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Case No: HC-2016-003069
Case No: HC-2017-002087

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

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

Date: 19/05/2020

Before :

MR JUSTICE TROWER

- -

Between :

STUBBINS MARKETING LIMITED

Claimant

- and –

(1) STUBBINS FOOD PARTNERSHIPS LIMITED (IN ADMINISTRATION)
(2) STUBBINS GROWING PARTNERSHIPS LIMITED (IN ADMINISTRATION)
(3) THE ESTATE OF WAYNE ANTHONY SMITH (REPRESENTED BY Ms LORNA NEWCOMBE)
(4) PIETRO TURONE a.k.a. PETER TURONE
(5) SALVATORE TURONE a.k.a. SAMMY TURONE
(6) KOMBBI LIMITED
(7) SEDGE GREEN SALADS LIMITED

Defendants

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- -

Thomas Roe QC and Clara Johnson instructed by **Duffield Harrison LLP** for the **Claimant**
Lesley Anderson QC instructed by **Rae Nemazee LLP** for the **Third Defendant** and by **Gary Summers** as licensed litigator for the **Fourth and Fifth Defendants**

Hearing dates: 5-8 November 2019, 11-15 November 2019, 18-22 November 2019, 25-26 November 2019 and 2-4 December 2019
Supplemental Written Submissions: 21 January 2020

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Approved Judgment

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

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MR JUSTICE TROWER

MR JUSTICE TROWER:

Introduction

1. In these proceedings Stubbins Marketing Limited ("SML") seeks damages and/or equitable compensation pursuant to section 178(1) of the Companies Act 2006 (the "2006 Act") and an indemnity pursuant to section 195(3)(b) of the 2006 Act against three of its former directors (or in the case of one of them his estate). SML also seeks certain ancillary relief including an account of profits, rescission of a debenture and certain declarations. Any entitlement to that ancillary relief flows from the circumstances in which SML is entitled to damages and/or an indemnity.

2. The claim for damages relates to a number of different breaches of duty said to have been committed by those directors at various times between 2013 and 2016. The claim that they are liable to indemnify SML arises out of a substantial property transaction, by which SML sold a major part of its assets to companies controlled by those defendants on 1 April 2016. It is also pleaded that, by procuring SML to enter into that transaction, those directors committed breaches of duty.

3. SML was incorporated in 1987 to take over a Lea Valley-based market gardening business carried on by three siblings, Paolina Turone ("Pauline"), Antonio Difrancesco ("Tony") and Mariano Difrancesco ("Mario") (collectively the "original shareholders"). Throughout its existence, all of the shares in SML have been held by members of the Difrancesco and Turone families. One third of the shares are now registered in the names of Pauline and members of her branch of the family, one third are now registered in the names of Tony and members of his branch of the family and one third are now registered in the names of Mario and members of his branch of the family.

4. For ease of reference I use the anglicised versions of first names when describing the individual members of the Difrancesco and Turone families who feature in this judgment. I intend no disrespect in adopting that course. It is the way they have been described by all parties during the course of the trial.

5. The dispute between the parties came to a head shortly after 1 April 2016 when SML sold its business to Stubbins Food Partnerships Limited ("SFP") and Stubbins Growing Partnerships Limited ("SGP"), companies which were owned and controlled by four of the five directors of SML. The relevant asset purchase agreement (the "APA") also made provision for the sale and leasing by SML to SFP and SGP of certain real property from which SML had until then carried on its business. The APA and the leases were constituent elements of a wider transaction (the "Transaction") by which the shares in Continental Express Transport Limited ("CET"), a company in the same ownership as SML, were sold to Logistic Partnerships Limited ("LPL"), a company which was owned and controlled by the same directors who owned and controlled SFP and SGP.

6. Some time before the Transaction was entered into, a significant number of the shares in SML had been transferred by the original shareholders to nine younger members of the family. Management responsibility had also been transferred to four of them when Pauline's two sons, the fourth defendant Pietro Turone ("Peter") and the fifth defendant Salvatore Turone ("Sammy"), Tony's son Salvatore Difrancesco ("Spider Sam") and Mario's son Salvatore Michele Difrancesco ("Salvi") were appointed directors. By the

time of the Transaction there was also a fifth director, Wayne Anthony Smith ("Mr Smith"), who was the only non-family member on the board. He died after the commencement of these proceedings and his estate is the fifth defendant. He was a childhood friend of Peter's, who joined the board later than Peter, Sammy, Spider Sam and Salvi, but who had played a significant role in SML's affairs for some time before he did so.

7. Peter, Sammy and Mr Smith (the "Director Defendants", which also includes Mr Smith's estate where the context so requires) and Salvi were not just directors of SML, they were also the four directors of SFP, SGP and LPL and the holders of all of the shares in SFP and LPL, and almost all of SGP's issued shares. The exception was 5 of SGP's 101 issued ordinary shares which were split equally between Pauline, Mario, Tony, Spider Sam and Tony's other son Giovanni Difrancesco ("John") for reasons to do with the transfer by SML to SGP of certain tax losses, which is the subject matter of one of the issues I have to decide.

8. The Director Defendants were the driving force behind the Transaction, although there is a difference between the parties on the extent to which Salvi was also involved in its design and implementation. These proceedings flow from the belief of other members of the family, and more particularly Mario and one of his sons Antonio Giuseppe Difrancesco ("Antony"), that the APA and other elements of the Transaction stripped value out of SML without their informed consent and followed a period during which it can now be seen that the Director Defendants profited at the expense of SML from various unratified breaches of duty.

9. It is common ground that the APA led to the acquisition by companies connected with the directors of SML of a substantial non-cash asset within the meaning of section 190 of the 2006 Act. It is also common ground that no formal resolution approving the APA or other elements of the Transaction was put to or passed at a general meeting of SML with the *prima facie* consequences (a) that the Transaction was unlawful and voidable at the instance of SML, (b) that the directors of SML, SFP and SGP (and SFP and SGP themselves) are liable to account to SML for any gains they made by the Transaction and (c) that those persons are also liable to indemnify SML for any loss or damage resulting from the Transaction, in each case pursuant to section 195 of the 2006 Act.

10. The Director Defendants assert that the approval required by section 190(1) of the 2006 Act was supplied by operation of the *Duomatic* principle (*In Re Duomatic Limited* [1969] 2 Ch 365). This is disputed by SML. While most of the essential elements of the Transaction were known to each of the shareholders (and each of them actually signed some but not all of the relevant documentation), it is SML's case that informal unanimous consent was not given to every material element of the Transaction and that the disclosures made to the shareholders were in any event inadequate and misleading.

11. The misleading statement to which most attention was given at trial was that SML's bank, Barclays Bank Plc ("Barclays"), was no longer willing to support SML and would push it into administration if the Transaction was not approved. There were also a number of other misrepresentations on which reliance is placed, including in particular as to the true value of some of the assets being transferred by SML to SFP and SGP under the terms of the Transaction, and the fact that SFP and SGP were granted leases of SML's property on highly advantageous terms.

12. In these circumstances, the first issue in the lengthy list of issues agreed between the parties is whether the shareholders of SML gave valid, unanimous, informal consent to the Transaction. As part of the first issue the court is asked to determine whether the Director Defendants acted in breach of duty in causing SML to enter into the Transaction, a question to which any valid informal consent given for section 190 purposes will also be relevant. SML then claims that it has suffered loss as a result of the Transaction. The extent of any such loss is also a matter for determination at this trial.

13. The second to thirteenth agreed issues are concerned with a number of different breach of duty claims. It is said by SML that during the period after the original shareholders had ceased to be directors, SML's business was mismanaged, and its assets (including the benefit of certain profitable contracts and business opportunities) were misapplied and misappropriated in a number of significant respects. SML contends that this conduct gave rise to breaches by the Director Defendants of one or more of their general duties under Part 10 Chapter 2 of the 2006 Act, including their duty of care under section 174. It is then said that SML was caused loss as a result of the Director Defendants' breaches of duty both in the amount of the value of the assets misapplied and by reason of trading losses sustained through their negligence.

14. The proceedings also raise three miscellaneous issues. Issue 14 is whether the claims made by SML against the Director Defendants were themselves sold by SML to SFP and SGP under the terms of the APA, and if so whether the sale was a further breach of duty by the Director Defendants. Issue 15 is whether the Director Defendants ought fairly to be excused for any breaches of duty pursuant to section 1157 of the 2006 Act. Issue 16 is the entitlement of SML to interest on any sums for which the Director Defendants may be liable.

15. The number of separate breach of duty claims which are made and the number of different issues of fact and law to which those claims give rise (which include a large number of sub-issues) means that this judgment is much longer than I would have wished. More particularly there is little alternative to setting out the background to SML's business and the family relationships relating to that business. Without an appreciation of the broad structure of that background it would be difficult to put in their proper context some of the conclusions that I have reached. In the course of doing so I shall make a number of factual findings which are relevant to one or more of the agreed issues.

The Parties and the Witnesses of Fact

16. The claimant is SML. Its current board of directors includes four members of Mario's branch and Tony's branch of the family: Mario himself, Antony, Michele Difrancesco ("Michele") and Onofria Di Carlo ("Onofria"). Giuseppe Ricotta, who is Pauline's son in law, is also now a director of SML. Its only other director is Stephen Randall ("Mr Randall") who had been SML's financial controller between 2002 and 2015, but who was appointed a director shortly before these proceedings began.

17. The only active defendants were Peter, Sammy and the estate of Mr Smith represented by his partner, Ms Lorna Newcombe ("Ms Newcombe"). As to the other defendants,

SFP and SGP are now in administration, the proceedings against them are stayed and they played no part in the trial. The sixth defendant, Kombbi Limited ("Kombbi"), is a company of which Mr Smith was the sole director and his estate is the sole shareholder. Its only relevant function was to act as the entity through which Mr Smith provided some of his services to SML. The only relief sought against it is rescission of a debenture granted in its favour shortly after completion of the Transaction (the "Kombbi Debenture") and it has played no part in the proceedings. The seventh defendant, Sedge Green Salads Limited ("SGS"), was originally joined when rectification of its register of members was sought; it too has taken no part in the proceedings.

18. I heard oral evidence from a number of members of the Difrancesco and Turone families: Mario and Antony for SML and Pauline, Peter and Sammy for the Director Defendants. In a number of respects the evidence of all of them was unsatisfactory.

19. The first member of the extended family to give evidence was Mario, who was called by SML. The principal problem with Mario's evidence was that he often found it difficult to concentrate on the precise point about which he was being asked without constantly reverting to one or other of the main themes in SML's case. He also found it difficult to remember how particular events fitted into their proper place in the chronology of what occurred and was prone to become very excitable when it became apparent during his cross-examination (as it did on a number of occasions) that his recollection of the details was faulty. Nonetheless, with one exception, I do not think that he set out to mislead. The occasions on which his evidence was misleading, and I regret to say deliberately so, were when he sought to play down the role which his own son, Salvi, played in the management of the business and the design of the Transaction. On the occasions that he was wrong, he was often very reluctant to accept that he was, but for the most part he tried to tell the truth as he remembered it to be.

20. Antony's role in the events giving rise to these proceedings was limited but important. He only featured at the time of the Transaction, but he was the leading objector to what it was that the Director Defendants wanted to do. It is clear that he thought they had been incompetent in their management of SML's business since their appointment, that they had been misleading his father (Mario) for some time and were trying to strip the maximum value out of SML to the detriment of its remaining shareholders. On the whole, his evidence was credible, but it was given in a manner which displayed a rather unattractive enjoyment in exposing what he thought of as Peter's and Sammy's misconduct. This gave the impression that he had something to prove and caused me to approach what he had to say with some caution.

21. SML also called two witnesses who were not members of the family. The first was Mr Randall who was SML's financial controller between 2002 and March 2015 when he left on extended sick leave as a result of what he said was work-place stress caused amongst other things by the bullying behaviour of Peter and Mr Smith. After his sick leave started, he opened a formal grievance which included a wide range of complaints against the Director Defendants generally and more specifically against Peter and then began proceedings against SML in the employment tribunal. A number of those complaints featured in these proceedings, as did the circumstances in which the employment tribunal proceedings were compromised and the amount that Mr Randall was then paid. He has since been reemployed by SML and has been a director since

September 2016 when this dispute had already begun and shortly before proceedings were actually commenced.

22. There was much about Mr Randall's evidence that was unsatisfactory, including an apparent inability to distinguish between argument, comment and advocacy on the one hand and a description of events in respect of which he was able to give admissible evidence on the other. This was particularly the case with his witness statement, much of which contained tendentiously expressed reconstructions of events of which he had no first-hand knowledge. This approach extended into his oral evidence as well, where he often tried to make arguments rather than give straightforward evidence.

23. It was also plain that he was embittered by his experience of working with the Director Defendants and allowed his deep dislike of all of them, particularly Peter, to affect what he had to say. I agree with the submission of Ms Anderson QC for the Director Defendants that it was clear that Mr Randall had an axe to grind bordering on vindictiveness. In part his attitude was driven by a genuine belief that the Director Defendants had been mismanaging SML and running it into the ground, but there were occasions on which he was not wholly frank about the attitude that he had had to the Director Defendants at the time of many of the events of which complaint is now made. In short, I have had to approach his evidence with caution, and have often not found it possible to rely on his uncorroborated evidence on issues relating to the conduct of the Director Defendants.

24. The second non-family member called by SML was Mr Andrew Pickford, ("Mr Pickford") who was the relationship manager at Barclays responsible for its relationship with SML. Ms Anderson QC described him as unusually combative and hostile for a supposedly neutral witness and it is fair to say that he expressed himself on a number of issues in forceful terms. However, I found his evidence reliable and have no doubt that he gave an accurate description of the relationship between SML and Barclays. Unlike a number of the other witnesses, he gave his evidence in a straightforward albeit forthright manner and he did not seek to embellish his evidence in order to justify his conduct at the time.

25. The members of the family called by the Director Defendants were Peter, Sammy and Pauline. Mr Roe QC for SML described the evidence given by Peter and Sammy as most unimpressive and pointed to the fact that they both admitted to dishonesty in the way they conducted themselves as against HMRC, Barclays and in the context of the grievance which Mr Randall commenced against SML in 2015. Thus, when questioned about his expenses and benefits form for 2014/15 Peter declined to answer in order to avoid incriminating himself.

26. I have not been able to accept some of the evidence which has been given by both Peter and Sammy. In particular I do not think that they were forthright about the process of planning the restructuring which became the Transaction and the extent to which, and manner in which, they involved other members of the family in their plans. I have also concluded (as will appear) that there were a number of important events in respect of which the evidence that they gave was both untruthful and incomplete. I do not think that either of them was wholly dishonest, but I think that they were prepared to give a spin on what happened which did not reflect the true position. Sometimes this was because they had convinced themselves that what they were saying was an accurate

reflection of what occurred, but there were also occasions when I think that they knew that what they were saying was not accurate.

27. The deficiencies in Pauline's evidence were different in quality. In her case it was particularly obvious that her witness statement had been drafted for her and that very little of it reflected her own version of events, let alone her own words. I have no doubt that she was doing what she could to protect her sons, but I do not consider that she ever went so far as to say anything that was positively misleading or untrue. Furthermore, I think that she was an essentially honest witness, and on those occasions when her evidence was important and I was satisfied that she was able to remember what occurred, I have felt able to rely on what she had to say.

28. The Director Defendants also called Ms Newcombe. Mr Smith has now died, and I consider that Ms Newcombe did her best to give a fair account of her limited role in what occurred and to explain her perception of the extent and nature of Mr Smith's participation in SML's affairs (which was very important). She was however at a considerable disadvantage in giving direct relevant evidence, and it was inevitable that much of what she had to say was second-hand with little probative value. Where her evidence was of relevance, I was able to accept it as being both honest and a bona fide attempt to assist the court.

29. The Director Defendants also called a number of professional advisors, who were involved in the planning and implementation of the Transaction. The first was Mr Neil Heyes ("Mr Heyes"), who was a chartered accountant and a partner in Rayner Essex. He was first instructed by SML in the summer of 2015, and from then on played an important part in developing the figures for the restructuring and in the Director Defendants' discussions with the banks. While I did not find all of his conduct during this process to be wholly explicable (as will appear), I was able to accept the evidence which he gave. In some respects, he had difficulty in justifying what occurred, but the evidence which he gave was essentially reliable.

30. The Director Defendants also called Mr Simon Moffat ("Mr Moffat") and Mr Paul Wilson-Smith ("Mr Wilson-Smith") who were both partners in Gisby Harrison, a firm of solicitors instructed shortly before the Transaction was completed. Mr Moffat in particular played an important role in what occurred immediately before the Transaction was completed. I was able to accept the evidence that they gave as credible.

Factual Background: the Early Years

31. The original shareholders arrived in this country from Sicily in 1958. From the mid-1970s, Tony, Mario, Pauline's husband (Giuseppe Turone, known as Joe) and Carmelo Nicastro were in partnership together. They traded as market gardeners under the name Difrancesco Turone Nicastro or DTN from Stubbins Nursery near Waltham Abbey in Hertfordshire ("Waltham Abbey"), a site which had some five acres of glass houses. In 1978, Carmelo Nicastro left the partnership and the following year Joe Turone was killed. Pauline then stepped into her husband's shoes.

32. Over a period of many years, DTN became increasingly successful. Early on, it grew cucumbers and delivered them for sale at local markets, but by the 1980s DTN had

branched out into growing other salad produce. It was very much a family business with many members of the family participating in different activities: working in the greenhouses, visiting other local growers, packing the produce and so on. Peter and Sammy in particular went straight into the business after leaving school without any formal qualifications. They both described how, as they had lost their father, their uncles Tony and Mario were like father figures to them.

33. DTN expanded onto two neighbouring properties eventually covering 7.25 acres with glass over a 13.5-acre site. It seems that it was one of the more innovative market gardening businesses in the Lea Valley, experimenting in new ways of growing such as hydroponics. The original shareholders also moved into transport, buying their own lorry, and at about the time of SML's incorporation in 1987, a new packhouse was built on the Waltham Abbey site.

34. SML was incorporated in June 1987 to take over the DTN business. In the early years SML had an authorised share capital of £300, and 100 shares were issued to each of the original shareholders, who were also appointed to be its directors. Mario was managing director, Pauline was finance director (and also acted as company secretary) and Tony was responsible for the growing. At this stage, SML did not acquire ownership of Waltham Abbey itself or the combined heat and power ("CHP") engines on that site; they remained in the ownership of the original shareholders.

35. By the time that SML took over from DTN, the core of the business comprised the growing and packing of salad produce for supply to supermarkets. Somerfield and Safeway were important customers. In 1989 SML started to import produce from Spain as a result of an introduction from an agent called Steve Knight. Peter described this as an exciting opportunity because it enabled SML to trade during the winter months when the English nurseries were not producing fresh produce for sale.

36. The logistics of running the import side of the business were unreliable, and so in 1992, the original shareholders acquired CET. It traded in parallel with SML, operating a fleet of lorries which delivered goods for third parties to the Iberian Peninsula and bringing SML's own imported produce back to the UK. Its directors were the same as SML's, with Mario as managing director. The shares in CET were held by the original shareholders in the same proportions as they held shares in SML.

37. In 1995, SML acquired a logistics depot at Munro Industrial Estate, Waltham Cross ("the WX Hub") from where it was able to pack both the produce it had grown itself and also the produce it had purchased from other local growers and from Spain. The packhouse at the WX Hub was extended in 2004 to meet the requirements of the supermarkets which were SML's main customers. After the acquisition of the WX Hub, SML redeveloped the old greenhouses at Waltham Abbey and continued to expand its acreage under glass. In 1998, it bought some land at Fen Drayton in Cambridgeshire ("Fen Drayton") on which it initially built some 8 acres of greenhouses, expanding to 18 acres of glass on 52 acres of land over the course of the next 10 years. Fen Drayton also included four houses and a staff hostel. This growth meant that, during the course of the 1990s, SML had become one of the UK's largest suppliers of salad produce to supermarkets.

38. In April 2002, SML engaged Mr Randall as a financial controller. Until then the business had been run on a very informal basis, with no scheduled meetings, no agenda

and no minutes. This continued to be the case, but it seems that, with Mr Randall's arrival, Pauline started to have more regular and structured meetings with him to go through the accounts. Mr Randall plays an important role in these proceedings, and many of the complaints which are now made by SML were first articulated by Mr Randall when he commenced employment tribunal proceedings against SML and Peter in August 2015. I will deal with the circumstances in which Mr Randall left SML later in this judgment, but as I have already mentioned he has now returned, having been appointed as a director in September 2016 shortly before these proceedings were issued.

39. In 2003, SML also purchased another nursery at Rhymney Valley, St Mellons, near Cardiff (the "Cardiff Nursery") where it grew tomatoes (until then SML's main crop had been cucumbers and peppers) in 20 acres of glasshouses on a 25-acre site which included five staff bungalows. Some idea of the size of the operation at this stage can be gleaned from the fact that the combined workforce of SML and CET was over 600 staff at peak times, and in 2004, which was the last financial year in which all of the shares were held by the original shareholders, SML had sales of £82.3 million and made pre-tax profits of £2.8 million.

Involvement of the next generation

40. During this period of growth in the business, SML's authorised share capital was increased to £300,000, divided into 100,000 A shares of £1 each, 100,000 B shares of £1 each and 100,000 C shares of £1 each. The A shares were issued to Pauline, the B shares were issued to Tony and the C shares were issued to Mario.

41. In 2005, the original shareholders decided that the time had come for the next generation to play a larger role in SML's business. To that end their children all acquired shares in SML. Pauline transferred 19,000 of her ordinary A shares to each of Peter and Sammy and 10,000 to her daughter Giuseppina Ricotta ("Giuseppina") (who retransferred her shares to Pauline in 2015). Tony transferred 25,000 of his ordinary B shares to each of his children, Spider Sam, John and Onofria. Mario transferred 12,000 of his C shares to each of Salvi and his other children Onofria Giuseppina Difrancesco, Antony and Michele.

42. The effect of these transfers was that Tony ceded control of his Group Class (the B shares) to his children, retaining only 25% himself. By contrast both Pauline and Mario retained ultimate control of their respective Group Classes (the A and the C shares) through their continued holding of 52% each, increasing in Pauline's case to 62% when the shares held by Giuseppina were retransferred to her in 2015.

43. At the same time, Peter, Sammy, Spider Sam and Salvi all became directors of SML. It was Mario's evidence that these appointments were made by whichever of the original shareholders was the parent of the new director concerned and I am sure that the decisions as to which family member was to become a director were in practice made by the head of the relevant branch. Peter took on the role of commercial director and was responsible for sales, Sammy became the production director looking after transport and the packhouse, Spider Sam was the director responsible for growing and Salvi was responsible for procurement. Finance and administration continued to be the responsibility of Pauline, which she carried out in conjunction with Mr Randall.

44. The original shareholders continued in office as directors for the time being, although they started to take more of a backseat role. This was particularly the case with the eldest of the original shareholders, Tony, who had effectively stopped working in 2000 because his wife was ill, and she required increasing levels of care. It was Mario's evidence that, in the period after 2005, he kept Tony informed on decisions made by the other directors, but Tony had ceased any active role in SML's affairs. Tony did, however, come to the WX Hub for an annual meeting with SML's accountants to go through and sign the accounts.

SML's Articles: Group Class Representatives

45. In March 2004, shortly before the share transfers to the younger generation were made, SML had adopted new articles of association (the "Articles") which were still in force at the time of the events with which these proceedings are concerned. They entrenched the class rights attached to each of the three classes of shares (separately described as a "Group Class").

46. The Articles provide, by Article 6, that the rights attached to each Group Class can only be varied, modified or abrogated with the consent in writing (or unanimous vote) of each of the holders of the issued shares of that Group Class. Article 7 then makes detailed provision for Group Class Meetings and for the appointment at a Group Class Meeting of Group Class Representatives to represent each Group Class at general meetings of SML. Article 7 contemplates that a Group Class Representative can be appointed either generally or for a specific general meeting. Under Article 7.7 the appointment of a Group Class Representative required a majority vote at a Group Class Meeting. The combined effect of Articles 7.11, 9.1 and 10.1 is that each Group Class Representative is entitled to one vote at general meetings of SML and that no business can be transacted at a general meeting of SML unless a quorum consisting of one Group Class Representative from each Group Class is present.

47. It was the Director Defendants' case that, at about the time that the younger generation became directors of SML, Peter, Spider Sam and Salvi were appointed as Group Class Representatives (as that phrase is used in the Articles) for the A, B and C shareholders. There is no allegation that the appointments were made any later than a time at or about the date that they acquired their shares in SML. They contended that, once the appointments were made, they subsisted through to 2016 with the consequence that each of Peter, Spider Sam and Salvi continued to be the Group Class Representative for his respective group of shareholders at the time that the Transaction was entered into. It is said that the consequence was that, for the purposes of the application of the *Duomatic* principle, they were able to assent to the Transaction on behalf of the other members of their respective class.

48. There are no documents which evidence any formal vote being held or any appointment being made (or purported to be made) by any other means. Furthermore, there is no documentary evidence that any Group Class Meeting was ever held for the purpose of appointing a Group Class Representative for any of the three classes of share, nor did any of the witnesses assert that such a meeting occurred.

49. The evidence relied on by the Director Defendants is in the witness statements without any documentary support. Peter said that, at about the time that the younger generation became directors of SML, the original shareholders said that he, Spider Sam and Salvi should be appointed as Group Class Representatives for the A shareholders, the B shareholders and the C shareholders respectively. However, he was not very specific as to when or the circumstances in which this was said, and his evidence is simply that it was said that this should happen, not that it did. He did not point to anything which demonstrates that any formal steps to implement this intention were ever taken.

50. Furthermore, although there are parts of his evidence in which Peter explained that the structure which was established provided for himself, Salvi and Spider Sam to be group class representatives who "*reported into our parents*" as he put it, that is more consistent with the way in which they in their capacity as directors reported to the original shareholders than it is with their formal constitution as Group Class Representatives under the terms of the Articles. Indeed at one stage in his evidence, Peter seems to have equated what he was referring to as the Group Class Representatives as "*the elders and their chosen children who would report back to them*" a group that was obviously more extensive than the three Group Class Representatives contemplated by the Articles.

51. Sammy's evidence was also relied on by the Director Defendants but was even less firm on this point. He simply said that at the time that he was appointed a director the original shareholders talked about Peter, Salvi and Spider Sam being appointed Group Class Representatives. He did not say that any such appointment was made, and at times referred to the original shareholders as the effective representatives of the A, B and C Shareholders as the case may be, without in any way qualifying that description by reference to Peter, Salvi and Spider Sam as the legally constituted Group Class Representatives.

52. The evidence in Pauline's witness statement was also relied on by the Director Defendants. She said:

> "*At the same time that Peter, Sammy, Salv and Spider Sam became directors, it was agreed by Tony, Mario and I that Peter, Spider Sam and Salv would become the group class representatives for the class A, B and C shareholders respectively.*"

53. However, Pauline too gives no evidence about the actual making of an appointment in reliance on any such agreement and when she was cross-examined on this subject, she expressed herself rather differently (as was the case with much of what she had to say in the witness box). It was clear that she did not make any real distinction between the appointment of Peter, Salvi and Spider Sam as directors of SML, which is common ground, and their appointment as Group Class Representatives which is not. Indeed, when pressed on the point by Mr Roe QC, she accepted that the evidence I have cited above was a reflection of her recalling the fact that each of the families had at least one director (Peter, Salvi and Spider Sam as the case may be), not that those individuals had each been appointed as a Group Class Representative. This was one of a number of occasions on which Pauline's evidence as prepared by the drafter of her witness statement was more precisely focused on the issue relevant to the Director Defendants' case than was justified by her own unaided recollection.

54. Mario's evidence contradicts the Director Defendants' case. He said that while Peter, Spider Sam and Salvi were all appointed directors at this stage, they were not appointed to be Group Class Representatives. He also said that the original shareholders were "*the representatives of the shareholders*". This did not amount to evidence that the original shareholders had been appointed as the Group Class Representatives within the meaning of the Articles, but it is consistent with his assertion that none of Peter, Spider Sam or Salvi had been appointed to that role.

55. Mario's evidence was corroborated by Mr Moffat, a solicitor who (as I have already mentioned) was instructed at the time of the Transaction. He said that his recollection was that the voting rights attached to the shares in SML were held by the heads of the family, by which he meant the original shareholders. He thought that the source of this belief was looking at the Articles (i.e. the provisions for Group Class Representatives) and what he was told by the Director Defendants and Salvi. I do not think that he would have been given that impression at the time of the Transaction if Peter, Salvi and Spider Sam had been appointed Group Class Representatives within the meaning of the Articles, whether or not the ultimate or most influential decision-makers were in fact the original shareholders.

56. I shall return to the question of the way in which decisions were in fact made later in this judgment, but I accept Mario's evidence on the question of whether or not Peter, Salvi and Spider Sam were appointed to be Group Class Representatives within the meaning of the Articles. I am satisfied that they were not, a conclusion which is corroborated by the fact that there is no written evidence that any such appointments were made at any Group Class meetings as required by Article 7 of the Articles, nor indeed is there any evidence that any such meetings were held. To the extent that Peter, Sammy and Pauline said that they were, they failed to distinguish between other representative roles of importance and influence in the conduct of SML's affairs, and they were wrong in the views that they expressed. If any such appointment had been made, I am satisfied that it would have been regarded as an important technical matter that would have been recorded in some way.

Post 2005: the role of the original shareholders

57. It is right to note at this stage that there is a consistent theme from all of the evidence that the original shareholders (and more particularly Mario and Pauline) continued to remain actively involved, notwithstanding the transfer of some of the shares to members of the younger generation and their appointment as directors. This gave rise to an alternative argument by the Director Defendants that, if they were wrong to contend that Peter, Spider Sam and Salvi were appointed as the three Group Class Representatives in 2005, then the original shareholders were the *de facto* proxies for or representatives of their respective classes, with the ability, for the purposes of the *Duomatic* principle, to give effective assent on their respective behalves.

58. I will revert to this part of their case later in the judgment, but the role and involvement of the original shareholders has ramifications for a number of the issues which arose. Accordingly, it is convenient to give an outline summary of the position at this stage, with particular reference to Mario and Salvi, the latter of whom was the member of

Mario's branch of the family with the greatest involvement in the development and implementation of the Transaction.

59. There was disagreement between the parties about exactly how much time Mario spent on the business after members of the younger generation took on their role as directors. While it seems that his involvement diminished over time, he described in his evidence how he continued with a range of jobs and activities and used the title managing director until 2009. It seems that, up until then, Peter and Mario worked together as the principal managers of the business. In October 2009 a surprise retirement party was held in Peter's garden for all three of the original shareholders, and Mario did in fact then retire at which stage Peter took over as managing director of SML and Sammy took over as managing director of CET.

60. It would be wrong to conclude that Mario then ceased all active participation in SML's affairs. Far from it. He had been very much the face of the business and he lived on the Waltham Abbey site. He continued as a director until December 2014 and maintained an office at the WX Hub. He popped in quite regularly and continued to take an active interest in what was going on. All of the younger members of the family, and Mr Randall, sought his advice, guidance and help and the impression I had was that when he made suggestions, they were given considerable weight, and that his views when he expressed them were highly influential.

61. I do not think, however, that Mario continued, after his retirement in 2009, to make real management decisions. Peter gives a number of examples of Mario's role in his witness statement, including specific events that he helped to organise and one-off tasks such as registering SML with the environment agency for waste exemptions in 2013. He also describes how Mario continued to present himself, particularly in the local Italian community, as chairman of SML and to put himself forward as the front man for the business when a senior member of the family was required. I am sure that Mario was a strong character and may well have found it difficult to let go, but I am not satisfied that the instances which are given reflect anything other than an involvement by Mario in particular projects where his long experience and seniority were thought to be appropriate. It was more a question of him taking on the role of figurehead on occasions when he or they considered that it would be useful.

62. I am also satisfied that from some time before he eventually resigned as a director in December 2014, Mario had stopped going into SML's offices on a regular basis. To that extent he was out of touch with the detail of what was going on. Indeed, when Mr Randall described a meeting at Waltham Abbey in January 2015 to which I will return later in this judgment, he said that this was the first time that he had seen Mario for over a year. Mario had also stopped asking Mr Randall for financial information and management accounts, which it had been his practice to ask to have printed out for him before he resigned as a director. Although Mario accepted that he could always have asked for the information if he wanted to, and would have received it, he said that he did not need to do so once he had retired. That changed in the run up to the Transaction, when Mario complained that financial information, and more particularly management accounts that he wanted to see, were not forthcoming.

63. Pauline also continued to go into the office in the immediate aftermath of her retirement in October 2009 (in the first year for up to three days per week) but Mario said that like himself she had nothing to do with the management of SML in the years leading up to

the Transaction. She had started to experience health issues which caused her doctor to advise that she should take steps to reduce the stress in her life. The evidence is consistent with her involvement having reduced to the role of consultee. As she put it: "*After the party, my involvement became much more limited although Peter, Sammy and Salv would still come to me for advice and to discuss big decisions with me*." However, like Mario, she continued as a director of SML until she resigned in December 2014.

Post 2005: the role of the younger generation

64. Mario was adamant that it was Peter and Sammy who ran the business after the younger generation took over, and that neither Salvi nor Spider Sam were interested in stepping up to take any more responsibility. There was no real challenge to this so far as Spider Sam was concerned and I was left with the clear impression that growing was his thing. Although he was a director with the legal responsibilities which that entailed, he was left to just get on with that and played very little role in the management of SML's business more generally.

65. The role of Salvi was much more controversial and was explored in the evidence. I should say something about it at this stage. Although he remained a director of SML throughout the events with which these proceedings are concerned, he is not a defendant, with the possible implication that SML, as now controlled by Mario's and Tony's branches of the family, considers that he bears no responsibility for the breaches of duty alleged against the Director Defendants. However, the Director Defendants do not accept that he did not play a full role in the events for which they are now sued by SML and rely on the disparity in treatment in defending this claim. They also rely on the fact that he was privy to information relating to the planning of the restructuring (which eventually became the Transaction) as support for a submission that Mario and his branch of the family knew much more about what was proposed than they now admit to be the case.

66. It is clear that Salvi's responsibilities were procurement and I was told by Mr Randall that his role in financial matters was limited to the provision of sales forecasts and purchasing forecasts for budgeting purposes. Salvi himself did not give evidence but Mario said that he stuck to procurement where he was happy, that (like Spider Sam) he was only a director so that each branch of the family had a member on the board and that the business was really run by Peter and Sammy. Mario said that Salvi "*would probably say yes to anything*", and Mr Randall said that, although Salvi was a director throughout the relevant events, he was carried along by the Director Defendants and did not really know much of what was going on. Mr Randall accepted, however, that it would not be right to describe Salvi as being bullied into doing what he did not want to do. Mario and Mr Randall both also said that Salvi was not involved in any discussions with Barclays, that he was not copied into e-mails with Barclays and that he did not receive any management accounts.

67. In my view, this is an inaccurate summary of the position because it underplays Salvi's role. He was company secretary of SML throughout the period July 2009 to August 2016 and his signature appears on core business documentation such as the formal variation of a facility agreement with Barclays, which he signed in October 2012.

Sammy exhibited a lengthy schedule of e-mails which demonstrated the extent to which Salvi was copied in on documentation relating to the running of SML and the development of the Transaction. It is clear that he was also a participant in approving the new commercial strategy to which I will come later in this judgment, albeit a participant who I accept was less proactive in the development of it than the Director Defendants. Indeed, there are even examples of occasions when it was Salvi who initiated confirmatory correspondence about the new commercial strategy and occasions (for example in January 2015) when it was Salvi who set up the meetings at which that strategy was to be discussed.

68. I am also satisfied that Salvi was a central participant in some of the core activities about which SML now complains and his name crops up again and again in the evidence to which I shall be referring. As I have already mentioned he was a 25% shareholder in both SFP and SGP and in that capacity benefited from the Transaction in the same way as the Director Defendants. He was also identified by Mr Randall in his employment tribunal proceedings as a director whose conduct in altering purchase orders amounted to breaches of duty and in some respects fraud. Salvi did not give evidence, and it is not necessary for me to make any formal findings, but it is appropriate for me to say that there are a number of respects in which the evidence points to SML having claims against Salvi to the same extent as it has claims against the Director Defendants.

69. Mario seemed unable to accept what the contemporary documentation on the issue of Salvi's real role demonstrated. When he was cross-examined on the confirmatory correspondence about the new commercial strategy, he was adamant that it would not have been drafted by Salvi. I do not accept this evidence, which was in any event speculative hearsay. I think that the impression which Mario was trying to convey in his evidence was that no member of his branch of the family was involved to any material extent in developing or implementing the strategy which led to the events of which SML complains in these proceedings. I do not think that this reflects the true position.

70. Mario was also wrong to say that Salvi did not receive management accounts – it is plain that he did (see for example an e-mail from Mr Randall to Barclays of 6 February 2015 which was copied to Salvi and one from Sammy dated 7 March 2016 of which Salvi was a recipient). I have formed the view that Mario's evidence on this point was both speculative and inaccurate. In my view, Salvi had available to him much more financial information, and participated in the development of the Transaction on an informed basis, to a much greater extent than Mario was prepared to admit. The obvious inaccuracies in the evidence given by Mario and Mr Randall when dealing with the role of Salvi means that I have had to adopt a cautious approach to relying on their uncorroborated evidence of events in which Salvi appears to have participated.

71. I must also record that, although Salvi did not give evidence, he was present in court during part of the proceedings. It is very surprising that he was not called, because it must have been obvious to SML that his evidence was very relevant to many of the more contentious issues with which these proceedings were concerned. I shall be referring to his role on a significant number of occasions later in this judgment. It also appears that at one stage SML thought the same, because it originally intended to call him, an intention which reflected what would have been a much more straightforward approach to the resolution of this dispute.

72. The only sensible inference is that he was not called because SML was concerned that his evidence would harm its case, and I also infer that the harm would have been material because SML adduced hearsay evidence (largely from Mr Randall in respect of the period after March 2015) on a significant number of issues on which Salvi would have been far better placed to assist the court with first-hand evidence. The consequence of this is that, while it is difficult for me to identify all of the matters on which SML's case would have been likely to be harmed by his evidence, I have had to adopt a particularly critical scrutiny of SML's case on disputed events where his evidence could have assisted.

Development of the business: 2005 to 2012

73. I now return to the chronology. In 2007, a couple of years after Peter, Sammy, Spider Sam and Salvi had become directors, it was agreed that SML would purchase Waltham Abbey, and later the CHP engines at Waltham Abbey, from the original shareholders for c.£3.5 million. The purchase price was payable in instalments and funded by part of a 10-year loan advanced under a facility agreement dated 27 July 2007 with Barclays, the balance of which was used to purchase more land at Waltham Cross. It included what Peter described as an expensive interest rate swap. The idea was that this would provide money to fund the retirement of the original shareholders, and in any event, it made sense for the land to be owned by the operating company. A few months later, Mr Pickford took over as the Barclays relationship director responsible for SML's account. He explained in evidence that at that stage his principal contacts at SML were Mario and Mr Randall.

74. Peter said that, during this period, Mr Randall was entering into currency and commodity hedging transactions with Barclays, many of which were loss- making and cost SML a great deal of money. It was clear, however, that the directors authorised these transactions, and although it may well be the case that Mr Randall enjoyed research into what was available and the terms on which the hedging deals could be done, it would not be right to infer that either Mr Randall or SML's directors were committing SML to speculative transactions that were not reasonably regarded by all involved to be in SML's best interests.

75. There is a dispute as to precisely when it was that SML's margins started to be squeezed as the supermarkets became more aggressive looking for every opportunity to cut costs. It was Peter's evidence that this began in the early 2000s, but Mario put it later. Both seemed to be focussed on asserting that the downturn started in the period in which the other was in charge. Precision on this issue is not necessary but what does seem clear is that, from about the mid-2000s, the market was increasingly challenging, and SML was starting to lose some of its traditional business. Thus, it lost the Safeway business when that chain was purchased by Morrisons in 2004 and the Somerfield business declined when it was purchased by Co-op in 2008, eventually ending altogether in 2011.

76. The loss of both customers had a significant impact as SML's turnover resulting from their business was substantial. Safeway had been purchasing £57 million of fresh produce per year and Somerfield had been purchasing up to £21 million. The loss of the Safeway business was exacerbated by the fact that SML made a major investment in the WX Hub packhouse in the unfulfilled expectation that the Morrisons business

would continue while, in the case of Somerfield, the profit margins available during the post-takeover period were materially lower given the fact that the Co-op product range did not include so many premium (and more profitable) products.

77. Although the impact was significant, a contract with Asda which had been agreed in 2006 or 2007 initially went a long way towards replacing SML's business with Safeway and then with Somerfield. It was a very profitable relationship, with annual sales peaking at around £45 million, but in 2010 Asda told SML that it was intending to build up its own direct model, packing through a subsidiary International Produce Limited ("IPL"), which led to a gradual reduction in sales to Asda between 2011 and 2015 from c.£30 million to c.£11 million. However, although the sales reduced, Sammy said in his evidence that on the growing side SML retained the more profitable parts of the business i.e. the produce which was more difficult to grow.

78. One of SML's complaints in these proceedings is that the Director Defendants were negligent in the approach that they took to replacing the business lost as a result of the decline in the orders from Asda. In particular, SML complains that inadequate steps were taken to reduce overheads and prepare for the anticipated loss of business, notwithstanding the notice that Asda had given. This is disputed by the Director Defendants, and Peter's evidence describes the steps that SML took to try to rectify the situation. He lists out a number of things that they did, including continuing to work with Asda and IPL, making the most of the surviving period of the contract, securing new contracts with Suncrop, Ocado, and Pret a Manger and working to increase their sales to Co-op and Costco. Mr Randall in his evidence for SML accepted that this showed that the directors of SML, and indeed he himself had "*actively looked for other business*".

79. When Peter's evidence on this issue was tested in cross-examination, he did not agree that the figures which reflected the sales from the continuing relationship with IPL of themselves demonstrated that the import business was loss-making, but there is little doubt that the issues which SML was then having with its relationship with Asda had some impact on its financial position. In my view, however, it has not been established that, during the period of decline in the Asda business (between 2010 and 2014), the directors did not take steps to replace the Asda contract. This four year period of decline in the Asda-related turnover is important background to a more focused complaint that is made about what happened between December 2014 when the Directors Defendants received a warning from Mr Randall that the import business was loss-making and the end of November 2015 when that business was eventually brought to an end. I shall revert to this issue later in this judgment when I deal with agreed issue 12.

80. On 11 March 2011, not long after Asda had told SML about its proposals for the future of their relationship, Barclays told the directors that SML was in breach of one of the financial covenants in relation to the loan, which had been taken out at the time of the agreement to purchase Waltham Abbey and the CHP engines from the original shareholders together with some land adjacent to the WX Hub. There was at least one further covenant breach, this time of the debt service covenant, later the same year. Barclays reserved its rights in relation to these breaches and put SML under the monitoring of its business support unit ("BSU"). Mr Pickford said that SML was placed in the first of three escalating warning lists. One of the things that Barclays did at this stage was to take security over some of the real property (Fen Drayton) over which its charges then needed to be perfected.

81. Barclays then reset the banking covenants sometime in the first half of 2012 which was the trigger for SML to exit the BSU in July 2012. Shortly thereafter, it advanced £550,000 to SML to purchase some property adjacent to the WX Hub, which was thought to contribute to an increase in the overall value of the site. At about the same time Barclays and SML agreed a new facility letter with new covenants. There was some debate as to whether or not these were more relaxed, but whether or not they were, Barclays continued to show every indication that it was happy to continue to support SML, which was by then a long-established customer.

82. Also, in 2012, the amounts outstanding in relation to the Waltham Abbey and CHP engine purchase (which had been being repaid in instalments of £100,000 per annum to each of the original shareholders) were discharged in full. The question then arose as to the appropriate level at which SML could continue to make payments to the original shareholders. In the event, SML agreed to pay £60,000 per annum to each original shareholder, described by Peter as a form of pension. The evidence points to this being a difficult decision because on the one hand their parents had what Peter said was "no more income" while on the other the business was under some pressure. Payments at this level continued until the APA was signed in April 2016.

The employment of Mr Smith

83. Peter said that, once the role of the BSU had come to an end, Barclays (through its Eastern region managing director, David Farrow) was very complimentary about the business, but said that SML needed some help with marketing and expanding its contacts and suggested a non-executive director with marketing experience. Mario accepted in his evidence that SML did not really have a marketing department at this stage. It was put to Peter in cross-examination that the suggestion to hire a non-executive director did not come from Mr Farrow, but Peter was clear that it did, and I have no reason to doubt his evidence on this point, not least because it was consistent with what both Mr Pickford and Mr Randall said in their evidence. They were also at the meeting with Mr Farrow. However, Mr Pickford also said that the non-executive assistance suggested by Mr Farrow was for a somewhat different purpose, i.e. to help with good practice in what was a family business. A similar point was made by Mr Randall who said that Barclays' suggestion was that SML should look for a non-executive who was an independent and experienced businessperson. He said that Barclays made no specific suggestion that that person should have marketing experience.

84. The relevance of this is that Peter said that Mr Farrow's view was part of the reason that he decided it would be a good idea for SML to hire Mr Smith. That decision is much criticised by SML, and in particular by Mr Randall and Mario, both of whom now say that they regard the hiring of Mr Smith as the event from which everything began to go wrong. I do not consider that the precise nature of the suggestion made by Mr Farrow adds a great deal to the case one way or the other, but Peter's evidence that this suggestion was part of the reason he invited Mr Smith to become involved in the business was not very convincing. Mr Farrow's suggestion was made almost a year before Peter sought to introduce Mr Smith to the business and, while Peter may have been justified in assuming that Barclays would have supported the decision to hire Mr

Smith, I think it is much more likely that the real catalyst was Peter's own belief that he knew Mr Smith very well and thought that he had something to contribute.

85. As I have already mentioned Mr Smith was a childhood friend of Peter's and he knew a number of other members of the extended family. As a boy he had been a frequent visitor to their homes and attended many family functions. The relationship seems to have continued into adulthood and Peter says that he had long used Mr Smith as an informal sounding-board for ideas relating to the business, but that Mr Smith had always resisted Peter's attempts to persuade him to take on a more formal role at SML because he did not want to mix business and friendship.

86. Ms Newcombe described Mr Smith as a successful marketing and IT specialist. She said that he had experience of re-engineering the operational structures and finances of a number of different businesses. While SML did not mount a direct challenge to this evidence it did contend (in a different context) that Ms Newcombe was unable to give proper evidence of Mr Smith's experience and expertise because, as she had admitted in other litigation associated with these proceedings, she knew nothing of Mr Smith's business affairs when he died. I do not think that is a fair summary of the position. In my view, there is no reason to conclude that Ms Newcombe did not know the sort of things that would be known by "*anyone would who lives with someone for 15 years*", even if her understanding of the detail of his business affairs was limited. I accept that her knowledge of Mr Smith's working life was more than sufficient for her to have known the broad parameters of his experience and I also accept that what she said about that in her witness statement was broadly accurate.

87. Peter's continuing belief that Mr Smith had much to offer the development of SML's business, (he described him as having extensive commercial experience) led to him arranging for Sammy, Salvi and Mr Randall to have a meeting with Mr Smith to see if they agreed with his view that giving Mr Smith a role in the affairs of SML would be beneficial. After that meeting, which was held on 10 May 2013, Peter asked the others to let him know what they thought, and Mr Randall's views were expressed in an e-mail on which he was cross-examined. The Director Defendants relied on the fact that at that stage Mr Randall expressed himself in very positive terms about the benefits that Mr Smith could bring to the business.

88. It was a consistent theme of Mr Randall's evidence that he was reluctant to accept that he might have got things wrong in the past. On that theme he now says that the views he expressed in this e-mail did not reflect what he really thought, and that he only said what he said because he believed that it was the answer that Peter wanted to hear. It is not a central issue in the case, but I did not find Mr Randall's evidence on the views that he then had about Mr Smith to be very convincing. I do not think that he was then, any more than he is now, as biddable as this evidence would suggest. There are a number of other occasions to which I will refer in this judgment when Mr Randall does not seem to have had any difficulty in giving unpalatable news to Peter and I think that if he had thought that hiring Mr Smith was a bad idea he would not have expressed himself in the way that he did. I think it is quite possible that he has realised that the tone of this e-mail is inconvenient to SML's case that a marketing man such as Mr Smith was unnecessary, and he has difficulty in admitting that that is not what he thought at the outset.

89. My conclusion on this part of Mr Randall's evidence is consistent with the weight that I am prepared to give to a number of other occasions on which he said in his evidence that documents which express themselves in a manner that is inconvenient to the tone of the case that SML now advances, were only expressed in the way that they were because of pressure from Peter. He also made such an assertion in relation to at least one e-mail sent by Salvi in January 2015. When pressed on this point by Ms Anderson QC, he accepted that he was not able to support an assertion that Peter made or even encouraged Salvi to send the e-mail. In my view, this exchange reflected the fact that there were parts of Mr Randall's evidence which were more concerned with advocacy than they were with conveying an accurate independent recollection of what in fact occurred.

90. In any event, it seems that other members of the management team thought that the hiring of Mr Smith was a good idea. It was Peter's unchallenged evidence that he received positive feedback from Mark Ayres (the group's logistics and operations manager who worked for CET) and Keith Sadler (SML's commercial director). Indeed, Mr Sadler's view is corroborated by Mr Randall himself because he gave evidence to the effect that Mr Sadler's expression of a positive view was the reason that he gave Peter an opinion about Mr Smith that he did not really believe in – he did not want to be the odd one out. Peter also says that he discussed the desirability of hiring Mr Smith with Pauline and Mario (but not Tony) and they were very supportive, hoping that it would assist those who were not pulling their weight (by which he meant Spider Sam) and help drive SML back to profitability. This evidence was not challenged by SML.

91. I have concluded that Mario and Mr Randall were broadly supportive of Peter's desire to hire Mr Smith to assist in SML's marketing activities and future commercial strategy at the time that he was hired. While I accept that Mario would not have gone down that route of his own volition, because he did not think that what he regarded as modern marketing techniques were required, he was quite content that, if Peter wanted to go ahead with hiring Mr Smith, he was not going to stand in his way. At this stage, Mario continued to be a director of SML and, although he was no longer its managing director, I have little doubt that if he had been sufficiently negative about the suggestion, his resistance would not have been overcome.

92. There were then further meetings with Mr Smith during the early summer of 2013, and I was shown an e-mail that he sent to Peter immediately after meetings held on 7 June 2013 both with the directors of SML and members of the wider management team. In that e-mail he commented on the interrelationships between SML's directors and management and the conclusions he drew from that on two different strategies for developing the business. The two possibilities were the establishment of autonomous companies and a restructuring with three distinct profit centres. His view was that the better way forward was to restructure the business into three clearly defined profit centres under the continuing single corporate entity, i.e. SML, and then move to a corporate restructuring with autonomous legal entities running separate parts of the business at some stage thereafter (he suggested that a decision for stage two could be made in 2016). He signed off on the e-mail as Group Innovations Director for Stubbins Food Partnerships. I agree that these restructuring suggestions were the genesis of the Transaction.

93. For the purposes of these proceedings, a question of equal significance to the hiring of Mr Smith was the question of what if anything he should be paid if he was. This is

important because any obligation of SML to pay Mr Smith's consultancy fees was a component part of an aggregate sum to which the Director Defendants say that Mr Smith had become entitled during the course of his time with SML and which SML now asserts to be exorbitant. More specifically, the Director Defendants contend that SML's obligations to Mr Smith in respect of these fees were paid in kind by substantial building works done on the home he shared with Ms Newcombe and their two children at 1 Griffins Wood Cottages, Epping ("Griffins Wood"). The cost of this work is said by SML to be one of the larger misappropriations that is now the subject matter of these proceedings. It is raised by agreed issues 2 and 4.

94. Peter's evidence on this issue was relatively straightforward. He said that either at the meeting on 7 June 2013 when Mr Smith met members of the wider SML team, or on some other occasion before he was engaged, the directors of SML (and Mr Randall) knew about and approved his consultancy fees. According to both Peter and Sammy, the arrangement was that Mr Smith was to be instructed through Kore Creative, which he described as Mr Smith's service company. He also described how Mr Smith also told them not to worry about when SML would be able to pay, as he knew that it was struggling financially, and he could wait until the business had started to turn around before seeking payment.

95. In their witness statements neither Peter nor Sammy said when or in what amount the fees were agreed. In cross-examination Peter said that he agreed that Mr Smith could charge his daily rate of £1,300 per day. This reflected what Ms Newcombe had said in her witness statement, namely that she understood from Mr Smith that he had an agreement with Peter that he would be able to charge for his consultancy services to SML at a rate of £1,300 per day. There is, however, no contemporaneous documentary evidence to support this agreement, no invoices for these fees were ever rendered and Ms Newcombe's evidence, as clarified in cross-examination, was that she only heard about the rate, and that the payment would be deferred, at the end of 2013 at the time the building works (to which I will come shortly) first started.

96. Mario said in his evidence that he knew nothing about any agreement to pay consultancy fees (described by him as salary) to Mr Smith and he never saw any invoices rendered by Mr Smith or his companies in relation to such services. Given his role by that stage, it was not particularly surprising that Mario did not see any invoices, but he also said, when giving evidence about Mr Smith's early involvement with SML, that "*Peter had been telling me that Mr Smith had helped him with advice for the past year and had not charged us for his time as he was doing it as a friend.*" Mr Randall said in his evidence that he was not told anything about a £1,300 per day charge at the time and there is no reason to think that he is mistaken about that.

97. Peter said that he had no recollection of discussing with Mario what hiring Mr Smith would cost and confirmed that his reference to the approval given by the directors to Mr Smith's fees was a reference to Sammy and Salvi but not to Mario. He said that "*I do not recall what I told Mario about the amounts or whatever, but it is obvious Mr Smith would not have been doing it for nothing*". I do not agree that it is obvious that Mr Smith would not have been doing it for nothing, because much would have depended on the extent of the commitment that Mario was told that Mr Smith would be making. Indeed, the fact that Mr Smith said that he did not expect payment until the business had started to turn around is an indication that even Mr Smith and Peter recognised that payment might not be made if no turnaround occurred.

