Neutral Citation Number: [2018] EWHC 756 (Ch)

Case No: HC-2014-01959
HC-2015-002392

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
CHANCERY DIVISION

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

Date: 13/04/2018

Before:

THE HONOURABLE MR JUSTICE MORGAN

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Between:

INSTANT ACCESS PROPERTIES LIMITED (IN LIQUIDATION)	**Claimant**
- and -	
(1) MR BRADLEY JOHN ROSSER **(2) MRS MARIA HELENA GIFFORD** **(3) MR JAMES BERNARD MOORE (A BANKRUPT)** **(4) JEFFCOTE DONNISON LLP** **(5) MR PHILLIP DONNISON** **(6) MISHCON DE REYA (A FIRM)** **(7) MR JONATHAN BERMAN**	**Defendants**

And between:

KEVIN ANTHONY MURPHY AND RICHARD HOWARD TOONE (AS JOINT LIQUIDATORS OF INSTANT ACCESS PROPERTIES LIMITED)	**Applicants**
- and -	
(1) MR BRADLEY JOHN ROSSER **(2) MRS MARIA HELENA GIFFORD** **(3) MR JAMES BERNARD MOORE (A BANKRUPT)** **(4) JEFFCOTE DONNISON LLP** **(5) MR PHILLIP DONNISON** **(6) MISHCON DE REYA (A FIRM)** **(7) MR JONATHAN BERMAN**	**Respondents**

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Mark Phillips QC & Daniel Lewis (instructed by **Taylor Wessing LLP**) for the **Claimant**
Lance Ashworth QC & Matthew Morrison (instructed by **Francis Wilks & Jones**) for the **First Defendant**
The Second Defendant appeared **in Person**
The Third Defendant did not appear and was not represented
Mark Simpson QC, Isabel Barter & Niamh Cleary (instructed by **DAC Beachcroft LLP**) for the **Fourth Defendant**
Edmund Cullen QC & Joseph Farmer (instructed by **DAC Beachcroft LLP**) for the **Fifth Defendant**
Jamie Smith QC & Michael Ryan (instructed by **DWF LLP**) for the **Sixth and Seventh Defendants**

Hearing dates: 20, 21, 22, 23,24, 27, 28, 29, 30 November, 4, 5, 6, 7, 8, 11, 18, 19 and 20 December 2017

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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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THE HONOURABLE MR JUSTICE MORGAN

MR JUSTICE MORGAN:

Introduction

1. Between 2003 and going into administration, and then liquidation, in 2008, Instant Access Properties Ltd ("IAP") received substantial sums by way of commission in relation to sales of residential properties acquired by members of IAP, principally as investments. The commission in question was directly or indirectly received from the developers of those properties. During that period, IAP shared the commission paid by the developers with two other companies, Leadenhall Group Ltd ("Leadenhall") and Darrencrest Corporation Ltd ("Darrencrest"). As will be explained, at the relevant times, there were three persons who had interests of some kind or other in IAP and who also had interests of some kind or other in Leadenhall and Darrencrest. These three persons were Mr Moore, Mr Rosser and Ms Forth. Mr Moore is the Third Defendant and Mr Rosser is the First Defendant in these proceedings. Ms Forth is not a defendant.

2. The essential case put forward by IAP and its liquidators in these proceedings is that the arrangements made by IAP with Leadenhall and Darrencrest were a fraud on IAP. It is said that, in effect, IAP gave away for the benefit of Leadenhall and Darrencrest, and for no consideration, commission to which IAP alone was entitled. It is said that this fraud on IAP was committed by Mrs Gifford (the Second Defendant in these proceedings) who was a *de jure* director of IAP and by Mr Moore and Mr Rosser who are said to have been *de facto* or shadow directors of IAP. Accordingly, the case is that these "directors" broke whatever fiduciary duties they owed to IAP by giving away its assets to Leadenhall and Darrencrest, in which Mr Moore and Mr Rosser in particular had interests.

3. IAP and its liquidators also alleged that the purpose of the fraud being committed on IAP was to engage in tax evasion which was said to be unlawful and dishonest. Leadenhall and Darrencrest were both incorporated in the British Virgin Islands and the intention of Mr Moore and Mr Rosser, in particular, was that dividends paid by those companies to their shareholders would not be subject to any significant amount of tax. It was said by IAP and the liquidators that the arrangements made by IAP with Leadenhall and Darrencrest were contrary to the transfer pricing provisions contained in schedule 28AA to the Income and Corporation Taxes Act 1988.

4. These proceedings were brought on 18 December 2014. The events which were said to have amounted to wrongdoing by the *de jure*, *de facto* and shadow directors of IAP had all taken place more than 6 years before that date. The potential limitation defences which might be put forward to these claims obviously influenced the way in which the claims were put. First, the liquidators of IAP brought a claim pursuant to section 213 of the Insolvency Act 1986 which allows a court to order certain persons to contribute to the assets of IAP where those persons have knowingly participated in fraudulent trading by IAP. If that allegation could be established, the liquidators could not be defeated by a limitation defence as the relevant six year period began to run on the liquidation of IAP on 21 December 2008 and the section 213 claim was brought in time (just) on 18 December 2014.

5. IAP, acting through its liquidators, brought a second claim against the *de jure* director and against the allegedly *de facto* and shadow directors and the professional advisers of IAP. IAP alleged a number of breaches of fiduciary duty on the part of the *de jure* director and the allegedly *de facto* and shadow directors. It also alleged that the professional advisers had dishonestly assisted those breaches of fiduciary duty and all of the "directors" and the advisers had conspired to injure IAP by the use of unlawful means which had caused loss and damage to IAP. For good measure, IAP contended that the professional advisers had been negligent. IAP obviously faced limitation problems with these claims. However, IAP might have been able to get around these limitation problems if their claims were based on fraud or deliberate concealment.

6. In these circumstances, the case against the "directors" and the professional advisers was pleaded, and was opened, as a case based upon a fraud or a series of frauds against IAP and against the Revenue.

7. In their closing submissions, IAP and the liquidators have continued to assert that IAP has been the victim of fraud practised by the various Defendants. However, the allegation that there had been a fraud on the Revenue has effectively disappeared. Further, in the course of discussing the scope of the fiduciary duties of directors and, more particularly, shadow directors, a number of submissions have been advanced which, the Defendants say, were not properly pleaded. Further, IAP and the liquidators have advanced the case that, even if IAP suffered no loss by reason of what has occurred, the allegedly *de facto* or shadow directors are liable to account for profits made as a result of breaches of their fiduciary duties owed to IAP. Again, the Defendants say that a claim to an account of profits was never pleaded. As will be seen, I will consider the various ways in which IAP and the liquidators have tried to identify a claim against the various Defendants even though a claim for an account for breach of a fiduciary duty, where there was no fraud or deliberate concealment, will face some obvious limitation problems.

The relevant entities and individuals

8. IAP was incorporated in England and Wales (under the name Abberise Ltd) on 8 April 2002. Its Articles of Association provided that the Regulations contained in the Companies (Tables A to F) Regulations 1985 should apply save as otherwise provided in the Articles. The Articles did not disapply regulation 85 of the 1985 Regulations. Regulation 85 is referred to later in this judgment. Article 13 provided that a director was entitled to vote as a director in regard to any contract or arrangement in which he was interested or upon any matter arising out of such a contract or arrangement and, if he should vote, his vote should be counted and he should be reckoned in estimating a quorum when any such contract or arrangement was under consideration. Article 14 provided that the necessary quorum for the transaction of the business of the directors was two, unless otherwise fixed by the directors.

9. The directors of IAP were:

   (1) Mrs Kim Moore (who was at that time the wife of Mr Moore) from 4 May 2002 to 28 February 2003;

   (2) Mr Moore from 1 March 2003 to 23 October 2003;

(3) Mrs Gifford from 23 October 2003 to 4 July 2011;

(4) Lumley Management Ltd ("Lumley") from 31 October 2003 to 10 January 2008;

(5) Mr McKay from 18 January 2008 until IAP went into liquidation on 21 December 2008.

10. The liquidators contend that Mr Moore was a *de facto* and/or a shadow director of IAP from the time when he ceased to be a *de jure* director (on 23 October 2003) until IAP went into administration on 19 September 2008.

11. The liquidators contend that Mr Rosser was a *de facto* and/or a shadow director of IAP from around June 2003 until IAP went into administration on 19 September 2008.

12. Mrs Gifford was the company secretary of IAP from 4 May 2002 until IAP went into administration on 19 September 2008.

13. The shareholdings in IAP were as follows:

(1) before 31 May 2003, 100 shares (being all of the shares then issued) were held by Prism Holdings Ltd;

(2) by November or December 2003, there were altogether 200 issued shares in IAP held as to 105 shares by Prism Holdings Ltd, 40 shares by the Jiki Trust, 40 shares by the Mhoran Trust and 15 shares by the Omegaville Trust;

(3) on or about 19 February 2004, Prism Holdings Ltd transferred its 105 shares to the Pearson Foundation.

14. Prism Holdings Ltd was incorporated in Malta in around December 2002. The shares in Prism Holdings Ltd were held by AVMT (Trustees) Ltd on trusts which were not identified in the evidence before me. The liquidators would wish to say that Prism Holdings Ltd was beneficially owned by Mr Moore and there is certainly material to support that possibility but I do not need to make a specific finding as to that.

15. The Pearson Foundation was a foundation registered in Panama on 27 October 2003. I was asked to proceed on the basis that the Pearson Foundation involved the assets of the Foundation being held by trustees on what were essentially discretionary trusts. One of the potential beneficiaries under this discretionary trust was Mr Moore.

16. The Jiki Trust was a trust declared in accordance with the laws of the Isle of Man. The trustees of the Jiki Trust held the assets of the trust on a discretionary trust and one of the potential beneficiaries under the trust was Mr Moore.

17. The Mhoran Trust was a trust declared in accordance with the laws of the Isle of Man. The trustees of the Mhoran Trust held the assets of the trust on a discretionary trust and one of the potential beneficiaries under the trust was Mr Rosser.

18. The Omegaville Trust was a trust declared in accordance with the laws of the Isle of Man. The trustees of the Omegaville Trust held the assets of the trust on a discretionary trust and one of the potential beneficiaries under the trust was Ms Forth.

19. The trustees of the Jiki Trust, the Mhoran Trust and the Omegaville Trust were Duncan Lawrie Offshore Services Ltd and Jeffcote Donnison (Overseas) Ltd.

20. IAP went into administration on 19 September 2008 and went into creditors' voluntary liquidation on 21 December 2008.

21. Inside Track Seminars Ltd ("ITS") was incorporated in England and Wales on 21 May 2002. Mrs Moore was a director of ITS until 23 October 2003 when she was replaced by Mrs Gifford. Lumley was appointed as a second director on 31 October 2003. Mrs Gifford was the company secretary. The shareholders in ITS were the same as the shareholders in IAP.

22. IAP and ITS were not formally in a group of companies although there are repeated references in the documents to "the Inside Track Group". Further, the documents frequently used the term "Inside Track" in circumstances where it was not clear whether this was a reference to ITS or to IAP. In some of these cases, the term "Inside Track" was used because the person using that term had not formed a view as to which company was relevant.

23. Leadenhall was incorporated in the British Virgin Islands on 10 October 2003. From around November 2003, the director of Leadenhall was Candolle Management Ltd ("Candolle") and the company secretary was JDS Secretaries Ltd.

24. The shareholders in Leadenhall were as follows:

    (1) As at 5 January 2004, 145 shares were held by the Pearson Foundation, 40 shares were held by the Montpelier Foundation and 15 shares were held by the Derwent Foundation;

    (2) On 8 October 2004, the Pearson Foundation transferred its 145 shares to the Bespoke Foundation;

    (3) On 31 December 2005, the Bespoke Foundation transferred its 145 shares back to the Pearson Foundation.

25. I have already described the position in relation to the Pearson Foundation.

26. The Montpelier Foundation was a foundation registered in Panama in December 2003. I was asked to proceed on the basis that the Montpelier Foundation involved the assets of the Foundation being held by trustees on what were essentially discretionary trusts. One of the potential beneficiaries under this discretionary trust was Mr Rosser.

27. The Derwent Foundation was a foundation registered in Panama. It may be that the Derwent Foundation was only created in March 2004 but I was asked to proceed on the basis that it owned 15 shares in Leadenhall with effect from 5 January 2004. I was asked to proceed on the basis that the Derwent Foundation involved the assets of the Foundation being held by trustees on what were essentially discretionary trusts. One of the potential beneficiaries under this discretionary trust was Ms Forth.

28. Sunpuddles Ltd was a company incorporated in the British Virgin Islands for the purpose of entering into a consultancy agreement with Leadenhall. Under the

agreement, Leadenhall was required to pay fees to Sunpuddles Ltd. The shares in Sunpuddles Ltd were held by the Montpelier Foundation and the fees paid to Sunpuddles Ltd were ultimately for the benefit of Mr Rosser.

29. Darrencrest was incorporated in the British Virgin Islands on 15 June 2004. The director of Darrencrest was Candolle and the company secretary was JDS Secretaries Ltd.

30. The shareholders in Darrencrest as at 10 January 2005 were as follows:

(1) 62% of the issued shares were held by the Delenas Foundation;

(2) 27% of the issued shares were held by the Montpelier Foundation;

(3) 7.5% of the issued shares were held by the Derwent Foundation;

(4) 2.5% of the shares were held by Riko Real Estate SA;

(5) I note that these percentages add up to 99% but these were the percentages given to me by the parties.

31. I have already described the position in relation to the Montpelier Foundation and the Derwent Foundation.

32. The Delenas Foundation was a foundation created in Lichtenstein. I was asked to proceed on the basis that the Delenas Foundation involved the assets of the Foundation being held by trustees on what were essentially discretionary trusts. One of the potential beneficiaries under this discretionary trust was Mr Moore.

33. As to Riko Real Estate SA, I was told that Mrs Gifford had a 40% interest in that company held through Falcor BC Ltd and that Mr Donnison had a 60% interest in Riko Real Estate SA held through Jeffcote Donnison (Suisse) SA Ltd ("JDS"). I am not able to be more precise as to the nature of these interests.

A comment on the discretionary trusts

34. I have referred above to various discretionary trusts or to Foundations, where I am asked to proceed on the basis that the arrangements were in substance similar to the arrangements under discretionary trusts. In this case, it was not argued that these discretionary trusts were shams or that they created arrangements which were not genuine discretionary trusts. It was accepted that I should analyse the position of potential beneficiaries under such trusts in a conventional way. The conventional analysis is that a potential beneficiary under a discretionary trust has a right to be considered as a potential recipient of benefit by the trustees. That right is an interest which equity will protect. That right is more than a mere hope. However, that right is not a proprietary interest in the assets held by the trustees. I take this analysis from JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2016] 1 WLR 160 at [13] per Lewison LJ. The particular arrangements in that case were considered in great detail in the later judgment of Birss J in that case: see [2017] EWHC 2426 (Ch).

35. It is worth commenting at this stage on the fact that the shares in IAP and in Leadenhall and in Darrencrest were held on discretionary trusts or pursuant to arrangements which I was asked to treat as akin to discretionary trusts. By the end of the case, it appeared to suit the Claimants to contend that this was indeed the position. This meant that the shareholders in IAP were not the same as the shareholders in Leadenhall and Darrencrest. In particular, it appeared to suit the Claimants to say that the shareholders in IAP were not Mr Moore, Mr Rosser and Ms Forth but instead were different legal persons, namely, the trustees of certain discretionary trusts. The Claimants had not always put matters in that way. Throughout their pleadings, the Claimants had asserted that Mr Moore, Mr Rosser and Ms Forth were the beneficial owners of these three companies. If, in fact, Mr Moore, Mr Rosser and Ms Forth had owned the shares in IAP, then some of the contentions put forward by the Claimants as to non-disclosure of the interests of Mr Moore and Mr Rosser in Leadenhall and Darrencrest to the shareholders in IAP would have fallen away. Similarly, if Mr Moore, Mr Rosser and Ms Forth had been the shareholders in IAP, then it could be said that they had consented to IAP entering into contracts with Leadenhall and Darrencrest with full knowledge of the interests of Mr Moore and Mr Rosser in Leadenhall and Darrencrest. The Claimants did not at any stage amend their pleadings to remove the allegations that Mr Moore, Mr Rosser and Ms Forth were the beneficial owners of these three companies but, instead, in closing submissions they made their submissions on the basis that the shareholders in the three companies were the trustees of various discretionary trusts and Mr Moore and Mr Rosser were merely potential beneficiaries in relation to the discretionary trusts which were relevant to them.

36. The Defendants did not contend that the Claimants should be held to their pleaded case that Mr Moore, Mr Rosser and Ms Forth were the beneficial owners of IAP. The Defendants also accepted that the shares in these three companies were held by the trustees of discretionary trusts. I will therefore proceed on that basis. However, although I will accept that the trusts were genuine discretionary trusts, it was quite clear on the evidence that in the case of Mr Moore and Mr Rosser they fully expected that all of the benefits received by the trustees from the arrangements which are the subject of this dispute would flow to Mr Moore or Mr Rosser as the case may be or, possibly, to the members of their immediate families. This fact is relevant to the question whether Mr Moore or Mr Rosser were fraudulent or dishonest, as alleged by the Claimants. At the time of the events in question, each of the three companies was solvent so that there was no question of the companies being run in a way which was adverse to the position of creditors of the companies. Accordingly, Mr Moore and Mr Rosser had no reason or motive to act in a fraudulent way as regards IAP or its shareholders because, in view of the way in which they expected to benefit from the discretionary trusts of the shares in IAP, any harm which they did to IAP would be harm to themselves. No doubt it was this consideration which caused the Claimants to allege that it was HMRC which was the victim of the alleged fraud but, by the end of the case, the Claimants appeared to accept that the arrangements made by the three companies in this case amounted to tax planning, which did not involve fraud, whether such tax planning was effective or not.

Mr Moore

37. Mr Moore was originally the moving force behind ITS and IAP. He was described in the evidence as a very good salesman. He made the connections which were of central

importance to the making of the arrangements which are at the heart of the dispute in this case. At some point, Mr Moore was made bankrupt and I was told that his trustee in bankruptcy had consented to these proceedings being brought against Mr Moore. Mr Moore did not participate in any way in these proceedings.

Mr Rosser

38. Mr Rosser was brought up in Australia. After university in Australia and the United States he worked for the Bond Corporation in Australia and then joined the London office of the well-known management consultants, McKinsey & Co. Between 1995 and 1998, he worked for Virgin as the group corporate development director and from 2001 to 2003 he acted as a consultant to Unilever, helping to develop Unilever Ventures. He has also over the years pursued his own ventures. By 2003, he had not had previous experience of the property world. In the middle of 2003, he became connected with matters which are now relevant in this litigation. He had a contract of employment with ITS but not IAP. I was not shown a signed copy of any such contract of employment but the trial bundle included an unsigned contract of employment dated "2004" which stated that his employment began on 1 June 2003. He was never a *de jure* director of any company which is relevant to this litigation. It will be necessary to make further findings in due course as to his involvement with such companies.

39. It is convenient to comment at this stage on the evidence which Mr Rosser gave at the trial. He prepared two witness statements, the first of which was very detailed. He was cross-examined in detail as to the relevant events which began in 2003, some 14 years before the trial. However, at least some of those events were relevant to an application made in 2011 by the Secretary of State for an order that Mr Rosser be disqualified from acting as a director. In connection with that application, Mr Rosser made a detailed affirmation in 2012 which was therefore nearer in time to the events of 2003, although still some time after them. I find that he had genuine difficulty in recalling detailed matters from so long ago particularly when the point of detail was not recorded in any contemporaneous document. He certainly stated at many points in his evidence that he could not recall the point of detail about which he was asked questions. However, it is quite possible that he professed an inability to recall certain matters in an attempt to prevent any further detailed examination of them. He was also at pains to say, in the course of his evidence, that he had not been involved in much of the detail at the relevant time as his role was a strategic one which did not require him to descend into such details. I consider that he overstated the extent to which he was detached from detailed events and matters at the time.

Mrs Gifford

40. In 2002, Mrs Gifford was running a small accountancy practice from her home. At that time, Mr Moore approached her and invited her to set up some administration and accounting processes for IAP and ITS. Mrs Gifford became the company secretary of IAP and ITS from around that time and she became a director of IAP and ITS on 23 October 2003. I was not told that she had been involved in running a business (apart from her accountancy practice) before 2002 and I was not told that she had any experience in the types of business being run by IAP and ITS. I will make findings in due course as to the extent to which she acted on the directions or instructions of Mr Moore or Mr Rosser.

41. Mrs Gifford was directly involved in creating documents at various stages which were deliberately designed to misdescribe the real events. These documents purported to record things which had not occurred and they were given dates which were intended to mislead. I will refer to these false documents in more detail later in this judgment. I find that Mrs Gifford's involvement in creating these documents was clearly dishonest. In this respect, it does not matter that the documents were not in the end used to mislead anyone. In her evidence, Mrs Gifford denied any wrongdoing and put forward implausible suggestions as to how these documents were created in an honest way. Mrs Gifford must have known that these implausible suggestions were untrue. In the light of this, I will treat her evidence with considerable caution.

Mr Donnison

42. Mr Donnison (the Fifth Defendant) is a chartered tax adviser and a member of the Fourth Defendant, Jeffcote Donnison LLP ("JDLLP"), which was a limited liability partnership offering tax advice and corporate and commercial services to both personal and business clients.

43. Mr Donnison gave evidence that Jeffcote Donnison Consulting Ltd ("JDCL") operated as a separate entity from JDLLP. He said that he used JDCL to advise IAP on a consultancy basis to deal with matters which went beyond tax planning (on which JDLLP could and did advise IAP) and audit and accountancy services (with which the firm of Slaven Jeffcote LLP dealt).

44. Mr Donnison was a director of Lumley which was appointed as a corporate director of both IAP and ITS. Mr Donnison carried out the activities of Lumley as the director of IAP and ITS.

45. Mr Donnison was directly involved in preparing notes which were prepared a considerable time after the meetings to which they purportedly related. Some of these notes were prepared for the purpose of being shown to others to describe the relationship between IAP and Leadenhall. Some of these notes were misleading as to the actual events and Mr Donnison must have appreciated this at the time he prepared the notes. There are also grounds for suspicion as to the extent of his involvement in the preparation of documents which were created in his office and which were back-dated in order to misdescribe the events which had occurred.

46. Mr Donnison gave fluent and apparently careful evidence. Nonetheless in view of the grounds for suspicion which exist in relation to his possible involvement in relation to documents which were created and backdated at his offices, I considered that I ought to be cautious about the evidence which he gave. However, in the end, I do not reject the evidence which he gave in relation to the matters which are now of central importance. Having regard to the contemporaneous documents and the inherent probabilities I am able to accept a great deal of his evidence as being reliable.

Mr Berman

47. Mr Berman (the Seventh Defendant) is a solicitor and a partner in the Sixth Defendant, Mishcon de Reya (a firm). That firm was the predecessor to Mishcon de Reya LLP and the firm and the LLP are well known solicitors. Having regard to the contemporaneous

documents and the inherent probabilities I am able to accept a great deal of his evidence as being reliable.

Other witnesses

48. I heard evidence from a large number of other witnesses in addition to Mr Rosser, Mrs Gifford, Mr Donnison and Mr Berman. I found the evidence of these other witnesses to be helpful and generally reliable. I do not consider that it is necessary to refer to these other witnesses in more detail at this stage.

The various agreements involving IAP, Leadenhall and Darrencrest

49. It is necessary to refer to a number of agreements which were entered into by IAP or Leadenhall or Darrencrest. It is convenient to list these agreements at this point and I will then refer to the relevant terms of those agreements before I make further findings of fact. The agreements to which I will refer are:

(1) An agreement dated 24 October 2003 between IAP and Maesbury Homes Inc ("Maesbury");

(2) An agreement dated 26 November 2003 between IAP and Leadenhall;

(3) An agreement dated 26 March 2004 between IAP, Leadenhall and Maesbury;

(4) An agreement dated 26 March 2004 between Leadenhall and Maesbury;

(5) An agreement dated 26 March 2004 between Leadenhall and IAP;

(6) An agreement in October 2004 between Darrencrest and Maesbury;

(7) An agreement dated 7 October 2004 between Darrencrest and IAP;

(8) An agreement dated 4 April 2005 between Lake Austin Properties I Ltd ("Lake Austin") and Darrencrest;

(9) An agreement dated 5 September 2005 between IAP, Darrencrest and Lake Austin;

(10) An agreement dated 1 August 2007 between IAP and Leadenhall;

(11) An agreement dated 1 August 2007 between IAP, Leadenhall and Maesbury;

(12) An agreement dated 1 August 2007 between IAP and Darrencrest;

(13) An agreement dated 1 August 2007 between IAP, Darrencrest and Maesbury;

(14) An agreement dated 28 August 2007 between Darrencrest, Lake Austin and IAP.

The agreement dated 24 October 2003

50. The agreement dated 24 October 2003 was made between IAP as "the Agent" and Maesbury as "the Developer". Mrs Gifford signed the agreement on behalf of IAP. The agreement referred to "the Development" as defined in the Schedule to the

agreement. The Schedule referred to "the Units" as later defined but the later provisions were not completed as at 24 October 2003. Instead the agreement provided that the Schedule would be agreed from time to time between the Agent and the Developer. The agreement recited that the Developer was in the process of developing the Development and wished to secure sales of Units in the Development. The agreement further recited that the Agent had marketing experience in the property field and was willing to act as the exclusive marketing agent for the Units on the terms of the agreement.

51. By clause 2.1 of this agreement, the Developer appointed the Agent for an Exclusivity Period from 10 October 2003 to 9 October 2004 as its exclusive worldwide agent for the promotion of the Units and the solicitation of purchasers for the Units and the Agent agreed to act in that capacity. Clause 2.2 provided for the Developer and the Agent to complete a Schedule which defined the Units which were agreed to be the subject of the agreement.

52. By clause 4.1 of the agreement, the Agent agreed to use its reasonable commercial endeavours to promote and market the Units in the United Kingdom and to seek purchasers for the Units. By clause 4.6, the Agent was entitled to obtain from a person introduced as a purchaser of a Unit a deposit in respect of that Unit at a level to be negotiated by the Agent.

53. By clause 6.1 of the agreement, the Developer agreed to pay to the Agent a commission equal to (after an initial period at a different rate) 20% of the Sale Price of each Unit in respect of which the Developer entered into a contract of sale with a person introduced, directly or indirectly, by the Agent. The benefit of the agreement was assignable by either party.

54. By clause 12 of the agreement, the Developer and the Agent were to nominate a suitable senior employee to assume overall responsibility for its obligations under the agreement. Clause 12 stated that the first person so nominated by the Agent was Mr Rosser.

The agreement dated 26 November 2003

55. The agreement dated 26 November 2003 was made between IAP and Leadenhall. The agreement was signed by Mrs Gifford on behalf of IAP. The agreement recited that IAP carried on the business of sourcing and marketing for sale to its members residential properties which were located predominantly in the United Kingdom. The agreement further recited that IAP wished to market to its members and others properties located outside the United Kingdom and wished to appoint Leadenhall to assist in establishing, exploiting and managing "the Business". "The Business" was defined to mean the business of promoting for sale any property located in a Territory (to be agreed between the parties but so that it would exclude England, Wales, Scotland and Northern Ireland), such business to include any ancillary commercial activities whether as agent or by way of joint venture, partnership, principal or otherwise. The agreement further recited that IAP had agreed to appoint Leadenhall as its representative to establish, exploit and manage the Business.

56. By clause 2.1 of the agreement, IAP appointed Leadenhall as its exclusive representative in the Territory with effect from 1 October 2003 for the purpose of:

(1) sourcing properties suitable for being sold to members of IAP or others and procuring the appointment of IAP as the marketing agent in respect thereof;

(2) Negotiating the terms of arrangements with developers and others;

(3) Managing the business of IAP in the Territory including matters such as establishing and maintaining good relations with developers, mortgage brokers and various professionals and arranging for the payment of fees and expenses incurred by IAP.

57. By clause 3 of the agreement, Leadenhall took on certain obligations which it owed to IAP. These included obligations to:

(1) use its reasonable endeavours to promote the interests of IAP in relation to the Business in the Territory;

(2) seek developers willing to appoint IAP as marketing agents;

(3) provide quarterly reports;

(4) act on the direction of IAP in specified respects;

(5) describe itself as "overseas representative" of IAP.

58. By clauses 4.1 to 4.3 of the agreement, IAP agreed to pay to Leadenhall a commission equal to 50% of the net proceeds received by IAP in respect of the Business and to reimburse all expenses exceeding £5,000 in aggregate in any month; IAP was also to pay a "non-returnable but fully recoupable" advance of £20,000 per month in respect of commission. By clause 4.13, IAP agreed to make a loan to Leadenhall of £500,000 for working capital purposes upon which interest of 4% per annum, compounded annually, was payable and which was to be repaid on the earlier of the second anniversary of the agreement and the termination of Leadenhall's appointment.

The agreements dated 26 March 2004

59. On 26 March 2004, IAP, Leadenhall and Maesbury entered into a tripartite agreement, described as a Termination Agreement, intended to bring the earlier agreements of 24 October 2003 and 26 November 2003 to an end. The tripartite agreement recited the earlier agreement of 24 October 2003. It further stated that "[p]rior to entering into [the agreement of 24 October 2003] Leadenhall was appointed by [IAP] as its sub-agent for the sale of the properties. Then the tripartite agreement recited that as the arrangements between IAP and Leadenhall had commenced prior to the agreement of 24 October 2003, the parties wished the earlier agreements to be terminated and for Leadenhall to be appointed as Maesbury's agent pursuant to a new agency agreement so as to "more appropriately reflect the actual arrangements between the parties". The operative terms of the tripartite agreement then sought to give effect to the intentions declared in the recitals.

60. Also on 26 March 2004, Leadenhall entered into an agreement with Maesbury. This agreement largely, but not entirely, followed the form of the agreement dated 24 October 2003, save that Maesbury's counter-party was now Leadenhall in place of IAP.

61. Finally, on 26 March 2004, Leadenhall entered into an agreement with IAP. This agreement recited that IAP carried on the business of marketing residential properties for sale to its members and that Leadenhall carried on the business of sourcing and predominantly through sub-agents marketing for sale on behalf of developers residential properties located outside the United Kingdom. The agreement further recited that IAP wished to be appointed as a sub-agent of Leadenhall to market to its members and others properties located outside the United Kingdom and Leadenhall had agreed to make that appointment. It should be noted that the agreement dated 26 March 2004 between Leadenhall and IAP was very different from the earlier agreement between those parties of 26 November 2003. The agreements of 26 March 2004 did not simply reverse the roles of the parties pursuant to the earlier agreement.

62. The agreement dated 26 March 2004 between Leadenhall and IAP specified a commencement date of 1 October 2003. The agreement provided for certain circumstances in which Leadenhall would be obliged to notify IAP of Leadenhall's appointment as the sales agent for certain properties. Following such notification, IAP was free to choose whether to accept an appointment as Leadenhall's sub-agent. If IAP were then appointed as Leadenhall's sub-agent, IAP was under an obligation to Leadenhall to perform the obligations imposed on Leadenhall by its agreement with a developer. In consideration of the obligations undertaken by IAP as sub-agent of Leadenhall, Leadenhall was to pay to IAP a commission equal to 50% of the net proceeds received by Leadenhall pursuant to its appointment by the developer.

The agreement between Darrencrest and Maesbury in October 2004

63. It appears that in early October 2004, Darrencrest and Maesbury entered into an agreement. The documents in evidence included a draft of the intended agreement between these parties but not the executed agreement. The draft agreement between them was in the same terms as the agreement dated 26 March 2004 between Leadenhall and Maesbury save that the commencement date was to be 1 October 2004. The intention seems to have been that Leadenhall and Maesbury would continue to have the rights and obligations under the agreement of 26 March 2004 in relation to the properties which had previously been identified as being the subject of that agreement but, in relation to properties which were subsequently identified by Maesbury, they would be the subject of the agreement of October 2004 between Darrencrest and Maesbury. In particular, the development at Lake Austin was to be the subject of the agreement with Darrencrest and not the agreement with Leadenhall.

