the shares in the buyside holding company (Nobel Topco Ltd), compared to Metric's 65% majority stake.

ii) None of the Defendants' shares were vested on issue (Clause 8.2.1(A) of the Investment Agreement).

iii) Before the Defendants (and the other management individuals with an equity interest) saw a penny of return on their investment Metric had to recoup twice its initial investment: Metric's cash injection into the business was structured as debt:

iv) Also requiring to be repaid were:

a) The VLN: a further £30 million in debt, loaned at a high rate of interest).

b) A £17 million bank facility.

236. It is emphatically not the case that (as Mr Kelly seemed to think) the Defendants received 35% of the equity in the new company on Day 1, still less an interest equating to the 35% of the value of the businesses.

237. Upon completion of the Transaction, the Claimants entered into a Deed of Indemnity whereby they agreed to waive any claims against any of the "Target Companies" (which, as defined therein, includes their officers and employees) and to indemnify them against all losses incurred in connection with such claims. The Defendants, who were officers and employees of the Target Companies, therefore claim an indemnity on

all losses they have suffered in consequence of these proceedings, including their legal costs of the same.

238. Consistently with the amicable way the deal had proceeded and the concerns to maintain the business to the same levels of success which had been achieved by the family, the Kelly brothers were to remain associated with the business. As the announcement of the Transaction stated:

> "Des will continue to be in charge of the direct labour allocation and plant and workshop functions as well as supporting and advising at a project level;
>
> John has agreed to continue to assist on a consultancy basis on key strategic projects and relationships;…
>
> Jim will continue to support us with business development and client relations;"

239. On 3 April 2017 SFG changed its company name to Corbally Holdings Ltd and DSMGH changed its company name to Arden House Holdings Ltd.

240. At the time of completion Mr Kelly was perfectly happy with the deal. A photo to which I was repeatedly taken in evidence shows him just after the transaction closed - beaming broadly and flanked by the Defendants. He sent a message in the warmest terms to Mr Braid congratulating him on the Transaction; "*topman Rob, it's been a hard year for you – but very good things to come over the next 5 and you will succeed – well done and thanks*".

241. It is quite clear to me that Mr Kelly was fully advised – by advisers retained for the family as sellers – as to the terms of the Transaction before contracts were exchanged. While he received advice however, I am not convinced that the advice was fully comprehended by him; it may well be that third party advisers were less successful at decoding the concepts than Mr Baker, who really understood the Kellys, had been in the past.

242. But it is at least quite clear that Mr Kelly was not under any impression that the sale was an outright sale to an independent buyer. Mr Kelly knew that the Defendants had acquired an interest and was entirely happy with that outcome at the time. He wanted them to succeed. While I would not go so far as to say that he did not care how much money they might make in consequence (subsequent events cast doubt on this possibility) he certainly hoped that they would do well from the transaction and their interest in it.

After the deal: Mr Kelly's road to litigation

243. It has formed no part of the issues in this case to ascertain why things turned sour first between Mr Kelly and the Defendants and then between Mr Kelly and his family.

244. However not least in the light of the issues this has caused to Mr Kelly himself, to the Defendants, and to the wider Kelly family it may assist to set out a few conclusions.

245. A text message exchange between Mr Kelly and Mr Richard Grimes took place on 11 April 2017 as to whether the Transaction was an MBO.

246. It appears to me that Mr Kelly was somewhat disconcerted when he was told that the Transaction was an MBO. As I have noted, he had a particular (narrow) understanding of the term, and a dislike for that concept. Once that idea was in his head, the negative associations with the MBO concept were present to him also, and a seed was sown for discontent.

247. Other things followed which added to this. Some helpful friend suggested that Mr Baker and Mr Braid were living like millionaires; at some point Mr Kelly formed the view that they had acquired 35% of the equity; which he did not think could be justified by the amount they could actually put into the deal. This misconception seems to me to have been very likely to have been the starting point for the concerns about the business being sold at an undervalue.

248. Then there was the question of working capital. At the time of the deal there was a discussion about working capital, with particular focus on the value of scrap. Mr Kelly's recollection was that the value of this was to be paid to the family once its value was ascertained in six months' time, but that this did not happen. Mr Kelly was ill in late 2017 and after he recovered he asked an acquaintance, Mr Dunn, to look into this question. Although this was not in itself an issue before me, it appears that Mr Kelly was not happy with what had happened on this front.