98. I accept Mario's evidence that he was not told by Peter that he had agreed with Mr Smith that he would be paid a consultancy fee of £1,300 per day for work carried out on behalf of SML, albeit only payable once the business had started to turn around. I have no doubt that if that had been spelt out to Mario, anyway in circumstances in which there was any prospect of substantial expenditure being incurred, he would have objected and there would have been some form of record of that objection. That does not, however, mean that Peter and Mr Smith did not themselves reach an agreement by which SML would have been bound.

99. SML relies on a number of indications that no specific agreement was entered into with Mr Smith. In particular, it points out that no invoices have been found for the first year of Mr Smith's involvement with SML, that none of the amounts now claimed were paid at the time they are said to have been incurred and that SML's books and records do not disclose the existence of any obligation to him. It is also the case that no evidence has been adduced to show that Kore Creative, through whom it is now said that Mr Smith was to charge these consultancy fees, had accounted in its own books and records for debts due from SML in respect of the period prior to June 2014.

100. Ms Newcombe said that she had been unable to find any invoices relating to these consultancy services, the absence of which was relied on by SML as demonstrating that payment was never agreed. This is significant because other aspects of Mr Smith's work (through Kore Creative and Kombbi subsequent to June 2014) were invoiced and paid at or about the time it was carried out. In assessing the significance of this factor, I bear in mind that Mr Smith has died, and that Ms Newcombe has had some difficulties in obtaining access to all of the information about their affairs. Nonetheless, and in large part because her inability to find any invoices is matched by the evidence that none were recorded by SML either, I am satisfied that none were in fact rendered.

101. SML also relies on the fact that Mr Smith did not mention fees in the e-mail of 7 June I have referred to above. However, given its subject matter I do not regard it as entirely surprising that he did not. It also points out that Peter's notes of a meeting with Barclays held on 28 June 2013 make no reference to the fact that SML had just hired a consultant at £1,300 per day, which Mr Roe QC suggested that it would have done if the agreement with Mr Smith had been reached. He pointed out that there was no mention of this substantial commitment even though the notes referred to a "record high cost" of +500k and suggested that there would have been mention of it if any such agreement had been reached. Mr Roe QC made a similar point in relation to Peter's notes of a meeting that he had with Barclays on 23 September 2013 where Mr Smith was mentioned as a new director but there is no indication that Peter told Barclays about the arrangement for consultancy fees.

102. Peter disagreed with Mr Roe QC's suggestion, because he said that the question of consultant's fees was not the kind of issue that he would have discussed with Barclays even on the occasion (28 June) on which the question of high costs was clearly on the agenda and even though (on 23 September) Mr Smith was mentioned as being a new director. Based on the way in which the note of the June meeting was written, Peter thought that the reference to high costs was probably a reference to energy costs, from which I took it that energy fixed costs were more likely to be the type of cost in which Barclays would have had an interest than discretionary consultancy costs.

103. I accept Peter's evidence on the suggestions made by Mr Roe QC in relation to the Barclays meetings. I do not think that the terms on which Mr Smith might have been hired was an obvious topic for discussion at meetings of this sort, which were more concerned with issues such as financial covenants, asset valuations and SML's future plans in a more general sense. Even if any mention of Mr Smith's hiring was in fact made, I do not think it at all surprising that any fee was not discussed and, even if it had been, the notes were made by Peter and there is no particularly obvious reason why he would have recorded it unless it became an issue with Barclays, which it may well not have done. This is particularly the case when it is not clear to me how much time it could be seen at this early stage in the relationship that Mr Smith was likely to be spending on SML's affairs.

104. In support of their case that SML must have agreed to pay consultancy fees to Mr Smith at the rate of £1,300 per day, the Director Defendants relied on a schedule for the period from May 2013 to September 2014 (the "Schedule") which was described by Ms Newcombe as "*the amounts as Wayne summarised them*", although it was accepted that this summary was only prepared later. The total amounts listed on the Schedule came to £210,600 plus VAT, equating to 146 full days and 35 partial days' work.

105. In her oral evidence Ms Newcombe confirmed that the Schedule was sent to solicitors when Mr Smith was considering a counterclaim against SML. It was not therefore a contemporaneous document. She also said that she had seen the e-mail under cover of which it was sent although in the event this e-mail was never adduced in evidence. In my view, the mere fact that it was sent to solicitors by Mr Smith gives the Schedule very little additional evidential quality. I should also add that, although Ms Newcombe said that she understood that there was an agreement between Peter and Mr Smith that the consultancy fees would be deferred, it became apparent during her oral evidence that her understanding came from Peter, not from anything that was said to her by Mr Smith at the time.

106. One of the striking aspects of this Schedule is that it shows Mr Smith earning consultancy fees of £210,600 plus VAT for the 17 months between May 2013 and September 2014. This is to be contrasted with his annual earnings from self-employment for the four tax years ending 5 April 2012 to 5 April 2015 (when declared on a mortgage application dated 24 July 2015) as being £39,770, £52,449, £38,899 and £50,000 (estimated) respectively. Not only do these figures show that his taxable earnings were very substantially less than the amounts he was able to make out of SML, they also appear to show that the fees listed on the Schedule were not declared as earned income for tax purposes.

107. Thus, the Schedule lists invoices totalling £126,750 for the 11-month period from May 2013 to March 2014 (inclusive). This period falls wholly within the tax year ended 5 April 2014 in which Mr Smith declared income from self-employment of only £38,899, less than a third of the amount now said to be chargeable to SML. Of course there may have been costs to set against any consultancy fees, but it seems most improbable, given the nature of the activities then carried on by Mr Smith, that they explain the whole of the difference, more particularly as it seems that, during this period, he was also carrying out other work. It is right to say, however, that the evidence as to what else Mr Smith was doing while he was also providing assistance to SML is sparse, and it is difficult for me to make findings with any degree of certainty.

108. Drawing the threads together, I do not accept the suggestion by SML that Mr Smith simply agreed with Peter that he would assist without payment because he was a friend. Quite apart from Peter's evidence to this effect, the way that Mr Smith was presented by Peter to the outside world, and the way that he presented himself, are inconsistent with that being the case. There is a consistent theme throughout the documents that in the early summer of 2013, what had been a relationship in which Mr Smith gave occasional, informal advice became a relationship established on a rather more formalised footing.

109. In my judgment, the probabilities are that an informal arrangement was reached between Peter and Mr Smith sometime around about 7 June 2013 that when the time was right Mr Smith would be able to charge a reasonable daily rate for consultancy services. I accept that Mr Smith told Peter that that he would want to try and charge £1,300 per day, but I do not accept that the arrangement went any further than that. If it had, it would have been recorded in some way, Mr Randall would have known about it and invoices would have been rendered. I should also add that I think it is most unlikely that Mr Smith (as a consultant with experience in a number of business activities) can have thought that this was not something that he would be expected to do in order to be paid what he was owed. The absence of any invoices or any other contemporaneous documentary evidence is particularly significant, and it is telling that later on there were a number of other contexts in which Mr Smith knew that invoices were required and rendered them through Kore Creative and Kombbi.

110. Apart from the complete absence of contemporaneous documentation, one of the reasons why I am not satisfied that there was a legally enforceable agreement that he could charge £1,300 per day is that he subsequently agreed to an annual salary of £135,000 per annum to include consultancy work which Peter confirmed in his evidence was a full time job. This was substantially less than half of what he would have got if he had been working full time at £1,300 per day.

111. The existence of an informal arrangement does not mean that the Director Defendants have established that what was discussed between Mr Smith and Peter was sufficiently clear-cut or certain to give rise to a legal obligation to pay any particular amount. Mr Smith was content to proceed on the basis that his relationship with Peter was sufficient to ensure that, when the time came, a reasonable figure would be agreed between them. At that stage he was confident that he and Peter would be able to reach an accommodation and he certainly did not anticipate that he would need to agree it with anyone else. On that basis he was prepared to proceed on trust and commence more formal work on SML's affairs.

112. I am also not satisfied that there was a legally enforceable agreement between SML and Mr Smith either for him to be able to charge for any specific period of time or for him to be paid any particular rate for the hours actually worked. In particular, I am not satisfied that there was any agreement by SML to pay for the periods identified in the Schedule. I am satisfied however, that if and to the extent that Mr Smith had been able to establish that specific instructions to do particular pieces of work could be shown to have been given or subsequently approved, he would be entitled to charge a reasonable fee for that work. I also think that he assumed that he would have had no difficulty in persuading Peter that a reasonable fee for work done could be based on a £1,300 daily rate.

113. In any event, I do not believe that Mr Smith had any form of agreement which entitled him to charge SML without rendering proper invoices for any work that he asserted was done. I do not accept that he and Peter agreed that SML was to come under an accrued liability to him in respect of services provided without first being supplied with a properly particularised invoice. Put another way I infer that the supply of an invoice properly describing the work carried out was a necessary precondition to the accrual of a current liability. I will return to the significance and consequence of these conclusions when I consider the claim for building works carried out at Griffins Wood and agreed issues 2 and 4.

114. Before I leave this period, I should mention one other matter that arose at the meeting with Barclays on 28 June 2013 which I have already mentioned. It relates to the true value of the WX Hub at the time of the Transaction. Peter accepted in his evidence that at that meeting, when discussing SML's financial situation with Barclays, he might have thought that the WX Hub was worth about £11 million. The notes of the meeting disclose that he had that discussion in the context of valuing SML's assets (£11 million for the WX Hub, £3 million for Waltham Abbey and £7 million for Fen Drayton) to set against its £6.5 million of borrowings, and he agreed that he and others believed that the WX Hub was then worth much more than the value of £8.6 million for which it was included in the books. Peter was quite defensive when he was questioned about his recording of the value of the WX Hub at the June 2013 meeting and I do not accept his tentative suggestion that he was simply writing down a figure put forward by someone else. I do not think that he would have recorded it in the way that he did if £11 million was not an amount that he believed it was worth.

Development of the business: late 2013

115. After Mr Smith was taken on, there continued to be pressure on SML's ability to comply with its banking covenants. The Cardiff Nursery was sold in November 2013 for £2.5 million and SML realised a profit of some £934,000 on the sale. This was variously described in the evidence as a "quick fix" decided on by Peter, and a "one off boost" to SML's accounts. The proceeds of sale amounting to some £2.5 million were used to pay off SML's £1.7 million overdraft, although it kept a £1.5 million facility with Barclays (down from £4 million) thought to be desirable to cover the seasonal planting costs at Waltham Abbey and Fen Drayton.

116. Mario says that he was unhappy with this development and I am sure that he was. He said in evidence that he did not believe in selling property which he always saw as a good long-term investment. This seems to have been one of the several business decisions driven forward by the Director Defendants and Salvi of which he disapproved. Mr Randall also explained that the cash surplus which was generated on the sale of Cardiff Nursery was used up, and the overdraft was utilised far more quickly than it should have been over the course of the next 15 months. He now says that this was caused by the new strategy instigated by the Director Defendants which could by early 2015 be seen to have been failing terribly.

117. This was all consistent with the way in which Mario's views diverged from those of Peter and Sammy on the way forward for the business. With varying degrees of emphasis, he continued to be keen to do more to develop the traditional supermarket

business. For example, he pointed to opportunities with Aldi and Lidl, saying that although their product range was more limited and sold for lower prices, the cost of inputs was lower as well. Whether Mario was right of wrong about that, the raw data points to a decline and then a levelling off in turnover both before and after the one-off injection of cash achieved on the sale of the Cardiff Nursery. The figures which I have seen show that, for the five accounting periods from the year ended 30 June 2008 to 30 June 2012, SML's turnover decreased year-on-year from c.£79 million to c.£50 million. There were then two years of relatively small increases in turnover which took the figures back up to the levels they were at in the year ended 30 June 2011 (c.£56 million) by 30 June 2014.

118. In December 2013, Mr Smith was introduced to Barclays. He attended a meeting (including dinner) at Canary Wharf with Mr Pickford, where SML was also represented by Peter, Sammy and Mr Randall. The developing commercial strategy was discussed, which involved a move away from the supermarket business where the margins were beginning to shrink and a focus on small box sales to smaller customers where the profit margins should have been significantly higher. Peter said that this strategy was very much Mr Smith's idea, but that it was supported by the directors including at that stage Pauline and Mario. A presentation was made to Barclays which included two new logos for the growing and food partnerships divisions that had been designed by Mr Smith. Mr Randall said that SML was treated by Barclays as an important client.

119. At this stage the strategy involved reviewing the role of the WX Hub, but Peter said that he did not think that a reference to the WX property deal in the minutes of the meeting reflected an intention at that time for any of the directors to acquire the WX Hub. What does seem to have been discussed however was the strategy, originally floated by Mr Smith in June, under which the business would be divided into separate cost centres. As I understood the evidence, that process had already started by the time of the meeting with Barclays in December. There seems to have been a sense of optimism as to SML's prospects after the meeting at Canary Wharf, and the contemporaneous e-mails reflected a belief that SML had a clear business strategy which went down well with Barclays, whatever the views which Mario had and Mr Randall now says he had about the right way forward. In what appears to have been an entirely spontaneous e-mail from Mr Randall to Mr Smith, he described it as a "great day".

120. A few days later on 17 December 2013, SFP was incorporated as a wholly owned subsidiary of SML, with Peter as the sole director and company secretary. Initially it was called Stubbins Food Partnership Limited (singular) and remained dormant, although Stubbins Food Partnerships was used as an SML trading name. Another relevant development in December 2013 was that SML entered into an agreement to acquire a 50% interest in SGS, a local grower of salad produce owned by the Faranda family. Salvi was then appointed a director of SGS. In the event this was not a profitable venture for SML in the sense that SGS never paid a dividend. However, the treatment of SML's shareholding under the terms of the APA and the Transaction more generally is one of the agreed issues and a matter to which I shall have to return later in this judgment.

2014: The Building Works

121. In his witness statement Peter said that, as at December 2013, Mr Smith's consultancy invoices had not been paid because SML continued to have financial difficulties. The Schedule purports to show that, as at the end of 2013, £70,850 (ex VAT) was chargeable but unpaid. Peter said that he therefore suggested to Mr Smith that SML's building division, which did not have much work on at the time, could help to build an extension to Griffins Wood the cost of which (agreed at £120,000) would be charged to Mr Smith, but then set off against the outstanding invoices in respect of consultancy fees. Apparently, the planning permission which Mr Smith had for a redevelopment of the property was about to expire, which meant that this was advantageous to him.

122. The building work which was then carried out for the benefit of Mr Smith is not an obvious business expense for SML to have incurred and SML now says that the Director Defendants are liable for breach of duty in permitting SML's resources to be expended in this way. The Director Defendants say that some at least of this work was in lieu of payment of the outstanding invoices already rendered by Mr Smith for consultancy work. These two questions are the subject of the fourth agreed issue, and I shall return to them later in this judgment.

123. The work on Griffins Wood was not the only building work carried out on properties belonging to the Director Defendants at the cost of SML. Work was also done on properties belonging to Peter and Sammy. In Peter's case the property was called Comptons Brow, Theydon Bois ("Comptons Brow"). In Sammy's case the property was at 122 Bramfield Road, Datchworth ("Bramfield Road"). It is not in issue that such work was done and paid for by SML, but the costs and amount of the work was a contentious matter between the parties. I shall return to this issue as well when considering the fourth agreed issue.

2014: general developments

124. Peter explained in his evidence how during 2014, SML took a number of steps to try and reduce its overheads. These included attempts (which do not seem to have been very productive) to work with a company called Yorkshire Grown Produce ("YGP"), which involved a loan to YGP of SML's packing equipment and also diversification. He said that SML worked at increasing its supermarket sales while at the same time moving more into the supply of food boxes.

125. One of the developments which reflected the new strategy of moving SML from being a grower/packer company to becoming a logistics company for food boxes was its attendance at the London Produce Show and the Taste of London event both of which took place during the summer of 2014. By this stage Peter had confirmed to Mr Smith (he did so in an e-mail of 8 March 2014) that SML had agreed to a £15,000 per month marketing budget for the 14-month period from the beginning of March (i.e. totalling £210,000). Mario confirmed in his evidence that SML supplied fresh produce to every stall at the Taste of London event and Peter said that SML's presence there "*was brilliant exposure and allowed us to demonstrate to the industry how we were positioning SML for the future*". The evidence was that Mr Smith was heavily involved in the preparation for this and at the beginning of Ms Newcombe's evidence, videos were played of the presentations, towards the preparation of which Mr Smith made a significant contribution. Peter also explained how SML's presence at the London

Produce Show was instrumental in agreements that SML was able to reach with Grocery Delivery E-Services Ltd ("Hello Fresh") for its food boxes, and new supply contracts with CH Robinsons Fresh, Costco and Asda/IPL.

126. At about this time, Mr Smith started to invoice SML through his service company, Kore Creative. Between 28 June 2014 and 28 February 2015, SML made payments to him totalling £150,331.15 in respect of 25 invoices for various categories of services provided by Kore Creative to SML. There was agreement between the parties that by June 2014, i.e. the time of the first of these invoices, Mr Smith had become a *de facto* director of SML. Some of these invoices are challenged by SML which says that payments made under them were made in breach of duty. I will revert to that issue later in this judgment when dealing with the second agreed issue.

127. Peter then gave evidence that, during the latter part of 2014, (and he referred to a meeting in October), he had a conversation with Mr Smith, Sammy and Salvi about changing Mr Smith's title to include the word "Director" as it would be helpful for his dealings with third parties. This evidence is peculiar, because Mr Smith had already been using the title Innovation and Marketing Director during the course of 2013, although it may be that this use had not been agreed by the directors. In the event, the date was not challenged in cross-examination, and nothing very much turns on it. But what was challenged in cross-examination was Peter's evidence about a manuscript note prepared by Mr Smith which seems to reflect a meeting between Peter and Mr Smith on this subject which was held on 18 December 2014. This took place shortly after Mario and Pauline had formally resigned as directors which they both did on 15 December 2014.

128. In my view this note records an agreement between Peter and Mr Smith that he would be treated as a director of SML with effect from 1 January 2015 (although in the event he was not formally appointed as a director until May 2015). His remuneration package was to have retrospective effect to 1 October 2014, and from that date would be £135,000, paid as to £60,000 by way of salary via PAYE and as to £75,000 by way of consultancy fee. The fact that Mr Smith's remuneration package took effect from 1 October 2014 is also consistent with the fact that the Schedule which was prepared by Mr Smith before his death (albeit in contemplation of litigation) does not seek to claim for a period beyond the end of September 2014. As I understand the evidence, the payments in relation to this agreement started to be made in January 2015.

129. It was also put to Peter that at that stage he had promised Mr Smith that he would be getting 25% of SFP in due course. Peter denied that a promise to that effect was made and I do not think that the evidence establishes that it was as strong as a promise. I do, however, accept that Peter and Mr Smith had discussions at that stage for Mr Smith to participate by way of a 25% stake in a hived-off food partnerships business, and that much of what then happened is only explicable on the basis that a structure of this part of the business going forward would include an equity participation of some sort for Mr Smith.

130. I also think that the Director Defendants and Salvi all anticipated that the idea would be that each of them would be a participant in the new structure. It is clear from e-mails sent in January 2015 that the hive-off was under active consideration and I accept Mr Randall's evidence that Mr Smith told him at this stage that it had been agreed in principle that he would be an active 25% participant in SFP. Mr Randall obviously

found this to be an unpalatable prospect, both because he did not like Mr Smith and because he thought that family ownership should not be watered down and was an essential part of the Stubbins name and culture.

131. From the beginning of 2015 Mr Smith began to invoice for additional services through Kombbi. The precise extent to which he did so and the nature of the services to which those invoices are said to relate has developed during the course of these proceedings, but most of the invoices which are now subject to challenge were either dated or paid after completion of the Transaction and after the time at which it was clear to the Director Defendants that they were almost certain to be removed as directors of SML. I shall return to deal with the claims in relation to those invoices later in this judgment when I am considering the second agreed issue.

132. Meanwhile, at the beginning of December 2014, SML had concluded an agreement with Hello Fresh, although the relationship seems to have started a little earlier in October. This agreement featured in the evidence for reasons to do with the proper valuation of the assets transferred as part of the Transaction. Amongst other things, Hello Fresh agreed to take a minimum purchase amount of an average 8,000 boxes per week for 2015 and SML agreed to invest up to £75,000 p.a. in the purchase of new equipment to enable it to supply the services that it had contracted to provide. The agreement was entered into for an initial term of 24 months. The initial 24 month term was of relatively minor significance because the contract was automatically renewable until terminated by either party and was terminable by either party without cause on 6 months' written notice to the other, and with cause (the precise details of which do not matter for present purposes) by written notice either forthwith or on the expiry of 7 days depending on the nature of the cause.

133. It was not explored in any detail at the trial, but there was some evidence that Barclays was being kept informed of the development of SML's commercial strategy at this stage and was positive about what SML was doing. This was illustrated by the fact that in January 2015 Mr Smith recorded that at a November 2014 meeting between Mr Pickford and Tom Carr of Barclays and Sammy, Salvi, Mr Smith, Peter and Mr Randall for SML, Mr Pickford and Mr Carr "*could not hide their enthusiasm and willingness to engage and support our new [SFP] business strategy*". This was a reference to SML's proposals to focus on Hello Fresh and similar contracts with premium products and higher profit margins. Mr Smith's record was made at a time when the Director Defendants and Salvi were reconsidering the way forward in light of the implications of the concerning news about SML's finances that I shall describe shortly.

David Platt

134. Towards the end of 2014, probably in November, David Platt who ran a transport agent business in Portugal through his company David Platt Transportes Internacionais Unipessoal LDA ("David Platt LDA"), approached Mark Ayres, who was CET's transport manager, and offered him the opportunity of purchasing David Platt LDA because he wanted to retire. Mr Randall said that David Platt LDA provided haulage services to SML, although Peter and Sammy said that the real relationship was with CET which is consistent with them both being in the same business. Sammy, in his capacity as Managing Director of CET, was told about this by Mr Ayres, but said that

he was not particularly interested in the opportunity because CET did not operate in Portugal and in any event he thought that it would be more hassle than it was worth. The relevance of this to these proceedings is that SML contends that it was deprived of the opportunity to make that investment and more importantly that the Director Defendants are liable for breach of duty in taking the opportunity for themselves.

135. Both Sammy and Peter said that Mr Randall was interested in and even excited by this opportunity and thought that it ought to be taken forward. Mr Randall says that the reason for this was that the terms being offered by David Platt were very favourable. The proposal seems to have been for a deferred consideration of €120,000 payable over 6 years out of profits per annum in excess of €20,000. He said that "*This was an excellent opportunity to acquire a business for no upfront cost and no risk, unlike all the other previous investments made by Peter*". Mr Randall may be right about that, but there was no evidence, apart from his own personal belief, that this was a good deal.

136. Mr Randall therefore instructed Jonathan Goldsmith of Vanderpump & Sykes ("V&S") and asked him to make enquiries with Portuguese lawyers about acting on an acquisition. Mr Goldsmith seems to have thought that his client would be CET, which is consistent with Peter and Sammy's evidence about the nature of the real relationship. Some progress was made by the lawyers and I was shown e-mail correspondence which indicates that preliminary work was done in both England and Portugal. Sammy said that he did not know about the instruction at the time it was initially given, but both he and Peter said that when they were asked by Mr Randall to authorise the instruction of solicitors a little later on, Sammy said that he had by then decided to do nothing about the opportunity to proceed and told Mr Randall accordingly. In an e-mail to Mr Randall in January 2015 he said that "*we are not doing anything at the moment*".

137. There is some evidence that, subsequently (in mid-February 2015), the shares in David Platt LDA were then purchased by Beneli Ltd, a company owned by Mr Ayres and members of his family. Mr Ayres became its managing director and Nic Coman, another employee of CET, became its general manager. Sammy said that, because they could both fit their work for David Platt LDA around their work for CET he had no concerns about this arrangement. He also said that, after the acquisition, SML's IT Manager (Paul Cantrell) went out to Portugal to help set up David Platt LDA's new IT system, but this was done over a weekend, and David Platt LDA paid for his travel costs.

138. Mr Randall said in his evidence that the ownership of the shares in David Platt LDA was always intended by the Director Defendants to end up as to 80% with them (which he contends was to be achieved through Food Partnerships Innovations Limited ("FPIL"), a company anyway later owned by the Director Defendants and Salvi) and as to 20% with Mr Ayres through Beneli Limited. The reason he said this was not because he had any independent knowledge of the intention, but because of what he had later read in an e-mail from Mr Smith to his personal accountant, Mr Alan Heywood, at the beginning of February 2015. I think that it is right that this was the intention at one stage and, more importantly, that this continued to be the intention after the time at which Sammy told Mr Randall that they were not doing anything at the moment. This gives rise to the legitimate suspicion that the Director Defendants were interested in some way in David Platt LDA, but did not want Mr Randall to know that they were.

139. Subsequently this rather obscure relationship between FPIL, Beneli Limited and David Platt LDA was further evidenced by a payment of €25,000 that was made by FPIL to David Platt on 12 February 2016. This was a year later and would be consistent with it being one of the instalments of the deferred consideration paid by FPIL for its investment. The relationship is also evidenced by some handwritten notes written by Peter, recording a meeting that was held in October 2017 between the Director Defendants and Mr Heyes. The notes appeared to show that the four of them were discussing the return of the money which had been paid and how it was then going to be distributed between the Director Defendants and Mr Ayres. The way in which the note was prepared indicates that the payment which was being referred to was some form of investment in David Platt, although Mr Heyes' evidence on the point was that he was not sure that any acquisition of shares in David Platt LDA ever actually happened.

140. Both Peter and Sammy denied that they ever made an investment in David Platt LDA. What they seem to have meant by this (as Peter tried to explain in cross-examination) was that they never received any shares in David Platt, that they never took any money out of the business and that there was never a partnership. However, their evidence as to what actually occurred was confused and in particular it was never properly explained what it was intended that they would get in return for the money which they do not deny was actually paid, although it was unclear from the evidence how much was paid in total. They were both unforthcoming on the point, and overall, I had the clear impression that they were not being full and frank in their explanations of the documentation which was put to them.

141. However, I did not understand it to be suggested that any entity other than Beneli Limited ever actually acquired legal title to the shares in David Platt LDA and the evidence to support SML's case that the Director Defendants (whether through FPIL or otherwise) actually acquired an interest in those shares is very thin. In SML's skeleton argument it is submitted that the shares in Beneli were in fact held on trust for the Director Defendants and Mark Ayres, but the evidence comes nowhere near establishing that that was the case. It is equally consistent with the money being paid for an investment which was never in fact consummated or by way of loan.

142. Nonetheless, everything which occurred is consistent with the existence of some form of financial relationship and that at some stage the Director Defendants thought that the acquisition of an interest would be a good idea but that they then decided that they wanted their money back. The closest that Peter got to a coherent explanation was that money had been paid for an interest in the shares in David Platt LDA (albeit not until 2016) but that this was something that never led to an interest being acquired and they then subsequently tried to reverse it.

143. As I said, it is no part of SML's case that its assets were used in anyway in relation to this investment. The complaint is that it was deprived of an opportunity to make a profitable investment itself, which the Director Defendants then took for themselves. I shall consider the consequence of the factual findings I have made in this section of my judgment when I give my conclusions on agreed issue 13.

<u>December 2014 and January 2015</u>

144. Reverting to the chronology, on 24 December 2014, Mr Randall sent an e-mail to Peter, Sammy and Salvi which caused considerable consternation. Ms Anderson QC described it as an unwelcome bombshell. In it, he recorded that they had not had a management meeting to discuss SML's performance for some time. He attached the November management accounts and said that the most important thing to mention was that the low level of SML's gross profit before overheads meant that, even with significant cost-cutting by reduction of the overheads, SML was loss-making; a problem caused entirely by the size of the margin between the buying and selling price of its products. The core of the issue arose in relation to the import business in respect of which he said the following:

> "*Even with significantly reduced overheads, the only way to break even is a huge reduction in buying price. If this isn't possible, then there is no business model that works for imported product at current selling prices.*"

145. Mr Randall suggested that, on the assumption that SML's packaging, direct labour and transport costs were not massively out of line, the supermarket direct-purchasing units were either paying a lot less for their imported produce than SML, or they too were trading at large losses in the winter which they would need to recover from the growers in the summer. This led to a meeting, which Mr Randall says took place immediately after he sent the e-mail, and in which there was a discussion with Peter and Sammy about the problems which included the lack of margin selling to the supermarkets with overheads of £400,000 per month, the weaker pound and the fact that the nurseries were having a bad year again. Mr Smith joined the meeting a bit later, at which stage Peter and Sammy told him that Mr Randall had said that SML was bankrupt and that it would run out of money in 6 months. Mr Smith's response was that SML had £20 million of assets and would not run out of money. Mr Randall subsequently withdrew the comment that he had made about the risk of SML going bust.

146. This meeting was followed up by a further e-mail from Mr Randall at the beginning of January. In that e-mail he suggested that the directors might wish to take advice as to their position, as SML should cease trading if they believed that SML was not going to be able to meet all of its liabilities as they fell due. Mr Randall also raised the issue of what Barclays would be likely to require as a condition for advancing further funds, an issue that he suggested should be discussed with the shareholders. He also expressed a concern that it would be wrong for what he described as Food Partnerships to be hived off to a different group of shareholders (including it appears Peter, Sammy and Salvi) without compensating or at least obtaining the approval of SML's shareholders as a whole. Mr Randall says that he made his views on this point clear because, as I have already mentioned, he had been told by Mr Smith that Peter had promised him 25% of the Stubbins Food partnerships business, and he felt very strongly that this was wrong.

147. There is some disagreement as to what happened next, but I am satisfied that there was then a meeting on 12 January 2015 which was attended by Peter, Sammy, Wayne, Mr Randall and probably Salvi at which the concerns expressed in Mr Randall's letter were discussed. The upshot was that his concern about what he called the hiving-off of the Food Partnerships business was retracted by Mr Randall because, as he put it "*Food Partnerships was never a Stubbins owned business*".

148. Shortly thereafter, at a meeting which was I think held on 16 January 2015, the Director Defendants and Salvi confirmed their agreement to set up FPIL, a company which I

have already mentioned in the context of David Platt, and to progress their new commercial strategy. In the event FPIL was incorporated the following month. At or about the same time as the meeting Mr Randall was asked to produce figures which showed what the position would be if SML were to be wound up. On 24 January he sent the results of that work to the Director Defendants and Salvi which showed SML making a loss of £2.5 million and in relation to which he expressed the view that seeking a new loan was something to be considered although it would be hard to sell to the bank.

149. On 26 January 2015 a meeting (variously called a directors meeting and a shareholders' meeting) took place at the Marriott Hotel in Waltham Abbey. It is clear that this was an important event, the catalyst for which was the financial condition that SML found itself in. The initial attendees were Peter, Sammy, Pauline, Mario, Salvi and Mr Smith but nobody from Tony's branch of the family was present. After the meeting had started, Spider Sam and John (representing Tony) arrived, as did Mr Randall.

150. At this meeting, Peter said that there was no future in the business, that a new strategy had to be put in place, and that Mr Smith would help with the process. He supported this with the figures prepared by Mr Randall which demonstrated the likely realisations on a winding up of SML and CET as at the beginning of December 2014 and as at the beginning of May 2015. These were the figures prepared at the request of Sammy made at the 16 January meeting and showed a reduction of shareholder value from approximately £6 million in December to zero in May caused for the most part by the costs of planting up the nurseries for the year, but also by an additional discount on the realisation values of the fixed assets and 6 months of anticipated trading losses. Mr Randall summarised the position in his covering e-mail: "*I currently value the shareholder value in the business as zero*".

151. In his evidence, Mr Randall said he had been bullied by Peter into producing figures which were designed to make SML's finances look as bad as possible. Mr Randall described how he considered that the whole purpose behind them was to persuade the original shareholders that they would lose everything if they did not go along with the new cost reduction strategy and a change of bank. I have formed the view that the way this was described by Mr Randall in his evidence was broadly correct, although I am not persuaded that he prepared the figures as a result of what can properly be described as bullying. I think it is clear that Peter instructed him to present the unvarnished reality of SML's financial situation to the shareholders and that what he produced was based on a forecast for the position as at 1 May because that was the worst point in the annual cash flow cycle. I have also formed the view that this was done to enable the shareholders to see what the position was on a worst-case basis, and to give substance and impetus to the Director Defendants' proposals for the way forward. I do not, however, consider that this was all part of a deliberate long-term strategy to mislead the other shareholders for the purpose of facilitating the ability of the Director Defendants and Salvi to pick up parts of the business on the cheap.

152. As to the allegations of bullying more generally, Mr Randall also contends that he was bullied by Peter into withdrawing the comment about SML going bust and retracting the concerns he expressed in relation to Food Partnerships which I have described earlier. Although I am satisfied that Peter was assertive and forceful in the demands he made on Mr Randall, who was under considerable pressure as a result of the financial condition of the business, I am not satisfied that they amounted to bullying, nor have I

been persuaded that Mr Randall would have produced paperwork which did not reflect what he then believed to be the case.

153. In my view, Mr Randall would not have succumbed to a request by Peter to produce documentation for submission to the shareholders, including Pauline and Mario, which he knew to be positively misleading. He had been an employee of SML's for many years with a responsible job, he had relationships with several members of the family to whom he could have gone if he had felt that Peter had overstepped the mark and I was shown no corroboration from others employed by or connected to SML which supports what Mr Randall says.

154. Mr Randall did go to Pauline and SML's head of HR later in the year, but it was only in the context of complaints that he made against SML later in 2015 that these allegations of bullying first emerged. Furthermore, Mr Randall himself made no contemporaneous record of what he now alleges to have been Peter's bullying behaviour and did not strike me as somebody who was easily bullied.

155. The discussion of SML's financial situation, and its relationship with Barclays was an important topic at the 26 January meeting. There was also some discussion about whether or not to sell Fen Drayton and pay off the debts from the proceeds of sale. Sammy said that this led to Quinton Edwards ("Quintons") being instructed to produce a valuation which was eventually received in October 2015, although Peter said that the Quintons valuation was done for a separate purpose relating to something called the PUG deal relating to the CHP engines. One of the aspects of the discussion which was stressed by a number of the witnesses and is reflected in the notes of the meeting taken by Sammy was the importance of protecting the family assets, by which was meant the properties, more than the business then carried on from the properties.

156. Also, at this meeting there was some discussion of the role of the new company (FPIL) that was to be owned by the Director Defendants and Salvi. Mario accepted in his evidence that he knew that the concept behind FPIL was connected to new ideas, marketing and branding. Mr Randall took issue with the idea that he thought that FPIL was going to be involved in marketing and said that he thought that it was just about ideas. He also said that he thought that the shareholders did not really understand the full extent of what was being suggested by Peter and Mr Smith as being the extent of FPIL's role, which Mario agreed. He now says that he did not see the point of any such developments.

157. Peter said that at the meeting "*a new strategy was agreed and that to support that new strategy a loan of £500,000 was agreed from SML to FPIL and ring-fenced for this purpose away from Barclays to progress the new strategy and protect the assets*". Both Mr Randall and Mario denied that there was any discussion of how FPIL was to be funded, whether by a loan or otherwise, and Mario said that the first he knew about it was after the Transaction. Mario also said that he did not understand why an ideas company would need funding by a loan from SML. He pointed out in cross-examination that there was no reason to fund a service provider of this type in any event.

158. I do not accept Peter's evidence on this point, nor do I accept Ms Anderson QC's description of Mario's evidence as a bit of opportunism around the absence of any mention of the loan in the note of the meeting. In my view the evidence of Mario and Mr Randall is to be preferred. I do not think that the shareholders in effect agreed to

remove assets from the reach of one of SML's creditors (Barclays), which is what Peter's evidence amounted to, nor that lending £500,000 to an associated entity to be owned and controlled by a different group of people from the existing shareholders of SML was the way in which it was agreed to be done.

159. I am satisfied that, given the general discussion of SML's financial difficulties at this meeting, if any form of loan had been discussed or agreed, it would have been recorded in some way. No record to that effect was made, whether in the informal notes of the meeting or the e-mail which Salvi sent to the participants the following day recording the plans which had been agreed. In short there is no documentary evidence to support any suggestion that there was any mention at this meeting of loan funding for FPIL. I also accept what SML's expert Mr Frenkel said on this issue: "*it is most unusual commercially to pre-pay that sort of money for marketing, and in my view, in that context, it is inappropriate*". From SML's point of view it had no interest in anything other than being charged for services provided.

160. Mario also said that his position at the meeting was "*to me the idea was to stick to core business*", but I think it is clear that the consensus reached within the family was that there should be a new business strategy that focused more on the packing and related services side rather than the growing. I am sure that Mario was unhappy with this, but he went along with it, and at this stage anyway he was apportioning no blame for the difficult situation in which SML found itself. Mario also denied that there was any form of discussion about a management buy-out at the 26 January meeting, by which he meant a restructuring strategy which involved SML's business being transferred to a new company or group which was owned or controlled by the existing members of the management team (i.e. the Director Defendants and Salvi).

161. I accept Mario's evidence that the focus of the meeting was not on a management buy-out which might involve all of the business assets being transferred to a new group controlled by only some of the existing shareholders, or that not all of the existing shareholders would necessarily retain the same interest in each of the companies carry on the business going forward. However, I did not understand him to dispute that he knew that the new strategy involved some form of splitting the business from the property assets because he remembered a discussion about Keith Sadler (SML's commercial director) and Mr Randall staying on to work for the newco.

162. It is not entirely clear how the meeting ended, but an e-mail sent by Salvi to the Director Defendants, Mario, Pauline and Spider Sam the following day confirms that there was general agreement that the directors should investigate a refinancing of the existing debt, preferably with a loan without covenants of the type required by Barclays, although there was no agreement at this stage that SML should move away from Barclays. The important thing was an agreement that SML should be prepared to move to another bank if it was advantageous to do so. It was also agreed that some of the assets ought to be sold (and they appear to have had in mind Fen Drayton, which was Mario's preferred option) and that the new commercial strategy should be accelerated.

163. I agree with the Director Defendants' position that at this stage SML had a serious cash flow issue, but it was not a case of its liabilities exceeding its assets. I also think it is clear that the members of SML's management team, by which I mean the Director Defendants, Salvi and Mr Randall had all bought into a way forward for SML in the light of its cash flow difficulties which involved a short term, a medium term and a

long-term strategy. This included moving the packing operation from the WX Hub to the nurseries, concentrating on Hello Fresh and SGS and looking at ways of raising additional funding in the short term. It also involved considering the sale of a major asset (such as the WX Hub or the Waltham Abbey nursery) and investing in new business areas away from growing for supermarkets in the medium term and focusing on a marketing led organisation with a larger number of smaller customers (both retail and internet based) in the longer term. A significant investment in marketing was something that all of them appreciated was required.

164. It is clear that, in taking that strategy forward, Mr Smith in particular seems to have thought that it would be possible to build on Barclays' willingness to support and engage, something which he took away from the meeting that he had been present at in November as being the bank's position. It was also the case, however, that the Director Defendants and Salvi had started at this stage to formulate their ideas for a short term containment strategy to be run through SML, while also planning for the role that SFP would be taking in a medium to long term strategy for sustainable growth and long term profit. Mr Randall says that he was not part of the discussions about this aspect of the plans for the future, and it is now SML's case that he was deliberately kept out of the picture because the Director Defendants and Salvi were planning to develop that part of the growth strategy for their own benefit (through SFP) without involving SML.

165. The strategy of moving away from supplying the supermarkets was something that both Mario and Mr Randall now distance themselves from. In his witness statement Mr Randall said that the impact of the supermarket price wars had been exaggerated by the Director Defendants, although when the expert evidence of SML's performance at this stage was put to him in cross-examination he accepted that that it had an effect during one year in particular, but that that had to be seen in the context of many other problems. I am bound to say that I was left with the impression that Mr Randall's evidence on this issue was driven more by a reluctance to concede points which he knew would not help SML's case than it was by a straightforward approach to explaining the situation as it appeared at the time.

166. It is part of SML's case that the Director Defendants ought to have realised that the import business should have been stopped at this stage. I shall return to this point later in this judgment when dealing with agreed issue 12. At this stage I shall just note that Peter and Sammy both disagreed on the essential basis that stopping immediately would have caused more harm than good.

167. At the beginning of 2015, Mr Pickford said that he was approached by Peter about an increase in the lending. This led to two meetings, one on 12 February and one on 25 February. Before the first of these meetings, Mr Randall sent the SML results to Barclays under an e-mail copied to the Director Defendants and Salvi. He explained that SML had seen a decline in the volumes and prices from the supermarkets and reiterated that SML had exciting restructuring plans on which they were looking forward to presenting.

168. As a result of the first meeting, which was primarily concerned with a discussion of the numbers, Barclays agreed to an increase in the lending from £1.5 million to £2.5 million. Mr Randall said that Mr Pickford expressed himself to be very supportive of SML at this meeting. He also made the point that SML was relatively under-indebted and with the value of its property assets (about £25 million) had plenty of capacity to

borrow more. Apparently, there was also a discussion about the effect of administration and the fact that, if assets had to be sold in a formal insolvency, the administrators were required to achieve the best price reasonably available.

169. There was a presentation made at the second meeting which was designed to explain SML's new strategy. This presentation was one of the pieces of work which, as I have already described, was carried out by Mr Smith and for which he then charged SML through an invoice rendered by Kore Creative. After the second meeting, Barclays then agreed to a further £1 million increase to £3.5 million. Peter said that from the extra £1 million, what he described as the £500,000 loan was to be taken. This was a reference to the loan to FPIL which he had earlier said was to be "*ring-fenced for this purpose away from Barclays to progress the new strategy*".

170. SML says that at this stage, the contemporaneous evidence supports its case that Mr Smith was being paid up to date for all of the work which he was carrying out on behalf of SML, which is inconsistent with the existence of any unpaid invoices. By way of example, Mr Smith had correspondence in February with both Mr Randall and Mr Heywood dealing with amounts that he was owed. On neither occasion was there any suggestion that amounts which had not been invoiced remained outstanding, despite the fact that the context of the correspondence meant that it is likely to have been mentioned if that were to have been the case. This is I think correct. As, however, the building work on Mr Smith's house, which is said by the Director Defendants to have been carried out in lieu of payment to Mr Smith of consultancy fees for his pre-June 2014 work for SML, seems to have been finished by then, the fact that payment was said to be up to date in February 2015 throws no light on the question of whether there was any agreement in 2013 to pay Mr Smith at £1,300 per day, or in 2014 to discharge SML's obligation by doing building work on his house.

The Departure of Mr Randall

171. In March 2015, Mr Randall left SML and Sammy, aided by Mr Randall's assistant Daniel Burns, stepped in to take on his work. I need to describe the circumstances of his departure, and what occurred thereafter, in some detail. The reason for this is that the settlement which was eventually reached between SML and Mr Randall gives rise to one of the agreed issues, i.e. that the settlement sum which was eventually paid to him was excessive and a breach of duty, being paid for an improper purpose.

172. When Mr Randall left there was a dispute as to whether he had resigned or whether he was simply off work on health grounds, not formally resigning until much later on in the year. It is not necessary for me to resolve that question, but I think it is clear that he was ill. He described his illness as work-related stress. I do not have sufficient evidence to justify a finding that that was the case, but there is no reason to doubt Mr Randall's belief that stress at work was the cause of his own illness and there is no doubt that he was under very considerable pressure. It is also clear that Mr Randall did not get on at all with Mr Smith or Peter and the strains in their relationship had a significant impact on Mr Randall's ability to do his job properly. Pauline had the impression from Peter and Sammy that Mr Randall was jealous of Mr Smith and felt threatened by the role that he was playing in the business. That may be an over-simplistic assessment because part of the problem was the strain of being financial

controller in a company subject to real financial pressures. Nonetheless, what Pauline had to say about one of the causes had a ring of truth about it.

173. I also think that Mr Randall was increasingly unable to cope with what he had come to see as a business that was changing rapidly through a combination of commercial pressures, financial (and in particular cash flow) difficulties and undoubted disagreements between shareholders as to the right way forward. The emergence of Mr Smith as the first outsider with real influence exacerbated the strain. In that sense Mr Smith's role, together with what Mr Randall regarded as Peter's unacceptable behaviour, was the catalyst for his initial departure in March. Shortly after he did so he raised an internal grievance identifying a number of the issues, which have now been taken up by SML in its claim against the Director Defendants in these proceedings. It was conducted by members of SML's human resources department and was eventually dismissed at the end of September. It is plain that while this was going on SML was preparing to make Mr Randall redundant.

174. Meanwhile, on 3 or 4 August 2015, Mr Randall and his wife went to see Pauline. Pauline said that the papers for employment tribunal proceedings which Mr Randall was proposing to take against SML had already been prepared and Mr Randall brought them with him. She said that Mr Randall told her that he had a lot of information that would be damaging to Mario and SML, and that he wanted to be paid £650,000 as compensation, taking into account the time he had worked for SML and his illness. She says that she offered him £150,000, which Mr Randall rejected.

175. Mr Randall did not accept this description of the meeting and in his oral evidence at trial he sought to give the impression that it was more of a casual chat. He said that he was looking for two-years' salary which would have come to about £150,000, and that it was he who mentioned that figure not Pauline. He denied that he made any threats but said that he did talk about concerns he had with the way that SML was being run. His concerns, which in general terms were justified, included the way in which the Director Defendants were using SML's resources to pay for their own personal expenditure (such as the building works I have already described). He accepted that the figure of £650,000 was mentioned, but not at this meeting; it was only mentioned much later on in the context of a mediation after employment tribunal proceedings had been issued.

176. I think that Pauline's description of the tone of the meeting is more accurate than the one given by Mr Randall. There were times during the course of Pauline's evidence when she was quite clearly confused about important matters, but this meeting quite evidently made a significant impact on her and the way that she expressed herself about it carried conviction. It is also consistent with the fact that the likely purpose of the meeting from Mr Randall's point of view was to try and achieve a result without having to commence the employment tribunal proceedings which he was on the point of issuing, and in which he was making serious whistleblowing allegations against SML. This was one of the occasions on which I was left with the impression that he was trying to play down the way in which he expressed himself at the time in order to bolster SML's case. As Ms Anderson QC explored with him in cross-examination, the impression which he sought to convey in his oral evidence was not reflected by (or a complete reflection of) the way in which Mr Randall described the meeting in the employment tribunal proceedings which he subsequently issued.

177. In particular, I think it is likely that Mr Randall did mention a figure of £650,000, which was an amount that he had already been advised by his solicitors, Slater & Gordon, was the type of figure that his claim was worth. I do not accept that this figure only emerged much later as an amount that he was advised by Slater & Gordon was the kind of figure he should be looking for in a mediation. Come what may, I think that Mr Randall made quite clear to Pauline that he was expecting a pay-off of very substantially more than the £150,000 which I am satisfied that Pauline offered to pay him.

178. Shortly thereafter (on 14 August), Mr Randall commenced proceedings in the employment tribunal. These were proceedings for whistleblowing detriment and unauthorised deductions from wages, and Pauline described her concern about the damage which some of the allegations could have done to SML's reputation at a time when it was already struggling. Peter said that Mario called to say that SML simply needed to get rid of him, and I accept his evidence on this point. In any event there seems to have been general agreement within the family (including Mario) that the dispute with Mr Randall was distracting and time-consuming and that SML simply needed to move on.

179. It is of some relevance that a number of the claims made by Mr Randall in the employment tribunal proceedings have also been raised in these proceedings, including irregularities and fraud in relation to payments to Mr Smith and Kombbi, fraud relating to building work at Fen Drayton and fraud relating to building work carried out at Sammy and Peter's homes. There were also allegations about fraud relating to car insurance paid from SML for members of Peter's and Sammy's families, which were but no longer are pursued in these proceedings, and allegations about the conduct of Salvi which were never included as complaints in this action. Mr Randall also made a number of allegations about how he had been subjected to bullying by Peter and Mr Smith as a consequence of which he was made to sign documents which he would not otherwise have signed.

180. Peter and Pauline both said that Mario and Pauline were kept informed on a regular basis about the progress of the dispute, and in my view this evidence rang true. Mr Randall had been with SML for a long time, had fulfilled an important role in the development of its business and left in circumstances which were upsetting to both Pauline and Mario and would have made them both anxious to know its progress and eventual outcome. Even if Peter had not volunteered information about the progress of what was happening, it was sufficiently significant to the future of SML's business and to the reputations of the original shareholders (as well as the younger generations of the family) that I am sure that Mario and Pauline would have ensured that they kept abreast of developments.

181. In October 2015, Mr Randall's complaint in the employment tribunal proceedings was amended to make allegations in relation to the setting up of SFP and FPIL, and the diversion of business opportunities from SML. By this stage the grievance had been dismissed and Mr Randall had launched an appeal. The evidence was not very precise as to the chronology, but Peter, Sammy, Pauline and Mario all agreed that SML needed to try and do a deal with Mr Randall. I accept the evidence that Mr Smith took a different view. He was reluctant for Mr Randall to be paid anything and I do not agree that an undated text message relied on by SML demonstrates the contrary.

182. Mr Smith's views on this issue did not however prevail and the Director Defendants, Pauline and Mario therefore agreed to a judicial mediation which took place on 13 November 2015. Peter says that he consulted both Pauline and Mario about the figure which could be offered to Mr Randall during the mediation and Mario does not disagree that he did, although he says that he did not authorise more than £150,000, and then only if SML's solicitors recommended it be paid. Peter says that they all decided that £300,000 was the maximum amount that SML could afford.

183. Mr Randall's opening position was that he wanted £600,000 and the first attempt at mediation did not succeed. At the end of the first mediation session, SML put an offer of £300,000 on the table, but it was rejected. A few days later, Mr Randall's lawyers came back with another proposal which led to SML reiterating its £300,000 offer, which Peter says was again discussed with and agreed by Pauline and Mario, although there was disagreement from Mr Smith and Mr Heyes that this was the right thing to do. In the end a settlement was reached with Mr Randall for a staged payment of £300,000 (£150,000 within 28 days and £150,000 in 12 monthly instalments).

184. It was Mario's evidence that he approved an offer being made of £150,000 prior to the mediation. He says that after the mediation, he was told that the parties had agreed to settle for £300,000, a sum that he had not approved. Mario said by this point that he had '*no choice*' but to agree it because the amount had already been agreed. I am sure that Mario thought that £300,000 was far too much money, but I do not think that he said that £300,000 should not be agreed. I think that if he had been as adamant as he now says that he was, the settlement with Mr Randall would not have been completed. I think it is clear that he, together with the Director Defendants, Salvi and Pauline *'all wanted it closed down*' as Peter put it.

185. I am also satisfied that there were good business reasons for taking this approach, because the dispute was distracting for SML at a time when it was struggling with its finances and its attempts to restructure. I also have little doubt that one of the reasons why everyone wanted it closed down was because of the nature of the allegations that were being made by Mr Randall. Everyone in the family was well aware of what those allegations were, and that they included allegations of impropriety and fraud. It must also have been clear to them all that the proceedings that Mr Randall was taking against SML were being progressed with some considerable determination. I shall return to the significance of what occurred in the parts of my judgment which deal with agreed issue 7.

186. It was Peter's evidence that, after the Transaction completed, an agreement was reached between him and Mr Smith for the payment to Kombbi of £57,200 for the work that Mr Smith did in reaching the settlement with Mr Randall. Peter said that Mr Smith had worked on the project together with solicitors and barrister between March and November 2015. This payment was heavily criticised by SML, and I shall return to it when dealing with agreed issue 2 as it relates to payments to Kombbi. For present purposes it suffices to say that there was no specific documentary evidence about the role which Mr Smith played in the proceedings brought by Mr Randall, and as will appear I have concluded that the payment to him which was made in July 2016 was wholly unjustified.

Business Developments: March to November 2015

187. Meanwhile, on 20 May 2015, Mr Smith had been formally appointed a director of SML without opposition from any of the shareholders. As I have already mentioned, he had been held out as a director for some time before and it is common ground on the pleadings that he had been a *de facto* director of SML since at least June 2014.

188. During the summer of 2015, steps were taken to activate SFP as a separate company in the sense that on 11 June 2015 (a) its name was changed to Stubbins Food Partnerships Limited (plural) and (b) SML's share was transferred to Peter. At about the same time Sammy, Mr Smith and Salvi were appointed directors and each of them was issued with a single share. Barclays opened accounts for SFP in July 2015 with the Director Defendants and Salvi on the mandate, although it did not take security from SFP, and this was later to cause concern to Mr Pickford when reviewing the security position, because he was unsure as to which trading assets belonged to SFP and which to SML. At about the same time SML was placed back under the supervision of Barclays' BSU.

189. It was about this time as well that Mr Heyes' firm, Rayner Essex, took over as SML's accountants from Thickbroom Coventry. SML was referred to Mr Heyes by Mr Smith's personal accountant, Alan Heywood. At the original meeting he had with the Director Defendants and Salvi, Mr Heyes was told both about the financial difficulties SML was in and the plan to move away from growing and packing for supermarkets towards becoming an internet business supplying direct to the consumer. He was also told that SML was looking for help on the best way to achieve a proposed restructuring. After that meeting, he was instructed by SML, CET, SFP and SGP. As Mr Heyes understood it, the proposed restructuring at that stage involved SML changing its name to SGP, SFP becoming the new internet fulfilment business, FPIL becoming the manager of the group's websites and a new entity called Food Partnerships Marketing Limited ("FPML") being established as responsible for public relations and marketing.

190. During this period (between 21 May and 20 July 2015), 7 invoices were raised by FPIL for sums totalling £575,833 (£691,000 inclusive of VAT) for what were said by the invoices to be management services. The invoices appeared to refer to the London Produce Show. All but one of these invoices (the last one for £100,000, or £120,000 including VAT) were paid and so the total amount actually paid was £571,000 (including VAT). Peter and Sammy both said in their evidence that these invoices were a mistake because the payments should have been recorded as the loans to FPIL that they claimed had been agreed at the January meeting attended by some of the shareholders including Mario. In the event it seems that the incorrect treatment was subsequently resolved by Mr Heyes. The bulk of the monies paid by SML to FPIL were then transferred on to Kore Creative.