The agreement dated 7 October 2004

64. On 7 October 2004, Darrencrest entered into an agreement with IAP. This agreement was executed by Mr Donnison for Lumley as a director of IAP. This agreement was in essentially the same terms as the agreement dated 26 March 2004 between Leadenhall and IAP save that IAP's counter-party was Darrencrest rather than Leadenhall.

The agreement dated 4 April 2005

65. On 4 April 2005, Darrencrest entered into an agreement with Lake Austin. This agreement followed the format of the original agreement dated 24 October 2003 between IAP and Maesbury (and therefore the format of the later agreements based on that original agreement). In the agreement of 4 April 2005, there was a completed

schedule which identified the properties which were initially the subject of the agreement. The agreement defined the commencement date as 30 September 2004. The commission payable was 10% of the sale proceeds of the units rather than 20% in earlier agreements.

The agreement dated 5 September 2005

66. On 5 September 2005, IAP, Darrencrest and Lake Austin entered into an agreement whereby Lake Austin appointed Darrencrest as its agent (on the terms of the earlier agreement of 4 April 2005) and Darrencrest appointed IAP as its sub-agent (on the terms of the earlier agreement of 7 October 2004) in relation to the properties the subject of the agreement of 5 September 2005.

The agreements dated 1 August 2007

67. On 1 August 2007, IAP and Leadenhall entered into an agreement which terminated, from that date, the arrangements made under their earlier agreement of 26 March 2004. It was agreed that any receipts by Leadenhall on or after 1 July 2007 pursuant to the agreement which Leadenhall had entered into with Maesbury on 26 March 2004 would be dealt with as follows: the first $4 million would belong to Leadenhall and any further receipts would belong to IAP.

68. Also on 1 August 2007, IAP, Leadenhall and Maesbury entered into a tripartite agreement dealing with the payment of monies due under the earlier agreement dated 26 March 2004 between Leadenhall and Maesbury. The copy of that agreement in the trial bundles was incomplete and I will proceed on the basis that this agreement gave effect to the agreement of 1 August 2007 between IAP and Leadenhall as to the payment of commission by Maesbury to Leadenhall and IAP.

69. On 1 August 2007, IAP and Darrencrest entered into an agreement which terminated, from that date, the arrangements made under their earlier agreement of 7 October 2004. Darrencrest then assigned to IAP, with effect from 1 July 2007, the benefit of all the agency agreements which Darrencrest had made with various developers. The relevant developers were seven developers in Florida (including Maesbury and Lake Austin) and two in Cyprus. In consideration of that assignment, IAP agreed to pay to Darrencrest the first $6.8 million it received as commission from developers under the agency agreements which had been assigned to IAP.

70. Also on 1 August 2007, Darrencrest, Lake Austin and IAP entered into a tripartite agreement which substituted IAP for Darrencrest under the earlier agreement of 4 April 2005 between Darrencrest and Lake Austin and under the earlier agreement of 5 September 2005 between IAP, Darrencrest and Lake Austin.

The agreement dated 28 August 2007

71. On 28 August 2007, Darrencrest, Lake Austin and IAP entered into a tripartite agreement which was supplemental to the earlier agreement of 4 April 2005 between Darrencrest and Lake Austin and to the earlier agreement of 5 September 2005 between IAP, Darrencrest and Lake Austin. The parties agreed certain terms as to the payment of commission. IAP and Lake Austin agreed to enter into a new agency agreement under which Lake Austin was to appoint IAP as its marketing agent. The

new agency agreement was said to be in the form attached to the agreement of 28 August 2007 but I was not shown this form of agreement.

A summary of the position under the agreements

72. Although the above agreements contained detailed provisions as to the rights and obligations of the various parties, it is possible to summarise some key points arising from this sequence of agreements:

(1) Throughout the series of agreements, there was always an agreement or agreements with a source of properties for sale in the United States, the source being either Maesbury or Lake Austin;

(2) The first agreement with Maesbury was made by IAP, providing for IAP to receive a commission at the rate of 20%;

(3) IAP then made an agreement with Leadenhall under which IAP was to pay to Leadenhall one-half of that commission;

(4) Then the agreements between Maesbury, IAP and Leadenhall were restructured so that Leadenhall contracted with the source of the properties in return for a commission of 20% and Leadenhall agreed to pay one-half of that commission to IAP;

(5) At that stage, although the contractual arrangements were restructured, the economic situation was broadly similar, certainly to the extent that a commission of 20% was paid by Maesbury and the 20% commission was divided equally between IAP and Leadenhall;

(6) The next step was to substitute Darrencrest for Leadenhall in relation to new properties with the result that Darrencrest contracted with Maesbury, and later with Lake Austin, and then Darrencrest agreed to pay one-half of its commission to IAP;

(7) When the individuals behind IAP, Leadenhall and Darrencrest wished to revise these arrangements in 2007, IAP contracted directly with Maesbury and Lake Austin and Leadenhall and Darrencrest ceased to be involved as regards future marketing and sales.

73. I will also make some further general points about these agreements. First, it was not alleged that the agreements were shams or that they took effect in any way other than in accordance with their terms. Secondly, although it was pointed out, in relation to the agreement of 24 October 2003, in particular, that the agreement related to properties described in a schedule and that, as at 24 October 2003, the schedule had not been completed and therefore did not identify any properties which were the subject of that agreement, the subsequent conduct of the parties did identify the properties which were to be the subject of that agreement and the parties then operated the provisions of that agreement in relation to those properties.

The evidence

74. In the usual way, I was provided with evidence in the form of contemporaneous documents and oral evidence. As regards the documents, there are two categories of documents which I need to mention at this point. The first category consists of documents which were written after a relevant event and then back-dated to make it appear that they were written at the time of the relevant event. Plainly, I cannot hold that those documents were brought into existence on the dates which they bear. Further, I do not consider, in relation to the majority of these documents, if not all of them, that I can regard the contents as reliable as if the documents were an accurate note of what had happened at a time before the documents were created. Generally speaking, in relation to this first category of documents, it is clear that the document was created not only to mislead as to its date but also to have misleading contents. The second category of documents does not involve any misleading as to the date of creation of the documents. Instead this category consists of documents prepared as a purported description of earlier events. In relation to such documents, it was put to the author of the document that the author was knowingly making a false statement. Even if the author of the document did not know the contents to be false I do not regard these descriptions, some years after the event, as reliable as to what had happened earlier. Generally speaking, these later accounts were prepared for the purpose of achieving a particular result or convincing someone as to what had happened and they contain a considerable amount of presentation or "spin", even if they are not wholly false. In fact, in relation to the earlier matters which are purportedly described in this category of documents I have reasonably reliable evidence as to what really happened at the relevant time and I will make my findings in those respects without paying very much attention to the later presentations of those matters.

75. I have already referred to the oral evidence which I received.

Findings of fact

76. ITS was incorporated in May 2002 and commenced trading in August 2002. Mr and Mrs Moore used ITS to run a new business of providing information and advice to potential investors in residential properties. The provision of information and advice took different forms but one form involved seminars conducted by Mr Moore himself.

77. The business of ITS achieved some success and that led to potential investors seeking further advice and assistance in order to make investments in residential property. That led Mr and Mrs Moore to use IAP, a company they had earlier formed or acquired, to start a further business in around March 2003. IAP offered membership, in different categories. The benefits of membership were that a member would be informed by IAP of investment opportunities in residential properties. IAP did not itself source properties to be introduced to its members. As regards properties in the UK, it used a separate company, Whitedrake Ltd, a company in which Mrs Moore's sister had an interest. As regards property in Spain, it used Regency Estates SL, a company in which initially Ms Forth and then later Mr Moore and Ms Forth had interests. The evidence as to what these two sourcing companies did was not as clear as the evidence which I was given as to the work which was later done by Leadenhall and Darrencrest, which were also described as sourcing companies for IAP. In connection with Leadenhall and Darrencrest, the evidence was that the work done by a sourcing company extended to sourcing such properties, usually at the off-plan stage, carrying out some due diligence on behalf of potential purchasers, obtaining discounts on the purchase price from the

developers and supporting potential purchasers through the purchase. The support involved the sourcing company liaising between the purchaser and the developer, lawyers and mortgage brokers.

78. Mr Moore met Mr Rosser in 2002 when they discussed various business opportunities. Mr Moore contacted Mr Rosser by email on 26 March 2003. He told Mr Rosser that "we sell £20m of property per month" and he wished to explore with Mr Rosser strategic expansion of his business with a view to its sale in 1 or 2 years' time. He asked if Mr Rosser would be interested in discussing that subject. Mr Rosser was interested and met Mr Moore in April 2003. At their meeting, Mr Moore described the businesses of ITS and IAP. He explained that those businesses had experienced rapid growth. Mr Rosser's evidence was that Mr Moore wanted him to use his skills, knowledge and experience of public relations, branding and strategic business development to bear on ITS and specifically to provide strategic advice with a view to ultimately achieving a successful sale of one or more of ITS, IAP and any related businesses. Mr Moore had a particular concern that property education and investment businesses tended to have a poor reputation and he wished the businesses of ITS and IAP to be distinguished from others in the market. Mr Rosser gave evidence that he was not being asked by Mr Moore to run ITS or IAP or become involved in the selection of properties for sale or the like.

79. Mr Rosser asked Mr Moore about the identity of the directors and the managers of ITS and IAP. As the intention was that one or other of these companies would be sold on terms that Mr and Mrs Moore would not remain involved, Mr Rosser advised that the companies needed directors and management who were capable of running the businesses without Mr and Mrs Moore. Mr Rosser also advised Mr Moore that the companies should retain experienced accountants, auditors and lawyers and that these professionals should review the systems and mode of operation of the companies. To this end, Mr Rosser introduced Mr Moore to Mr Berman a partner in Mishcon de Reya, to Mr Donnison's practice (for tax advice) and to Slaven Jeffcote LLP, as auditors, where Mr Donnison was a member.

80. The trial bundle includes a minute of a purported meeting of the board of IAP on 31 May 2003. The minute suggests that by the end of May 2003, it had been agreed that Mr Rosser (or more accurately the trustees of a discretionary trust in relation to which he was a potential beneficiary) should be issued shares in IAP. At that time, Mr Moore was the sole director of IAP and Mrs Gifford was the company secretary. The minute purports to record a resolution as to the issue of shares which would result in there being 200 issued shares with entities connected to Mr Moore (Prism and the Jiki Trust) holding 72.5% of the shares, the discretionary trust connected to Mr Rosser holding 20% of the shares and the discretionary trust in relation to which Ms Forth was a potential beneficiary holding 7.5% of the shares. Although the minute is dated 31 May 2003, it is clear from later documents that the issue of shares in IAP in this way was not settled until much later. Indeed, there is a clear pattern in this case of minutes being prepared for meetings that never took place and which are given a date long before the minutes were prepared. The evidence shows that this minute was signed after 27 October 2003 and then back-dated. I also find that no such board meeting took place on 31 May 2003.

81. On 14 June 2003, Mrs Gifford sent an email to various persons (including Mr and Mrs Moore) who, I assume, were connected to the businesses of ITS and IAP and stated that Mr Rosser had "been appointed Vice Chairman of the group from the 1 June 2003." The email went on to describe Mr Rosser's strategic planning experience and the intention that he would provide guidance through a period of growth and diversification.

82. In June 2003, Mr Moore and Mr Rosser met a Mr Storey. Although the details are not clear, it appears that Mr Storey met Mr Moore at an ITS seminar in Manchester and he met Mr Rosser at Heathrow. In due course, Mr Storey came to play a significant part in relation to the sourcing of residential development properties particularly in the United States. At this time, Mr Storey was an official in the British Embassy in Lima but, rightly or wrongly, he did not feel inhibited in performing the services for IAP or Leadenhall or Darrencrest which are referred to below. It appears from an exchange of emails between Mr Storey and Mr Moore on 24 June 2003 that Mr Moore and Mr Rosser discussed with Mr Storey the services and the introductions which he might be able to provide. In the exchange of emails, Mr Moore told Mr Storey that "we" wanted to explore the possibility of Mr Storey helping with sourcing property outside the United Kingdom. It is not clear who was being referred to as "we". Mr Moore then referred to "our international sourcing company" and suggested some possibilities as to Mr Storey's connection with, or involvement in, such a company. In his reply to Mr Moore, Mr Storey stated that he was intending to meet certain representatives of Pulte Homes and he suggested that Pulte Homes might be a source of properties of interest to Mr Moore.

83. Mr Storey sent his initial email in June 2003 to Mr Moore alone but Mr Moore copied Mr Rosser into the exchanges and thereafter, in June and July 2003, Mr Moore addressed his emails to Mr Moore and Mr Rosser. In an email from Mr Storey to Pulte Homes on 24 June 2003, he referred to the Chairman and the Vice-Chairman of the company for whom he was acting. These were references to Mr Moore and Mr Rosser respectively. However, Mr Storey also described himself as a non-executive director of whichever was the relevant company although he was not a non-executive director of any relevant company. He regarded that as an inaccurate but nonetheless appropriate self-promotion for consumption by Pulte Homes.

84. Before 30 June 2003, Mr Donnison had a meeting with Mr Rosser, Mr Moore and Ms Forth. I will refer later to the question of which entity Mr Donnison was acting for in this respect. Mr Donnison had been introduced to Mr Moore and Ms Forth by Mr Rosser who had been a client of Mr Donnison's since 1996, if not earlier. On 30 June 2003, Mr Donnison wrote to Mr Rosser, Mr Moore and Ms Forth. It appears from this letter that Mr Donnison had been asked to advise on the tax consequences of the use of various corporate structures involving Mr and Mrs Moore, Ms Forth and Mr Rosser. Mr Donnison referred to the possibility that the reorganisation of arrangements would involve the use of offshore trusts.

85. On 30 June 2003, Mr Rosser emailed Mr Storey with suggestions as to the arrangements which could be made to involve Mr Storey. The email referred to "Inside Track" and its wish to develop its international business. When discussing how Mr Storey would be remunerated for his services, Mr Rosser referred to the setting up of a

single purpose entity that would be majority owned by Inside Track but it was clear at that point that the detail of this suggestion had not been worked out.

86. In July 2003, Mishcon de Reya were retained by ITS and IAP on the recommendation of Mr Rosser.

87. On 2 July 2003, Mr Storey wrote to Mr Rosser and Mr Moore referring to the role he might have in connection with their "international sourcing company". He was obviously here referring to what Mr Moore had said in the earlier email of 24 June 2003. There were further emails between Mr Rosser and Mr Storey in July 2003 on the subject of Mr Storey's remuneration. Mr Rosser told Mr Storey that the relevant companies were going through a corporate restructuring and the agreement involving Mr Storey would be made with "an inside track entity of our choosing as recommended by our tax advisor".

88. On 25 July 2003, Mr Rosser emailed a Mr Flanagan who was to be appointed as managing director "of the new entity". It was not made clear what this entity was to be. However, the email shows Mr Rosser negotiating with and appointing Mr Flanagan as a managing director of some company or other connected with ITS and/or IAP.

89. In the trial bundle, bearing the date 3 August 2003, is a letter apparently from Leadenhall to Mrs Gifford. The letter states that it was written to provide Leadenhall's assessment of a certain residential development, Windward Bay, in Florida. The letter purported to enclose a report bearing the date August 2003 concerning that development. The report states that Leadenhall had negotiated certain rights in relation to 36 units on that development. The letter then referred to Leadenhall's research and its due diligence in relation to this development. The letter purports to be signed by Mr Storey.

90. The trial bundle includes a purported reply, dated 15 August 2003 to the earlier purported letter of 3 August 2003. The reply acknowledges receipt of the letter of 3 August 2003 and the report on Windward Bay. The reply is signed by Mrs Gifford.

91. It is obvious that the letter dated 3 August 2003 was not sent on or around that date. For one thing, Leadenhall did not exist on that date. It follows that someone went to the trouble of creating this document at a later time and putting the date of 3 August 2003 on it. Further, someone went to the trouble at a later time of creating the purported reply on which was placed the date of 15 August 2003. It was suggested that these letters had indeed been written later than August 2003 but that there was a quasi-innocent explanation in that certain communications from Mr Storey had gone missing at a later time and that led IAP to endeavour to make good the gap in its records by doing its best to recreate what the records had earlier showed. However, whatever went missing and whatever the missing documents earlier showed, they did not include a letter of 3 August 2003 from Leadenhall which did not exist at that date. It is obvious to me that these letters were created with a view to them being used to be shown to a third party at a later time. The intention was either to mislead a third party or to manufacture evidence to support a case which it was otherwise difficult to prove. I have no evidence to show that they were actually used to mislead anyone or relied upon as evidence but that does not detract from my finding that they were created so that they could be used to mislead a third party or used as manufactured evidence.

92. Mrs Gifford signed the letter dated 15 August 2003. She told me that she did not notice that when she signed it (probably some considerable time after 15 August 2003) was dated 15 August 2003. I do not accept that evidence. Further, it is clear to me that when Mrs Gifford gave that evidence she knew that she was not telling the truth and she knew she was concealing from the court the real explanation for these letters.

93. There was an issue as to when these letters were created. It was suggested that these letters were created in accordance with what was said by Mrs Gifford in her email to Mr Rosser and Mr Moore on 20 November 2003. This email was sent after the agreement between IAP and Leadenhall had been signed by IAP; the agreement was later dated 26 November 2003. In her email, Mrs Gifford said that the "[p]aper trail will start asap (waiting to do some letterheads)". If the letters which were dated 3 August 2003 and 15 August 2003 were what was contemplated by Mrs Gifford's reference to a paper trail, then that might indicate that Mr Moore and Mr Rosser knew what Mrs Gifford intended to do and what she then later did when creating the letters which were dated 3 August 2003 and 15 August 2003. On its own, that is quite a plausible explanation. However, it was countered by Mrs Gifford pointing out that the letter of 15 August 2003 has the reference "MV002" and giving evidence that "MV" was a reference to Melanie Vink who was only employed by IAP in April 2005. There was no evidence to link the reference to MV to anyone else. This evidence suggests that the letters were created after April 2005. Of the two explanations, I find that it is likely that the letters were indeed created after April 2005 and there is no direct link between what Mrs Gifford said to Mr Moore and Mr Rosser in November 2003 about a paper trial and these letters.

94. I have already held that the letters were created in order to mislead a third party or at least to be passed off as evidence of a matter that required to be proved. The next question is: in what way were the letters to be relied upon? That can be answered by considering the position as revealed in the letters. They suggest that in August 2003 (before IAP entered into the agreement with Maesbury on 24 October 2003), Leadenhall was sourcing properties in the United States and passing on the information about those properties to IAP. It is apparent from later documents, that for various reasons (including a possible sale of the shares in IAP and also including the tax position arising from the relationship between IAP and Leadenhall) IAP wished to show, or convey the impression, that the original relationship was between Leadenhall and Maesbury rather than between IAP and Maesbury. I find that these letters were deliberately created to help IAP put forward that case.

95. I have discussed the position in relation to the letters which were dated 3 and 15 August 2003. There are other documents which were false and which appear to have been created for the same reason as the letters of 6 and 15 August 2003 were created. I will not separately discuss those other documents as the same reasoning and the same conclusions apply in relation to them.

96. This attempt to mislead or to manufacture evidence plainly involves serious wrongdoing. I have found that Mrs Gifford was knowingly involved in that wrongdoing. I am not able to make specific findings as to who else was involved in this element of wrongdoing. I have referred earlier to Mr Donnison's preparation of notes which were misleading but I have not made a finding as to whether he was aware of other documents being falsely created and wrongly dated in his offices. I do find,

however, that it is unlikely that knowledge as to the preparation of misleading documents was restricted to Mrs Gifford and Mr Donnison.

97. The liquidators drew attention to these documents which had been falsely created to advance their case that IAP was being operated dishonestly in a number of respects including this respect. However, Mr Phillips QC accepted that a finding that IAP had created these false documents did not give him any cause of action based on the creation of those documents. Conversely, the Defendants did not attempt to persuade me that these documents were genuine or even that they were useful evidence as to what was happening at any time. Accordingly, having considered those documents and their implications, I will continue to assess my findings of fact as to the relationship between IAP, Maesbury and Leadenhall without regard to what appears in those manufactured documents.

98. In August 2003, Mr Berman drafted a consultancy agreement in relation to Mr Storey. The agreement was drafted to be entered into by ITS although the benefit of the agreement could be assigned to certain connected persons.

99. On 15 August 2003, Mr Storey emailed Mr Moore and Ms Forth with information about the terms he had negotiated with Mr Oxley of Maesbury. These terms were later the subject of the agreement dated 24 October 2003 between IAP and Maesbury. However, as at 15 August 2003, Mr Storey described the proposed arrangements as being between ITS and Maesbury.

100. On 18 August 2003, a draft consultancy agreement was sent to Mr Storey by the finance director of ITS. On 21 August 2003, Mr Storey emailed Mr Rosser and the finance director of ITS about the draft agreement and Mr Rosser replied on the same day.

101. On 26 August 2003, Mr Storey received a proposal from Park Square Homes, a developer in the United States, about the possibility of "Inside Track" acting for it in connection with marketing its properties. Around the same time, there were email exchanges between Mr Storey and Pulte Homes which referred to the possibility of "Inside Track" acting for Pulte Homes.

102. On 20 August 2003, a firm of solicitors, Thomas Eggar, sent to Mr Rosser a draft agreement between a Developer and an Agent. It seems that those solicitors had given advice to Ms Forth in connection with the Agent named in the draft agreement. It seems that the draft agreement was sent to Mr Rosser to be used as a possible model for an agreement to be entered into with a developer or developers in the United States. Mr Rosser emailed the draft to Mr Berman and his email referred to a marketing agency agreement for IAP.

103. On 18 September 2003, Mr Donnison had a meeting with Mr Moore. Mr Donnison prepared a list of action points following this meeting and he also gave detailed evidence about the meeting. I will begin by referring to the list of action points and proceed then to Mr Donnison's oral evidence about this meeting.

104. Mr Donnison's list of action points started with the heading "COMPANY" and then had as the first point:

> "Set up International Marketing Company to provide marketing and property sourcing. Base in Geneva. Use Homestar. Owned 100% Jim's foundation to start. Bill group companies under Service Contract to be set up. Will buy Prism contract in due course."

105. The list of action points continued with references to setting up new companies in Spain and in North and South Cyprus. The company in Spain was to take over from Regency Estates SL. IAP had prior to this time used Regency Estates SL as a company to source properties in Spain for IAP.

106. The list of action points went on to deal with the various shareholdings in the various companies. It is apparent from this list that the shares in IAP and ITS had not yet been allotted to the discretionary trusts connected with Mr Rosser and Ms Forth.

107. A further action point in the list referred to the position of Mr Rosser and the intention to set up a BVI company to invoice "non UK companies" for part of his remuneration package. In due course, Sunpuddles Ltd was set up in the BVI and it entered into a consultancy agreement with Leadenhall under which Leadenhall was to make payments to Sunpuddles Ltd as a fee for services purportedly rendered. The payments to Sunpuddles Ltd were ultimately for the benefit of Mr Rosser. Leadenhall made the payments to Sunpuddles Ltd out of the commission it received from IAP and later the commission it directly received from Maesbury.

108. As background to the meeting with Mr Moore on 18 September 2003, I was told that Mr Moore moved to Spain in 2003 and was registered for tax there with effect from 1 September 2003. Mr Donnison gave evidence that Mr Moore told him at the meeting on 18 September 2003 that Mr Moore wished to set up an offshore property sourcing and marketing company to invoice what he called the Inside Track Group for some of the property sourcing that was carried on by Mr Moore overseas. Mr Moore told Mr Donnison that this new company would be wholly owned by Mr Moore. Mr Donnison told me that at this point he understood that the opportunities to source properties abroad "belonged" to Mr Moore and not to IAP. Mr Moore's desire to have a property sourcing company set up overseas was tax driven. He also envisaged that if and when ITS and/or IAP were sold this overseas company would be retained by him.

109. The reference to Homestar in the list of action points was a reference to a company which Mr Donnison had acquired for Mr Moore earlier in 2003. Mr Donnison told me that both he and Mr Moore assumed that Homestar would be the overseas sourcing company. When cross-examined, Mr Donnison was asked about Mr Moore's intentions as to the contractual arrangements between Maesbury, IAP and Homestar. I did not find his evidence on that subject to be clear and it may be that Mr Moore had not at that point thought through what the contractual arrangements ought to be. However, Mr Donnison did give clear evidence, which I accept, that the intention was that Homestar would invoice IAP for the service which Homestar would provide to IAP. This service was to be the sourcing of international property which Homestar would introduce to IAP for IAP to introduce to its members.

110. Also on 18 September 2003, Mr Rosser emailed Mr and Mrs Oxley of Maesbury. The email referred to an earlier meeting between Mr Rosser, Mr Moore and Mr and Mrs

Oxley. Mr Rosser appeared to be writing on behalf of "Inside Track" and he described himself as "Vice Chairman". His email proposed certain terms, including commission at 20%, in return for Inside Track acting for Maesbury in marketing a Maesbury development.

111. Later on 18 September 2003, Mr Storey emailed Mr Moore and Mr Rosser to report on a conversation which Mr Storey had with Mr Oxley. Mr Storey reported on the possibility that Mr Oxley would wish to instruct Inside Track on the marketing of developments at Bahama Bay and Bahama Bay 2 and a future project at Lake Austin.

112. On 22 September 2003, Mr Donnison emailed to Mr Moore, with a copy to Mr Rosser, the list of action points following Mr Donnison's meeting with Mr Moore on 18 September 2003. In this way, Mr Rosser would have been able to see that Mr Moore's intention was to set up (or use) an international sourcing company and, in particular, to use Homestar for that purpose. On 24 September 2003, Mr Moore's P.A. forwarded this email to Mrs Gifford. Mrs Gifford was then contacted by Mr Moore and he asked her to raise with Mr Donnison some questions arising out of the list of action points. She did so by an email to Mr Donnison of 24 September 2003. She did not raise a question as to the proposal to set up an international sourcing company and to use Homestar for that purpose. However, in a later question which she did raise, she referred to the proposal that Mr Rosser should set up a BVI company to take payment for his benefit and she asked about the position of other directors. Mr Donnison replied stating that the position was not clear and in particular it was not clear whether they could use the BVI company which would be the international sourcing company.

113. By 1 October 2003, Mr Berman had drafted an agreement to be entered into with a US developer. On 1 October 2003, he emailed a copy of the draft to a US attorney for advice on certain points. In his email he stated that his client was ITS but the agreement might be entered into by an associated company which acted as a property agent. This email was copied to Mr Rosser and Ms Forth. Mr Rosser approved the form of the draft and it seems that Ms Forth approved it with some suggested amendments.

114. On 2 October 2003, there was a meeting between Mrs Gifford, Mr Rosser, Ms Forth and Mr Donnison. Mr Donnison's note of the meeting referred to Mr Rosser having been involved with effect from 1 June 2003. It appears that at this meeting the share split in relation to ITS and IAP was decided. It was proposed that the agreement as to shares would be recorded by a board minute back-dated to May 2003. As indicated earlier, a board minute was later drawn up and dated 31 May 2003. It was also agreed that the directors of ITS and IAP would be Mrs Gifford and Lumley. The note stated that Lumley would act as a nominee for Mr Moore. Mr Moore had been the director of those two companies since March 2003 and it was intended that he would resign as a director and that is what happened in due course. Mr Donnison also recorded:

> "THIRD PARTY DEVELOPMENT COMPANIES
>
> Brad explained that they were looking to get into development of properties in various countries where they will work with local developer and have a contract to buy the finished product into the group. The structure for this is still to be owned by all

> the shareholders in proportion subject to a percentage being held by the local developers. This group is to be separate from the main group and would not be included in any capitalisation. Accordingly, it may require its own UK holding company.
>
> Initially, a deal is being done in Spain with a guy called Jens for a development there. Further deals may be done in North and Southern Cyprus. Local companies will be used, owned by the UK holding structure underneath the various trusts and foundations."

115. The reference to third party development companies was not to the international sourcing company which had been discussed earlier but was to other companies to be set up in which Mr Moore and Mr Rosser in particular would have interests.

116. On 2 October 2003, Mr Donnison prepared a file note in relation to the setting up of a new Panama foundation for Mr and Mrs Moore. The note contained a reference to "an international marketing company". The note recorded that a BVI company based in Switzerland had been set up and that this company would provide services to the group in sourcing and negotiating contracts on properties and in providing international marketing support.

117. On 3 October 2003, Mr Berman sent to Mr Storey a draft of an agreement providing for ITS to retain the services of Mr Storey. The draft stated that the agreement was deemed to have commenced on 1 July 2003. Under the agreement, Mr Storey was to identify properties anywhere in the world, except the UK, for "the Company" to offer for sale to its members. Properties were to be identified in accordance with certain stated criteria one of which was that "the Company" would be appointed as exclusive marketing agent in respect of such properties. On the wording of the draft agreement, "the Company" was ITS although the company which had members for this purpose was IAP, rather than ITS. The draft listed other services to be provided by Mr Storey. The draft provided that the benefit of the agreement could be assigned by ITS to certain other entities. The draft provided for Mr Storey to be paid by ITS for his services.

118. Mr Phillips QC, acting for the Claimants, appeared to accept that the contract for Mr Storey's services was made by ITS and not by IAP. He also accepted that the benefit of the contract was not later assigned by ITS to IAP. He did however submit that IAP had the benefit of the contract in the sense that the services which Mr Storey was under the contract with ITS obliged to provide were services which would benefit IAP as it could pass on to its members information about the properties sourced by Mr Storey. Mr Phillips submitted that IAP had paid Mr Storey and that Mr Storey had invoiced IAP for payment. However, the material produced on behalf of Mr Donnison and JDLLP showed that this was not the case. In 2003, ITS and not IAP paid Mr Storey and in 2004, Mr Storey was paid by Leadenhall.

119. Also on 3 October 2003, Mr Berman sent to Mr Oxley of Maesbury a draft of an agreement to be entered into by IAP and Maesbury.

120. On 9 October 2003, Mr Donnison emailed Mrs Gifford in connection with the proposed shareholdings in ITS and IAP and the appointment of new directors of those

companies. He asked her to prepare a board minute to be dated May 2003 in relation to the shareholdings and she in due course did so.

121. On 14 October 2003, Mr Donnison prepared a file note in respect of the setting up of Sunpuddles Ltd, a BVI company. The note records that the shares in this company would be held by the Mhoran Trust, the Isle of Man discretionary trust where Mr Rosser was a potential beneficiary. Although the note records that Sunpuddles Ltd would provide services to the group of companies known as "Inside Track", Sunpuddles Ltd would invoice Homestar and another sourcing company, Regency Estates SL, which sourced properties in Spain. Homestar was described as an international and property search vehicle for the group. Mr Donnison gave evidence that at this stage he believed that Homestar, owned by Mr Moore alone, would be the international sourcing company for ITS/IAP.

122. In mid-October 2003, as a result of information provided to Mr Berman by Mr Storey, Mr Berman drafted an agreement to be entered into by IAP and Maesbury as an agreement supplemental to their main agency agreement.

123. On 21 October 2003, Mr Berman sent to Mrs Gifford an email which was copied to Mr Rosser. The email enclosed the draft agreement to be entered into by IAP and Maesbury. Mrs Gifford was asked to sign this agreement on behalf of IAP. At this date, it had been decided that Mrs Gifford would become a director of IAP although that only formally occurred on 23 October 2003. In his email, Mr Berman explained to Mrs Gifford how the agreement with Maesbury was intended to operate and how the schedule to the agreement would be subsequently completed. Mr Berman also asked Mrs Gifford to sign a second agreement contained in a draft letter. He pointed out that the letter ought to come from IAP rather than ITS.