249. He continued to work with the Defendants, in particular helping to finish off the Tottenham Hotspur deal and also in dealing with the results of the Carillion liquidation. There was however a dispute about Mr Kelly's entitlements under the Transitional Services Agreement under which Mr Kelly agreed to provide consultancy services for a period of twelve months after the sale. The TSA provided for him to be paid a consultancy fee of £40,000 for up to 40 days' work and further payment at a daily rate of £1,000 for additional days worked. The TSA also provided for a profit share to be paid in certain circumstances, to incentivise him and his brothers to increase the profitability of DSM. The dispute flared up in mid-2018 and led to proceedings being issued in late 2018. In October 2020 that claim was dismissed by HHJ Watson.

250. At some point it seems that Mr Kelly placed together various things with which he was not happy, and in particular started to wonder whether the business had been undersold. Much of this seems to have rested on a feeling that what Mr Baker and Mr Braid got out of the deal was out of step with the £500,000 they could afford to put in themselves. As he put it:

> "what had actually happened was -- what we know now -- that is how the deal was put together, was they went with the people who was offering them the most percentage. What I was being told, they were allowed to buy shares and, to me, £500,000, it wasn't a lot. What I didn't realise is £500,000, before you have seen the background, is that they had actually got more shares, not just for the £500,000."

251. As I have explained above, that concern was ill founded – Mr Baker and Mr Braid had not gone with the deal which offered them most percentage (there was only one deal

available), and the deal did not give them anything like the share of the business which Mr Kelly thought they obtained.

252. But in any event, by late 2018 Mr Kelly was seriously concerned that something had gone wrong in the Transaction. He entered SFG's premises and placed a covert recording device in the offices of Mr Kennedy, the in-house lawyer. He recorded a number of conversations. When the device was discovered the Defendants and SFG sought an injunction against Mr Kelly. He (dishonestly) denied placing the device. Issues as to the use of this material were fought out strenuously. In late 2019 the Court of Appeal rejected Mr Kelly's arguments.

253. On 21 November 2019 Mr Baker resigned as a director of the buyers.

254. At the same time as these various disputes rolled out *vis a vis* the Defendants, Mr Kelly had engaged in a number of other disputes with Mr Jim Kelly. In part these were doubtless fuelled by what he saw as Mr Jim Kelly's wrongheaded support for Mr Baker and Mr Braid. But in part there were disputes as regards the management of the family's businesses and how certain development sites were dealt with. Disagreements no longer resolved themselves after vigorous family discussion, as they had done in the past. The longstanding family harmony was at an end. On 20 July 2020 votes were taken to remove Mr Kelly as a Director. These were supported by all of his siblings. Mr Kelly thereafter resigned as a director of SFG. He has indicated an intention to bring an unfair prejudice petition against the family companies and Mr Jim Kelly.

Conclusion on the facts and law

255. The state of affairs which has resulted is highly regrettable and, as I have explained in some detail above, as regards the case against the Defendants it is a dispute which appears to have been based on a series of misunderstandings and mis-recollections by Mr Kelly.

256. To be clear, I conclude that no fiduciary relationship arose out of a history of trust and influence being reposed by the Claimants in the Defendants. Nor in the subsequent events was there any occurrence which could impose a fiduciary relationship.

257. I summarise here my factual findings in relation to the main factual issues:

i) The Kelly family – including Mr Kelly – wanted to sell the business, if the price was right.

ii) Mr Kelly was told and understood in October 2015 (and subsequently) that the proposed sale was one which was led by management and that management, including Mr Baker and Mr Braid, would receive equity in the new arrangement. It was in essence a management buyout, though Mr Kelly did not ascribe that term to it.

iii) Mr Kelly knew and understood that the proposal was one where the buyers would endeavour to deliver a price dictated by the family. He and the family – who had an understanding of the companies' values - discussed the price to be sought and named the figure of £140 million.

iv) Mr Kelly knew and understood that Catalyst was acting for the buyside of the Transaction.

v) Mr Baker and Mr Braid did not offer to get the best price available for the family.

vi) Catalyst and the management team, including Mr Baker and Mr Braid, endeavoured to find buyers for the companies. The only two candidates to express real interest were Terra Firma and Metric. Terra Firma dropped out without making any firm offer. Metric was the only offer which emerged.

vii) Terra Firma's decision to drop out was down to a lack of enthusiasm for the project and the business on the part of its main decisionmaker; it was not the result of anything done or said by Mr Baker or Mr Braid. On the contrary, Mr Baker and Mr Braid endeavoured to kindle and to rekindle Terra Firma's interest.

viii) There was no offer which matched what the family wanted, which was £140 million, cash out, on Day 1.

ix) Mr Kelly was provided with the Metric initial offer and the Terra Firma expression of interest in June 2016.

x) The JLL report was a document produced as part of the attempt to sell the deal to funders. It was not a valuation for the family. Mr Kelly knew and understood this. He did not rely on it; and indeed nor did the rest of the family.