191. For reasons that will become clearer in due course, there is no separate claim for recovery of amounts that were lent by SML to FPIL. The reason for this is that the net sum paid by SML to FPIL (£475,833 excluding VAT or £571,000 including VAT) has been treated by SML as an asset transferred as part of the Transaction, while the unpaid invoices were treated as a liability taken over by SFP. However, it is right to say that the evidence given by both Peter and Sammy on the question of whether the loan was agreed at the January meeting and their explanations of what they then described as mistakes in the invoicing were wholly unconvincing: the sums of money were very substantial indeed and were paid out to a connected entity at a time when SML was in

some considerable financial difficulty. The only conclusion that I am able to draw is that the invoices were deliberately drafted in a way which was designed to conceal the true nature of the payments that were made.

192. On at least one occasion during the summer, the original shareholders (or anyway Pauline and Mario) were kept informed about the progress that was being made in implementing the new strategy. On 22 July 2015, during the period in which the Director Defendants were having discussions with Mr Heyes, there was a meeting at Pauline's house between Peter, Mr Smith, Pauline and Mario. Peter and Mr Smith explained to Pauline and Mario the extent of the losses that were being made and discussed the option of two new companies renting the WX Hub and the two nurseries (Waltham Abbey and Fen Drayton) from SML. At this stage Mario thought that the WX Hub was probably worth about £10 million and the two nurseries were worth between £7 and 8 million. It seems to have been anticipated that the rental income for SML would have been somewhere in the region of £1.2 million per year.

193. There was disagreement about whether a second option was also discussed at that meeting: to sell Fen Drayton and rent out the WX Hub and Waltham Abbey to the newcos, clearing off some or all of the debt from the sale of Fen Drayton. Mario had no recollection of any discussion of the second option, perhaps because it had always been his position that he did not want any of the property assets to be sold. Nonetheless I think that the point was probably raised although it was not front and centre of the discussion.

194. Of more significance, I am satisfied that Mario and Pauline expressed firm support at this meeting for what Peter and Mr Smith were trying to do. At this stage, however, Mario seems to have thought that SFP, the company that was going to rent the WX Hub, was a company owned by SML and this was an important aspect of both his approach and his reaction to what he was told by Peter and Mr Smith. I did not understand there to be any challenge to what followed from that, namely that he did not then know of the steps taken to activate SFP that I have described above.

195. There was then a meeting with Barclays on 13 October 2015 attended by Mr Pickford and Mike Copson from Barclays' BSU. On the SML side, the meeting was attended by the Director Defendants, Salvi and Mr Heyes, the latter of whom was fulfilling some of the functions of a finance director. In preparation for the meeting, Mr Heyes had put together some figures which presupposed that SFP, SGP and LPL, the entity which was to acquire CET, would be trading going forward with SGP paying rent for its occupation of the Fen Drayton and Waltham Abbey nurseries. It is apparent from Mr Heyes' evidence that two aspects of the proposed restructuring were by then becoming clearer. The first was that all of the new companies were to be owned and controlled by the Director Defendants and Salvi. The second was that it was being proposed by Mr Smith that the WX Hub would be acquired by SFP from SML on the basis that it had an assumed value of £8.6 million.

196. Quite when this formulation of the proposed restructuring was developed is not entirely clear but there does seems to have been a meeting between the Director Defendants and Salvi a few days earlier on 8 October when they discussed a form of the restructuring. This was reflected in an e-mail from Salvi to Peter which makes quite clear that Salvi was involved in the discussions, but the form of which betrays a rather confused description of what he seems to have thought had been agreed.

197. I should add that there is some evidence that Peter at least had been contemplating the acquisition of the WX Hub from some time earlier in the summer of 2015 and possibly for no more than £6 million. However, although SML had originally contended that this was at the time of the July meeting with Pauline and Mario, the evidence on the point was inconclusive and I am not satisfied that the manuscript note, which appears to evidence that this was a possibility that Peter wanted to investigate, dates from then. At the same time the Director Defendants were being advised by Quintons that the market rental value for Fen Drayton was £457,600 per annum, but that it could be marketed for rather more (they suggested £475,000 for the glasshouse and £57,600 for the hostel accommodation). It is not clear precisely when this valuation was received, although it was dated 9 October 2015. There is no evidence that it was provided to the shareholders, and Peter's evidence seemed to confirm that it was not.

198. The other main element of the proposal was an energy deal with CHP Solutions Limited. The proposed CHP deal (also called the energy deal or the PUG deal) was discussed at an important shareholders' meeting in November after which agreement in principle was concluded, and I shall describe its terms at that stage in the chronology. The deal also features quite heavily in the dispute about the terms of the Transaction and I shall return to it in that context as well. For present purpose what matters is that the proposal would generate an upfront payment of £3.5 million from the sale and leaseback of the CHP engines but there would then be a premium payable on future energy costs. Mr Heyes proposed that part of the proceeds would be used to purchase the WX Hub and part would be used as business development capital. Barclays indicated that, as they were part of its security, it would expect the proceeds to be used to pay down the existing debt.

199. Mr Heyes' figures showed a total funding requirement of £7 million to fund the purchase of the WX Hub and leave sufficient cash for business development. On the trading side he told Barclays that SML's borrowing requirements for the winter would not exceed the current £3.5 million limit, but Mr Pickford was concerned that Mr Heyes did not seem to have a proper grasp of the numbers and raised the issue of the failure to supply management accounts in a timely manner. Mr Pickford was also concerned about the proposal that was put to them for a structure which contemplated that SML would retain the nurseries on a debt-free basis with the debt being transferred from SML to SFP. The problem from his perspective was that this would reduce Barclays' security position by a significant amount (he estimated from £30 million to £15 million) and he was not prepared to recommend this where there was what he described as no visibility of the current trading of SFP.

200. After the meeting, Mr Copson reiterated what he had said at the meeting to the effect that Barclays was "*committed to acting sympathetically and positively when customers face financial difficulties*". He then went on to describe what their concerns were and the plans that Barclays and SML had agreed on to address them. In summary their concerns were the increasing cash flow pressure and trading losses with a consequential increase in the overdraft requirement, the breach in financial covenants, a need to strengthen the financial function in the absence of a financial controller (Mr Randall), the lack of management information and cashflow forecasts and the age of Barclays' security valuations for Waltham Abbey, Fen Drayton and the WX Hub. The goals included Barclays' specific requirements for dealing with these concerns, but Mr Copson also recorded that they had been told about the deal with CHP Solutions

Limited and also about the plans to restructure the business. As to the plans to restructure the business, Mr Copson said that Barclays needed to understand the financial details behind what was proposed before deciding whether or not it was able to support them.

201. The Director Defendants contend that the meeting with Barclays was not supportive of the proposed new structure, which is plainly true in part because Mr Copson indicated that it needed to understand more about the proposal before giving its full support. This was fleshed out further in a phone call between Peter and Mr Pickford the following day when Mr Pickford said that he thought that Mr Heyes' advice was quite aggressive, that it was very important for the CHP energy deal to be done to plug the cash requirement (although he did not think that the cash on offer would be sufficient) and he expressed concern about what SML would be losing once SFP started trading and the impact which the split might have on the financial covenants that Barclays had from SML. In short, as he said in his oral evidence, the business was unable to articulate how and whether it would become profitable.

202. Notwithstanding these concerns about the structure going forward, Mr Pickford disagreed with the suggestion that Barclays was pretty pessimistic and unhappy with the proposals. As Mr Pickford explained in his evidence "*This was a longstanding Barclays client with 40 years' standing, well-secured, we would have no reason to not support but needed to understand how it worked to be able to work up a new funding strategy*." This is consistent with the way in which Barclays continued to support the business while the proposals were being developed. Thus, shortly after the meeting it confirmed an extension of the £3.5 million working capital overdraft facility for another month on the basis that it would then be reduced at the beginning of December.

203. One aspect of what was going on was not, however, discussed with Barclays at this stage. From the beginning of October, the Director Defendants and Salvi had started to trade through SFP, operating an account with Barclays that had been opened in September in SFP's name. This trade was also reflected in VAT returns for SFP showing sales for the 3 months ending 31 December 2015 totalling £1.63 million and sales for the 3 months ending 31 March 2016 totalling £2.22 million. The fact that this was happening is central to one of the agreed issues to which I will return later in this judgment and I will deal with its full significance at that stage. Initially SML, through evidence from Mr Randall, contended that it had suffered losses from the misappropriation of stock worth £126,237 and the diversion of contracts which were profitable to the tune of £457,036 during the six-month period up to the completion of the APA. That claim has now been refined, and totals £236,196.97.

204. What was going on only came to Mr Pickford's attention in early December (either through his assistant or from correspondence with Mr Heyes). Peter told Mr Pickford that the trade reflected by this activity was new business won by SPL and did not relate to SML's customers, but Peter and Sammy have both admitted that the reason they started trading through SFP was to put assets outside the Barclays security envelope at a time when the business was under very significant cash flow pressure and Peter accepted that he did not tell Barclays at the time the trade started. Although Peter said that he thought this was a commercially proper thing to do, I have difficulty in understanding how he can have thought that was the case. In the light of the concern which Barclays had expressed about the impact of trading being conducted through SFP, this conduct was unlikely to smooth SML's long-term relationship with Barclays,

a relationship which it was important for the Director Defendants to maintain if they wanted to improve their options for maximising the value in SML's business. The true nature of SML's relationship with Barclays was at the centre of what occurred at the time of the Transaction.

The 9 November Meeting

205. On 9 November 2015 there was another meeting at the Marriott Hotel in Cheshunt. It was described as a joint board and shareholders' meeting, although Mario denied that it was a shareholders' meeting and said that he later filled in Tony on what occurred. It was, however, attended by members of all three branches of the family: the three A shareholders (Sammy, Peter and Pauline), two of the four B shareholders (Spider Sam and Jon) and the two most involved of the C shareholders (Mario and Salvi). The purpose was recorded as being to approve a new structure and complete the emergency measures to avoid SML and CET being unable to pay their liabilities as they fell due.

206. At this meeting Mr Smith was voted in as SML's chairman by unanimous vote of the shareholders. They were told that it was simply to give Mr Smith more credence when talking to the banks, but his actual duties do not seem to have been very much changed. Peter's support for Mr Smith was also strongly expressed as a need to thank him for making SML stop losing money supplying supermarkets and managing to convince Barclays to increase the overdraft to £3.5 million. In her cross-examination of Mario, Ms Anderson QC did not suggest that there was a discussion of what if anything extra Mr Smith would be paid, and Peter could not remember whether there was. Nonetheless, I think that Mario probably accepted that there would be some sort of uplift in his salary, although I don't think that he had any idea of what the uplift might be, because he did not even know that Mr Smith was on £135,000 at that stage. Ms Newcombe and Peter both said that Peter and Mr Smith agreed that the uplift would be £2,750 per month and that was not challenged in cross-examination.

207. It is clear that, although the voting at the end of the meeting was unanimous, there was much disagreement about what needed to be done operationally and why. Thus, Mario wondered whether SML was able to get more supermarket business, a suggestion that was treated with astonishment by Sammy (he said "*are you having a laugh*"). I cannot resolve this divergence in view about the most sensible way forward for the operational aspects of the business towards the end of 2015, but what matters for present purposes is that the differences between Mario and the Director Defendants both existed and were known to each other to exist. Indeed the Director Defendants had always known that Mario was very unhappy with the move away from growing and selling to supermarkets, and their appreciation of that fact may go some way to explaining why they were not as forthcoming as they should have been in explaining to the other shareholders the background to and the true nature and extent of their proposals. In my view, they should in fact have taken the opposite approach – the more that they knew about Mario's unhappiness with their proposals, the more forthcoming and open they should have been about the detail of what they proposed to do.

208. The Director Defendants and Salvi for their part presented a new structure which involved separating the nurseries from the WX Hub and releasing them from the bank security, but with the WX Hub being transferred to SFP, the transfer being funded by a

deferred loan. This was the structure which had been presented to Barclays on 13 October on the back of the figures produced by Mr Heyes. As I have already indicated these were characterised as emergency measures to avoid SML being unable to pay its liabilities as they fell due and Mr Heyes had the impression that these plans were being explained to the shareholders other than the directors for the first time. There was no mention of the proposal that LPL, a company also owned by the Director Defendants and Salvi in the same proportions as they owned the shares in SFP, should purchase CET.

209. There was also a more general discussion about the financial predicament in which SML found itself and, in his witness statement, Mario said that "*We were told that Barclays were pulling the plug as they thought that SML was going into bankruptcy*", a point which he initially reiterated in his oral evidence. When challenged on this by Ms Anderson QC, he accepted that he was wrong and that this was only said later. This clear example as to how Mario was prepared to make and then withdraw very dogmatic statements about what he was told of Barclays' attitude to its support for SML, means that I have to treat his evidence on this subject with some caution.

210. In fact, the tone of the discussion about Barclays was rather different because, after Mario had asked about the possibilities for refinancing, Pauline expressed a clear view that SML needed to "*get rid of Barclays*", a view that was driven by her perception that Barclays was not fully behind SML and certainly not behind the proposed restructuring. She was clearly very concerned that SML was in serious difficulties and that Barclays was not giving the support that she expected. However, in the light of subsequent events, it is relevant that this meeting did not approve a move from Barclays to another bank. Despite Pauline's view, no decision to move SML's business from Barclays was made by the meeting, nor were the Director Defendants and Salvi authorised to move banks if that was what they decided to do. The only decision was to present to other banks in order to solicit alternative funding and, although there was considerable dissatisfaction with Barclays, there is no reason to think that the shareholders other than the Director Defendants were left with the impression that a move from Barclays would take place come what may.

211. In reaching that conclusion I have considered what Pauline said in her witness statement about the vote extending to proceeding with a new commercial strategy "*including changing banks*". It was clear that, like much of her evidence, this part of her witness statement was far removed from her own words and I am not satisfied that she was correct to say that approval was given to change banks in any event. It is obvious that she was strongly against Barclays – it was a theme which she raised throughout the period in the run-up to the Transaction – but whether or when to move remained an issue on which the shareholders did not vote in anything other than an indicative manner. To that extent, they expected to be consulted once the terms proposed by any alternative bankers became known.

212. One other issue mentioned at this meeting, which I have already alluded to, was the energy deal relating to the CHP engines. Negotiations had been going on since at least the summer, and possibly earlier. Peter told the meeting that if the deal was successful, part of the cash would be made available to the other family members. When he referred to what the original shareholders would be getting, he meant what they would be getting through SML, because the CHP engines had been purchased from them by SML many years earlier.

213. Mario said that the figure discussed as the value of the WX Hub which SML would receive from SFP was £10 million, although I do not think that anybody thought that this was a hard valuation. He was quite clear, however, that the proposal as he understood it would involve £3.5 million being shared between the three families once SML's debts of £6.5 million had been discharged from the purchase price for the WX Hub being paid by SFP, together with the proceeds of the CHP energy deal. He said that there was no discussion about the purchase price being deferred, nor that any part of the proceeds of the energy deal would go to anyone other than the SML shareholders. Peter said that he did not recall the shareholders being told at the meetings that these sums should end up with the existing shareholders through SML, but he did not say that they were not and Sammy's evidence on this issue was vague and imprecise.

214. It was not just Peter's and Sammy's recollections of the meeting that were imprecise, Mario's recollection of the meeting was particularly unreliable and he changed his evidence on at least one other issue apart from the question I have already described of whether or not there was mention of Barclays pulling the plug. In his witness statement Mario said that the position of CET was discussed and that he was told by Wayne and Peter that it (as well as SML) was in a bad situation. In cross-examination Mario insisted that CET was never mentioned despite what he said in his witness statement. I think that he was wrong, and I am satisfied that CET was discussed, although I accept that it was not a major part of the discussion, which is why Mario may not have remembered. His insistence in cross-examination that it was not, may have been driven by the fact that he remembered (correctly) that CET was not subject to the same financial pressures as SML.

215. I also think that Mario was incorrect when he said that there was no discussion of the proposal that not all of the proceeds of the energy deal would be received by the shareholders. Likewise, I think he was wrong to say that there was no mention of the proposal that part of the WX Hub purchase consideration might be deferred. I think it is unlikely that the figures for the amount of the proceeds of the energy deal that would come to the shareholders were discussed in any detail, not least because the Director Defendants probably did not know the precise figures themselves. I also think it is unlikely that anything was said about the amount of the purchase price that would be deferred or the nature of any loan notes that were then under consideration. I am satisfied, however, that both issues were mentioned at the meeting as part of the existing restructuring proposal, but they were only mentioned in outline terms.

216. This, therefore, was the first meeting at which there was a proper record of the proposal that there would be what was in effect a management buy-out with the Director Defendants and Salvi trading part of SML's business through SFP. In cross-examination, Sammy agreed that, because it was not in the minutes, the shareholders present at this meeting were not told that any trading through SFP had already started. Peter did not agree that this had not been said, but I think that Sammy is right on this point. This was the meeting after which the process which led to the Transaction really started, but Mario said that he would have to think about it and talk to Tony and I do not think that he was fully reconciled to the plans which had been being developed by the Director Defendants and Salvi, and I think that they must have known that was the case.

217. In the event the main outcome from the November meeting, apart from the appointment of Mr Smith as chairman, was an agreement to present a new commercial strategy and

business plan to various banks in an attempt to refinance the debts and support the operation of the business under a new corporate structure. Mario accepted that this was in broad terms the structure which became the Transaction although he was quite firm that he was not presented with any figures or valuations and I am sure that he is right about that. I also accept Mario's evidence that at this meeting he asked Mr Heyes and Peter for the latest (September) management accounts and that they were not supplied.

The end of 2015 and the Bank Presentations

218. Meanwhile, SGP had been incorporated. It was a company whose shares, as I have already mentioned, were held by the Director Defendants and Salvi in essentially the same proportions as they held the shares in SFP. By this stage the import business which had given rise to the concerns expressed by Mr Randall at the end of 2014 had come to an end but, as Peter agreed, the business being carried out by SFP (and in particular the business based on Hello Fresh) was profitable.

219. Shortly after the meeting, the CHP negotiation reached the stage of a formal proposal when, on 25 November, some heads of terms were sent to SFP under which a newly incorporated SPV, called Power-Up Generation Ltd (also referred to in the evidence as PUG) would acquire the 4 CHP engines for £3.35 million in exchange for which 'Stubbins' would enter into a 15-year heat purchase contract at a cost of wholesale gas price plus 12%. This proposal was made to SFP, not to SML, but Peter and Sammy both said that the proposal always was that if the deal went ahead SML would be getting £1.5 million from the deal and £1.85 million would go to SFP, reflecting the 12% increase in the wholesale price of the gas payable over 15 years. In economic terms, SFP would gain a cash flow benefit, as the £1.85 million was received immediately in compensation for which PUG received a 12% uplift in the price of the gas it supplied over a 15-year period. The terms of this deal were subsequently heavily criticised by Mario on the basis that the receipt of cash up front by SFP left SML very vulnerable to paying for gas at 12% for a long time into the future, in the event that SFP was no longer able to pay.

220. Also, at the end of November, the Director Defendants and Mr Heyes made presentations of their plans to NatWest, HSBC and Barclays. The form of the presentations was in evidence. There were detailed figures and the slides referred to the sale of the WX Hub, but the slide which is of particular relevance for present purposes was one headed "The Commercial Advantages of the Management Buy-Out". It made the point that the retiring shareholders (i.e. Mario, Pauline and Tony) had agreed to sell the business at a realistic price with a deferred asset purchase deal, and that they and the incumbent management team (i.e. the Director Defendants and Salvi) would welcome the fact that the business would benefit going forward without having to increase its financial leverage. Although he did not see these presentations at the time, Mario accepted, albeit with some reluctance, that they reflected the agreements that had been reached at the shareholders meeting on 9 November.

221. I think that Ms Anderson QC is correct to submit that the notes of the meetings with HSBC and Barclays displayed a difference in tone, but I do not agree that it would be right to conclude that they demonstrated that Barclays was entirely negative, even when compared to the attitude of HSBC, and Mr Pickford denied that Barclays was "*pretty*

pessimistic and unhappy with the proposals". Barclays had a long-standing relationship and knew quite a lot about the business. It was in a better position to probe, which Mr Pickford seems to have done, in some large part because he was unhappy with the quality of the figures which had been produced. As he said, "*we did not have the management information to be able to wrap substance around the strategy*". This unhappiness was not only expressed in the evidence adduced from Mr Pickford himself, it was also consistent with the contemporaneous notes of the meeting taken by Peter.

222. In summary Mr Pickford's position was that Barclays was sceptical about the restructuring proposals. It wanted SML to be stabilised and to see 9 to 12 months of profitable trading before the business was split in the way proposed by the restructuring. He said that he and Mr Copson were still continuing to look into how they could best support SML by obtaining the funds required to cover the maximum exposure figures that were now being forecast by the directors. In light of the fact that Barclays was dealing with what Mr Pickford described as "*a longstanding Barclays client with 40 years' standing, well-secured*" his evidence that Barclays had no reason not to support so long as it had properly worked up the funding strategy was a credible description of its position at that stage.

223. At about the same time there was also some correspondence between Barclays and Mr Heyes relating to the fact that (as Mr Heyes expressed it) "*we have certain elements of trade flowing through*" SFP. This was a reference to the fact that SFP had been trading as a separate legal entity since the beginning of October. Mr Heyes sought to play down its significance because of the extent of Barclays' fixed asset security cover, but Mr Pickford was obviously concerned that SML was being deprived of liquidity by this and that it would have been much more appropriate for some form of cross-guarantee structure to be put in place. Nonetheless, he said that Barclays was continuing to work with the directors to try and understand what SML's requirements would be.

224. Over the course of the next two months there were two main sources of funding being pursued by the Directors Defendants: HSBC and Barclays. It is clear that HSBC was trying to take on the Stubbins business, while Barclays was continuing to apply pressure on SML to reduce its overdraft and was treating the energy deal as pivotal to SML's cash requirements. In particular Mr Pickford could not understand how those cash requirements were going to be satisfied unless agreement was reached with PUG in short order. He was also looking for BDO or FRP Advisory to be instructed to report on SML's financials and forecasts, which eventually led to BDO's production of a limited scope cash flow review on 23 February 2016. Mr Pickford also told SML that Barclays needed a valuation of the property assets to be carried out and in the event Bidwells were appointed.

225. The evidence is that at the end of the year SML continued to be under very considerable pressure, although there is no indication that Barclays was on the point of calling in its loan or taking steps to enforce its security. In fact, it continued to extend the £3.5 million overdraft, albeit for short periods at a time, and made clear that it wanted to support a stabilisation of the business before looking further into the restructuring. Mr Pickford was pressed in cross-examination on how supportive Barclays was actually being but was clear that the short overdraft extensions were a deliberate policy which was not inconsistent with long term support. I accept his evidence when he said: "*The bank's policy, or strategy, at this time was to mark the limit forward in short, monthly breaks so that we had a continued dialogue with the directors of the business*". I think

that the strategy of the Director Defendants (as I record being described by Mr Smith below) to use the proposals received from one of the banks in their discussions with the other is consistent with their appreciating that this was Barclays' position.

The HSBC Funding Proposal

226. At some stage before Christmas 2015, probably 23 December, the Director Defendants first received via Mr Heyes some form of outline funding proposal from HSBC. The documents do not disclose the full terms, but they seem to have included a 5 year payment deferral of £4.7m to £5m of the consideration payable for the purchase of the WX Hub, although Mr Heyes said that "*the deferment is up for negotiation once my figures have been audited*".

227. At the end of the year, HSBC gave its agreement in principle subject to a report from Macintyre Hudson. This was based on the restructuring proposals which had been presented at the end of November. The proposal was for a £6 million 10-year loan and a £500,000 overdraft secured on the WX Hub and a security package from SFP and SGP, leaving SML outside the security envelope. It was a term of the loan that the deferred element of the consideration for SFP's purchase of the WX Hub from SML was to be formally deferred behind HSBC for a period of 5 years (although Paul Tarn of HSBC indicated that there might be some room for negotiation on the timing). There was some evidence that Mr Smith, although chairman and a director of SML, was pleased with the prudence shown by HSBC in requiring a 5-year deferral on payment of the balance outstanding to SML after discharge of the existing indebtedness to Barclays. I agree with SML's submission that this demonstrated a clear focus on the benefit to SFP and SGP going forward (which was all that HSBC was likely to be interested in) rather than in ensuring that SML received full value for the assets to be transferred.

228. The proposed rates of interest were materially more attractive than those on offer from Barclays, while HSBC was prepared to lend on the basis of a much more favourable loan-to-value ratio. In his e-mail to Mr Heyes conveying the agreement in principle, Mr Tarn made clear that the proposal was subject to a satisfactory valuation of the WX Hub, as to which Bidwells would advise and that "*We are seeking a value of £10mio*". In my view, once this offer had been made, the strategy of the Director Defendants was to design the restructuring by reference to the funding that was available. While in some respects this was understandable, it had material consequences in the approach that they took to the true valuation of the assets to be transferred and was in my view unjustified unless all of the shareholders were fully informed that this was the approach that they intended to adopt.

The Discussions with Barclays: January and February 2016

229. At the beginning of January, Mr Heyes spoke to Mr Pickford. He told Mr Pickford about the HSBC indicative offer and said that SML would still like to work with Barclays going forward. He made clear to the Director Defendants that part of his approach involved using the HSBC offer as a negotiating tool with Barclays, although

by this stage I do not think that they had any genuine desire to stay with Barclays. As Mr Smith put it in an e-mail to Mr Heyes: "*We do need to play Barclays along, once we have completed the HSBC due diligence, we can open up more.*" There is no indication that Barclays knew that this was the approach being adopted by the Director Defendants and I do not think that it did.

230. So far as Barclays was concerned, extensions of the overdraft were not going to solve the problem in anything other than the very short term, because the 13-week cash flow forecast which Sammy showed to Barclays at the meeting in November projected a cash requirement of £5.1 million by March 2016. However, the Director Defendants had a meeting with Barclays on 5 January, which Mr Pickford explained was for the purpose of introducing them to Mark Andrews and Tony Nygate of BDO and to agree the scope of their report. It was also attended by Adam Cassell of Barclays BSU (who had just taken over from Mr Copson), and it is clear that Barclays was looking positively for a solution.

231. Mr Cassell's e-mail of 18 January summarised the key operational points arising out of the meeting as being (a) a concern that the CHP energy deal which could bring in much needed cash was unlikely to complete before the overdraft facility was exceeded, (b) an agreement to extend the overdraft facility until the end of the month, (c) recognition of the fact that SML's November results would be off track with a knock-on effect on cash flow and (d) some uncertainty about the creditor / debtor position although HMRC was up to date. The e-mail also recorded the fact that "*The key operational Directors would like to buy out other family members and a proposed restructure was shared with the Bank*", although Mr Cassell went on to make clear that "*it was agreed that the priority has to be to stabilise the business and cash position before any restructuring can be considered*". I do not think that this last point was a matter of agreement between the Director Defendants and Barclays, although it would appear that Barclays thought that it was. Mr Cassell finished by stressing that he and Mr Pickford were ready to support SML through what he described as "*this challenging period*".

232. On 25 January Barclays extended the overdraft facility until the end of February and Mr Cassell asked for another meeting early the following week to discuss the findings of the BDO cashflow review. The meeting was fixed for 4 February and Mr Cassell asked to introduce the Director Defendants and Mr Heyes to a turnaround professional called Colin Wray. In her closing submissions, Ms Anderson QC described this as hand to mouth stuff as SML was dependent on incremental extensions of the overdraft from the BSU. On one level that is correct and there is some evidence that Sammy was under considerable pressure from creditors seeking payment. Barclays was not, however, making any threats to foreclose or place SML in administration. Although it was always open to Barclays to make demand, particularly at the end of the period, there was nothing more specific than that to indicate that this was a course that it was minded to take.

233. Immediately before that meeting, Mr Heyes wrote to the Director Defendants and Salvi telling them that he had spoken to BDO who had given him the impression that Barclays wanted to continue to support the business, but that there were issues about the lack of management information, something that Mr Heyes said was "*in part due to me drip feeding the info while we deal with HSBC/ MacIntyre Hudson*". Peter said in his evidence that this was simply a case of managing the situation. I do not agree. In my judgment it was part of a deliberate policy of minimising the information flow to

Barclays while waiting for the HSBC proposal to be formalised, an approach that was effectively admitted by Mr Heyes in an e-mail to the Director Defendants: "*We can send December numbers. I had sat on them to stretch out the BDO / Barclays process* …". This is clear evidence that the Director Defendants knew that Barclays may have been prepared to move faster to achieving a solution than they were prepared to countenance.

234. There was then a meeting on 4 February 2016 with Adam Cassell, at which stage Barclays had received some preliminary feedback from BDO. At that meeting Barclays agreed in principle to fund the required cash shortfall. Barclays also thought that there was agreement that the business would benefit from interim turnaround assistance, which would involve the appointment of someone to take over the role of Finance Director from Mr Heyes. When Barclays' position was reduced to writing in an e-mail sent to the Director Defendants on 12 February, Mr Cassell said that Barclays was still concerned to put the business restructure on hold and wanted to ensure that the proceeds of the CHP energy deal were all utilised in reducing the bank borrowings. He explained its position as follows:

> *"Barclays and Stubbins have enjoyed a 50-year partnership and we wish to be here for you in the challenging times as well as the good ones, which we hope will return shortly. To this end, I will be recommending to our risk committee that we extend the initial £1.5m overdraft facility to £5.1m subject to the following conditions:*
>
> - *New Valuations on the Waltham Cross and Cambridge sites (awaiting reports)*
> - *The total lending exposure will not exceed 50% of the update valuations*
> - *All new entities will fall under the Bank's security via a new Cross-guarantee and Debenture*
> - *As the risk profile of the company has deteriorated the overdraft will be subject to a pricing review. Andrew Pickford's team are running the company financials through our pricing matrix and will advise ASAP*
> - *Funds received from the CHP transaction will be used reduce Bank borrowings*
> - *Engagement of IFT professionals to strengthen the company's finance Department*
> - *A full independent business review to be conducted once there is sufficient information to do so"*

235. Ms Anderson QC described this as quite an extensive shopping list of conditions behind the proposal to raise the overdraft facility. It is also clear, as Mr Pickford accepted in cross-examination, that they would have taken some time to satisfy. Notwithstanding that, I think that Barclays had a clear idea of how it thought that its continuing support could be given and was positive about a long-term continuation of its relationship with SML. In the short-term Barclays said that it would be willing to support essential payments up to £3.9 million, although the formal overdraft would not be put in place until receipt of the reports from the professionals and completion of the security.

236. The way in which Mr Smith chose to record that agreement is illuminating in the light of subsequent events:

> "*Hi Adam, thanks for your call on Monday and for taking the time to explain how Barclays want to work with the directors to maintain Barclays relationship with Stubbins and the proposed steps that you think would further assist us going forward. The directors collectively believe the responsible actions that both the directors and Barclays have taken to deliver the turnaround of Stubbins during the past 12 months have been both productive and fundamental in delivering sustainable growth and profits going forward. The proposals put forward by yourself during our meeting on Thursday, 4th February, to increase the O/D facility to £5.1 million and to explore option to introduce additional professional assistance to further improve the reporting proceedings is most welcome.*"

Mr Smith went on to ask for Barclays' formal agreement to increase the overdraft facility. It is clear, however, that Barclays' formal position awaited the BDO report.

237. It was also suggested by Ms Anderson QC that Barclays never made a firm offer of £5.1 million to SML. That is certainly true in the sense that there was no formal facility letter prepared, but I do not agree that this was an indication that Barclays was not serious about its proposal, subject to the conditions on Mr Cassell's "shopping list". I think that it was, and I think that the Director Defendants knew that the facility would be forthcoming if the other conditions were satisfied. The real point was that Barclays was not supportive of the proposed restructuring going ahead at that stage, and this was a deal-breaker for the Director Defendants so long as they could find some other source of funding (such as HSBC) which was prepared to support what they wanted to do. The failure to explain this to the shareholders (and to Mario in particular) is one of the issues that is at the root of the claim made in these proceedings.

238. Throughout this period, the e-mail correspondence demonstrates that the Director Defendants were at least giving the impression that there was a possible way for SML and Barclays to move forward together. One example was Mr Smith's e-mail of 25 February to Mr Cassell, an extract from which I will cite below. However, I do not think that that is what they genuinely believed, because they did not think that Barclays had bought into their proposed restructuring and it is plain that they did not regard any proposal from Barclays as a long-term solution. The reality is that the Director Defendants seem to have been trying to keep Barclays warm while they were waiting to firm up on what HSBC were prepared to offer, an approach that was admitted by Peter:

> "W*ayne continued to liaise with Andrew Cassell and Andrew Pickford although my understanding was that he was just keeping Barclays "warm" because what we were waiting for was the indicative offer from HSBC*"

239. The Director Defendants had yet another meeting with Barclays on 15 February in which they expressed dissatisfaction with the approach that Barclays was taking. They included the length of time that it had taken for Bidwells to produce their valuations and the additional costs being incurred for increasing the facility. It seems that the Director Defendants also confirmed that they had received offers of finance from HSBC (of which Barclays had first been informed at the beginning of January) and NatWest. Although Mr Cassell recorded in an e-mail to the Director Defendants that he had been

told about a NatWest funding offer, that was in fact untrue, as Peter accepted in his oral evidence. Barclays' proposed interim turnaround professionals, John Greenhalgh and Colin Wray, joined the meeting part way through.

240. In the e-mail that Mr Cassell sent after the meeting, he recorded that the Barclays credit committee had given a positive response to a request for an increase in the overdraft facility to £5.1 million, subject to the conditions that had already been mentioned in his e-mail of 12 February. He reiterated Barclays' support as follows; "*I sincerely hope that your businesses will continue to bank with Barclays*" but went on confirm that if they wanted to change providers, he could assure them that any change would be undertaken in a professional manner. The Director Defendants relied on the fact that Barclays' agreement to allow a facility to make essential payments up to £3.9 million was not a formal overdraft facility, that it would expire on 29 February by which time all of the conditions for the formal facility would have to have been met and that it would attract a higher margin of 4.2%.

241. The valuations of the nurseries were carried out by Bidwells at the end of January, and Peter was part of that process in the sense that he told Mario in a text sent on 29 January that he was with Bidwells valuing both nurseries. As to the WX Hub, on 15 February Bidwells e-mailed Sammy that "*Waltham Cross units will be £11.5m as previously stated*". Although the full reports were not actually received until the end of the month, I have no doubt that each of the Director Defendants knew by then at the latest that a sum of approximately £11.5 million was the market value of the WX Hub.

242. Although they were not finalised until after the Transaction, drafts of SML's financial statements for the 15-month period ending 30 September 2015 were prepared before the end of January 2016. Peter was very unclear as to when he first saw a draft, but I think that he must have seen them at some stage during February 2016. They disclosed a loss of £3.26 million. This was to be contrasted with a profit for the year ending 30 June 2014 of c.£768,000. They were not made available to Mario or the other shareholders at the time they were received.

The Meeting on 16 February

243. On 16 February, there was another meeting at the WX Hub attended by Mario, Pauline, the Director Defendants and Salvi. There was no note of the meeting and so what occurred is dependent on the recollections of Mario, Peter and Sammy who gave evidence about what was said. Mario accepted that the purpose of the meeting was for him and Pauline to be updated on the discussions with Barclays and said that they were told that Barclays had (in Mario's words) "*put a lot of restrictions*" onto SML including "*putting an accountant*" into SML. Sammy, who gave a more detailed account of this meeting in his witness statement than Peter, said that Mario was angry with Mr Smith, and seems to have taken the view that Mr Smith had not done enough to keep Barclays on side. Sammy also said that they told Mario and Pauline that the £3.9 million overdraft was only on offer for another two weeks until the end of the month.

244. Mario agreed that he and Pauline were told that the situation was very serious, in response to which his position was that SML could not go into administration after 40 years of trading. The core of Mario's complaint is that they were not told by the

Director Defendants that Barclays was willing to lend £5.1 million on terms, nor were they given a full explanation of the recent correspondence. He said that the substance of what they were told was that "*we will be bankrupt*" because Barclays had said that they would put SML into administration. Furthermore, Mario was quite clear that, although he was told that the situation was very serious, there was no agreement by the shareholders to switch SML's banking to HSBC. I am satisfied that there was a conversation about the possibility of administration at this meeting. I think that it is improbable that anybody said that a specific threat had been made by Barclays to put SML into administration, but I am also satisfied that the Director Defendants deliberately left Mario with the impression that they believed that Barclays was prepared to do so.

245. Neither Peter nor Sammy contended that Mario was told about the Barclays £5.1 million offer, whether with or without a description of the conditions which were attached to it, and I accept Mario's evidence that he was not. The discussion was all about how Mr Smith was going to try and get Barclays to extend the temporary £3.9 million overdraft. Peter and Sammy said that it was agreed at the end of the discussion that another meeting was required with all of the senior shareholders present, i.e. including Tony. That meeting eventually took place on 9 March in circumstances to which I will come shortly, although even then not all of the shareholders were invited or attended.

246. It is clear to me that, by failing to give a full explanation to Mario of Barclays' position, the Director Defendants gave Mario an incomplete and, in some respects, misleading picture as to the options available to SML going forward. In my view, the silence of the Director Defendants on this point was motivated by their desire to minimise the chances of anything getting in the way of the restructuring that they had decided was the best way forward for the future of the business. It was not suggested by the Director Defendants in closing that the valuation figure for the WX Hub which Sammy had received from Bidwells the day before was disclosed to Mario and Pauline at this meeting and it is clear that it was not.

247. On 17 February the MacIntyre Hudson Report was completed. It was described as a limited scope Financial Due Diligence Review for HSBC. A few days later, on 23 February, the BDO report, prepared by Mr Nygate for Barclays, SML and CET, was completed. Amongst other matters it expressed the view that Barclays should only agree to the proceeds of the energy deal being used to reduce the borrowing: this of course meant that it could not be used as working capital going forward nor could it be made available to the shareholders (whether through SML or otherwise). Although it forecast a return to profit in April, which was an important conclusion, I agree with Ms Anderson QC's description of the report as very lukewarm and cautious, and it expresses some doubts over the integrity and reliability of the cash flow forecasts.

248. On 25 February, Mr Smith wrote to Mr Cassell and Mr Pickford, thanking them for Barclays' support and confirming that "*Now that the above consultative services have been completed the directors would like to move forward with the financial proposals put to Barclays*." Barclays (Mr Cassell and Mr Pickford) then had further correspondence with Peter who expressed particular concerns in a letter to Mr Cassell on 29 February. Overall, however, I think that it was tolerably clear that Barclays was still trying to find ways of supporting SML and that the Director Defendants were giving the impression that they wanted it to do so.

249. Thus, having received the valuation from Bidwells and the BDO report, Mr Cassell confirmed where Barclays had got to. He said that "*Barclays is looking to support the business with an increased overdraft facility to £5.1m until 1 June 2016"* at which stage it would reduce again to £3.5m, but that Barclays "*would be looking at longer term facilities, once the full business review is complete*". This e-mail was followed up the same day with an e-mail from Mr Pickford to Mr Smith which made clear that the only two conditions for the £5.1 million facility would be a cross-guarantee and debenture and the employment by SML of turnaround assistance. He confirmed that the increase in the overdraft was in response to the recommendation made by BDO and also that Barclays thought (with the benefit of the advice from BDO) that this would be sufficient to tide SML over the existing cash flow crisis. As he put it: "*The additional overdraft limit should provide sufficient leeway within the business and alleviate cash pressure*."

250. Barclays also made clear that, although it was not yet ready to support the proposed restructuring and in particular was concerned that the original shareholders "*need their own legal advice as the transition needs to be handled as professionally and sensitively as possible*" in which context he referred to the "*£25 m of balance sheet assets to be carved up"*, it was certainly not ruled out in the longer term. Its position was not inconsistent with the fact that Barclays remained willing to continue to support SML while a full examination of the restructuring was carried out. While the Director Defendants cannot have assumed on the basis of this correspondence that Barclays would certainly continue to support the business while it stabilised, I think that the bank was giving every indication that it wanted to do so if it could. I also think that the Director Defendants knew that this was the case. As Mr Smith put it in an e-mail to Peter, Sammy and Mr Heyes on 1 March: "*Barclays are now all over me trying to tie us in, it's almost a bit awkward / embarrassing at points*".

251. After this correspondence had been received, and notwithstanding the concerns that Peter had expressed earlier in the day, the Director Defendants continued to give the impression that they were proceeding full steam ahead with Barclays. Having received Barclays' offer of support, Mr Smith wrote later that evening to Mr Cassell and Mr Pickford confirming that now the due diligence from BDO and Bidwells had been received, he would happily contact Mr Greenhalgh (Barclays' proposed turnaround professional) "*as I actually thought that he was a very professional and articulate individual with a very calming personality*."

The Bidwells Valuations

252. As I have mentioned, by the time he had sent his e-mail on 29 February, Mr Cassell had received the Bidwells valuations for Fen Drayton, Waltham Abbey and the WX Hub. They were in three separate documents and showed a value for Fen Drayton of £6.95 million (or £8.7 million in the event of planning permission for residential development being granted), a value for Waltham Abbey of £3.7 million and a value for the WX Hub of £11.45 million.

253. It is clear from an e-mail that the valuations for Fen Drayton and Waltham Abbey were then sent on to the Director Defendants by Mr Pickford's assistant on 29 February. At one stage there was some doubt as to the electronic version of the valuation for the WX Hub because it does not seem to have been enclosed with the same e-mail as the

valuations for Fen Drayton and Waltham Abbey, and in one part of her closing submissions Ms Anderson QC seemed to have been submitting that the WX Hub valuation was only ever sent to the Director Defendants in hard copy on 16 March. I do not think that is right. Sammy made clear in his witness statements that all three valuations were received by him in electronic form on 1 March, and he then explained in oral evidence that they had to be sent to his private e-mail and were printed out from that because SML's server could not deal with the size of the enclosures.

254. It is the Director Defendants' case that Mario was provided with copies of the valuations, although the evidence which supports this is unsatisfactory. Sammy's evidence on the point was muddled and inconclusive. In his witness statement he said "*I recall that we printed these and gave them to Mario, although I cannot recall exactly when that was*." In cross-examination he said that what he meant by giving them to Mario was not that he actually physically gave them to him, but that he "*would have put it in the office*". He could not however remember if he drew them to his attention. Despite not saying in his witness statement when he had given them to Mario, he said in his oral evidence that he was "*sure*" that they had been given (in the sense described above) that day.

255. As to Peter, his evidence was not that the valuations were given to Mario or left in his office to look at. In his witness statement he simply said that, after the valuations for the nurseries (i.e. Fen Drayton and Waltham Abbey) had been received on 1 March: "*I spoke to mum and Mario and told them what the report said the valuation numbers from Bidwells*" – this was a reference only to the valuations for the nurseries, not the WX Hub. In cross-examination he went further in relation to the WX Hub. His evidence was that the valuation for the WX Hub came through first and that he revealed to Mario what the valuation had been, although he did not say that Mario ever saw the valuation itself.

256. From the way in which he expressed himself, Peter seemed to be asserting that the figure he mentioned to Mario was the £11.5 million provisional figure that was sent to Sammy on 15 February, rather than a description of the valuation sent on 29 February. This would be consistent with the fact that the way in which Mario was cross-examined about this by Ms Anderson QC was that Peter had discussed the valuation with him on 24 February, when he and Mario were looking at the Land Registry entries for some of the sites, i.e. at a time before the formal valuations were received on 1 March. In the event, however, Peter's own evidence did not clarify this aspect of the case.

257. Mario was adamant that he never saw the valuation and that he did not know that the figure produced by Bidwells was £11.45 million. I accept this evidence. He was clear and consistent in his denials on this point and there is not a single piece of contemporaneous documentation which demonstrates or evidences that he saw the valuation for the WX Hub before the Transaction completed or when he did so. This includes the fact that there is no reference in any of the notes of subsequent meetings to the fact that, although the price for the WX Hub to be sold by SML under the proposed Transaction was £10 million, its actual value was materially more. In my view, it is inevitable that it would have been raised, explained and recorded if Mario had been aware of the difference.

258. It was submitted by Ms Anderson QC, and put to Mario in cross-examination, that there can have been no conspiracy to conceal the true value of the WX Hub because it was

openly disclosed to the professionals who advised in relation to the Transaction, so it was always quite likely to come out. In my view that slightly misses the point, and not just because there is no evidence that any of those professionals did in fact discuss the difference with Mario or the other shareholders. I think that the Director Defendants' position on this was consistent with their general approach to information disclosure, which was to drip feed material facts as and when they felt that they had to, but reducing to a minimum the information that they made available to the other shareholders in order to maximise the prospects of their restructuring proposal getting through. Even if they recognised that unhelpful material might come out, that did not mean that they were going to volunteer it unless it was necessary to do so. Some of this general attitude was also revealed in the approach that they took to keeping Barclays warm while going all out to conclude a funding deal with HSBC.

The HSBC Funding Offer

259. On the same day (29 February 2016), HSBC sent its formal funding offer to SML. As I have already mentioned, the report from Macintyre Hudson had been received by HSBC a few days earlier. The offer took the form that had been indicated at the end of December. Very shortly after the HSBC offer had been received, the Directors Defendants and Salvi had a meeting with HSBC and agreed in principle that they would like to accept HSBC's offer to finance the Transaction.

260. On 8 March 2016, Peter told Mr Pickford that SML would be moving banks to HSBC:

> *"I wanted to wait until Wayne returned from being ill before informing you of the family's decision. Last week, Sammy and myself had a meeting with the family and it remains their intention to retire. They want to release the equity in the Waltham Abbey and Fen Drayton sites and either have an income from it from a lease agreement or simply a lump sum from the sale of the site. Going forward, they also do not want the stigma of Stubbins Marketing Limited showing a 2.7 million-loss and prefer the Stubbins Food Partnership trading option. Based on the wishes of the family, we will now be switching our banking to HSBC."*

261. Barclays was also told that HSBC would be taking over the SML business on 22 March and prepared settlement valuations to that date. Mr Pickford said that it was never Barclays' intention to take enforcement steps if the transfer to HSBC did not take place on that date and I am sure that he is right about that. Barclays agreed to keep the overdraft in place up to the time of transfer. I am satisfied that the following summary of Barclays' position in Mr Pickford's witness statement is accurate:

> "*Barclays never threatened to place SML in Administration. There were no discussions with the Directors of SML or internal discussions I had within Barclays about this at any point. We wanted to retain the account which Barclays had had since SML was formed. We kept the £3.5m facility in place, unofficially increased it to £3.9m, and were willing to increase it further to £5.1m to support SML and keep the account. Even after being told that SML were changing the account to HSBC on 8th March 2016 Barclays made plans and contingencies to prepare for the eventuality that HSBC decided not to proceed for any reason.*"

262. The fact that Barclays was also negotiating with SML through the Director Defendants in the manner reflected by the correspondence I have described is not inconsistent with Mr Pickford's evidence. Barclays knew the business well and it is not at all surprising that it took the approach it did notwithstanding the desire and willingness to support SML expressed by Mr Pickford. A full explanation of the true nature of the differences in approach adopted by HSBC and Barclays was in my view essential to enable the shareholders to make an informed decision on the way forward.

263. In my judgment it is plain that once the HSBC offer had come through, the Director Defendants considered that they had in place the funding required for a restructuring in the form they wanted to achieve. They also thought that this was the only sensible way forward and that the strategy contemplated by what was on the table from Barclays would not lead to the long-term survival of the business unless there was an immediate restructuring which Barclays was not at that stage prepared to support. As Ms Anderson QC put it in a question to Mr Pickford with which he agreed "*In stark terms, the position was this: HSBC was prepared to fund the new strategy, and on terms that were more favourable viewed as a package, and Barclays was not*". This vision of the future was not, however, a vision which was shared by Mario with the benefit of the same information that was available to the Director Defendants, nor is there any evidence that it was shared by other members of the family who had not been involved in the negotiations with the banks on a fully informed basis.

264. There were other striking aspects to the way in which the Director Defendants dealt with the move from Barclays to HSBC. SML's communication of its decision to switch immediately pre-dated a meeting which was attended by a number of shareholders including Mario, but there was never a satisfactory explanation as to why the decision was communicated to Barclays before that meeting was held. It was said on behalf of the Director Defendants that nothing turned on the point, but in my judgment a great deal does, because it enabled the Director Defendants to give the impression that the impetus for the withdrawal of banking support was Barclays itself not SML's decision to proceed with HSBC's funding offer. It is also striking that Peter told Mr Pickford that there had been a family meeting the previous week and that "*Based on the wishes of the family, we will now be switching our banking to HSBC*". This was untrue because the previous family meeting had been on 16 February (not the previous week) and no decision to go with HSBC was made at that stage. The decision to do so was only made the following day in circumstances which I will now explain.

The meeting on 9 March 2016

265. The day after Barclays was told that SML was going to move its relationship to HSBC, there was another meeting at the Marriott hotel in Cheshunt attended by the Director Defendants, the original shareholders, Salvi, Spider Sam, John and Mr Heyes, who gave an update on the figures which showed a loss for the year of £3.5 million. Mario said that the other shareholders (including in particular his children) were not invited and that, so far as he was aware, they did not know about it. It was said that one of the main purposes of the meeting was to ensure that Tony was brought up to date with what had been happening as he had not had any direct involvement in any of the recent discussions either about the proposed restructuring or about SML's financial condition, nor had he been present at the meetings held on 9 November 2015 or 16 February 2016.

266. It is clear that the attitude of the Director Defendants to this meeting was that the shareholders would be presented with a proposal to which there was no alternative, while they were telling Barclays that all that was required was something close to formal confirmation of what had already been agreed. As Mr Heyes put it in an e-mail he wrote to Mr Cassell and Mr Pickford in which he referred to the decision that had been communicated to them by Peter the day before: "… *the family have reached the decision to refinance with HSBC through [SFP], as part of the ongoing turnaround and business development process in order to take the business forward under the new commercial structure. … We have a Board / Shareholders meeting this afternoon at which everything will be confirmed and a timeline of two weeks to 22 March to complete the legal agreements*." As with what Peter had said the day before, this was not a very accurate way of putting the position, because it is plain that the Director Defendants were some way from getting all of the shareholders on board with what they wanted to do.

267. There is an e-mail note of the meeting prepared by Sammy which Mr Heyes confirmed correctly sets out what was discussed in general terms. Pauline said that the early part of the meeting was quite heated with Mr Smith and Mario arguing about the situation that SML found itself in. The note of the meeting recorded that Mr Heyes said that Barclays had confirmed that they would not lend any more money and would "*pull the plug on SML by the end of the month*". Mr Heyes did not accept that he put it in quite those words, but he accepted that the meeting was told that if they did not go along with the MBO, Barclays would appoint administrators and they would lose everything. It was said that on a fire sale the family would be left with just £6 million. Pauline gave evidence that she remembered that Mr Heyes said words to the effect of Barclays pulling the plug and that the meeting was told that SML really had its back to the wall because Barclays was not interested. I do not think that was an accurate description of Barclays' attitude.

268. Despite that being said, Sammy described in his evidence how Barclays' position had in fact been somewhat different. In particular he confirmed that Barclays had not threatened administration:

> *"Q. Well, what they had actually said was, "It will take some time but let's see how things go in the meantime and there's no particularly urgency for it". Is that not the gist of what they were saying?*
>
> *A. Yes, but they were not feeling the squeeze of the creditors, you know, and we had to do what was right because they could have foreclosed on us.*
>
> *Q. They had not said, had they, that they were going to pull the plug.*
>
> *A. They did not have to. They were pushing us and pushing us to keep the overdraft at 3.5 to 3.9. You know, they've said they'd go to 5.1 but they have not actually done it and they never gave it to us, so we were always sitting at 3.9 and all I was doing is the creditors were going up and up and up.*
>
> *Q. And they had not said to you, had they, that they were going to put SML into administration or to foreclose?*
>
> *A. No, but it felt like they would because of the way we were working*."

269. Peter had no recollection of telling the meeting that he and the other directors had initiated the change of banks from Barclays to HSBC the previous day and I am quite sure that he did not do so. However, he insisted that *"everybody was aware that we were changing to HSBC by that period*" and went on to say that the decision was actually taken earlier "*The family had already agreed to change the bank by that time*". In my judgment that is not an accurate reflection of the position. Although the meeting on 9 November had agreed to attempts to look for alternative funding, neither it nor the meeting on 16 February approved a move to HSBC come what may. I am satisfied that approval would not have been given (and in the event was not given) without a clearer idea of how any available proposals compared with each other. That is not something which was ever properly explained to the shareholders other than the Director Defendants and Salvi.

270. In short Mario says that they were not told that Peter had turned down the Barclays offer and terminated the relationship the day before. I accept Mario's evidence to that effect. I am satisfied that the effective decision to move banks was made by the Director Defendants and probably Salvi as well without consulting the other shareholders. They made the decision because they considered that it was the only way that the restructuring they wished to pursue could be funded. I am also satisfied that they wanted to present that decision to the other shareholders as a *fait accompli* and that this was one of the reasons why they were not open with the shareholders either at the meeting on 16 February or at the one on 9 March about discussions which had taken place with Barclays in the first couple of months of 2016 and the circumstances in which the negotiations with Barclays had come to an end.

271. In short, I am satisfied that those shareholders who had not been privy to the negotiations and discussions with Barclays were deliberately left with the impression that they had no option but to proceed with the management buy-out strategy funded by HSBC, a state of affairs that was given greater apparent substance by the termination of SML's relationship with Barclays the previous day. I am also satisfied that as part of the process of persuading them that this was the right way forward the Director Defendants set out to leave the impression that it was inevitable that SML would be driven into administration at the end of the month if their proposed restructuring funded by HSBC did not go ahead, because that is what had been threatened. As part of that strategy the Director Defendants made a deliberate decision not to tell the other shareholders that they had initiated the termination of the relationship with Barclays and to give the impression that it was Barclays which had pushed for that result.

272. I do not however think that the Director Defendants were driven only by a desire to change banks because HSBC was prepared to fund the restructured business from which they personally would benefit to the detriment of the other shareholders. I have concluded that it is quite likely that they had all convinced themselves that the benefits to the other shareholders (from their continued interest in SML) were significant and were ultimately in their own best interests. Having convinced themselves of that fact they chose to ignore the fact that the other shareholders were entitled to make that decision for themselves (acting collectively), and that the only way in which that could be achieved was by them all being fully informed of all material considerations before being required to do so.