124. Also on 21 October 2003, Mr Berman sent to Park Square Homes and to Pulte Homes drafts of agreements to be entered into by IAP with those companies. The draft agreements were in similar terms to the draft of the agreement between IAP and Maesbury, although the rates of commission were different. I was not shown any executed contracts with Park Square Homes or Pulte Homes. I was told that IAP did enter into an agreement with Park Square Homes but not with Pulte Homes. However, there was no real investigation at the trial as to the position in relation to Park Square Homes, nor as to the commission which was paid by Park Square Homes nor as to what sums were received by Leadenhall out of any commission paid by Park Square Homes to IAP.

125. The trial bundle contains a minute of a board meeting of IAP which recorded the resignation of Mr Moore as a director of IAP and the appointment of Mrs Gifford and Lumley, all these steps being said to take effect on 23 October 2003. In fact, Lumley asked for certain indemnities to be provided before taking up the appointment and it became a director from 31 October 2003.

126. Mrs Gifford, as a director of IAP, executed the agreement between IAP and Maesbury and dated it 24 October 2003. Mr Oxley executed it on behalf of Maesbury.

127. Mr Donnison had a number of meetings relevant to this case in the week beginning 27 October 2003. The meetings involved Mr Donnison meeting Mr Moore and Mr Rosser. He did not meet Ms Forth nor Mrs Gifford. He prepared a note of these

meetings around that time and he sent a copy of his note to Mr Moore, Mr Rosser, Ms Forth and Mrs Gifford. The note dealt with a large number of points including points arising about property in Spain and in Cyprus. Mr Donnison's note referred to the signing of a minute for a meeting of the board of IAP which had allegedly taken place on 31 May 2003 and this was duly done. The note discussed the position of Homestar and the result of the discussion was that Homestar would remain wholly owned by Mr Moore and there were references to Homestar invoicing Regency Estates SL as the property sourcing company in Spain.

128. Mr Donnison's note then recorded:

> "A new BVI marketing company is going to be set up to (*sic*) based at JD offices in Geneva. This company will enter into a contract with Instant Access Properties Limited for fees in relation to the marketing and introduction of overseas developments to the UK customer base. The company will shortly issue its first invoice for this activity."

129. The note later referred to Sunpuddles Ltd invoicing the new BVI marketing company. Thus, the position which was established at this stage was in some respects the same as that indicated by Mr Moore to Mr Donnison on 18 September 2003 but in other respects differed from the earlier position. On both occasions, it was envisaged that the work of sourcing international property, particularly in the US, would be carried out by an off-shore company which would be regarded as providing services to IAP for which IAP would pay that company. The original intention was that the off-shore company would be Homestar, wholly owned by interests connected to Mr Moore, whereas in late October 2003 the intention was to set up a new BVI company to provide the services of sourcing international property. Mr Donnison's note of the meetings in late October 2003 does not expressly state who were to be the shareholders in the new BVI company.

130. On 31 October 2003, Mr Donnison sent an email to Mr Rosser. The email referred to a meeting between Mr Donnison, Mr Rosser and Mr Moore the following day. The note referred to a new BVI marketing company which was to attract non-UK developers to the UK companies and to bill the UK companies for this service.

131. After his various meetings with Mr Moore and Mr Rosser, and probably before 6 November 2003, Mr Donnison wrote the words "LEADENHALL GROUP LIMITED" alongside the first reference to the BVI company. He also added a manuscript note to the effect that the new company would pay "the agents" who had earlier been paid by IAP. There was some inconclusive debate in the course of the evidence whether this referred to a person such as Mr Storey or to formation agents who had been involved in creating the new BVI company.

132. Mr Donnison arranged for the purchase of a new BVI company and by 6 November 2003, he had acquired Leadenhall with the intention that it would be used as the international sourcing company.

133. Around this time, Mr Moore, Mr Rosser and Ms Forth entered into a Nominee Agreement and a Management Agreement. These documents were dated 1 November 2003 which was a Saturday and it may be that the documents were actually signed on a

different date but nothing now turns on that. The Nominee Agreement was made by the three individuals with JDS Secretaries Ltd. This agreement recorded that JDS Secretaries Ltd held 200 shares in Leadenhall and held those shares as nominee for the three individuals. (I have described, earlier in this judgment, how the shares were ultimately held by three Panama Foundations.)

134. The Management Agreement in relation to Leadenhall was made by the same three individuals as the Beneficiaries and by JDS and Candolle as the Director. The three individuals stated that they were the beneficial owners of the shares in Leadenhall. It was agreed that JDS would provide Leadenhall with a registered office. JDS agreed that it and the Director would follow all lawful instructions of the three individuals and, in particular, would arrange for the business activities of Leadenhall. If this Management Agreement were taken at face value it would mean that the three individuals controlled Leadenhall and the position of the Panama foundations as shareholders was side-lined.

135. On 6 November 2003, Mr Donnison had a meeting with Mr Rosser alone and that was followed by an important meeting between the two of them and Mrs Gifford. Mr Berman joined this meeting after it had begun. Mr Berman made notes of the meeting as it proceeded after he arrived and those notes are available to be consulted. The trial bundle also contained a note prepared by Mr Donnison. This note was prepared in late April 2005. It is clear that when Mr Donnison prepared his note, he did not do so for the purpose of giving a comprehensive account of the meeting, as his note is short. Further, it is clear that Mr Donnison's note was not intended to be precise and accurate as to what had been discussed at the meeting. His note does not even record the presence of Mr Rosser at the meeting. Instead, Mr Donnison's note was prepared to support a case which it suited IAP to present later as to how it came about that IAP entered into a contract with Leadenhall as it later did on 26 November 2003. I can make similar comments about a note prepared later by Mrs Gifford and dated 6 November 2003 or 16 November 2003 and which purported to be a note of this meeting. I do not regard the notes prepared by Mr Donnison and Mrs Gifford as of any real help as to what was discussed at the meeting. Conversely, Mr Berman's note is of real assistance. If it had not been for this note, I would have had real difficulty in determining what had transpired at this meeting not least because, in the absence of this note, the memories of the witnesses may well have been unreliable.

136. This meeting was the first occasion when Mr Donnison met Mr Berman. Mrs Gifford attended the meeting in her capacity as a director of IAP. Mr Donnison attended the meeting as the representative of Lumley in its capacity as a director of IAP. The position of Mr Rosser at the meeting is contentious.

137. Mr Berman's note of the meeting obviously started from the time of his arrival into a meeting which had already begun. The note begins by referring to matters which are not now of central importance in that they dealt with the corporate structures and the financial arrangements for activities in Cyprus and Spain. The note then refers to Leadenhall. There was some disagreement as to how to read Mr Berman's note and what finding to make as to what was said and what was agreed in relation to Leadenhall. In particular, Mr Berman without having any independent recollection of what was said, interpreted his note as recording instructions given to him that Leadenhall had had an oral agreement for the preceding six months to source

international properties. I do not read the note in that way. I find that what Mr Berman was told and what he recorded was that in the preceding six months ITS/IAP had had oral agreements with individuals like Mr Storey and Gus (a similar agent operating in Australia) to source international properties for ITS/IAP. The note then referred to there being offshore marketing agreements with Gus, Mr Storey and Maesbury. As to Mr Berman's interpretation of the note, it was plainly not the case that Leadenhall had had such arrangements for the preceding six months as Leadenhall had only become involved or potentially involved a matter of days earlier. There was no reason for anyone to have misdescribed the situation in that respect to Mr Berman.

138. Mr Berman's note then referred to the arrangements to be made between IAP and Leadenhall. His note included the following statements. He recorded that the rationale of the arrangements was to get a tax deduction for the benefit of IAP. He referred to there being an effective date of 1 July 2003; that was probably by reference to the date from which Mr Storey had been retained by ITS. The next part of the note is probably to be interpreted as saying that Leadenhall would repay to IAP sums paid by IAP, in particular the sum of £8,000 paid to Mr Storey. The note then recorded that "Jim is in Leadenhall". "Jim" was Mr Moore. The note then recorded that Leadenhall was to take over from that day all foreign work for IAP. The note specified the foreign work as being or including work of co-ordination, enforcement and arranging payments in return for which Leadenhall would be paid a retainer.

139. The note then turned to what is now an important topic, namely, what sum would be paid by IAP to Leadenhall. The position finally adopted as recorded in the note was that Leadenhall would receive 50% of the fee paid to IAP. This meant in the case of IAP's agreement with Maesbury, that IAP would receive a commission of 20% from Maesbury and IAP would then give 50% of that to Leadenhall. The note shows that the figures of 30% and 40% were written down and then crossed out before the parties arrived at 50%. The note records that there were to be certain deductions from the payment to Leadenhall to reflect certain costs borne by IAP and a separate monthly payment made to Leadenhall.

140. Mr Berman's note recorded that the appointment of Leadenhall by IAP was to be non-exclusive although when Mr Berman drafted an agreement for these parties to enter into he altered that point and he made a note to that effect on his note of the meeting of 6 November 2003.

141. I heard evidence about this meeting from Mr Rosser, Mrs Gifford, Mr Donnison and Mr Berman.

142. In his first witness statement, Mr Rosser stated that he was not involved in the negotiations between IAP and Leadenhall which led to the agreement that IAP would pay half of its 20% commission to Leadenhall. He was then shown Mr Berman's notes of the meeting of 6 November 2003 which indicated that Mr Rosser had been present at that meeting. Mr Rosser then prepared a second witness statement. In that statement, he said that he could not recall the meeting of 6 November 2003, 14 years earlier. However, he did recall or professed to recall that Mr Moore had wanted a split of commission under which Leadenhall took 90% of the commission from IAP. He also said that any stance taken by him at the meeting on 6 November 2003 would have been on behalf of Leadenhall.

143. Mr Rosser was cross-examined about the meeting of 6 November 2003 but he repeatedly stated that he did not now recall what was said at the meeting.

144. In her witness statement, Mrs Gifford did not specifically deal with the meeting of 6 November 2003 although she referred to her note which bore the date 16 November 2003. When cross-examined by Mr Smith QC, acting for Mishcon de Reya and Mr Berman, she said that there had been "a strong discussion" about the split of commission between IAP and Leadenhall. She said that she was there "to fight my corner" by which she meant she was representing the interests of IAP. She also said that she put her case based on what IAP was receiving in relation to Spanish property and after "much discussion" those present arrived at a 50/50 split. When cross-examined by Mr Phillips QC, she suggested that Mr Moore may have spoken to her before the meeting and said that Leadenhall wanted to have 90% of the commission payable to IAP. She said that she looked at the figures appropriate in the case of the sourcing of Spanish property and some calculations were done and they came to a split of 50/50.

145. In his first witness statement, Mr Donnison stated that he could not remember precisely what was discussed at the meeting on 6 November 2003 and he then set out the best of his recollection as to that meeting. He believed that he knew of the existence of the IAP/Maesbury agreement by 6 November 2003. He stated that his understanding had been that Mr Moore was at all times intending to source overseas property through an offshore company. He said that the terms of the proposed agreement between IAP and Leadenhall were discussed in detail with Mr Berman at this meeting. Mr Berman did not suggest there was any issue as to the legality of such an agreement. Mr Donnison did not mention the issue of transfer pricing at the meeting but he was well aware that HMRC would be "all over" the transaction and that it would be necessary to justify the commercial arrangements which were made.

146. Mr Donnison's witness statement contained this passage:

> "I relied on IAP to satisfy itself that the agreement was a good deal for IAP, by which I mean whether a 50:50 split was a fair contribution and by extension whether HMRC would have considered it to be equivalent to arm's-length terms. I was not in a position to assess the commerciality of the terms to be agreed between IAP and Leadenhall. I had only just become involved and was still unfamiliar with the day to day running of the business. I did not know how to approach the question of international property sourcing or how such services should (or even could) be priced. Therefore, I relied on Maria (and she in turn would have relied on Jim, and Brad) to assess whether the terms being agreed by Leadenhall and IAP were commercial. I understood that Jim and his team were going to take some remuneration through Leadenhall, rather than through IAP. I could not have assessed whether a 50:50 profit share reflected the level of input that it was intended that Leadenhall would have relative to IAP, but it was to be inferred that this was the minimum that Leadenhall was prepared to accept, and I relied on Brad and Maria to tell me if the split was fair or not. I don't

> remember whether any other percentage splits were discussed although Jonathan's note (which I deal with below) suggests that they were."

147. Mr Donnison prepared a second witness statement to respond to Mr Rosser's second witness statement and Mr Donnison stated that he did not recall a discussion on 6 November 2003 about a split of commission 90/10 in favour of Leadenhall. Mr Donnison was cross-examined by three leading counsel about this meeting. In his first cross-examination, he stated that he did not remember very much about the meeting. He said that he thought a 50/50 split was acceptable as a starting point for an arms-length relationship and that if he had thought that it was not acceptable, he would not have allowed it to be agreed at that meeting. In the second cross-examination, Mr Donnison was prepared to accept that he had participated in a discussion on the split of the commission.

148. In the third cross-examination of Mr Donnison, he gave evidence as to what he knew on 6 November 2003 as to the previous activities of IAP and what he knew about those whom he described as the people behind Leadenhall, in which group he included Mr Moore, Mr Rosser, Ms Forth and Mr Storey. Mr Donnison said that he knew of the agreement between IAP and Maesbury but he understood that no properties had been sold as contemplated by that agreement so that the making of new arrangements between IAP and Leadenhall would not have involved a transfer of a business which already existed in the UK. Mr Donnison said that he would have been very uncomfortable if the commission had been split 90/10 because he did not think that would be a realistic split. Mr Donnison said that the negotiation as to the percentage split was between Mrs Gifford and to some extent himself on behalf of IAP and Mr Rosser and the known views of Mr Moore on behalf of Leadenhall.

149. In his witness statement, Mr Berman said that he remembered the discussion at the meeting on 6 November 2003 about the level of fees payable to Leadenhall. He said that Mr Rosser and Mr Donnison had had "a vigorous discussion" about the level of the fee. Mr Berman did not give any detail of how the discussion went. He stated that Mr Donnison was confident that a 50/50 split was appropriate. Mr Berman remembered that it was thought to be appropriate that the fee was justifiable as an arm's-length price. When cross-examined, Mr Berman said that there had been "a proper discussion" and the figures as to the split of commission went backwards and forwards. When asked about the figures of 30, 40 and 50 referred to in his note, he was not able to recollect who had proposed which figures to whom.

150. It was put to Mr Berman that the discussions at the meeting on 6 November 2003 should have alerted him to certain persons having a conflict of interest in relation to IAP and Leadenhall. Mr Berman's evidence, which I accept, was that the suggestion of a conflict of interest did not occur to him and he did not raise any problem of that kind at the meeting. At that time, he did not have any doubts about the legality of what was proposed and which he later went on to provide in an agreement which he drafted.

151. My findings about the meeting on 6 November 2003 are as follows:

(1) there was a clear intention that IAP would enter into an agreement with Leadenhall;

(2) there was a clear intention that IAP would pay part of its 20% commission to Leadenhall;

(3) the benefit to IAP of paying part of its commission to Leadenhall was that IAP's taxable profit from the various transactions would be reduced;

(4) the benefit to the shareholders in Leadenhall would be that the commission received by Leadenhall would not be taxed in the UK;

(5) as regards Mr Moore, Mr Rosser and Ms Forth, they preferred to derive their benefits from the transaction from the untaxed profits of Leadenhall rather than from the taxed profits of IAP;

(6) before the meeting, Mr Moore had expressed the view that Leadenhall should receive 90% of IAP's commission; this fact was known to those present at the meeting;

(7) at the meeting, it was agreed that Leadenhall should receive 50% of IAP's commission;

(8) it is not possible to know whether anyone at the meeting pressed for Leadenhall to receive 90% of IAP's commission; it is likely that Mr Rosser argued for Leadenhall to receive more than 50% of IAP's commission; Mr Rosser's wish was to get as high a percentage as reasonably possible for Leadenhall;

(9) it is possible that Mrs Gifford contributed to the meeting by saying that a net receipt of 10% commission by IAP would be a good outcome for IAP and it is possible that she referred to the arrangements which applied in Spain as support for this view; Mrs Gifford's wish was for IAP to receive a worthwhile level of commission and 10% was worthwhile for IAP;

(10) the split of commission was discussed in some detail as the figures, 30, 40 and 50 in the note indicate;

(11) Mr Berman did not express any view about the split of commission;

(12) it is likely that Mr Donnison expressed the view that the split of commission should appear to be at arm's-length so that it could be justified to HMRC if the need arose;

(13) although Mr Donnison could not himself evaluate the services to be provided by Leadenhall to IAP, he favoured a 50/50 split as something that could potentially be justified as an arm's-length split;

(14) those present at the meeting took Mr Donnison's advice that a 50/50 split could be presented as an arm's-length agreement but a split which was more generous to Leadenhall might be more difficult to justify.

152. Following the meeting of 6 November 2003, Mr Berman drafted an agreement to be entered into by IAP and Leadenhall. On 10 November 2003, he sent his draft agreement to Mrs Gifford, Mr Rosser and Mr Donnison. In his covering email, he provided a short summary of the terms of the draft agreement. The draft provided for the agreement to take effect on 1 October 2003. Mr Berman explained that the

intention was for the agreement to apply from the beginning of the operation of the existing arrangements which IAP had made and he had in mind the agreement between IAP and Maesbury amongst others. Mr Berman had taken the initiative when drafting to modify some of the proposals made at the meeting of 6 November 2003. He did so on the basis that he was drafting for both parties to the proposed agreement and he adopted wording which he considered more appropriate or fairer. One example of this is where he provided for the appointment of Leadenhall to be an exclusive one rather than a non-exclusive one as had been proposed at the meeting.

153. On 17 November 2003, there was a meeting called a "Management Meeting" of ITS and/or IAP. This meeting was attended by Mr and Mrs Moore, Mr Rosser and Mrs Gifford and nine employees of ITS and/or IAP. Mr Moore appears to have chaired the meeting and appears to have given a number of directions to those present. Mrs Gifford gave "an overview of the company". Mrs Moore presented the position in relation to a number of topics. Mr Rosser also gave a number of directions to those present.

154. On 18 November 2003, Mr Donnison emailed Mrs Gifford in relation to a contract to be entered into by ITS and Prism and stated that there were "transfer pricing issues" as the two parties to the contract were related. This shows that at this point at any rate Mr Donnison was aware of the need to demonstrate that the commercial terms as to price in a contract between related parties were at arm's-length.

155. On 19 November 2003, Mr Berman's secretary at Mishcon de Reya, a Ms Elliott, sent to him a draft of an email to be sent to Mrs Gifford. The email referred to the draft of the agreement between IAP and Leadenhall and added the comment: "(Section 320 Shareholders resolution of Instant Access required)". The reference to section 320 was to section 320 of the Companies Act 1985 which prohibited substantial property transactions involving directors unless the arrangement was first approved by a resolution of the company in general meeting. The suggested need for a resolution of shareholders was not pursued and Mr Berman suggested in his evidence that there was no need for such a resolution but he could not recall his thinking at the time.

156. On 21 November 2003, Mrs Gifford emailed Mr Moore and Mr Rosser and said that the contract with Leadenhall had been signed (presumably by her on behalf of IAP). She added "paper trail will start asap (waiting to do some letterheads)". I have already referred to the suggestion that the "paper trail" here referred to was to the documents which Mrs Gifford subsequently created and back-dated to suggest the involvement of Leadenhall some months before November 2003. Mr Moore replied to this email but he dealt with a different subject namely his views about the size of the wage bill of ITS and/or IAP.

157. The agreement between IAP and Leadenhall was executed on behalf of Candolle as a director of Leadenhall and was dated 26 November 2003.

158. On 15 December 2003, there was a management meeting of ITS and/or IAP. The meeting was attended by Mr Rosser, Mrs Moore and Mrs Gifford. The minutes of the meeting record interventions by Mr Rosser on a number of points. Mr Rosser also made a presentation on a number of topics. Mrs Gifford also dealt with a number of specific topics.

159. On 5 January 2004, the Pearson Foundation, the Montpelier Foundation and the Derwent Foundation became the registered shareholders in Leadenhall. The percentages in which they held their shares were 72.5%, 20% and 7.5% respectively.

160. On 9 January 2004, Mr Gandy (of JDLLP) wrote to Mr Rosser at "Inside Track" with his letter being copied to Mrs Gifford. The letter contained five pages and was a very detailed account of the tax rules in relation to transfer pricing. The basic point being made in the letter was that prices agreed between connected companies might in certain circumstances be subject to scrutiny by HMRC to ensure that the prices were arm's-length prices and, if they were not, the companies in question would be taxed on the basis that an arm's-length price had been paid. Mr Gandy stated that in the absence of evidence as to the prices charged by the relevant company to an unconnected party, it would be necessary to do work to support and justify the prices charged between the connected companies. Mr Gandy did not refer to any particular companies or to any particular transactions. The evidence did not make clear what was the catalyst which had led to his letter being sent. It is therefore not clear that Mr Gandy had in mind the arrangements between IAP and Leadenhall when he wrote the letter although it is possible that he did. Mr Gandy had suggested in his letter that the matter might be discussed at a meeting but it does not appear that any such meeting took place. Mr Rosser does not appear to have done anything in response to the letter nor even given the matter much thought at that time. There is no evidence that Mrs Gifford gave any thought to the letter or did anything in response to it.

161. By late February 2004 or early March 2004, IAP/Leadenhall were considering a re-arrangement of the agreements which had been made in October and November 2003 between Maesbury, IAP and Leadenhall. This appears from statements made in draft instructions to counsel which were dated 11 March 2004. The proposal was that the earlier agreements should be replaced by an agreement between Maesbury and Leadenhall and then an agreement between Leadenhall and IAP. Under the new arrangements, Leadenhall would be paid 20% commission by Maesbury and Leadenhall would share that commission 50/50 with IAP. The instructions to counsel did not seek advice on the appropriateness of making these new arrangements but on the different question of the possible obligation on IAP to disclose to its members, who might agree to buy a property from Maesbury (or another developer), the fact that Maesbury (or another developer) was paying commission in connection with that sale. Mr Chitham of Mishcon de Reya appears to have taken advice from junior counsel on some aspect of the matter but I was not given evidence as to the advice received. Mr Berman and Mr Chitham then wished to have further advice from Mr Ian Hunter QC and he was duly instructed and gave advice in consultation on 15 March 2004 and later in a written Advice dated 18 March 2004.

162. I was not given any real evidence as to who suggested that there be a re-arrangement of the agreements nor as to why it was thought to be desirable in March 2004. The initiative does not seem to have come from Mr Moore, or Mr Rosser or Mrs Gifford. It might have come from Mr Donnison. The reason might have been that the new agreements were a better reflection of how the previous arrangements were being operated in practice. It is conceivable that it was thought that the new agreements would help IAP to argue that it did not have to disclose that the developer was paying commission on the sales to IAP's members. It is even possible that it was thought to be helpful in connection with transfer pricing considerations that IAP was not paying a

sum to Leadenhall but was receiving a sum from Leadenhall. It was submitted at the trial that the new arrangements were more favourable in various respects to IAP than the previous arrangements but there was no sign of that possibility being considered by IAP at that time.

163. On 26 March 2004, Maesbury, IAP and Leadenhall entered into the agreements which resulted in a re-arrangement of the relationship between them. I have referred to the terms of these agreements earlier in this judgment. Under the new agreements, the marketing contract with Maesbury was made by Leadenhall and not IAP. Leadenhall was to receive commission of 20% from Maesbury. Leadenhall then contracted with IAP on terms that IAP would receive 50% of the commission received by Leadenhall. The effective date for the operation of the agreement between Leadenhall and IAP was 1 October 2003 and that had been the effective date for the operation of the earlier agreement (dated 26 November 2003) between those parties.

164. The Termination Agreement dated 26 March 2004 between IAP, Leadenhall and Maesbury recited that prior to Maesbury and IAP entering into their earlier agreement of 24 October 2003, IAP had appointed Leadenhall as its sub-agent and in view of that fact the parties now wished to have an agreement under which Maesbury appointed Leadenhall as its agent. Those recitals were not correct. Mr Berman was not able to explain how it was that the recitals were incorrect. I consider that it is at least possible that the draftsman of the Termination Agreement took the opportunity to re-write history in an attempt to emphasise that the relationship with Maesbury had been with Leadenhall rather than with IAP. These recitals tend to support the idea that the agreements were re-arranged in March 2004 to assist IAP in some way with any arguments it might have with HMRC on the arm's-length nature of the split of commission with Leadenhall.

165. On or about 9 August 2004, Mr Moore, Mr Rosser, Mr Oxley and Mr du Preez or, more accurately, companies controlled by them or with which they were connected, entered into a partnership agreement for Lake Austin, a Florida limited partnership. Mr Moore through his interests in a company and a foundation had a 34% share in this partnership. Mr Rosser through a company and a foundation had a 15.5% share in the partnership. Mr Oxley had a 42.5% share and Mr du Preez had a 7% share. The remaining 1% share was held by the general partner, GFD Inc, the shares in which were owned equally by companies controlled by Mr Oxley and Mr Rosser respectively. The partnership agreement provided that the general partner had the sole and exclusive authority to manage the affairs of the partnership.

166. In the summer of 2004, Mr and Mrs Moore were in the process of being divorced. Although I do not know all of the details, it appears that Mrs Moore had an interest in Leadenhall through the Pearson Foundation. Mr Moore wished to arrange matters so that any further properties which might be available to be introduced by Maesbury or the Lake Austin partnership would be introduced to a new company in place of Leadenhall and so that Mrs Moore would not have an interest in the new company. Accordingly, Darrencrest was formed in the BVI at that time and, as I understand it, Mr Moore did, but Mrs Moore did not, have an interest in the Delenas Foundation which acquired 62% of the shares in Darrencrest. Thus if Maesbury and the Lake Austin partnership were thereafter to contract with Darrencrest in place of Leadenhall, Mrs Moore would not share in the benefits flowing from those contracts.

167. As explained earlier, the other shares in Darrencrest were owned by the Montpelier Foundation, the Derwent Foundation and Riko Real Estate. They owned, respectively, 27%, 7.5% and 2.5% of the shares in Darrencrest. Mr Rosser was a potential beneficiary in relation to the Montpelier Foundation and Ms Forth was a potential beneficiary in relation to the Derwent Foundation. Mr Donnison (through JDS) had a 60% interest in Riko Real Estate and, but only from a later date (in 2005), Mrs Gifford (through Falcor BC Ltd) had a 40% interest in Riko Real Estate.

168. On or about 7 October 2004, Darrencrest entered into an agreement with Maesbury in essentially the same terms as the agreement between Leadenhall and Maesbury. On 7 October 2004, Mr Donnison wrote to Mr Sierro of JDS (on behalf of Darrencrest) stating that the agreement would cover the ongoing marketing of the development at Lake Austin (also called Grand Palisades).

169. On 7 October 2004, Darrencrest entered into an agreement with IAP in essentially the same terms as the agreement of 26 March 2004 between Leadenhall and IAP.

170. On 17 November 2004, Mr Donnison made a note of a meeting he had had with Mrs Gifford and Mr Rosser. His note records that Mr Rosser had stated that each of the directors, meaning Mrs Gifford and Lumley, or possibly Mr Donnison, would receive 1% of Mr Rosser's share of the net proceeds of sale of the companies, presumably that was ITS and IAP.

171. On 10 December 2004, Mr Rosser attended a meeting with Mr Berman and Mr Donnison. The purpose of the meeting appeared to be to discuss various matters which needed attention in connection with a proposal to sell the shares in ITS and IAP. Mr Rosser asked for a full review of the documents which had been entered into so that properly executed documents would be available as part of a due diligence exercise in connection with the sale. Mr Berman was also asked to review the minute books of the companies. Mr Berman stated that he wanted the shareholders of ITS and IAP, and in particular a Mr Dawson representing the trustees of the various Isle of Man trusts, to be aware of the arrangements with Leadenhall and Darrencrest and he wished there to be disclosure to the shareholders and ratification by the shareholders of all issues involving related parties.

172. On 2 March 2005, Mr Berman prepared a note to be used by Mr Rosser at an intended meeting with Mr Dawson who was acting for the trustees of the various Isle of Man trusts. The most relevant part of the note stated:

> "Why ratify? Given that the various businesses with which we are involved are not all in one group, according to Jonathan, there is a prospect that following a sale, the new directors of any company could try and make a case to attack the previous board in relation to conflicts of interest and to attack me, Alex and Jim, by claiming that we were shadow directors and saying that we, through the trusts, make secret profits. Whilst we do not believe that any of the companies would have a claim against any of the directors for past acts (for example the Board of Inside Track attacking its directors for allowing business to be conducted through Instant Access or the Board of Instant

> access attacking the directors for permitting business to be conducted through Fuel), or against Jim, me or Alex, the one way to avoid any prospect is to officially disclose everything and to get the shareholders to ratify everything that has gone on. This will protect the directors, Jim, Alex and myself and through us the trusts etc. I do not want to have the prospect of anyone claiming that I made a secret profit as a shadow director when it is crystal clear to everyone involved what I have and where. Jonathan tells me that technical breaches can be used by Courts to force directors to pay profits over, i.e. the assets of Mhoram (*sic*) etc. There is no way that anyone involved would want to voluntarily put themselves into a position whereby they would hand over control of the company to somebody who could get it into their minds that they could recover some of the sale price by claiming that Jim I and Alex were directors, that we did not declare our interests fully and that we made secret profits in which case the monies would have to be repaid. It would be irresponsible not to deal with this issue however unlikely it would be to occur. Given the prospect, it is best to avoid the problem by blessing everything that has happened."

173. There then followed a long process of drafting, amending and approving a number of documents intended to be used for obtaining the ratification proposed in the note of 2 March 2005. I will refer to the documents which emerged from this process when I consider the question of ratification later in this judgment.

174. On 4 April 2005, Darrencrest and Lake Austin entered into an agreement whereby Darrencrest was appointed as the exclusive worldwide marketing agent for the units at Grand Palisades, Florida. The agreed rate of commission payable to Darrencrest was 10%.

175. At the end of 2004, ITS and IAP (or their shareholders) had embarked on a process designed to lead to the sale of those shares. This was a major exercise which took place in two phases and the first phase of the process lasted until around January 2006. ITS and IAP retained a number of advisers to assist them with the sales process and, in particular, in around April 2005, they engaged Deloitte & Touche LLP ("Deloittes") to prepare a detailed report as a Due Diligence Report which would be made available by the vendor of the shares to a potential purchaser.

176. It appears to be the case that it was around this time that Mrs Gifford began creating letters and attendance notes, which she dated 2003 and 2004, in an attempt to re-write the history of what had occurred in relation to the arrangements which IAP had made with Leadenhall and Darrencrest.

177. On 10 May 2005, Deloittes prepared a draft Vendor Due Diligence Report. This draft report referred to the businesses of ITS and IAP and also referred to Leadenhall and Darrencrest. On page 31 of the draft report, Deloittes stated that they had not been able to obtain details of the ownership of Leadenhall and Darrencrest but that they had been advised by the management of ITS/IAP that these companies were not connected to ITS/IAP. On page 123 of the draft report, Deloittes discussed the rules as to transfer

pricing whereby in certain circumstances prices agreed between related companies, if those prices are not at arm's-length, are replaced by arm's-length prices for the purposes of taxation. Deloittes noted that if the same parties controlled IAP and Leadenhall, the arrangements between those companies could fall within the transfer pricing rules. On page 124, a similar comment was made in relation to the arrangements between IAP and Darrencrest.