xi) Mr Baker and Mr Braid did not seek to lower the valuation of the assets produced by JLL. On the contrary they tried to raise it.

xii) The decision to carve out certain properties was made by Mr Jim Kelly as a result of a discussion between himself and Mr Baker. Mr Kelly knew of the decision and the scope of the properties carved out.

xiii) Mr Kelly knew of the revised offer which followed from Metric.

xiv) The family – including Mr Kelly – took the decision to accept the offer. He did not rely on advice from either of the Defendants.

xv) Mr Kelly was closely involved in the decision to bridge the funding gap with the VLNs.

xvi) Mr Kelly was happy with the Transaction at the time that it concluded. He understood that the Defendants had acquired an interest. He wanted them to succeed and make money.

xvii) At the time of the Transaction the Defendants were each were issued with 7% of the shares of the holding company. None of those shares vested until Metric saw a return of twice its initial investment.

258. It follows from these conclusions that the Claimants' claim fails.

Valuation

259. In the light of the conclusions which I have reached the valuation issues do not arise. However, a consideration of them is useful as a parallel to the narrative and conclusions set out above.

260. The starting point here is the Claimants' pleaded case. The case advanced in the Particulars of Claim was that the value of DSM and SFG was at least £200 million based on the following particulars:

> "(1) The true valuation of the shares of the subsidiaries of DSMGH at the date of the Transaction was no less than £90 million.
>
> (2) The true market value of the portfolio of properties involved in the Transaction, and consequently the shares of the subsidiaries of SFG, was no less than £121.28 million."

261. By the time of trial, that case had retreated somewhat. The Claimants' expert Mr Taub (having revisited his original calculations) calculated the value of DSM at £82.363 million and the value of SFG at £91.1 million. The Defendants' expert Mr Dodge valued DSM at £55 million and SFG at somewhere between £39.4 and £51.4 million, thus valuing the business at around the price achieved.

262. Although Mr Taub had plainly done a careful job and gave evidence clearly and helpfully, I concluded that the valuation produced by Mr Dodge was more robust and was to be preferred. There were a number of factors which fed into that.

263. The first was the nature of the exercise which the two experts performed. Mr Taub was only instructed to produce a "high level valuation" of DSM and SFG as a single entity, and only as at 17 March 2017 (rather than "*true realisable value … during 2016 and up to and including March 2017*", which was the formulation ordered for this aspect of the expert evidence). Similarly, Mr Taub was not asked to consider what alternative structures might have been used to realise value for the companies' owners, and whether an alternative to a private equity-backed MBO might have realised greater value.

264. Secondly Mr Taub's original approach to SFG was less satisfactory and he subsequently effectively resiled from it. His original approach was based on (i) an application of a multiple to forecast EBITDA or alternatively (ii) a valuation of the underlying asset base predicated on a valuation of the sites by BNP Paribas (which valuation was not disclosed). However, in light of the valuations produced by Mr Crust (the Claimants' property report) and Mr Dodge's report, he provided a new valuation adopting some elements of Mr Dodge's approach, albeit with significant differences.

265. Thirdly Mr Taub appeared to have less relevant expertise than did Mr Dodge. Mr Dodge had extensive experience of private equity backed transactions which Mr Taub lacked. Mr Taub was not in a position to (or asked to) challenge Mr Dodge's view that a private equity backed MBO was likely to be the best means of realising greatest value for the assets.

266. Fourthly when it came to the granular points of disagreement it appeared to me that Mr Dodge also had the better of the argument.

267. Thus so far as SFG was concerned, the addition of £33.4 million to represent future cashflows derived from new unidentified sites and a terminal EBITDA value seemed to be inconsistent with: (i) his agreement that "*the value of SFG at the relevant valuation dates was largely dependent on the value of its property assets net of costs of demolition, remediation, infrastructure and planning*" and (ii) his own original approach which did not involve any such addition. The approach seemed to me to be likely, as the Defendants submitted, to lead to a degree of double counting, because the earnings and cashflows from future sites are not separate and distinct from the value associated with existing sites, but rather the value of those existing sites "recycled" at a subsequent point in time. I did not see Mr Dodge's focus on valuation from the point of view of a private equity investor as opposed to a seller as the "fundamental oversight" which the Claimants submitted it was, but rather as a realistic approach in circumstances where a sale was not only planned now, but had been planned in the past, and where the business model, based on the family, which was itself aging, was not long term viable.

268. Mr Taub's defence of this element of his analysis was not persuasive. He accepted that that was in essence a payment for a business plan on the basis of "*a lot of very positive material about the company's abilities, contacts, contacts with agents and things like that, which would enable it to generate future profits.*" However, as we have seen above, some of the material which Mr Taub understandably took at face value was plainly "gilding the lily".