273. There were other elements of the Transaction which do not seem to have been discussed at this meeting. Thus, the evidence is that this meeting was not told about the Bidwells

valuations generally, nor more specifically that the valuation of the WX Hub had come in at £11.45 million. It was not recorded in the note of the meeting and the upshot of Sammy's rather hesitant evidence on the point was that he did not think that the valuation itself was even mentioned. Although Peter says that he remembers telling Mario and Pauline about the figure, he did not remember telling the other shareholders, so even on his own case it is improbable that there was any mention of this on 9 March because Tony, John and Spider Sam were also present at this meeting. As I have already mentioned Mr Heyes confirmed that the note of the meeting prepared by Sammy was correct in general terms. He also said that if it had been discussed he thinks that it would have been mentioned in the note and I agree. I am sure that if this point had been raised or discussed it would have been recorded in the note, which it was not.

274. I also do not think that there was any discussion about the amount to be paid by LPL for its purchase of the CET shares, nor that it was going to be paid by the issue of deferred loan notes to be subordinated to HSBC's debt. As to the issue of deferred consideration more generally, I have already explained that I think that this was discussed in outline at the meeting on 9 November 2015, but I do not accept that any figures were given or discussed either then or at the meeting on 9 March 2016, and there is no real evidence that they were. It certainly does not appear that the shareholders were told at this stage that the unpaid element would be deferred for 5 years and would be payable behind HSBC, both of which were aspects of the HSBC deal of which each of the Director Defendants was well aware.

275. It follows from this that, although the shareholders present all voted to proceed with the Transaction at the end of the meeting and to change banks to HSBC, they did so without full disclosure to them of all material facts. In particular, they did not know that the change from Barclays had already been initiated by the Director Defendants nor did they know Barclays' real attitude to funding SML going forward. They did not know of the differences between the valuations proposed to be used for some of the assets and their likely open market values and at that stage they did not know all of the figures to be included in the Transaction or the precise form that it would take.

The Instruction of Solicitors

276. On the same day that Barclays was told of SML's move to HSBC (and the day before the meeting at the Marriot hotel), Keith Thompson and Jonathan Goldsmith of V&S were instructed by Mr Heyes and Mr Smith to assist in drafting the documents for the Transaction. This was followed up with a written management buy-out summary prepared by Mr Heyes in which he explained that in simple terms SFP had obtained financing from HSBC in the form of a £6 million loan and a £500,000 overdraft to acquire the trade of SML and the WX Hub and for LPL to acquire the shares in CET. The summary was worked up with the assistance of Mr Smith and to a lesser extent Peter and Sammy. There was no challenge to Mr Heyes' evidence that it reflected how each of them intended the Transaction to be described. In this document Mr Heyes told V&S that:

> "*SFP will acquire all of the freehold land and buildings at Waltham Cross for an agreed £10m (the estimated valuation at the start of the process) and the non-produce related trade of SML. The valuation of the site by Bidwells for Barclays*

Bank plc is £11.45m, and it is expected that this is the market value on which both SDLT, payable by SFP, and any chargeable gain on the disposal of the site, payable by SML, will be calculated."

277. Ms Anderson QC submitted that this document demonstrated that it was inconceivable that the Director Defendants had intended to supress the £11.45 million figure from the other shareholders because they had no control over the information once it had been passed on to V&S. She also drew attention to the fact that Salvi knew that the value was in excess of £11 million because he was copied into an e-mail from Mr Goldsmith to Peter in which this was referred to. As I have already mentioned, although I am sure that Salvi knew that the true value of the WX Hub was more than £11 million I do not accept the underlying submission. My assessment of what was going on was that the Director Defendants knew that this type of detail might be revealed, and were prepared to tough it out if it was by stressing the absence of any alternative options, but they had no desire to be full and frank with the other shareholders by presenting any more detail on the development of the terms of the Transaction than was absolutely necessary.

278. Mr Heyes also explained that SML's produce-related trade was to be acquired by SGP and that the shares in CET were to be acquired by LPL in exchange for deferred loan notes to be issued to CET's shareholders. He said that the value of the CET element of the Transaction was estimated to be £2.7 million. He also explained that the following additional elements of the Transaction needed to be documented:

i) the incorporation of an overage into the sale agreement for any potential uplift in development value of the WX Hub (which he said in his witness statement was included at the suggestion of Mr Smith);

ii) leases of Waltham Abbey and Fen Drayton from SML to SFP;

iii) leases of the glasshouses and related buildings at Waltham Abbey and Fen Drayton and some office space at the WX Hub from SFP to SGP;

iv) leases of the CHPs at both Fen Drayton and Waltham Abbey to PUG and of two units at the WX Hub to Whole Foods; and

v) leases of parts of the WX Hub and Waltham Abbey from SFP to LPL.

279. In their Defence, the Director Defendants pleaded that the figure of £10 million for the WX Hub was agreed between the SML shareholders with the assistance of Rayner Essex (Mr Heyes' firm) "*as an average between the Bidwells valuation and a valuation of the WX Hub carried out by valuers called Glenny in 2011 showing a value of £8.6m, and taking into account SML's current financial circumstances.*" This allegation contained two parts, first that there was an agreement and secondly that it was based on some sort of mid-way point between the two valuations.

280. As to the second part of the allegation, Mr Heyes gave it some initial support in his witness statement where he said that the £10 million which he had said was "*the estimated valuation at the start of the process"* was used "*as it was the midground between Bidwells' February 2016 valuation and an earlier valuation of the property*". Initially he stood by this explanation and asserted that he thought that the earlier valuation may have been a couple of years earlier although he accepted that he had not

checked before signing his statement. However, during the course of his oral evidence it transpired that the earlier valuation can only have been one carried out by Glenny LLP in July 2008 (i.e. 7½ years earlier) which valued the WX Hub at £9.2 million (not £8.6 million). This length of time and the proportions: £9.2m / £10m and £10 / £11.45m makes this explanation for picking £10m as an appropriate figure very difficult to support. The £8.6 million seems to have derived from the discussions in October 2015 which I have already described.

281. It also became clear during Mr Heyes' cross-examination that the suggestion that the £10 million figure was a mid-point between the two valuations emanated from a subsequent justificatory e-mail written to him by Peter on 7 April, after the Transaction had completed. This e-mail was the first occasion on which the suggestion had been made that a split between the two valuations might justify a £10 million valuation, and although Mr Heyes thought that it might have been mentioned earlier, he agreed that this approach to valuation was not to his knowledge discussed with the SML shareholders.

282. This leads me on to the first part of the allegation in the Director Defendants' pleadings as to how the £10 million figure was reached, i.e. the fact that there was an agreement between the SML shareholders. In one sense this is consistent with the explanation Mr Heyes gave to V&S in his management buy-out summary where he referred to "*an agreed £10m*", but there is no documentary evidence for any such agreement having been reached and Peter who was also cross-examined on the point was unable to explain why it was that there was no record of Pauline and Mario being told about the reason for picking £10 million any more than he could explain why it was that there was no record of Mario being provided with a copy of Bidwells' £11.45 million valuation. Indeed, the absence of any documentation in relation to either point strengthens the conclusion that I am unable to accept his evidence in relation to both.

283. I am also satisfied that it is now clear that, despite what Mr Heyes said in his briefing note to V&S, prepared as it was with the assistance of the Director Defendants, the £10 million figure was not identified by reference to anything that could properly be described as "*the estimated valuation at the start of the process"*. There was nothing capable of amounting to a proper "*estimated valuation*" at £10 million, and the exercise that is now advanced as the averaging process pleaded in the Defence was not one that was carried out at the time. It was only carried out subsequently and then in the context of trying to put forward what might justify a fair value for tax purposes, not as a reflection of what the Director Defendants thought that its real market value might be. In my judgment the real explanation is relatively simple. £10 million had been the value for the WX Hub that HSBC were seeking, and the true market value was too high to make the figures work on the back of the HSBC funding offer. As Mr Roe QC suggested in his cross-examination of Peter the £10 million was "*just worked out by reference to what HSBC could lend*". Peter had no credible answer to that suggestion and all of the evidence points to it being true.

284. The following day HSBC sent Mr Heyes its formal credit approval of the facilities to be granted to SFP, CET and LPL. They were confirmed as a £6 million term loan facility to CFP, a £3 million invoice discounting facility to CET and SFP and a group overdraft to SFP, CET and LPL. In his e-mail Mr Tarn referred to the deadline to complete the acquisition as aggressive. The timing was driven, anyway in part, by the fact that the Barclays overdraft facility was due to expire on 22 March.

285. Angela Lever of Lever & Co was first contacted by Pauline after the meeting of 9 March. She was an Italian-speaking private client lawyer who came from Mario's own village in Sicily and had helped various members of the family for some time on a number of different matters. A meeting was arranged for 14 March at Mario's home which was attended by all three of the original shareholders and the four members of the family who were also directors: Peter, Sammy, Salvi and Spider Sam. At this meeting Ms Lever was told that "*Barclays seem to want to foreclose on them, but HSBC have come to the rescue*". She gave a concise summary of the structure and the proposals including the fact that the new businesses would be owned by the younger generation but that the land would be retained by the older generation "*so that at least they will have some income during their old age*". She told the original shareholders that she was not a commercial lawyer but would do the best that she could to assist the family and that she would focus on looking after the interests of the older generation. The information that her note shows that she was given about Barclays wanting to foreclose on SML was consistent with what Mario said he had been told by the Director Defendants at the 9 March meeting.

286. Ms Lever wrote to the original shareholders on 17 March recording what she had been told at the meeting on 14 March. By that stage, however, the Director Defendants and Salvi had decided to move the instruction from V&S to Gisby Harrison, but Ms Lever thought that V&S were still instructed and recorded that she had been having some difficulty in getting hold of them but was standing ready to attend a meeting the following day. Indeed V&S themselves still regarded themselves as instructed on the morning of 17 March, because Mr Goldsmith wrote to the Director Defendants, Salvi and Mr Heyes expressing concern about the timescale.

287. What had happened was that on the previous day (16 March) Peter had already made contact with Gisby Harrison, who had acted for Sammy in his divorce a few years earlier and had also done some work for SML before they moved to V&S, and arranged a meeting with a commercial partner, Simon Moffat. At that meeting Mr Moffat agreed to assist with the drafting of the documentation for the Transaction. He was told that the timescale for what he understood to be a management buy-out funded by HSBC was very tight and that their existing solicitors, V&S, were not in a position to do the work required because of holiday commitments. Having discussed the matter with Mr Heyes, he confirmed that Gisby Harrison were in a position to assist and they were then instructed by SFP and SGP to advise and draft the necessary documentation.

288. In evidence that was not challenged by the Director Defendants, Mr Randall and Mario both said that they were subsequently told by Mr Thompson of V&S that V&S had been working on the Transaction up until 17 March but there were two reasons for the move to Gisby Harrison. The first was the short timescale and the fact that Mr Goldsmith was about to go on holiday, but the second was that he (Mr Thompson) was concerned about the instruction to include an overage arrangement based on a value of £11.45 million when the purchase price for the WX Hub under the terms of the APA was to be £10 million. He did not wish to be part of an agreement which appeared to be depriving the SML shareholders of overage (at 30%) on the difference between £10 million and £11.45 million. He said that Peter removed the instruction when he made this clear. In the absence of any challenge by the Director Defendants there is no reason to think that this evidence is not accurate.

289. On 18 March, Mr Heyes sent the Director Defendants his valuations of the SML and CET businesses and SML's interest in SGS. He valued SML's business at the nominal figure of £1 each for the non-produce and produce trades on the basis of prior years' losses, uncertainty and the figure for net liabilities of £1,686,150 in the February management accounts. He raised the question of whether the figure for net liabilities should be deducted from the £10 million to be paid for the purchase of the WX Hub. He valued CET's business at £1,483,841, based on a three-year profit average, adjusted for market rental of the WX Hub and a multiple of 5 times maintainable profits. He valued a 50% share in SGS at £209,689 based on a three-year profit average, adjusted for market rent and a multiple of 4 times maintainable profits.

290. Mr Heyes stressed that these valuations were an indication as a basis for negotiations with HMRC and that the actual amount to be paid by SFP and SGP must ultimately be decided by the directors "*changed for any adjustments you want to make and the shareholders agree to*." I do not think that the Director Defendants can have been in any doubt after this was received from Mr Heyes that they needed to give a full explanation to SML's shareholders as to how these figures had been prepared and the nature of the valuation by which they had been produced.

291. The figures for net liabilities to be transferred as part of the Transaction is relevant to the quantification of the losses which SML claims to have sustained. They were as follows:

    i) Assets totalling £4,175,279 made up of Stocks of £921,991, Trade Debtors of £2,586,845 and Prepayments of £666,443;

    ii) Liabilities totalling £5,861,429 made up of Trade Creditors of £4,775,900, PAYE/NI of £101,239, Accruals of £623,729 and Deferred Income of £360,561.

292. Mr Moffat took most of his instructions on the detail of the Transaction from Mr Heyes who also supplied him with the core figures. In particular, he was instructed that the WX Hub was to be sold to SFP for £10 million, that the non-produce trade, related assets and liabilities were to be sold to SFP for a nominal figure (initially zero but changed to £1) and the produce trade, related assets and liabilities were to be sold to SGP for the same nominal £1. He said in his evidence that he did not think that he ever saw the Bidwells valuation. There is no reason to think that he was mistaken about that.

293. On 21 March 2016, Mr Moffat spoke to Ms Lever for the first time and sent her the first drafts of the APA, the share purchase agreement and the loan note instrument. His initial understanding was that she had been instructed by all of the shareholders of SML, but she subsequently clarified that she was acting for the original shareholders only. Later the same day Mr Heyes sent to Mr Moffat a summary of the financial position for both SFP/SGP/LPL on the one hand and SML/CET on the other. Mr Heyes made clear that the purpose of sending the summary to Mr Moffat at this stage was to forearm him with the figures for a meeting that he was to have with Ms Lever the following day. The figures disclosed the following salient points:

    i) £10,000,000 for "Purchase of WX Hub" by SFP from SML. In response to a question in cross-examination that the way he presented this made it look as if the value of the of WX Hub was £10 million, Mr Heyes said that "*I could see*

why you might think that". In that sense the information given to Gisby Harrison does not seem to have been as full as the information given to V&S.

ii) It was said that this purchase was to be paid for by £6,500,000 from HSBC and £2 million, being the net liabilities of SML's produce and non-produce trade, which were to be acquired by SFP and SGP. The figure for net liabilities seems to have been rounded up from the £1.686 million figure he had included in the valuation he produced on 18 March based on what Mr Heyes said was now forecast to be the position.

iii) £1,484,000 was to be paid for the shares in CET by way of the issue of deferred loan notes by LPL.

iv) £1,500,000 was to be left outstanding as a deferred liability.

v) The position of the family shareholders was that they would be left with Fen Drayton and Waltham Abbey worth £11 million, the deferred loan notes in respect of CET worth £1,484,000, the deferred balance of the purchase price for the WX Hub totalling £1,500,000 and a figure of £3,000,000 by way of potential overage on the future sale of the WX Hub.

vi) Nothing seems to have been included for the shareholding in SGS, which had been listed as one of the businesses valued in Mr Heyes' 18 March e-mail.

294. On the evening of 22 March, after her meeting with Mr Moffat, Ms Lever attended a meeting at the WX Hub with the original shareholders and the four family directors (Peter, Sammy, Salvi and Spider Sam). Ms Lever's attendance note of the meeting recorded her simplified summary of the Transaction which she discussed with the other attendees. Amongst other things she described the figures which had been produced by Mr Heyes and passed on to her by Mr Moffat earlier on in the day.

295. In her note, Ms Lever identified a number of benefits to the proposed Transaction from the perspective of the businesses going forward (i.e. primarily for SFP, SGP and LPL), but she also recognised that there were advantages for SML's shareholders. She described in particular how they would be retaining their shares in SML which would be retaining the sites at Fen Drayton and Waltham Abbey which would themselves generate an income stream. She recorded as well that it was designed to facilitate the transfer of the businesses to the next generation, which was a good thing from a family perspective, albeit for a largely deferred consideration which the SML shareholders would not see for some time. She also identified that the proposal for overage on the WX Hub was a particularly important aspect of the proposed transaction from the SML shareholders' perspective.

296. A number of other points arise out of Ms Lever's note. The first is that she described the £10 million for the WX Hub as follows: "*They have placed the purchase of the [WX Hub] at £10 million which will be paid by the HSBC loan and the liabilities for produce and non produce*." The second is that, as Sammy accepted, this was the first occasion on which the shareholders were told about the proposal in relation to CET. The third was that, in the context of considering certain tax issues (a subject on which she seems to have had some expertise) she recorded that the shareholders had little option but to proceed with this transaction in order to salvage their business. The fourth is that she

was clearly told that if the Barclays' overdraft was not paid off on 31 March "*Barclays solicitors are threatening to take over the land basically*".

297. Ms Anderson QC said that the recording of the Barclays threat was no more than a statement of the obvious, i.e. that if Barclays did not get paid it would step in. I do not agree. In my view, consistently with a number of other occasions on which the same point was made by the Director Defendants, this reflected an attempt to give the impression that Barclays had made actual threats to foreclose and enforce, when it had done no such thing.

298. During the course of 23 March, Ms Lever and Mario spoke at least once and Ms Lever wrote two letters to the original shareholders. She gave some clear advice about her understanding of the form of the transaction and stressed that Peter, Sammy and Salvi had a foot in both camps (as directors of SML and as shareholders of the new companies, i.e. SFP, SGP and LPL). In her second letter she gave some strong advice that, in the light of the structure, she felt that the original shareholders must be advised by a lawyer dealing with corporate matters who would be better placed to look after their interests.

299. Ms Lever also wrote to Mr Moffat and Mr Heyes, copying in the Director Defendants and (unfortunately) Mr Tarn and HSBC's lawyers explaining that the original shareholders "*were very concerned to find that they were to receive little financial recompense, in comparison to the proposed transfer of assets including the WX Hub*". She also queried how the figures for net liabilities and the value of CET had been arrived at, queried the conditions for the payment of the £1.5 million deferred consideration and said that the original shareholders had come to the conclusion that they were being left with little more than the use of the land at Fen Drayton and Waltham Abbey. The copying-in of HSBC caused some consternation, because its contents were a surprise to Mr Tarn and led to him telling Mr Heyes that he would have to withdraw what he had submitted to his credit colleagues on the deferred consideration structure.

300. This led to a fraught meeting that evening at the WX Hub attended by Mario, Pauline and the Director Defendants at which Mario expressed many of the concerns that had been raised in Ms Lever's correspondence. In particular, Mario expressed concern about the disparity between the 5-year period of the leases for Waltham Abbey and Fen Drayton and the 15-year period for which the proposed CHP energy deal would last. He was concerned that, once the leases came to an end, SML would have 10 years during which it would be burdened with the obligation to pay for gas at an inflated price in circumstances in which most of the up-front benefit of doing the deal in the first place had gone to SFP not SML. The fact that this issue was only being raised at this late stage is reflective of the Director Defendants' drip-feed approach to the provision of information which I have already mentioned.

301. Immediately before that meeting draft financial statements for the period ended 30 September 2015 were sent to Peter by Mr Heyes. He did so specifically for the purposes of "*your discussion this evening*" which must I think have been a reference to this meeting. Mr Heyes said that he did not know whether they had been sent to the directors any earlier, but I think it is likely that a draft had. I think that the probabilities are that they must have found their way to the Director Defendants some time before 23 March, because it is improbable that they could have finalised their planning on the precise

form of the Transaction without them. He also said that Sammy had the detail of how the £2 million figure for net liabilities had been arrived at in circumstances in which the original figure for net liabilities in the February management accounts had been £1.689 million. In his evidence Sammy was unable to give an explanation as to the basis for the increase and the inference is irresistible that it was simply rounded up as part of the process of making the terms of the Transaction fit the available funding.

302. In the end, Mario was persuaded that he should send an e-mail to Ms Lever in the following terms "*Following our discussion earlier today I have managed to meet up with boys at Waltham cross to explain my earlier points It seems I was emotionally overcome and clearly Didn't understand the situation So please can you confirm to all parties I am happy To proceed See you tomorrow to sign*". He said in evidence that he was forced to send this e-mail by Peter and Mr Smith by which he meant that they made clear that "*If I did not send it, they would put the company into liquidation*". Peter denied that he wrote the e-mail and said that Salvi had written it for his father.

303. Ms Anderson QC submits that I should reject as a lie Mario's evidence that the e-mail was written by Mr Smith, and she asks why Mr Smith would draft something on Mario's private phone when his son Salvi was present. The difficulty with that submission is that it is based on words which do not quite reflect what Mario said. What he in fact said was that he wrote it with the help of Mr Smith. It is also of note that he does not say that he now thinks that the restructuring is a good idea – what he says is that in the light of what he now understands, he is happy to proceed. That is not that same thing. In my judgment what actually happened was that Mario was persuaded to send this e-mail by what he was told of the attitude of Barclays in relation to continuing support for SML. All of those present took part in this but the insistence on the need to go ahead with the restructuring came particularly from Peter and Mr Smith because they were at the forefront of its design and development. I also think that Peter's evidence is accurate in the sense and to the extent that the e-mail was probably actually typed in by Salvi, but I think that it is likely that Mr Smith and Peter had a fair bit of input in what it needed to say.

304. The important point is that when Mario told Ms Lever that he "*didn't understand the situation*", he was referring to the fact that he had been told again that the restructuring, financed by HSBC, was the only way forward to save the business and avoid administration, because Barclays was preparing to pull the plug. The way that Mr Heyes described what he had been told by Peter and Mr Smith ("*I recall discussing this with Peter and Wayne later, and that they said they had met with Mario on the evening of 23 March 2016 and allayed Mario's concerns*") reflected what Mr Heyes was told by them, but it rather missed the point of what Mario had said. It was not that his concerns had been allayed. It was simply that he found himself in a position where he decided, based on what he had been told by Peter and Mr Smith, that there was no other option.

The Signing Meeting

305. On the afternoon of Thursday 24 March 2016, a meeting was held at the offices of Gisby Harrison for the purposes of signing the APA and the other documents relating to the Transaction. The meeting was attended by all of the shareholders and was

recorded by Antony on his mobile phone. This recording was made without the consent of the others at the meeting and there were question marks as to its completeness. The recording also ended before the meeting finished because Antony was made to turn it off when others in the room (particularly Pauline, Sammy and Peter) objected quite vociferously to the fact that Antony had been making a recording without their consent or knowledge. Be that as it may, I listened to the recording at the trial without objection and it gave me a very good sense of the tone of the meeting and the concerns which were being expressed by a number of the participants, most particularly by Mario and Antony. I also read competing transcripts of the meetings, although none of the differences seemed to me to be particularly significant.

306. The professionals present at the meeting were Mr Moffat and Mr Wilson Smith, but it was not attended by Ms Lever. It seems that she did not think that she would be needed for what she had understood was going to be a simple signing meeting. This caused some difficulties. Mario was angry because he had thought that she was going to be there. The impression I had was that Mario thought that he was going to be able to ask detailed questions about the content of the documentation and that Antony had the same expectation. None of the professionals shared that expectation, however, and Mr Moffat made clear at the outset that he was only instructed by the purchasing companies (SFP and SGP), not by the existing shareholders. He explained that he understood that the shareholders had been assembled together for the purposes of signing the documents in escrow with the intention of completing the documents on the following Thursday (31 March). If there were any outstanding matters of substance to be discussed they could be raised by shareholders with their own solicitors before instructions to release the documents from the escrow were given.

307. At the outset of the meeting there was a lot of discussion about the logistics of completion. It was also clear that several of the attendees were only being given sight of the documentation for the first time; indeed, not just the documentation but the terms of the deal as well. As Antony said a short while into the meeting in response to Mr Moffat's question as to whether or not the shareholders wanted to start signing before speaking to Angela Lever as there was quite a lot to get through:

> "*When you say start signing, do we get outline what the actual package is, what the deal that you are putting together, or is that just on the side and we just have to sign documents today because I'm guessing for 50% of the people here have no idea what the actual deal is and we're shareholders.*"
>
> "*So, we have no idea what's going on. So it would be really good to actually understand that.*"

308. This was a great surprise to Mr Moffat. He obviously had no idea that the meeting was to involve anything other than the administrative exercise of obtaining signatures from the shareholders. He was shocked by the tone of the meeting and the anger and aggression demonstrated by some of the participants, in particular Antony. He had been told by Mario that the only decision-makers were in fact the original shareholders, because they were the original owners of the business and the majority / senior shareholders of SML. Faced with the reaction from Antony in particular, Mr Moffat outlined the terms of the Transaction describing firstly how the shares in CET were going to be purchased by one of the new companies for £1,484,000, the debt to be paid by loan notes, i.e. by way of deferred consideration. He then explained that the produce

trade and non-produce trade of SML were to be sold by SML to SGP and SFP respectively, "*but because those two trade businesses don't have any value they are transferred at £1 for each trade*".

309. Mr Moffat then said that the WX Hub "*has a value and that's been agreed at £10m purchase price*" of which £6.5 million "*comes across at completion*" to clear off the debt to Barclays, with the balance left outstanding as deferred consideration. What was not explained was that, of the balance of £3.5 million, £2 million was made up of liabilities of SML that were taken over by SFP and SGP as part of their acquisition of the Produce and the Non-Produce Business. Mr Smith was not present at the meeting, but neither Peter nor Sammy nor Salvi said that, although £10 million had been agreed as the purchase price, Bidwells had advised that it was in fact worth £11.45 million. He also explained that there was the potential for an energy deal (i.e. the agreement which had been negotiated with CHP), £1.5 million of which would be used to pay off some of the debt due to SML.

310. It seems that Antony was taken by surprise by the terms of the Transaction because it was much worse than the deal which his father had briefly described to him before the meeting. Expressing himself in very forceful terms, he made clear that he had no confidence in the ability of the new businesses to generate sufficient cash to pay off the deferred consideration. He criticised Peter and Sammy (and I think Salvi as well) for having run SML's business at a loss for the last 5 years and Mr Smith for not turning it around and said that his questions needed answering before he would sign anything. Although he did not put it this way in the meeting, he said in his evidence that he did not understand why the Director Defendants and Salvi could not have negotiated a similar funding deal for SML to the deal which they had negotiated for SFP and SGP. He said though that he would listen to Mario, Pauline and Tony.

311. In response to this outburst from Antony, who by this time was dominating the meeting, Pauline said that "*If you don't close this deal we fucking lost Stubbins*", a colourful turn of phrase which reflected the heated nature of what was going on. Mr Moffat then intervened in an apparent attempt to explain what he understood to be the realities of the situation and said "*Can I just point out one thing Barclays bank have said they're going to foreclose on the businesses at the end of this month, and pull the plug, if they do that the likelihood is that you will lose almost everything*." Mr Moffat then said that the employees would be unemployed, nothing would be preserved for the old family and that this deal was the only way that the shareholders were going to come out with some assets behind them "*If it doesn't happen on Thursday, you are going to lose the lot*." Neither Peter, nor Sammy nor Salvi intervened to qualify or contradict what Mr Moffat said about the attitude of Barclays, and none of them explained either that Barclays had made no actual threat to foreclose or that it was the Director Defendants' and Salvi's decision to stop banking with Barclays which had led to the need to repay the overdraft at the end of the month or that an alternative offer from Barclays (albeit one which did not support the proposed restructuring at this stage) had been on the table.

312. It was apparent that the focus of Antony's anger was that the Director Defendants and Salvi had been paid by SML to make money, which they had failed to do, and were now taking over its business with the same facilities without taking any of the risk which had been undertaken by the original shareholders when they established the business in the first place. This led to a tetchy exchange amongst members of Mario's

branch of the family, Mario himself saying "*I know that it is wrong but you'll lose everything*" an opinion that was supported by Salvi. This led to Antony turning on his brother (Salvi) "O*f course, you agree that it's wrong, then. You're supposed to represent us*", a reference to Salvi's role as the Class C shareholders' director. Antony then made clear that the only reason he would sign the documents was because of his respect for the three original shareholders.

313. At this stage in the meeting, Peter and Sammy said that the shareholders (and I think that this was particularly directed at Antony) had a choice, but the only choice was between the deal that was on the table and closing the business tomorrow. Antony then referred to the fact that he had the possibility of alternative funding of £3 million to clear the overdraft, a reference to the fact that he had had an outline discussion with the father of his partner, who was a successful businessman and might have been prepared to assist with an alternative funding structure. Peter closed off that line of enquiry making plain that £8.6 million was required. It may well have been the case that there was no real prospect of this alternative source of funding being productive at this stage, but the way that the discussion went made it apparent that Peter for one was not prepared to consider anything other than the deal which was on the table.

314. There was then a further discussion about the critical position of SML and the attitude of Barclays in which it was made quite clear to all of the attendees at the meeting that Barclays was going to withdraw its facilities. For the most part the position was described by Mr Wilson Smith, who had come into the meeting part way through, and gave evidence that when he did so he found the atmosphere to be quite hostile. He used a number of phrases all of which were allowed to pass without comment by Peter, Sammy and Salvi and which would therefore have been taken by the remaining attendees as an accurate reflection of the true position.

315. Thus Mr Wilson Smith said that if there were no signatures today "*Well the company is going to run out of money as Barclays won't extend the current borrowing*" and "*So the company just literally is not going to be able to meet its debts, and there is a potential for creditors to call it in*". He then emphasised the adverse impact on market confidence if word were to get out about SML's potential inability to perform on its contracts and in that context said " … *and Barclays have made their position very clear that they're not interested, they don't want to get involved in the re-financing, they don't want to get involved in the re-packaging of the business*." He then made the same point again, albeit in slightly different words towards the end of the meeting: "*that Barclays just, not so much that they are pulling the plug, they are just not extending, they got to the point where they've said its never going to turn round, we don't even want to hear the story, just find another bank."*

316. There was then a further discussion during the course of which Peter said that the new companies (SFP and SGP) were taking on £9 million of debt and a property worth £10 million, by which he meant the WX Hub "*We end up with a £9m loan with a £10m property*." By this stage the documentation was being signed by the shareholders, but shortly after that process had concluded the meeting came to an end when the fact that Antony had been recording it came to light and Pauline, Peter and Sammy walked out.

317. The statements at the meeting which are now relied on by SML as being misleading and therefore vitiating what would otherwise be informal shareholder consent are:

i) The reference to the two trade businesses not having any value;

ii) The £10 million agreed purchase price for the WX Hub;

iii) The statement that Barclays had said they were going to foreclose on the businesses at the end of the month and pull the plug;

iv) The statement that if it did not happen on Thursday, the shareholders would lose the lot;

v) The statement that Barclays would not extend the current borrowing;

vi) The statement that Barclays had said that "*we don't even want to hear the story, just find another bank*";

vii) The statement that "*we*", by which Peter meant SFP, "*end up with a £10 million property".*

Aftermath of the signing meeting

318. The Director Defendants submit that the whole point of the Transaction documents being held in escrow was to provide the shareholders with a cooling off period before they agreed for them to be released in order to enable completion to take place. Antony took advantage of this and, immediately after the meeting, he instructed Craig Harrison of Longmores LLP, a solicitor with company and commercial expertise. The idea was that he would be instructed on behalf of the SML shareholders (and more particularly the original shareholders) although Pauline did not know this at the time. It seems that Antony had in fact first made contact with Mr Harrison before the meeting. At more or less the same time he was giving the impression of wanting to mend fences with the Director Defendants, sending an e-mail in the following terms:

> "*good luck with what you are proposing. If you honestly feel you are doing right by your Mum/Aunty and Dad/Uncles there is no more we can ask. For the sake of the family I hope if it goes ahead your new business succeeds so everyone gets what due to them*"

319. The following day, 25 March which was Good Friday, Mario rang Ms Lever to tell her that Mr Harrison had been instructed. Antony then told Mr Harrison that Ms Lever would be sending the Transaction documents over to him and arranged to meet with him on the Easter bank holiday Monday (28 March), a meeting which Antony asked Mr Harrison to keep to himself. Mario, Antony and Mr Harrison then met on 28 March.

320. Meanwhile, and given the nature of the discussion at the signing meeting and its tone, Mr Moffat had been in touch with Ms Lever to tell her that he thought that it would be a good idea for her to have a further meeting with the family:

> "*The signing meeting was fractious, to say the least. I think it would be useful for you to hold a further meeting with the family. They did all sign the documents, but on the understanding that it is all held to your order pending completion*."

321. On 29 March, Ms Lever told Mr Moffat that she had had a number of conversations with members of the family and had recommended that they instruct company / commercial lawyers. She said that she had sent the Transaction documents to Mr Harrison to review on their behalf. It had always been Ms Lever's position that she did not have the commercial expertise which she thought was required. She said that Mr Harrison would be looking at the Transaction documents "*on behalf of SML*".

322. Also, on 29 March, there was a meeting attended by the original shareholders, the Director Defendants and Salvi at 12.30pm. According to an e-mail from Salvi sent shortly afterward, this was an "*extraordinary meeting ... with the three senior shareholders and operational directors including the secretary and chairman*". He went on to record that each shareholder was given the opportunity to discuss any questions relating to the HSBC financial rescue package, all of which were addressed and resolved, and that a vote was then taken, and that it was unanimously agreed to move forward. The e-mail was copied to Spider Sam for onward transmission to Tony who did not have an e-mail address.

323. Later on that evening, Mr Harrison wrote to Tony, Mario and Pauline. Initially Mr Harrison sent this letter by e-mail to Antony but it is not clear when it was actually seen by the original shareholders. He said that he had considered the proposed Transaction and his overall feeling was that it was very much to the advantage of the management team (by which he meant the Director Defendants and Salvi) and disadvantage of the shareholders of SML and CET. He said that the documents raised a number of what he called "*troubling questions and it is unclear whether the deal represents true value for the shareholders.*" In particular, he pointed out that:

    i) the WX Hub and business and assets of SML and shares in CET were being transferred for what appeared to be below market value and without the shareholders being given any independent valuation advice;

    ii) he did not know how real the threat of Barclays pulling its financial support was and it appeared that the Director Defendants had focused on refinancing the companies with HSBC rather than focusing on a solution that involved all the SML shareholders;

    iii) more information was needed before the SML shareholders should decide whether to go ahead with the Transaction.

324. It is clear that Mr Harrison was doubtful that the Transaction needed to be completed with quite such urgency and he said as much. He also queried whether it would be possible for the SML shareholders to provide funding to SML and CET in order to reduce Barclays' concerns as an alternative to entering into the Transaction and to allow more time for other options to be considered.

325. Mr Harrison also advised that the lack of up-to-date accounts made it practically impossible to arrive at a logical conclusion as to whether there was any merit in the proposed transaction and in particular that he had yet to see any evidence that SML was facing significant financial difficulty, other than the statements made by the Director Defendants. He advised that further information was needed before any logical decision could be made as to whether to approve or reject the proposal that had been put forward. He also suggested sending an attached draft letter requesting information,

without which it was impossible to know whether the deal represented the best deal available to the shareholders as whole. He also pointed out that the judgement of the Director Defendants and Salvi would inevitably be clouded by their own interest in acquiring the assets, a specific reference to their conflict of interest. As Mario accepted, this was clear advice as to the downside of the Transaction.

326. The draft letter to Gisby Harrison which Mr Harrison had enclosed with his letter of advice to Antony and Mario included the statement: "*that there are a number of concerning issues that need to be resolved before our clients can reasonably be expected to make an informed decision to either approve the transaction or reject it*". It then listed out some 18 issues and asked for the correspondence with Barclays confirming that it really was about to terminate the facilities and also for an explanation of the £11.45 million figure that was used in the draft overage deed for the WX Hub. Although it was included with the letter of advice, this draft was never sent.

327. Despite the fact that it was fairly obvious that the meeting at the WX Hub and the letter from Mr Harrison were both important matters, Mario made no mention of either of them in his witness statement. He then said in cross-examination that he could not remember the meeting although it obviously (and not surprisingly) made an impression on him at the time because Antony said in cross-examination that he was told by Mario after the meeting had finished that "*they have sorted something out*". Neither Mario nor Antony had any coherent explanation as to why neither of them mentioned the letter from Mr Harrison. I have formed the clear view that neither of them was being straightforward when they gave their evidence about these two events. I think that Ms Anderson QC was justified in putting to them both that they were selective in the evidence that they gave because they knew that neither of these two events suited their case. The extent to which this undermines SML's case that its shareholders did not give informed consent to the Transaction is, however, a different matter.

328. During the course of the following day there was further communication between Ms Lever, Mario and Mr Harrison. Early that morning Ms Lever was recording that she had been told that the family had met the previous day and was now ready to proceed. However, in the middle of the afternoon Mr Harrison was still in e-mail communication with Mario and Antony on questions relating to the form of the leases explaining that he had no idea how the figures had been calculated.

329. Meanwhile, Mr Moffat had written to Ms Lever saying that he had attempted to contact Mr Harrison but had as yet had no response. He then asked for her to obtain the necessary authority to use the signatures of the shareholders on the Transaction documents but was told that he needed to liaise with Mr Harrison. Rather more generally the solicitors do not seem to have been kept up to date with what was going on in the family. In particular it was not clear to Mr Moffat who had instructed Mr Harrison and so he wrote to him:

> *"I have been trying to get to speak to you to understand who you are instructed by and what your scope of instruction is.*
>
> *I should make it clear that the transactions that are to complete tomorrow are a rescue plan for the Companies that have been put in place with the new funding bank. The bank are dictating the terms of this rescue transaction. […] There is no*

room for any negotiations in respect of these transactions. It is a take it or leave it situation.

If the shareholders of SML do not agree to complete tomorrow then the company will be put into Administration."

330. There is no doubt that the position articulated by Mr Moffat reflected what the Director Defendants had told him the position was and was consistent with the way that he had expressed himself without contradiction at the signing meeting. It was clear that Mr Harrison was being told that completion of the Transaction was being driven by the terms laid down by HSBC and that there was no alternative. Whether Barclays would have been prepared to extend their lending at this late stage had they been asked must be doubtful, but what was misleading was the way that this letter reinforced the impression that there had never been any alternative because the attitude of the funders meant that the only two options that were ever on the table were the HSBC-funded restructuring on the one hand or a Barclays-driven administration on the other.

331. Sometime in the late afternoon of 30 March, Mario and Spider Sam went around to the WX Hub to discuss the Transaction again. Mario was armed with the letter from Mr Harrison and was clearly very unhappy. Pauline said that she was summoned by Peter when they turned up unannounced. The issue with which Mario was most concerned was the base value of the WX Hub for overage purposes, which he wanted to be £10 million rather than £11.45 million. Pauline said that if he was so concerned about it, she would pay. There was a dispute about whether she said that she would reimburse Mario from the difference out of her share of the proceeds of the WX Hub if it was sold, but for present purpose the precise nature of her promise does not matter. What matters is that the value of the WX Hub and how the overage would work remained controversial.

332. Everyone also agrees that the meeting got heated at one stage and it was said by Mario that Mr Smith (who was also present) said that he would put SML into administration if Mario did not release his signature on the Transaction documents. I do not think that Mr Smith went that far but I have little doubt that Mario was told by him that the Company would go into administration if the escrow was not released and from Mario's perspective that came to much the same thing. Eventually with some reluctance Mario agreed that he would go ahead. Pauline said that he was happy to go ahead; I don't think that is correct.

333. After Mario had agreed to go ahead, he got in touch with Mr Harrison and told him that his services were no longer required. Mr Harrison then wrote to Mr Moffat telling him that "*my instructions are not to submit any comments on the proposed documents that have been prepared".* He also said that the only outstanding point was that Mario was expecting to see "*a document pursuant to which he, his brother, sister and Salvatore Difrancesco would each receive 5% of the issued share capital of [SGP].*" The withdrawal of instructions to Mr Harrison remained of real concern to Ms Lever; she had always said that the advice she was being expected to give was outside her expertise and doubtless she felt very exposed. The following day (31 March) she advised that her strong recommendation was that Mr Harrison should be looking at the Transaction documentation from a commercial perspective, but by this stage he was no longer instructed. Her concern was also reflected by the fact that in the exchange of e-mails

she then had with Mr Harrison she went on to say that "*hopefully Mario was speaking on behalf of all the SML shareholders*".

334. I am satisfied that several of the shareholders other than the Director Defendants were the recipients of very clear legal advice that the form of the Transaction was potentially highly disadvantageous to SML's shareholders. Both Ms Lever and Mr Harrison expressed strong and detailed concerns about the form and substance of what had been agreed, and I am satisfied that of the shareholders other than those interested in SFP and SGP, Mario, Pauline, Antony and Spider Sam were all well aware of the nature of those concerns. They proceeded to authorise Gisby Harrison to complete the Transaction nonetheless and the fact that they did so is a significant factor in my assessment of whether they gave informed consent so as to engage the *Duomatic* principle. I shall explain my conclusions on that issue in due course, but at the moment I should record that there is no evidence that the other shareholders were privy to the advice given by Mr Harrison and there were in any event a number of other relevant matters to which nobody's attention was then drawn.

335. So far as Mario, one of the named recipients of this advice, was concerned, he said that although by this stage he knew of many of the downsides of the Transaction, he was driven into going along with it because he believed that the only other alternative was an immediate formal insolvency and that was to be avoided at all costs. He was strongly pressed on this point by Ms Anderson QC, but I accept the thrust of the following part of his evidence:

> "*Q. … So again, Mr Harrison is advising, in very, very clear robust terms, as to the downside on this transaction, is he not?*
>
> *A. Yes, he is. But as I said, we were so worried about going bankrupt – as they were telling us – that we let them – we agreed to it.*
>
> *Q. At any point if you had been concerned about, for example, valuation advice ---*
>
> *A. And even he said, there is no valuation ---*
>
> *Q. Yes, but ---*
>
> *A. --- we did not know of any valuation at all at that time.*
>
> *Q. But you could have said, "No, we are not proceeding. We need to get a valuation."*
>
> *A. Yeah and then the next day, the bank would pull the plug on us and we would go bankrupt. And from what Wayne said, if you do not sign tomorrow or release the signatures, we would be bankrupt.*
>
> *Q. But that is correct by that stage.*
>
> *A. Yes.*

> *Q. Because where it says, "The directors have been expending their energies negotiating finance with HSBC", that was precisely what the shareholders had told them to do back in November 2014.*
>
> *A. Yes. Because we knew that they told us that the bank would not lend us any more 1 money. They did not tell us they were going to increase their loan to 5.1 million. We would not have been in that position.*
>
> *...*
>
> *Q .... So again, you were specifically drawn to your attention that there was a conflict of interest.*
>
> *A. Yes. It was drawn to our attentions, but we believed that what the directors were telling us that if we did not do this deal, there would be no choice. And we would go bankrupt, that is why.*"

Completion of the Transaction

336. On 1 April 2016, the Transaction completed when Gisby Harrison were authorised by all of the shareholders to release their signatures from escrow. The most reluctant was Antony who did so late on the evening of 31 March when he was at a restaurant he was opening in Stoke Newington. He said that he remained very unwilling but was persuaded by his partner not to be the only one who was holding out.

337. Completion of the Transaction meant that the APA came into effect. It provided for the sale of SML's Non-Produce Business and Non-Produce Assets to SFP and its Produce Business and Produce Assets to SGP both as going concerns. The purchase consideration, described as "*the aggregate of the values attributed to such assets as set out in Schedule 1*", was £1 for the Produce Assets and £1 for the Non-Produce Assets. The Produce Business included SML's tax losses. The APA also made provision for the sale of the WX Hub to SFP for £10 million, less what were described as the Assumed Liabilities of £2 million. As to payment of the £8,000,002 balance after deduction of the Assumed Liabilities, it was provided that £6,500,000 would be payable on completion and £1,500,002 would be left outstanding as a debt (described as the Deferred Payment).

338. The APA also imposed an obligation on SML to grant SGP leases of Fen Drayton and Waltham Abbey in the agreed form. The form of these leases was not finalised until mid-May.

339. The other documents which formed part of the Transaction were:

    i) A share purchase agreement by which LPL agreed to purchase the shares in CET in consideration for £1,484,000 to be satisfied by a loan note instrument under which LPL issued to the shareholders of CET unsecured notes with an aggregate face value of £1,484,000. These notes were interest-free and matured on 31 March 2026.

ii) An intercreditor agreement (the "ICA") which subordinated the claims of the loan note holders and SML against SFP, SGP, LPL, CET, FPIL and FPML to the amounts owed by any of those companies to HSBC. The effect of the ICA was to defer the Deferred Payment for 5 years, unless SFP received before then £3.35 million in respect of the energy deal.

iii) An overage deed (the "Overage Deed") by which SFP agreed to make a 30% overage payment to SML in the event of a disposal of the whole or any part of the WX Hub for a price in excess of £11.45 million. The overage period was 50 years.

Post-Transaction Events

340. Once the Transaction had been completed a number of further relevant events occurred. They included points of substance which had been left out of the Transaction because of the speed with which it was completed.

341. The first related to the leases from SML to SGP and SFP of the Waltham Abbey and Fen Drayton nurseries, each of which was for the whole of the relevant site with 5-year terms. Peter said that they should have carved out the land where the CHP equipment stood but did not do so. As he explained, if the PUG deal was to go ahead, the land where the CHP equipment was located would need to be sub-let to PUG and PUG would need access to the wider site in order to install the new CHP engines. It was therefore necessary to prepare new leases so that SML was then leasing the CHP engine sites to SFP under 20-year leases and the remainder of the land at the Waltham Abbey and Fen Drayton nurseries except for the CHP engine sites to SGP under 5-year leases. The rent paid for each nursery remained the same but was divided between the carved-out land on which the CHP engines stood and the remainder of the nursery. The rent payable to SML was £24,000 for both Fen Drayton and Waltham Abbey CHP engine land, £344,500 for the remainder of the land at Fen Drayton and £76,000 for the remainder of the land at Waltham Abbey.

342. The second was the requisitioning by Mario of a general meeting of SML which he attempted to do on 17 May 2016. It was clear by this stage that a serious dispute had developed between the Director Defendants and other shareholders including at least Mario and Antony. His initial requisition notice was invalid for failure to specify the business to be considered and, after taking advice from Gisby Harrison on the point, Peter told Mario that this was the case on 31 May. There was then a short period of delay and on 26 June 2016, a valid requisition was received for a general Meeting of SML to be held. It was signed by every shareholder member of Tony and Mario's branches of the family apart from Salvi. The business to be considered was the removal of Mr Smith, Sammy, Salvi and Spider Sam and their replacement by Antony, Michele and Onofria. After taking further advice, the notice was sent out by Peter on 21 July for the meeting to take place on 18 August.

343. On 18 August 2016, the resolutions to remove Mr Smith, Sammy, Salvi and Spider Sam and replace them with Antony, Michele and Onofria were duly passed. From that date the directors of SML were Antony, Michele, Onofria and Peter. Mario and Mr Randall were then appointed on 21 September 2016 and Peter resigned a few days later.

344. The third series of events occurred while the process of calling the general meeting of SML was taking place. It related to the terms of the Director Defendants' service contracts with SML and the grant of the Kombbi Debenture. After the Transaction had completed, the Director Defendants and Salvi stayed on as directors and employees. However, Peter and Sammy said that their jobs at SML were very different because the businesses themselves were now being carried on by SFP and SGP. They and Salvi therefore said that they agreed that they needed new service agreements with SML which they agreed at £5,000 per annum. They also said that they agreed that Mr Smith needed a written consultancy agreement.

345. This led to a meeting which Mr Smith and Peter had with Mr Moffat and one of his partners from Gisby Harrison's employment team on 20 May 2016 in order to discuss these agreements. The meeting took place just after the first attempted requisition for a general meeting had been received by Peter. By this stage it was clear that some at least of the shareholders (including in particular Antony and Mario) were very unhappy about what had occurred both under the Transaction and as a result of the conduct of the Director Defendants before it was entered into.

346. Mr Moffat understood that the terms of these service agreements were similar to those which SML had already entered into with other former employees, such as Mr Randall. So far as the consultancy agreement with Mr Smith was concerned, he told Mr Moffat that he was worried that he would not be paid what he said were some fairly large sums that were owed to him because of the SML shareholders' attitude to the Transaction. The consultancy agreement was eventually entered into between Kombbi and SML on 21 July 2016. It made provision for a monthly fee of £2,750 in consideration for making Mr Smith available to provide what were described as Services, namely "*To serve as Chairman of the Board*". It also made provision for the payment of a lump sum of £250,000 plus VAT in the event of either the termination of Kombbi's engagement by SML under the terms of the agreement or the termination of what was described as Mr Smith's directorship with SML. I shall explain the detail of what occurred in relation to the consultancy agreement when considering the questions which arise under the second agreed issue.

347. Meanwhile, on 19 July, SML had created and registered the Kombbi Debenture in favour of Kombbi as security for all present and future liabilities. I shall explain the surrounding circumstances in more detail when I consider the third agreed issue. It is self-evident that, by the time the consultancy agreement and the Kombbi Debenture were entered into, the concerns which Mr Smith had expressed at the May meeting with Gisby Harrison had greater substance because the requisitioning of the general meeting meant that the Director Defendants knew that control of SML was highly likely to pass out of their hands and into the hands of those who considered that the Transaction had operated in a manner which was contrary to their interests and who blamed the Director Defendants for the form that it had taken. In these circumstances it is perhaps not surprising that neither the consultancy agreement nor the Kombbi debenture was approved or sanctioned by SML in general meeting.

348. The fourth post-Transaction event was the completion of the sale of SML's shareholding in SGS. It only emerged towards the end of May 2016 that this had not been dealt with at the time of completion and so steps were taken to give effect to the intention to transfer this 50% interest to SFP. In the end, the shares were transferred for a nominal consideration and SML's claim for the loss sustained as a result of that

decision is the subject of the tenth agreed issue. It is convenient for me to describe what actually occurred when I give my conclusions on that issue.

Directors' Duties: the Law

349. It is not in dispute that each of the Director Defendants was a director of the SML for almost all of the period relevant to the issues which arise. Thus, Peter was a director between 14 July 2005 and 30 September 2016, Sammy was a director between 14 July 2005 and 18 August 2016 and Mr Smith was a *de jure* director between 20 May 2015 and 18 August 2016 and it is common ground that he was a *de facto* director from at least June 2014. These therefore are the periods for which each of them owed duties to SML under Part 10 Chapter 2 of the 2006 Act and, by reason of the definition of director contained in section 250 of the 2006 Act, Mr Smith did so with effect from June 2014.

350. Several of these general duties are applicable to one or other of the issues which arise. Those on which reliance is placed by SML are explained in the following paragraphs.

351. The first duty relied on by SML is the duty on a director under section 171(b) of the 2006 Act only to exercise his powers for the purposes for which they are conferred. This is at the core of a director's duties and has recently been examined by the Supreme Court in *Eclairs Group Limited v JKX Oil and Gas plc* [2015] UKSC 71. Lord Sumption summarised the principles at [15] and [16] of his judgment:

> *"15. The proper purpose rule has its origin in the equitable doctrine which is known, rather inappropriately, as the doctrine of "fraud on a power". For a number of purposes, the early Court of Chancery attached the consequences of fraud to acts which were honest and unexceptionable at common law but unconscionable according to equitable principles. ... In Duke of Portland v Topham (1864) 11 HLC 32 , 54 Lord Westbury LC stated the rule in these terms:*
>
> > *"that the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power."*
>
> *The principle has nothing to do with fraud. ...*
>
> *The important point for present purposes is that the proper purpose rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope but done for an improper reason. It follows that the test is necessarily subjective. "Where the question is one of abuse of powers," said Viscount Finlay in Hindle v John Cotton Ltd (1919) 56 Sc LR 625 , 630, "the state of mind of those who acted, and the motive on which they acted, are all important".*

> *16. A company director differs from an express trustee in having no title to the company's assets. But he is unquestionably a fiduciary and has always been treated as a trustee for the company of his powers. Their exercise is limited to the purpose for which they were conferred."*

352. Later in his judgment (at [21] and [22]), Lord Sumption made clear that, where the directors of a company act for more than one purpose, and one or more of those purposes is improper in the sense explained in the passages I have just cited, an approach equivalent to a "but for" causation test is the appropriate one to apply:

> "*If the answer is that without the improper purpose(s) the decision impugned would never have been made, then it would be irrational to allow it to stand simply because the directors had other, proper considerations in mind as well, to which perhaps they attached greater importance ...*
>
> *Correspondingly, if there were proper reasons for exercising the power and it would still have been exercised for those reasons even in the absence of improper ones, it is difficult to see why justice should require the decision to be set aside.*"

353. The second duty relied on by SML is the duty under section 172(1) of the 2006 Act to act in the way that the director concerned considers in good faith would be most likely to promote the success of the company for the benefit of its members as a whole. In doing so he must have regard to a number of identified considerations which it is not necessary for me to set out in full because none of them plays a particular role in the present case. This duty codifies the long-established principle explained by Lord Greene in *Re Smith and Fawcett Ltd* [1942] Ch 304, 306:

> "*The principles to be applied in cases where the articles of a company confer a discretion on directors … are, for the present purposes, free from doubt. They must exercise their discretion bona fide in what they consider – not what a court may consider – is in the interests of the company, and not for any collateral purpose."*

354. This principle has been cited with approval in numerous subsequent cases, of which *Regentcrest Plc v Cohen* [2001] 2 BCC 494 was cited in Mr Roe QC's skeleton argument. In *Regentcrest*, Jonathan Parker J explained the nature of the duty as follows (at paragraph [120]):

> "*The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see Palmer's Company Law (Sweet & Maxwell) para. 8.508). The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test.*"

355. Although this duty is subjective, it requires at least some evidence that the director has given consideration to the relevant issue. I agree with the way that Mr John Randall QC explained this part of the test in *Re HLC Environmental Projects Ltd, Hellard v Carvalho* [2014] BCC 337 at [92]:

> "*the subjective test only applies where there is evidence of actual consideration of the best interests of the company. Where there is no such evidence, the proper test is objective, namely whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company*"

356. The next duty on which reliance is placed by SML is the duty to exercise reasonable care, skill and diligence imposed on directors by section 174 of the 2006 Act. This duty has both subjective and objective elements because the section spells out that the care, skill and diligence required is that which would be exercised by a reasonably diligent person with (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by that director in relation to the company, and (b) the general knowledge, skill and experience that the director concerned actually has.