178. On 13 May 2005, Deloittes sent to ITS/IAP a revised section of their draft report dealing with transfer pricing (amongst other things). In relation to the arrangements which IAP had made with Leadenhall, Deloittes stated that it was difficult to identify the exact nature of the relationship between those companies and it was difficult to conclude whether the remuneration received was appropriate for tax purposes.

179. The Deloittes' draft report was followed by a number of communications between ITS/IAP and Deloittes. On 8 July 2005, Deloittes prepared a revised draft of their report. This draft stated that the management of ITS/IAP had stated the Leadenhall and Darrencrest were not connected parties to ITS/IAP but given the potential legal and commercial implications of the arrangements, a legal review of the contracts should be carried out. That did not occur and the first phase of the sales process came to an end in January 2006.

180. On 5 September 2005, IAP, Darrencrest and Lake Austin entered into an agreement whereby Lake Austin appointed Darrencrest as its exclusive agent in relation to the sale of units in Grand Palisades and Darrencrest appointed IAP as its exclusive sub-agent in relation to the sale of those units.

181. On 1 March 2006, HMRC opened an enquiry into IAP's tax return for the year to 30 April 2004. On 4 August 2006, HMRC asked JDLLP for a copy of the contract of 26 November 2003 (between IAP and Leadenhall). On 25 September 2006, HMRC wrote to JDLLP stating that their remaining concern related to the arrangements between IAP and Leadenhall and stating that the majority control of Leadenhall was the same as that of IAP. HMRC made a number of points in relation to that connection and one of the points questioned the 50/50 split of commission between the two companies. On 1 November 2006, Mr Gandy of JDLLP wrote to HMRC giving an account of the circumstances in which IAP had entered into arrangements with Leadenhall.

182. In 2006, ITS/IAP began a second phase of their sales process. ITS/IAP re-engaged Deloittes to assist them and also instructed Ernst & Young. It appears that when ITS/IAP instructed Ernst & Young as to their forecast sales figures they included revenues to be earned by Leadenhall and Darrencrest. Deloittes became aware of these forecasts and by email of 28 November 2006 Deloittes asked ITS/IAP for their explanation. On 30 November 2006, at a meeting between representatives of Deloittes and representatives of ITS/IAP, Deloittes reported that they had been told by Ernst & Young that ITS/IAP said that the arrangements with Leadenhall and Darrencrest were "only tax schemes".

183. On 4 December 2006, representatives of Deloittes met Mr Rosser, Mrs Gifford, Mr Donnison and Mr Berman and one other. Deloittes expressed their unease at the various bits of information that they had been given about Leadenhall and Darrencrest. Deloittes had in mind in this respect their draft report of 8 July 2005, JDLLP's letter to

HMRC of 1 November 2006 and the recent proposal to include the revenues of Leadenhall and Darrencrest in the forecasts for ITS/IAP. Deloittes then resigned from their appointment by ITS/IAP with immediate effect.

184. On 5 December 2006, Mr Rosser met Ms McKinnon of Deloittes but Deloittes remained of the view that they ought to resign their appointment. A note prepared by Deloittes recorded that Mr Rosser had said to Ms McKinnon that Leadenhall and Darrencrest were established "solely for tax purposes".

185. On 9 March 2007, HMRC wrote to IAP stating that the enquiry in relation to IAP had been taken over by the Special Civil Investigations office of HMRC and that the enquiries were into the three years ended 30 April 2003, 2004 and 2005. The investigation was to be carried out in accordance with COP8 which is used where serious fraud is not suspected. On 1 May 2007, HMRC wrote to JDLLP questioning the 50/50 split of commission between IAP and Leadenhall.

186. On 6 July 2007, Mr Donnison emailed Mr Rosser and Mr Berman to say that IAP had "finished its negotiations" with Leadenhall and Darrencrest with a view to agreeing a termination of the agreements between IAP and Leadenhall and IAP and Darrencrest. Mr Donnison stated that he expected Leadenhall and Darrencrest to accept this proposal at their board meetings on 19 July 2007. On 16 July 2007, Mr Kitto sent to Mr Berman a list of developers by whom Darrencrest had been appointed as a marketing agent. The list included Maesbury and Lake Austin but also included five other developers in Florida and two in Cyprus.

187. On 24 July 2007, HMRC (Special Civil Investigations) notified IAP that they intended to enquire into IAP's tax return for the year ended 30 April 2006.

188. On 1 August 2007, IAP entered into agreements with Leadenhall and with Darrencrest terminating the earlier agreements between them; in the case of Leadenhall the earlier agreement was dated 26 March 2004 and in the case of Darrencrest the earlier agreement was dated 7 October 2004. Also on 1 August 2007, IAP entered into two further agreements; the first of these was with Leadenhall and Maesbury and the second was with Darrencrest and Lake Austin. Under these various agreements, Leadenhall remained entitled to the first $4 million received by way of commission from Maesbury and Darrencrest remained entitled to the first $6.8 million by way of commission received from the developers with which it had previously made agency agreements; these were the seven developers in Florida and the two in Cyprus referred to earlier. Darrencrest assigned to IAP the benefits of its agency agreements with those developers.

189. On 28 August 2007, IAP entered into a further agreement with Darrencrest and Lake Austin which provided for IAP to enter into a new agency agreement with Lake Austin.

190. On 4 September 2007, JDLLP wrote to HMRC giving an account, or a purported account of the commercial background to the original arrangements between IAP and Leadenhall and the reasons for the commercial terms agreed between those parties.

191. By 25 October 2007, the sum of $6.8 million due to Darrencrest under the agreements of 1 August 2007 had been paid in full. At some date thereafter, Darrencrest went into liquidation.

192. Lumley resigned as a director of IAP on 10 January 2008 and on 18 January 2008, Mr McKay was appointed a director of IAP. Mr McKay had been appointed Chief Operating Officer of IAP in 2004.

193. By March 2008, IAP appears to have been in some financial difficulty as evidenced by an email dated 19 March 2008 from Mr Gandy to Mr Donnison referring to the company's "plight" and predicting that HMRC would seek to take action sooner rather than later to protect its position.

194. On 12 May 2008, Mr Rosser emailed Mr Donnison referring to the initial arrangements in relation to IAP and Leadenhall in particular. By this time, Mr Rosser had fallen out with Mr Moore. Mr Rosser suggested that the original arrangements involved the understanding that any income received by IAP or Leadenhall would be paid out as dividends to the shareholders. Mr Rosser also suggested that Mr Donnison was in control of IAP and that Mr Moore (or perhaps it should have been the trustees of the discretionary trust under which he was a potential beneficiary) as the majority shareholder in IAP was not in a position to take control of IAP.

195. On 19 September 2008, IAP appointed joint administrators pursuant to paragraph 22 of Schedule B1 to the Insolvency Act 1986. The administrators were Mr Murphy and Mr Toone of Chantrey Vellacott DFK LLP.

196. On 10 October 2008, the joint administrators reported to the creditors of IAP with their proposals in relation to the administration. The report stated that the administrators had been informed that in early 2008, the shareholders of IAP had invested almost £4 million to support the business by way of loan stock.

197. On 21 December 2008, IAP entered creditors' voluntary liquidation and Mr Murphy and Mr Toone were appointed joint liquidators.

The matters to be considered

198. I will consider the issues which now need to be decided under the following headings:

(1) the pleaded case as to breach of the duties of a director;

(2) *de facto* and shadow directors;

(3) the Claimants' case as to *de facto* and shadow directors;

(4) were Mr Moore and/or Mr Rosser *de facto* or shadow directors of IAP?

(5) the duties of a *de jure* director;

(6) the duties of a *de facto* director;

(7) the duties of a shadow director;

(8) did Mr Moore and/or Mr Rosser owe fiduciary duties to IAP?

(9) the allegation of "no or no adequate consideration";

(10) the allegation of obtaining a benefit from a third party by reason of being a director: the law;

(11) obtaining a benefit from a third party by reason of being a director: the facts;

(12) conflict of interest in transactions with IAP;

(13) ratification;

(14) negligence;

(15) dishonest assistance;

(16) conspiracy to injure by unlawful means;

(17) section 213 of the Insolvency Act 1986;

(18) limitation.

The pleaded case as to breach of the duties of a director

199. The Claimants plead that Mrs Gifford was a *de jure* director; that is not in dispute. As to the duties which she owed to the company, the Claimants used the wording which is now contained in sections 171 to 177 of the Companies Act 2006 and added in an allegation of a duty to consider and act in the interests of the creditors of the company when it was insolvent or in the vicinity of insolvency or was likely to be rendered insolvent by reason of the directors' actions. Although the wording of most of the pleaded duties was taken from the Companies Act 2006, which was not in force at the time of the relevant events in this case, there was no real argument as to the extent of the duties owed by Mrs Gifford to the company.

200. As to Mr Moore and Mr Rosser, it was pleaded that they were *de facto* alternatively shadow directors of the company. Mr Moore did not participate in these proceedings but this allegation was denied by Mr Rosser. The Claimants then pleaded that Mr Moore and Mr Rosser owed the same duties as a *de jure* director. That was denied by Mr Rosser.

201. As to the alleged breaches of duty, by the end of the trial, it seemed to me that the Claimants wished to argue that Mrs Gifford had committed one breach of her duties and that Mr Moore and Mr Rosser had committed the same breach and two other breaches of their duties. In the case of all three of these Defendants, the Claimants said that they had broken the duty to act bona fide in what he or she considered were the best interests of the company. In particular, the Claimants contended that these Defendants had caused IAP to enter into certain agreements for no or no adequate consideration. The Claimants did not allege that all of the agreements made by IAP in this case were disadvantageous to IAP; for example, it was accepted that the agreement made with Maesbury in October 2003 was very profitable for IAP. In relation to certain agreements made by IAP with Leadenhall and Darrencrest, it was in some

cases pleaded that IAP had entered into an agreement for "no or no adequate consideration" and it was sometimes pleaded that commission that was "due to IAP" was "diverted" to Leadenhall or Darrencrest. It was then separately pleaded that the agreements referred to below were to the detriment of IAP and for no legitimate purpose and instead for other purposes (presumably illegitimate purposes) such as evading tax, concealing ownership and "personally profiting Mr Moore and Mr Rosser as the ultimate beneficial owners of [Leadenhall] and [Darrencrest] to which IAP's revenue was diverted". The specific agreements which were the subject of these allegations were:

(1) the agreement dated 26 November 2003 between IAP and Leadenhall;

(2) the agreements dated 26 March 2004 involving IAP and Leadenhall;

(3) the agreement dated 7 October 2004 between IAP and Darrencrest;

(4) the agreement dated 4 April 2005 between Darrencrest and Lake Austin;

(5) the agreement dated 1 August 2007 between IAP and Leadenhall; and

(6) the agreement dated 28 August 2007 between Darrencrest, Lake Austin and IAP.

202. It is accepted that the Claimants have adequately pleaded a case of breach of duty by these three Defendants in the respects described above.

203. As to Mr Moore and Mr Rosser (but not Mrs Gifford), by the end of the trial, the Claimants wished to allege two further breaches of duty by them. In this respect, the duties which it was alleged they owed to IAP were the duty of a director not to obtain a benefit from a third party by reason of his position as a director of the company and the duty of a director to avoid a conflict of interest. The Claimants' case in closing submissions appeared to be that each of Mr Moore and Mr Rosser had obtained benefits for himself (through Leadenhall and through Darrencrest) as a result of being a director of IAP and that the relevant agreements involved a conflict of interest. The Claimants also wished to argue that even if these two breaches of duty had not caused loss to IAP, IAP was nonetheless entitled to require Mr Moore and Mr Rosser to account for the profits which they had made as a result of their alleged breaches of duty.

204. The Defendants contended that the two breaches of duty referred to in the last paragraph had not been pleaded and, further, that the Claimants had not pleaded a claim for an account of profits resulting from a breach of duty. I will take separately the two alleged breaches of duty.

205. As to the allegation of a breach of the duty not to obtain a benefit from a third party by reason of his position as a director of the company, it is clear that the Claimants pleaded that Mr Moore and Mr Rosser owed such a duty to IAP. It was then pleaded that they had acted in breach of "the above duties" which phrase included this specific duty. It is also correct that the Claimants pleaded that Mr Moore and Mr Rosser had benefitted from the matters complained of; paragraph 102.6(iv) of the pleading alleged that Mr Moore and Mr Rosser had personally profited as the ultimate beneficial owners of Leadenhall and Darrencrest to which "IAP's revenue was diverted". It could

be said that the pleading should have done more to explain how it was to be alleged that Mr Moore and Mr Rosser had benefitted "by reason of his position as a director of IAP". However, the pleading does say that Mr Moore and Mr Rosser caused or permitted IAP to enter into certain agreements. It is far from obvious from the pleading that the Claimants were intending to develop an allegation of a breach of this kind and I would have expected a more specific and clearer pleading if that had been their intention. If the Claimants had intended to put forward this allegation that fact is rather disguised as it is somewhat swamped by a large number of allegations (to which I refer below) which pleaded a number of illegitimate purposes behind the relevant transactions and which allegations were not pursued at the end of the trial. However, after some hesitation, I consider that the pleading is just sufficient to put forward an allegation of the relevant breach.

206. As to the allegation that Mr Moore and Mr Rosser were in breach of the duty of a director to avoid a conflict of interest, the pleading does allege that Mr Moore and Mr Rosser owed a duty to IAP to avoid a situation of conflict of interest. It was then pleaded that they had broken "the above duties" including therefore this duty. Then it is pleaded that they personally profited from the transactions. The words "conflict of interest" are not repeated in the particulars of breach and an allegation of a breach in this respect is again entirely swamped by the other allegations of illegitimate purposes. Nonetheless, it can be said that a director who personally profits from a transaction with the company is inevitably in a position of a conflict of interest and duty and the fact of personal profit was expressly pleaded. In this case, with even more hesitation than in the former case, I consider that the pleading just crosses the line in order to do enough to put forward an allegation of the relevant breach. The Defendants also submitted that the relevant duty on a director was to disclose the conflict of interest and it had not been pleaded that Mr Moore and Mr Rosser had failed to do so. I consider that the true position is that it is open to the Claimants to allege that Mr Moore and Mr Rosser benefitted in a situation of conflict but it is open to Mr Moore and Mr Rosser to defend that claim by showing that they disclosed the conflict to the board or to the shareholders and that such disclosure avoided a breach of duty.

207. The Defendants then argued that the Claimants had not sought in their pleading the remedy of an account of profits made by Mr Moore or Mr Rosser from the alleged breach of duty. The Defendants submitted that the claim had been for "equitable compensation" which meant compensation for loss resulting from the breach of duty and did not extent to an account of profits where IAP had suffered no loss. The Claimants pointed to the fact that the prayer for relief referred to "equitable compensation for breach of fiduciary duty, alternatively damages for breach of duty" and also claimed further or other relief "including all necessary accounts and enquiries to determine the amount of compensation or damages payable to IAP".

208. I am inclined to agree that the main thrust of the prayer for relief was to claim compensation for loss caused by the alleged breaches of fiduciary duty. However, the words "equitable compensation" are sometimes used to refer to an account of profits resulting from a breach of fiduciary duty. In FHR European Ventures LLP v Mankarious [2015] AC 250 per Lord Neuberger PSC at [7], Lord Neuberger referred to a case of principal and agent where the agent had received a bribe or secret commission and where the principal was entitled to an account of the profit made by the agent. He then stated that the principal's right to seek an account gave him a right

to "equitable compensation" in respect of the bribe or secret commission which was the quantum of the bribe or secret commission (subject to any permissible deduction for expenses incurred by the agent). In AIB Group (UK) Ltd v Mark Redler & Co [2015] AC 1503, Lord Reed JSC at [120] discussed the right to equitable compensation, by which he meant the right to compensation for loss caused by a breach of duty in equity and he explained that in Mankarious the description of a right to payment of the sum found due on an account of profits as "equitable compensation" was the use of the phrase in a different sense. In Interactive Technology Corporation Ltd v Ferster [2017] EWHC 217 (Ch), I had to construe the words "equitable compensation" in an order of the court and I held that I should construe those words in the light of certain background matters which were said to be relevant. So construed, on the specific facts of that case, I held that the words meant compensation for loss resulting from a breach of duty. In the light of the way in which the words "equitable compensation" were used in the Mankarious case, I think it would be too strict to rule out the possibility that it is open to the Claimants to claim an account of profits made by Mr Moore or Mr Rosser as a result of the alleged breaches of duty.

209. Before reaching a final conclusion on these pleading points, I will refer briefly to those parts of the pleaded case which tended to swamp the allegations which the Claimants wished to rely upon at the end of the trial. The Claimants' pleaded case asserted breaches of duty in that IAP was permitted to continue with the above arrangements with Leadenhall and Darrencrest after receipt of the Deloittes' report of 13 May 2005. This plea appeared to depend upon it being shown that the arrangements in question fell within "the transfer pricing provisions" which provisions were later identified as Schedule 28AA to the Income and Corporation Taxes Act 1988. This plea was coupled with the further plea that these three Defendants were in breach of duty by failing to apply the transfer pricing provisions and to self-assess the tax due from IAP resulting in the underpayment of tax to HMRC. Although the operation of the transfer pricing provisions in this case was a highly contentious issue at the beginning of the trial, this particular allegation of breach was not pursued in the Claimants' closing submissions.

210. The next allegation of breach of the duties of a director related to the payment of dividends and, perhaps, a related allegation that the diversion to Leadenhall and Darrencrest of sums allegedly due to IAP amounted to an unlawful distribution to the shareholders of IAP. Again, at the end of the trial it did not appear to me that the Claimants were pursuing that way of putting their case as an addition to their other allegations of breach of duty. In particular, as regards the allegation of the unlawful payment of dividends by IAP, the Claimants did not call the evidence which would be needed to determine whether they had established their pleaded case in that respect.

211. The final allegation of breach of the duties of a director was that it was said that Mrs Gifford, Mr Moore and Mr Rosser had attempted to conceal the true position from Deloittes and from HMRC and had created a number of false documents. As to that allegation, it was accepted by the Claimants that even if they established that these Defendants had made false statements, it was not being said that the making of such statements had given the Claimants any separate cause of action against these Defendants. Instead, the allegedly false statements were said to be part of the circumstances in which the other alleged breaches had been committed and, further,

the allegedly false statements showed that these Defendants had acted dishonestly in connection with the arrangements in question.

212. I have certainly hesitated before reaching my conclusions as to the case pleaded by the Claimants. I have considerable sympathy for the position in which the Defendants were placed at the end of the trial having to face allegations of breach of duty which had not been given any real prominence earlier in the case and finding that substantial and serious allegations of wrongdoing which had been made against them were simply no longer being pursued. Nonetheless, I have decided that it would not be right to shut the Claimants out from alleging the two further breaches of duty against Mr Moore and Mr Rosser to which I have referred.

De facto and shadow directors

213. Mr Phillips submitted that Mr Moore and Mr Rosser were *de facto* or shadow directors of IAP at the times which are material in this case. Counsel for the various Defendants submitted that Mr Moore and Mr Rosser were neither *de facto* nor shadow directors at any material time. Mr Phillips submitted that a *de facto* director owes to the company the same fiduciary duties as a *de jure* director. The Defendants seemed to accept that that was so. Mr Phillips further submitted that a shadow director also owes to the company the same fiduciary duties as a *de jure* director. The Defendants submitted that that was not so and that in a particular case a shadow director might owe no fiduciary duties to the company. The parties also appeared to agree that a *de facto* director could seek relief, under section 727 of the Companies Act 1985 (now section 1157 of the Companies Act 2006), from liability for a breach of fiduciary duty if he had acted honestly and reasonably but that a shadow director could not seek such relief.

214. At this point, I will refer to certain statutory provisions. This case is governed by the Companies Act 1985 and not by the Companies Act 2006 but it is nonetheless worthwhile considering how *de facto* and shadow directors are treated under both these Acts. Both the 1985 Act and the 2006 Act defined "director" and "shadow director" for the purposes of those Acts. In section 741(1) of the 1985 Act (section 250 of the 2006 Act), "director" was defined to include "any person occupying the position of a director, by whatever name called". This was generally taken to mean that a *de facto* director was a "director" of the company and, in the case of the 2006 Act, was a director for the purposes of the codification of a director's duties in sections 171 to 177 of that Act. "Shadow director" was defined by section 741(2) of the 1985 Act (section 251 of the 2006 Act) to mean "a person in accordance with whose directions or instructions the directors of a company are accustomed to act". This was subject to later qualifications relating to persons giving advice in a professional capacity and, for certain purposes, qualifications relating to persons who are bodies corporate: see section 741(2) and (3) of the 1985 Act and section 251(2) and (3) of the 2006 Act. Section 251 of the 2006 Act was later amended by section 90 of the Small Business, Enterprise and Employment Act 2015 to introduce further qualifications.

215. In the case of the codification of a director's duties in sections 171 to 177 of the 2006 Act, section 170(5) originally provided that these duties applied to shadow directors: "where, and to the extent that, the corresponding common law rules or equitable principles so apply". Section 170(5) has since been amended by section 89(1) of the

Small Business, Enterprise and Employment Act 2015 so that it now provides: "The general duties apply to a shadow director of a company where and to the extent that they are capable of so applying." Section 89(2) of the 2015 Act gave to the Secretary of State power to make regulations making provision for the application of the general duties of directors to shadow directors. Section 89(3) of the 2015 Act provided that the regulations could, in particular, make provision: (a) for prescribed general duties of directors to apply to shadow directors with such adaptations as may be prescribed; and (b) for prescribed general duties of directors not to apply to shadow directors.

216. In the present case, I am asked to determine whether Mr Moore and/or Mr Rosser were *de facto* directors or were shadow directors. If they were *de facto* directors, it is agreed that they owed the same duties to the company as would a *de jure* director. If they were shadow directors, there is a separate question as to whether they owed fiduciary duties to the company and, if so, which duties. If I am asked to apply a provision of the Companies Act 1985 which expressly deals with the position of a shadow director, then (for that purpose) I plainly need to decide whether Mr Moore or Mr Rosser were shadow directors. However, if I am asked to decide whether Mr Moore or Mr Rosser owed fiduciary duties to the company, it might be said that I should proceed to a discussion of that question without deciding whether to put the label of shadow director on them. However, as the parties addressed in detail the question whether Mr Moore or Mr Rosser were shadow directors I will do so also.

217. As will be seen, the question whether a person is a *de facto* director or a shadow director depends upon the specific facts of each case. There does not appear to be a clear legal test to help one decide whether a person is or is not a *de facto* or a shadow director. For the purpose of deciding that question, it is necessary to focus on what the person actually did in relation to the company. Whilst in earlier cases, there were said to be clear distinctions between a *de facto* director and a shadow director, those distinctions have since been blurred and it is now possible to be simultaneously a *de facto* director and a shadow director.

218. The parties cited a large number of cases as to the test for determining whether a person is a *de facto* or a shadow director. The cases before 2010 were fully reviewed by the Supreme Court in Revenue and Customs Comrs v Holland [2010] 1 WLR 2793. The issue in that case was whether a director of a corporate director of the relevant company was a *de facto* director of that company. The Supreme Court, by a majority of 3 to 2, held that he was not. The judges who formed the majority were Lords Hope, Collins and Saville JJSC.

219. Lord Hope reviewed the earlier authorities at [26]–[37]. He approved propositions in earlier cases to the effect that:

(1) if it is unclear whether the acts of the person in question are referable to an assumed capacity or to some other capacity such as shareholder or consultant the person in question must be entitled to the benefit of the doubt;

(2) it is difficult to postulate one decisive test;

(3) in considering whether a person "assumes to act as a director" what is important is not what he calls himself but what he did;

(4) circumstances vary widely from case to case, the issue is one of fact and all relevant factors must be taken into account.

220. Lord Collins also reviewed the earlier cases at [58]-[93]. He made the following comments, in particular:

(1) it was now impossible to maintain the distinction between a *de facto* director and a shadow director;

(2) the court had a very difficult problem of identifying what functions were in essence the sole responsibility of a director or board of directors;

(3) the most relevant tests for identifying what functions were the responsibility of a director were:

a. whether the individual was the sole person directing the affairs of a company (or acting with others equally lacking in a valid appointment);

b. if there were true directors, whether the individual was acting on an equal footing with them in directing the affairs of the company;

c. whether there was a holding out by the company of the individual as a director and whether the individual used that title;

d. whether the individual was part of "the corporate governing structure" of the company, which phrase refers to the system by which companies are directed and controlled.

221. On the question as to whether the relevant person owed the fiduciary duties of a director, Lord Collins said at [93]:

> "93 It does not follow that "*de facto* director" must be given the same meaning in all of the different contexts in which a "director" may be liable. It seems to me that in the present context of the fiduciary duty of a director not to dispose wrongfully of the company's assets, the crucial question is whether the person assumed the duties of a director. Both Sir Nicolas Browne-Wilkinson V-C in *In re Lo-Line Electric Motors Ltd [1988] Ch 477*, 490, and Millett J in *In re Hydrodam [1994] 2 BCLC 180*, 183, referred to the assumption of office as a mark of a *de facto* director. In *Fayers Legal Services Ltd v Day* (unreported) 11 April 2001, a case relating to breach of fiduciary duty, Patten J, rejecting a claim that the defendant was a *de facto* director of the company and had been in breach of fiduciary duty, said that in order to make him liable for misfeasance as a *de facto* director the person must be part of the corporate governing structure, and the claimants had to prove that he assumed a role in the company sufficient to impose on him a fiduciary duty to the company and to make him responsible for the misuse of its assets. It seems to me that that is the correct formulation in a case of the present kind. See

> also *Primlake Ltd v Matthews Associates [2007] 1 BCLC 666*, para 284."

222. At [96], in expressing his conclusion that Mr Holland was not a *de facto* director of the relevant company, Lord Collins said:

> "96 There is no material to suggest that Mr Holland was doing anything other than discharging his duties as the director of the corporate director of the composite companies. It does not follow from the fact that he was taking all the relevant decisions that he was part of the corporate governance of the composite companies or that he assumed fiduciary duties in respect of them. If he was a *de facto* director of the composite companies simply because he was the guiding mind behind their sole corporate director, then that would be so in the case of every company with a sole corporate director. The development of the law of *de facto* directors from *In re Lo-Line [1988] Ch 477* and *In re Hydrodam [1994] 2 BCLC 180* onwards was a significant judicial innovation given that for some 150 years *de facto* directors meant individuals who had actually been appointed, or purportedly appointed, as directors. As has been seen, in two of the three older cases which dealt with the liability of *de facto* directors, an analogy was drawn with executors de son tort: *Gibson v Barton* (1875) LR 10 QB 329 and *In re Canadian Land Reclaiming and Colonising Co (Coventry and Dixon's case)* (1880) 14 Ch D 660. That suggests strongly that the basis of liability was the assumption of responsibility. The legislature has already intervened in the 2006 Act to ensure that there is a natural person to whom responsibility is attributed. The purpose of what became Companies Act 2006, section 155(1) , was to ensure that every company would have at least one individual who could, if necessary, be held to account for the company's actions: see Department of Trade and Industry, *Company Law Reform* (Cm 6456) (2005), para 3.3. For the court to hold that every significant decision of individual directors of a corporate director is to be regarded as being taken as if they were directors of the company of which it is the corporate director goes considerably beyond the law as it has been developed at first instance and by the Court of Appeal in the modern *de facto* director cases, and beyond what I would regard as the function of the court. I would not wish to question the modern judicial development of the *de facto* director concept, and I well understand the policy reasons why in such a case as this a person in the position of Mr Holland should be liable, although those reasons may not be as powerful as they were prior to the enactment of the Companies Act 2006, section 155(1)."

223. Lord Saville gave a short concurring judgment.

224. In Smithton Ltd v Naggar [2015] 1 WLR 189, the Court of Appeal considered and applied the majority decision in Holland. Arden LJ said at [75], that the judgment of Lord Collins expressed the view of the majority. Her judgment contains the following passage at [33]-[45]:

> "*Practical points: what makes a person a de facto director?*
>
> 33 Lord Collins JSC sensibly held that there was no one definitive test for a *de facto* director. The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director. However, a number of points arise out of *Holland's* case and the previous cases which are of general practical importance in determining who is a *de facto* director. I note these points in the following paragraphs.
>
> 34 The concepts of shadow director and *de facto* [director] are different but there is some overlap.
>
> 35 A person may be *de facto* director even if there was no invalid appointment. The question is whether he has assumed responsibility to act as a director.
>
> 36 To answer that question, the court may have to determine in what capacity the director was acting (as in *Holland's* case).
>
> 37 The court will in general also have to determine the corporate governance structure of the company so as to decide in relation to the company's business whether the defendant's acts were directorial in nature.
>
> 38 The court is required to look at what the director actually did and not any job title actually given to him.
>
> 39 A defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief.
>
> 40 The court must look at the cumulative effect of the activities relied on. The court should look at all the circumstances "in the round" (per Jonathan Parker J in *Secretary of State for Trade and Industry v Jones [1999] BCC 336* .
>
> 41 It is also important to look at the acts in their context. A single act might lead to liability in an exceptional case.

> 42 Relevant factors include: (i) whether the company considered him to be a director and held him out as such; (ii) whether third parties considered that he was a director.
>
> 43 The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision.
>
> 44 Acts outside the period when he is said to have been a *de facto* director may throw light on whether he was a *de facto* director in the relevant period.
>
> 45 In my judgment, the question whether a director is a *de facto* or shadow director is a question of fact and degree. … "

225. Although both of these cases discussed the position of a shadow director as well as that of a *de facto* director, it is still helpful to refer to the earlier case of Secretary of State for Trade v Deverell [2001] Ch 340 which considered the meaning of "shadow director" for the purposes of the Company Directors Disqualification Act 1986. That Act defines "shadow director" in essentially the same way as in the Companies Act 1985 and the Companies Act 2006. In that case, Morritt LJ said at [35]:

> "35 I propose to express my conclusions on these and other issues in a number of propositions.
>
> (1) The definition of a shadow director is to be construed in the normal way to give effect to the parliamentary intention ascertainable from the mischief to be dealt with and the words used. In particular, as the purpose of the Act is the protection of the public and as the definition is used in other legislative contexts, it should not be strictly construed because it also has quasi-penal consequences in the context of the Company Directors Disqualification Act 1986. I agree with the statement to that effect of Sir Nicolas Browne-Wilkinson V-C in *In re Lo-Line Electric Motors Ltd [1988] Ch 477*, 489.
>
> (2) The purpose of the legislation is to identify those, other than professional advisers, with real influence in the corporate affairs of the company. But it is not necessary that such influence should be exercised over the whole field of its corporate activities. I agree with the statements to that effect of Finn J in *Australian Securities Commission v AS Nominees Ltd*, 133 ALR 1, 52-53 and Robert Walker LJ in *In re Kaytech International plc [1999] BCC 390*, 402.
>
> (3) Whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as a direction or instruction must be objectively ascertained by the court in the light of all the evidence. In that

> connection I do not accept that it is necessary to prove the understanding or expectation of either giver or receiver. In many, if not most, cases it will suffice to prove the communication and its consequence. Evidence of such understanding or expectation may be relevant but it cannot be conclusive. Certainly the label attached by either or both parties then or thereafter cannot be more than a factor in considering whether the communication came within the statutory description of direction or instruction.
>
> (4) Non-professional advice may come within that statutory description. The proviso excepting advice given in a professional capacity appears to assume that advice generally is or may be included. Moreover the concepts of "direction" and "instruction" do not exclude the concept of "advice" for all three share the common feature of "guidance".
>
> (5) It will, no doubt, be sufficient to show that in the face of "directions or instructions" from the alleged shadow director the properly appointed directors or some of them cast themselves in a subservient role or surrendered their respective discretions. But I do not consider that it is necessary to do so in all cases. Such a requirement would be to put a gloss on the statutory requirement that the board are "accustomed to act" "in accordance with" such directions or instructions. It appears to me that Judge Cooke, in looking for the additional ingredient of a subservient role or the surrender of discretion by the board, imposed a qualification beyond that justified by the statutory language."