269. Also in the context of SFG the evidence which I heard suggested to me that the business could not really be characterised as a business of average risk, justifying a 13% cost of equity discount. Some further discount is logical given the lack of historical profitability, the nature of the business and the change in dynamic as the family took a step back; that risk was plainly acutely present to potential buyers in the earlier sales. Mr Taub essentially accepted this, saying:

> "If it is the case that it was totally dependent on the family, and it didn't have an infrastructure of existing management, then that would be a very significant risk factor… I would agree that if the court considers that that infrastructure isn't in place, that would have a significant impact on value"

As for the level of discount, Mr Dodge's reasoning based on what a typical private equity investor's approach, appeared to me to be sound.

270. Mr Taub also revised his own multiple for the DSM calculation down from 6 to 5.5 in the light of Mr Dodge's analysis, but the figure settled upon did not seem to be particularly well justified. By contrast Mr Dodge's reasons for choosing 5 were well explained and reflected concerns noted by PwC at the time. It seemed more robust than the 5.5 used by Catalyst at an earlier stage in the process.

271. Mr Taub's figure on maintainable EBITDA was calculated using information which post-dated the sale of the business and which was to an extent exceptional. While I can see that this later figure may be seen as better quality information I was not persuaded that, given the exceptional contracts which formed part of the results, it was an appropriate evidence base to use. Again Mr Taub's defence of this approach was not

compelling, with him accepting that DSM's 2016 profits were "*quite significantly higher than previous figures and was not expected to continue*".

272. I conclude based on the expert evidence that there was in fact no sale at an undervalue; it was a sale at the top end of the value of the businesses.

273. I also note that the result arrived at by Mr Dodge, suggesting that the sale value was a very good price for the Kelly family, being very much at the top of the range of values, also harmonises with the real-life facts. The businesses were offered for sale to seventeen potential funders. That is a not insignificant number, as was common ground. Only two financiers were prepared to be past the very initial stages. Only one offer emerged. Getting that over the line was not entirely straightforward. The perception of Mr Currie, an experienced and plainly acute evaluator of the situation, was that the sale price was a "full price".

274. I deal with the property valuation experts only for completeness as (i) the misrepresentation case to which it was primarily addressed has really withered on the vine and (ii) the evidence did not ultimately materially inform the property valuation experts views.

275. I can deal with that evidence quite briefly. Mr Crust for the Claimants had not been instructed to opine on the true realisable value of the assets – as contemplated by the CMC Order. He had done what was in effect a sense-check of the existing valuations – for example in relation to Nigg Energy Park of a report which was a marketing document produced by Peter Graham Associates in 2015 in the hope of winning a sale mandate and which did not comply with Red Book standards. To the extent he had, as he suggested in passing in evidence, gone further his methodology was not evidenced in his report and could not therefore be interrogated or evaluated. Mr King for the Defendants had done a full "Red Book" valuation of each site in the portfolio.

276. Fairly inevitably in the circumstances I prefer the evidence of Mr King. While a number of detail points were put to him in cross-examination – for example in relation to DRIP costs, and the valuation of individual buildings at Nigg Energy Park, I still consider his views to be more persuasive than those of Mr Crust, based on his more limited and derivate exercise.

277. I therefore conclude that, as reflected in Mr King's evidence, the simple aggregate value of the 22 sites on the valuation date was £65.795 million. Applying appropriate discounts this figure should be reduced to a range of between £39.48 million and £46.055 million.

Counterclaim: Indemnity

278. Upon completion of the Transaction, the Claimants entered into a Deed of Indemnity. Under the terms of that deed they agreed to waive any claims against any of the 'Target Companies' (which, as defined, includes their officers and employees) and to indemnify them against all losses incurred in connection with such claims. The Defendants, who were officers and employees of the Target Companies, therefore claim an indemnity on all losses they have suffered in consequence of these proceedings, including their legal costs.

279. Naturally given my conclusion on the claim there is limited scope for the indemnity to operate. It may however have teeth as regards any shortfall in recovery on assessment of legal costs.

280. The effect of this indemnity was denied as regards the principal reason for which it was pleaded (namely if the claim succeeded). Given my conclusions, I do not need to consider this aspect of the Counterclaim. None of the arguments raised in that connection however go to this question of irrecoverable legal costs. I therefore conclude that the indemnity is apt to cover any losses (including legal costs) of the Defendants in circumstances where they have not breached any duty to the Claimants.

Conclusion

281. It follows from the above that the Claimants' claim fails and the Defendants' Counterclaim succeeds.