357. The final duty on which reliance is placed by SML is the duty under section 175 of the 2006 Act to avoid conflicts of interest. This was pleaded as being applicable to a number of SML's claims but is now only relied on in relation to agreed issue 13 which is concerned with the Director Defendants' diversion to themselves of an opportunity to invest in David Platt LDA. The principle was summarised by Jackson LJ in *Sharma v Sharma* [2014] BCC 73 at [72]:

> *"A company director is in breach of his fiduciary or statutory duty if he exploits for his personal gain (a) opportunities which come to his attention through his role as director or (b) any other opportunities which he could and should exploit for the benefit of the company."*

358. I agree with Mr Roe QC's submission that when considering this duty and its breach it is not necessary for SML to prove that the opportunity was one which it would have taken up if it had not been taken up by the Director Defendants (if that is what they did). As Jonathan Parker LJ said in *Re Bhullar Bros Ltd* [2003] BCC 711 at [41]:

> "*It seems obvious that the opportunity to acquire the property would have been commercially attractive to the company, given its proximity to Springbank Works. Whether the company could or would have taken that opportunity, had it been made aware of it, is not to the point: the existence of the opportunity was information which it was relevant for the company to know, and it follows that the appellants were under a duty to communicate it to the company.*"

Agreed Issue 1: the Transaction

359. The first agreed issue relates to the Transaction and falls into three parts. (a) Did the shareholders of SML give valid, unanimous, informal consent to the Transaction? (b) Did the Director Defendants breach their duties to SML in causing SML to enter into

the Transaction? (c) What (if any) loss has SML suffered as a result of entering into the Transaction, by reference to the business and assets sold under it, the property leased under it, the tax effect of the transfer of accrued losses and the costs of the Transaction?

360. The Director Defendants submit that another issue arises: did the shareholders of SML give consent to the Transaction in accordance with the Articles of Association of SML? SML does not accept that this issue arises.

361. The legal context in which the first issue arises is not all controversial. There is no dispute between the parties that the Transaction was a substantial property transaction within the meaning of section 190 of the 2006 Act. This is because it was an arrangement under which SGP and SFP as persons connected with directors of SML (i.e. the Director Defendants and Salvi) acquired from SML a substantial non-cash asset. The consequence is that the Transaction was unlawful unless it was approved by a resolution of the members of SML.

362. If the Transaction was unlawful for contravention of section 190 of the 2006 Act, each of the directors of SML, SGP and SFP (i.e. the Director Defendants, Salvi and Spider Sam) will be liable to account to SML for any gain that he has made directly or indirectly by the Transaction (section 195(3)(a)). Each of them will also be jointly and severally liable to indemnify SML for any loss or damage resulting from the Transaction (section 195(3)(b)). SGP and SFP will also be liable pursuant to section 195(4)(b) for any gains they have made by the Transaction or losses resulting from it. The claims made by SML are under section 195(3)(b). I did not understand it to pursue any claim under section 195(3)(a) or section 195(4)(b).

363. As I understood paragraph 211.5 of her closing submissions, Ms Anderson QC referred to this part of SML's claims as being run as a breach of duty case, but I think that it is clear that SML advanced its case in respect of the Transaction itself on two bases. The first was for a statutory indemnity under section 195(3)(b) and the second was for equitable compensation for breach of duty, the breach being the transfer of SML's assets to SFP and SGP for less than their true value. Fully informed shareholder consent would have been a defence to both of those claims. As to the former, it would have supplied the necessary approval within the meaning of section 190(2) of the 2006 Act. As to the latter it would have constituted ratification of what would otherwise have been a breach. What then were the legal mechanisms by which the necessary consents are said by the Director Defendants to have been given?

364. There is no doubt that the Transaction was not approved by a resolution of the members of SML, passed in accordance with the Articles. However, it is common ground that the *Duomatic* principle, which takes its name from the decision of Buckley J in *Re Duomatic Ltd* [1969] 2 Ch 365, is capable of supplying both the shareholder approval required to ratify the breaches of duty in respect of which SML claims, and the approval required by section 190(2). This is because the approval required in both instances "*was intended only for the protection of the current members entitled to it*" (the description of the test for the application of the principle set out in Palmer's Company Law at para 7.444). As Buckley J said in *Duomatic* itself (at p.373):

> "*where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting*

> *of the company could carry into effect, that assent is as binding as a resolution in general meeting would be*"

365. As with ratification of a breach of duty, where the *Duomatic* principle applies in the context of section 190, it operates to supply the approval for the Transaction in circumstances in which there was no resolution of members as contemplated by that section, but it must be a fully informed assent. The need for shareholder assent to be fully informed before the *Duomatic* principle can be engaged is unsurprising, but it was clearly articulated by Neuberger J in *EIC Services Ltd v Phipps* [2003] 1 WLR 2360, where he said as follows:

> *"the essence of the Duomatic principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver or estoppel, and whether members of the group give their consent in different ways at different times, does not matter."*

366. This description of the essence of the principle emphasises the need for the shareholders to be aware of all relevant facts, and it also explains that if they are so aware, the means by which their approval or consent can be given is capable of taking a number of different forms. However, the importance of full knowledge of the relevant facts is stressed in many cases including (e.g.) the decision of the Court of Appeal in *Sharma v. Sharma* [2014] BCC 73 at [52]. In my view it is clear that full knowledge means knowledge of all the facts which are material to the decision-making process required and, in assessing materiality, the way in which those facts are presented to the shareholders may be as important as the bare description of the fact itself.

<u>*Duomatic*: Identifying the relevant shareholders</u>

367. The first question which must be established is whether there has been a sufficient assent to the relevant matter, i.e. the approval of the relevant arrangement. In the present case, this requires the Director Defendants (and it seems to me that given *prima facie* non-compliance with section 190 the evidential burden is on them), to identify each of the shareholders with a right to attend and vote, and to prove that each of them has assented to the approval of the Transaction. In most cases there is no difficulty in establishing the identity of the shareholders with "*a right to attend and vote*". In the present case, this is not so straightforward both because of the way in which the Articles were drafted and because of the way in which decisions were in practice made.

368. I have already considered the first of these points earlier in this judgment. It arises because the Articles made provision for Group Class Representatives. In her closing submissions, Ms Anderson QC maintained an argument, albeit without any real enthusiasm, that all that was required for the *Duomatic* principle to be applied was the informed assent of the three shareholders whom the Director Defendants contended had been appointed as Group Class Representatives (i.e. Peter for the class A shareholders,

Spider Sam for the class B shareholders and Salvi for the class C shareholders). This argument cannot succeed in the light of my conclusion (explained earlier in this judgment) that no such appointments were made.

369. I do not therefore have to grapple with the question of whether the *Duomatic* principle can be satisfied by the assent of Group Class Representatives appointed under the Articles. I should however say that Ms Anderson QC referred to the decision of the Court of Appeal in *Blindley Heath Investments Ltd v Bass* [2017] Ch 389 at [108], in which the court mentioned what it described as proxy or representative assents, but said that it had some reservations about their application to the *Duomatic* principle. In my view, those doubts are less likely to emerge where the proxy or representative assent is given by a person entitled to vote as a Group Class Representative because their entitlement arises under and in accordance with the very contract (the Articles) which governs the relationship between company and shareholder. In that situation the only question is whether, on their true construction, it can be said that the representative has been given and retains authority to exercise that part of the bundle of shareholder rights which entitles the shareholder concerned to attend and vote.

370. SML also submitted in closing that, because the burden of showing *Duomatic* assent by all of the shareholders was on the Director Defendants, the absence of Group Class Representatives appointed at a Group Class Meeting meant that the shareholders had no entitlement under the Articles to vote at a general meeting of SML. It followed as I understood the submission that *Duomatic* assent could not be given or inferred either. I am doubtful that that is the case and I think that the more likely conclusion is that the unanimous informed consent of all shareholders would be sufficient and would overcome a failure to appoint Group Class Representatives. It follows that my conclusion that Peter, Salvi and Spider Sam were not appointed Group Class Representatives meant that all of SML's shareholders were required to assent in order for the *Duomatic* principle to supply the necessary approvals for the Transaction.

371. The Director Defendants contended that that is not right for another reason. They also argued that the informed assent of the original shareholders was sufficient on the grounds that each of them was a *de facto* or proxy representative of their respective group. This argument was advanced quite independently of the appointment of Group Class Representatives under the Articles. It gives rise to a question of fact, having regard amongst other things to the principle that the grant of a proxy (like many other forms of agency) will normally be both grantable and revocable at the will of the shareholder.

372. I should say that there is no suggestion in this case that formal proxies were executed by any shareholder in accordance with Article 12 of the Articles. If that had been the case, and if the proxy had been valid at the time of the assent and drawn in sufficiently wide terms to entitle the proxy to assent on behalf of the shareholder, it seems likely that this would have been sufficient for *Duomatic* purposes. This was not the case, however, and the very fact that proxies were not given to anybody (such as the original shareholders) now said to be entitled to assent on behalf of others so as to engage the *Duomatic* principle, counts against their entitlement to do so.

373. The way that the case on *de facto* decision making was put by the Director Defendants derived in part from what was said by Mario in his evidence, namely that "*we are the*

representatives of the shareholders". He also had the following exchange with Ms Anderson QC:

> "*Q. So it would be fair would it, to say that leaving aside the formalities of the position, you three were the decision makers?*
>
> *A. Yes. In a way*."

374. In my view Mario was not thereby asserting that he and the other original shareholders had become Group Class Representatives within the meaning of the Articles at the time of the share transfers or indeed at any other time. Nor do I consider that he was making the point in the sense that the original shareholders retained any form of legal entitlement to exercise shareholder rights if or when it came to the need to do so. Likewise, I do not think that Pauline's evidence justifies a conclusion that there was any formal or legal entitlement to exercise the shareholder rights of members of their branch of the family. The way that she put the point in her evidence was that she and her brothers were "*the senior, decision making shareholders of SML*", but she said this both in the context of decisions relating to the management of SML, and in the context of a company that had been run for many year without any perceived need to consult the shareholders in their capacity as such.

375. More generally, I am satisfied that both Mario and Pauline said what they said about their role as shareholder representatives in the context of the influence which they regarded themselves as having retained through their majority shareholdings and their status as the founders of the business and the most senior members of their respective branches of the family. This was fortified by consistent evidence that the junior generation deferred to the views of the senior generation, i.e. the original shareholders, and was a point that was made in slightly different ways by many of the witnesses. In my view this is not particularly surprising in the context of a family business which had been established by the original shareholders. It is plain that members of the family were ingrained with a culture which involved the children demonstrating respect for their parents (as it was put by Mario) and respect for their elders (as it was put by Mr Randall). They continued therefore to have the influence which flowed from that respect.

376. Nonetheless I consider it to be clear that the assent of the original shareholders would only have been sufficient to satisfy the *Duomatic* principle if the Director Defendants had proved that all the other members of the individual families, whether formally or through their conduct, had delegated the exercise of their shareholder rights to their respective head of family. In a related context, the recent decision of the Court of Appeal in *Dickinson v NAL Realisations (Staffordshire) Limited* [2019] EWCA Civ 2146 stresses (a) that the delegation must be sufficient to render the consent of the delegate the consent in law of the legal owner and (b) that all shareholders means exactly what it says – all must approve. *Dickinson* was a case about the right of a beneficiary to assent on behalf of the pension trustee legal owners of the relevant shares, and so is not on all fours with the present case, because there is no allegation that the younger generation held their shares on trust for the original shareholders. However, Newey LJ at [24] expressed his conclusion on the operation of the *Duomatic* principle where the question is whether assent has been given by someone other than the legal owner in a way which stressed the need for all shareholders to do so:

> *"…[I]n circumstances where (as in the present case) neither the trustees as a body nor all those beneficially interested delegated decision-making to one or more individuals, there can be no question of the Duomatic principle applying unless all those with beneficial interests in the shares approved the relevant matter".*

377. Furthermore, where questions of agency arise, it is not sufficient to show that management or other rights or powers were ceded to them nor is it sufficient to show that their influence as to how to proceed was strong or even compelling. The strength of the proxy's influence may evidence the existence of a right, but what is required is still a right to attend and vote, and in my view that means a legal right, enforceable as such in accordance with the terms of the statutory contract constituted by the Articles.

378. On this point I think that the evidence is clear. As I have already described, several years earlier deliberate decisions had been made by the original shareholders to transfer proportions of their shareholdings to the next generation, albeit in the case of Mario and Pauline while maintaining a majority stake. There is no evidence that they intended to retain some part of the bundle of legal rights to which the shareholders were entitled, i.e. a legal right to vote the shares they transferred. The only legitimate inference is that they relied on a combination of the family culture of showing respect for elders and, in the case of Mario and Pauline their majority stakes, to exercise such continuing influence as they wished to retain. Their gradual withdrawal from the operating aspects of the business so as to enable the younger generation to take things forward is consistent with no retention of legal voting rights in relation to the shares transferred. This was particularly the case with the B Shares held by Tony's branch of the family, because Tony only retained 25%, he had withdrawn much earlier on from active involvement and by common consensus his son Spider Sam was less engaged in the general conduct of SML's business than any of the other directors.

379. More specifically, there is a body of evidence which makes plain that the shareholders from the younger generation assumed that they had the legal right to vote the shares which had been transferred to them by their parents (meaning that their assents were required for the operation of the *Duomatic* principle), and no steps were taken by the original shareholders to disabuse them of that assumption. This was why they had to participate in the meetings that mattered whether or not they were part of the management team. Five specific examples suffice.

380. First, the notes of the November 2015 shareholders' meeting were scrupulous in recording the percentage entitlements of each shareholder noted in aggregate as "Voting Share attending 67.32%". This evidences the fact that those separate voting entitlements were regarded as a relevant aspect of the participation at the meeting of shareholders other than the original shareholders.

381. Secondly, in an e-mail dated 21 February 2016, Peter put together a schedule of shareholders' voting entitlements for the purpose of working out the precise percentage of votes which, at the meeting held the previous year on 26 January 2015, had already been cast in favour of what he described as protecting the family assets by restructuring the finances going forward. He specifically identified that 71.33% had already supported the more embryonic restructuring proposal the previous year. This exercise would have been neither appropriate nor necessary if the *de facto* voting entitlement had been retained by the original shareholders. Mr Smith stressed the importance of getting this right in a further exchange of correspondence with Peter, Salvi, Sammy and

Mr Heyes. None of this would have been necessary if the voting rights had been thought by any of them to be anything other than in accordance with the holdings which each shareholder had registered in their own name.

382. Thirdly, considerable efforts were made to ensure that all of the shareholders were present at the 24 March 2016 meeting at which the documentation for the Transaction was signed. It is clear from the way in which everyone behaved at the meeting (and as I have explained I have listened to a recording of what occurred) that each shareholder assumed that their presence and consent was required. I appreciate that it might be said that they were there simply to append their signatures to some of the documentation and not necessarily to consent to SML's role in the Transaction, but I do not consider that the tone of the meeting is consistent with that being what the other shareholders themselves thought was the case.

383. In any event, and this is the fourth factor, each of the shareholders executed the Overage Deed in their capacity as a shareholder in SML in their own right. This would not have been regarded as necessary or appropriate if those rights had been capable of exercise by each original shareholder on behalf of each other member of their respective branch of the family. They also each executed the ICA in their capacity as loan note creditors of LPL to whom they were selling their shares in CET for a deferred payment of £1.484 million. While the CET share sale was not part of the Transaction in respect of which SML shareholder assent was required, CET and SML were intimately inter-connected and seem to have been treated by the family in practice as separate divisions of the same group more than as individual entities in their own right. It is most improbable that the original shareholders were free to exercise their children's shareholder rights in relation to SML in circumstances in which they would not have been regarded as free to do so in relation to their children's shareholdings in CET.

384. Fifthly, Antony made plain during the course of the signing meeting that he was only signing the relevant documents "*because of you three*", by which he meant the original shareholders. This statement would have been heard by everybody else and was accepted by them without apparent contradiction. It carried with it the clear inference that, while he was heavily influenced in the way he intended to vote by the views and position of the original shareholders, he regarded himself as the person who had the legal right to do so, a position from which nobody else in the room dissented. I had the clear impression that this was the position of other members of the younger generation.

Duomatic: Assent of the relevant shareholders

385. SML then submits that there is no basis in the evidence for any finding that all of the shareholders gave valid assent to the whole of the Transaction. In making that submission SML says that nothing which occurred before the signing meeting (and in particular nothing which occurred at the meetings of 26 January 2015, 9 November 2015 or 9 March 2016) could amount to the necessary fully informed consent. I agree if only for the reason that most but not all of the shareholders were present at any of the three meetings, and at the time of the first two meetings, the Transaction was still some way off the form which it eventually took. The figures had not yet been settled on, and the HSBC funding had not yet been agreed.

386. The 9 March meeting came closer to an occasion on which the details of the proposed Transaction were disclosed to the shareholders who attended. But it was not attended by Onofria or any of Mario's children apart from Salvi, all of whom were shareholders, and so to that extent it cannot have supplied the necessary consent. Furthermore, there was no evidence that those who were not present, and therefore did not vote at the end of the meeting, gave any consent or approval to what was proposed, let alone a sufficiently informed consent such as is necessary to engage the *Duomatic* principle.

387. Theoretically the 9 March meeting was capable of being an occasion on which those who attended might have been given sufficient information about the Transaction to ensure that their subsequent conduct constituted informed consent. However, as I have already explained, the difference between the value to be attributed to the WX Hub by the Transaction (£10 million) and the figure for which it had been valued by Bidwells (£11.45 million) was not disclosed to those present, let alone sought to be justified, nor had the figure been disclosed at the earlier meeting attended by Mario and Pauline on 16 February 2016.

388. I am also satisfied that disclosure of Barclays' true position was not made to those present, nor were they told that it was the Director Defendants who had pulled the plug on Barclays not the other way around. As I have already explained in my factual description of what occurred at the meeting, there was also no explanation of the deferred elements of the Transaction, whether in relation to the CET shares or in relation to the amounts to be paid for the transfer of the WX Hub over and above the amount required to repay Barclays.

389. Taken overall, it is clear to me that, even as at 9 March 2016, the picture being presented to the shareholders of the form which the Transaction was to take was incomplete. What they gleaned from what they were told at this stage would have provided additional material from which they might subsequently have been able to put together all of the essential terms of the Transaction, but the drip-feed of information was not a promising basis for a full and frank disclosure to them of the terms and surrounding circumstances of the Transaction. At this stage anyway, the Director Defendants had fallen some way short of making full disclosure of all relevant facts.

390. Turning to the signing meeting of 24 March, SML points out that the only agreements forming part of the Transaction to which all the shareholders gave express written consent were the ICA and the Overage Deed, which all shareholders signed. SML then said that these two agreements are not at the heart of the present proceedings, because the agreements which matter for the present proceedings are the APA and the leases of the nurseries which did not require the shareholders' signatures and did not get them. It is thus said that there is insufficient evidence to prove that all of the parts of the Transaction, and more particularly the parts which matter, were in fact assented to by all of the shareholders, because they were not signed by them.

391. SML accepts that all the shareholders were present on this occasion and knew that, by agreeing to release their signatures to the ICA and the Overage Deed, they allowed the whole Transaction to proceed. In that sense they assented to SML's participation as a counterparty to the Transaction, but, so it is submitted, only to the extent that they knew and understood its component parts.

392. In making that submission, SML relied on the way in which Neuberger J expressed the principle in the passage from *EIC Services v Phipps* that I have cited above. It also relied on:

i) *Denite Ltd v. Protec Health Ltd* [1998] BCC 638, a case which raised (anyway tangentially) the application of the *Duomatic* principle to the statutory predecessor of section 190, where Park J said at p.649F:

> "*I accept that this does not require approval of every last detail, but in my judgment there are some central aspects which must be covered*"; and

ii) the way in which this issue was dealt with by the Court of Appeal in *Sharma v Sharma* [2013] EWCA Civ 1287 at [69], where informal consent was upheld because all the material facts were clearly put before the family. What is and what is not material will of course depend on all the circumstances of the case, but *Sharma* (see the judgment of Jackson LJ at [47]) is also an illustration of the principle that, where *Duomatic* is relied on to demonstrate that the shareholders have cleansed a breach of fiduciary duty, "*the court is scrupulous to ensure that the director has made full disclosure of all relevant facts to the shareholders*." The focus is on whether the facts are relevant to the decision which has to be made. In this context the court should also be scrupulous to ensure that shareholders have an adequate opportunity to absorb and understand not just what those facts might be, but also how they might be relevant to the decision which they are being asked to make.

393. In my view the mere fact that not all the shareholders signed all of the Transaction documents does not demonstrate of itself that there was no sufficient assent. Nor do I agree with SML's submission that there was no assent because there is no hard evidence that each of them had seen and considered each of the Transaction documents. If there had otherwise been a full and frank description of the Transaction and its surrounding context, it may have been possible to infer assent from the fact that the documentation would have been available for inspection had they chosen to take advantage of that opportunity. This is because they would have known from the description which they should have had that the documents which they signed were only part of the whole Transaction. However, the fact that several of the shareholders were not shown all of the documents increased the burden on the Director Defendants to ensure that the terms of the Transaction itself and the relevant surrounding circumstances were explained in a full and frank manner.

394. In my judgment that did not occur, and there are a number of respects in which it cannot therefore be said that SML's shareholders gave approval and assent to the Transaction at this meeting. This is not because they did not know of all of the component parts of the Transaction – in a general sense they did and went ahead anyway. It is more because there were important relevant details of which some of them were not aware at all and it cannot be said that they were matters which they could have been expected to take steps to identify themselves, more particularly in the light of what the Director Defendants were telling them about the imminent formal insolvency of SML if they did not approve the Transaction as a matter of urgency. It was also because there were other relevant matters in respect of which their knowledge was incomplete.

395. The matters falling into these categories were (a) an inadequate explanation of the arrangements under which Waltham Abbey and Fen Drayton were to be rented out by SML (b) how the price for the transfer of all of the assets transferred was calculated (c) the fact that, while the WX Hub was included in the Transaction for £10 million, it had been valued at £11.45 million and (d) the true attitude of Barclays to the funding of SML as an alternative to the management buyout to be achieved through the medium of SFP, SGP and LPL and funded by HSBC.

396. In their closing submissions, Mr Roe QC and Ms Johnson distinguished between material facts which were not mentioned at the signing meeting held on 24 March and some positively misleading misstatements which were made in relation to the same matters. I shall deal with both together by reference to the four specific subject areas which I have just mentioned. Some were obviously more significant than others, but they must also be looked at in the round. Having done so, I am satisfied that at the time they appended their signatures at the signing meeting, the shareholders apart from Peter, Sammy and Salvi were not sufficiently informed to enable them to give a fully informed consent to the Transaction. In short, to the extent that decisions to approve the Transaction were made at that stage, they were not made after full disclosure of all relevant facts.

397. The reason that I qualify the extent to which decisions were made at the signing meeting itself is that the documents were only signed in escrow. In my view this also means that shareholder consent to the Transaction for the purposes of the *Duomatic* principle must be reconsidered at the time at which Gisby Harrison were authorised by each of the shareholders to release the escrow to enable the Transaction to complete. It follows that the events subsequent to the signing meeting (but before the time of completion on 1 April 2016) are also relevant to the question of whether or not the shareholders gave fully informed consent. I shall return to that question shortly, but before I do so I shall explain my findings in relation to each of the material matters in which full disclosure was not made by the Director Defendants to the other shareholders at the time of the signing meeting itself.

Waltham Abbey and Fen Drayton Leases

398. As to the difference between the market rental value of the Waltham Abbey and Fen Drayton on the one hand and the amount for which the Transaction provided that the nurseries would be rented to SGP, the terms of this part of the Transaction do not seem to have been raised at all at the signing meeting and the lease was not a document which the shareholders were required to sign. In my view this was a material omission because the rent payable to SML under the leases was materially less than the rent which would have been paid on the open market having regard to such evidence as was available to the Director Defendants at the time.

399. As I explained earlier in this judgment, the Director Defendants had seen a valuation of Fen Drayton in October 2015, which seems to have been for the purposes of the PUG energy deal relating to the CHP engines. The annual rental value for Fen Drayton given by Quintons at that stage was £457,600 per annum with the potential to market it for rather more: £475,000 for the glasshouse and £57,600 for the hostel accommodation. The figure included as part of the Transaction was £368,500 per annum, very

substantially less than the amount that Quintons had considered was a proper market value only a few months earlier.

400. In his evidence Peter confirmed that the figures arrived at for the Fen Drayton lease did not come from the Quintons valuation, but rather were calculated by "*myself and Salvi doing the forecasts. That is where we got all the rent figures from*". There was then the following exchange, which clearly reflects the reality of what occurred, which was to value the rental stream by reference to what could be afforded by the new business to be operated by SFP and SGP rather than by what the market value in fact was:

> "*Q. What I am suggesting to you is that none of those, as far as the rental value of the property was concerned, for the purposes of the transaction, none of them used a market rent as the basis of it. They all used a rent that somehow fitted into the transaction to suit getting the transaction working.*
>
> *A. That is correct.*"

401. Sammy also said that he was involved in the process and his evidence explained how the rentals were calculated in terms which were consistent with the conclusion that the focus was on what the new business could afford not what the market rental value of the land actually was. He also made the point that what the Director Defendants and Salvi were looking at was what they all thought would be an appropriate dividend for SML (as lessor) to be able to pay to its shareholders:

> "*We were looking at how to get back, because Mario, Pauline and Antonio were on £60,000 a year and we wanted to get them back more money. So, what we did is we worked the rent out. And I think when we did the rental figures, it worked out that Mario would get £80,000 in dividends, Pauline was a little bit more, Tony was still over the £60,000. And all the other shareholders, first time in their life they would ever have got dividends."*

402. Doubtless there are many business contexts in which the approach adopted by the Director Defendants would have been appropriate, but in circumstances in which the rental figures reached by taking this approach were materially less than the market value and the tenants under the leases were companies in which the directors of the landlord had an interest, I have no doubt that full and complete disclosure to SML's shareholders was required. In my judgment, in order to ensure that the other shareholders gave informed consent to the Transaction, it was necessary for them to understand what had actually been done in relation to the leases. In order for their assent to the Transaction to be fully informed, it was necessary for the Director Defendants to have explained to all of the shareholders (a) the basis on which the rent payable under the two leases had been calculated, (b) that the amount payable under the Fen Drayton lease was less than the amount for which it had been valued a few months earlier and (c) that no independent valuation had been obtained for either Fen Drayton or Waltham Abbey for the purposes of the Transaction.

403. I should add that SML also adduced expert evidence of the rental value of the two nurseries at trial. The principal reason for doing this was to establish its loss rather than for the purposes of establishing material non-disclosures to SML's shareholders. I shall consider the detailed criticisms of that evidence when dealing with the question of loss, but for present purposes it suffices to say that I consider that the view of the expert (Mr

Mark Catley FRICS) was broadly accurate. In my view, his conclusions support SML's case that the non-disclosures were material. His evidence was that the market rental value of Fen Drayton was £435,000 per annum, a figure which was slightly less than the figure given in the Quintons valuation. His view of the market rental value of Waltham Abbey was that it was £308,500 per annum. Both of these figures were materially more than the £368,500 for Fen Drayton and the £100,000 per annum for Waltham Abbey included in the terms of the Transaction.

The Transferred Liabilities

404. The second matter relied on by SML as a matter which should have been explained to the shareholders was how the proposed £10 million price for the acquisition of the WX Hub, the Produce Business and the Non-Produce Business was to be discharged. This was a reference to the fact that, while £6.5 million "*comes across at completion*" as Mr Moffat put it at the signing meeting, there was an inadequate explanation of the component elements of the £3.5 million balance. In particular it was not explained to the shareholders how the £2 million of liabilities to be taken over by SFP and SGP as part of their acquisition of SML's Produce and Non-Produce Businesses were calculated.

405. This was an issue on which Sammy was cross-examined. He was unable to assist on whether the shareholders were given any information on the point and I am satisfied that, if they had been, he would have been able to explain how and when the information was provided. There was no documentary evidence of how the calculation was carried out and although it was said that details would be provided to Ms Lever the day before the signing meeting, there is no evidence that they were, and Sammy said that "*I would not know if it got given to Angela Lever or not*." Sammy denied that there was simply a rounding up of the SML liabilities disclosed in the February management accounts from a figure of £1.689 million to £2 million, but I am very sceptical about his evidence on this point, not least because documentary evidence explaining the position would have emerged if the calculation said to have been done by Sammy had been done in a manner which supports what he now says occurred.

406. In summary I do not accept that an accurate assessment of the liabilities was made when the £2 million figure was chosen, and I am satisfied that an element of rounding up occurred. I accept that Sammy may have revisited the £1.689 million figure, but I do not accept that the increase from a precise figure to a rounded £2 million reflected the extent of the liabilities undertaken with the precision with which they had been included in the February management accounts. In my judgment what happened was a mix of the two: Sammy found some more liabilities after the end of February, but he then rounded up the figure to £2 million.

407. Given that this was the case, I think that this was another matter which should have been disclosed to the shareholders at the signing meeting. Taken on its own it may not have been a particularly significant issue in purely financial terms, but it reflected an approach to the design of the Transaction as a whole which concentrated more on ensuring the viability of the new businesses going forward than it did on an accurate assessment of the value of the assets and businesses being transferred. This approach was itself a matter of which the shareholders were entitled to be informed, in the light

of the Director Defendants' obligations to ensure (as counterparties to the Transaction through SFP and SGP) that their consent was given on a fully informed basis.

Value of the WX Hub

408. The third matter relied on was the value of the WX Hub. The factual background to this is relatively straightforward. The APA made provision for the purchase price to be £10 million, while the Bidwells valuation which had been produced at the end of February valued it at £11.45 million. I have already explained earlier in this judgment why I am not satisfied that this valuation was drawn to the attention of Mario, as alleged by the Director Defendants. What is not really in dispute, however, is that the valuation was certainly not drawn to the attention of the shareholders as a whole and the difference between it and the figure included in the Transaction documents was not drawn to their attention or explained. Indeed, there were a number of occasions on which the clear impression was given not just that the WX Hub was being transferred at an agreed value of £10 million, but also that £10 million was what it was worth.

409. Taking these considerations together, I am satisfied that the consent to the Transaction given by the shareholders whether at the signing meeting or otherwise was not given on fully informed basis. It is appropriate however, for me to summarise in a little more detail, why it is that the approach of the Director Defendants to the true value of the WX Hub was so misleading. I do so against the background of the information other than the Bidwells valuation which was available to them and which should in my judgment have caused them to be much more open with the shareholders than they were about the likelihood that the transfer of the WX Hub was for a figure which was very significantly less than its true value. Their lack of openness is illustrated by the confusing evidence as to how Mr Heyes came to his £10 million figure which I have already described when explaining what he told V&S at the time they were instructed at the beginning of March.

410. The first piece of information that they had was that there was an earlier valuation of the WX Hub which I have already mentioned and on which reliance was placed by Mr Heyes. It was produced almost 8 years before the Transaction by Glenny LLP and was for £9.2 million, valued on what was described as a comparable freehold approach.

411. The second was Peter's own view of the value of the WX Hub from time to time. The clearest example of this was when he indicated that he thought it was worth about £11 million when discussing SML's financial situation with Barclays in June 2013. I have already explained a little more of the detail of what occurred, but I should reiterate that Peter was very defensive when he was questioned about his recording of the value of the WX Hub at the June 2013 meeting and I do not think that he would have recorded it in his note of the meeting in the way that he did if he had not then believed (some 3 years earlier) that it was worth £11 million.

412. A figure of £8.6 million was then used by Mr Heyes as a value for the WX Hub when he was advising on how much of the loan and energy deal finance being derived from the refinancing which eventually became the Transaction could be made available for business development purposes. Peter accepted that he did not challenge the use of the £8.6 million valuation for this purpose. I think it is clear that this is a symptom of the

fact that Peter's focus was on valuing the WX Hub at a figure which made the Transaction work, rather than asking what the WX Hub was worth and then designing the Transaction around that figure. Put another way it became clear from this amongst other evidence that the basis on which the Director Defendants in fact chose the figure for the value of the WX Hub was as Peter crisply put it in his oral evidence "*It was what funds were available to do the deal*".

413. In reaching my conclusions on this aspect of the Transaction, and the significance of what the shareholders were not all told about the value of the WX Hub, I have had regard to what Mario was advised by Mr Harrison in his letter of 29 March. The letter raised questions about the value attributed to the WX Hub under the Transaction, although the focus (in this letter and the draft letter to Gisby Harrison which accompanied it) was more on the discrepancy in the Overage Deed between the £11.45 million figure at which the overage payment became payable and the figure of £10 million for which the WX Hub was to be transferred under the Transaction This overage issue was also the point by which Mario was most exercised when he went to the WX Hub the following day.

414. Ms Anderson QC pointed to this as a clear indication both that Mario must have known that the WX Hub had been valued at £11.45 million and that in any event he had sufficient information as a result of what he knew from comparing the Overage Deed to the price included in the APA to have worked out that the price was less than the figure for which the WX Hub had been valued. While I agree that on this point it is surprising that he did not simply assume that the WX Hub had been valued at £11.45 million, I do not think that he made that assumption. More importantly for present purposes I am satisfied that the burden remained on the Director Defendants (as the effective recipients through their ownership of SFP and SGP of the assets to be transferred under the Transaction) to ensure that full information on this point was given to Mario, and indeed each of the other shareholders. In my judgment, they did not do this.

The Attitude of Barclays

415. The fourth matter relied on by SML was a failure to disclose the true attitude of Barclays to the funding of SML as an alternative to the management buyout to be funded by HSBC. This was an important factor because it was something which continued to operate on the mind of Mario even after the advice that he was given by Mr Harrison on 29 March 2020. Mario's assessment of the risk of administration or some other form of formal insolvency eventually outweighed all of his other doubts about the Transaction. As my factual findings have already indicated, I agree with the broad thrust of SML's case that the Director Defendants were not straightforward with the shareholders on this issue. They did not give them the full picture and left them with a highly misleading impression of what had occurred.

416. The simplest way of describing the half-truths which the Director Defendants told (and permitted others, in particular Mr Moffat and Mr Wilson Smith, unwittingly to tell) is the constant refrain that, if the Transaction was not concluded, Barclays would force SML into administration and the shareholders would lose everything. As I have already described in some detail, this was said with particular insistence both at the 9 March

meeting and the signing meeting on 24 March 2016 and I have no doubt that what was said reflected what each of the Director Defendants intended to convey whether or not they said it themselves. The impact of the way that this was expressed has to be seen against the background of similar expressions of Barclays' general attitude which had been conveyed to Mario and Pauline by the Director Defendants and Salvi on 16 February 2016 when they were told in terms that the Transaction funded by another bank was the only alternative to administration.

417. It is clear from what Mario said in his evidence, from the transcript of the signing meeting and from what Ms Lever recorded as having been told at the time she was instructed, that Mario at least (and others of the shareholders as well) had been left with the clear impression by the Director Defendants that Barclays wanted to pull the plug and foreclose. Mario made clear at the signing meeting that this was what he understood the position to be and he would not have said what he said if that was not what he thought was likely to happen, and that was not contradicted by Peter or Sammy. He also would not have expressed himself in the way that he did if he had realised that the catalyst to terminate SML's facilities was not Barclays' own decision to withdraw support (as the Director Defendants sought to portray), but was rather their own preference to proceed with the Transaction on the terms which reflected the funding made available by HSBC.

418. I am satisfied that the Director Defendants gave a materially misleading impression of the attitude of Barclays both before they themselves terminated the relationship and afterwards, when they were describing to the shareholders the circumstances in which SML then found itself as a result of the ending of that relationship. I accept that for some time there had been concern about Barclays and the support that it was prepared to give which had been expressed with varying degrees of force by some of the shareholders (Pauline seems to have been particularly vociferous in her opposition). However, I do not accept that a decision to move away from Barclays was made as long ago as the 9 November 2015.

419. All that happened at that stage was that the Director Defendants were authorised to look for other sources of funding. What seems to have happened is that they took the discussion held then as a green light to move SML's banking elsewhere come what may. More seriously they then entered a mindset which led them to structure the Transaction around the funding that was available rather than working out the true value of the business and the assets and then seeking to see if they could obtain the funding they required to take matters forward. This also led them to adopt an attitude of mind which focused more on how to fund the new business, rather than having regard to the question of how they ensured that a full and fair value was paid by the new business for the assets to be transferred by SML.

420. In my judgment this approach caused the Director Defendants to present Barclays' position as being destructive of the ability of SML to continue to trade. This was not a full and frank description of Barclays' position because it was clear from Mr Pickford's evidence that in principle it was prepared to continue to support SML – what Barclays was not prepared to do at that stage was to support the new structure proposed by the Director Defendants. In order to disclose all material facts to the shareholders, it was necessary for the Director Defendants to have given a clear explanation to the shareholders that there was an alternative to the Transaction which it was likely that Barclays would have been prepared to support. This they did not do.

421. The position in relation to the disclosure of Barclays' true position did not improve as a result of the advice which some but not all of the shareholders received from Mr Harrison after the signing meeting. In his letter of 29 March 2016, Mr Harrison advised the original shareholders to whom it was addressed that it was unclear how real the threat of Barclays pulling its financial support actually was. It is plain that this, amongst other things, caused Mario to think again, but it is also clear that as a result of what he was then told by the Director Defendants (and more particularly Mr Smith) at the WX Hub on 30 March, he formed the view that there was no alternative but to proceed. Doubtless by this stage, pulling the Transaction, and going back cap in hand to Barclays would have been difficult (although it is noticeable that Mr Harrison was unsure how real Barclays' threat actually was). However, what matters is that even then the full story had not been told by the Director Defendants, and the burden remained on them to do so. In my judgment, the only way that a fully informed consent could have been extracted from the shareholders was if that had been done.

The Breaches of Duty

422. SML does not just rely on the statutory indemnity, it also says that the Director Defendants acted in breach of duty in procuring it to enter into the Transaction. The first breach is simply that they failed to obtain informed shareholder approval for the Transaction. On one level this adds little to the statutory liability to indemnify under section 190, but I agree with SML's submission that it amounts to a freestanding breach of duty because the Director Defendants all participated in the design and implementation of the Transaction without obtaining full shareholder consent, thereby causing SML to commit an unlawful act. Put another way, the facts which I have already set out as to why there was no fully informed shareholder assent to the terms of the Transaction meant that the Director Defendants were not acting with the proper ambit of their powers because the disclosures that they made and failed to make (as already described) did not give the full picture to which the shareholders were entitled.

423. The second breach of duty asserted by SML was a failure by the Director Defendants to instruct lawyers to advise SML separately from SFP and SGP, combined with a failure to give the shareholders of SML sufficient time to obtain advice on and scrutinise the terms proposed. I agree that the Director Defendants owed a duty to SML to ensure that proper independent advice was obtained, because separate representation would have gone some way towards ameliorating the consequences of the conflict of interest which they had as directors of SML on the one hand and directors and shareholders of SFP and SGP on the other. In my judgment it is elementary that in a transaction of this type and size, directors of the selling company will normally come under a duty to ensure that it has separate legal advice from the advice being given to the purchaser. This may not be necessary where those interested in the vendor and purchaser are exactly the same people, but where the nature of the transaction is such that legal advice is required and there is a divergence in ownership or other stakeholder interest, the directors of both entities are likely to be in breach of duty if they simply rely on the legal advice being given to the other.

424. In the present case the role fulfilled by Ms Lever and Mr Harrison went some way towards satisfying the duty, but I do not consider that anything like enough was done, nor was it done early enough. There are a number of reasons for this. In particular

neither Ms Lever nor Mr Harrison were ever instructed by SML, and there was some confusion over exactly whom they were both advising, which the Director Defendants knew to be the case. They each regarded themselves as instructed by one or more of the original shareholders, but Ms Lever never saw herself as acting for SML. It was also evident that Ms Lever did not have the appropriate experience or expertise to give the necessary advice (nor did she purport to do so). While Mr Harrison was only instructed after the signing meeting and then by some but not all of the shareholders rather than SML itself.

425. Most importantly, the advice was only given and received at a very late stage in the process which gave little time for reflection or the considered advice which it would have been in SML's best interests to receive and which would have been more likely to enable the shareholders to consider whether or not to approve the Transaction on a fully informed basis. I accept that once the decision to move the banking from Barclays to HSBC had been conveyed to Barclays there was acute timing pressure if the Transaction was to proceed. However, I am satisfied that this was driven by the Director Defendants' own desire to push for completion of the Transaction with insufficient regard to the question of the steps that needed to be taken to ensure that SML was properly advised in the interests of its shareholders as a whole. In my view, by failing to ensure that lawyers were instructed to advise SML earlier in the process when, objectively speaking, there was no good reason for them not to have done so, the Director Defendants breached their duties to SML.

426. The third breach of duty relied on by SML was a failure by the Director Defendants to obtain professional independent valuations of SML's business. It was submitted that Mr Heyes was incapable of providing independent advice because his primary role was as advisor to the Director Defendants and Salvi in their capacity as directors of and shareholders in the purchaser. SML submits that this gave rise to an obvious conflict of interest which it was in SML's interest to have resolved by the appointment of an independent valuer looking at the position from the perspective, and only the perspective, of SML. It was submitted that the reason that the Director Defendants did not obtain independent valuations was because they were not approaching the Transaction with the intention of paying the market value for SML's business and assets, and they valued the business and assets of SML in order to fit the level of finance they had been offered by HSBC.

427. In my judgment, SML has established this breach of duty as well. For reasons similar to those which I have explained in relation to the breach of duty in not instructing separate lawyers, I consider that it was essential for SML to have had separate valuation advice and the Director Defendants took no steps to ensure that this was done. I am satisfied that, by failing to take this step the Director Defendants failed to act in a manner which was required to protect SML's best interests and I do not consider that it is sufficient for the Director Defendants to say that the responsibility for obtaining that advice lay with the shareholders themselves. This is to ignore the fact that SML was a separate legal entity in its own right and it was SML's assets which were being transferred and restructured under the terms of the Transaction. No steps were taken by the Director Defendants to correct this deficiency before completion of the Transaction.

428. The fourth breach alleged by SML was that the Director Defendants failed to give any proper consideration to alternatives to the Transaction. It was submitted that quite apart

from the failure to pursue a continuation of the long-term relationship with Barclays, deferring the restructuring until after the new business model had settled down, they should have explored the feasibility of selling SML's assets and more specifically the offer of a £3 million loan suggested by Antony at the 24 March meeting or even of seeking the repayment by FPIL of SML's loan.

429. The real substance of this complaint is that, once the Director Defendants had started to develop the Transaction in the broad form which it eventually took, there was insufficient consideration given by them to any other alternatives over and above whatever they could achieve through a structure which took that form. In short, the complaint is that, having fixed on this solution at an early point in time, they did not give proper and continuing consideration to whether a market asset sale would not achieve a better result.

430. In her closing submissions, Ms Anderson QC had a section which explained how the Transaction in fact achieved value and benefit for the SML shareholders. This was intended to demonstrate that the restructuring deal which the Director Defendants devised was in everyone's interests including in particular the original shareholders. She said that, before the Transaction, SML had had three sites worth c.£20 million (in fact I think they were worth £22 million plus development potential at Fen Drayton worth another £1.8 million) with liabilities of c.£9.5 million, while the effect of the Transaction was to leave SML with Fen Drayton and Waltham Abbey (worth £10.65 million plus the development potential) and a substantial and secure income stream. She then said that SFP took all the risk ending up with the WX Hub, debt to HSBC, rental obligations and the need to turn the business around. This she said was a good deal all round, and particularly for the original shareholders who wanted to retire.

431. I accept that these types of benefit were significant factors to go into the mix when the Director Defendants were considering the right way forward. But the overarching problem with this analysis is that the Director Defendants arrogated to themselves the responsibility for taking the ultimate decision by driving the proposal forward in such a way that they removed the effective decision-making power from the shareholders by presenting to them a situation in which they had no alternative but to agree or accept an administration of SML (the latter of which was not in any event accurate). The legislation leaves with the shareholders collectively the right to approve or disapprove the terms of a substantial property transaction within the meaning of section 190. The conduct of the Director Defendants cut across this principle.

432. In any event, one of the principal deficiencies in the approach adopted by the Director Defendants was that they had no proper regard to alternative asset realisation strategies which focussed on maximising value for each of the assets, but instead became focussed on how the business was to be carried on by SFP and SGP going forward. The most tangible manifestation of this approach is the clear evidence which I have already outlined that the Transaction was designed around the available funding, rather than working out what the best value was that could be achieved for the assets and then pursuing that solution unless and until the shareholders, on a properly informed basis, resolved that that course of action was no longer to be pursued. It is also supported by the evidence that the Director Defendants were stringing along Barclays whose support would have been predicated on an alternative approach while waiting for the HSBC offer which they knew (as and when it came) would be designed around the form of Transaction which they had set their minds on implementing. The conflict of interest

between the Director Defendants as directors of the vendor and their position as directors and owners of the purchasers is an illustration of why a transaction of this sort needs shareholder approval.

433. I do not think that the Director Defendants and Salvi set out to defraud the other shareholders. I do however think that they developed an idea of what they wanted to do at quite an early stage. They then convinced themselves that a restructuring of that type could be designed so that it generated what they regarded as an adequate return for SML's shareholders and a healthy income stream for the original shareholders in particular. Having been through that thinking process, they then concentrated on how to maximise their own beneficial return from SFP and SGP in the future and closed their eyes to the possibility that as the restructuring developed so the return for SML's shareholders might become increasing unattractive. This was apparent as aspects of the Transaction such as the impact of the deferred consideration and the proper value of the WX Hub developed. It is clear to me that as that happened, they completely lost sight of what they should have been doing all along which was keep the interests of SML in the maximisation of its assets clearly in mind.

434. For these reasons I am satisfied that each of the Director Defendants is liable for this breach of duty.

Section 1157(1) of the 2006 Act

435. I must also give consideration to the question of whether or not the Director Defendants have established that the court should exercise its jurisdiction to excuse the Director Defendants from liability. This is the fifteenth agreed issue, but it is convenient to consider it at this stage. Section 1157 is in the following form:

> *"If in proceedings for negligence, default, breach of duty or breach of trust against–*
>
> *(a) an officer of a company, or*
>
> *(b) a person employed by a company as auditor (whether he is or is not an officer of the company),*
>
> *it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit."*

436. It is not in issue that relief is available in any case where directors may be liable under section 195 of the 2006 Act, to the same extent as it is available where a director is otherwise liable under Chapter 2 of Part 10 of the 2006 Act. Although not on all fours, it seems to me that a case which I have already referred to in a different context, *Dickinson v NAL Realisations (Staffordshire) Ltd* [2019] EWCA Civ 2146 at [44], is supportive of the conclusion that SML was correct not to argue that relief was not available as a matter of principle. Where a claim is made against a director for causing

the transfer of property by a company without authority it is likely that the jurisdiction to relieve under section 1157 of the 2006 Act will be engaged whatever the underlying reason for the lack of authority and irrespective of whether or not the relief sought against the director is personal or proprietary in nature.

437. It follows that in both cases the essential question for the court is whether it appears that the director concerned has acted honestly and reasonably. If it does, the court is then able to go on and consider whether he ought fairly to be excused. In many cases, once a director has been found to have acted honestly and reasonably, that will be sufficient, and the relief will then be granted but that is not necessarily the case. I should add that *Re D'Jan of London Limited* [1994] BCLC 561 is an example in a much simpler context of how a negligent director can be held to have acted reasonably for the purposes of section 1157. In *D'Jan*, even though there was objective carelessness by a director in failing to read a form before signing it, that conduct was held to be not unreasonable for section 1157 purposes given that the only persons whose interests he was thereby putting foreseeably at risk were himself and his wife.

438. In seeking relief in the present case, the Defendants rely on the fact that they did not act dishonestly and that SML has never pleaded that they did. They say that they acted honestly in seeking to rescue the business and to preserve value in the assets for the benefit of the families as a whole and especially the older generation in extremely difficult circumstances. They also rely on the fact that they were trying to do their best while the other two directors (Salvi and Spider Sam) abrogated their responsibilities and they point to the fact that the experts agreed (as they did) that the separation of the trading business from the land and property which SML owned was a reasonable commercial and financial strategy.

439. In considering this question the burden is on the director liable for breach of duty to show that relief ought to be granted. In my judgment, in the present case, they have failed to do so. The primary reason is linked to their failure to respond in the way that they should have done to the developing nature of the restructuring and to keep on reconsidering whether it remained the best deal for SML without regard to the question of their own interests in SFP and SGP. They failed to take this approach at every stage and that was very clearly unreasonable conduct. Furthermore, I am satisfied that the more that the Director Defendants knew about the concerns of the other shareholders, the more that it was incumbent upon them as directors acting reasonably to ensure that the other shareholders were fully informed.

440. I also have regard to the fact that some of their conduct during the development of the restructuring proposals was particularly egregious and displayed a high level of unreasonableness which counts against the grant of relief. The particular matters which I take into account, all of which served to emphasise the Director Defendants' lack of regard for the rights of the shareholders collectively to determine whether or not the Transaction should proceed included:

    i) the way in which they started to divert business from SML to SFP some time before the terms of the Transaction had been approved, and the fact that they were not straightforward with Barclays that they had done so;

    ii) the pretence that they had a NatWest funding offer when they did not;

iii) the pretence that the shareholders had already approved the move from Barclays to HSBC at the time when they gave notice of the move;

iv) the undisclosed reasons for the move from V&S to Gisby Harrison, part of which included Peter's irritation that V&S were querying the basis of the overage arrangements.

441. I also do not consider that the fact that the Director Defendants designed and implemented the Transaction with the benefit of professional advice assists their position.

i) There was considerable confusion until the very last minute as to which lawyers were advising whom and there was no attempt by the Director Defendants to ensure that there was a proper delineation of responsibility as between those advising SML and those advising SFP and SGP. Indeed, the only clear advice with appropriate expertise given to the vendor side of the Transaction came from Mr Harrison and was obtained by Antony for the benefit of himself and Mario. It was not obtained by the directors of SML (as it should have been) nor was it given to SML itself. It proved too late to be of material benefit to SML, a consequence in my view of the Director Defendants' culpable failure to obtain separate advice for SML at a much earlier stage.

ii) The position is even more acute so far as concerns valuation and accountancy advice. It was plain that Mr Heyes was looking at everything from the perspective of SFP and SGP, rather than the perspective of SML. I think that this was obvious to the Director Defendants, and points strongly against a conclusion that they behaved in a reasonable manner in relation to the Transaction such as to justify the grant of statutory relief from liability.

442. In all these circumstances the application for relief under section 1157 of the 2006 Act fails.

SML's Loss from the Transaction

443. I now consider the loss which SML claims to have suffered as a result of the Transaction. The principles to be applied in ascertaining the amount in respect of which the Director Defendants are obliged to indemnify SML were summarised by Arden LJ in *Murray v Leisureplay plc* [2005] EWCA Civ 963, when considering the correct approach to the statutory predecessor to sections 190ff. In my view they are equally applicable under the current law:

> "*In Re Duckwari plc (no 2), this court decided the issue of borrowing costs as a matter of the interpretation of section 322(3)(b) . Section 322(3)(a) imposes a liability to account for any gain made "directly or indirectly" by the arrangement or transaction in question. By contrast, the liability to indemnify the company is only for any loss or damage "resulting from the arrangement or transaction". In my judgment this court essentially took the view that loss or damage within section 322(3)(b) could not include loss or damage which resulted indirectly from the arrangement or transaction in question. It is open to question whether this*

interpretation is consistent with this court's previous conclusion in the earlier Duckwari case that a parallel was to be drawn between the liability imposed by section 322 and the liability imposed as a matter of trust law on the trustees. However, its interpretation of section 322(3)(b) in this way is binding on us"

444. As I have already explained it is also contended by SML that, quite independently from the obligation to indemnify SML under section 195(3)(b), the Director Defendants are liable to compensate SML for the breaches of duty which caused the Transaction to be entered into, and in the previous section of my judgment I have concluded that the Director Defendants are liable for such breaches. I did not understand either party to contend that different principles applied to quantification of the losses to SML depending on the question of whether the claim was for an indemnity or was for damages or equitable compensation for breach of duty in accordance with section 178 of the 2006 Act.

445. The categories of loss were identified in Schedule 3 to the Re-Re-Amended Particulars of Claim. There were 3 categories of what were described as "Loss resulting from the Transaction" as follows:

i) The difference between the net value of the business and assets transferred and the sum of £6,358,973 received by SML under the Transaction. The precise amount of this figure moved during the course of the trial, but by the time of its closing submissions SML quantified these losses as £10,141,027.

ii) The difference between the amount that SML would have received if Fen Drayton and Waltham Abbey had been leased at market rents and the amount that they in fact received under the terms of the Transaction. This loss was quantified at £275,000 per annum and persisted for 994 days until SML took possession on 20 December 2018 after SGP had gone into administration, therefore totalling £748,392.

iii) The costs of the Transaction which SML put at £118,511.

446. Much more time was spent at trial on the first head of loss and SML adduced expert evidence from a chartered accountant, Mr John Frenkel, on the true value of the business and assets transferred as part of the Transaction. (Mr Frenkel also gave evidence on some of the other heads of loss not directly arising out of the Transaction.) Initially the Director Defendants elected not to obtain expert valuation evidence of their own, although at the last minute they changed their minds by which stage it was too late. Nonetheless, Ms Anderson QC subjected Mr Frenkel to a forceful cross-examination on this, amongst other issues, and as will appear I have not accepted many of the views which he expressed.

447. I should add that Ms Anderson QC described Mr Frenkel as a witness who was partisan, prone to bias and exaggeration and who trespassed on numerous occasions outside the ambit of the court's orders, his own expertise and the proper scope of expert comment. Regrettably there is force in some of these criticisms, and Mr Roe QC accepted in his oral closing submissions that he could not defend some of what was said as proper evidence from an expert owing duties to the court. Indeed, the way in which Mr Frenkel expressed himself on occasions gave the appearance of a lack of independence of mind. It has made the court's job more difficult and it has reinforced the need to treat what he

had to say with some caution. However, his report also contained many good points and provided support for the methodology adopted by SML to quantify the losses it claims to have suffered as a result of entering into the Transaction, and I shall express my conclusions by reference to his structure.

448. It seems to me that the starting question is what the assets sold as part of the Transaction were in fact worth at the time of the Transaction, or as Mr Roe QC put it in his closing submissions what a hypothetical purchaser interested in purchasing those assets would be prepared to pay. Mr Frenkel's final position after some adjustments was that (a) the WX Hub was worth £11.45 million not the £10 million at which it was valued for the Transaction, (b) rather than net liabilities of £2 million being taken over by SFP and SGP from SML, they in fact acquired net assets of £1,574,577 and (c) the value of the remaining assets transferred to SFP and SGP as part of the Transaction, comprising in large part the benefit of profitable contracts and goodwill was not the nominal £2 provided for by the Transaction but was in fact £3,475,423.