226. At [36], Morrritt LJ made two further observations, the first of which is relevant:

> "Before leaving this part of the case I would add two observations. The first relates to the use of epithets or descriptions in place of the statutory definition of a shadow director. They may be very effective in graphically conveying the effect of the definition in the light of the facts of that case, as shown by their frequent use in the reported cases to which I have referred. But, it seems to me, they may be misleading when transposed to the facts of other cases. Thus to describe the board as the cat's paw, puppet or dancer to the tune of the shadow director implies a degree of control both of quality and extent over the corporate field in excess of what the statutory definition requires. What is needed is that the board is accustomed to act on the directions or instructions of the shadow director. As I have already indicated such directions and instructions do not have to extend over all or most of the corporate activities of the company; nor is it necessary to demonstrate a degree of compulsion in excess of that implicit in the fact that the board are accustomed to act in accordance with

> them. Further, in my view, it is not necessary to the recognition of a shadow director that he should lurk in the shadows, though frequently he may, for example, in the case of a person resident abroad who owns all the shares in a company but chooses to operate it through a local board of directors. From time to time the owner, to the knowledge of all to whom it may be of concern, gives directions to the local board what to do but takes no part in the management of the company himself. In my view such an owner may be a shadow director notwithstanding that he takes no steps to hide the part he plays in the affairs of the company. Lurking in the shadows may occur but is not an essential ingredient to the recognition of the shadow director."

227. I need to consider a number of further points about shadow directors which may be material in this case. A major shareholder can act in a way whereby he becomes a shadow director. However, being a shareholder whose views are relevant and considered influential by the directors does not of itself make a shareholder a shadow director. In this context it is relevant to refer to a passage in Ultraframe at [1264]-[1269] where Lewison J discussed the position of a funder or a lender (whether or not also a shareholder). He said at [1268]:

> "A lender is entitled to keep a close eye on what is done with his money, and to impose conditions on his support for the company. This does not mean he is running the company or is emasculating the powers of the directors, even if (given their situation) the directors feel that they have little practical choice but to accede to his requests. Similarly with customers who may, because of their buying power, be able effectively to dictate conditions to their suppliers (or the other way around). In other words a position of influence (even a position of strong influence) is not necessarily a fiduciary position. To find otherwise would place a wholly unfair and unnatural burden on men of business. In broad terms, I accept this submission."

Similar comments can be made in relation to an influential shareholder.

228. Also in Ultraframe, Lewison J discussed the part of the definition of "shadow director" which refers to "the directors of the company" being accustomed to act on the direction or instruction of the alleged shadow director. The judge said at [1272]:

> "There is, no doubt a difficulty, as a pure matter of language, in construing the phrase "the directors of the company" as meaning "*some of* the directors of the company" or even "*a majority of* the directors of the company". However, the policy underlying the definition is that a person who effectively controls the activities of a company is to be subject to the same statutory liabilities and disabilities as a person who is a *de jure* director. Since a *de jure* director is subject to those liabilities and disabilities even if he is non-executive, or even inactive, it would undermine the policy of the definition if the fact that an

> inactive director did not act on the instructions of an alleged shadow director (because he did not act at all) could prevent that person from being a shadow director, even though in reality he controlled the activities of the company. In my judgment, therefore, a person at whose direction a governing majority of the board is accustomed to act is capable of being a shadow director."

229. Then, in Ultraframe, Lewison J considered the phrase "accustomed to act" and asked the question: if it is shown that, over a period, the directors of a company were accustomed to act on the directions or instructions of another person, is that person a shadow director from the beginning of the period; or only from the point at which it can be said that the directors are "accustomed" to act on his directions or instructions? Having discussed this question, the judge said at [1277]:

> "I conclude, therefore, that if a person becomes a shadow director as a result of the board being accustomed to act on his instructions or directions, transactions entered into before it can be said that the board is so accustomed are not retrospectively invalidated."

The Claimants' case as to de facto and shadow directors

230. The Claimants have served lengthy Voluntary Particulars of the case that Mr Moore and Mr Rosser were *de facto* and/or shadow directors of IAP. The particulars in relation to Mr Moore extend to 15 pages and those in relation to Mr Rosser extend to 29 pages. The particulars cover the entire period of the connection which they had with IAP although the particulars are not evenly distributed across the entirety of the period. I consider that it is potentially relevant to have regard to the position of Mr Moore and Mr Rosser in connection with IAP over the entire period of their involvement because it may be that their position at a particular point of time, or in relation to a particular decision by IAP, can only be assessed by reference to their previous involvement in the affairs of the company. However, it is also right that I should focus on the particular decision which is challenged and ask myself whether, in connection with that decision, Mr Moore or Mr Rosser participated in that decision as a *de facto* director or whether Mr Moore or Mr Rosser gave directions or instructions in relation to that decision and the *de jure* directors acted upon those directions or instructions.

231. The main points pleaded by the Claimants in relation to Mr Moore concerned the following:

(1) the holding out of Mr Moore as the Chairman of "the Group";

(2) statements made by various persons to the liquidators describing the role of Mr Moore;

(3) his involvement in recruitment and the negotiation of service contracts;

(4) his involvement in directions given as to contracts with developers;

(5) the financial reporting in relation to IAP;

(6) his involvement with the sale of "the Group".

232. Mr Moore had not defended the claim against him so that I do not have any pleaded response by him to the Claimants' case that he was a *de facto* and/or shadow director of IAP.

233. The main points pleaded by the Claimants in relation to Mr Rosser concerned the following:

(1) the holding out of Mr Rosser as the Vice-Chairman of "the Group";

(2) statements made by various persons to the liquidators describing the role of Mr Rosser;

(3) his involvement in recruitment and the negotiation of various service contracts; these related to Mr Storey who had a contract of employment with ITS, but who provided services for the benefit of IAP, and to a Mr da Silva;

(4) his involvement in directions given as to contracts with developers and negotiations with developers;

(5) his involvement in instructions to Mr Berman and Mishcon de Reya and Mr Donnison and Mr Gandy in relation to the sale of "the Group" and to the investigation by HMRC;

(6) the financial reporting in relation to IAP;

(7) his other involvement with the sale of "the Group".

234. Mr Rosser pleaded the following in response to the allegation that he was a *de facto* or a shadow director of IAP:

(1) Mr Rosser was asked by Mr Moore to bring his strategic expertise and experience of public relations and business development to enhance the position of ITS with a view to the ultimate sale of ITS and IAP;

(2) Mr Rosser advised on the recruitment of directors and management for ITS and IAP;

(3) Mr Rosser was not asked to be, and did not wish to be, a director of ITS or IAP;

(4) it was important to Mr Rosser not to be a director of ITS or IAP as he wished to pursue other projects;

(5) under his contract of employment, Mr Rosser was required to follow the instructions of the board of ITS;

(6) Mr Rosser retained Mr Pinson and Mr Kitto to form a strategic consultancy hub;

(7) Mr Rosser also advised Mr Moore to retain accountants, auditors and lawyers of the companies;

(8) Mr Rosser was a strategic sounding board for the directors and management of ITS and IAP;

(9) in 2004 and 2005, Mr Rosser's principal activity (apart from work for Leadenhall and Darrencrest) was to arrange for commercial due diligence in connection with the sale of ITS and IAP;

(10) legal and financial due diligence was delegated to professional advisers working with Mrs Gifford;

(11) when the sale process ultimately failed in the latter part of 2007, Mr Rosser had almost nothing to do with ITS or IAP apart from assisting with attempts to raise finance to avoid IAP becoming insolvent;

(12) as regards the allegation that Mr Rosser negotiated contracts with developers (this allegation being made in the Particulars of Claim as well as in the Voluntary Particulars) Mr Rosser said that he negotiated with developers on behalf of Leadenhall and Darrencrest and to the extent that such contracts affected IAP the decisions made in relation to them were taken by IAP's *de jure* directors;

(13) Mr Rosser's negotiations with Mr Storey were carried out on behalf of Leadenhall and Darrencrest.

Were Mr Moore and/or Mr Rosser de facto or shadow directors of IAP?

235. In his witness statement, Mr Donnison said:

> "I deny that I assumed a personal role in the governing structure of IAP, rather than merely acting in the role of director of Lumley Management Limited ("Lumley"). I acted at all times within the scope of Lumley's retainer (which is discussed further below at paragraphs 19 to 22). **Lumley acted on the instructions of Brad and (less frequently) Jim.**" (emphasis added)

236. I referred earlier to Mr Donnison's note of a meeting he had with Ms Forth, Mrs Gifford and Mr Rosser on 2 October 2003. In that note, Mr Donnison recorded that Lumley would act as a nominee for Mr Moore. When cross-examined by Mr Ashworth QC, Mr Donnison accepted that the note did not refer to him acting as a nominee for Mr Rosser as well as Mr Moore. However, when cross-examined by Mr Phillips QC, Mr Donnison confirmed the accuracy of his witness statement as regards his acting as a nominee for Mr Rosser and Mr Moore. He explained that for some of the time, Mr Moore was away and "anything that he wanted doing would have come through Brad or possibly Maria".

237. I accept Mr Donnison's evidence that Lumley acted as a nominee director for Mr Rosser and Mr Moore. Further, I accept his evidence that he generally acted "on the instructions" of Mr Rosser and Mr Moore.

238. Mr Rosser called Mr McKay as a witness on his behalf. Mr McKay's connection with IAP began in 2004. From 22 March 2004, Mr McKay was retained by IAP as a

consultant and he became chief operating officer of IAP and ITS from 1 July 2004. He had a service agreement with IAP dated 19 July 2004. He became a director of IAP and ITS on 18 January 2008.

239. Mr McKay had made various statements to the Insolvency Service or the liquidators before giving evidence at the trial. On 1 October 2008, he answered a question from the Insolvency Service which referred to shadow directors and he identified Mr Rosser as the Vice Chairman of IAP. On 19 March 2010, Mr McKay told the liquidators that Mr Rosser was "effectively CEO" of IAP. He also said that Mrs Gifford had told him that she took instructions from Mr Rosser and Mr Moore.

240. In his witness statement, Mr McKay stated that after Mr Moore had ceased to be a director of ITS and IAP (in October 2003) and had moved to Spain, he continued to exercise influence and control over the affairs of ITS and IAP, primarily through Mrs Gifford and other members of the management. The result was that no major decisions were taken by the directors or members of management without Mr Moore being consulted. Mr McKay described the work done by members of the management team and the work done by Mrs Gifford.

241. Mr McKay then described the role played by Mr Rosser. Mr Rosser's most important role related to work on the strategy to prepare ITS and IAP for sale. Part of this work involved Mr Rosser focussing on how the businesses of the two companies could be improved. Mr McKay described Mr Rosser's meetings with the management of the companies.

242. Mr McKay then referred to earlier statements he had made to the Insolvency Service or the liquidators including a statement that he believed that Mr Rosser was a shadow director of IAP and a statement that Mr Rosser was "effectively CEO". He explained in his witness statement that he now considered that whether someone was a shadow director was a legal question on which he did not have the necessary legal expertise to form a view. As to the statement that Mr Rosser was "effectively CEO", Mr McKay explained that at the time that he made that statement, he felt aggrieved about the position in which he had been placed in relation to IAP and he offered an explanation of his statement by reference to what Mr Rosser did in terms of setting key performance indicators.

243. Mr McKay continued by saying that Mr Rosser did not hold himself out as a director and was not held out by others as a director. The title "Vice Chairman" was explained as a grand sounding title. Mr Rosser was not a signatory on any relevant bank account. He had no role in relation to finance, tax or accounting. He did not represent ITS at seminars nor IAP at member facing events. The collapse of the sale process in October 2007 led to Mr Moore assuming again a hands-on role in relation to the businesses and a breakdown in the relationship between Mr Rosser and Mr Moore.

244. When cross-examined, Mr McKay accepted that it was correct to say that Mr Rosser was "effectively CEO". He also accepted that it was correct to say that everyone did what Mr Rosser said. He also confirmed that Mrs Gifford had told him that she took instructions from Mr Rosser and Mr Moore.

245. Mrs Gifford's computer had a file comprising a note which stated:

"The factors with reference to Brad Rosser,

1. He joined as Vice Chairman as at 1 June 2003.

2. Ran the group from January 2004 as [Mr Moore] and [Ms Forth] were away for personal reasons.

3. Started his initiative which was to recruit a strategy team and new management team, preparing the company to sell in a period of time.

4. Recruited a number of key staff including CEO, the finance director, the sales and marketing director, and the Fuel operations director in spring 2004. During 2007 recruited MD of Fuel and Sales Director.

5. From spring 2004 until the end of the first failed sale process (end 2006), he had weekly meetings with the entire management team.

6. Attended Board Meetings with Directors and gave us an update on the management of the operations.

7. Drove the Dividend Policy.

8. Drove the salary and bonus of all senior personnel.

9. Had final say on all agreements/ contracts

10. Ran the process of the second attempt at the sale of the Business

11. Was instrumental in Novation Agreement.

12. Offered various contracts to directors and new staff members offering equity (?) (which was never an option).

13. Authorised 3 months notice periods to his staff (strategy team only)

14. Agreed/Approved all salary reviews, incentive schemes, bonus discussions annually for all staff.

15. Carried out salary/bonus negotiations with senior staff annually.

16. Drove establishment of KH office, Fuel Establishment, Leadenhall & Darrencrest."

246. This note appears to have been prepared in 2008. It is not wholly clear who prepared it nor for what reason. I consider that it is likely that this

note represented Mrs Gifford's views in 2008. However, that was at a time when Mr Rosser had ceased to be so involved with IAP and it is possible that others, like Mrs Gifford, who remained were minded to blame Mr Rosser for some of the difficulties which then faced IAP. I am prepared to be cautious about some of the points in case they might not have been wholly fair to Mr Rosser. Nonetheless, I do have very extensive evidence, both documentary and oral, as to what Mr Rosser actually did in connection with ITS and IAP and the evidence bears out many of the specific points made in this note. What are of particular interest in the note are the statements: "Ran the group from January 2004" and "had final say on all agreements/ contracts". The reference to his attendance at board meetings might be considered to be double edged. The directors of a company can invite non-directors to make reports to the board. A report to the board is different from a direction or an instruction to the board.

247. Prior to her appointment as a director, Mrs Gifford was the company secretary. She was an accountant by training and she had a small accountancy practice. She had no real business experience. It was not expected that she would actually manage and direct the business of ITS and IAP. She was made a director because it did not suit Mr Moore or Mr Rosser to be directors. She was expected by them to act on their directions or instructions. They did not have complete control over her conduct and there were times when she did not fall in with their directions. However, I find that she was accustomed to act on the directions or instructions of Mr Rosser and Mr Moore.

248. Mr Moore did not participate in these proceedings and did not give evidence at the trial. In his evidence, Mr Rosser sought to play down his involvement in relation to the running of IAP and emphasised his role in relation to overall strategy and the sales process to deflect attention from his involvement in relation to other aspects of the business of IAP. I prefer the evidence of Mr Donnison and Mr McKay and the earlier views of Mrs Gifford to the evidence of Mr Rosser as to the substance of his involvement in the affairs of IAP.

249. Based on these findings, my conclusion is that Mr Rosser and Mr Moore were shadow directors at least in relation to some parts of the activities of IAP. I do not find that they were *de facto* directors. They did not need to be *de facto* directors because the affairs of IAP which required to be dealt with at the level of the board would be dealt with by the *de jure* directors (Mrs Gifford and Lumley) on the direction or instruction of Mr Rosser and Mr Moore.

250. The position of Mr Moore and Mr Rosser as shadow directors of IAP in relation to some parts of the activities of IAP was not the only capacity which they had in relation to matters which are relevant in this case. Mr Rosser and Mr Moore were potential beneficiaries under the discretionary trusts (the Mhoran Trust and the Jiki Trust), the trustees of which held shares in IAP. Mr Moore also had an unspecified interest in Prism and an interest in Pearson, which successively held shares in IAP. Mr Moore and Mr Rosser were also interested in Leadenhall and Darrencrest who were counterparties to contracts made with IAP. Mr Moore and Mr Rosser also provided services to Leadenhall and to Darrencrest.

251. Having found that Mr Moore and Mr Rosser were shadow directors, at least in relation to some parts of the activities of IAP, and having further commented that both of them were involved with IAP in other capacities, I will need to ask myself at a later stage in this judgment whether the alleged breaches of duty by them involved the *de jure* directors of IAP acting on the instructions or directions of Mr Moore or Mr Rosser.

The duties of a de jure director

252. As already described, when pleading the duties of (inter alios) a *de jure* director, the Claimants have used the wording now contained in sections 171 to 177 of the Companies Act 2006 and have then added further wording whereby the duty (now contained in section 172) to promote the success of IAP for the benefit of its members extends to a duty to have regard to the interests of creditors of IAP at a time when IAP is or may become insolvent. I note that in Premier Waste Management Ltd v Towers [2012] BCLC 67, Mummery LJ commented on the relevance of the wording of sections 171 to 177 of the Companies Act 2006 in a case where the relevant facts occurred before the coming into force of those sections. His comments encourage an approach whereby the court can regard the wording of those sections as extracting and expressing "the essence of the rules and principles which they have replaced": see at [3]. In any case, that was the approach adopted by Mr Phillips for the Claimants and this approach was not challenged by the Defendants. There are nonetheless some differences between the positions before and after the Companies Act 2006 and, in particular, there is a difference between the way in which disclosure is dealt with in section 317 of the 1985 Act and section 177 of the 2006 Act; I will consider the question of disclosure later in this judgment.

253. For present purposes, there is no dispute that a *de jure* director owes to the company the following duties, in particular:

(1) a duty to act in the way which he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole;

(2) a duty not to accept a benefit from a third party (other than the company) conferred by reason of his being a director or his doing (or not doing) anything as a director; and

(3) a duty to avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company; this duty applies in particular to the exploitation of any property, information or opportunity and it is immaterial whether the company could take advantage of the property, information or opportunity.

The duties of a de facto director

254. As explained, it was common ground in this case that a *de facto* director owes to the relevant company the same duties as would a *de jure* director of that company.

The duties of a shadow director

255. The parties did not agree as to whether a shadow director owed any fiduciary duties to the relevant company. Mr Ashworth relied on the reasoning and the conclusions of

Lewison J, as he then was, in Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch). The judge said at [1289]:

> "The indirect influence exerted by a paradigm shadow director who does not directly deal with or claim the right to deal directly with the company's assets will not usually, in my judgment, be enough to impose fiduciary duties upon him; although he will, of course be subject to those statutory duties and disabilities that the Companies Act creates. The case is the stronger where the shadow director has been acting throughout in furtherance of his own, rather than the company's, interests. However, on the facts of a particular case, the activities of a shadow director may go beyond the mere exertion of indirect influence."

256. Lewison J had earlier remarked at [1285] in Ultraframe:

> "In truth, it seems to me that the use of labels such as "shadow director", which is a statutory definition, may serve only to obscure the real question. The real question is not what is the proper label to attach? It is: in what circumstances will equity impose fiduciary obligations on a person with regard to property belonging to another?"

257. The reasoning in Ultraframe was considered by Newey J (as he then was) in Vivendi SA v Richards [2013] BCC 771. After a detailed discussion of the rival arguments, Newey J said at [143]:

> "In the end, my own view is that *Ultraframe* understates the extent to which shadow directors owe fiduciary duties. It seems to me that a shadow director will typically owe such duties in relation at least to the directions or instructions that he gives to the *de jure* directors. More particularly, I consider that a shadow director will normally owe the duty of good faith (or loyalty) discussed below [for the avoidance of doubt, I regard the duty of good faith as a fiduciary duty] when giving such directions or instructions. A shadow director can, I think, reasonably be expected to act in the company's interests rather than his own separate interests when giving such directions and instructions."

258. In Sukhoruchkin v Van Bekestein [2014] EWCA Civ 399, the Chancellor (Sir Terence Etherton) referred to Ultraframe and Vivendi and said at [41] that it was apparent that the law was "not entirely settled as to the circumstances in which a shadow director owes fiduciary duties".

259. I commented earlier that if a party relies upon a statutory provision which expressly refers to "a shadow director" then it will be necessary to determine whether a particular individual is a shadow director for the purposes of the statutory provision. It may be that, in due course, in the exercise of the powers conferred by section 89 of the Small Business, Enterprise and Employment Act 2015, the Secretary of State will

make regulations which define the duties of a shadow director. However, in the absence of any such regulations, when the ultimate question is whether an individual owes fiduciary duties to a company, it will not be essential and it may not even be helpful to ask whether that individual is a shadow director of the company. In other words, instead of asking three questions, first, whether an individual is a shadow director, secondly, what fiduciary duties does a typical shadow director owe to a company and, thirdly, does the individual owe the same duties as a typical shadow director, it may be preferable to ask instead whether in all the circumstances of the case the individual owed fiduciary duties, and if so what duties, to a company. I therefore agree with the comment of Lewison J in Ultraframe at [1285] that to attempt to define the duties of a typical shadow director may not be helpful.

260. In Holland Lord Collins said at [93]:

> "It seems to me that in the present context of the fiduciary duty of a director not to dispose wrongfully of the company's assets, the crucial question is whether the person assumed the duties of a director."

261. Although Lord Collins was referring to the position of an alleged *de facto* director, his comment can be applied to the case of an alleged shadow director who is alleged to owe fiduciary duties to the relevant company. In a case of an alleged shadow director, the court ought to arrive at the same answer whether the question is:

(1) did the individual assume the duties of a director (which consist of the usual fiduciary duties of a director)? or

(2) did the individual assume fiduciary duties to the company?

262. It is now well established that, outside the paradigm cases of established fiduciaries, the question whether an individual owes fiduciary duties is a fact-sensitive matter. This approach undoubtedly causes some uncertainty as to the result in a particular case but nonetheless the decided cases give guidance as to the approach to be applied. Some of the decided cases involved joint venturers and the recent decision in Farrar v Miller [2018] EWCA Civ 172 described the matter in this way (per Kitchin LJ at [75]):

> "I recognise that joint venturers may or may not have a relationship in which one of them owes fiduciary duties to the other. The question, to my mind, is whether the circumstances of their relationship justify the imposition of such duties, and in answering that question it is often helpful to consider whether, to adopt the words of Millett LJ in *Bristol and West Building Society v Mothew [1998] Ch 1* at 18, one joint venturer has undertaken to act for or on behalf of the other in a particular matter or circumstances which have given rise to a relationship of trust and confidence. It may also be helpful to ask whether one joint venturer is in a relationship with the other which has given rise to a legitimate expectation, which equity will recognise, that he will not use his position in such a way which is adverse to the interests of the other: see, for example, *Arklow Investments Ltd v Maclean [2000] 1 WLR 594* at 598. Whether

> a joint venture relationship carries obligations of a fiduciary nature is therefore highly fact-sensitive: see, for example, *Ross River Ltd and anor. v Waverley Commercial Ltd and ors. [2013] EWCA Civ 910* at [30] to [64]."

263. This passage shows that a question such as the present is fact-sensitive but it is usually helpful to ask whether the individual has expressly or impliedly (from the circumstances) undertaken or assumed a position of trust and confidence or whether there is a legitimate expectation that he will not use his position in a way adverse to the interests of the other.

264. Further, there are cases which show that even if an individual owes some fiduciary duties to another, the circumstances may affect the extent of those duties. In N Z Netherlands Society v Kuys [1973] 1 WLR 1127, Lord Wilberforce, sitting in the Privy Council, said at page 1130 B-E:

> "The present case is concerned with an officer of an incorporated, non-profit-making society. Kuys was not paid for his services but he was a trusted employee; and he was ready to agree that he had duties of trust and confidence placed in him. On the other hand the scope of his responsibility and the dividing line between that and his own personal interests were loosely defined. It appears from the evidence that he was able to run a small insurance business of his own: also it appears that he was permitted a personal interest in the group travel service which he managed for the society. A person in his position may be in a fiduciary position quoad a part of his activities and not quoad other parts: each transaction, or group of transactions, must be looked at. Their Lordships find support for this approach in the English Court of Appeal's judgments in *Tufton v Sperni* [1952] 2 T.L.R. 516, particularly in that of Jenkins L.J., and in the High Court of Australia's judgment in *Birtchnell v. Equity Trustees, Executors and Agency Co. Ltd.* (1929) 42 C.L.R. 384 . Dixon J. said, at p. 408:
>
> "The subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties … but also from the course of dealing actually pursued by the firm.
>
> This was said in the context of a partnership but the principle must be of general application."

265. In Kelly v Cooper [1993] AC 205, the Privy Council held that the fiduciary duties of an agent were qualified by terms to be implied into the contract of agency.

266. In Vivendi, Newey J referred to my decision in Ross River Ltd v Waveley Commercial Ltd [2012] EWHC 81 (Ch) which was upheld by the Court of Appeal: [2013] EWCA Civ 910. Newey J said that the decision was reversed on other grounds but that is not quite right. The Court of Appeal upheld this decision. However,

following my decision, which related to liability, I held a separate hearing and gave a later judgment on remedies ([2012] EWHC 2487 (Ch)) which was reversed by the Court of Appeal. Ross River did not involve a *de facto* director or a shadow director. The question was whether another company, Waveley Commercial Ltd, owed to Ross River fiduciary duties in relation to a joint venture. If Waveley Commercial Ltd did owe such fiduciary duties there was then a second question as to whether a director of Waveley Commercial Ltd owed fiduciary duties to Ross River. There was no question of that director being a shadow director of Ross River. In the event, I held that both Waveley Commercial Ltd and its director owed fiduciary duties to Ross River. What might be said to be interesting about the decision is that I held that the fiduciary duties in that case did not extend to the full range of duties owed by, for example, a trustee or a director. I held that both Waveley Commercial Ltd and its director owed a fiduciary duty of loyalty to Ross River and, in addition, owed a specific duty not to do anything in the handling of the joint venture revenues which favoured itself to the disadvantage of Ross River but beyond that I did not go and I did not hold that there were fiduciary duties not to allow a conflict between duty and interest and not to profit from the fiduciary position.

267. In Ross River, I discussed at [235]-[255] the principles which a court ought to apply when asked to determine whether a person owed fiduciary duties to another. I held that the relevant question was whether on the specific facts of the case, the relevant person undertook expressly or by implication a fiduciary obligation. I will not repeat that lengthy passage in this judgment. In the Court of Appeal, Lloyd LJ (with whom the other members of the court agreed) held at [59] that my conclusions were properly reasoned and sound and correct on the facts of that case.

268. As to the differences between Ultraframe and Vivendi, these may be more apparent than real at the level of general principle. In the first case, Lewison J considered that a shadow director would not in many cases be subject to fiduciary duties but that in some cases he could be. In the second case, Newey J considered that a shadow director would normally owe a duty of good faith but the use of the word "normally" suggests the possibility that he might not owe such a duty. Further, Newey J thought that a shadow director would typically owe fiduciary duties "at least" when giving directions or instructions to the *de jure* directors; that formulation does not specifically deal with a case where the shadow director is not giving such directions or instructions. However, I consider it is probably wrong to regard the fact that the individual was acting in his own interests as a pointer to that individual not owing fiduciary duties (as Lewison J suggested at [1289]); that fact may be consistent with the individual owing fiduciary duties and acting in breach of them.

269. The very real difficulties in laying down a general principle as to the fiduciary duties (if any) of a shadow director are revealed when considering the differences between a *de jure* director and a typical shadow director.

270. A *de jure* director has the status of director during the period that he holds that office. He is a director in relation to all of the activities of the company. He owes duties which impose positive obligations as well as negative obligations; I refer to the duty to promote the success of the company (section 172) and the duty to exercise skill and care (section 174). Where the director is under a positive obligation he can be liable for failing to act. The director also owes negative obligations. He has a duty to avoid a

conflict between his interests and the interests of the company (section 175). He has a duty not to accept benefits from third parties conferred by reason of his position as a director or his actions or omissions as a director (section 176).

271. It seems that a *de facto* director is in the same position as a *de jure* director. In a case where, for example, the individual is a *de facto* director because of a defect in his appointment as a *de jure* director and he acts as a director, then it seems reasonable that the *de facto* director should owe the full range of duties of a *de jure* director.

272. A shadow director is defined as "a person in accordance with whose directions or instructions the directors of the company are accustomed to act". It can be said that this definition refers to a status so that when the facts of the case come within the definition, the individual has the status of a shadow director. Indeed, there are statutory provisions which impose a duty to act on a person who has the status of a shadow director. Referring to the provisions of the Companies Act 2006, rather than the earlier legislation, there are such duties, for example, imposed by sections 68, 75, 76, 84, 272, 275, 276 and 858. However, is it necessary for the person with that status to give a direction or an instruction in relation to a decision or an action which is challenged before he can be said to be liable in equity for the consequences of that decision or that action? Can a shadow director be liable in equity for a breach of the positive obligations placed on a *de jure* director when the shadow director omits to act? As regards an alleged conflict between his interests and the interests of the company, if the shadow director abstains from giving a direction or an instruction to the company, does he avoid committing a breach of fiduciary duty? As regards the duty not to accept a benefit from a third party conferred by reason of his being a director or by reason of his doing or not doing anything as a director, if the shadow director abstains from giving a direction or an instruction to the company, does he avoid committing a breach of fiduciary duty? I remind myself that in Kuys, Lord Wilberforce said:

> "A person in his position may be in a fiduciary position quoad a part of his activities and not quoad other parts: each transaction, or group of transactions, must be looked at."

273. I referred earlier to my decision in Ross River where I held that Waveley Commercial Ltd and its director did owe fiduciary duties to Ross River but the duties which they owed were not the full fiduciary duties which would typically be owed by a trustee or a director. Accordingly, if that decision is right (and the contrary was not submitted to me), when a court is asked to determine whether a person owed fiduciary duties and the case is outside the paradigm cases where the principles are established, it is open to a court to hold that a person owed some of the usual fiduciary duties, but not all of them, or to hold that the specific fiduciary duty owed is a qualified form of the general fiduciary duty. This means that the court is not confined to an all or nothing response to the question.

274. The possibility of answering the question in a highly fact-sensitive way as described in the last paragraph might be relevant in this case. I can illustrate the point by referring to the duties as expressed in the Companies Act 2006. Section 175 imposes a duty to avoid conflicts of interest. Section 177 imposes a duty on a director to declare an interest in a proposed transaction with the company. The duties in sections 175 and 177 may apply to a shadow director: see section 170(5). Section 1157 confers on the

court a power to relieve a director from a breach of fiduciary duty where he acted honestly and reasonably and where he ought fairly to be excused. The power in section 1157 can only be used in relation to an officer of the company or an auditor. A shadow director is neither an officer or an auditor. If, in a particular case, a *de jure* or a *de facto* director committed a technical breach of sections 175 and 176 and the court thought it right to relieve him from liability, that director would not be liable. If it were held that a shadow director owed the identical duties as did a *de jure* or a *de facto* director and had committed a technical breach of them but the court could not relieve him from liability under section 1157, then the shadow director would be liable when the *de jure* or the *de facto* director would not be. That result may well be inappropriate. It is possible to avoid that result by holding that although the shadow director owes a duty to avoid conflicts of interest and ought to disclose his interest to the *de jure* directors of the company, the duty is to act honestly and reasonably in those respects so that an honest and reasonable shortcoming in these respects would not be a breach of fiduciary duty. Conversely a dishonest or an unreasonable shortcoming in these respects would be a breach of fiduciary duty.

275. It may be that it is not necessary in this case to answer definitively all of the questions raised in the above paragraphs. In their submissions, the parties focussed on what they said were the proper findings of fact in this case. The parties' submissions were very far apart on that matter. They did not address all of the matters which I have now raised. In those circumstances, I will now proceed to analyse the facts of this case and in the course of that analysis it will emerge how many of these difficult questions need to be resolved. If a question of that kind does not need to be decided in this case, I would prefer not to do so and to leave it for decision in another case where the decision will affect the outcome and where the court will have full argument on the point.