449. The first two figures were reached by the essentially straightforward exercises of (a) taking what Mr Frenkel considered to be the best evidence of the market value of the WX Hub and (b) making what he considered to be a number of legitimate adjustments to the net liabilities figure reached by Mr Heyes. The figure for the value of the remaining assets was reached by a different process of reasoning. It involved Mr Frenkel adopting an earnings-based valuation – i.e. applying an appropriate multiplier to a weighted average EBITDA - in order to establish the total value of the businesses transferred. The value of the remaining assets referred to in (c) above was then the difference between the total value of the businesses transferred and the assets referred to in (a) and (b) above. His conclusion was that the total value of the businesses transferred was £16,500,000 which led to the figure for goodwill of £3,475,423 that I have already mentioned.

450. Ms Anderson QC submitted that, standing back, Mr Frenkel's valuation felt instinctively wrong in the light of SML's recent financial performance during the run-up to 1 April 2016 and the extensive evidence as to the financial difficulties to which SML had been subject, including in particular it being subject to the Barclays BSU. As will appear, I have concluded that there is some substance in Ms Anderson's submission.

451. I can take the value of the WX Hub relatively shortly. I am satisfied that Bidwells' valuation of £11.45 million should be accepted as the market value of the WX Hub at the time of the Transaction, and the Director Defendants did not advance a positive case that it was not. It was well-reasoned and was produced at the request of Barclays for lending purposes so will not have been subjected to any client pressure to maximise value. The value is also entirely consistent with the previous assessments which I have outlined earlier in my judgment. On this element of the calculation, SML sustained a loss from the Transaction of £1.45 million.

452. As to the adjustments made to the figure which Mr Heyes arrived at for net liabilities, I shall deal with them one by one. The first is relatively straightforward. I have already mentioned that the figure actually reached by Mr Heyes was £1,686,150, not the £2 million included in the computation of the consideration to be paid. There has never been any explanation of that discrepancy apart from the inference that it was simply a

rounding-up. I can see no basis on which that rounding should not be reversed as part of the computation of the true value of the assets transferred to SFP and SGP.

453. The next adjustment made by Mr Frenkel was that the assets and liabilities taken over as part of the APA did not include the fixed assets included in SML's fixed asset register as at 29 February 2016. He said that these should have been included because they were all transferred to SFP and SGP as part of the Transaction. He quantified the necessary adjustment at £521,943. The Director Defendants did not dispute that this figure was not included in the £1,686,150 calculation of assets and liabilities taken over as part of the APA, but it was Mr Heyes' evidence that their value was included in the £10 million which was paid for the WX Hub. Furthermore, the fixed asset register was concerned with a net book value of cost less depreciation and did not reflect a separately realisable asset value.

454. I was not taken through the nature of these fixed assets in any detail, and it is not clear to me whether or not they would have been included as part of the Bidwells' £11.45 million calculation of the value. However, such evidence as there was from Mr Heyes is that they were necessary as part of the WX Hub and to run the business of WX Hub. On that basis it would not be surprising to find them included in the valuations of the WX Hub reached by both Mr Heyes and Bidwells. When Mr Heyes gave this explanation in cross-examination, Mr Roe QC said that he might come back to the point but did not in the event do so. Ms Anderson QC did not challenge the evidence on this point given by Mr Frenkel in his report, but that may be because she did not consider it necessary to do so, as all that he had said was that Mr Heyes had not accounted for any fixed assets taken over by SFP and SGP and Mr Roe QC did not challenge Mr Heyes' evidence that he had, albeit in the £10 million for the WX Hub. Neither party addressed the point in their closing submissions. In these circumstances, I am not satisfied that the £521,943 should be added back in the way suggested by Mr Frenkel. The only safe basis on which I can proceed is that they were accounted for in the respective figures given for the value of the WX Hub.

455. I should add that, before the finalisation of this judgment, but after a draft had been sent to the parties, I received written submissions from Mr Roe QC and Ms Johnson requesting me to reconsider the findings I have made in the previous two paragraphs. The core of their point was that it could be seen from the Bidwells' report that Bidwells were not including plant and machinery, motor vehicles or office equipment in their valuation. Ms Anderson QC responded in writing, objecting to the approach which SML had adopted on the basis that this was an unfair attempt to persuade me to make findings of fact which had not been argued out at trial, and at a stage in the decision-making process when parties' comments are meant to be restricted to typographical corrections and other obvious errors. She also drew my attention to a number of parts of the Bidwells report in which it appeared that some of the fixed assets had been taken into account in reaching the £11.45 million figure in any event.

456. I am sympathetic to Ms Anderson QC's response and would have given directions for further submissions had it been necessary to do so. However, having looked at the point again, and subject only to an amendment to the last sentence of paragraph 454 above, I am satisfied that the conclusion I reached is correct on the basis of the evidence adduced and the way the case was argued at trial. In my view it is now too late for SML to advance a newly developed case, which was not put to the witnesses of fact and was not articulated in written or oral closing submissions.

457. In any event, I consider that SML has not demonstrated by reference to the parts of Bidwells' report to which it has drawn my attention, that the £521,943 should be added back in the way suggested by Mr Frenkel, and the burden is on it to do so. This is partly because it is clear that the Bidwells' valuation was prepared on the basis that some at least of the fixed assets were included (see in particular the way in which they describe their valuation methodology in paragraph 14.2 of their report). The author of the report was not called to give evidence at trial, and no means was suggested by which I could have reached an accurate assessment as to the respective values of what was included and what was not. It is also because SML's case was that the value of the fixed assets transferred under the APA was what I have described above as a net book value of cost less depreciation. Whilst this may give an acceptable valuation for some accounting purposes, I cannot safely assume that it provides an adequate reflection of a separately realisable asset value such as would be required for the purposes of assessing the quantum of the claims made in these proceedings.

458. The next material adjustment made by Mr Frenkel was a reduction in trade creditors from £4,775,900 to £2,599,188. The only material part of this reduction was a figure of £2,155,149 representing an amount owed to CET. The reason that SML says that this amount should not be included in trade creditors is that while taking account of this as a liability of SML's, Mr Heyes was at the same time not treating it as an asset of CET's for the purposes of valuing CET's shares. This was explained in Mr Randall's evidence and Mr Frenkel said that he regarded this as a fundamental inconsistency in Mr Heyes' approach to valuing on the one hand CET's assets and on the other hand SML's liabilities, both of which were required to be valued for the purposes of arriving at proper figures for different elements of closely linked transactions.

459. Mr Heyes' explanation for this difference in approach was that his valuation of CET was done on an earnings basis and that he did not therefore need to take into account the face value or indeed any value for the debt due from SML. He then said in his e-mail to Peter:

> "*Please note that the valuation of CET is profit-based only and does not take account of any value in the balance sheet as the £2.9m reserves would effectively be eliminated by a write-off of the intercompany debt from SML. The valuation of the SML trade is based on losses as the reserves will remain with SML after the transfer"*

460. When he was cross-examined on this by Mr Roe QC there was the following exchange:

> "Q … *So I think you are saying in relation to CET, I think this just confirms what you said a few moments ago, it was an earnings-based valuation.*
>
> *A. Correct.*
>
> *Q. But it depended, did it not, upon effectively treating as if it were written off, the debt that it was owed by SML?*
>
> *A. There was no suggestion that it was going to be written off at any point. I was purely valuing that on an earnings basis. So taking no regard to the asset base of the company.*

> *Q. But something must have happened to make you want to treat it that way, otherwise you surely would have valued it on an asset basis, would you not?*
>
> *A. If you were selling to a pure third party, they probably would have wanted those debts written off between the two companies before the transfer of the business, so it would be taking account from that point of view. As it was between related parties, and as at the time I believed it was mutually agreed between related parties, you would keep the intercompany debts there with a possibility that the companies trade, make a profit and repay the debts. Continental receiving payment for their debt would have provided the cash to pay the dividend up to Logistic Partnerships Limited from which they could then repay the loan notes*."

461. In my judgment there is insufficient evidence to demonstrate that the debt was in fact written off as matter of law, and I accept Mr Heyes' evidence on this point. All that he said was that it was "effectively" written off for the purposes of valuing CET on an earnings basis seeking to assess the potential earnings from CET's business going forward. Mr Heyes' evidence is also consistent with the fact that the liability continued to be shown in SFP's accounts. The mere fact that the liability was not taken into account in the valuation of CET does not establish that it did not remain a liability of SML that was taken over by SFP.

462. Nonetheless, I am not satisfied that it was correct to include it as a liability of SML's for the purposes of valuing the assets to be transferred under the Transaction. As acknowledged by Mr Heyes in the passage I have quoted above, the only reason that it was not written off was because the Transaction was not with a genuine third party and, if it had been, the purchaser would almost certainly have required that to be done. Furthermore, this liability was not treated by CET as an asset that it was entitled to recover for the purposes of working out the potential earnings from its business going forward. To that extent it is difficult to see why it should be treated as a liability of SML's so as to depress the purchase price, where the sale of the shares in CET and the sale of the relevant part of the business of SML were all part of the same overall transaction. This was the essence of the point made by Mr Frenkel in his report and I agree with it.

463. I should also add that this part of Mr Frenkel's report confirms the treatment of a number of items which relate to other agreed issues. In particular the figure for debtors includes the amount invoiced from FPIL (£575,833) which I have already referred to and an inter-company debt from SFP of £758,283. The inclusion of these items as debtor assets in the £1,686,150 calculation of assets and liabilities taken over as part of the APA affects the quantification of some of the other losses in respect of which SML say they are entitled to make recovery.

464. The next material adjustment relates to a deferred grant totalling £360,561. According to Mr Randall this dated back to 2003 and was not repayable unless the WX Hub was sold within 5 years (i.e. by 2008). Mr Frenkel said that the only reason that the figure was included in the accounts at all was because the grant was being amortised as income over a number of years. In his view it should have been written off several years earlier and should certainly not have had any value attributed to it for the purposes of valuing the net assets or liabilities transferred under the Transaction.

465. Mr Heyes' evidence on this point was that he thought that the correct accounting treatment was to amortise the grant across the lifetime of the property to which it related. He said:

> "*It is not a question of it being repayable. You have received an amount that related to a development. It relates to the property and the property is still there. When the property is not there then you would write it off or write it back at that point.*
>
> *Q. Is not the more sensible approach to look at the reality of it ever having to be repaid and if it does not have to be repaid then it does not count as a liability, does it?*
>
> *A. The repayment does not come into it*."

466. I have difficulty in seeing why that should be the case where the grant is no longer repayable and on this point I prefer Mr Frenkel's evidence. Including this figure as deferred income was an accounting treatment to write off the grant over a period of time, and it does not matter that (rightly or wrongly) that accounting treatment was continued by SFP after the Transaction. It does not reflect the existence of a cash liability. I accept the explanation given in the following exchange between Ms Anderson QC and Mr Frenkel and consider that he was therefore correct to make the £360,561 adjustment that he did:

> "*Q. Well, if that was right, whoever drew up the accounts would not show it as still being a liability, and they do.*
>
> *A. No, no, sorry. You can show some as a liability but it is not necessarily a payable liability. It is something that is called deferred income and it is apportioned over future income. It is apportioned over that. And because they have gone well past the repayable date, it was never a liability that it was going to be repaid. So to include it as, in the schedule of liabilities that were taking over, "Oh, we will settle that, do not worry" was wrong because it was never going to have to be repaid. That is the point I was making.*"

467. The final material adjustment related to credits to which SML was entitled for supplying electricity to the National Grid from Fen Drayton and Waltham Abbey at times of peak national demand. These are called TRIAD payments, and the payments due for the winter of 2015 were received by SFP in April 2016. Mr Frenkel said that they should have been accounted for as a debtor due to SML as at 1 April 2015. In his oral evidence Mr Heyes accepted that this was probably correct. The adjustment increases the assets transferred by £182,652.

468. The effect of my conclusions on these issues is that adjustments totalling £2,698,362 must be made to the net liabilities of £1,686,150 transferred to SFP and SGP as part of the Transaction. The correct amount transferred to SFP and SGP is therefore a net asset figure of £1,012,212.

The Valuation of the Businesses

469. This was the most contentious element of Mr Frenkel's calculations. The calculation that he made was on the basis of an arm's length transaction between a willing buyer and a willing seller with a reasonable amount of time for the business to be marketed and for the transaction to be completed, and with the buyer having access to a reasonable amount of information proportionate to the nature and size of the transaction. There was no specific challenge to this being an appropriate valuation basis.

470. He reached a value for the businesses of £16,500,000 based on a weighted average EBITDA of £1,648,208 and a multiple of 10. The adjusted EBITDA that he used for the years ending 30 June 2013 (£843,517) and 30 June 2014 (£612,601) and the 15-month period ended 20 September 2015 (-£2,445,455) were based on actual figures adjusted for exceptional items. Although they were revised during the course of the hearing, they were not themselves challenged by the Director Defendants. What was challenged was his conclusion that the calculation of an average should also include an estimate of the projected EBITDA for the period ending 31 March 2017. The figure he came up with (£3,084,436) was also challenged.

471. The weighting which Mr Frenkel then used was also controversial. He applied a weighting of 1 to the 30 June 2013 EBITDA of £843,517, a weighting of 2 to the 30 June 2014 EBITDA (which increased it to £1,225,202), a weighting of 0.35 to the 30 September 2015 EBITDA (which reduced it to -£855.909) and a weighting of 3 to the projected EBITDA for the 31 March 2017 EBITDA (which increased it to £9,253,309). It is immediately apparent that the effect of this approach was to give the projected EBITDA for 31 March 2017, and its weighting, a dominant place in the computation of the £1,648,208 weighted average.

472. As to the multiple, Mr Frenkel adopted 10, being of the view that sales in 2016 of companies similar to SML, but with sales at twice the level achieved by SML, were priced on multiples of 11.5 which he then reduced to 10 based on SML's smaller size. All of these assumptions were challenged by the Director Defendants, so I must reach a conclusion on whether SML has proved that the calculations made by Mr Frenkel led to the conclusion that the value of its business as at the time of the Transaction was £16,482,077 which Mr Frenkel then rounded up to £16,500,000. Having carried out that exercise, he then deducted the value of the WX Hub and the value of the net liabilities assumed on acquisition in order to reach what he called (not entirely accurately) the value of SFP and SGP. In essence this was the value of the goodwill attributable to SML's transferred business at the time of the Transaction, which Mr Frenkel eventually quantified at £3,475,423.

473. I can start with the challenge to the projected EBITDA for the year ending 31 March 2017. The first element which went into the calculation was projected sales of £49,900,000 for the period. At first blush, and by comparison to the sales made in the previous periods ending 31 March 2014 and 30 June 2015, this does not appear to be unreasonable. However, the factor which makes this approach suspect is the assumption that the sales to Hello Fresh would have increased significantly during the period. As to this Mr Frenkel estimated £8 million for the year ended 31 March 2017, as against £3,939,201 for the year ended 31 March 2016 (of which £1,041,797 was for the first 6-month period and £2,897,404 was for the second 6-month period). He characterised the growth as between the first and second 6-month periods during the year ended 31 March 2016 as being 278% against which a doubling of the sales in the

year ended 31 March 2017 as against the year ended 31 March 2016 looks like a comprehensible estimate.

474. Some support for assuming that growth would continue can be derived from the fact that in the summer of 2015 Sammy had been telling Barclays that the Hello Fresh business was growing at a good rate and Peter accepted in his evidence that the business was growing at that stage. He estimated that in the period October 2015 to March 2016, the Hello Fresh business was "*doing pretty well*" and generated sales of approximately £100,000 per week. Mr Roe QC also emphasised the strength of this relationship by showing Sammy a press release from the London Produce Show 2015 in which Hello Fresh said that they looked forward to growing their relationship with Stubbins Food Partnerships for many years to come.

475. However, the difficulty with assuming any continuation of this high rate of growth is that the contract which was entered into in December 2014 was only for 2 years extendable. The consequence was that there was not a great deal of security that the relationship with Hello Fresh would continue beyond the end of 2016 and it was inevitable that much would depend on the extent to which SML or SFP was able to continue to provide the service that Hello Fresh required for what on any view was a rapidly growing business. The lack of security on this point was emphasised by Sammy in his evidence when he made clear that by the end of 2015, SML knew that they were unlikely to hold onto the Hello Fresh business after the expiry of the 2-year period. As he explained:

> *"… we knew HelloFresh was going; it was a two-year contract. We knew it was going to end … we knew the growth plans, we knew how big they were going to grow and they needed double the size of the area that we had. We had 100,000 square foot and they, in the end, purchased 200,000 square foot because they were big investors and they knew they were going to grow that, and they wanted to own their own sites.*"

476. At the stage that Sammy gave his evidence there was no documentary support for the suggestion that, by the end of 2015, SML knew that the Hello Fresh contract was not going to last. However, the suggestion was then further confirmed by Peter who was re-called to deal with some documents which were put in evidence late on in the trial. They were consistent with a finding that by December 2015 Hello Fresh had told SML that the contract would not be continuing beyond December 2016. They were also consistent with Sammy's explanation that by the end of 2015, it was clear that Hello Fresh had exceeded their growth expectations and were growing too big to be serviced at the WX Hub. As Peter then explained, when asked about his understanding of Hello Fresh's position at the end of 2015:

> "*They were buying their own facilities. They wanted their own in-house operations and they were viewing confidentially new sites all over the country and this was confirmation that this was happening now*."

477. Not surprisingly, Mr Frenkel accepted that the prospect that Hello Fresh would or might terminate its contract was a risk that needed to be taken into account in quantifying the projected sales and it is right to note that the full picture was incomplete at the time he gave his evidence. However, I am satisfied that well before the Transaction it was clear that the Hello Fresh contract would not last beyond December 2016. It is fairly obvious,

however, that the extent to which termination of the Hello Fresh contract would have made an impact on the figures for gross sales would inevitably be affected by the extent to which SML had been able to replace this contract with other business during the relatively lengthy period in which it had to plan for Hello Fresh's departure. Not surprisingly Peter accepted that they were looking for new customers and to some extent were being successful in that search (Mindful Chef, Plenish and a project with Ocado were all mentioned). The evidence on this, however, was not very precise and I was given very little detail of what any replacement business could be expected to add to the sales.

478. In reaching his conclusion that sales of £49.9 million was a realistic forecast as at 31 March 2015, Mr Frenkel referred to the fact that the actual sales relating to activities previously carried out by SML for the year ended 30 September 2016 were in the region of between £33 million and £44 million. In my view this casts doubt on whether £49.9 million was realistic, rather more than giving it support, particularly when taking into account the fact that the overall picture was one of declining sales, while Mr Frenkel's projected £49.9 million was almost exactly the same as the annualised figure for sales for the year ending 30 June 2015.

479. Taking into account all of these uncertainties I do not think that any hypothetical purchaser would attribute more than £6 million to the gross sales in respect of the Hello Fresh contract and the business which SML was seeking to attract by way of partial replacement. I do not think that there is sufficient evidence for me to discount any further so as to reflect the more general decline in sales which appears from the figures. In my judgment and doing the best I can notwithstanding the uncertainties in the figures, the right projection for gross sales would have been £47.9 million.

480. The next figure that is relevant for the purposes of establishing the projected EBITDA for the year ended 31 March 2017 is the gross profit margin of 14% which was applied by Mr Frenkel to reach his projected gross profit figure of £6,986,000. The reasonableness of this assumption has to be set against his acceptance in the joint statement which he produced with Mr Pearson that SML's gross profit margin had declined significantly from mid-2014 onwards and had not recovered by March 2016:

> "*The Experts agree that the issues affecting SML's profitability in the period to 30 September 2015 occurred primarily on a gross profit level (SML's gross profit margin per the statutory accounts, had fallen to 3% from 7% in the year ended 30 June 2014). The Experts understand that the primary reasons for this increase were supermarket pressure on margins, the consequences of packing at source and the high costs of import*."

481. Historically, and according to SML's statutory accounts, its profit margins for the period 2008 to 2015 had ranged between 3.9% and 9.1%, with the three most recent years (those ending 30 June 2013, 30 June 2014 and 30 September 2015) being 7%, 6.9% and 3.1%. This made Mr Frenkel's assumed profit margin for the year ended 31 March 2017 of 14% seem very high. He justified this figure by reference to management accounts for the 6-month period ending 31 March 2016 which disclosed an overall profit margin of 19.5% on the Hello Fresh and Frozen Sales of £3.9 million for that period. He said that he had reduced the profit margin from 19.5% to 14% to reflect the fact that these two parts of the business were the most profitable parts. They also amounted to less than 20% of overall sales. The experts agreed that supplies to

supermarkets, which still constituted a very significant part of the remainder of SML's business, were continuing to be under significant margin pressure.

482. The evidence included in the experts' agreed statement included some comparables from other produce growing companies in the UK and the range was very significant. Overall, however, they indicated that Mr Frenkel's 14% was right at the top end of what was being achieved by other companies in the market and that gross profit margins were just as likely to be reducing as they were to be increasing. On this issue I had the very clear impression from Mr Frenkel's evidence that he was seeking to justify the highest profit margin that he thought was sustainable. In my judgment that is not the correct approach. I think that my task is to identify the figure which a hypothetical reasonable purchaser would use and I have no doubt that 14% was exaggerated. I think that the right figure to apply is 11%. That is a realistic and sustainable margin which reflects an appropriate short-term increase in the more profitable Hello Fresh business, while giving weight to the conclusion which I have already reached that it was known that this particular contract would terminate before the end of the applicable period and to the profitability of other parts of the business.

483. Applying a profit margin of 11% to gross sales of £47,900,000 gives a gross profit of £5,269,000 from which it is necessary to deduct administrative expenses and directors' remuneration to reach the projected EBITDA. The figure applied by Mr Frenkel in his report was £3,901,564 and I did not understand this to be challenged by either party, which means that the correct projected EBITDA for the years ended 31 March 2017 would have been £1,367,436.

484. As to weighting the EBITDA for each of the four periods, I have already explained the approach which Mr Frenkel took. He accepted that it was very unusual to apply the highest multiple to a projected figure and then the lowest to the most recent actual figure. He also accepted that the usual approach would be to apply a weighting of three to the most recent year, two to the year ended 30 June 2014 and one to the oldest year and that it would be pretty unusual to apply the lowest weighting to the most recent period. However, he said that his approach was justified because of the fundamental changes which the business was undergoing. By this he meant amongst other things the extent of the loss-making in the period ended 30 September 2015 some of which was exacerbated by matters to which I have referred elsewhere in this judgment. These included the reduction in the Asda business which had been causing much of the losses and the cessation of the loss-making import business which stopped in November 2015.

485. On this issue, I accept Mr Frenkel's approach. It seems to me that there were good reasons for him to attribute only a very limited weighting to the losses for the period ended 30 September 2015, and to treat whatever may be the appropriate projected adjusted EBITDA for the period ended 31 March 2017 as the figure to which the most significant weighting ought to be applied. This means that in my judgment the proper computation of a weighted average EBITDA leads to a figure of £837,026, to which it is necessary to apply an appropriate multiple in order to identify the value of the business on an earnings basis.

486. As to the multiple, Mr Frenkel said that he used the Business Valuation Benchmarks ("BVB") publication for 2017 which recorded details of actual sales transactions that took place in 2016. Ms Anderson QC cross-examined by reference to the 2016, 2017 and 2018 versions of the publication which evidenced a median multiple for food

manufacturers, wholesalers and distributors of 5.1 in 2015, 11.5 in 2016 and 7.7 in 2017 respectively. Mr Frenkel accepted that he did not take into account the 2015 figures or the 2017 figures and confirmed that his starting point was the 11.5 for 2016 recorded in the 2017 version even though a number of the transactions post-dated the 1 April 2016 date of the Transaction. The comparables for the first quarter of 2016 taken together gave a median multiple of 8.5. If he had looked at the 2015 figures (which he said that he did not do), he would have seen that the comparable multiples for 2015 gave a median of 5.1, although as Mr Frenkel pointed out the lower figures were in the earlier part of the year and those in the second half of 2015 gave a median of 10.

487. Mr Frenkel was also asked about SGS where a post-tax multiple of 5 (or an EBITDA multiple of 3.5) was applied. He said that this was not comparable because its turnover was significantly smaller than that of SML (c.£8 million as compared to £50 million for SML). When he was asked about the size of the examples from which his 11.5 starting point was taken, he accepted that they were significantly larger than SML, but was clear that this differential was accounted for by the 1.5 reduction from 11.5 to 10 which he applied. The essence of his evidence was that the difference between a £90 million turnover business and a £50 million turnover business was much less pronounced than the difference between a £50 million turnover business and one such as SGS which turned over only £8 million.

488. One thing which this exercise established very clearly was that, while data of this sort can lend support to a conclusion it illustrates that a wide range of multiples are applied to business sales in the same economic sector, dependent on a number of different factors such as time, performance, the size of the business, its precise location, a more precise description of the sub-sector it operates in, the nature of its customer base and so on. The figure which is eventually reached by vendor and purchaser will depend on a more specific analysis of the potential that a particular business has than can be achieved by comparing multiples applied in other deals which may or not be closely equivalent. But it is important to appreciate that the multiple eventually applied reflects what a businessman sees as the potential going forward and when an expert such as Mr Frenkel is expressing views about what he thinks is the correct multiple there is an element of judgment based on experience involved. It is not a precise or predictable exercise.

489. Against that background I have to reach my best estimate of what I think the right multiple is, and I have concluded that this was another instance in which Mr Frenkel's propensity to shoot high was displayed and he did not apply enough of a discount to the 11.5. But I do not think that a multiple anything like as low as 3.5 would be justified. I think that the right figure is 9. This maintains a closer proximity to the £90 million turnover business where the median multiple was 11.5 than to the smaller SGS business. It also reflects more happily the BVB comparables for the first quarter of 2016. Applying that to the weighted average EBITDA, the value of the business on an earning basis was £7,488,234.

490. This valuation is approximately 50% of the valuation reached by Mr Frenkel. It is more than twice the valuation for which the Director Defendants contended. As it is less than the value of the net assets actually transferred (£12,462,212: £11.45 million for the WX Hub plus £1,012,212 for other net assets), it demonstrates that there was little or no goodwill attributable to the business itself, a conclusion which rather belies the reason which SML says that the Director Defendants resolved to enter into the Transaction in

the first place. It also leads to the counter-intuitive result that the value of the WX Hub was more than the market value for which the business incorporating the WX Hub could have been sold. This gives pause for thought but may reflect the fact that the return on the use of the WX Hub was nothing like as good as it could have been if it had been used or sold separately from the underlying business.

491. But that is not the way in which the case was presented. SML and Mr Frenkel made no attempt to attribute a value to the business which was separated from the WX Hub or its operation. The consequence of this is that the loss which SML sustained by the sale of the WX Hub and its Produce and Non-Produce Businesses can only be quantified by reference to the difference between the true value of the WX Hub and the net assets of £1,012,212 on the one hand and the amount which SFP and SGP paid pursuant to the Transaction on the other. The amount actually paid was £6,358,973, in exchange for the transfer of assets worth £12,462,212. This means that, subject to an increase in the price paid to reflect the value of the deferred purchase consideration totalling £1,500,000, the undervalue paid by SFP and SGP was £6,103,239. To what extent ought the deferred purchase consideration be treated as reducing that loss?

492. The deferred loan owing by SFP has not been paid and SFP is now in administration. This means that SML is unlikely to be paid the consideration due under the deferred loan, although Mr Frenkel accepted that no work had been done on the extent to which some recovery might be achieved, and this point was not developed at the trial. However, SML asserts that it was never given security for the loan and Mr Frenkel said that it would be a reasonable commercial requirement for a loan of this sort to be adequately secured. I accept all of those statements, although it is difficult to construe the way in which Mr Frenkel expressed himself as amounting to an opinion that it would be unreasonable for a company in the position of SML not to ask for security, and there is no indication that, once the shareholders knew of the deferred element of the consideration, they then mentioned the need for security to be provided.

493. The question at this stage of the analysis is whether or not the debt due under the deferred loan is to be taken into account when quantifying "*the loss or damage resulting from the Transaction*" in respect of which the Director Defendants are liable pursuant to the statutory indemnity. It seems to me that this gives rise to the question of whether there is a sufficient causal link between the Transaction and the loss caused by reason of SFP's insolvency. In this context, there is no evidence as to why SFP went into administration or whether it could reasonably have been anticipated at the time of the Transaction that it would. There is also no evidence as to whether SML might make any form of recovery from SFP's administration. I imagine that the WX Hub will have been one of the principal assets realised in SFP's insolvency and so there must be at least some prospect of a material return to its unsecured creditors.

494. This is all relevant, because the true quantification of any loss must take into account the value at the time of the Transaction of the consideration actually received by SML. SML's real claim in relation to the deferred loan is that its value at the time of the Transaction was in fact less than the £1.5 million which was attributed to it. I do not have the information which enables me to make that assessment, but does that mean that SML has not established a loss in respect of which it is entitled to a statutory indemnity? Or does it mean that the Director Defendants have failed to show the true value of an element of the consideration which their companies paid for the acquisition of an asset which was transferred in breach of trust?

495. In my judgment it is the former rather than the latter. Even if it were to have been a breach of duty to SML not to insist on the provision of security for the deferred consideration, and I am inclined to think that it was, it would still be necessary for SML to show on the evidence that a secured loan would have been worth its £1.5 million face value while an unsecured loan would not. I do not have the evidence to reach a conclusion on this point and the mere fact that SFP was a newly incorporated company which has gone into a formal insolvency process does not mean that it can now be seen that a loss of an identifiable amount was sustained at the time or certainly as a result of the Transaction. It follows that SML has not shown that the amount of the deferred purchase consideration should not be taken into account as part of the purchase price paid at the time of the Transaction. The consequence is that the loss sustained on the sale of SML's assets was in my view £4,603,239.

The Waltham Abbey and Fen Drayton Leases

496. The next head of loss claimed to have arisen directly out of the Transaction is the leasing of the Waltham Abbey and Fen Drayton nurseries at an undervalue. I have already explained the factual background to this head of claim when considering the material facts which were not explained to the shareholders for the purposes of ensuring that the consent they gave to the Transaction was given on a fully informed basis. It is clear from those findings that the Director Defendants all knew that the figures to be included in the elements of the Transaction which provided for the renting of the two nurseries to SFP and SGP were less than the evidence they then had for the market value which was achievable for the rental stream and were calculated simply by reference to what the funding of SFP's and SGP's business model going forward could bear.

497. On the face of it this was a clear breach of duty, because no steps were taken by the Director Defendants to compare the rate which they thought the business could bear to the market value which the nurseries would achieve were they to be rented out on the open market. Without carrying out this exercise they cannot have given proper consideration to the question of what would be most likely to promote the success of SML in the best interests of its members as a whole. This was a breach of their duty to promote the success of SML and I do not believe that they could possibly have considered in good faith that it was not an exercise that they should carry out.

498. For the purposes of the Transaction the rent selected by the Director Defendants for Waltham Abbey was £100,000 p.a. split as to £24,000 p.a. payable by SFP in respect of the CHP plant and £76,000 p.a. payable by SGP in respect of the rest of the site. The rent selected by the Director Defendants for Fen Drayton was £368,500 p.a. split as to £24,000 p.a. payable by SFP in respect of the CHP plant and £344,500 p.a. payable by SGP in respect of the rest of the site.

499. I have already mentioned that SML called expert evidence from Mr Catley on the market value. Mr Catley said that, in his view, the market rental value of Waltham Abbey was £308,500 p.a., rather than the £100,000 p.a. the Director Defendants caused SML to lease it for; and that the market rental value of Fen Drayton was £435,000 p.a., rather than £368,500 p.a. It follows that the undervalue claimed by SML was £208,500 p.a. for Waltham Abbey and £66,500 p.a. for Fen Drayton. As I have already mentioned the loss which SML claims is £275,000 p.a. which it says persisted for 994 days from

1 April 2016 (the time of completion of the Transaction) until SML re-took possession on 20 December 2018 after SGP had gone into administration. The total claim is therefore £748,392

500. There was no expert evidence from the Director Defendants on the relationship which the rent provisions bore to the market rate, but Mr Catley was subjected to a rigorous cross-examination by Ms Anderson QC. I need to examine the points which she put to him, but in her final submissions she said that the evidence pointed to the true annual rental values for each of the nurseries being less not more than the amounts for which they were leased by SML to SFP and SGP under the terms of the Transaction. In general terms the worth of Mr Catley's evidence was challenged on the basis that he had not done a deal involving glasshouses and nurseries before. Against that he said that he had been a chartered surveyor for 38 years, that he was conversant with the valuation provisions for glasshouses and associated assets and that he came from a horticultural area (the Vale of Evesham) and knew the market quite well. Despite the fact that he had not concluded a glasshouse deal before, I am satisfied that Mr Catley had sufficient expertise to be of assistance to the court.

501. So far as the greenhouses themselves and ancillary fixtures are concerned, it seems that their valuations are based in substantial part on an appropriate value per square foot of the greenhouse glass, and that there is a different value for older glass and newer glass. Not surprisingly, it also appears that older glass is worth less than newer glass. As with many valuations, one of the exercises conducted by Mr Catley was to rely on comparable figures for the rental achieved in other rental deals, although as he put it in a colourful phrase: "*rental evidence for glass is as rare as hen's teeth*".

502. In reaching his £308,500 p.a. figure for Waltham Abbey Mr Catley attributed £208,5000 to the nursery, glasshouses and CHP plant. He applied a value of £0.75 per sq ft to the newer glass and £0.50 per sq ft to the older glass. He then attributed £100,000 to the Transport yard based on £5 per sq ft for the workshop and £1.50 per sq ft to the yard itself. He relied on a number of factors which caused him to attribute the value that he did including the fact that in 2016 there was significant demand in the Lea Valley area and very limited supply.

503. Mr Catley produced one comparable for Waltham Abbey which was the SGS nursery at Nazeing where there was a 2016 rental at £0.73 per sq ft. He described it as a modern facility with a space heating system, packhouses and ancillary buildings. This was information that he obtained from Promap and aerial photographs. Ms Anderson QC challenged the comparability on the grounds that it was a much larger greenhouse than Waltham Abbey, it was described as a grade A property and it was fully operational with a manager and machinery, including offices. More significantly she demonstrated that Mr Catley did not describe in his report that he had taken into account a number of factors in relation to this comparable, including the fact that although, according to SGS's accounts, the transaction was based on market evidence it was between connected parties (something that he did not mention in his report) and that the market in the Lea Valley was significantly different from the market in other parts of the country.

504. She also relied on the fact that the comparables for Fen Drayton showed rentals at a much lower level than Waltham Abbey. In relation to Fen Drayton Mr Catley produced comparables from three nurseries:

i) One in Bedfordshire (2011), c.180,000 sq ft of old glass at £0.18 per sq ft

ii) One in Lincolnshire (2009), c.35,000 square ft of mixed old and new glass with cold stores at £0.23 per sq ft

iii) One in Cambridgeshire (2016), c.118,000 sq ft of mixed older and newer glass with store and packhouse at £0.25 per sq ft.

505. Mr Catley denied that there was any true comparability between the Lea Valley area and the Lincolnshire/Bedfordshire/ Cambridgeshire area which he used for the purposes of valuing the glass at Fen Drayton. He was adamant that the market was different, and in principle I am satisfied that he is right about that.

506. Ms Anderson QC put to him a number of factors which she contended would have depreciated the market value of Waltham Abbey. The first was the fact that the older glass could not be planted up. Mr Catley disagreed with that but did accept that it was less efficient than the newer glass, which he said was taken into account by the fact that he attributed a value of 2/3rds of the value of the newer glass. I see no reason to doubt Mr Catley's evidence on that point. She also challenged the state of the CHP engines, and it emerged that Mr Catley had no knowledge that they were old at the time of the valuation (April 2016) and subject to the terms of the CHP deal. He had simply relied on what he had been told by Mr Randall, who was an unreliable source of information as he had not been around at the time. In my view this was a more significant deficiency in Mr Catley's approach, and I did not find his attempt to justify it to be either objectively expressed or particularly helpful.

507. As to the transport yard, he was challenged about planning enforcement proceedings, a non-transferable licence and the fact that the yard cannot be used separately from the nursery itself. He said that these factors had either been taken into account in the figure he had reached or did not affect it from a valuation perspective. Although it would have been more helpful if he had spelt that out in his report I have no reason to doubt his evidence on that point.

508. Ms Anderson QC criticised Mr Catley's evidence as being unreliable and partisan giving rise to exaggeration and a tendency to do what he could to support his client's case rather than objective evidence to the court. In broad terms I do not agree with this criticism although I do think that he was too ready to accept what he was told by Mr Randall and had an unfortunate tendency to make assumptions without explaining on the face of his report why he had done so. She argued for a valuation of £70,835 for the glass at Waltham Abbey (as opposed to Mr Catley's £208,497) and £37,513 for the transport yard and workshop (as opposed to Mr Catley's £100,159).

509. Taking all of those considerations into account, I am satisfied that the SGS transaction was a relevant comparable, but on the available information I do not think that it is sufficiently close to give it the same figure for newer glass as the figure adopted by Mr Catley. In my judgment both the newer and old glass are overvalued in Mr Catley's valuation by about 10%. I do not agree however that the criticisms in relation to the transport yard and the workshop were made out, and I accept Mr Catley's view as to their market value. It follows that in my view the market rental value which Mr Catley came to for Waltham Abbey was overvalued by £20,850. In my judgment a full market rent for Waltham Abbey would have been £287,800.

510. Turning to Fen Drayton, Mr Catley valued the glass based on age and height to the eaves, for which he gave £0.35 per sq ft for the older glass below 4m to eaves and £0.45 per sq ft for the newer glass to 4.5m eaves. Initially he justified the differential on the grounds that the 4m glass was good for cucumbers while the 4.5m glass was ideal for vine tomatoes. He then accepted that 5m eaves were the industry standard for vine tomatoes but maintained his position that the differential was still justified. This came to a total of £319,000 p.a. He also valued the four dwellings and the hostel on the site at £86,400 p.a. for the dwellings (based on a monthly rental for each dwelling of £1,800 pm) and £30,000 p.a. for the hostel (based on 70% occupancy) respectively. His market valuation was £435,000.

511. In his report Mr Catley described the glass at Fen Drayton as "*in extremely good order and extremely modern in control systems, heat, ventilation and carbon dioxide flow*". In his oral evidence he reiterated that it was exceptionally good glass and gave more detail of the ventilation and carbon dioxide extraction systems. He was pressed hard as to the discrepancy between his valuation and the three comparables which I have already described but insisted that, having been to the property, his figures were correct. He accepted that the glass was not brand new but still insisted that it was of very high quality and explained how the photographs he exhibited to his report illustrated that glasshouses meant that they were a "*very very different world*" from the only local comparables that he had found.

512. He was also cross-examined about the quality of the CHP engines which he described as being in exceptional order, although it was not clear to me that the source of his information on this issue was accurate or that he in fact had a full and reliable understanding of the state and condition of the CHP engines as at the time of the Transaction.

513. As to the value of the dwellings, it was not said that Mr Catley was wrong to attribute a monthly open market rental of £1,800 to each of the houses, or that the annual rent for the hostel was inflated as compared to an open market rent. The argument was that an open market rental was not the appropriate comparator because they were rented out to staff, and Ms Anderson QC said that SML actually earns much less than the open market value from doing so. Mr Catley did not agree with this challenge and it seems to me that his evidence on this point was logical and correct. The question is the open market rent, not the amount that might actually be paid by staff, because there will be many reasons why a business might wish to charge its staff less for their accommodation than the market would bear. That does not mean to say that the open market value is not the amount for which a landlord is entitled to look if it is renting the whole property out to a business tenant on arms-length terms.

514. In the event Ms Anderson QC argued for a valuation of the newer glass at Fen Drayton at £0.35 per sq ft and the older glass to be £0.25 per sq ft. but said that the Bubbles greenhouse was worthless because it could not be used. She said that the houses should be valued at £6,750 p.a. each and the hostel at £15,750 p.a. I do not agree with the approach adopted by Ms Anderson in relation to the glass or the Bubbles greenhouse. I think that Mr Catley's valuation for this part of the Fen Drayton site was justified and that his figure of £319,403 is accurate. Likewise, I have also reached the conclusion that the rental value that Mr Catley attributed to the houses and the hostel is appropriate as well. It is a fair valuation of the market value of Fen Drayton as at the time of the

Transaction, and has some corroboration from the earlier valuation which had been obtained from Quintons in October 2015.

515. It follows from these conclusions that the loss sustained by SML on the Waltham Abbey and Fen Drayton leases is £66,500 p.a. for Fen Drayton and £187,800 p.a. for Waltham Abbey: a total of £254,300. I think that SML is correct to compute the loss as extending for 994 days which therefore amounts to a total figure for the rental loss in respect of both nurseries totalling £692,058.

The Tax Losses

516. Somewhat confusingly the claim for this loss appears at the end of SML's Adjusted Schedule 3 and is dealt with in their closing submissions quite separately from the other losses sustained as a result of the Transaction. This reflects the fact that Mr Frenkel included them in the Other Claims section of his report rather than as part of his valuation of the property and assets taken over pursuant to the APA at less that their true value. However, it is clear from the way that the case is put that SML's complaint is that the trading losses had value but were transferred to SGP for no consideration under the terms of the APA. The claim therefore falls into the same category as the other losses dealt with under the first agreed issue.

517. The relatively short point is that SML made substantial trading losses in the period to 30 September 2015 which could have been carried forward and set off against trading profits in future years for the purposes of relief from corporation tax, and to that extent the trading losses had a value. However, they were transferred to SGP as part of the Transaction for no consideration and, in the year ending 30 September 2016, SGP benefitted by not having to pay c.£296,000 in corporation tax which it would otherwise have had to pay.

518. These tax losses were only available to be set off against trading profits by SGP because of its share structure, a state of affairs which was achieved by the issue of B shares in SGP to Pauline, Mario, Tony, John and Spider Sam in March 2016. An unconnected third party could not have acquired the benefit of SML's trading losses in the same way. It follows that, on any view, the losses were a special asset which had no market value to third parties who were not connected with SML. Nevertheless, SML contended that the trading losses were an asset in its hands, of which it was deprived by the Transaction for no consideration.

519. Mr Frenkel said that it appeared from SGP's 2017 accounts that it acquired some £5,148,000 of tax losses from SML. This suggested to him, that if SML had continued in the same trade, it could have relieved these losses against future profits. If, as SML contended, it would have made cumulative profits in excess of £5,148,000 "*in the years following the Transaction*" and as corporation tax is payable at a rate of 20%, it is said by SML that those losses would have been worth £1,029,600 million to SML.

520. Ms Anderson QC said in her closing submissions that there was no cross-examination on this point. That is not quite right. Mr Roe QC had the following exchange with Mr Heyes:

"*Q. So, this arrangement that you describe here was to ensure that that was the case. So, that if SGP made a profit, it would be entitled to benefit from the losses that Stubbins Marketing Limited had made?*

A. Correct.

Q. Right – put them against – what would otherwise be its tax liability. Did you give any thought to whether that was something, given that SML was passing that to SGP, that was something which SML ought to be paid for? After all, it was a valuable thing that it was – you were arranging for it to pass on to SGP. Did you consider whether it ought to be paid for it in some way, as part of the consideration for this deal?

A. I do not think that was considered at the time, no."

521. Sammy was also asked about this issue by Mr Roe QC. He had no memory as to whether or not it had been considered and his evidence on this point rang true. Peter was not asked about it at all. I think it is likely that this was regarded as a matter for the professionals as a sensible tax efficient way of structuring the Transaction in the light of the fact that the trade in which the losses were made was being transferred. I do, however, think that the Director Defendants must have appreciated that this was potentially beneficial to SGP because otherwise they would not have gone along with the issue of nominal shareholdings to other members of the family in order to ensure that it worked. I think that they were in breach of duty, because having thought that the transfer was of benefit to SGP they should have carried through the logic of working out the value which was lost to SML which they did not do.

522. I was not shown where the figure of £5,148,000 was derived from. Mr Frenkel did, however, express the view that, properly advised, SML and SGP should have shared the benefit of the tax losses between them on an equal basis. He expressed that view in the context of a situation in which "*the new company qualified for retaining the losses and where there was clarity about the transaction throughout*". Mr Frenkel was not cross-examined on this issue and I can see the force of his opinion that this would be the correct approach. While the tax losses were an asset of SML's they were not an asset that SML was able to realise without retaining the trade and utilising them against its own future profits or transferring them to a special purchaser who was also acquiring the trade. It follows that the starting point is that, as a result of this not being properly considered at the time of the Transaction, SML suffered a potential loss of up to half of what the tax losses themselves were worth if all fully utilised (i.e. up to £514,800)

523. Nonetheless, I consider that the extent to which SML might have been able to utilise these losses is itself a speculative exercise. For SML to have considered that there was value in them sufficient to be shared 50/50, it would have had to take into account whether it considered that it would be profitable going forward, and also whether SGP would be profitable because, whatever they might theoretically have been worth it could not have extracted very much from a purchaser unless there were objectively sound grounds for thinking at the time of Transaction that the asset was of value both to it and to the purchaser. Of course, these kinds of speculative considerations are why Mr Frenkel expressed the view on value that he did.

524. The way that Ms Anderson QC approached this issue in her closing submissions was that SML cannot "*have their cake and eat it*". She said that SML sold a loss-making business and that it now wants the benefits from those losses. She submitted that if it takes that approach the APA must be unwound and SML can then take back the loss-making business. She said that it cannot be correct that SML can have the benefits both of the sale and the losses.

525. I do not agree with that way of looking at the issue, because although it is true that SML had just had a loss-making year, there was no reason to think that the loss-making would have continued were the Transaction not to have been completed. But nor do I agree with the approach adopted by SML, viz that the value to it of the tax losses transferred was 20% of £5,148,000. Indeed, that approach is not even justified by its own expert evidence. In my judgment, and doing the best I can on very thin evidence, the state and condition of the underlying businesses of SML (before and after the Transaction) and of SGP (after the Transaction) were such that the directors of SML, if they had been acting on an arm's length basis, would have given them value of 50% of £1,029,600 of which, applying Mr Frenkel's approach half (i.e. £257,400) should have been apportioned to SML and half to SFP. It follows that the only loss that I am satisfied that SML has established through not attributing any value to the losses as part of the Transaction, when it would have extracted value if a proper arms-length negotiation had taken place, is £257,400.

The Costs of the Transaction

526. The fourth category of loss is the costs incurred by SML in relation to the setting up of SFP, SGP and the Transaction. The way that the case is put is that because the Transaction itself was entered into in breach of duty by the Director Defendants, the costs in relation to it were also incurred in breach of duty. The amount of the claim was £118,511 which included amongst other matters the costs of the McIntyre Hudson report and the forecasting work carried out by Mr Heyes.

527. The evidence on this issue was given by Mr Randall who listed the invoices which had been paid. The figure claimed is not the same as the aggregate of the amounts listed by Mr Randall, but his evidence that SML paid for the BDO Report, the Bidwells Reports and the MacIntyre Hudson report was not specifically challenged by the Director Defendants. Likewise, there was no challenge to the amounts (£68,553) paid to Mr Heyes' firm, Rayner Essex. I agree that the cost of the McIntyre Hudson report should have been borne by SFP and SGP and that it was wrong of the Director Defendants to permit it to be paid for by SML.

528. I do not agree that the same can be said about the Bidwells and the BDO Reports. They were commissioned at the request of Barclays and so were required by SML's bankers to enable it to reach a decision on the facilities that it was prepared to offer. I do not agree that these costs were not for SML's benefit. It was for its benefit for its bankers to be properly informed of the value of its business prospects and the value of its assets. In my view Mr Randall is wrong to say that they were incurred in relation to a transaction which was only ever going to be executed in breach of duty in the way that he does. I also do not agree that all of the Rayner Essex fees between October 2015 and January 2016 should not have been paid by SML. At that stage Mr Heyes was

providing services to SML and to SFP / SGP and there was no particular reason why they should not have been charged equally to SFP / SGP on the one hand and SML on the other.

529. By way of summary I therefore consider that it was a breach of duty to SML for the Director Defendants to permit any more than half of the Rayner Essex costs for that period to be paid by SML. It was also a breach of duty for them to permit the costs of the MacIntyre Hudson report to be paid by SML. Otherwise SML has not established that the list of "Costs incurred in relation to the transaction", as they were characterised by Mr Randall, were payments made in breach of duty to SML.

Agreed Issues 2: Payments to Mr Smith

530. The second group of four agreed issues relates to payments to Mr Smith, Kombbi, Kore Creative and FPIL:

i) What sum was Mr Smith contractually entitled to be paid by SML?

ii) What (if any) sums were paid to Mr Smith or Kombbi above his contractual entitlement?

iii) What (if any) sums were paid to Mr Smith, Kombbi, Kore Creative or FPIL unlawfully or in breach of duty by the Director Defendants?

iv) Did the payment of £45,000 made pursuant to clause 4.7 of the Consultancy Agreement dated 21 July 2016 require a resolution of the members pursuant to section 215 of the 2006 Act?

531. There were a number of different contexts in which payments were made to Mr Smith. The most convenient way of dealing with them is by reference to the Adjusted Schedule of Loss (Schedule 3 to the Re-Re-Amended Particulars of Claim), which lists them under 4 categories.

532. The first category relates to FPIL, the company which was formed by Peter and Mr Smith in February 2015 and to which Sammy and Salvi were appointed directors in September 2015. In the event there is no separate claim relating to these payments, but they featured in the evidence as an example of the way in which the Director Defendants conducted themselves and they are relevant to an understanding of the aggregate amount received by Mr Smith, so it is appropriate that I should refer to them briefly.

533. In summary, FPIL invoiced SML for £575,833 (excluding VAT) on invoices rendered and paid between May and July 2015. All but one of those invoices (the last one for £100,000 excluding VAT) were paid, and a VAT inclusive amount of £571,000 (representing £475,833 excluding VAT) was paid by SML to FPIL. Of the cash actually paid by SML and received by FPIL the major part (£467,295) was then paid on to Kore Creative. These amounts were disclosed in the related party notes to SML's financial statements as at 30 September 2015. The only other payments of significance made out of monies received by FPIL from SML were £87,988 paid to HMRC in respect of VAT and £19,971 paid to David Platt.

534. As I mentioned earlier in this judgment, the relevant invoices recorded "*management services*", but the accounting treatment was subsequently corrected by Mr Heyes to record them as loans. The effect of this accounting treatment was that FPIL was a debtor to SML for the full amount paid, while the amounts invoiced and paid were not then treated as consideration for services supplied to SML. There was still a serious question mark, however, over whether it was in SML's interests to make a loan of this amount to FPIL.

535. The reason that SML classified these payments under the heading of sums paid to Mr Smith is that much of the money found its way to Kore Creative, and that the service for which the payments were made (a website platform and an e-commerce facility) had not yet been supplied. Mr Frenkel therefore treated what occurred as a most unusual pre-payment of a large sum of money for marketing (the activities to be carried out through Kore Creative), when SML's cash position made the pre-payment very difficult for it to afford.

536. In the light of my factual findings as to what occurred at the meeting in January 2015 and the way in which the Director Defendants initially recorded the loans, I think that the characterisation of what occurred as most unusual is entirely justified. Indeed, it is clear to me that the Director Defendants initially thought that the expenditure for which Kore Creative charged FPIL could be treated as a service provided to SML, a treatment which was only subsequently corrected. I do not accept as credible their evidence that they had intended it to be a loan throughout.

537. But SML makes clear in its pleadings (Schedule 3) that it has no separate claim for these amounts because the net balance of the loan outstanding from FPIL to SML was transferred to SFP as part of the Transaction. As Mr Frenkel accepted at the end of his cross-examination: "*Q. … you accept, I think that … that SFP paid, in effect, for the FPIL loan of £571,000. A. Yes, they did. Yes.*" It follows that any findings as to breach of duty in relation to these payments would serve no purpose because no separate loss is claimed. It is apparent, however, that what occurred is a further aspect of the Director Defendants' conduct which is open to legitimate criticism. All of the indications are that in authorising the payments, the Director Defendants did not have sufficient regard to the proper purposes of SML for which the money was then to be used.

538. The second category of sum to which there was a dispute as to Mr Smith's entitlement is concerned with the building works to the Director Defendants' homes. The connection arises because the Director Defendants claim that the building work carried out at SML's expense on Mr Smith's home at Griffins Cottage was payment in kind for sums which Peter agreed to pay him at the time he was originally hired by SML in June 2013. My conclusions on what actually occurred have already been expressed earlier in this judgment. In short, I am not satisfied that there was a legally enforceable agreement reached between Peter and Mr Smith for him to be able to charge, or for SML to pay, for the periods identified in the subsequently prepared Schedule. I am satisfied however, that if and to the extent that Mr Smith had been able to establish that specific instructions to do particular pieces of work could be shown to have been given or subsequently approved, he would be entitled to charge a reasonable fee for that work.

539. I also concluded that Mr Smith did not have any form of agreement which entitled him to charge SML without rendering proper invoices for any work that he asserted was done. I do not accept that he and Peter agreed that SML was to come under an accrued

liability to him in respect of services provided without first being supplied with a properly particularised invoice. Put another way I infer that the supply of an invoice properly describing the work carried out was a necessary precondition to the accrual of a current liability.

540. Even if there were to have been an agreement between Peter and Mr Smith that SML would come under an accrued liability to pay without an invoice being rendered, Peter's conduct in agreeing to such an arrangement would have been an obvious breach of duty to SML. The breach would have arisen because of the adverse impact on the proper maintenance of SML's books and records that such an arrangement would have caused, combined with the inherent uncertainty for the proper conduct of its business. It would also have made it very difficult for SML to check that the work was carried out in the way contended for by Mr Smith and for SML to account for the work as an expense properly incurred at the time and in the context claimed.

541. It follows that, in my judgment, any such agreement would be contrary to SML's best interests and sufficiently obvious that Mr Smith would be on notice of the breach. I consider the impact of those conclusions on the claims against the Director Defendants for permitting and procuring SML to carry out the building works (self-evidently not something which without more it was in SML's best interest to fund) when dealing with agreed issue 4.