Did Mr Moore and Mr Rosser owe fiduciary duties to IAP?

276. For the reasons given when discussing the question of the fiduciary duties which might be owed by a shadow director, I indicated that I would not deal with the possible fiduciary duties of Mr Moore and Mr Rosser in general terms but I would address that question in the context of the detailed facts of the case and with regard to the allegations made as to their breaches of any such duty. I can however, make two general comments on this subject.

277. If Mr Moore or Mr Rosser gave directions or instructions to the *de jure* directors intending the directions or instructions to be acted upon and the *de jure* directors did act on them causing loss, then that could well be an appropriate case for holding Mr Moore or Mr Rosser liable for the resulting loss.

278. Further, I consider that there would be obvious difficulties in establishing that a shadow director owed a fiduciary duty and committed a breach of it and is liable for any resulting loss to the company, even though he acted honestly and reasonably, where a *de jure* director on the same set of facts would not be liable because he would be relieved from liability under section 727 of the 1985 Act or section 1157 of the 2006 Act.

The allegation of "no or no adequate consideration"

279. In their presentation of their claim, the Claimants concentrated on the agreement dated 26 November 2003 whereby IAP contracted with Leadenhall on terms that IAP was obliged to split its commission from Maesbury 50/50. I will therefore proceed in the same way by focussing on the Claimants' case in relation to that agreement.

280. The Claimants' case under this heading is made against Mrs Gifford, Mr Moore and Mr Rosser. Mrs Gifford undoubtedly owed to IAP the normal fiduciary duties of a director. I will therefore consider whether the Claimants have shown that Mrs Gifford committed a breach of duty. Following my conclusion in relation to Mrs Gifford it will then be appropriate to consider the case against Mr Moore and Mr Rosser and to consider their involvement in the relevant events and, in particular, whether the *de jure* directors of IAP acted on the directions or instructions of Mr Moore or Mr Rosser and whether they owed fiduciary duties to IAP in relation to these matters and whether they committed breaches of those duties.

281. In connection with the case against Mrs Gifford for breach of duty in this respect, it is relevant to consider separately whether the agreement between IAP and Leadenhall was a case where Leadenhall provided "no consideration" to IAP and then to consider whether it was a case where Leadenhall provided "no adequate consideration" to IAP.

282. The Claimants accept that the agreement between IAP and Leadenhall was not a sham. It follows that the Claimants accept that the agreement was a contract which was binding on both parties. The agreement imposes obligations upon Leadenhall and IAP has, in law, the benefit of those obligations. Accordingly, as a matter of legal analysis, Leadenhall plainly gave consideration to IAP under this agreement.

283. The Claimants' argument about no consideration therefore appears to be that if one carries out an assessment of the value of the consideration given by Leadenhall to IAP, one ought to conclude that the obligations which amounted to consideration as a matter of law were of no economic value to IAP. It was also submitted by the Claimants that even if the agreement imposed on Leadenhall the obligation to perform services for IAP, IAP could have arranged matters so that it could have performed the services itself and so the services actually performed by Leadenhall were of no value to IAP.

284. The difficulty with these submissions is that they are wholly incompatible with a considerable body of evidence most of which was not challenged by the Claimants at the trial.

285. Mr Rosser's witness statement contained over 30 pages of description as to what work was carried out by Leadenhall (and later Darrencrest). As to the personnel who carried out work for Leadenhall, Mr Rosser referred, first, to the management and administration services carried out by JDS but he then went on to identify the following as persons who carried out work for Leadenhall: Mr Moore, Mr Rosser himself, Mr Storey, Ms Forth, Mr Schmidt and Mr Kitto. Mr Rosser then discussed each of these individuals separately and, in the case of Mr Kitto, he distinguished between the work Mr Kitto did for ITS and the work he did for Leadenhall. Mr Kitto and Mr Schmidt also gave evidence which corroborated Mr Rosser's evidence.

286. Mr Rosser then gave detailed evidence as to the categories of work carried out by Leadenhall and he referred to the following:

(1) establishing, maintaining and progressing relationships with developers and conducting due diligence on new developments;

(2) putting in place arrangements with financial and legal service providers, rental companies and furniture suppliers to facilitate the completion of property purchases;

(3) providing assistance to developers to enable them to finish developments and tailor their product for consumers;

(4) acting as a liaison between developer and agent to ensure that developer, agent and end loan providers had all of the information that they required and to resolve issues that could only be dealt with at developer level; and

(5) ensuring that developers paid commission on time.

287. Over many pages, Mr Rosser discussed these five categories of work. None of this evidence from Mr Rosser was challenged in cross-examination. Mr Phillips submitted that none of this work came within the obligations which Leadenhall had undertaken, in its agreement with IAP, to undertake for IAP. I am unable to accept that submission. Even if it were conceivable that, on the true construction of that agreement, some of the work identified by Mr Rosser might fall outside the obligations contained in that agreement, it cannot be argued that all of the work fell outside the agreement so that Leadenhall was not doing the work which it contracted to do but was instead doing extensive work which it had not contracted to do.

288. Mr Phillips argued that I should take the view that Leadenhall was doing no work for IAP because Leadenhall had no employees whom it could ask to carry out such work. However, as Mr Rosser explained in his evidence, Leadenhall was able to draw on the services of a number of people without those persons being employed by Leadenhall. In the case of Mr Moore, he did the work which he did for Leadenhall because he was a potential beneficiary under a discretionary trust of 72.5% of the shares in Leadenhall and the trustee shareholder received substantial dividends which were passed on to Mr Moore; Mr Rosser suggested that Mr Moore might in addition be receiving a consultancy fee from Leadenhall. As regards Mr Rosser, he benefited from the payments made by Leadenhall to Sunpuddles Ltd, which payments were passed on to Mr Rosser, and the dividends paid to the trustee shareholder (who owned 20% of the shares in Leadenhall) where that trustee passed the dividends on to him. Ms Forth was in a similar position to Mr Rosser as she was paid a consultancy fee through Canberra Consulting and she also received dividends through her trustee shareholder who owned 7.5% of the shares in Leadenhall. Mr Storey was paid by Leadenhall for the work he did for Leadenhall. Mr Schmidt was paid referral commissions by Leadenhall.

289. Could IAP have performed the services itself? Even if it could have, that did not mean that outsourcing the services to another meant that the performance of the services by that other was of no benefit to IAP. But the evidence again established that IAP did not have any pre-existing ability to perform the services itself and free of any charge to itself.

290. The case for IAP being able to perform the services itself involved, I think inappropriately, identifying Mr Moore, Mr Rosser and Ms Forth with IAP. The case further involved identifying Mr Storey with IAP although his contract had been with

ITS, rather than IAP. None of Mr Moore, Mr Rosser or Ms Forth was employed by IAP. IAP did not have the benefit of existing contracts of employment with them under which they were obliged to perform the relevant services for IAP. It seemed to be suggested that if I held that Mr Moore and Mr Rosser controlled IAP, that somehow meant that they were obliged to perform services for IAP directly so that they could not arrange matters so that IAP contracted with Leadenhall and Mr Moore and Mr Rosser performed services for Leadenhall. I do not accept that suggestion. Even if Mr Moore and Mr Rosser controlled IAP it does not follow that IAP controlled Mr Moore and Mr Rosser. Whatever fiduciary duties they might have owed to IAP as shadow directors of IAP, those duties did not oblige them to provide the services to IAP which were provided by Leadenhall.

291. Of course, if IAP had wanted to, it could have invited Mr Moore, Mr Rosser and Ms Forth to perform those services. However, if IAP had done so, there is no reason to think that they would have performed those services free of any charge to IAP. That was certainly the position in November 2003 and remained the position until it suited Mr Moore and Mr Rosser, for other reasons, to re-arrange matters in 2007. Of course, each of them was a potential beneficiary under a trust which held shares in IAP and each of them, no doubt, expected to be the beneficiary of dividends paid by IAP to its shareholders. However, the whole point of creating and using Leadenhall was that some of the commission earned by IAP would be paid to Leadenhall and that would allow Leadenhall to pay dividends to its shareholders and those shareholders could be expected to pass the benefit of the dividends to Mr Moore, Mr Rosser and Ms Forth. These three individuals clearly preferred to have dividends from Leadenhall rather than dividends from IAP because of the different tax treatment of the dividends from the two different sources. It may even have been the case that in the unlikely event of Mr Moore, Mr Rosser and Ms Forth agreeing with IAP to perform services for IAP in return for payment, they would have asked for a payment which, when tax was deducted, would have been equivalent to the sums they would hope to receive as untaxed dividends from Leadenhall. That would be likely to have cost IAP more than the 50% split of commission in favour of Leadenhall.

292. For these reasons, I reject the case that IAP gave away 50% of its entitlement to commission for "no consideration". I therefore now need to consider the Claimants' case that the consideration which Leadenhall gave for its 50% share of IAP's commission was "no adequate" consideration.

293. I have referred earlier to the meeting of 6 November 2003 when IAP and Leadenhall agreed upon the 50/50 split of commission. I am able to accept that the way in which the parties negotiated the split of commission was not sophisticated and appears to have been influenced by the belief that the commission was being split between two entities owned by the same people and what was needed was a figure which could be justified as appropriate for an arm's-length transaction. However, given that Leadenhall was entitled to some share of the commission for the obligations which it undertook, I have no evidence which would allow me to say what share of the commission would have been the true market value of the services to be provided by Leadenhall or what would, or even should, have been negotiated by commercial parties acting at arm's-length.

294. The Claimants did not call any evidence as to what they said was the true value of the consideration moving from Leadenhall. Nor did they cross-examine any witness with a view to establishing that the true value of that consideration should have resulted in a split of commission more favourable to IAP than 50%. The Claimants persisted in their case that the value of the consideration from Leadenhall was nil and they did not attempt to establish an evidential base for a finding by the court that the split should have been a percentage different from 50%. At one point in the evidence, there was a reference to the stance taken in August 2007 by the accountants KPMG who were advising Direct Wonen NV, a Dutch company which was interested in buying the shares in ITS and IAP. KPMG advised its client as a potential purchaser of the shares as to the worst case scenario if HMRC were to reject the transfer price between IAP and Leadenhall and between IAP and Darrencrest. No one from KPMG was called to give evidence. The worst case scenario was put to Mr Gandy, of Jeffcote Donnison LLP, in the course of his evidence and he said that at that time he had pointed out that KPMG's calculations were a worst case scenario, rather than an opinion as to the correct position, and had furthermore been prepared without reviewing the accounting records and on the basis of a number of incorrect assumptions. Mr Gandy himself believed that the split of commission with Leadenhall and with Darrencrest was defensible as an arm's-length split.

295. On this state of the evidence, the Claimants have not established that the agreement between IAP and Leadenhall involved "no adequate" consideration from Leadenhall.

296. In these circumstances, the Claimants have not established (in relation to the agreement with Leadenhall):

(1) that Mrs Gifford did not act in a way which she considered in good faith would be most likely to promote the success of IAP for the benefit of its members;

(2) that she failed to use reasonable care, skill and diligence; or

(3) that IAP suffered any loss as a result of entering into the agreement with Leadenhall;

(4) if, and in so far as, Mr Moore and Mr Rosser caused IAP to enter into the Leadenhall agreement, that they are in any different position from Mrs Gifford, as described above.

297. The Claimants did not make a separate allegation of breach of duty against Mrs Gifford to the effect that she failed to exercise independent judgment, in particular at the meeting on 6 November 2003. Nonetheless, I have considered whether the correct finding to make is that, in particular at that meeting, Mrs Gifford simply acted on the instructions she was given by Mr Moore or Mr Rosser.

298. I am not able to find that, at the meeting on 6 November 2003, Mrs Gifford simply acted on the instructions of Mr Moore. He was not present at the meeting on 6 November 2003 but Mrs Gifford seems to have known that he wanted Leadenhall to have a 90% share of the commission. Mrs Gifford did not agree with that suggestion so it cannot be said that, in that respect, she acted on the instructions of Mr Moore. As regards Mr Rosser, while the evidence was not clear, to the extent that he asked for Leadenhall to have 90% of the commission or at any rate a percentage share greater than 50%, Mrs Gifford did not agree to that. It may be that Mr Donnison's view as to

the split of commission was more important than Mrs Gifford's view; Mr Donnison does appear to have influenced the discussion in arriving at a split which he would regard as defensible if questioned by HMRC. Mrs Gifford appears to have been influenced by that and that does appear to show that she did not act on the instructions of Mr Rosser. Further there was evidence that Mrs Gifford herself argued for a lower percentage than that requested by Mr Rosser and she deployed some evidence from IAP's experience in Spain in support of her argument. I do not reject that evidence. My overall conclusion is that it has not been established that Mrs Gifford failed to exercise independent judgment on and after 6 November 2003 in relation to the agreement with Leadenhall. In any case, even if she did in some way break her duty in this respect, the Claimants have not established that IAP suffered any loss as a result.

299. I have referred earlier to the wider allegations made by the Claimants in their pleaded case as to the purpose of the Leadenhall agreement of 26 November 2003 being illegitimate and open to challenge on other grounds. As I understood it, those allegations were not pursued in closing submissions. However, I am able to make brief comments on those matters as follows. Insofar as the Claimants allege that Mrs Gifford caused or permitted IAP to enter into the Leadenhall agreement to the detriment of IAP and for no legitimate commercial purpose and instead for various other purposes such as avoiding UK tax, my findings as set out above mean that:

(1) the Claimants have not established that the Leadenhall agreement was to the detriment of IAP;

(2) the Leadenhall agreement was for a legitimate commercial purpose;

(3) the fact that the Leadenhall agreement involved some of the commission being received offshore and not being subject to UK tax was not unlawful;

(4) it was not the purpose of the Leadenhall agreement to conceal the beneficial ownership and control of Leadenhall;

(5) the fact that the Leadenhall agreement conferred benefits on the shareholders of Leadenhall and those benefits were passed to Mr Moore and Mr Rosser does not mean that agreement was to the detriment of IAP and for no legitimate purpose.

300. Although the Claimants' submissions on this part of the case concentrated on the agreement between IAP and Leadenhall on 26 November 2003, I will next consider whether the position is any different in relation to any of the other agreements made by IAP.

301. I have earlier described the terms of the three agreements entered into on 26 March 2004. These three agreements rearranged matters between the three parties, Maesbury, IAP and Leadenhall. The rearrangement resulted in IAP and Leadenhall continuing to split the commission 50/50. In view of my earlier finding as to the consideration given to IAP by the agreement of 26 November 2003 in return for splitting the commission 50/50, the same conclusion is appropriate in relation to the combined effect of the three agreements of 26 March 2004. It has not been established that these agreements resulted in IAP receiving no or no adequate consideration from Leadenhall.

302. I have earlier described the terms of the agreement between Darrencrest and IAP on 7 October 2004. Under that agreement, Darrencrest conferred on IAP the benefit of receiving 50% of the commission payable to Darrencrest by Maesbury. This was not a case of IAP giving away its rights for no or no adequate consideration. The same reasoning applies to the agreement, to which IAP was a party, on 5 September 2005.

303. The last set of agreements were those made in August 2007 when IAP moved from being entitled to 50% of the commission paid by the developers to being entitled to 100% of the commission paid by the developers. Prima facie, therefore, there was a considerable improvement in the position of IAP and it cannot be said that it gave away its entitlement for no or no adequate consideration. One of the terms in the agreements whereby IAP became entitled to receive all of the relevant commission concerned the transitional arrangements under which Leadenhall was to be entitled to the first $4 million of commission and Darrencrest was to be entitled to the first $6.8 million of commission. The Claimants have not sought to establish that those amounts to be paid in the period of transition were not appropriate. I am not in a position on the evidence to substitute any other figures for the figures agreed between the parties.

304. The result of these conclusions is that Mrs Gifford did not cause or permit IAP to enter into an agreement for no or no adequate consideration or to divert monies to which IAP was entitled for no or adequate consideration. It follows that Mrs Gifford was not in breach of any of the duties which, as a *de jure* director, she admittedly owed to IAP.

305. As regards Mr Moore and Mr Rosser, I have held that they were shadow directors of IAP but I have not identified what, if any, fiduciary duties they owed to IAP, either generally or in relation to their involvement which led to IAP entering into the agreements in question. However, I have rejected the Claimants' case that the relevant agreements were made for no or no adequate consideration. Therefore, in so far as it is alleged that Mr Moore and Mr Rosser were in breach of whatever duties they owed by reason of their involvement in the events whereby IAP entered into these agreements because the agreements were for no or no adequate consideration, that allegation fails as against them in just the same way as it failed against Mrs Gifford.

306. Later in this judgment, I will consider whether, if I had held that Mrs Gifford, Mr Moore or Mr Rosser had been in breach of a duty to IAP in relation to the amount of the consideration agreed between IAP and Leadenhall or Darrencrest, a claim in relation to such a breach of duty would have been statute barred. Prima facie, the claim would have been statute barred because the relevant cause of action arose 6 years before the commencement of these proceedings. However, the Claimants sought to counter the limitation defence by contending that the relevant breach of duty was fraudulent. I ought to comment at this stage on the allegation that Mrs Gifford, Mr Moore or Mr Rosser committed a fraudulent breach of duty.

307. As I have held that Mrs Gifford, Mr Moore and Mr Rosser did not commit the breach of duty alleged against them, I also hold that their conduct could not be described as dishonest or fraudulent. If, contrary to my actual findings, I had held that they had committed a breach of fiduciary duty, for example, by conceding to Leadenhall and Darrencrest too much of the commission payable by developers, I would not have held that any such breach would have been dishonest or fraudulent. As to Mrs Gifford, she

had no motive to defraud IAP. In any event, as far as she was concerned, the people who were interested in the shares in IAP on the one hand and Leadenhall and Darrencrest on the other were the same people. It obviously did not occur to her that those people were defrauding themselves. As to Mr Moore and Mr Rosser, again they regarded themselves as being interested in IAP on the one hand and Leadenhall and Darrencrest on the other hand. They wished to derive benefits from all of these companies. The arrangements they entered into were designed to produce the result that the earnings of these companies would be subject to less tax. The earnings of IAP would be subject to less tax because IAP could set the payments to Leadenhall or Darrencrest against its income in order to reduce its taxable profit. The earnings of Leadenhall and Darrencrest would be received in a low, or no, tax jurisdiction. Mr Moore and Mr Rosser did not consider that they were harming themselves as the persons ultimately interested in IAP. The Claimants' pleaded case was that Mr Moore, Mr Rosser and Mr Forth were the beneficial owners of IAP, Leadenhall and Darrencrest. If that had been the case, it is difficult to see how their decisions as to how to divide up the earnings of the companies could be described as dishonest or fraudulent. Of course, by the end of the trial, it suited the Claimants to say that Mr Moore, Mr Rosser and Ms Forth were not the beneficial owners of the companies and all of the shares were owned by the trustees of discretionary trusts and the three individuals were merely potential beneficiaries under those discretionary trusts. The formal position under the discretionary trusts is not in dispute but it was clear on the evidence that Mr Moore and Mr Rosser regarded themselves (or conceivably their families) as the persons who would benefit from the shares held by their respective discretionary trusts. I add that when the various agreements were made, IAP was not insolvent nor was in the vicinity of insolvency nor was it at risk of becoming insolvent by reason of the arrangements which were made.

308. It is alleged that Mr Moore and Mr Rosser (but not Mrs Gifford) owed further fiduciary duties to IAP and it is alleged that they broke those duties. I now turn to consider those allegations.

The allegation as to obtaining a benefit from a third party by reason of being a director: the law

309. The Claimants plead that the relevant duty on Mr Moore and Mr Rosser is correctly stated in what is now section 176 of the Companies Act 2006 which imposes a duty on a director not to accept a benefit from a third party conferred by reason of his being a director or his doing, or not doing, anything as a director. For the purposes of this duty, a "third party" is a person other than IAP. The possibly relevant third party in this case could be Maesbury or Lake Austin. The stipulation that the benefit is obtained from a third party and not from the company is to distinguish this duty from the separate duty which arises where a director proposes to enter into a transaction or an arrangement with the company of which he is a director. Under the current statutory provisions, that duty is not imposed by section 176 but by section 177 and the scope of the duties and the possible steps which can be taken to avoid a breach of the duties are different. As indicated earlier, I will later in this judgment consider the separate case made against Mr Moore and Mr Rosser that they profited in a position of a conflict of interest.

310. In relation to the duty now being considered, not to accept a benefit from a third party which benefit has become available to the director by reason of his position as a

director of IAP, Mr Phillips naturally relied on the leading authority of Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134 (Note). In Regal, the plaintiff company had formed a subsidiary with a view to the subsidiary taking up a lease of two cinemas. The owner of the cinemas required the subsidiary to have a paid-up capital which, in the honest opinion of the plaintiff's board, was greater than the plaintiff could afford to subscribe. The ordinary directors then subscribed at par for part of the balance of the capital required. The remainder of the capital required was subscribed for by third parties (although in the name of the chairman of the plaintiff's board) and by the solicitor who had been acting for the plaintiff. Although the intention was to sell the two cinemas, together with a cinema owned by the plaintiff itself, in the event, the shares of the plaintiff and the subsidiary were sold at a price substantially above par. The plaintiff sued the ordinary directors, the chairman and the solicitor for an account of the profits made by them on the sale of the shares in the subsidiary. It was held that the defendants had acted honestly throughout. Nonetheless, the ordinary directors were held liable to account to the plaintiff on the basis that they had been able to obtain a benefit from a third party by reason of their position as directors of the plaintiff company. They would not have been liable if they had disclosed their proposed actions to the plaintiff company in general meeting and had been authorised to proceed. The chairman was not liable because he had subscribed for shares on behalf of third parties who owed no fiduciary duties to the plaintiff. The solicitor was not liable because, although he owed fiduciary duties as a solicitor to the plaintiff, his conduct was effectively sanctioned by the board of the plaintiff. In Regal, it was held that a director could be held to be liable to account for profits he has made even where the company itself could not have made that profit, or had bona fide decided not to try to make that profit or had suffered no loss by reason of the director making that profit.

311. The key to the decision in Regal was that, on the findings of fact in that case, the ordinary directors had made a profit by taking a benefit which was available to them by reason of their being directors of the plaintiff company.

312. Regal was followed and applied in Phipps v Boardman [1967] 2 AC 46 where, again, the essential finding of fact was that the fiduciary had made a profit from the use of information which had been acquired by him by reason of his being a fiduciary.

313. I was referred to a substantial body of authority both before and after Regal which considered this duty and other duties of a fiduciary. However, the principle relied upon by the Claimants, derived from Regal, was not in dispute. Although I have considered the other authorities which were cited and while they are helpful to me in illustrating how the principle has been applied to different sets of facts, I do not think that it is necessary to cite those authorities in order to define the principle which is to be applied. My task is to apply this principle, which is not in dispute, to the facts of this case as I find them to be.

314. In the present case, Mr Moore and Mr Rosser were not directors of IAP but I have held that they were shadow directors of IAP. I have not held whether they owed a duty to IAP not to accept a benefit from a third party conferred by reason of their position in relation to IAP or by reason of their doing, or not doing, anything in the course of having that position. In these circumstances, having decided the facts as to the position which Mr Moore and Mr Rosser held in relation to IAP, I consider that it would be

useful to consider next whether they did accept a benefit from a third party by reason of their being in that position in relation to IAP.

The allegation of obtaining a benefit from a third party by reason of being a director: the facts

315. During 2003, Mr Moore wished to set up a company in an offshore jurisdiction to operate as an international sourcing company. In particular, Mr Moore intended to use that company to source properties in the United States. Mr Moore intended that the company would provide to IAP information about the properties in question and that IAP would pass that information onto its members. Mr Moore intended that the company would be separate from IAP and if the time came when IAP was sold, Mr Moore could retain his interests in the international sourcing company.

316. In accordance with Mr Moore's intentions, he pursued a relationship with Mr Storey and through Mr Storey he developed a relationship with Mr Oxley of Maesbury. Mr Oxley was interested in working with Mr Moore and Mr Storey for the purpose of having his development properties marketed in the UK.

317. Mr Rosser was less involved with Mr Storey and Mr Oxley than Mr Moore but he too was involved in building a relationship with both Mr Storey and Mr Oxley.

318. The international sourcing company intended to be set up by Mr Moore was, in the event, Leadenhall. Leadenhall was only acquired for that purpose on 6 November 2003.

319. The commercial structure of the arrangements which were entered into with Maesbury in the autumn of 2003 was devised by Mr Moore. The tax consequences of those arrangements were the subject of advice by Mr Donnison.

320. If, in the autumn of 2003, Mr Moore had set up Leadenhall and Leadenhall had then entered into an agreement with Maesbury whereby Leadenhall had been appointed as a marketing agent for Maesbury in return for a commission of 20%, it could not be said that Mr Moore had used his position in relation to IAP to obtain that agreement for Leadenhall. The correct analysis would have been that Mr Moore had obtained that agreement for Leadenhall by developing his relationship with Mr Oxley and in doing so Mr Moore was not using his position in relation to IAP.

321. If, in the autumn of 2003, Leadenhall had entered into a marketing agreement with Maesbury as described above and then Leadenhall had offered to share its 20% commission with IAP, that would have been an attractive and favourable offer to IAP. In such a case, Leadenhall would provide a service to IAP of providing information about development properties which IAP could pass on to its members. In addition, the split of the commission would have been a further way in which the agreement would be attractive and favourable to IAP.

322. Instead of Leadenhall entering into an agreement with Maesbury for a commission of 20% and then Leadenhall agreeing to provide a service to IAP, IAP entered into a direct agreement with Maesbury under which it was to receive 20% commission and then, after Leadenhall was set up, IAP agreed with Leadenhall that Leadenhall would provide a service to IAP and would receive half of IAP's commission.

323. Mr Moore did not give much detailed thought as to which of the UK companies, ITS or IAP, should be a party to the relevant arrangements. For example, the contract to retain the services of Mr Storey was made with ITS and not IAP. ITS paid Mr Storey until Leadenhall became involved. Nonetheless, as it was IAP which had members who might be potential purchasers of development properties, it made sense for the UK company which was to be used to be IAP, rather than ITS.

324. Although it was suggested in the course of the evidence that the reason that IAP had entered into the contract with Maesbury instead of Leadenhall entering into a contract with Maesbury was that there was a delay in setting up Leadenhall and Mr Moore was keen to have a signed agreement with Maesbury so that IAP was used as the counterparty instead of Leadenhall, I am not persuaded that that was the real reason for the Maesbury contract being with IAP. I think it is more likely that Mr Moore regarded all the relevant companies, ITS, IAP and Leadenhall as being his companies. What was important to Mr Moore was that a large part of the commission paid by Maesbury should end up with Leadenhall in an offshore jurisdiction. It did not matter to Mr Moore whether the Maesbury agreement was with IAP or with Leadenhall provided an agreement between Maesbury and IAP would be followed by an agreement between IAP and Leadenhall under which Leadenhall would charge IAP for its services. This would result in the charge being a deduction against IAP's profits and the receipt by Leadenhall being offshore.

325. Before the arrangements were entered into by Maesbury, IAP and Leadenhall, it was contemplated that Mr Rosser and Ms Forth would have interests in the shares in IAP and Leadenhall. Mr Rosser took the same view as Mr Moore did as to the commission received from Maesbury being split between a UK company and an offshore company. It seems that Mr Moore wanted the offshore company to receive far more than 50% of the commission, possibly as much as 90%, but in the event the offshore company only received 50% of the commission. Mr Rosser would have liked the offshore company to have received more than 50% of the commission but on 6 November 2003 he agreed on a 50/50 split of the commission.

326. When Mr Moore allowed the opportunity he had created of entering into a commission agreement with Maesbury to be taken by IAP it was always envisaged that IAP could not take all of the commission for itself. The first reason for that was that the arrangements which had been devised had always envisaged that the commission would be split with the offshore company. Secondly, IAP did not have the staff and the contacts to do what was expected to be involved in respect of sourcing property in the US. Of course, IAP could ask Mr Moore, Mr Rosser and Ms Forth to do that work but they were not obliged to agree to do that work. They were certainly not obliged to do that work for no consideration and they were not obliged to do that work for a consideration paid by IAP as distinct from a consideration paid offshore.

327. Against that background I now need to consider the agreements where companies in which Mr Moore and Mr Rosser had interests (Leadenhall and Darrencrest) obtained benefits from a third party, namely, a developer such as Maesbury or Lake Austin. The possible fiduciary duty which I am now considering is a duty not to obtain a benefit from a third party and it is not a duty not to obtain a benefit from the company itself. However, as will be seen, the Claimants tried to rely on this possible fiduciary duty to challenge agreements between Leadenhall, or Darrencrest, and IAP. That was

misconceived. The agreements where Leadenhall and Darrencrest obtained benefits under agreements with IAP involve the potential application of a different principle as to conflict of interest or self-dealing.

328. Although there were fourteen agreements entered into which involved IAP, Leadenhall and Darrencrest in one way or another, as described at paragraph [49] above, the Claimants' pleaded case of breach of fiduciary duty refers to only seven of these agreements: see paragraph 102 of the Re-Re-Amended Particulars of Claim. The seven agreements which are referred to in the pleading are:

(1) the agreement dated 26 November 2003 between IAP and Leadenhall;

(2) the agreement dated 26 March 2004 between Leadenhall and Maesbury;

(3) the agreement dated 26 March 2004 between Leadenhall and IAP;

(4) the agreement dated 7 October 2004 between Darrencrest and IAP;

(5) the agreement dated 4 April 2005 between Lake Austin and Darrencrest;

(6) the agreement dated 1 August 2007 between IAP and Leadenhall;

(7) the agreement dated 28 August 2007 between Darrencrest, Lake Austin and IAP.

329. The first agreement which is challenged by the Claimants as involving a director taking a benefit as a result of his position as a director of IAP is the agreement between IAP and Leadenhall of 26 November 2003. However, that agreement was not made with a third party; it was made with the company (IAP) itself. Thus, I find that that agreement does not fall to be assessed by reference to the duty of a director not to take a benefit from a third party which benefit results from his position as a director. Instead that agreement falls to be assessed by reference to the different duty of a director to avoid a conflict of interest with the company or, if there is such a conflict, to disclose it to the company. I will consider that agreement of 26 November 2003, in the light of that duty, later in this judgment.

330. The next two agreements which are challenged by the Claimants by reference to the duty not to take a benefit from a third party are two agreements of 26 March 2004 (but not a third agreement of the same date). Only one of these two agreements was made by Leadenhall with a third party, Maesbury, as the other agreement was between Leadenhall and IAP. I consider that the agreement made by Leadenhall with Maesbury did not involve Mr Moore and Mr Rosser, through their position in Leadenhall, taking a benefit from a third party by reason of their position in relation to IAP. First of all, I do not find that the agreements involved Leadenhall receiving a benefit as compared with the pre-existing arrangements. Indeed, it was argued that IAP was the one who was better off by being relieved of its direct liability to Maesbury. Nonetheless, I am inclined to regard the agreements made on 26 March 2004 as being essentially neutral as between IAP and Leadenhall. Secondly, Mr Moore and Mr Rosser did not use their position in relation to IAP to receive any conceivable benefit to Leadenhall. There was very little evidence as to how the agreements of 26 March 2004 came about but, so far as the evidence went, it suggested that the initiative to re-arrange matters in that way

was taken by Mr Donnison and did not involve Mr Moore or Mr Rosser using whatever position they might have had.

331. The next agreement which is challenged by reference to the duty not to take a benefit from a third party is the agreement dated 7 October 2004 between Darrencrest and IAP. Again, this is not an agreement with a third party; this agreement does not fall to be assessed in relation to the possible duty not to take a benefit from a third party; it may have to be considered in relation to the self-dealing rule. However, I have the following comments on this agreement. Prior to that agreement, Darrencrest had entered into a marketing and commission agreement with Maesbury and by the agreement of 7 October 2004, Darrencrest split its commission with IAP. Accordingly, the agreement of 7 October 2004 was essentially for the benefit of IAP.