542. The third category is payments to Kore Creative. Between 28 June 2014 and 28 February 2015, SML made payments totalling £150,331.15 in respect of 25 invoices for various categories of services provided by Kore Creative to SML. It is necessary to explain the nature of these invoices because SML has challenged 17 of them (a) in so far as they relate to work done after 1 October 2014 because that was a period during which Mr Smith was being paid as a director and (b) in so far as the description of the work done is so vague that it is not possible to understand its nature. There was agreement between the parties that by June 2014, Mr Smith had become a *de facto* director of SML.

543. The first two Kore Creative invoices which are challenged by SML are dated 28 June 2014 (KC752 and KC753), one for £40,000 (rendered to "Stubbins") and the other for £20,000 (rendered to "Stubbins Food Partnerships"), both of which described the work done as "Produce Re-design and Branding for Stubbins". These are challenged by SML on the basis that they do not give anything like sufficient detail to justify such large round-sum payments. Sammy was asked about these invoices and was unable to explain what they were for. SML submitted that it was not possible to infer that these invoices related to any of the following categories of specific marketing work which I was shown, because that was all referred to in other invoices:

    i) Work on the Stubbins 50th anniversary film, which was reflected in 3 other invoices totalling £11,188.75.

    ii) Work on the Cannon memorial film, which was referred to in 6 other invoices totalling £10,937.

    iii) Work on the film and campaign for the Taste of London referred to in 7 other invoices totalling £25,726.20.

544. In my judgment SML has not established that these invoices were not legitimate. True it is that they were unspecific in what they described and to that extent scepticism is justified, but in the end, I do not consider that SML has adduced sufficient evidence to show that full consideration was not provided. In reaching that conclusion I bear in mind two factors which together count against drawing any inference that they generated far more than Mr Smith can have been expected to earn for himself alone.

545. The first is that they reflect 4 months of the £15,000 per month marketing budget agreed with Peter, and there is no indication that the March to June element of the budget was spent in any other way. The second is that there was evidence to the effect (as Ms Anderson QC put it) that "*Kore Creative was not simply Wayne Smith or undertaking work which related to his role as a director*." It also seems to have outsourced work to others, and I was told by Ms Newcombe about Phil Nobo who carried out some of this work and there seem to have been others.

546. The next group of Kore Creative invoices are eight invoices dated 28 September 2014, totalling £23,226.46, which are not challenged by SML, unless the court accepts that Mr Smith was entitled to charge £1,300 for consultancy fees for the period May 2013 and September 2014 in which case they are challenged for double counting. This work is described as marketing, digital media and creative services relating to the Stubbins Memorial Cannon and various aspects of a part of the business called Lovi Sweets. In the light of SML's case, the issue is not whether the work described was done by Mr Smith but is rather whether he has in effect been paid twice for it. As I have concluded that Mr Smith had no free-standing independent claim to charge £1,300 per day for consultancy fees over and above the amounts actually invoiced, SML's concession means that it has no claim for breach of duty in respect of these invoices.

547. The third category is fifteen invoices dated 28 October 2014, 28 November 2014, 28 December 2014, 28 January 2015 and 28 February 2015 totalling £39,494.50 all of which were rendered to "Stubbins" for work described as marketing, digital media and creative services relating to a range of projects: websites, the Stubbins Memorial Cannon, Lovi Sweets, Stubbins FP business stationery and online banners and the Barclays presentation. These are challenged by SML on the ground that they relate to a period when he was also being paid £135,000 as a director of SML, which had been agreed between Peter and Mr Smith to have retrospective effect to 1 October 2014. Again, it is SML's case that the issue is not whether the work described was done by Mr Smith, but rather whether it was covered by his director's salary albeit with retrospective effect.

548. The agreement with Peter meant that, so far as Mr Smith's remuneration package was concerned, it would have retrospective effect to 1 October 2014, and from that date would be £135,000, paid as to £60,000 by way of salary via PAYE and as to £75,000 by way of consultancy fee. The fact that Mr Smith's remuneration package took effect from 1 October 2014 is also consistent with the fact that the Schedule which was prepared by Mr Smith before his death (albeit in contemplation of litigation) does not seek to claim for a period beyond the end of September 2014. As I understand the evidence, however, the payments in relation to this agreement only started to be made in January 2015.

549. On the face of it, this agreement is inconsistent with Mr Smith being able to charge £34,494.50 under the third category of invoice I have described above. However, the

description of the work on these invoices is consistent with the invoicing by Kore Creative of services carried out on behalf of SML by Kore Creative's own sub-contractors that I have already mentioned, in effect outsourcing some of the specialist activity required to put together films and other presentations. The evidence one way or the other on this issue was sparse, but I saw some of the work which had been done. I accept that some of it was relatively unsophisticated. However, I cannot conclude that these invoices did not reflect Mr Smith charging through Kore Creative a reasonable fee for work that was done for SML, nor can I conclude that they replicated payments for services for which he had already been paid (or became entitled to be paid) under the terms of the agreement that he reached with Peter.

550. The fourth category is the payments to Kombbi. It is important to distinguish between SML's claim to what it asserts to be unjustified payments to Kombbi on the one hand and the existence of any undischarged liabilities that SML may have to Kombbi on the other. It is necessary to keep the distinction clearly in mind because the payments challenged by SML give rise to claims against the Director Defendants for losses it claims to have sustained as a result of their breaches of duty, while the possible existence of undischarged liabilities is one of the points which affects the claim for rescission of the Kombbi debenture. Nonetheless it is convenient to deal together with the making of the disputed payments and the extent of the disputed liabilities.

551. SML's adjusted Schedule of Loss (Schedule 3) claims that SML made payments to Kombbi totalling £328,081.75 (excluding VAT) on nine invoices totalling £540,581.75. The invoices are dated between 16 June 2015 and 9 September 2016, although as will appear some of them were only paid much later than their date and after the Transaction. The unpaid balance of £212,500 (excluding VAT) arises under the final invoice and is said by the Director Defendants to be secured by the Kombbi Debenture, which is an issue to which I will return when considering the third agreed issue.

552. The first group of payments were made under three disputed invoices dated 16 June 2015 and 16 September 2015 totalling c.£47,500. They simply referred to the provision of consultancy services. These payments related to a period when Mr Smith was already being paid £135,000 per annum more than half of which was a consultancy fee; they were therefore paid in addition to the amounts which he was entitled to receive under the agreement pursuant to which he was meant to be working full time for SML. Sammy was cross-examined as to what the payments might relate to but was unable to remember.

553. Ms Anderson QC said that the burden of proof was on SML to establish that these payments were made in breach of duty and she is of course correct in that. In my judgment, however, that burden has been discharged because the starting point on the evidence is that Mr Smith was already being paid at the same rate as SML's other directors for doing a full-time job at a salary (split between wages and a consultancy fee) of £135,000. Unlike the position in relation to Kore Creative, there was no evidence that Kombbi, which was Mr Smith's personal service company, had other full-time employees such as Phil Nobo.

554. In my view the existence, amount and nature of that pre-existing contractual entitlement is more than sufficient to shift the evidential burden of proof to the Director Defendants to establish why Mr Smith was entitled to anything more than £135,000 per annum for the services of a consultant and a director. No credible explanation was put forward

and the directors who knew that the payments were made are in my judgment liable for breach of duty. That includes Sammy who passed the invoices, Mr Smith himself as recipient and I infer that Peter would have known as well.

555. The second payment was made on 11 July 2016 under an invoice dated 28 January 2016. The amount paid (excluding VAT) was £57,200. Payment was discussed at the same time as the Director Defendants were putting in place the consultancy agreement for Mr Smith and at a stage at which it was clear to the Director Defendants that there was a real risk that they would be removed as a result of shareholder dissatisfaction with the Transaction.

556. This invoice included the rubric "*to conducting a full review into the financial affairs of Stubbins Marketing Limited, reporting on anomalies discovered, recommending and, subsequently, assisting with the implementation of remedial action … all consultancy services provided between April and November 2015".* In his oral evidence Peter confirmed that this was inaccurate because the payment to Mr Smith was purportedly justified as consideration for the work which he did on Mr Randall's employment claim which led to the settlement agreement, the subject of the seventh agreed issue. He accepted that he agreed that the payment should be made at a meeting he had with Mr Smith on 21 May, giving the following account of why he thought that it was appropriate that it should be paid:

> *"And the answer to the 57,000 was, he [Mr Smith] did not want the money, and I did not think it was fair because I felt he had worked really hard on Mr Randall's settlement. You know, there was a huge figure Mr Smith never wanted to settle with Mr Randall and we did, but he did not want to. And I thought it was fair and I remember how hard he was working over it and I said to him, "Take it for your kids' sake." That was how the conversation – if you read down, you can see the content of what the meeting was about and the first page, as well. So it was a very personal meeting. But at that point, he wanted me to make peace with the family."*

557. Two things were clear from this evidence. The first was that until this point in time there was no agreement between SML and Mr Smith that he would be entitled to any payment for the work which he did in achieving a settlement of Mr Randall's claim. The second is that the reason for the payment so far as Peter was concerned was that he thought it was "*fair*" that Mr Smith should have the money for his children's sake. It is quite clear from Peter's evidence that he gave no thought to whether or not it was in the interests of SML for this agreement to be reached or for this money to be paid and although he said that he told Mario about the £57,200, I am unable to accept that he did. In any event he did not assert that Mario (or indeed any other shareholders) agreed that it should be paid.

558. SML pointed out that this amounted to approximately 42% of Mr Smith's annual salary and that it was a staggering amount to pay for this work given that he was already employed and being paid a salary, that SML had instructed solicitors and a barrister to deal with the claim, that the claim did not progress beyond pleadings and that the mediation lasted for half a day. Furthermore, it was clear from Peter's evidence that there was no assertion that the payment when made was pursuant to an existing agreement. I agree with SML's characterisation of this payment as nothing more than a gratuitous bonus paid after the event.

559. The evidence is clear that the payment was agreed by Peter, was authorised by Sammy who passed the invoice and was received by Mr Smith (albeit through his personal service company, Kombbi). Each of them was a director at the time, but none of them has put forward any basis for the payment being in SML's interests, even if they thought that it was "*fair*" that it should be made. Whatever the size of payment, there was no particular reason to reward Mr Smith for past services, where there had been no agreement to do so, because there was no reason to think that SML (as opposed to SFP or SGP) would be requiring his services in the future. I am satisfied that this is a plain example of a payment that was not in SML's interests and I am also satisfied that none of them could possibly have thought that it was if they had looked at the position as they should have done from the perspective of SML.

560. The third payment was made at the end of June 2016 under an invoice dated 31 March 2016. The amount paid (excluding VAT) was £150,000 and was said to be for "*conducting a full review into the business operations, margins and ongoing financial viability of Stubbins Marketing Limited, reporting to the board thereon and providing all assistance required in the subsequent restructure and refinancing of that company, such services provided up to 31 March 2016*".

561. Peter described this as "*a bonus for doing the APA*" and "*a retainer bonus*" When it was put to him that "*That is a description of the stuff that he was doing for his £135,000 a year, is it not?*" Peter said, "*Not all of it, no*". Sammy said that the reason for the payment was that "*I think he did a tremendous job for us to save the family assets, and everything, and to get us where we did*". Both accepted that they did not tell any of the shareholders about this payment, a fact which gives some support to a finding that they knew that the payment would be very difficult to justify, particularly at a stage when they were on the cusp of being removed as directors (as I am sure they knew).

562. The submission made by SML was that like the previous payment, the figure was an extraordinary sum on any view. It amounted to more than 100% of Mr Smith's annual salary. It also said that the idea of this being a retainer bonus gave the game away in the sense that it made it clear that this was a bonus to encourage Mr Smith to stay, but the only work for him going forward would be with the new group comprising SFP, SGP and LPL, rather than SML. It was also fairly obvious by this stage that the majority of the shareholders in SML had taken the view that the Transaction had not been in SML's interests but was only in the interests of SFP and SGP. For that reason alone, it is clear that the Director Defendants should have given very careful consideration to the source (i.e. SML or SFP/SGP) from which any form of bonus for work done on the Transaction should be paid. There is no evidence that they went through the process of thinking about that issue and I think that it is most unlikely that they did.

563. In all these circumstances, I am satisfied that those directors who participated in making the payment of this invoice were responsible for an obvious breach of duty. Although the invoice seems to have been passed by Peter, l think that it is clear from Sammy's evidence that all three of the Director Defendants were involved in either authorising or receiving the payment. They were all still directors at the time and I am satisfied that they are all liable for breach of duty for participating in the paying away of SML's assets in circumstances in which they cannot properly have thought that the payment was in SML's best interests.

564. The fourth group of payments were made to Kombbi for what were said to be chairman's services and were claimed under three invoices dated 9 July 2016, 9 August 2016 and 9 September 2016 totalling £35,750, all of which were paid shortly after they were rendered. The services covered the entire period for which Mr Smith had held office as chairman (November 2015 to August 2016) and reflected what was recorded in the consultancy agreement eventually entered into on 21 July 2016. As I have already explained the consultancy agreement had made provision for Kombbi to receive a monthly fee of £2,750 in consideration for making Mr Smith available to provide the services, described as "*To serve as Chairman of the Board*".

565. It was said by the Director Defendants that this entitlement was included in the July 2016 consultancy agreement because it had already been agreed at the meeting back in November 2015. The instructions which the Director Defendants therefore gave to Gisby Harrison had been that the consultancy agreement between SML and Kombbi should refer back to the time of what they were told was the time of the oral agreement for the consultancy. This was said to be 9 November 2015, which was the date of the meeting at the Marriot hotel at which Mr Smith was appointed chairman.

566. The evidence from Peter and Ms Newcombe was that the agreement reached between Peter and Mr Smith in November had included an uplift in his salary of £2,750 per month. Although it is surprising that Mr Smith allowed so much time to expire before making any claim for payment for Chairman's services, this evidence was not specifically challenged, and I therefore accept that such an agreement was reached between the two of them at that time. The evidence is that the agreement reached in November was that Mr Smith would be paid the uplift through Kombbi. It is also difficult to reach a clear conclusion as to what the agreement contemplated that Mr Smith would be doing for his extra fee. It was not recorded in any contemporaneous documentation nor was it drawn to the attention of the shareholders let alone approved by them, an omission which gives rise to the legal consequences to which I refer below.

567. SML submits that it is clear that these payments were for directors' remuneration which was not approved by ordinary resolution of SML in general meeting and so could not lawfully be paid. SML's Articles of Association incorporated the Companies (Tables A-F) Regulations 1985 save where modified or excluded by the Articles. Regulation 82 was not one of the excluded or modified regulations and provides that "*the directors shall be entitled to such remuneration as the Company may by ordinary resolution determine*". It is also said that, in agreeing and authorising payment, the Director Defendants committed breaches of duty both by permitting payments which did not comply with Kombbi's Articles and because the payments were not in any event in SML's interests.

568. In my view, the agreement reached in November was an agreement to pay remuneration within the meaning of Regulation 82 and it was not submitted by the Director Defendants that it was not. They were right to make no specific challenge on this point because Kombbi was no more than a conduit (akin to a personal service company) through which Mr Smith received his remuneration as chairman of the Board. Such services as Mr Smith provided as chairman were part of the means by which he satisfied his duties as a director.

569. Despite the provisions of regulation 82, there was no evidence that any resolution determining Mr Smith's remuneration as including the additional £2,750 per month was

passed, nor was it said that all of the shareholders gave their assent so as to engage the *Duomatic* principle. Even if (as I have found) Mario might have assumed that something extra would be paid to Mr Smith, that falls well short of compliance with the terms of SML's Articles and in any event, there is no indication that the other shareholders gave their assent.

570. In these circumstances, the payment for chairman's services was beyond the powers of the Director Defendants to approve. All of the Director Defendants, who knew and approved of the agreement, were therefore liable for breach of duty in the event that payment was made. In any event I am not satisfied that the amounts which were included in the consultancy agreement reflected a proper assessment by any of the Director Defendants of an amount that was justified.

571. The only qualification which I would make to my conclusion is that the last of these invoices (for £11,000 plus VAT) was only paid after Sammy and Mr Smith had been removed as directors of SML. In my judgment this does not affect Mr Smith's liability to repay because he was a recipient through Kombbi of a payment, which he was on clear notice as being paid in breach of duty. For that reason he is liable in any event to account to SML. But I have not seen sufficient evidence to justify a claim against Sammy who was no longer a director at the time it was paid.

572. The fifth payment was for £45,000 made by SML on 13 September 2016 pursuant to an invoice for £250,000 (plus VAT) rendered on 9 September 2016. This was said to be in partial discharge of SML's obligation to make a termination payment to Kombbi under the consultancy agreement. As I understand the Director Defendants' case, it was said that the obligation had crystallised when Mr Smith was removed from office by the shareholders at the general meeting held on 18 August 2016.

573. The background to this is that at the meeting which Peter and Mr Smith had with Gisby Harrison on 20 May 2016, they were instructed to include provision for termination payments in the consultancy agreement for Mr Smith and the service contracts for Peter, Sammy and Salvi. I did not understand it to be suggested that this provision had been agreed back in November 2015, although Peter did say in his cross-examination that he had discussed it with Mr Smith earlier than May 2016 and there was some evidence that it had been debated in concept before the Transaction was agreed. However, there was no evidence that any agreement had been reached as to the terms on which a termination clause might be included before the time at which it had become apparent that a significant risk had emerged that the Director Defendants and Salvi would be removed as directors.

574. Indeed Peter's witness statement not only gave a reasonably accurate flavour of the real motive for the termination provision, it also made clear that there had in fact been no agreement before May – he used the language of what Mr Smith was keen to have, not what had already been agreed with Mr Smith:

> *"Wayne was also very keen to include what he called a "footballers" clause; something that would require SML to pay him a lump sum in the event his directorship was terminated. He pointed out that as shareholders of SML, Sammy, Salv and I all had shares in the unencumbered nurseries which were valuable asset plus a proportion of the income from the rent. Wayne had no such assets and would have no compensation if he was removed from his position as a director which both*

> *he and I thought would be unfair given all the hard work he had put into achieving the Transaction*."

575. In the event, clause 4 of the consultancy agreement made provision for the payment of a lump sum of £250,000 plus VAT in the event of either the termination of Kombbi's engagement by SML under the terms of the agreement or the termination of what was described as Mr Smith's directorship with SML.

576. It was submitted by SML that the termination payment required the approval of shareholders by reason of section 217(1) of the 2006 Act, because it was made to a director of SML for loss of office. It is not in issue that the payment was not in fact approved by resolution of the members of SML and on the face of it that means that it was unlawful. However, shareholder approval is not required under section 217 for a payment made in good faith in discharge of an existing legal obligation (section 220(1)), which means:

> *"an obligation of the company, or any body corporate associated with it, that was not entered into in connection with, or in consequence of, the event giving rise to the payment for loss of office."* (section 220(2))

So the question arises as to whether there was a legally binding obligation pursuant to which the payment was made that was not entered into in connection with or in consequence of the event giving rise to the payment for loss of office

577. In my judgment the event which gave rise to the payment for loss of office in the case of Mr Smith was his removal as a director of SML on 18 August. The question which then arises is identifying the relevant legal obligation. In my judgment, the legal obligation in partial discharge of which the payment was made was clause 4 of the consultancy agreement, which had been finalised on 21 July, 6 weeks before the payment was made and 4 weeks before Mr Smith's removal.

578. There is no doubt on the evidence that the inclusion of the obligation to make the termination payment was included in the consultancy agreement in consequence of the steps which were already being taken by the shareholders of SML to remove (amongst others) Mr Smith as a director. As Peter makes quite clear in his evidence the impending possibility of Mr Smith's removal was the actual reason for including the clause. Furthermore, this is corroborated by the fact that by the time the consultancy agreement was signed a requisition to hold the general meeting to remove Mr Smith had been received and the Director Defendants had been advised that it was valid. Peter then sent out the notice of the general meeting on the same day.

579. In my view, it can in these circumstances properly be said that SML's legal obligation under clause 4 of the consultancy agreement was entered into in connection with the removal of Mr Smith from office as a director. It seems to me that where the event giving rise to the payment for loss of office is the removal from office by a company in general meeting, an agreement to make the payment entered into in response to the requisitioning of that general meeting for the purposes of passing the relevant resolution will normally be "*in connection with*" that removal and I am satisfied that it was in the present case.

580. The only possible answer to this is if the consultancy agreement was simply confirming in written form the existence of a prior agreement which itself imposed the legal obligation in discharge of which the payment was made. For the reasons that I have already given, I do not think that that argument is available to the Director Defendants. Although what was described as the footballer's clause had been discussed before the Transaction, I am quite satisfied that there was no legal obligation to make the payment before the consultancy agreement had been entered into.

581. In these circumstances the payment of £45,000 to Mr Smith was unlawful for breach of section 220 and the Director Defendants, all of whom authorised it, acted in breach of duty in procuring it to be made. Even if that had not been the case, I do not consider that the Director Defendants can properly have reached the conclusion that it was in the best interests of SML to agree to the termination clause in the consultancy agreement and to make the payment. Put at its highest they were simply responding to pressure from Mr Smith to make the payment and have never advanced any reasons why it was in SML's interests (or why it was appropriate for the purposes of promoting the success of SML) for it to enter into the agreement or to make the payment at the time it did when it was under no pre-existing legal obligation to do so.

Agreed Issue 3: Kombbi Debenture

582. The third agreed issue falls into three parts and relates to the Kombbi Debenture. (a) Did Mr Smith, in threatening to make a demand for payment, breach his duties to SML? (b) Did the Director Defendants breach their duties to SML by granting the Kombbi Debenture? (c) Is SML entitled to rescission of the Kombbi Debenture?

583. The background to this issue is that, on 19 July 2016, which was two days before the notice calling the general meeting of SML to remove the Director Defendants was sent out by Peter, SML created and registered the Kombbi Debenture in favour of Kombbi as security for all present and future liabilities. It was drafted sufficiently widely to secure sums which arose under the consultancy agreement which had first been discussed at the May meeting. Clause 6.1 of the Kombbi Debenture contained a negative pledge in standard terms which prevented SML, without the consent of Kombbi, from creating, purporting to create or permitting to subsist any security over any secured asset. It seems that the existence of this clause has caused difficulties for SML in raising further finance.

584. Mr Moffat was also instructed in relation to the grant of the Kombbi Debenture. He explained what happened as follows:

> *"Wayne reiterated his concerns about the SML shareholders blocking payment to him and his company Kombbi, for work he had done to date.*
>
> *"Peter explained to me that Wayne's company, Kombbi, was owed quite a lot of money and that Wayne was concerned that given the comments made by the SML shareholders, he would not be paid. Wayne in his capacity as a director of Kombbi, had said to Peter and Sammy that either: (i) Kombbi had to be granted security by way of a debenture over SML's assets to ensure he would be paid in future; or (ii) he would make an immediate demand for repayment. Peter said that SML couldn't*

afford to pay Wayne in full at that time and sought my advice, on behalf of SML, as to what should be done."

585. Mr Moffat said in his witness statement that he told Peter and Mr Smith that if Kombbi sought immediate payment but SML could not pay it, there would be a risk that Kombbi would serve a statutory demand on SML and that providing security appeared to be in the best interests of SML. Peter then called a board meeting approving the debenture while still at Gisby Harrison's offices. Peter and Mr Smith spoke to Sammy on the phone to obtain his approval. This was all done at the same time as the Director Defendants approved the transfer of the SGS shares to SFP, an issue which I deal with in more detail when considering the tenth agreed issue.

586. The way in which the case is put by SML is that it was manifestly not in the best interests of SML for Mr Smith to have threatened to make an immediate demand for payment from SML if security were not to be granted. It was then said that Peter and Sammy failed to act with reasonable care by giving in to Mr Smith's threats. The consequence of this is that the Kombbi Debenture is said to be voidable at the instance of SML and that, in the absence of any intervening third-party interests, SML is entitled to rescission. It is also said that there are in fact no sums outstanding from SML to Kombbi and for that reason as well SML is entitled to its discharge.

587. Kombbi itself has not appeared at the trial, but the arguments have been put by the Director Defendants and I am satisfied that it is appropriate for me to grant relief if it is otherwise justified. The defence advanced is that there was no breach of duty because advice in relation to the grant of the Kombbi Debenture was given by Mr Moffat who told Peter and Mr Smith that if Kombbi sought immediate payment but SML could not pay it, there would be a risk that Kombbi would serve a statutory demand on SML and that providing security therefore appeared to be in the best interests of SML.

588. I accept Mr Moffat's evidence that this is what he advised. Mr Moffat also accepted in cross-examination that he took it on trust from Peter that Kombbi was owed money by SML, but I do not think that SML is correct to submit as Mr Roe QC did in his closing submissions that Mr Moffat did not know that the sums due were likely to be disputed by SML if Mr Smith was removed as a director. Mr Moffat said in terms that Mr Smith said that he was concerned that, given the comments made by the SML shareholders, he would not be paid. However, although Mr Moffat's advice was that the grant of the Kombbi Debenture appeared to be in the best interests of SML, it was given in the narrow context of whether or not security granted to forestall a creditor from making demand for his debt could be in the chargor's interests. That goes nowhere on the wider question of conflict and whether or not the creditor might himself be acting in breach of duty in making the demand in the first place.

589. In my judgment the Director Defendants acted in breach of duty to SML in procuring it to grant the Kombbi Debenture. I am satisfied that it was not in SML's interest for this to be done, because the security included a negative pledge and was bound to make it more difficult for SML to raise further finance if there were to be an extended dispute as to the validity of the underlying debt, as was entirely predictable at the time and as has proved to be the case. If a demand were to be made by Kombbi, it was in SML's interests for its validity to be appropriately investigated and to be defended if there was a defence but conceded if there was not. In this particular situation, I am satisfied that the grant of security can only have weakened SML's position in protecting its own

interests as against the claims made by Kombbi. In my view the overwhelmingly dominant motive for granting the Kombbi Debenture was to benefit Kombbi at the expense and to the detriment of SML.

590. This breach of duty could only have been ratified by the informed consent of the members of SML in general meeting or acting pursuant to the *Duomatic* principle. It is plain that neither of these things occurred. It follows that the Kombbi Debenture is potentially voidable at the instance of SML. However, that does not necessarily mean it will be rescinded, because it is also necessary for SML to show that Kombbi's conscience is affected by actual knowledge of (or wilful blindness as to) the breach of duty.

591. In my judgment this is established in the present case. As I have explained Mr Smith was Kombbi's sole shareholder and director, and Kombbi effectively acted as his personal service company. It follows that Mr Smith's state of mind is to be attributed to Kombbi and he plainly had an overwhelming personal interest in, and gained a personal benefit from, advantageous transactions entered into by Kombbi. Mr Smith cannot be said to have been unaware of the fact that it was not in SML's interests for the Kombbi Debenture to be granted. I am satisfied that he knew of all of the surrounding circumstances which gave rise to the breach and in particular he must have known that, by procuring the grant of a debenture through threats to make demand for payment in respect of liabilities that would be disputed, he was advancing his own interests in a manner that was adverse to the interests of SML.

592. This conclusion is I think fortified by the fact that the grant of the Kombbi Debenture is a plain case of self-dealing by a fiduciary (Mr Smith who was still a director at the time), where his principal (SML) is entitled to rescission as a matter of right in the absence of informed consent. The only persons who consented on behalf of SML (the Director Defendants) were themselves acting in breach of duty, which is plainly insufficient. For the reasons that I have already explained, the fact that they received some advice from Mr Moffat on the point does not affect that conclusion.

593. In these circumstances, I am satisfied that the Kombbi Debenture should be rescinded. In any event, in the light of the conclusions that I have reached in relation to the previous agreed issue, I am satisfied that there are no sums outstanding to Kombbi that are capable of being secured by the Kombbi Debenture. On this ground as well SML are entitled to what I think technically would be an order for redemption and discharge of the Kombbi Debenture on the grounds that there is no debt outstanding under it.

Agreed Issues 4: Building Works

594. The fourth group of six agreed issues relates to building works to the homes of Director Defendants. (a) Was the cost of building works carried out to the homes of Peter and Sammy in excess of any sums that were due to them by SML? (b) Was the building work carried out at Mr Smith's home in lieu of monies owed to him by SML? (c) If so, what sums were owed? (d) Was the building work to the Director Defendants' homes authorised by the Director Defendants in breach of duty? (e) Is SML entitled to a proprietary remedy (f) What (if any) sum is SML entitled to as equitable compensation?

595. The context in which the building works were carried out to the homes of the three Director Defendants at the expense of SML is different in each instance and I shall deal with them separately. However, in each instance it is said that the building work was carried out as payment-in-kind for obligations which SML had to each of them and to that extent the claims have something in common. It is also right to say at the outset that the Director Defendants gave some evidence which seemed to be directed at showing a culture which was tolerant of personal expenses being funded out of SML's assets or using its resources. As Peter put it when he was describing the context in which work was done for him (which he said was done at the suggestion of Mr Randall):

> *"I thought this made sense and was aware that the building division had often done work for others in the family including Mario, Salv and also for Steve Randall*."

596. I do not accept, if this was the message which Peter sought to convey, that merely because SML's resources had in the past been used for the benefit of other directors or employees, such a practice excused what would otherwise have been a misapplication of resources for his benefit.

597. Having said that, in my view (and leaving aside the need to make proper declarations to HMRC in respect of tax which may fall due) there is nothing inherently wrong with work in kind being done for directors or employees in lieu of payment for the discharge of obligations which a company owes to them. However, it is self-evident that any such practice is open to abuse and, where it happens, it is particularly important that the original obligation itself is properly recorded, that the asset or resource expended by the company in discharge of the obligation is given full value and is also properly recorded and that all necessary internal procedures are complied with. It will also always be relevant for the directors to give careful consideration to whether the utilisation of the company's resources in this way is the best way of using those resources in the light of the other business pressures to which it may be subject. Otherwise it cannot be said that the payment-in-kind will involve the use of the resource in a manner which is most likely to promote the success of the company for the benefit of its members as a whole.

598. As to proper recording, both the costs of the materials and the costs of SML employees used on this work were recorded in SML's accounting records as "building work at Cambridge Nursery" (i.e. Fen Drayton), "work in progress" or "overhead labour". It was contended by SML that the way in which this information was recorded meant that SML was in breach of sections 386, 393 and 413 of the 2006 Act. There may well be force in this contention, but I do not propose to make any specific findings to that effect because none are necessary for the relief sought in these proceedings. Nonetheless, this case illustrates the importance of a company's records being sufficient to show and explain its transactions. It seems that the way in which this building work was recorded failed in that respect.

Building Work at Griffins Wood

599. As I have already explained, Mr Smith lived with Ms Newcombe and their two children at Griffins Wood. SML contends that during the course of 2013 and 2014 it was procured by the Director Defendants to spend £452,431.34 in the value of labour and

costs of materials on extending, renovating and upgrading Griffins Wood. It is obvious that building work of the type alleged cannot of itself have been in the interests of SML, nor can such work have been likely to promote the success of SML for the benefit of its members as a whole. To that extent, any director who procured or permitted the expenditure to be incurred (and all three Director Defendants knew and participated in what was happening to a greater or lesser extent) is liable to SML for breach of duty.

600. The Director Defendants do not dispute that substantial works were carried out on Griffins Wood by workmen employed by, or sub-contractors engaged by, SML. They contend, however, that these works were done in consideration for services supplied by Mr Smith. If they are correct in that contention, they may be able to establish that no breaches were committed. It seems to me, however, that the burden is on them to show that that was the case.

601. In his witness statement Peter said that, as at December 2013, Mr Smith's consultancy invoices had not been paid because SML continued to have financial difficulties. As I have already said I do not accept this way of putting it because no invoices had been rendered. Even if they had been, the Schedule on the basis of which this part of the claim is defended by the Director Defendants stated that, as at the end of 2013, £70,850 (ex VAT) was chargeable but unpaid. Peter said that he therefore suggested to Mr Smith that SML's building division, which did not have much work on at the time, could help to build an extension to Griffins Wood the cost of which (agreed at £120,000) would be charged to Mr Smith, but then set off against the outstanding invoices in respect of consultancy fees. Apparently, the planning permission which Mr Smith had for a redevelopment of the property was about to expire, which meant that this was advantageous to him.

602. As SML pointed out in its closing submissions, the figures referred to in Peter's evidence make little sense, because, even on the basis of the Schedule, there was insufficient outstanding to Mr Smith at the end of 2013 to justify a set-off of building works to a cost of £120,000 which was £50,000 more than the amount which is now said to have been outstanding at that stage to Mr Smith. In fact, SML incurred very substantially more in the way of expenditure on this work. Thus, it is now not in issue that the sum of £164,212.92 was spent by SML on various labour and material costs for the building of Griffins Wood, plus a further sum which relates to the value of the in-house labour provided by SML.

603. The reason why it was said to be acceptable for SML to provide this benefit in kind was, as Sammy said, that SML's building team was not busy at the time. The gist of Peter's evidence was that this was better than paying Mr Smith's invoices, although this is difficult to reconcile with his evidence that the amounts chargeable by Mr Smith for his consultancy services were only payable when SML was in a position to do so. Even on Peter's own evidence as to when SML would have come under a liability to Mr Smith, SML would have had to be free of its financial difficulties for the liability to have arisen. I should add that Peter continued to maintain in his oral evidence that he believed there were such unpaid invoices, although as I have already explained none emerged in the course of preparation for the trial. This evidence was inconsistent with what Sammy had to say (as I shall explain) and I do not accept that Peter's evidence on this subject was true.

604. There was a further difficulty with this explanation. It transpired during the trial that SML did not have a building division, but only had a maintenance department. This meant that it was not in fact in a position to do all of the work on Mr Smith's house from its own in-house resources. This became clear from SML's records, and in particular from the recording of the expenditure under the specially created codes set up by Mr Randall, 1GWC and 2GWC. Much of the work in fact carried out was done by third party contractors who would have had to be paid in any event. To that extent there was no cash saving for SML.

605. In the end, Peter accepted in cross-examination that what he had described in his witness statement made no sense. He also accepted that the bigger house for Mr Smith did not benefit SML or its shareholders in any way.

> *"Q. I do not understand the explanation that works were being contraed. That does not make much sense. However you describe it, the bottom line is that this arrangement involved SML having to shell out quite large quantities of cash, and therefore your explanation that this came about because of a lack of cash makes no sense. Do you accept that?*
>
> *A. Yes.*
>
> *Q. It did not benefit SML or SML's shareholders in any way for Mr Smith to have a bigger house, did it?*
>
> *A. No, it did not."*

606. Sammy said that at the time the building team started work at Griffins Wood, it was initially agreed that SML would render invoices to Mr Smith. In his oral evidence he clarified that what he meant by this was that it was initially agreed that Mr Smith would pay for the work. He then said that it was agreed that "*SML could contra the invoices against the amounts SML owed to him*", but accepted in cross-examination that he never saw any invoices for amounts that were owed to Mr Smith, although as he put it "*I think there was owed monies*". This evidence was confused, but on any view it demonstrated an approach to scrutinising the true extent of SML's obligations to a service provider which was nothing like as rigorous as it should have been.

607. Mr Randall said in his evidence that when he set up the internal codes for the work, he was told by Sammy that the costs would be re-charged to Mr Smith plus a 20% profit margin. This is consistent with Sammy's evidence although with the critical difference that he was not told at the beginning that payment could or would be made by a discharge of a liability to Mr Smith for consultancy fees. I accept this evidence.

608. In summary, I do not accept the assertion that Mr Smith had already rendered invoices in respect of his consultancy work before the building work on Griffins Wood started. I think that is most unlikely to have been the case. Sammy did not see any invoices, there were no copies of any such invoices in the voluminous disclosure of documents which took place before the trial, there was no record of any such invoices in any of SML's books and even the Schedule which I have already referred to above does not relate the work that Mr Smith claimed to have done to any invoice rendered to SML whether on a daily basis, a monthly basis or otherwise. In the absence of invoices, there is no obvious link between the amount said to be outstanding to Mr Smith at any one

time and the amount which SML had incurred, or was committed to incur, by way of expenditure on the building works at that stage.

609. There was no other evidence made available to Peter or Sammy as to the value of the work which had in fact been carried out by Mr Smith at the time of the arrangement that he reached with Peter in relation to the building work at Griffins Wood. The consequence of this is that I have no doubt that there was insufficient material for Peter and Sammy to have properly concluded that Mr Smith had in fact carried out consultancy work to any particular value which would have justified a contra against his obligation to pay for the building work.

610. In my judgment, the reality of the position is that Peter and Sammy were prepared to accept a figure for the value of his consultancy work which was based on the cost of the building work, rather than a proper assessment of the services actually provided. I think that the following passage in Mr Randall's evidence conveys the substance of what in fact happened:

> "*...when we were building the house, I was first of all told that we take the materials and all the labour costs, add 20 per cent margin and re-invoice it to Wayne. At the date, I cannot give you the exact date of, Peter said to me, "We owe Wayne some money." And I said, "For what?" And he said, "Well, some work he has done for me." I said, "Well, how much?" And he said, much as 150,000." I thought, "That is quite convenient because the estimate for stage 1 on his house was 150,000." We then went on and built stage 2 of Wayne's house and, at that point, I said to Peter, "Can you give me an exact figure because I want to put an accrual in the accounts for it?" At that point, he said to me, "Oh, I do not know." And Peter and Sammy went round to visit Wayne and, when they came back, I said, "How much is it?" And Sammy got his book out and said, "Well, there is something for that and something for that and altogether it comes to about 290,000." And at that stage, because we had built phase 2 of the house, surprisingly, there were bills for that sort of money. Now, I saw no invoices, no agreement or anything else. It was simply those two conversations I had with Peter and Sammy. The first one was just with Peter and the second one was Peter and Sammy*."

611. As to the value of the building works themselves, or rather the cost to SML of the work, I have already mentioned that it is common ground that the sum of £164,212.92 (excluding VAT) was spent by SML on various labour and material costs relating to supplies made by third parties. Although this is evidenced by the GWC coding set up by Mr Randall and is agreed, there is greater controversy about the value of the work provided by SML's in-house employees. SML assert that the value was £256,050 being the estimated salaries of five full-time employees over a period of one year. This is based in a paragraph in the witness statement of Mr Randall in which he says:

> "*The extension was huge as can be seen in before and after pictures … a year of building team's labour (based on the schedule of material invoices) amounted to at least £256,050 (including NI). The following people worked on the site: Bill Edwards, Paul Edwards, T Haworth, A Haworth, S Wookey, Darren Latch. There would have been others including electricians and plumber. I am not aware of the salaries of those named. I have assumed three with salaries of £45,000 and 3 with salaries of £30,000 for a total of £225,000 plus 13.8% NI for a total of £256,050."*

612. Mr Randall was asked about the assumption and accepted in cross-examination that the figure of £256,050 was only based on an estimate made by him. SML made no further attempt to substantiate this figure in a conventional manner by (for example) putting in evidence from the workmen themselves as to how long they had spent on the site or adducing time sheets or equivalent contemporaneous documentation. Ms Newcombe said that while she knew the Edwards brothers who were there from time to time (she said they were "*at my house but not frequently*"), she did not recognise the other names. She also said that Sammy had talked about the in-house workers being employed on other roles on other projects but agreed that several of them were there over the course of several months, a point that was also made by Sammy. I accept the broad thrust of Ms Newcombe's evidence on this point.

613. I do not agree with SML's submission that, because the building works were carried out in breach of duty on the part of Director Defendants any doubt as to the extent of any gain or profit made by Mr Smith should be resolved in SML's favour. The reason for this is that there was no attempt by SML to show the extent of the gain or profit to Mr Smith. Such evidence as there was is limited to the cost to SML. It is only once the value gained has been established, that there could be any question of the presumption of the type apparently relied on by SML. In my view the evidential burden remains on SML to prove the periods for which its employees worked at Griffins Wood, the cost to SML of that work and (if necessary) the value of it to Mr Smith. Then but only then did the burden shift to the Director Defendants to demonstrate the extent to which it has been paid for by the whole or partial discharge of SML's obligations to Mr Smith in respect of consultancy fees.

614. In their closing submissions the Director Defendants assert that the only amount proved is 50% of Paul Edwards' time for nine months at a cost of £16,875. I do not think that the figure is as low as that, but nor do I think that SML has come anywhere near showing that it was £256,050. On the evidence I have seen the figure claimed by SML is very substantially inflated. Having regard to the size of the project (and I saw some photographs), the fact that much of the work was done by outside contractors and falls within the £164,213 and the fact that Ms Newcombe accepted that at least some of the work was carried out by in-house employees, I think that the evidence points to four full time employees spending most but by no means all of their time (I estimate 75%) on the project over 9 months to the end of September 2014, two of whom were paid £30,000 and two of whom were paid £45,000. It is quite possible that it may have been more, but SML has not discharged the burden of showing that it was.

615. This gives a total of £96,019 (including employer's NI at 13.8%) that I am satisfied was the cost to SML of the in-house labour. In my judgment, SML has established that the total therefore expended by it on Griffins Wood was a VAT exclusive figure of £260,231.

616. For reasons which I have already discussed the only justification for any part of this building work to have been paid for by SML is if it can be treated as having been paid for by consultancy work for which SML was obliged to pay. This means invoiced work carried out by Mr Smith during the period between June 2013 and March 2014 when he was given a budget by Peter which was spent through the Kore Creative charges which I have already mentioned. As none had been invoiced, and there is no evidence of specific authorisations, it is difficult to see how SML had any contractual obligation to pay. However, it is plain that Mr Smith was doing some work for SML. One example

was his introductory meeting with Barclays in December 2013 for which, amongst other things, he had designed some logos. There is sparse evidence of anything else not least because it seems to have been covered by other invoices, e.g. the preparation for the Taste of London exhibition in 2014, where the work was done as part of the marketing budget charged by and paid to Kore Creative.

617. In these circumstances I think it is clear that there would have been a burden on Mr Smith to demonstrate that he had done consultancy work sufficient to justify the building expenses incurred and the nature of what occurred means that any doubts would have been decided against him. I have little regard to the Schedule in making this estimate, but I think it is clear that if a dispute were to have arisen at the time, Mr Smith would have been able to make some recovery against SML, even if only on the back of a claim to a quantum meruit. There is little for me to go on, but doing the best I can, and notwithstanding the prima facie breach of duty committed by Peter and Sammy in permitting this building work to be carried out (of which Mr Smith was on notice), my best estimate, based on what I have been shown that he was doing during this period, is that a minimum of three weeks' consultancy work at £1,300 per day would have been allowed notwithstanding the lack of invoices. Accordingly, I think that £27,300 must be deducted from the £96,019 which is the loss that SML sustained from this breach of duty.

618. SML accepts that the claim for £164,213 cannot be pursued against the Director Defendants because it was an asset which was transferred to SFP under the APA. It follows that the total personal claim for breach of duty is £68,719. SML does however contend that it has a proprietary claim to recovery of the full amount (which I have now quantified at £232,932) as a proprietary claim against Mr Smith's estate. Mr Roe QC bases this claim on the principles set out in *Foskett v McEwan* in the Court of Appeal ([1998] Ch 265), but the argument as to this was not developed and I am not satisfied that it has been fully made out.

619. There are two reasons for this. The first is that SML's claim to be able to trace into a property such as Griffins Wood can only succeed if it can show that the value of the property concerned has been enhanced by the expenditure (Lewin on Trusts (20th edn) at para 44-104). The evidence focussed on what was spent by SML. There was no evidence on the extent to which the value of Griffins Wood was actually enhanced by the expenditure incurred, and it is difficult for me to assume that it was, not least because there was a certain amount of credible evidence that there were serious deficiencies in the work that was carried out by SML's workmen.

620. The second reason is that, to the extent to which SML's claim was transferred to SFP under the APA, I am not satisfied that a proprietary remedy is available. In particular it has not been explained to my satisfaction how it is that SML can on the one hand concede (correctly as it seems to me) that an element of the claim has been transferred under the APA, but on the other hand maintain a proprietary claim to recovery of that same amount out of the property on which SML expended the money so claimed. At one stage the point was going to be further developed by SML, but in the event that course was not taken.

621. Accordingly, I do not accept that SML has made out its claim to a proprietary remedy in respect of the work carried out at Griffins Wood.

Building work for Peter and Sammy

622. As I have already mentioned Peter lived at Comptons Brow and Sammy lived at Bramfield Road. SML contends that it was procured by the Director Defendants to spend £82,438 in the value of labour and costs of materials on Comptons Brow and £61,800 in the value of labour and cost of materials on works on Bramfield Road.

623. The Director Defendants said that the work was carried out as agreed payments in kind in lieu of bonuses to which Peter and Sammy were entitled. Their bonus entitlements were not in dispute and arose because the effect of the sale of the Cardiff Nursery, which as I have explained took place in November 2013, had been to trigger £70,000 bonuses for Peter, Salvi, Sammy and Mr Randall under a scheme that had been put in place by Mario. Peter then said that it was agreed at Mr Randall's suggestion that Peter, Sammy and Salvi would each defer £49,000 of those bonus entitlements and that subsequently Mr Randall suggested that the deferred amount be paid off by the building work. Sammy said much the same thing and added that the suggestion was made because SML had insufficient cash at that time to pay the bonuses in full. It is not in dispute that they were both only paid £21,000 of this bonus and that £49,000 remained outstanding.

624. Mr Randall denied that he made any such suggestion and I do not think that it is necessary for me to decide whether he did or did not do so. What matters is that Peter and Sammy were both directors of SML and I am quite sure that they were both well aware of the rights and wrongs of using SML's resources for their own personal benefit. I shall come to the amounts spent shortly, but it is now clear that the way in which the invoices were drawn up and the work was recorded was deliberately misleading. In particular some of the invoices referred to the building work as having been done at Fen Drayton, and this was the way in which that expenditure was recorded in SML's books and records. There was evidence from Peter that this was done (anyway in part) to facilitate a reclaim of VAT and Sammy also gave evidence that it was VAT related, but in their witness statements they both sought to give the impression that it was all down to Mr Randall.

625. However, in his evidence at trial Sammy accepted that he had asked the contractors to put Fen Drayton as the delivery address on the invoices relating to work at his own home at Bramfield Road. This was in conflict with what he had earlier said in the course of Mr Randall's formal grievance, namely that it had all been dealt with by Mr Randall and was either a mistake by the supplier or the work was in fact done at Fen Drayton. In the end he accepted that what he had said in the grievance hearing was untrue.

626. Peter's position was slightly different but was to a similar overall effect. In the grievance proceedings, Peter said that where the invoices included a reference to materials being supplied to Comptons Brow this was a mistake by the contractor, because the work was all done at Fen Drayton. In his evidence in these proceedings, he accepted that the work was done for him personally at Comptons Brow as a way of paying the unpaid element of his bonus. His explanation for the discrepancy included an acceptance that he had been untruthful in the grievance proceedings. His explanation

for lying then was: "*At that time, Mr Randall was causing a lot of problems and we were just trying to resolve his grievance*".

627. It also seems that these benefits did not appear on either of their P11D Expenses and Benefits Forms for the relevant tax year. Peter declined to answer questions as to whether he knew the form was false at the time he signed it. Sammy said that he has made voluntary disclosure to HMRC in respect of the contents of this form, and that at the time he signed it he did not know what tax year it was. At the end of the day this issue goes to credit rather more than it does to a matter at the centre of the dispute between the parties, but it is necessary for me to record that the way in which Peter and Sammy behaved in relation to the building work at their properties reflected a propensity to be untruthful in relation to matters affecting their own personal interests and to have scant regard to their legal obligations in relation to benefits they received from work carried out for them at the expense of SML.

628. As to the amounts which were spent on Bramfield Road and Comptons Brow, I am satisfied from the combination of the evidence adduced from Mr Randall and SML's expert, Mr Frenkel, that £51,500 (excluding VAT) was spent by SML on Sammy's property at 122 Bramfield Road and £76,935.95 (excluding VAT) was spent on Peter's property at Compton's Brow. I am also satisfied, as is not disputed by SML, that in any claim, SML is required to give credit for the outstanding unpaid bonus.

629. In reaching that conclusion I have taken into account the fact that the Director Defendants dispute the overall estimate of labour costs evidenced by estimates from Mr Randall. The Director Defendants put SML to proof that the value of the labour was £34,425 based on an estimate of 70 days of skilled work and 85 days of unskilled work. Ms Anderson QC said in her closing submissions that this was exaggerated but did not identify any specific evidence which might justify a conclusion that it was. In my judgment and having considered the nature of the work done on the two properties, the estimate made by Mr Randall is a fair reflection of the cost to SML of the in-house labour that it supplied for the benefit of Peter and Sammy.

630. Finally on this issue I should make clear that I am satisfied that Peter and Sammy were involved in authorising the expenditure on each of the three properties. Accordingly, the in personam claims for breach of duty in respect of all of that expenditure are capable of being pursued against both of them. That is not the case in relation to Mr Smith and his estate. In my judgment the estate is not liable for the claims in respect of Comptons Brow and Bramfield Road, because there is no evidence that Mr Smith participated in authorising the expenditure nor is there any clear evidence that he was a director at the time that expenditure was incurred.

Agreed Issue 5: Salary Increases

631. The fifth agreed issue falls into two parts and relates to salary increases. (a) Is SML entitled to be repaid the salary increases made to the Director Defendants from February 2016? (b) If so, what sum is due to be repaid?

632. At the commencement of the trial SML's allegation was that the Director Defendants awarded themselves salary increases in February 2016 at a time when they were

representing to SML's shareholders that SML was in a parlous financial state. It was said that the increases were not disclosed at the 24 March 2016 meeting at which the Transaction documents were signed in escrow, and that shortly before the termination of his appointment as a director in September 2016 Peter informed the shareholders that no such increases had been received. The total amount claimed at that stage was £22,760.

633. The Director Defendants contended that the pay rises, which were for Mr Smith, Sammy and Salvi, and were intended to take them each up to £150,000 per annum which was the amount being paid to Peter, were entirely justified. It was submitted that there was no evidence that they were not commensurate with a proper salary for the positions occupied by each of them. They also denied that any pay rise was paid to Peter. They accepted, however, that the pay rises for Mr Smith and Sammy should not have taken effect until 1 April 2016 when the Transaction completed, at which stage the intention was that the new salaries would be payable by SFP. They accepted therefore that Mr Smith and Sammy were paid too much in error. In the case of Mr Smith, the overpayment was £2,500 and in the case of Sammy it was £5,000.

634. By the end of the trial, the claims in respect of pay rises as set out in Schedule 3 of SML's adjusted Schedule of Loss related only to the pay rises to Sammy and Mr Smith. Sammy was awarded a 25% pay rise from £120,000 to £150,000 per annum, where the excess amount actually paid before 1 April 2016 was £5,000. SML claims that figure by way of damages for breach of duty plus the employer's national insurance payable on that amount totalling £5,690. Mr Smith was awarded an 11% pay rise from £135,000 to £150,000 per annum, where the excess amount actually paid before 1 April 2016 was £2,500. SML claims that figure by way of damages for breach of duty plus the employer's national insurance paid on that amount totalling £2,845. SML did not pursue a claim in respect of the pay rise awarded to Salvi, presumably on the basis of a more general approach that claims in relation to his conduct are not being pursued, and there was no challenge to the Director Defendants' case that Peter did not receive a pay rise.

635. In my judgment, there is insufficient evidence to show that any of the Director Defendants were guilty of breach of duty in respect of the payment of a pre-1 April pay rise to any of the other Director Defendants. I am not satisfied that SML has discharged the burden of showing that the payment of the excess amount was anything other than an administrative error, nor am I satisfied that it was intended by any of them that the pay rise amount would be paid by SML rather than SFP.

636. I am, however, satisfied that it is a breach of duty for a director in the position of Sammy and Mr Smith to accept and/or not to repay forthwith an amount received by way of remuneration to which he was not entitled, together with employers' national insurance if not otherwise recoverable. Doubtless, SML would also have a claim in mistake, but in these circumstances, I consider that Sammy is liable for £5,690 and Mr Smith (or rather his estate) is liable for £2,845 in each case being the sum which is now accepted as being in excess of the amount to which he was entitled.

Agreed Issue 6: Diversion of Custom

637. The sixth agreed issue falls into three parts and relates to the alleged diversion of custom to SFP: (a) Did the Director Defendants divert custom away from SML to SFP? (b) If so, was this in breach of duty? (c) What loss (if any) was suffered by SML as a result?

638. It is clear, and not I think disputed by the Director Defendants, that something called SFP started trading on 1 October 2015. The Director Defendants contend that SFP was not trading in its own right because its accounts were incorporated into SML's management accounts and simply treated as a division or separate cost centre within SML.

639. SML does not accept this explanation. It says that SFP was a separate legal entity with different shareholders to SML. It also relies on the fact that SFP sent notices to customers explaining that from now on they would be dealing with Stubbins Food Partnerships Limited and not SML trading as StubbinsFP. It points out that invoices were sent out with SFP's details on them and that SFP filed VAT returns. SML submits that the relevance of this is that by 1 October 2015, when SFP started trading on its own account, the Director Defendants had a settled intention to take over the trade of SML pursuant to a management buyout. It was therefore wrong of Mr Heyes and the Director Defendants to certify that SFP was dormant prior to the APA. I think that there is force in this submission.

640. Of equal significance is the admission by Peter and Sammy that the reason they started trading through SFP was to put assets outside the Barclays security envelope. Peter said in evidence that he thought it was a commercially proper thing to do at the time, although he accepted that he did not tell Barclays. As SML submits, part of the significance of this admission is that Peter and Sammy were thereby demonstrating low standards of commercial probity, but this conduct is also likely to have had an impact on SML's long-term relationship with Barclays, a relationship which was at the centre of what occurred at the time of the Transaction.

641. However, the real question, as SML accepts, is whether or not it suffered any loss from this conduct. The reason that this is in doubt is because the SFP trading was largely accounted for at the time of the Transaction and SML's loss in respect of the diversion of trade relates only to unpaid stock taken over on 1 October 2015 worth £128,236.98 and retained funds in its bank account of £107,959.9, which should have been treated as an asset of SML's at the time of the APA. The Director Defendants do not challenge these sums. In relation to the unpaid stock, Peter says in his evidence that he '*was not aware of this*' and there is no positive evidence which challenges the stock figure and the experts agree that the bank balance should have formed part of the assets accounted for through the APA.