332. It may be that the Claimants' intention was to challenge a different agreement (also made on 7 October 2004) namely that made by Darrencrest with Maesbury, although that is not what the Claimants have pleaded. If that had been the Claimants' intention, and ignoring the lack of a pleading to that effect, I would not hold that the benefit of the agreement made by Darrencrest with Maesbury in October 2004 was a benefit obtained by Mr Moore and Mr Rosser by reason of their position in relation to IAP. Immediately before October 2004, the direct agreement with Maesbury was with Leadenhall. Mr Moore wanted to revise the arrangements so that any further marketing of properties for Maesbury would be done by Darrencrest rather than by Leadenhall. Darrencrest was to take over from Leadenhall. The Darrencrest agreement was obtained by Mr Moore and to a lesser extent possibly by Mr Rosser but not by them using their position in relation to IAP.

333. The next agreement which is challenged is the agreement between Darrencrest and Lake Austin of 4 April 2005. I take the same view of this agreement as the view I took of the agreement in October 2004 between Darrencrest and Maesbury. There is the additional consideration that in April 2005, Mr Moore and Mr Rosser had an interest in Lake Austin so that it might be said that obtaining this agreement was influenced by their position in Darrencrest and in Lake Austin. But that does not amount to them using their position in IAP.

334. The next agreement which is challenged on this basis is the agreement of 1 August 2007 between IAP and Leadenhall. This agreement was not made by Leadenhall with a third party. Under this agreement, the earlier agreement between IAP and Leadenhall of 26 March 2004 was terminated. That was because the other agreement of 26 March between Maesbury and Leadenhall was terminated. On the face of it, that was beneficial to IAP as it allowed IAP to enter into a direct agreement with Maesbury to receive commission of 20% rather than only half of that sum. The purpose was to boost IAP's receipts to make IAP more saleable. However, there was a specific agreement as to the point at which the benefit of the commission would pass to IAP and under the relevant provision Leadenhall was to receive the first $4 million of commission. The Claimants did not call any evidence to demonstrate that this agreement was beneficial to Leadenhall when the purpose of the agreements was to benefit IAP. There was no evidence on which I could make a finding that the figure of $4 million was beneficial to Leadenhall as compared with the agreements of 26 March 2004 simply continuing.

335. The last agreement which I need to consider is the agreement of 28 August 2007 between Darrencrest, Lake Austin and IAP. Essentially the same reasoning applies to that agreement as applied to the agreement of 1 August 2007 considered in the last paragraph.

336. Having examined the Claimants' case based on an alleged fiduciary duty not to accept a benefit from a third party by reason of their position in relation to IAP, I find on the facts that neither Mr Moore nor Mr Rosser used their position in connection with IAP to obtain a benefit for themselves (through Leadenhall and Darrencrest). Accordingly, the question whether Mr Moore and Mr Rosser owed a fiduciary duty to IAP not to accept a benefit from a third party by reason of their position in IAP does not arise.

337. As I have held that Mr Moore and Mr Rosser did not commit the alleged breaches of duty, there is no question of them having acted dishonestly or fraudulently. If I had held that Mr Moore and Mr Rosser had committed the alleged breaches of duty, I would still not have held that they had acted dishonestly or fraudulently. I have already discussed a similar question in relation to the allegation that they committed a breach of duty by causing IAP to enter into agreements for no or no adequate consideration. I reach a similar conclusion to the one I reached in that context and for the same reasons.

338. The next question therefore is whether agreements made by Leadenhall or Darrencrest with IAP involved a conflict of interest or a breach of the self-dealing rule, given that Mr Moore and Mr Rosser had interests in Leadenhall and Darrencrest.

Conflict of interest in transactions with IAP

339. I have already considered whether the Claimants had pleaded that Mr Moore and Mr Rosser were in breach of an alleged duty not to place themselves in a position of conflict of interest and duty. I held, with considerable hesitation, that an allegation of that kind was made. However, I also explained that the Defendants had to face at the stage of closing submissions claims that had not been opened at the outset of the trial. In addition, the Claimants did not, even in their closing submissions, properly distinguish between the duty of a director not to obtain a benefit from a third party and the duty of a director to avoid a conflict of interest and duty and did not properly address the self-dealing rule. The duty not to obtain a benefit from a third party by reason of the position of being a director of a company and the no conflict or self-dealing rule operate in different ways and are subject to different considerations. In particular, in relation to the self-dealing rule, there may be a question as to whether the position has been properly declared to the other directors of the company (as distinct from being disclosed to the general body of shareholders). I did not find the Claimants' submissions on this part of the case to be very helpful. I was given more assistance by Mr Ashworth on behalf of Mr Rosser but it was probably not clear to him even by the end of the trial what precisely was being said against Mr Rosser (and Mr Moore). Nonetheless, I must do my best to ascertain the relevant legal principles and apply them to my findings of fact.

340. The agreements which are potentially said to be relevant to this allegation are the same seven agreements which are identified in paragraph 102 of the Re-Re-Amended

Particulars of Claim. For convenience, I will list the seven agreements again in this part of the judgment. They are:

(1) the agreement dated 26 November 2003 between IAP and Leadenhall;

(2) the agreement dated 26 March 2004 between Leadenhall and Maesbury;

(3) the agreement dated 26 March 2004 between Leadenhall and IAP;

(4) the agreement dated 7 October 2004 between Darrencrest and IAP;

(5) the agreement dated 4 April 2005 between Lake Austin and Darrencrest;

(6) the agreement dated 1 August 2007 between IAP and Leadenhall;

(7) the agreement dated 28 August 2007 between Darrencrest, Lake Austin and IAP.

341. I have held that it has not been shown that IAP suffered loss by entering into these contracts. However, I am now considering whether, irrespective of the fact that IAP has suffered no loss, Mr Moore and Mr Rosser are liable to account for any profits which they may have made, directly or indirectly, from these contracts because they broke the self-dealing rule as it would have applied to a director of IAP.

342. Although paragraph 102 of the Re-Re-Amended Particulars of Claim refers to seven contracts, two of them were not made between IAP and Leadenhall or Darrencrest. I refer to the agreement of 26 March 2004 between Leadenhall and Maesbury and to the agreement of 4 April 2005 between Lake Austin and Darrencrest. The other five agreements did involve IAP and Leadenhall or Darrencrest as parties.

343. I have already described the interests which Mr Moore and Mr Rosser had in Leadenhall and Darrencrest. Putting on one side the precise position of Mr Rosser in November 2003, I will proceed on the basis that Mr Moore and Mr Rosser throughout had interests in Leadenhall and Darrencrest. In November 2003, it was clear that Mr Rosser was going to have an interest in Leadenhall although it may be that shares in Leadenhall had not by that time been allotted to the trustees of a discretionary trust under which he was a potential beneficiary. However, I will assume against Mr Rosser that his expectation of being interested in Leadenhall was sufficient to make him interested in Leadenhall on or before 26 November 2003.

344. Of course, Mr Moore and Mr Rosser were not at any time *de jure* directors of IAP. However, I have held that they were shadow directors. I have not determined whether they owed fiduciary duties to IAP and in particular I have not determined whether they owed a fiduciary duty to IAP to avoid a conflict between the interests of IAP and the interests of Mr Moore and Mr Rosser in other companies. I consider that for the purpose of determining whether Mr Moore and Mr Rosser did owe such a fiduciary duty to IAP, it would be helpful to consider what the position would be, on the facts of the present case, if they had been *de jure* directors of IAP.

345. If Mr Moore and Mr Rosser had been *de jure* directors of IAP, then they would have owed a duty to avoid a conflict between their duty to IAP and their interests in Leadenhall and Darrencrest. However, they would also have had the benefit of Article

85 of IAP's Articles of Association. Article 85 provides that a director may be a party to a transaction with the company and the director shall not be accountable to the company for any benefit which he derives from any such transaction and the transaction is not liable to be avoided on the ground of any such interest or benefit. Article 85 is expressed to be subject to the proviso that the director has disclosed to the directors the nature and extent of any material interest of his. Article 85 is also to be read as subject to the 1985 Act and section 317 of the 1985 Act imposes a duty on a director to declare to a meeting of the directors of the company the nature of his interest in any proposed contract with the company. Section 317 lays down a fairly formal procedure for the disclosure by a director of the nature of his interest in the proposed contract. So far as I can see, and I was not specifically addressed on this point, Mr Moore and Mr Rosser did not comply with the formal requirements of section 317 in this case. Of course, they would not have appreciated that they had to comply with section 317, qua director, because they were not *de jure* or de facto directors.

346. Conversely, I find that the directors of IAP were at all times aware of the nature (see section 317) and the extent (see Article 85) of the material interest of Mr Moore and Mr Rosser in the proposed contracts with IAP. The Claimants do not assert that Mrs Gifford and Lumley as the *de jure* directors of IAP were unaware of the interests of Mr Moore and Mr Rosser in Leadenhall and Darrencrest. Indeed, the Claimants say the opposite. In paragraph 104 of the Particulars of Claim, it is pleaded that Mrs Gifford and Mr Donnison knew that Mr Moore and Mr Rosser "were the beneficial owners and controllers of" Leadenhall and Darrencrest. The Claimants plead that Mrs Gifford knew this from her role as a director of IAP and as a representative of Leadenhall and Darrencrest. In addition, I have found that Mrs Gifford was aware of the intended arrangements in relation to Mr Moore and Homestar because on 24 September 2003, she was sent by email the earlier email of 22 September 2003 with the list of action points following a meeting between Mr Moore and Mr Donnison on 18 September 2003. Further, on 6 November 2003, Mrs Gifford was told that "Jim is in Leadenhall". Mr Rosser gave evidence that, at the meeting on 6 November 2003, he was acting for Leadenhall. In the case of Mr Donnison, the Claimants plead that he knew about the involvement of Mr Moore and Mr Rosser in Leadenhall and Darrencrest because he advised them on setting up those companies and taking interests in them. There is no reason why his knowledge should not be attributed to Lumley when he was acting as the representative of Lumley, a director of IAP.

347. There is a considerable amount of authority as to the attitude a court should take in a case where a director has an interest in a proposed contract with the company, where the other directors know of that interest but where the interested director has not complied with section 317 of the 1985 Act.

348. In Guinness plc v Saunders [1990] 2 AC 663 at 694E, Lord Templeman commented on the importance of compliance with section 317 when he said:

> " … section 317 shows the importance which the legislature attaches to the principle that a company should be protected against a director who has a conflict of interest and duty."

349. The object of section 317 was also explained by Lightman J in Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald [1996] Ch 274 at 283A-F in these terms:

> "The object of section 317 is to ensure that the interest of any director and of any shadow director in any actual or proposed contract shall (unless the procedure has been adopted of giving a general declaration under subsection (3)) be an item of business at a meeting of the directors. Where a director is interested in a contract, the section secures that three things happen at a directors meeting: first, all the directors should know or be reminded of the interest; second, the making of the declaration should be the occasion for a statutory pause for thought about the existence of the conflict of interest and of the duty to prefer the interests of the company to their own; third, the disclosure or reminder must be a distinct happening at the meeting which therefore must be recorded in the minutes of the meeting under section 382 and clause 86 of Table A (consider in particular section 382(3)). Failure to record the declaration (if made) exposes the company and every officer in default to a fine (see section 382(5)) but does not preclude proof that the declaration was made and that section 317 was complied with. The existence of this record operates as a necessary caution to directors and shadow directors who might otherwise think that their interest might pass unnoticed if the contract falls to be scrutinised at some later date; and it affords valuable information as to the existence of any interest and its disclosure and thereby protection for shareholders and creditors alike in case they later wish to investigate a contract. A sole director will know of his own interest, but he may not know of the interest of any shadow director; section 317 ensures that he should know. The reminder of his duty and the making of the record required by section 317 must have enhanced value and importance in case of a sole director, where there are no other directors to witness or police his actions."

350. In Neptune, the judge left over the question to a later trial as to whether the director had made the necessary declaration orally at the relevant meeting and, if not, whether it would be appropriate to relieve the director, under section 727 of the Companies Act 1985, from any resulting liability arising from a breach of the self-dealing rule. At the subsequent trial (see [1995] BCC 1000), it was held that the director had not acted bona fide in the best interests of the company and his breach of duty would not be relieved under section 717. The trial judge went on to hold that the necessary disclosure had not been made and that the failure would not be overlooked as a mere technicality even though "the requirement for a sole director to make a declaration to himself of the nature of his interest of which *ex hypothesi* he knows everything might at first blush appear to be somewhat bizarre and unnecessary": see at 1023.

351. Notwithstanding these statements, there are many judicial comments which go the other way. These were collected by Lewison J in Ultraframe (UK) Ltd v Fielding

[2005] EWHC 1638 (Ch) at [1454]-[1460] and it is convenient to set out that passage, as follows:

> "1454 … In Lee Panavision Ltd v. Lee Lighting Ltd [1992] BCLC 22, 33 Dillon LJ said:
>
> "… if the judge was entitled to make findings of non-disclosure and non-declaration of interests that he did, the position is that each of the directors has failed to disclose formally at the board meeting an interest common to all the directors and, ex hypothesi, already known to all the directors. I would hesitate to hold that such apparently technical non-declaration of an interest in breach of s 317 has the inevitable result, as to which the court has no discretion, that the second management agreement is fundamentally flawed and must be set aside if Lee Lighting chooses to ask sufficiently promptly that it be set aside."
>
> 1455 In Runciman v. Walter Runciman plc [1992] BCLC 1084, 1093 Simon Brown J said:
>
> "Whatever may have been the strict legal requirements of the position, on the particular facts of this case I am perfectly satisfied that for the plaintiff to have made a specific declaration of interest before agreement of the variations here in question would have served no conceivable purpose. It would have been mere incantation."
>
> 1456 In Re Dominion International Group (No. 2) [1996] 1 BCLC 572, 598 Knox J said:
>
> "On the other hand it has been held that where the directors are all in fact sufficiently aware of the matter that should be formally disclosed, the absence of formal disclosure may not amount to more than a technical non-declaration of an interest."
>
> 1457 In MacPherson v. European Strategic Bureau Ltd [1999] 2 BCLC 203, 218 Ferris J held that a director ought to be relieved against a failure to declare an interest in a contract where:
>
> "No amount of formal disclosure by each to the other would have increased the other's relevant knowledge."
>
> 1458 In addition, in Coleman Taymar v. Oakes HH Judge Reid QC decided that section 727 might apply so as to relieve a director of a duty to account which would otherwise have arisen because of a failure to disclose an interest. In Re Duckwari plc [1999] Ch 253, Nourse LJ said that the application of section 727 should not be restricted unless it is necessary to do so.

> 1459 I therefore reject [counsel's] submission that the court has no discretion at all under section 727 in a case where a contract is vitiated by a director's non-disclosure. The cited cases show a series of judges treating a non-disclosure as being capable of being relieved, and also show the circumstances in which relief should be given.
>
> 1460 Although the position may be different where there is only one director (Neptune (Vehicle Washing Equipment) Ltd v. Fitzgerald (No.2) [1995] BCC 1000) it seems to me that where a director fails to disclose an interest which is already known to his fellow directors, and where there is no material prospect of a formal declaration changing the decision they have in fact made, the court should be ready to treat the non-disclosure as no more than a technical breach of duty. If, therefore, the director overcomes the two hurdles of having acted honestly and reasonably, the discretion to relieve is likely to be exercised in his favour."

352. In the present case, if Mr Moore and Mr Rosser had been *de jure* directors of IAP, then it is clear that there was no material prospect that a formal declaration by them, complying with section 317, would have made the slightest difference. If they had been *de jure* directors of IAP, they could expect to be relieved from their breach of the self-dealing rule under section 727 of the 1985 Act (section 1157 of the 2006 Act). Of course, if they had known that they were *de jure* directors and they had not disclosed their interest under section 317, there might have been a question as to why they had not done so. Apart from that possible question, I do not consider that there was anything in the conduct of Mr Moore and Mr Rosser which was not honest or not reasonable. Overall, although it is to an extent hypothetical, if they had been *de jure* directors this is a case where they could expect to be relieved from the consequences of a breach of the self-dealing rule.

353. I now need to consider the actual facts of the case where Mr Moore and Mr Rosser were not *de jure* directors but were shadow directors. The Claimants submit that, as shadow directors, they do not have the benefit of Article 85 and that would seem to be correct. Further, they did not comply with the duty of disclosure on shadow directors: see section 317(8). As to that, I think it is likely that, for most of the period of their involvement, they did not consider that they were shadow directors. In particular, I find that they did not consider that possibility as early as November 2003. On the other hand, the note of 2 March 2005 suggests that Mr Rosser considered by that date that it was possible that he was a shadow director of IAP.

354. The Claimants also submit that, as shadow directors, Mr Moore and Mr Rosser are not entitled to be relieved under section 727. The Claimants submit therefore that I should hold that they owed a fiduciary duty to avoid a position of conflict, that they broke the duty, that they cannot take advantage of Article 85 and section 317 and the result is that they are liable to account for the profits made from their breach even if a *de jure* director in the same circumstances would not be liable.

355. I acknowledge the logic of the Claimants' submission but it seems to me to produce an unacceptable result whereby a shadow director is liable to account for profits when a *de jure* director would not be. I consider that the flaw in the reasoning is to assume that the duty upon a shadow director is inevitably expressed in the same terms as the duty on a *de jure* director. As explained earlier, the real questions in this case are whether the individual being sued did owe a fiduciary duty at all and, if so, what was the extent of that duty. It is relevant in this case to consider whether the individual being sued acted in good faith. In this case, despite the strenuous submissions of the Claimants to the contrary, I find that Mr Moore and Mr Rosser did act in good faith in their dealings with IAP in the relevant respects.

356. It is therefore against that background that I have to consider whether Mr Moore or Mr Rosser assumed a responsibility to IAP which required them to avoid participating in the decision of IAP to contract with Leadenhall and Darrencrest when the *de jure* directors of IAP knew of Mr Moore's and Mr Rosser's interest in Leadenhall and Darrencrest and where Mr Moore and Mr Rosser were acting in good faith in relation to their dealings with IAP. Having regard to the responsibility which the law should regard Mr Moore and Mr Rosser as having undertaken and having regard to the expectations of IAP in relation to their conduct, I hold that whatever fiduciary duty might be imposed on them, it would not place upon them a liability to account for profits when a *de jure* director in the same position would have been relieved from such a liability.

357. I have not found this part of the case entirely straightforward to decide. That may be because the arguments in relation to this part of the case were not fully developed in closing submissions. In any case, this discussion may be somewhat theoretical in view of the fact that any breach of duty which might have been committed was committed more than six years before the commencement of these proceedings. Although the Claimants have sought to meet the limitation defence by contending that the breaches of duty were dishonest and fraudulent, I am satisfied that Mr Moore and Mr Rosser were not dishonest or fraudulent.

Ratification

358. I have now held that Mr Moore and Mr Rosser did not commit any breach of fiduciary duty to IAP. Mr Rosser argued that if he had committed such a breach, his actions had been ratified by the general body of shareholders of IAP. In view of my earlier findings, I do not need to decide whether that contention is well founded but as the matter was fully argued, I will express my conclusions in relation to the defence of ratification.

359. On 2 March 2005, in connection with a possible sale of the shares in ITS/IAP, Mr Rosser and/or Mr Berman prepared a note for a meeting with Mr Dawson, who was the representative of the trustees of the Isle of Man Trusts (Jiki Trust, Mhoran Trust and Omegaville Trust) who together with Pearson Foundation were the shareholders in ITS and IAP. Mr Berman copied this note by email to Mr Rosser. I have set out the first paragraph of this note earlier in this judgment. The note contains an explanation as to why it was thought to be desirable to have the shareholders of ITS and IAP ratify a number of contracts or arrangements which ITS and IAP had made in the past. Mr Berman then acted in accordance with this note and a number of documents were

prepared which were intended to provide disclosure by Mr Rosser, Mr Moore and Ms Forth of their interests in a large number of companies, in particular those which had entered into arrangements with ITS and IAP.

360. Unfortunately, not all of the documents which were prepared and which were submitted to ITS and IAP have survived. However, a number of the more important documents are available and I heard evidence from Mr Dawson, the representative of the trustees of the Isle of Man trusts who described the process by which the shareholders of IAP, in particular, passed a resolution to ratify contracts previously made by IAP.

361. Mr Rosser prepared a disclosure statement which referred to a large number of companies including IAP, Leadenhall and Darrencrest. The statement extends to 4 ½ pages. I will attempt to extract the points which are now of particular relevance. Mr Rosser stated his interests in Leadenhall and Darrencrest. He stated that IAP had from the first discussions in relation to any proposed arrangement been made fully aware of his and his family's interests in Leadenhall and Darrencrest. He accepted that by virtue of his interests in Leadenhall and Darrencrest, he was to be regarded as having an interest in any transaction or arrangement entered into between IAP and either Leadenhall or Darrencrest. He specifically referred to the transactions whereby Leadenhall and Darrencrest appointed IAP as a marketing sub-agent. He stated that further detail of the transactions was set out in a Shareholders' Memorandum. He then stated:

> "Once it became clear that there was a demand by members of Instant Access for foreign properties I suggested to Instant Access that I develop an independent property sourcing vehicle for properties overseas. I agreed to become involved in such project on the basis that I and/or Montpelier Foundation could benefit from the additional work that would be necessary in relation to such project. As with all the projects undertaken by each of the Companies, the other Companies who were in business at that time had not been actively pursuing the relevant opportunity albeit that Instant Access was involved on a piecemeal basis. Indeed, in each case, I was the person who wished, with Jim Moore, to be involved with the opportunity. Jim and I on each occasion presented a proposal and explained the terms on which we agreed to be involved. In each case the Board of each of the Companies stated that they preferred for their Company not to pursue such opportunity on the basis that if pursued by me and/or others with whom I am interested (amongst others) through a new vehicle in accordance with my/others' proposal, that such new vehicle would agree to provide services for members of Instant Access such that there would be a greater likelihood of an increase in business by all of the Companies as a result."

362. Mr Rosser's disclosure statement disclosed his interests in Leadenhall and Darrencrest. The narrative passage discussed above sought to explain the background to the formation of an independent property sourcing company for overseas properties.

The first sentence of that narrative stated that Mr Rosser had suggested to IAP that he develop this independent company. On my findings of fact, the idea of developing the independent company was originally Mr Moore's although Mr Rosser must have collaborated with Mr Moore in that respect and it was Mr Rosser, rather than Mr Moore, who attended the meeting on 6 November 2003 when IAP considered what commercial arrangement to make with Leadenhall. The narrative is written in general terms so that it describes a large number of transactions involving a large number of companies. It does not purport to describe the detailed arrangements between IAP and Leadenhall and then between IAP and Darrencrest, certainly not in the amount of detail contained in my findings of fact. However, this disclosure statement does disclose the essential point for present purposes, which is that Mr Rosser was interested in Leadenhall and Darrencrest and that those companies entered into transactions with IAP.

363. Mr Rosser's disclosure statement referred to the Shareholders' Memorandum. This was a lengthy document, of 17 pages, from Lumley and Mrs Gifford to, or concerning, 26 companies. These companies included IAP, Leadenhall and Darrencrest. The first 14 pages of the memorandum are descriptive text relating to a large number of arrangements and the last three pages comprise a list of 21 contracts. Some of the contracts are between IAP and third parties. The list includes the agreements of 24 October 2003, 26 November 2003, two out of the three contracts of 26 March 2004, an agreement of October 2004 with Lake Austin and the contract of 7 October 2004, which contracts have been described earlier in this judgment. The memorandum makes a number of statements which are potentially relevant in this case:

(1) The arrangements were said to have been made on an arms-length basis;

(2) There is detailed description of the circumstances in which Mr Rosser became involved with ITS and IAP;

(3) ITS and IAP were kept fully informed of the businesses being developed; as to Leadenhall and Darrencrest, it was said:

> " … in relation to the sourcing of properties overseas Leadenhall Group Limited and Darrencrest Corp have access to opportunities which have been made available to members of Instant Access and … a substantial number of properties will be made available at Grand Palis[a]des, again to the members of Instant Access … "

(4) The memorandum then stated:

> "It is also worthy of note that the shareholders of each of the Companies understood that without the involvement of Bradley Rosser or James Moore, (each of whom has insisted on the approach referred to above), the opportunities that have been and are continuing to be made available to the Company would not have been made available. Each of the Shareholders who is a signatory to this Memorandum therefore wishes to avoid any prospect that any of the directors of any of the Companies or any of Bradley Rosser, James Moore, Alex Forth and Kim

> Moore could be criticised or held to account or suffer any detriment whatsoever or otherwise be criticised for pursuing a policy either with the Company or as participants in any of the other Companies. It is the individual and joint stance and intent of the signatories that (i) to the extent permitted by each signatory, the acts of the directors of each of the Companies be ratified, approved and confirmed to the greatest extent permitted by law, (ii) that the position of each of Bradley Rosser, James Moore, Alex Forth and Kim Moore be protected such that:
>
> (a) their acts in relation to the Company whose shareholders are considering the relevant resolutions, be approved, consented to and ratified;
>
> (b) their involvement with each of the other Companies be approved and consented to; and
>
> (c) any benefits derived by any of them as a result of their involvement with any of the other Companies or any interest they have with or in any of the other Companies be approved and consented to such that such interests shall be entitled to be retained in full for their own benefit without them being held liable to account in respect thereof to the Company."

(5) The memorandum then described the business of IAP, Leadenhall and Darrencrest;

(6) The memorandum then described the arrangements between IAP and Leadenhall: the Claimants criticised certain passages in the memorandum and for convenience I have highlighted these passages in the text quoted below; they were not, of course, in bold in the original:

> "**Instant Access having become established, the management team began to encounter difficulties in obtaining sufficient opportunities in the UK to offer to their members. In addition there was a demand from the membership base of Instant Access for access to a greater number of overseas opportunities. It was clear that a significant amount of work would be required to be conducted abroad if Instant Access were to be able to offer to its members a significant amount of property with security that issues could be dealt with as they arise.** A proposal was made for LeadenhalI Group Limited to take over responsibility for exploiting foreign business which until that time had not been actively pursued. Instant Access wanted to ensure insofar as possible that Leadenhall assumed responsibility for all aspects of dealing with developers. **In addition, Neil Storey who was seen as the key to the success of any overseas property sourcing made it clear that for tax**

> **purposes he wanted to be engaged by Leadenhall and not by Instant Access.** Both Brad Rosser and Jim Moore had made it clear to Instant Access that they would not have been willing to have remained involved in overseas business otherwise than in accordance with the proposed arrangement. **Leadenhall was not willing to take on the role of pursuing overseas opportunities unless the commissions/fees payable by the foreign developers were divided equally between Leadenhall and Instant Access.** Whilst negotiations were continuing but before Leadenhall was in a position to commit to the role, negotiations between Instant Access and certain overseas developers were being finalised. **It was considered by the directors of Instant Access, having received appropriate assurances from those involved with Leadenhall, that it would be best to secure the commitment from the developers at the first opportunity and thereafter to restructure matters accordingly.**"

(7) The memorandum then continued by referring to the agreement of 24 October 2003 (although the date was misstated as 2004); the Claimants criticised certain passages in this part of the memorandum and again, for convenience, I have highlighted these passages in the text quoted below; they were not, of course, in bold in the original; the memorandum stated:

> "Following the conclusion of commercial negotiations Instant Access appointed Leadenhall as its agent to deal with the foreign developers. **One should be aware that Leadenhall helped construct the arrangements between the developers and Instant Access on the understanding it would be entitled to share any commissions with Instant Access on a 50:50 basis.** However, it was soon appreciated that the most sensible way to structure the arrangement was for Leadenhall to be appointed as the agent for the developer and for Instant Access to be given the opportunity (but not the obligation) to be appointed as sub-agent. This would enable Leadenhall to source more aggressively, leaving Instant Access with the time to review each proposal in a measured manner to pick and choose which units to act on. As a consequence, Leadenhall, Instant Access and Maesbury Homes Inc entered into various agreements, copies of which are contained at tabs 7, 8 and 9 of the Bundle, to record such new arrangement. Through the offices of Leadenhall the relationship in particular with Paul Oxley has been extended beyond that which was envisaged at the time that Leadenhall assumed the role as overseas property sourcer. As a result, the overseas business has expanded much faster and to a much greater extent than would have been the case had Instant Access been required to deal with the developers on its own account."

(8) The memorandum then described the arrangements in relation to Darrencrest; this was a lengthy passage extending to over three pages; in the light of the submissions which were made, I need not set out the whole of that passage but it is relevant to refer to the following; again I have highlighted the passages criticised by the Claimants:

> "**Lake Austin Properties has agreed to appoint Darrencrest as its agent to market some or all of the off-plan opportunities in respect of such development (see the Agreement at tab 11 of the Bundle). Darrencrest in turn has appointed Instant Access as its agent to market the opportunities for which it has been appointed as agent (see the Agreement at tab 12 of the Bundle).**"
>
> and also:
>
> "Darrencrest has entered into arrangements with Instant Access on a similar basis to those existing between Instant Access and Leadenhall. However, Darrencrest, in its arrangements with Lake Austin Properties has, for the reasons described below, accepted a selling commission in respect of units at Grand Pal[i]s[a]des of 10 per cent, not 20 per cent as payable to Leadenhall for sales at Bahama Bay. From the perspective of Instant Access (beyond the fact that sales commission in Florida is generally limited to 6% of the sales price, 4% below that as negotiated by Darrencrest) it has achieved considerable benefit from the arrangement as entered into by Darrencrest."

(9) The memorandum then referred further to agreement between Lake Austin and Darrencrest and stated (again, I have highlighted this passage in bold):

> "**This arrangement was made possible by the strength/personal relationship between Brad Rosser, Neil Storey and Paul Oxley.**"

364. The Claimants submitted that the passages in the Shareholders' Memorandum which I have highlighted in bold were untrue.

365. The shareholders of IAP passed the following resolution in relation to the disclosure by Mr Rosser:

> "We being all of the shareholders entitled to attend and vote at any general meeting of the Company:
>
> 1. having been furnished with and having reviewed each of the following documents:
>
> 1.1 a memorandum addressed to the shareholders of the companies listed therein (such companies referred to herein as the "Companies") describing the ambit of business of each such company and the details of the contracts and arrangements between the Companies to include between any of such

Companies and the Company (the "Shareholders Memorandum")

1.2 a memorandum prepared by Bradley John Rosser, a senior executive of Inside Track Limited, addressed to the directors of each of the Companies as identified therein to include the Company ("B J Rosser Memorandum")

1.3 the contracts specified in the schedule to the Shareholders Memorandum copies of such have been made available to us for inspection.

WE HEREBY UNANIMOUSLY RESOLVE having at all times past consented to the business activities of each of the other companies referred to in the Shareholders Memorandum being conducted by such other companies rather than the Company and having been kept informed of any new business opportunities that were subsequently pursued by such other companies and having consented to the Company collaborating with such other companies in the progression of such opportunities and notwithstanding any defect or irregularity by virtue of any non-disclosure to the directors (if such disclosure were required to be made by any of Bradley John Rosser) of any interest that Bradley John Rosser may have had or may now have in any of the contracts or arrangements disclosed in the Shareholder Memorandum or in the B J Rosser Memorandum as appropriate (such contracts and arrangements together and individually the "Contracts") as separate ordinary resolutions:

THAT the Company do ratify, confirm and approve each of the Contracts.

THAT all acts carried out by Bradley John Rosser on behalf of the Company be and are hereby approved and ratified and to the extent relevant and to the maximum extent permitted by law, and to include without prejudice to the generality of the foregoing, notwithstanding any failure to formally or otherwise disclose his interest in any Contract.