642. SML does not contend that this is deliberately misfeasant conduct by the Director Defendants, but it alleges that, if the Director Defendants had put their minds to it, then these items would have been included in the valuation of the assets transferred. It follows that SML is entitled to recover the value of the stock that was never paid for and the bank balance taken over but not treated as an asset of SML's for the purposes of the APA. I agree with SML's case on this point, and in my judgment, it was a breach of duty by the Director Defendants not to ensure that these two items, both of which had the value I have stated above, were accounted for in the APA. This claim for £236,197 is accordingly made out.

Agreed Issue 7: Mr Randall

643. The seventh agreed issue falls into two parts and relates to the payments to Mr Randall: (a) Did the Director Defendants breach their duties to SML by paying Mr Randall £300,000 in settlement of his claim against SML? (b) If so, what (if any) loss was suffered by SML as a result?

644. My factual findings as to what occurred are dealt with in the section of my judgment described under the heading 'The Departure of Mr Randall', In short summary, Mr Randall ceased active involvement with SML's business on 15 March 2015. Shortly after he left in March, he raised an internal grievance and then commenced proceedings against SML in the employment tribunal, raising a number of the issues which are also raised in these proceedings. He wanted to be paid £650,000. The employment tribunal proceedings were then compromised on terms which included a confidentiality agreement in exchange for what SML now contends was an excessive settlement figure (£300,000).

645. The claim is advanced as a breach of the duties owed by the Director Defendants under section 172 of the 2006 Act to act in the best interests of SML, under section 175 of the 2006 Act to avoid a conflict of interest and under section 171 of the 2006 Act to act within their powers. It is said that it was in the best interests of SML for the wrongdoing of the Director Defendants to be revealed and it was not in its best interests for its money to be used to conceal that wrongdoing. It is also said that the duties under sections 175 and 171 were breached because the Director Defendants preferred their own interests in avoiding detection to their duties to SML to report their own wrongdoing and that they used their powers in breach of duty by paying off Mr Randall in order to conceal their own wrongdoing.

646. The loss which they claim that SML suffered was the £300,000 which they caused SML to pay Mr Randall in order to settle his employment tribunal claim. It is said in the Schedule of Loss that this was done because they wanted to avoid a public airing of the fact that they had been causing SML to spend money on them personally through works to their homes.

647. The Director Defendants deny concealment or that the allegations made by Mr Randall were suppressed. They said that at the time of his departure in March 2015, Mr Randall wanted a pay-out with a confidentiality agreement and contend that the employment tribunal proceedings were a transparent attempt by Mr Randall to pressurise SML into giving him that. They contend that the Director Defendants agreed with Mario and Pauline that the payment should be made and that settlement in the sum paid was in SML's best interests.

648. SML says that both Peter and Sammy admitted that they lied in Mr Randall's grievance proceedings in order to bury the allegations. I do not think that their evidence can be read as going that far, although Peter certainly accepted that he gave a different account in his response to some of the grievances from the account that he now gives and I am satisfied that he has not been at all straightforward in his answer to the allegations in the different contexts in which they were made. SML also relies on the fact that the Director Defendants have not put forward a reasoned argument for paying Mr Randall

£300,000, which they would have been able to do if the payment was made in response to advice given by SML's solicitors and they submit that the inference that the Director Defendants caused the money to be paid for the suggested improper reason is a sound one.

649. It is important to understand the way in which SML puts its case on this issue. The duty pleaded was a duty of the Director Defendants actively to report their own wrongdoing to SML. The existence of such a duty is well-established: *Item Software (UK) Limited v Fassihi* [2005] 2 BCLC 91 and is now normally treated as an aspect of the duty under section 172 of the 2006 Act to act in what a director considers in good faith to be most likely to promote the success of the company. They were also said to be under duties not to prefer their own interests to those of SML by exercising their powers in a manner which concealed their own wrongdoing.

650. The breaches alleged against the Director Defendants all arise because SML said that the payment to Mr Randall was so excessive that it can be seen that it was made for an improper purpose. There is, however, no allegation that the amount was hidden from any of the shareholders, nor is it said that any of them were misled as to the nature of the allegations that had been made by Mr Randall. In his closing submissions, Mr Roe QC said that the real mischief was that the £300,000 was only agreed by the Director Defendants to hide their own discreditable conduct from a public airing and from HMRC, but he did not contend that it was paid to hide any of the allegations from any of the shareholders. The evidence would not in any event have justified any such argument being made. The way that it was put in the schedule of loss was "*the Director Defendants wished to avoid a public airing of the fact that they had been causing SML to spend its money on enriching them personally through works on their homes*".

651. In my judgment, SML has not established that the payment to Mr Randall was of such an excessive sum that the proper inference is that it was only paid to avoid a public airing. It was of course a very large sum of money by reference to Mr Randall's salary, but it was half what Mr Randall was demanding and there is no doubt that everybody including Pauline and Mario appreciated that the claim was complex and raised many issues several of which would not have constituted actionable wrongdoing by SML against the Director Defendants even if they were to have been justified. I do not think that payment of this amount was a greater sum than could objectively be justified; fighting Mr Randall's claim was likely to be immensely distracting, and everybody (including Mario) had formed the view that they wanted it closed down.

652. In any event, I do not think that SML has established that concealment of the allegations of breach of duty from a public airing, or even concealment from a public airing of the breaches themselves, gives rise of itself to a breach of duty to SML. While it was in SML's interests to be informed as to the nature of the allegations made, SML has not established that it was in its own interests for them to be "publicly aired" and I am sceptical that it was, more especially in circumstances in which SML itself, through the Director Defendants, Salvi and the original shareholders knew exactly what was being alleged, the nature of the proceedings that had been brought and the mediation that had been proposed to bring them to an end.

Agreed Issue 8: David Platt

653. The eighth agreed issue falls into three parts and relates to a warehousing payment from David Platt: (a) Did the Director Defendants cause SFP to invoice David Platt for services that had been provided by SML? (b) If so, was this in breach of their duties owed to SML? (c) If so, what loss has been suffered by SML?

654. The claim is advanced as a breach of the duties owed by the Director Defendants under sections 171, 172 and 174 of the 2006 Act to act in the best interests of SML by diverting to SFP revenue in the sum of £19,780 for warehousing services provided in January and February 2016 which ought to have been paid to SML. It is said that SML has suffered loss in the amount diverted and also suffered damage to its relationship with Barclays because when Barclays discovered that the payment had been made into an account in the name of SFP over which it had no security, it sought a cross-guarantee which the Director Defendants refused to provide.

655. The Director Defendants do not dispute that the amounts payable for warehousing services should have been paid to SML and Sammy's evidence was consistent with that being the case. SML pleaded that the sums were invoiced by SFP and Mr Randall's evidence was that the amounts invoiced were "taken" by the Director Defendants, by which I think he meant paid to SFP.

656. The Director Defendants pleaded that the sums were in fact paid into an SML bank account, although it appears from Peter's evidence that what was meant by this was that the money was paid into an account in the name of SFP, but at the time of receipt SFP was treated as a trading division of SML. The evidence of Mr Frenkel was that the payment appeared in SFP's cash book for its account with Barclays for 12 February 2016.

657. I am satisfied by this evidence that the amount was payable to SML and that it was paid into an account in the name of SFP. On the face of it this means that it is repayable by SFP and to the extent that any of the Director Defendants knew of or participated in the diversion they are liable for breach of duty. However, it is clear that the Director Defendants' case as to why the payment to an SFP account caused no loss to SML raises all of the same issues as arise in relation to agreed issue 6. In my judgment the evidence is that it was part of the SFP trading that was largely accounted for at the time of the Transaction. There is no separate claim for this amount.

658. The claim in relation to the damage said to have been suffered to SML's relationship with Barclays did not appear in the Schedule of Loss as a free-standing item and no submissions were made about this aspect of the claim at trial. Accordingly, I assume that this part of the claim is not pursued, and I say no more about it.

Agreed Issue 9: Post-Transaction Diversions

659. The ninth agreed issue relates to what SML has characterised as the post-Transaction diversion of money from SML. (a) Has SML proved that the Director Defendants wrongfully caused money to be removed from SML's bank account after the Transaction? (b) If so, how much? For reasons which will appear the only issue which I will be determining is (a), and even then only in part. I am not in a position to rule on (b).

660. It is not in dispute that, after the APA had been entered into, SML continued to make payments which ought strictly to have been paid by SFP or SGP, rather than SML. At the time that Schedule 3 was prepared, SML contended that the net amount which was paid by SML but which should have been paid by SFP or SGP was £456,009.03, after taking into account receipts of £410,471.78. It claims that this figure has been reached after carrying out a reconciliation of SML's bank account for the period between 14 April 2016 and 24 January 2017. It said that in effect the source of the money to pay this net amount was the income generated for SML by the rental of the nurseries to SFP and SGP.

661. Both parties dealt with this category of loss in abbreviated form both at the trial and in their closing submissions. SML did not try to go through the figures in any detail, but there was a narrowing of the gap between the parties in their attempts to agree all of the provisions of Schedule 1 to SML's Re-Re-Amended Particulars of Claim in which the claims were pleaded out more fully. It is now accepted that a number of the payments (such as the amounts received by Kombbi) were also included in the original reconciliation and so would be irrecoverable under this head for double counting.

662. In the light of this, and on the basis of the evidence with which I have been presented I am not in a position to adjudicate on the true balance of the account as between SML and SFP / SGP. Mr Roe QC accepted in his oral closing submissions that it would not be proportionate for me to be asked to do so. It would only be if the parties could not agree on the detail of the figures that I would have to rule. In any event it seems to me that the detail of any account could simply be adjourned to be dealt with by the Master. Nonetheless he did ask me to make findings on questions of principle, which in essence boil down to whether the making of any payments which led to a net balance in favour of SML amounted to a breach of duty by the Director Defendants. Ms Anderson QC did not disagree that it was appropriate for me to approach the matter in that way and I agree.

663. This issue was addressed in the evidence from Mr Randall and from Sammy, both of whom made clear that there was a mixing of monies received by SML and SGP/SFP after the Transaction. It was said by Sammy that this was largely due to the logistics of the transfer of contracts with suppliers and customers of the transferred business, all of which took time to sort out. Ms Anderson QC built on this evidence in her submissions by saying that consideration of the nature of the payments in dispute and the general context in which the dispute arose makes clear that this head of claim is no more than a claim for the reconciliation and payment of an inter-company debt by SML against SFP or SGP. She also says that the situation was exacerbated by the hostile stance adopted by SML immediately after the appointment of Mr Randall as a director, which made it difficult for agreement on the reconciliation to be reached and made a submission (which Mr Roe QC criticised as being wholly unsubstantiated by any evidence) that the loss was only ever sustained because SML drove SFP and SGP into administration thereby leading to a situation in which any balance on the inter-company account could not be paid.

664. I do not have the material to reach a conclusion on this last point, which was not in any event explored at trial, but against this background there are two points of principle on which I can rule. The first is that I do not think that it can be said that any of the payments out made after the moment in time on which the relevant Director Defendant ceased to be in office (18 August 2016 for Sammy and Mr Smith and 30 September

2016 for Peter) can be included in an account for any breach of duty claim against them. The reason for this, as Mr Roe QC accepted in his closing submissions, is that there is no evidence that any of the three of them procured any payment by SML for something that should properly have been charged to SFP or SGP after the time they ceased to hold office. After their removal the nature of their continuing duties to SML changed in the sense that they no longer had positive obligations to ensure that SML's assets not passing through their hands were properly secured.

665. Secondly, I agree that payments by SML of expenses which should have been paid by SFP or SGP are capable of being breaches of duty. However, I do not accept that the mere fact that a Director Defendant was a director means that liability can be attributed to him. SML must prove that the nature of each payment which it challenges was more than simply a non-deliberate appropriation to the wrong company. It must go on and show that the Director Defendant concerned was either involved in the authorisation of the payment being on notice that it was attributed to the wrong company or knew that it had happened and took no steps to reverse it. In my judgment it is not sufficient for SML simply to prove that the payment was made. In other words, the mere taking of an account as between SML and SFP / SGP showing a net balance in favour of SML is not sufficient to demonstrate that SML's directors are liable for breach of duty. As matters stand the submission made by SML is that the payments should not have been made and therefore the Director Defendants are liable. That is not sufficient.

666. Having said that, if SML does prove authorisation by any one of the Director Defendants in relation to any particular payment, there is a prima facie breach of duty claim against that director. It is wrong in principle for a company to pay the debts of an associated company unless there are good business reasons to do so (sufficient to amount to conduct in good faith likely to promote the success of SML) and the director concerned is satisfied with good reason that repayment (if not otherwise netted off) is adequately secured. In my judgment, proof to that effect may well render the original payment out of the wrong account not a breach of duty at all, and if it is a breach, a case in which relief from liability would be appropriate under section 1157 of the 2016 Act.

Agreed Issue 10: Sedge Green Salads

667. The tenth agreed issue falls into three parts and relates to the shares in SGS. (a) Were the SGS shares included within the definition of Assets sold to SFP under the APA? (b) Were the SGS shares transferred to SFP in breach of duty? (c) If so, what sum is SML entitled to as equitable compensation?

668. Like SML, SGS was a company trading in the market gardening sector. Until 2013 it was owned by members of the Faranda family. In December 2013, 100 shares in SGS (comprising 50% of its share capital) were issued to SML and Salvi was appointed a director. The practical consequence was that SGS became jointly owned and controlled by the Faranda family and SML.

669. SML's pleaded case is that the SGS shares were not sold to SFP or SGP as part of the Transaction and that more particularly they did not fall within the description of the Produce Business sold to SGP or the Non-Produce Business sold to SFP under the terms of the APA. It then pleads that, on 16 July 2016 (i.e. some 2½ months after execution

of the APA), Salvi executed a stock transfer form transferring the shares from SML to SFP for nominal consideration. Salvi did this even though a valuation of the SGS shares obtained by Sammy disclosed that they were worth £543,105. It is then said that SGS's register of members was amended to record the transfer, and that the Director Defendants must have asked Salvi to do what he did.

670. The Director Defendants plead in their Re-Amended Defence that the SGS shares had in fact been sold under the terms of the APA, but contend that their proper value was £100, apparently on the basis that as at 31 March 2016, SML owed SGS c.£1 million which was a debt that was assumed and paid by SFP as part of the Transaction. They say that the only reason that the stock transfer form was executed later was that a mistake had been made at the time of the Transaction.

671. In fact the stock transfer form which is in evidence was dated 19 July and was signed by Peter and Mr Smith, not by Salvi. Nothing turns on the dates, but SFP's authority to purchase the shares in SGS from SML for £100, payable as deferred consideration, was confirmed at an SFP board meeting attended by Mr Smith, Peter and Sammy on the same day. This was held at the offices of Gisby Harrison and I infer that the Director Defendants in their capacities as directors of SML also authorised the sale at the same time. This was the same day as the day on which the Kombbi Debenture was executed.

672. In my view, it is clear that the intention was that the shares in SGS would be sold to SFP or SGP as part of the Transaction. As I have already mentioned, Mr Heyes had produced a valuation of £209,689 for the 50% holdings in SGS on 18 March, i.e. a few days before the Transaction was completed, and it is clear that he did so for the purpose of including the SGS shares in the businesses to be sold. That valuation was based on a three-year profit average, adjusted for market rent and a multiple of 4 times maintainable profits. He stressed that it was an indicative valuation as a basis for negotiations with HMRC and that the actual amount to be paid by SFP and SGP must ultimately be decided by the directors "*changed for any adjustments you want to make and the shareholders agree to"*. For reasons which related to the change of solicitors from V&S to Gisby Harrison, the necessary steps and documentation to record their transfer were not taken at the time the Transaction was completed.

673. It seems that this omission only became apparent in May or early June at which stage Mr Heyes and Mr Moffat had a discussion about what to do. Mr Moffat's advice was that it would be possible for the SGS share transfer to be documented subsequently with the price being added to the deferred consideration, so long as the price ultimately paid was a fair value. It follows that for present purposes, (and this was the way in which the issue was argued in the parties' closing submissions), the question which matters is the value which was then attributed to the SGS shares, and whether or not that value reflected a fair value for the asset transferred, as and when the transfer actually took place.

674. As to this, two further valuations were available to the Director Defendants before the time at which they confirmed the transfer of the SGS shares. One was another valuation from Mr Heyes for £387,137 e-mailed to the Director Defendants on 26 May 2016. This was based on an adjusted price earnings ratio of 4 applied to maintainable earnings for SGS of £227,728, discounted by 15% for a 50% interest where there were 5 other 10% shareholdings. Mr Heyes said that this did not take into account any reduction

that would be appropriate if SGP decided to no longer take produce from SGS, a consideration that he confirmed would have reduced his valuation.

675. The third valuation was dated 6 June 2016 and was prepared by Mr Steve Tilby, a partner in A Infantino & Co LLP, for £543,205. They were SGS's accountants and Mr Tilby based his valuation for the whole company of £1,086,410 on a price earnings ratio of 5 applied to maintainable profits of £217,282 (also calculated by reference to a three-year weighted average). He applied no discount for a 50% interest.

676. It is clear that some consideration was initially given to including a figure reflecting Mr Heyes' valuation of £387,137, because a draft SFP board minute was prepared showing a transfer at that figure payable as deferred consideration under the terms of the APA. This would appear to be a reference to adding the amount to the Deferred Payment for which provision was made by clause 4.2 of the APA.

677. The justification given by Peter for a transfer at a nominal consideration was that "*at that time, I think we owed Sedge Green Salads about a million pound and SFP, or SGP, was taking on that debt as part of the APA*". Sammy said that SML owed SGS that amount because SGS was one of SML's growers, and that debt was then subsequently paid off by SFP. I think it is clear (including from what Mr Heyes said in his oral evidence) that what Peter and Sammy meant by this was that SML owed SGS approximately £1 million, and that SFP or SGP was taking on the discharge of that debt under the terms of the APA. This was presumably on the basis that it was a liability of SML's Non-Produce Business or Produce Business which was sold to SFP or SGP under the terms of the APA.

678. SML criticises this explanation as appearing for only the first time in cross-examination. That is correct so far as Sammy's evidence was concerned. His explanation for the £100 had been "*That figure was used as it was considered that SGS was totally reliant on SGP's business going forward, and that, without this business, SGS would not be able to survive"* and makes no reference to any form of set-off in relation to the undertaking of a liability. So far as Peter is concerned it is incorrect, because he had referred in his third witness statement to the fact that SML was heavily indebted to SGS, although he seemed to be making a different point. He also made the point, albeit in abbreviated form, in his fourth witness statement. Furthermore, the force of SML's criticism is undermined by the fact that the point is clearly pleaded in paragraph 122B of the Director Defendants' Re-Amended Defence which was before the court at the PTR on 14 October and was verified by statements of truth signed by them on 30 October shortly before the trial commenced.

679. What was less clearly explained was the justification for the position adopted by the Director Defendants. In particular, why it was that the undertaking of SML's liability to SGS could somehow be treated as reducing the amount that SFP would otherwise be required to pay for the SGS shares, and why it was therefore only appropriate for SFP to pay a nominal amount for them. This is even less clear in circumstances in which there is no contemporaneous documentation as to how or why the decisions was taken and none of the professionals seemed to have been involved in the decision of the Director Defendants that that was what they proposed to procure SML and SFP to do. Mr Heyes said in his evidence that he did not know why the Director Defendants caused SML to accept £100 for the shares, as "*The £100 was just taking the net value on the*

trial balance. The difference should have been taken through to the deferred consideration as it was not actually being paid full cash at the time".

680. Peter's explanation only makes sense as an answer if the discharge of SML's £1 million liability to SGS was excluded as a liability of the business transferred under the terms of the APA so that it remained a liability available to be set off against the purchase price payable by SFP. Mr Heyes said in his evidence that he would have expected the liability to SGS to have been transferred to SFP (or presumably SGP) under the terms of the APA and it seems to me that it is plain that it was. SML's liability to SGS was either within Produce Liabilities or Non-Produce Liabilities as defined and as such was or should have been taken into account in valuing the businesses transferred under the APA. This may have an impact on the proper value of SML as at the time of the Transaction, because its value should have taken into account its indebtedness to SGS, but, having been transferred to SFP and SGP under the terms of the APA, the existence of that liability cannot then be utilised again to reduce the amount otherwise properly payable by SGP for its acquisition of the shares in SGS.

681. In these circumstances, and in the light of the professional valuations that I have described, it is plain that the transfer of the SGS shares for a nominal amount was a breach of duty by the Director Defendants, each of whom was still a director of SML and a director and c.25% shareholder of both SFP and SGP. On this point in particular it is right to mention that Salvi's role was such that this is a particularly clear example of one of the instances in which there is strong likelihood that Salvi would have been liable to the same extent as the Director Defendants were SML to have chosen to sue him. The extent of their liability is the value of the asset so transferred, i.e. the value of the SGS shares. There was no evidence that any of the other shareholders were told about the transfer of the SGS shares, let alone the value at which the transfer was to take place, and Peter's evidence was that he did not think that they were.

682. While there was not much exploration at trial of the differences between the three valuations which I have described, in reaching my conclusion on the correct value I take into account the fact that both Mr Heyes and Mr Tilby were instructed by the Director Defendants and that A Infantino & Co LLP had the advantage of being SGS's accountants as well. This means that there is a higher chance that Mr Tilby's approach to the right multiple (anyway to the extent that it depended on a full understanding of the underlying business) is correct. I think it is also right to take into account the fact that on the evidence before me Mr Heyes was closer to the Director Defendants than Mr Tilby and also was intimately concerned in the design of the Transaction from the perspective of SFP, SGP and the Director Defendants. This is likely to have made it more difficult for him to produce a wholly dispassionate figure.

683. I also have regard to the fact that the first Heyes valuation was carried out for a different purpose, i.e. a negotiation with the Revenue, in which the likelihood is that Mr Heyes was starting at the lowest arguable figure in recognition of the fact that the negotiation might then push it up. For that reason alone, it seems to me that it has much less evidential weight on the question of the true objectively ascertainable value of the 50% SGS shareholding in the context of the right price as between SML and SFP/SGP. I also think that this renders the Heyes second valuation less reliable as well, because the chances are that Mr Heyes' views were affected by the consideration that he had already given to the value in the middle of March.

684. In my judgment, the right starting figure is Mr Tilby's valuation (£543,203). It was at the end of the day a valuation produced on the instructions of the Director Defendants through SFP. Furthermore, I do not think that it is appropriate to make a reduction from that figure for the possibility that SGP might decide no longer to take produce from SGS or anyway the amount of produce which had historically be purchased by SML; i.e. the point footnoted to Mr Heyes' second valuation. While it is no doubt the case that SGS was vulnerable to being supplier to one important customer, there was no evidence that there was any possibility that SGP would stop purchasing from SGS and indeed the very fact that the Director Defendants were keen to include the acquisition of an interest in SGS in their new group indicates that the prospects of that being the case should be given little weight in assessing the true value of the SGS shares.

685. Ms Anderson QC also suggested in cross-examination of Mr Frenkel (who adopted the Infantino valuation in his report) that there should be a discount for the fact that the directors of SGS appeared to be being underpaid and that any purchaser would have to increase payments out to them. Mr Frenkel disagreed and, on this issue, I think that Ms Anderson QC's suggestion was speculative. I do not think that any such discount would have been appropriate for that purpose and there was no evidence to suggest that it would have been.

686. However, there is one aspect to the Infantino valuation which I consider should lead to a downwards adjustment. There is no discount of the type given by Mr Heyes for the way in which the shares were held. On one view it might be said that this would be less appropriate than for the valuation of a minority stake but I do not think that is correct. Mr Frenkel said that the omission by Mr Tilby was justified because "*this could realistically be valued on a quasi-partnership basis*". I do not consider that the evidence was sufficient to demonstrate that this was the nature of the relationship between SML and the Faranda family. In my judgment, and in the absence of any real exploration of the issue at trial, SML has only demonstrated that the loss it suffered was the amount of the Infantino valuation prepared by Mr Tilby but discounted by 15% for the way in which the shares were held as explained in the second Heyes valuation. This means that I consider that the right figure is £461,724.

687. Accordingly, on the tenth agreed issue I consider that the Director Defendants acted in breach of duty when they resolved to transfer SML's 50% shareholding in SGS to SFP for a nominal consideration and that SML has established an entitlement to £461,724 by way of equitable compensation for that breach.

Agreed Issue 11: VAT

688. The eleventh agreed issue falls into two parts and relates to VAT reclaimed by SML in respect of SFP's post-Transaction trading. (a) Did the Director Defendants act in breach of duty by causing SML to reclaim VAT in respect of transactions entered into by SFP? (b) If so, what (if any) sum is SML entitled to as equitable compensation?

689. SML's challenge to these post-Transaction payments is the amount of input tax which it is said that the Director Defendants procured it to claim against HMRC, when the tax related to supplies made to SFP or SGP (and paid by them) rather than supplies made to SML. SML pleads that this was done because a number of suppliers continued to

invoice SML, even where the liability was incurred and paid by SFP or SGP, and so the only VAT invoice which could be produced as evidence of the payment of input tax was one issued by SML.

690. SML contends that, in a VAT inspection which took place in August 2018, HMRC identified the fact that SML should not have made the claims to input tax (because it was not the recipient of the supply) and raised an assessment against SML for £73,106 plus interest, which SML has now paid. SML also clarified that the amounts which had originally been claimed as input tax by SML were for the benefit of SFP and SGP because they were "paid" by SML to SFP and SGP by means of inter-company accounting. The figure in issue has now been revised in SML's Schedule of Loss to £74,213.36. The figures are the aggregate amounts which were claimed by SML in respect of invoices during the months of July, August and September 2016 for supplies made to SFP and SGP.

691. The Director Defendants' pleaded case was that, although they admitted that SML was not entitled to claim input tax on invoices made out to SML but in respect of which monies were paid to SGP and SFP, the actual claims were made by SML after they ceased to be directors. It is also said by the Director Defendants that HMRC has now accepted that SFP and SGP can in fact claim input tax on invoices which were made out to SML, but which were for supplies to, and were paid by, SFP or SGP. HMRC's position to this effect was confirmed in an e-mail from Mr David Knox of HMRC dated 15 November 2018.

692. In my judgment SML has not proved this claim for two main reasons. First, I agree with Ms Anderson QC's submission that there was nothing inherently damaging to SML in what occurred in the limited sense that any misdeclaration was capable of rectification without material loss to SML. This was established by the e-mail from Mr Knox and it is not clear to me how it can be said in the light of that e-mail that SML suffered any loss which might be attributable to any breach of duty that would otherwise have been committed by the directors responsible for submitting the relevant VAT returns.

693. Secondly, I am not satisfied that SML has shown that any of the Director Defendants were actually involved in making the VAT returns the completion of which are the acts said to amount to the breaches of duty. So far as Peter and Mr Smith are concerned the allegation made in SML's skeleton that "*the Director Defendants caused SML to reclaim the VAT using SML's VAT returns*" is not supported by any evidence at all. As for Sammy his role was such that if he were still in office at the relevant time, he would have been involved in its preparation. However, I not able to draw that inference because the dates of the relevant invoices fall within the periods of July, August and September 2016, and Sammy was removed as a director on 18 August. As monthly VAT returns do not have to be submitted until a month plus a few days after the end of the relevant period I cannot infer that he had any responsibility for submission of the relevant returns while he was still a director. Sammy gave evidence that that was indeed the case. He said that the July/August return would have been done in September and that "*we would not have done the September VAT return*". I accept his evidence on this point.

694. Mr Smith was also removed as a director on 18 August 2016 and so there is a similar reason why the claim is not made out against him either. Peter remained a director until

the end of September, but even the VAT return for the July invoices did not have to be submitted until the beginning of that month, and by then control of SML had been taken over from the Director Defendants by directors appointed by the shareholders from Tony's and Mario's branches of the family.

695. In summary, I am not satisfied that the Director Defendants committed the acts said to amount to the breaches of duty alleged. Furthermore, even if there were technical breaches (and SML has not sought to distinguish between the position of the Director Defendants) I am not satisfied that SML has suffered any loss caused by them. It follows that the answer to this issue is that SML has not established that the Director Defendants acted in breach of duty by causing SML to reclaim VAT in respect of transactions entered into by SFP. Accordingly, SML is not entitled to anything by way of equitable compensation

Agreed Issue 12: Loss-Making Business

696. The twelfth agreed issue falls into two parts and relates to the failure to cease SML's loss-making import business any earlier. (a) Did the Director Defendants act in breach of duty by failing to cease SML's loss-making import business sooner than November 2015? (b) If so, what loss has SML suffered as a result? The loss claimed by SML is £1,955,958.

697. This issue raises the question of whether the Director Defendants breached their duty to SML under section 174 of CA 2006 to act with reasonable care, skill and diligence. This duty has both an objective and a subjective element in the sense that the Director Defendants were obliged to act with the care, skill and diligence that would be exercised by a reasonably diligent person (a) with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by each of them in relation to SML, and (b) having the general knowledge, skill and experience that each of them in fact had. *Re D'Jan of London Ltd* [1994] 1 BCLC 561 was cited to me on this point, although the test established by Hoffmann LJ (sitting at first instance) in that case has in effect been codified by section 174(2).

698. SML makes this claim as a result of what it asserts to be the failure of the Director Defendants to stop the losses on the import business which were identified by Mr Randall in his e-mail of 24 December 2014 which I have described earlier in this judgment. In that e-mail Mr Randall had expressed the view that '*there is no business model that works for imported product at current selling prices.*' It is said by SML that, notwithstanding this warning, the Director Defendants procured SML to continue with this loss-making element of its trading activities until November 2015 and it seeks to recover the losses which were made by SML as a result of continuing its import business over that period. It puts those losses at just under £2 million.

699. In approaching this claim, it is important to bear in mind that it is long established that errors of judgment are quite different from negligent mistakes. In a situation in which directors are criticised for their decisions relating to the conduct of a company's trading activity, the position is pithily summarised in Mortimore on Company Directors, Duties, Liabilities and Remedies (3rd edn) at para 14.34:

> "*The courts have always been reluctant to second-guess commercial decisions taken by directors in good faith in what they honestly consider to be the best commercial interests of the company. They will certainly not do so simply because with the benefit of hindsight, the decision taken has turned out to be wrong*."

700. The way that SML pleaded its case was that the Director Defendants had had four years notice that Asda intended to establish its own direct procurement supply chain, which would have the effect of depriving SML of its work stream supplying imported produce to Asda. This is a matter that I have already described earlier in my judgment. It is then pleaded that they took insufficient steps to consider whether to reduce overheads so that the expected drop in turnover did not result in SML becoming loss-making and "*simply ploughed on with the same business model in spite of this impending problem with this aspect of it*." The adjusted Schedule of Loss (Schedule 3) claims £1,955,958 as the losses that were sustained by SML from the import business between the time that the extent of the loss-making was drawn to their attention in December 2014 until the end of the first week in November 2015 when the conduct of the import business came to an end.

701. As to the amount of the losses, in its closing submissions SML relied on the evidence from the Director Defendants' own expert, Mr Pearson, in which he concluded that the most significant issue faced by SML over the period he examined (2009 to April 2016) was the decline in SML's gross profit margin. In particular, SML pointed to Mr Pearson's evidence that during the second half of 2014, gross profit margins started to fall very dramatically and continued to be very poor through 2015 and the first 3 months of 2016. As Mr Pearson put it:

> *"The decline in gross profit margin is the primary factor that drove significant losses made by SML in the 15 months ended 30 September 2015*"

702. SML also pointed to the management accounts exhibited to Mr Pearson's report which showed that, whereas in each year between 2011 and 2014, SML had only been loss-making in the winter months, losses were suffered every month between October 2014 and May 2015 and only the months of June and July were profit making in 2015. It submitted that, viewed in context, the losses suffered in 2015 were truly extraordinary. There was therefore an element of this claim which relied on the size of the losses as speaking for themselves.

703. This evidence on the amount of the losses was said to be further substantiated by Mr Heyes who, in an e-mail to Barclays dated 30 November 2015 written shortly after the import business had come to an end (and which I have already referred to) said that:

> '*the major loss-making part of the Stubbins business, since October 2014, has been on the import of produce … which due to the reduced prices paid by the main, major customers, and the slowness in the company's reaction to this has resulted in significant monthly losses from Oct 14-Oct 15*'.

704. Mr Heyes then referred to the losses sustained on the Cambridge packhouse totalling £1.1 million and expressed the view that if these losses and costs (i.e. the produce import business and the Cambridge packhouse costs) had been identified and eliminated before July 2014, then the SML profit for the 15 months to September 2015 could have

been an adjusted profit of c.£850,000. In reaching that conclusion he said that the losses from the import produce part of SML's business were £2,751,956 for that period.

705. I am satisfied that the evidence establishes that substantial losses were in fact sustained by SML's import business between the end of December 2014 and the beginning of November 2015, and indeed it was no real part of the Director Defendants' case that they were not. I am also satisfied that the amount claimed in the Schedule of Loss (£1,955,958) is a proper quantification of that loss. SML's expert witness, Mr John Frenkel, relied on the McIntyre Hudson report of 17 February 2015 to evidence the extent of the losses on the import business and they showed a gross loss for the period from 1 October 2014 to the ending of the business in November 2015 of £2,727,842.

706. This figure for import business losses was confirmed by the figures presented to Barclays by Mr Heyes in his November 2015 e-mail. For all but his March to July figures (in respect of which the Heyes figures were slightly larger) the loss figures identified by Mr Frenkel and Mr Heyes were the same. As SML accepts, it would be wrong to include the months of October, November and December 2014 in which losses totalling £771,884 were made, and so the total loss incurred for the period during which it is contended that the import business should not have been carried on was £1,955,958.

707. However, the fact that SML made losses on this part of its business is not sufficient to establish that the losses sustained were caused by the Director Defendants' breaches of duty. It is only if SML has proved that the loss-making was caused by the Director Defendants' failure to act with reasonable care in continuing to trade that a claim will be made out. In support of that part of its case, SML relies on a number of matters.

708. First, it points to the warning given by Mr Randall in his Christmas Eve e-mail that heavy losses were being sustained. This was plainly a highly significant factor and the reaction of the Director Defendants which I have already described earlier in this judgment demonstrates that they regarded it is such. However, when Mr Pearson was asked about it there was the following exchange, which in my view reflects the care with which an allegation of failing to stop a loss-making trade must be approached:

> *"Q. In December 2014, the directors' attention was expressly drawn to the fact that the import business was losing money. Would you agree that, at that stage, there was a fairly clear warning sign that that business was losing money and that steps ought to be taken to bring that business to an end?*
>
> *A. Well, I think hindsight in business is a very difficult thing because it is very easy, after the event, to say, "That business was never going to be profitable again and, therefore, should have been stopped." It is, obviously, become a lot clearer by the next winter when that, again, made losses. But lots of businesses make losses and then improve and recover from that. So I do not think I can say, as an accountant, whether that should have been known specifically at that date. I agree that the issue had been identified at that date.*"

709. Secondly, it relies on the views expressed by Mr Heyes when writing to Barclays in November. Having said that SML was slow in reacting to the reduced prices paid by SML's major customers and having described the losses sustained on the packhouse costs and the import business, he then said

> *"It is of course perfectly clear that these issues could have and should have been addressed much earlier than they have in order to mitigate the losses early on. This, however, proved to be extremely difficult in a family business that had continued to be run as it had been in the good times*'.

But he then added:

> *"Now, though, these issues have been dealt with, the rot has been stopped and there is a strong underlying business which will be the platform upon which the Directors can further develop both existing and new income streams.*

710. To the same effect was the report by MacIntyre Hudson in February 2015 in which it commented that '*[t]he length of time that the unsuccessful packhouse and more significantly, the import segment of the business was allowed to continue in operation suggests that the group may be slow to react or resistant to change*'. Mr Pearson was asked about the speed of the Director Defendants' reaction and responded as follows:

> *"I think it is very difficult to say how quickly people should react. I think the interesting thing here is that not only were there winter losses in the business, there had also been a trend of declining gross profit margin in the more profitable summer months, and it had been over the last couple of years. So I do not think it was an instant thing that should have been readily detectable, I think it is a much more nuanced difficulty. And I do not think I can say when the appropriate point to recognise that would have been, that the company had been making losses and becoming less profitable for a prolonged period, that is true.*"

711. What these views illustrate is the inherent uncertainty of when a loss-making business ought to be stopped, but also the significance of the very nature of SML's business as a relatively old-fashioned family enterprise. The views which were there being expressed by Mr Heyes, McIntyre Hudson and Mr Pearson have to be set in the context of the debate which had been going on for some time within the family about whether to present a more modern image and experiment with new business opportunities (which was what the Director Defendants wanted to do) or whether to continue to find ways of servicing the traditional supermarket base (which was Mario's preferred approach). This debate was still raging during the course of 2015.

712. It is also of some relevance that McIntyre Hudson expressed the view, having made some favourable comments about Mr Smith's beneficial contribution to the business, that the decision to continue with the import operation for as long as it did was a finance issue which may in part have been down to the former Finance Director (by which they meant Mr Randall). SML submits that this was a reflection of internal blame being attributed to Mr Randall without justification. Nonetheless, this was a matter to which MacIntyre Hudson were prepared to put their name in the context of a due diligence report for HSBC, and in my view SML has not adduced sufficient evidence to demonstrate that it was without foundation.

713. Having said all that, these opinions do not of themselves explain the length of time that it took for SML to extract itself from this aspect of its business once the probabilities of continued loss-making became more apparent. The evidence on this, such as it was, came from Peter and Sammy. Peter said that stopping a business of the size of the import business would not have been a sensible or easy thing to do. He said that there

were contracts in place with growers, suppliers and customers, there were equipment leases and other obligations to people. He said that it was not possible simply to stop straightaway. He explained about the possibility of far greater penalties from contractual counterparties and how a hasty termination would mean letting down clients and growers leading to what he regarded as a much worse situation.

714. In one of his witness statements Peter gave a little bit more colour to this evidence, explaining that the difficulties of an over hasty cessation were exacerbated by the fact that SML operated what he called a "dual seasonal business". He also said that moving too quickly would have meant that all the packing staff, order replenishment staff and procurement team would have had to be made redundant leaving them no staff in place to cover the summer business when home-grown crops were in production. The following exchange summed up his position:

> *"Q. So what, there are contracts, are there, which are you committed to, which means that you cannot simply stop?*
>
> *A. Yes, there are agreements with suppliers. There are agreements with customers. There is an agreement with staff. There are leases in place for equipment, people. You cannot just stop a business of that size as sudden as ---*
>
> *Q. And are you saying, what? There would have been notice periods to have been given on people who you were taking product from?*
>
> *A. Yeah, I am sure, you know, there could have been a way of stopping but I think we took those precautions and I think we did it. We gradually slowed down that business but it takes time and that is what I believe.*

715. Sammy agreed. He said:

> '*we could only react at a speed of what we could do in the business because, obviously, we had commitments with orders. We could not just stop the orders because there was penalties you would have had to pay with supermarkets. And, you know, there was the whole business to think about. It was not just one section of the business' … We could have stopped it, but [it] would have been like trying to stop a steam train. It was just so difficult to try and stop*.'

716. SML has criticised his evidence for being very vague and pointed to the fact that the Director Defendants had produced no documentary evidence of any contracts which would have been breached if the business had been stopped immediately. While it was imprecise in some respects, I disagree that it should be stigmatised as vague in the light of the generalised way in which SML put its own case. The burden of proof was on SML and the evidence boiled down to reliance on historic poor performance of which Mr Randall had made sure that the Director Defendants were well aware and the fact that looking back after the end of the period it could be seen that the import business did in fact continue to make losses for reasons that were consistent with those which underpinned the making of the making of the historic losses in the first place.

717. Ms Anderson QC submitted that SML has been very selective in identifying those parts of the loss-making operations in respect of which it has sued. In particular she pointed out that it has not made any claims in respect of the very substantial losses which were

made in the operation of the Cambridge packhouse (which I refer to below) and said that the obvious reason for this was that Salvi (coming as he does from Mario's branch of the family) was primarily responsible for them. She also pointed to a number of other loss-making activities conducted by SML over the period covered by the evidence at trial (Evolve and the bubble greenhouse, losses on interest rate swaps and a failed investment in a Sicilian greenhouse operation). Again, she said that these were all expensive failures for which the Director Defendants were not wholly or even partially responsible, but they helped to illustrate her submission that loss-making activities were just part of the vicissitudes of business.

718. I do not think that the evidence justifies a finding that "*no thought was given as to whether it would have been better to incur penalties in the short term rather than severe losses in the longer term*". While I agree that the answers given by Peter and Sammy demonstrate that SML was slow to react, and did not take the decisions which can be seen with the benefit of hindsight they should have taken, I do not agree that SML has shown that the Director Defendants were so slow to react as to be negligent. Their conduct was nothing like as acute as it might have been, but it was not inconsistent with the way that SML's business had always been run.

719. In my view, while some criticism can be levelled at the Director Defendants for the time that they took to procure SML to stop the loss-making import business I do not think that their conduct can be stigmatised as negligent. That would give more weight to the absolute need to react immediately to Mr Randall's Christmas Eve e-mail than was justified. Accordingly, the answer to this issue is that SML has not established that the Director Defendants acted in breach of duty by failing to stop the loss-making import business any earlier than they did.

Agreed Issue 13: Shares in David Platt

720. The thirteenth group of agreed issues relate to the diversion of an opportunity to purchase shares in David Platt. (a) Did the Director Defendants divert an opportunity to acquire an interest in David Platt away from SML? (b) If so, was this in breach of their duties to SML? (c) If so, what sum (if any) is SML entitled to as equitable compensation? (d) Is SML entitled to an account of profits? The loss claimed by SML is £265,800.

721. SML alleges that the Director Defendants acted in breach of their duties under sections 171, 172 and 175 of the 2006 Act in diverting from SML the opportunity to acquire David Platt and by incurring costs in relation to the abortive acquisition. It is alleged that in their dealings with David Platt they acted for the purpose of supporting or benefiting Beneli Ltd (in which it is said that the Director Defendants had a personal interest) rather than SML and that it was contrary to the interests of SML for the Director Defendants to cease pursuing the opportunity to acquire David Platt when they did. It is also alleged that they had a conflict of interest in their dealings relating to the acquisition of an interest in David Platt, because it is to be inferred that they personally benefited from the acquisition by Beneli Ltd which was in conflict with their interests as directors of SML.

722. The loss claimed by SML as a result of the loss of the opportunity to acquire David Platt is €298,070 (or £265,800) being what it pleads is the current value of this asset, based on the balance sheet value show in its accounts for the year ended 31 December 2015. There is no attempt by SML to adopt a more scientific approach to valuation nor is there any credit given for the amounts that would have had to be paid by SML to make the acquisition. I should say that there is no separate claim for any costs which it may have incurred in the abortive attempt to make the acquisition.

723. The Director Defendants' say that the opportunity was not one which came to SML. Rather it came to CET with which David Platt had an existing relationship. Both entities were hauliers. They also say that they did not progress beyond solicitors' client care letters and decided not to take matters any further once Sammy had started to work on the possibility. They also deny that they acquired David Platt themselves or had any form of beneficial interest in the entity which did (Beneli Limited).

724. As will have been apparent from the description of what occurred that I gave earlier in this judgment I do not consider that I was given a full or frank explanation of what occurred by either Peter or Sammy. I think it is clear that some money was paid to David Platt after Sammy had told Mr Randall that CET was no longer interested in making an investment. Some of their evidence explaining the money that seems to have been paid out of FPIL was incoherent, neither of them really answered the question of what they said the money to David Platt was paid for and neither of them denied that they had a meeting with Mr Heyes in 2017 to discuss how to get their money back and how to account for it when they did.

725. However, in my judgment SML has come nowhere near establishing that this was ever the potentially profitable business opportunity which Mr Randall asserted it to be. He seems to have thought that it was a good idea, and he said in his witness statement that it was an "*excellent opportunity*" but there was no hard explanation as to why that was. He said that he was surprised by Sammy's rejection of the opportunity because "*SML was supposed to be looking for new sources of income*", but there was no evidence which explained why and how SML could have made money from it, and the question arose at a stage when it is SML's case that it was under increasing financial pressure and now says that it should have been withdrawing from its import business which is not consistent with it being a good idea to invest in a haulage company based in Portugal. Even if the Director Defendants did "invest" in David Platt LDA, which they seem to have done in some unidentifiable way, it is very difficult to identify from the evidence why this was an opportunity which ought to have been pursued by SML.

726. To that extent, I do not accept SML's case that this was an opportunity which it was a breach of duty for the Director Defendants not to pursue on behalf of SML. Whatever its nature, the evidence is equally consistent with the investment opportunity being a speculative one for the Director Defendants, in which it would have been quite wrong and inappropriate for SML to engage. Indeed, the note of the 2017 meeting with Mr Heyes which I referred to earlier in my judgment is if anything more consistent with an attempt to get back something from an investment or loan which had not made a profitable return than it is with an investment or loan which would have generated any form of meaningful benefit for SML.

727. In these circumstances, I am also not satisfied that, even if there was a breach of duty by the Director Defendants in relation to the David Platt investment opportunity, SML

suffered any loss. The loss would have to be ascertained by identifying the value of the opportunity, which would require as a starting point evidence of the value of David Platt LDA at the time of the investment and the extent to which the opportunity generated some form of return. The evidence of the amounts which were paid by the Director Defendants to David Platt, and which would in any event have had to be deducted from the value of any investment which they made was extremely limited.

728. In any event, I accept the submission of the Director Defendants that, if there is a claim at all, it is much more likely to be a claim that is available to CET not SML. Mr Ayres was on the logistics side of the combined business (looking at the Stubbins Group as a whole) and the opportunity if it existed was an opportunity related to the haulage business not the part of the business operated by SML. This conclusion is both consistent with the business area to which the opportunity related and also with the fact that when V&S were approached by Mr Randall in early 2015, they thought that they were acting for CET.

729. For all of these reasons SML's case on this issue fails. In my judgment, SML is not entitled to equitable compensation nor is it entitled to an account of profits in relation to the opportunity which it says it has lost by not being able to invest in David Platt LDA. I should add, however, that the conclusions I reached on the evidence given by Peter and Sammy on this point, and the evasive manner in which they gave it is one of the reasons why I have had to approach their evidence more generally with great caution.

Agreed Issue 14: Business Claims

730. The fourteenth agreed issue falls into two parts and relates to the meaning of "*Business Claims*" under the APA. (a) Are SML's claims against the Director Defendants "*Business Claims*" within the meaning of the APA? (b) If so, did the Director Defendants act in breach of duty by causing SML to sell its claims against them to SFP?

731. The Director Defendants plead that SML's claims in these proceedings are "*Business Claims*" within the meaning of the APA and have therefore been purchased by SFP and SGP. This is not accepted by SML, which pleads that if, contrary to its case, the effect of the Transaction was that SML had divested itself of the right to bring the claims in these proceedings against the Director Defendants, the causing of SML to enter into the Transaction was for that reason alone a breach by them of their duties under sections 171, 172 and 175 of the 2006 Act.

732. The way that the Director Defendants' argument was put in their skeleton argument and their closing submissions was as follows:

i) by clause 2.2 of the APA, SML sells and SGP buys "*the Produce Business as a going concern*";

ii) "*the Produce Business as a going concern*" comprises amongst other things "*(l) the Business Claims relating to the Produce Business*"

iii) "*Business Claims*" are defined by clause 1.1 of the APA to mean "*all of [SML]'s rights, entitlements and claims against third parties arising directly or indirectly out of or in connection with the operation of the Produce Business or relating to the Produce Assets and or the Non Produce Business or relating to the Non Produce Assets (as the context requires)*."

iv) "*Produce Business*" is defined by clause 1.1 of the APA to mean "*the business of growing, sourcing, packing, warehousing and supply and distribution of fresh salad produce for supermarket chains carried on by [SML] at the Effective Time*".

733. It is then said that the claims made in these proceedings have therefore been sold by SML to SGP, which gives the Director Defendants a general defence because the causes of action are no longer SML's to pursue. Their pleadings made a similar point in relation to the sale to SFP of the Non-Produce Business as a going concern. "*Non-Produce Business*" is defined by clause 1.1 of the APA to mean "*the business of sourcing, supply and distribution of frozen foods to restaurant chains carried on by [SML] at the Effective Time*". Even though SFP is not mentioned in this part of the Director Defendants' closing submissions, I did not understand them to abandon the contention that some part of SML's claims in these proceedings may have been sold to SFP rather than SGP. SML's submissions proceeded on the basis that this was the case.

734. Ms Anderson QC did not develop her arguments as to how the claims made against the Director Defendants were "*Business Claims relating to the Produce Business"*. She concentrated her submissions on SML's argument that, if the APA did sell the claims to SFP or SGP, it was a breach of duty. On that question, she submitted that the assignment of claims in this form was normal for an asset transfer agreement and that there was nothing to indicate that the Director Defendants caused the APA to be drafted in this way, nor that they were aware of the putative claims against them at the time it was entered into.

735. SML's case on construction of the APA makes a number of points. The first is that the context of the APA was the takeover of SML's business by SFP and SGP. It did not concern SML's rights to bring present or future claims against its officers. The second point was that the Director Defendants are not parties to the APA and nor are they named or otherwise identified in it. It is submitted that there is no reason why the APA would confer on them a personal benefit. The third is that the reference in the definition of claims to "*third parties*" should be read in a common sense rather than a legalistic way to mean complete strangers to the APA and not the owners and directors of the purchasing companies (SFP and SGP).

736. In support of these submissions, SML points out that the obvious purpose of that part of the APA which provided for the sale of Business Claims was to ensure the transfer of a necessary incident to the sale of contracts and stock. It points out that without such a sale SGP and SFP would be unable to pursue claims or other legal remedies against suppliers to or customers of the Produce Business and the Non-Produce Business. SML also submits that the majority of its claims do not in any event arise out of or in connection with the operation of the Produce Business or the Non-Produce Business. It also contends that the construction of "*Business Claims"* advanced by the Director Defendants would mean that SML has lost its common law and statutory rights to bring claims against its own officers for wrongdoing however serious and damaging that

wrongdoing may be. It says that the court will not reach a conclusion on construction of a contractual provision of this type which would reach such a result (which it characterised as "unfair") unless it contained clear words to that effect.

737. In my judgment SML's submissions on the question of construction are correct. The context in which the definition of "*Business Claims"* in the APA falls to be construed is (a) the sale of two going-concern businesses and (b) the sale of a property asset (the WX Hub) and the grant by the vendor of leases over other property (Fen Drayton and Waltham Abbey) to facilitate the continuing conduct of those going concern businesses. The acquisition was a business acquisition by way of management buy-out focussing on the continuing conduct of business activity, including what was required to enable those businesses to be carried on in the future. It was always envisaged that SML would continue to function as an operating corporate entity with its own assets and liabilities and through which all of its shareholders (including in particular the original shareholders) would be able to continue to make a return.

738. The "*Business Claims"* are sold as part of those going concern businesses and are listed as one of the categories of asset that falls within the definition of Produce Assets or Non-Produce Assets as the case may be. In that context the definition of "*Business Claims"* contains two categories of characteristic or limiting qualification to the phrase "*rights, entitlements and claims*". The first is the persons against whom the claims must be made ("*third parties"*) and the second is the matters out of which the claims must arise ("*the operation of the Produce Business or … the Non-Produce Business"*) or to which they must relate ("*the Produce Assets or … the Non-Produce Assets"*). Each characteristic or limiting qualification takes its true meaning from its juxtaposition to the other and must be read in the context of the draftsman's use of the word *Business* in the defined term itself.

739. In my view, this means that the phrase "*third party"* must be read as a third party to the relevant business activity. It does not extend to claims against those who were themselves acting for or on behalf of SML, rather than as a counterparty to SML in respect of a relevant business activity. If the person against whom a claim is sought to be made was not a person with whom SML was carrying on business but was in fact an officer, employee or agent of SML criticised for the wrongful carrying on of business activities on its behalf, they are most unlikely to be a third party for the purposes of the definition.

740. Another way of approaching this issue is the qualitative nature of the claims in the present case. They are all formulated as claims for breach of duty or compensation for losses sustained as a result of non-compliance with statutory provisions concerned with the internal management of a company's affairs. Such claims are internal to SML and are concerned with the operation of its internal management. They are different in concept from claims against persons with whom SML has carried on business, or who may be liable to SML as a result of activity related to its business but in respect of which they were a counterparty to SML.

741. For these reasons I consider that the claims made against the Director Defendants in the present cases are not "*Business Claims"* and so have not been sold to SFP or SGP under the terms of the APA.

742. This means that it is not strictly necessary for me to reach a conclusion on whether it would have been a breach of duty to SML for the Director Defendants to have procured the sale of the claims against them if that is what they had done. However, if it had been necessary for me to do so I would have been likely to conclude that the inclusion of a term to that effect in the APA would have been a breach by the directors who procured it of their duties to SML.

743. The reason for this is that a term to that effect would have amounted to the disposition of an asset without consideration being given to its value and without attributing any value to it. There is no evidence that, in assessing the value of the assets being transferred to SFP and SGP any consideration was given to the value of the claims. While there might have been room for legitimate disagreement about the merits of the claims, in my view it would have been a breach of duty by the directors of SML to procure their transfer for no consideration (if that is what the APA had done) without satisfying themselves as to the nature of the claims which might exist and reaching a reasonable and bona fide conclusion that they had no value. To the extent that such claims might have given rise to causes of action against the directors themselves, which in large part they did, the court would have required clear evidence that in agreeing to their transfer, they reached their decision unaffected by the conflict of interest. The loss would be the value of the claims which, on this hypothesis, SML would have been deprived of the ability to pursue.

744. While it is possible that any such breach could have been ratified by the informed consent of all of SML's shareholders, such a ratification would only have been effective if made on a fully informed basis. There is no evidence that any of the shareholders were informed that the effect of the APA would be to sell any of SML's claims against any of its present or former officers (including the Director Defendants), nor is there any evidence that the Director Defendants informed the shareholders of their own wrongdoing, which on this hypothesis would be the basis of the claims that would be being made.

Other issues

745. The first of the final two agreed issues relates to the statutory relief under section 1157 of the 2006 Act which is only dealt with in the agreed list in the context of the breaches of duty arising out of the Transaction itself. I have already dealt with it at an earlier stage in this judgment. The last issue relates to interest and I will consider any submissions which the parties wish to make should the need arise.

746. I ask the parties to take steps to agree an order to reflect the terms of this judgment. If they are unable to do so, a hearing can be fixed in due course to deal with that and any other consequential matters.