THAT the interests of Bradley John Rosser in each Contract, where the interests of Bradley John Rosser in the contracting party or parties is disclosed in the B J Rosser Memorandum, are each hereby each (*sic*) approved and are consented to and ratified and shall be deemed always to have been approved and consented to and that any benefit obtained directly or indirectly by Bradley John Rosser resulting from any such interest hereby be approved consented to and ratified and that Bradley John Rosser shall be entitled to maintain his interest in each of the companies and in each of the Contracts as disclosed by him in

> the B J Rosser Memorandum without being personally accountable to the Company for the benefits derived therefrom.
>
> THAT the actions of each of the directors in assisting and/or acting for or on behalf of any of the Companies in pursuit of their respective objectives as set out in any of the Shareholders Memorandum and the B J Rosser Memorandum hereby be approved, consented to and ratified to the maximum extent permitted by law and that the right of each of the directors and the right of Bradley John Rosser to retain any benefit accruing to him whether directly or indirectly be and is hereby approved consented to and ratified.
>
> THAT the actions of Bradley John Rosser in assisting and/or acting for or on behalf of any of the Companies in pursuit of their respective objectives as set out in any of the Shareholders Memorandum and the B J Rosser Memorandum hereby be approved, consented to and ratified to the maximum extent permitted by law and that his right to retain any benefit accruing to him whether directly or indirectly be and is hereby approved consented to and ratified.
>
> THAT the Company consents to the directors and Bradley John Rosser continuing to act for or on behalf of each of the Companies in pursuing their respective activities as described in the Shareholders Memorandum and the B J Rosser Memorandum without any liability to the Company for breach of fiduciary or other duty or for conflict of interest with the Company to the maximum extent permitted by law.
>
> THAT to the extent that by acting as described in the Shareholders Memorandum or the B J Rosser Memorandum or as otherwise within the knowledge and with the consent of the directors there may nevertheless be a breach of fiduciary duty or conflict of interest by Bradley John Rosser that to the maximum extent permitted by law Bradley John Rosser shall not be liable to account to the Company therefor and shall be entitled to maintain any benefit deriving from so acting for his own account.
>
> That Bradley John Rosser shall not be liable to the Company for any benefit or profits received by him or by any other company or any trust or foundation or other person or entity with which he is interested or connected by virtue of such company, trust, foundation, person or other entity having an interest in any Contract."

366. Mr Dawson gave evidence that the documents referred to above were disclosed to the shareholders of IAP and that the shareholders executed the resolution set out above.

367. The above documents refer to the position of Mr Rosser. Mr Dawson gave evidence that a similar process was completed in accordance with a disclosure statement of Mr Moore.

368. If, contrary to my earlier findings, Mr Moore and Mr Rosser had committed a breach of fiduciary duty in one of the ways alleged by the Claimants, they could point to the very broad terms in which the resolution of the shareholders was expressed. However, Mr Phillips submitted that the information provided to the shareholders prior to the resolution was misleading so that Mr Moore and Mr Rosser could not rely on a resolution made in those circumstances.

369. Before considering the facts as to whether the information provided to the shareholders was misleading, I need to consider the question as to what the shareholders must know or be told about the subject matter of the request for their approval. The relevant authorities deal with what has become known as "the Duomatic principle", after the decision in Re Duomatic Ltd [1969] 2 Ch 365. The principle was described in that case by Buckley J at page 373C in these terms:

> " … 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."

In his judgment, Buckley J did not discuss what the shareholders needed to know about the subject matter of the request for their approval although he referred at page 370D to the submission of counsel that the matter had been approved "with the full knowledge and consent" of the shareholders.

370. The question as to the relevant knowledge of the shareholders was considered by Mummery LJ in Gwembe Valley Development Co Ltd v Koshy (No. 3) [2004] 1 BCLC 131. In that case, a director had committed a breach of the self-dealing rule. The court considered whether the director had disclosed the relevant interest in accordance with the articles of the company and held that he had not. The court then considered whether the director had disclosed the material facts to the shareholders so that he could say they had acquiesced in what he had done. On that point, Mummery LJ said at [65]-[66]:

> "65. The requirement of the general law is that, although disclosure does not have to be made formally to the board, a company director must make *full* disclosure to all the shareholders of all the material facts. The shareholders in the company, to which he owes the fiduciary duty not to make an unauthorised profit from his position, must approve of, or acquiesce in, his profit. Disclosure requirements are not confined to the nature of the director's interest: they extend to disclosure of its extent, including the source and scale of the profit made from his position, so as to ensure that the shareholders are "fully informed of the real state of things," as

> Lord Radcliffe said in *Gray v. New Augarita Porcupine Mines [1952] 3 DLR 1 at 14.*
>
> 66. Rimer J held that Mr Koshy, on whom the onus of proving full disclosure to shareholders lay, fell short of the requirements of the general law. He failed to show that all of the other directors and shareholders were aware of his intended personal interest in Lasco. Further, he did not disclose to them the source and scale of his intended profit, in particular the nature, existence and scale of the very substantial profit from the top-up payment in December 1986."

371. In EIC Services Ltd v Phipps [2004] 2 BCLC 589 at [122], Neuberger J summarised the Duomatic principle in these terms:

> "122 … 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."

372. In that passage, Neuberger J referred to the shareholders being "aware of the relevant facts". He then proceeded to discuss a particular point which arose in that case because the shareholders did not appreciate that they were being asked to give their approval to a proposed transaction as distinct from being informed in advance of the proposal. The judge held that the shareholders could not be held to have consented to the proposal when they did not appreciate that they were being asked to consider the matter and to give their consent. He referred with approval to an Australian case (Herman v Simon (1990) 8 ACLC 1094 at 1096) where the judge had referred to the Duomatic principle as requiring "full knowledge and consent" on the part of the shareholders. Neuberger J's actual decision was reversed by the Court of Appeal but without any consideration of the Duomatic principle: see at [2005] 1 WLR 1377.

373. In Sharma v Sharma [2014] BCC 73, the Court of Appeal held that the shareholders had with full knowledge of the material facts acquiesced in a director's proposed course of conduct which would otherwise have amounted to a breach of fiduciary duty. Jackson LJ considered what had to be shown as to the existence of knowledge on the part of the shareholders. He referred to the cases I have cited and also to Boardman v Phipps [1967] 2 AC 46. In that case, the trial judge (Wilberforce J) had considered whether the beneficiaries had consented to the fiduciary defendants taking an opportunity for their own benefit. Jackson LJ said at [43] that the decision was authority for the proposition that the beneficiary's consent does not absolve the fiduciary from liability unless the fiduciary has disclosed all material facts. At [52], Jackson LJ summarised the position as follows:

> "If the shareholders with full knowledge of the relevant facts consent to the director exploiting those opportunities for his own personal gain, then that conduct is not a breach of the fiduciary or statutory duty."

374. The passage in the judgment of Wilberforce J in Phipps v Boardman [1964] 1 WLR 993 where the judge considered whether Mr Boardman had given the beneficiaries full information as to the material facts is at pages 1012-1017. The judge held that the disclosure to the beneficiaries had not been sufficient. He considered a letter which was relied upon by Mr Boardman as giving disclosure. He held at page 1012 that although there was no intention to mislead, the disclosure was not sufficient to enable someone coming fresh to the matter to appraise it. He also held at page 1017, in relation to the disclosure at a meeting that the plaintiff was justified in thinking that he had only been told half the truth.

375. These authorities make it clear that before a director can rely upon a ratification by the shareholders in relation to something which would otherwise be a breach of fiduciary duty, the director must show that the shareholders had full knowledge of the relevant facts so that they can appraise the situation and make an informed decision as to whether to ratify what has occurred.

376. I will now seek to apply this principle to the information which was provided to the shareholders in this case. For this purpose, I will refer to the three breaches of fiduciary duty alleged against Mr Moore and Mr Rosser. These were that they had: (1) caused IAP to enter into the agreements with Leadenhall and Darrencrest for no or no adequate consideration; (2) obtained a benefit from a third party by reason of their position as shadow directors of IAP; and (3) broken the self-dealing rule.

377. If, contrary to my earlier findings, I had held that Mr Moore and Mr Rosser had been guilty of the first alleged breach of fiduciary duty, then the shareholders were not given full information as to the matter; indeed, the information given to the shareholders was that the arrangements were on an arms-length basis. I add that although the shareholders' resolution was obtained principally for the benefit of Mr Moore and Mr Rosser, it also purported to ratify the actions of Mrs Gifford as a *de jure* director. If, contrary to my earlier findings, she had been guilty of the same breach of fiduciary duty, then again she would not have been able to rely upon the shareholders' resolution as removing her liability for that breach.

378. If, contrary to my earlier findings, Mr Moore and Mr Rosser had been in breach of fiduciary duty by accepting a benefit from a third party by reason of their position as shadow directors of IAP, then their ability to rely upon the shareholders' resolution would depend upon the findings made as to how it was that they were in breach of this duty. The shareholders' memorandum was on the basis of facts which did not give rise to a breach of duty in this respect and, indeed, I have held that there was no such breach of duty. Accordingly, one would have to compare the findings of fact on which a finding of a breach of duty was made with the statements of fact in the shareholders' memorandum. I do not consider that it would be a useful exercise to construct some hypothetical findings of fact in order to compare them with the facts stated in the shareholders' memorandum. I can comment, however, that the way in which matters are described in the memorandum is not the same in all respects as my actual findings

of fact. The principal example of this is that the memorandum proceeds on the basis that Leadenhall was involved in a relevant way in the period before IAP entered into the contract with Maesbury on 24 October 2003 whereas that was not the case. However, there is considerable force in the argument that the memorandum was not in substance misleading because "the people behind Leadenhall" principally Mr Moore and Mr Rosser were acting in their own interests and not on behalf of IAP prior to 24 October 2003.

379. I can make more useful comments as to what the effect of the shareholders' resolution would be if I found that Mr Moore and Mr Rosser were in breach of the self-dealing rule. In such a case, I would hold that the resolution did ratify the contracts made by IAP with Leadenhall and Darrencrest, the companies in which Mr Moore and Mr Rosser had an interest potentially in conflict with their duties to IAP. The shareholders were given full information as to the nature and extent of the interests of Mr Moore and Mr Rosser in Leadenhall and Darrencrest. Indeed, I did not understand the Claimants to argue otherwise. The Claimants criticised the passages I have highlighted in the shareholders' memorandum but those passages did not relate to the nature and extent of the interests of Mr Moore and Mr Rosser in Leadenhall and Darrencrest. The passages related to the circumstances in which the opportunity to earn commission was taken by Leadenhall and Darrencrest. In those respects, although my findings of fact are not in the same terms as the statements in the memorandum and although the memorandum is not accurate as to the involvement of Leadenhall before 24 October 2003, I would hold that the shareholders had been given full information as to the relevant facts as to the conflict of interest of Mr Moore and Mr Rosser and had not been misled in a relevant respect. If I had held that Mr Moore and Mr Rosser had been in breach of the self-dealing rule, I would have held that the shareholders' resolution ratified IAP's contracts with Leadenhall and Darrencrest and exempted Mr Moore and Mr Rosser from any liability for any breach of the self-dealing rule.

380. The shareholders' resolution was made in around March 2005 and the Claimants do allege breach of fiduciary duty in relation to contracts made by IAP with Leadenhall and Darrencrest after that date. However, the resolution recorded the shareholders' consent to the directors of IAP and Mr Rosser continuing to act on behalf of the various companies in pursuing their respective activities as described in the shareholders' memorandum.

Negligence

381. The second set of claims is brought against JDLLP, Mr Donnison, Mishcon de Reya and Mr Berman, I will deal with the claims against JDLLP and Mr Donnison first and then deal with the claims against Mishcon de Reya and Mr Berman.

382. The Claimants have pleaded that IAP retained JDLLP and Mr Donnison to act as its advisers in certain respects. JDLLP says that it was not retained by IAP to provide tax planning advice but that, instead, IAP retained a different entity, JDCL to provide tax planning advice. JDLLP accepts that it was retained at some point by IAP to act as IAP's corporation tax compliance agent and advisor and that it duly did so. JDLLP say that the matters complained of by the Claimants in these proceedings all relate to tax planning advice given by JDCL and cannot be asserted to be a breach of duty by JDLLP. JDCL has not been made a Defendant to these proceedings. Mr Donnison

agrees with JDLLP that it was JDCL and not JDLLP which was retained by IAP to provide tax advice. Mr Donnison was a member of JDLLP and a director of JDCL. He says that he did not assume any personal responsibility or duty to IAP.

383. In the remainder of this discussion of the second set of claims, I will assume in the first instance, in the Claimants' favour, that it was JDLLP which was retained by IAP to advise it and that Mr Donnison did owe a duty of care personally to IAP in relation to the advice which he gave.

384. The Claimants further pleaded that JDLLP and Mr Donnison owed to IAP fiduciary duties and a duty of skill and care. The fiduciary duties which were asserted were the duty to act in good faith and in the best interests of IAP. The Claimants then pleaded, in paragraph 109 of the Re-Re-Amended Particulars of Claim, that JDLLP and Mr Donnison committed the following breaches of their duties to IAP:

> "109.1. Causing or permitting the diversion of commission revenue to which IAP was entitled to LH and DC through the agreements set out above;
>
> 109.2. Advising IAP to enter into the arrangements by which the commission revenue was diverted;
>
> 109.3. Causing or permitting IAP to enter into the agreements with LH and DC, which served no valid commercial purpose;
>
> 109.4. Causing or permitting IAP to enter into the arrangements with LH and DC, for the purpose of dishonest tax evasion;
>
> 109.5. Failing to self-assess transfer pricing by which the tax charge of IAP for was understated or to advise IAP that it was required to do so;
>
> 109.6. Creating false documents, as set out in Section P above, by which the ownership and control of LH and DC was concealed and the commercial reasons for the agreements was purportedly justified;
>
> 109.7. Representing to Deloitte and HMRC that there was no common ownership and control of IAP, LH and DC, as set out in Sections Q and R above;
>
> 109.8. Failing to advise IAP (or to insist as a condition for continuing to act) that it should cease the arrangements with LH and DC and the diversion of revenue from IAP to LH and DC."

385. In paragraph 110 of their pleading, the Claimants alleged that these breaches of duty by JDLLP and Mr Donnison were fraudulent. In paragraph 111 of their pleading, the Claimants alleged that Mr Donnison and, by him, JDLLP:

> " … acted negligently in advising on and causing IAP to enter into the arrangements which he knew (or in the alternative should have known) infringed the UK taxation legislation as to transfer pricing."

386. In their opening submissions, the Claimants contended that JDLLP and Mr Donnison had acted dishonestly throughout. The Claimants' lengthy written opening submissions do not appear to deal with a separate allegation of negligence on the part of JDLLP and Mr Donnison.

387. In their closing submissions, the Claimants summarised the second set of claims against JDLLP and Mr Donnison in this way:

> "396. The claims for breach of duty against the advisors can be put very simply:
>
> (1) Mr Berman and Mr Donnison knew by the time of the 6 November 2003 meeting that IAP had secured agreements with developers;
>
> (2) Mr Berman and Mr Donnison knew that the individuals behind the shareholders of IAP, Leadenhall and Darrencrest were Mr Moore, Mr Rosser and Ms Forth and they stood to personally profit from the diversion of commission income to the offshore companies;
>
> (3) Mr Berman and Mr Donnison knew that the purpose of the agreements with Leadenhall and Darrencrest was to achieve a tax advantage and to personally profit Mr Moore, Mr Rosser and Ms Forth. The agreements were not on commercial terms. There was no assessment of the commercial value provided by Leadenhall and Darrencrest for the commission income they received."

388. It is clear that the Claimants have moved their position significantly over the course of the trial in relation to the second set of claims which they wish to make against JDLLP and Mr Donnison. As originally pleaded, the case being advanced was one of fraud. The only specific act of alleged negligence was pleaded in paragraph 111 of the Re-Re-Amended Particulars of Claim and this allegation was not repeated in the summary of the Claimants' case in their closing submissions. Counsel for JDLLP and Mr Donnison submitted that by the end of the trial, there was no surviving allegation of negligence against those parties which had been pleaded by the Claimants. As against that, the matters pleaded in paragraph 109 of the pleading were pleaded as a breach of duty by JDLLP and Mr Donnison and it can be said that some of the matters alleged in paragraph 396(3) of the Claimants' closing submissions were encompassed somewhere within paragraph 109 of the pleading.

389. By the end of the trial, it is only the allegations in paragraph 396 of the Claimants' closing which are pursued and with which I need to deal. What is said in paragraph 396(1) and (2) is not in dispute apart from the possibility of a disagreement about the use of the term "diversion", in so far as that suggests something inappropriate.

Similarly, the first sentence of paragraph 396(3) does not appear to be in dispute. Accordingly, what matters for present purposes are the second and third sentences of paragraph 396(3).

390. In the second sentence of paragraph 396(3), it is alleged that "the agreements were not on commercial terms". I have earlier held that the Claimants have failed to make good that contention. The third sentence of paragraph 396(3) alleges that: "[t]here was no assessment of the commercial value provided by Leadenhall and Darrencrest". What is surprising is that the Claimants' closing submissions do not go on to assert that this alleged fact constituted negligence on the part of JDLLP or Mr Donnison. If it is implicit, although not expressly stated, in paragraph 396(3), that JDLLP and Mr Donnison owed a duty to IAP to assess the commercial value of the consideration provided or, possibly, to advise IAP that it needed to assess the commercial value of that consideration, that is not a matter which is pleaded against JDLLP or Mr Donnison in paragraphs 109 or 111 of the pleading.

391. In any case, I do not consider that JDLLP and Mr Donnison did owe any duty to IAP to assess the commercial value of the consideration provided by Leadenhall and Darrencrest. Neither JDLLP nor Mr Donnison was retained to advise IAP on a commercial matter such as this and IAP did not expect them to give that advice. As to whether JDLLP or Mr Donnison ought to have advised IAP to consider for itself the commercial value of the consideration, Mr Donnison did advise IAP that the split of commission should appear to be at arm's-length so that it could be justified to HMRC if the need arose and he also favoured a 50/50 split as something that could potentially be justified in that way. I do not consider that there was any negligence in relation to that advice. But in any event, there is no pleaded allegation of negligence of that kind.

392. In the light of these conclusions, it is not necessary to consider whether the entity retained by IAP to give it tax planning advice was JDLLP (as the Claimants alleged) or JDCL (as JDLLP and Mr Donnison alleged). Nor is it necessary to consider whether the duty of care owed by the adviser to IAP was a duty owed by JDLLP or JDCL alone or whether Mr Donnison also owed a personal duty of care to IAP.

393. I now turn to consider the second set of claims against Mishcon de Reya and Mr Berman. The case against both of these Defendants is put in the same terms and for convenience I will discuss only the case against Mr Berman personally. The Claimants pleaded that Mr Berman was retained by IAP to act for it and to advise it in certain respects. It was pleaded that Mr Berman owed to IAP the fiduciary duties to act in good faith and in the best interests of IAP and it was further pleaded that he owed to IAP a duty of skill and care.

394. It was then pleaded that Mr Berman had a personal profit sharing deal with Mr Rosser and that he had failed to disclose that to IAP. It was pleaded that this arrangement meant that his personal interests conflicted with his duty to IAP. However, the Claimants did not appear to claim any specific relief against Mr Berman by reason of there being an alleged conflict of interest and an alleged failure to disclose it. Instead, the Claimants appeared to rely upon this arrangement as showing that Mr Berman had an incentive to act inappropriately as regards IAP.

395. In paragraph 124 of the Re-Re-Amended Particulars of Claim, the Claimants pleaded that Mr Berman had committed the following breaches of his duties to IAP:

> "124.1 Advising upon and drafting the agreements by which commission revenue, to which he knew IAP was entitled, was diverted to LH and DC;
>
> 124.2. Advising upon and drafting the agreements with the knowledge that they were intended to enable IAP to dishonesty (*sic*) evade tax;
>
> 124.3. By advising upon and drafting the agreements and diverting revenue to LH and DC, causing or permitting an unlawful distribution to IAP's beneficial owners;
>
> 124.4. Drafting or making the representations to Deloitte and HMRC (referred to above) in order to conceal the breach of the transfer pricing provisions of the UK taxation legislation;
>
> 124.5. Failing to advise IAP (or to insist as a condition for continuing to act) that it should cease the arrangements with LH and DC and the diversion of revenue from lAP to LH and DC."

396. In paragraphs 125 and 126 of the pleading, the Claimants alleged that these breaches were fraudulent, alternatively, negligent.

397. In their closing submissions, the Claimants summarised their case against Mr Berman in the same terms as they summarised their case against Mr Donnison (and JDLLP). Many of the comments which I have already made about that summary and how it departed from the pleaded case against Mr Donnison (and JDLLP) apply also to the way the case is now put against Mr Berman. Insofar as the Claimants wish to allege that Mr Berman was in some way negligent by reason of the fact that the relevant agreements were not on commercial terms, the Claimants have failed to prove that the agreements were not on commercial terms. Insofar as the Claimants wish to allege that Mr Berman was negligent because he did not himself assess, or advise IAP to assess, the commercial value of the consideration given by Leadenhall and Darrencrest, I do not consider that Mr Berman was obliged to assess the commercial value of the consideration or to give advice to IAP in relation to its commercial value. In any case, it is not pleaded that Mr Berman was negligent in such a way.

398. In their closing submissions, the Claimants contended that Mr Berman knew all of the constituent ingredients of the breaches of fiduciary duties which were, the Claimants allege, committed by "the directors" (a term which I take to include *de facto* or shadow directors) but did not advise IAP against entering into agreements in circumstances where the directors were acting in breach of fiduciary duty. The short answer to this contention (whether or not it has been pleaded) is that Mrs Gifford as a *de jure* director and Mr Moore and Mr Rosser as shadow directors did not commit a breach of fiduciary duty.

Dishonest assistance of a breach of fiduciary duty

399. The third set of claims made by the Claimants is that JDLLP, Mr Donnison, Mishcon de Reya and Mr Berman dishonestly assisted breaches of fiduciary duty committed by Mrs Gifford as a *de jure* director and by Mr Moore and Mr Rosser as *de facto* or shadow directors.

400. The short answer to this set of claims is that Mrs Gifford, Mr Moore and Mr Rosser did not commit breaches of fiduciary duty owed to IAP.

401. In view of the seriousness of the allegations made against Mr Donnison and Mr Berman, I wish to record that even if I had held that they had somehow or other assisted breaches of fiduciary duties, I would not have found them to have been dishonest.

Conspiracy to injure by unlawful means

402. The fourth set of claims made by the Claimants is that all of the Defendants, that is, Mrs Gifford, Mr Moore, Mr Rosser, Mr Donnison (and JDLLP) and Mr Berman (and Mishcon de Reya) entered into a combination or understanding with each other with an intention to injure or cause financial loss to IAP by the use of unlawful means and, in consequence, IAP suffered loss and damage.

403. The allegedly unlawful means relied upon by the Claimants are breaches of fiduciary duty by Mrs Gifford, Mr Moore and Mr Rosser. The short answers to this set of claims are that Mrs Gifford, Mr Moore and Mr Rosser did not commit breaches of fiduciary duty owed to IAP and IAP did not suffer any loss or damage. Further, there was no relevant intention to injure.

Section 213 of the Insolvency Act 1986

404. In the fifth set of claims, the Claimants allege that all of the Defendants participated in the carrying on of the business of IAP with the intent to defraud creditors of IAP and/or for a fraudulent purpose, as described in section 213(1) of the Insolvency Act 1986. In such a case, the court has the power, pursuant to section 213(2) of that Act, to declare that any person who was knowingly a party to the carrying on of the business in that manner is to be liable to make such contribution to the company's assets as the court thinks proper. The Claimants accept that in order for a defendant to be liable under this section, the defendant must participate in the carrying on of the business with the knowledge that the transactions in which he participates are intended to defraud creditors or are in some other way fraudulent.

405. The Claimants' pleaded case in relation to the alleged fraudulent trading is as follows:

> "131. The business of IAP was carried on with intent to defraud creditors of the company and for a fraudulent purpose in that:
>
> 131.1. HMRC was defrauded by reason of the arrangements between IAP, LH, DC and Lake Austin in that revenue, to which IAP was entitled, was diverted to LH and DC for the purpose of dishonest evasion of tax;

> 131.2. The true purpose of the arrangements (the dishonest evasion of tax) was concealed by the Defendants as set out above in Sections P, Q and R.
>
> 132. The Defendants caused IAP to be operated with intent to defraud creditors and for a fraudulent purpose by acting as set out above in paragraphs 102, 103, 109 and 124."

406. Paragraph 102 of the pleading set out the allegations that Mrs Gifford, Mr Moore and Mr Rosser had acted in breach of fiduciary duties owed to IAP. I have discussed those allegations of breach of fiduciary duty earlier in this judgment and concluded that the Claimants have not established the alleged breaches.

407. Paragraph 103 of the pleading alleged that Mrs Gifford, Mr Moore and Mr Rosser committed further breaches of fiduciary duty by attempting to conceal the true nature of the various agreements entered into by IAP with Leadenhall, Darrencrest and others. This paragraph cross-refers to the section of the pleading which identifies a large number of documents which are alleged to have been fabricated or to have contained false statements. These documents fell into the following categories:

(1) fabricated documents which purported to be from Leadenhall to IAP at a time when Leadenhall either did not exist or was not involved with IAP;

(2) notes of meetings or minutes of IAP which were fabricated or contained false statements;

(3) the Shareholders' Memorandum prepared in order to be disclosed to the shareholders in IAP to induce them to ratify the earlier actions of the shadow directors;

(4) backdating of correspondence involving IAP, Darrencrest and Lake Austin;

(5) statements made to Deloittes in connection with the proposed sale of the businesses of IAP and ITS;

(6) statements made to HMRC as to the basis of the split of commission between IAP and Leadenhall.

408. Paragraphs 109 and 124 of the pleading are quoted earlier in this judgment.

409. In their closing submissions, the Claimants dealt very briefly with the fraudulent trading claim. At paragraph 436 of their written closing submissions, they stated:

> "The fraudulent trading claim is based upon the same facts as the Part 7 Claims, and in particular the breaches of fiduciary duty by the directors and the assistance of the advisors. The fraudulent trading claim is brought because it is subject to a different limitation period."

410. "The Part 7 Claims" which are referred to in this paragraph of the closing submissions are the first, second, third and fourth set of claims referred to earlier in this judgment. I have now considered all of those claims and have held that the Defendants were not in

breach of fiduciary duty, did not dishonestly assist a breach of fiduciary duty, did not conspire to commit breaches of fiduciary duty and were not negligent. In those circumstances, the Claimants do not seek to say that the facts which I have found nonetheless amount to the business of IAP being carried on with the intent to defraud creditors or for a fraudulent purpose.

411. The fraudulent trading claim, as pleaded, though not as advanced in closing submissions, did rely upon the fact that persons connected with IAP fabricated documents and the further alleged fact that documents containing false statements were created and provided to others. Although the Claimants did not in the end rely on these matters for the purpose of their case as to fraudulent trading, I do wish to comment on that allegation.

412. It is fairly clear that Mrs Gifford participated in the fabrication and back-dating of documents which purported to be documents passing between IAP and Leadenhall. The purpose of creating these documents appeared to be to support the case which IAP wished to put forward, possibly to Deloittes, or possibly to HMRC, as to how the initial arrangements between IAP and Leadenhall came to be made. So far as I am aware, these documents were not shown to Deloittes and it is clear that they were not shown to HMRC. These documents had no influence on the actions of Deloittes or HMRC. Neither HMRC nor any creditor of IAP was adversely affected in any way which was attributable to the existence of these documents. The Claimants do not say that the creation of these documents gave the Claimants or any third party any cause of action against any of the Defendants.

413. As regards the explanations given to Deloittes as to the relationship and the transactions between IAP and Leadenhall and between IAP and Darrencrest, which explanations are said to have contained false statements, Deloittes was not persuaded that it had been told the whole story in those respects and ultimately withdrew from its involvement in the proposed sale process of the businesses of IAP and ITS. As regards the explanations given to HMRC, which again are said to contain false statements, HMRC do not appear to have acted on those explanations and, in particular, were not persuaded by any such statements to give up any claim which they might have had against IAP.

414. I find that it is not necessary to examine each and every document relied upon by the Claimants, which is said to be fabricated or to contain a false statement, before reaching the conclusion that no creditor was defrauded and no fraud was committed. I further find that the creation of these documents did not result in loss to any third party nor did it lead to a third party (such as HMRC) having a claim against IAP which it did not already have nor did it lead to the misapplication or misappropriation of the assets of IAP.

415. The relevant legal principles as to the application of section 213 of the Insolvency Act 1986 are not in dispute. They have been discussed in a number of cases to which I was referred. For present purposes I can take those principles from the decision of the Court of Appeal in Morphitis v Bernasconi [2003] Ch 552 at [43], [47], [53]-[55]. Applying those principles to my findings of fact, I conclude that:

(1) the business of IAP was not carried on with the intent to defraud creditors or for any fraudulent purpose;

(2) the creation of false documents and the allegedly false statements made in documents did not cause loss to IAP or to any third party;

(3) there is no basis for a declaration that any of the Defendants is liable to make a contribution to the assets of IAP.

Limitation

416. Because I have held that the Claimants have not established any of their claims against any Defendant it is not necessary to consider the question of limitation. However, I do wish to make some brief comments on that question.

417. It was always obvious that the Claimants faced grave difficulties in relation to limitation. The claims which they wished to advance in tort or in contract or for breach of fiduciary duty by a director or a shadow director were prima facie subject to a six-year limitation period and the Claimants' claims were not brought within that period. The claims in tort and contract were governed by sections 2 and 5 respectively of the Limitation Act 1980. The claims for breach of fiduciary duty by a director or a shadow director were governed by section 21(3) of the 1980 Act: see First Subsea Ltd v Balltec Ltd [2018] Ch 25 and Burnden Holdings (UK) Ltd v Fielding [2018] 2 WLR 885. The Claimants sought to avoid the prima facie conclusion that their claims were statute barred in a number of ways. First, they relied on section 213 of the Insolvency Act 1986 where the relevant limitation period began when IAP went in to liquidation on 21 December 2008; the claim under section 213 was brought in time (just) on 18 December 2014. Further, the Claimants sought to rely on section 21(1)(a) and 21(1)(b) and 32 of the Limitation Act 1980.

418. The only claim where the Claimants might be said to have come anywhere near establishing liability on the part of the shadow directors, Mr Moore and Mr Rosser, related to the allegation that they had not formally disclosed their interests in Leadenhall and Darrencrest when those companies entered into contracts with IAP. That would have been a very technical breach of fiduciary duty in circumstances where the *de jure* directors of IAP knew of those interests. It may be helpful to consider the question of limitation on the assumption that the Claimants had, contrary to my actual conclusion, succeeded in establishing a breach of fiduciary duty of that kind. In relation to that assumed breach of fiduciary duty, the limitation position would have been as follows:

(1) the breach would not have been a fraudulent breach of trust within section 21(1)(a) of the 1980 Act;

(2) the resulting claim to an account would not have been a claim to recover trust property or the proceeds of trust property within section 21(1)(b) of the 1980 Act: see First Subsea Ltd v Balltec Ltd at [59];

(3) the action would not have been an action based on fraud within section 32(1)(a) of the 1980 Act; and

(4) no facts relevant to the Claimants' right of action had been deliberately concealed from the Claimants, in circumstances where the *de jure* directors of the Claimants knew of the interests of Mr Moore and Mr Rosser so that the claim would not have been within section 32(1)(b) of the 1980 Act;

(5) accordingly, the claim would have been statute barred.

The overall result

419. The result of my findings is that the Claimants have not made out any of the claims which they have brought against any Defendant. The claims will therefore be dismissed.