Neutral Citation Number: [2023] EWCA Civ 167

Case No: CA-2021-003244

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
David Holland KC (sitting as a Deputy Judge of the Chancery Division)
[2021] EWHC 2550 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/02/2023

Before :

LADY JUSTICE MACUR
LADY JUSTICE ASPLIN
and
SIR LAUNCELOT HENDERSON

- -

Between :

KENNETH DAVIES	**Claimant/ Appellant**
- and -	
(1) STEPHEN FORD **(2) RICHARD MONKS** **(3) GREENBOX RECYCLING KENT LIMITED**	**Defendants/ Respondents**

- -
- -

Ben Shaw and **Chantelle Staynings** (instructed by **Dentons UK and Middle East LLP**) for the **Appellant**
The First Defendant did not appear and was not represented
Alexander Cook and **Daniel Kessler** (instructed by **Cripps LLP**) for the **Second and Third Respondents**

Hearing dates: 13 – 15 December 2022

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Approved Judgment

This judgment was handed down remotely at 11.00 a.m. on 17 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Launcelot Henderson:

Introduction and Background

1. This appeal and cross-appeal are from various aspects of the order made by Mr David Holland KC, sitting as a deputy judge of the High Court in the Business and Property Courts of England and Wales, on 17 November 2021 ("the Quantum Order"), after the trial by him of all issues relating to quantum in a split trial over some nine days in April 2021 ("the Quantum Trial"). Mr Holland, to whom I will generally refer as "the Judge", handed down his judgment ("the Quantum Judgment") on 22 September 2021: see [2021] EWHC 2550 (Ch). A further hearing to deal with consequential matters took place on 17 November 2021, when the Quantum Order was made.

2. The earlier trial relating to liability ("the Liability Trial") was heard by Mr Adam Johnson KC (now Adam Johnson J, "the Liability Judge"), also sitting as a deputy High Court judge, between 11 and 18 November 2019. He handed down his lengthy and comprehensive judgment, running to 414 paragraphs and some 90 pages, on 24 March 2020 ("the Liability Judgment"): see [2020] EWHC 686 (Ch). The relief consequential on the Liability Judgment was contained in an order of the same date ("the Liability Order").

3. The substituted claimant in the litigation (and the appellant in this court) is Mr Kenneth Davies ("Mr Davies"). Mr Davies is a businessman, who (in the words of the Liability Judge at [13]), has "a somewhat chequered history". On 15 September 2010, he gave undertakings in disqualification proceedings brought against him under the Company Directors Disqualification Act 1986 ("CDDA 1986"), on the grounds of his alleged unfitness to act as a company director. The undertakings were given, and accepted by the Secretary of State, for the period of 11 years from 8 October 2010, and thus fall within the period of 10 to 15 years' disqualification normally reserved for the most serious cases. The proceedings had resulted from the collapse and liquidation of a company called Ashford Recycling Centre Limited ("ARCL"). The misconduct of which Mr Davies accepted he was guilty included causing ARCL to trade while insolvent, and failure to maintain or preserve adequate accounting records: see the Liability Judgment at [90]. At around the same time, Mr Davies left England and went to live in Dubai.

4. The present case concerns a different venture in the skip hire and waste recycling business, which Mr Davies intended to carry on through a company which he incorporated on 1 March 2010 called Greenbox Recycling Limited ("GBR"). Mr Davies' position in the Liability Trial was that he intended GBR to take over an existing business of that nature ("the Business"), which operated from premises near Ashford in Kent ("the Ashford Site") and was run at the time through a company called Skip It (Kent) Limited ("SIK"): see the Liability Judgment at [1].

5. The Liability Judge was unable to make any precise findings about the structure and history of the Business. As he recorded, at [25]:

> "Precisely how [*the Business*] was structured historically … remains obscure despite extensive cross-examination on the topic. This reflects a theme running through Mr Davies' case, which is that his various business operations were run with a

> high degree of informality – indeed, one might say, with a complete disregard for any necessary formality – all of which makes it difficult to identify with any real clarity what the state of *the Business* was at any given point in time."

Despite these difficulties, however, the Liability Judge considered that he was "entitled to assume that something corresponding to *the Business* was being conducted by SIK from the Ashford Site from late 2007 or early 2008 onwards": see [26].

6. In very broad terms, Mr Davies' case in the Liability Trial was that, after he had gone to live abroad, the Business, which he had intended to be transferred to and operated by GBR, was dishonestly diverted, by the two original directors of GBR, to another company which they had incorporated on 7 January 2011 called Greenbox Recycling (Kent) Limited ("GBRK"). The directors of GBR who formed GBRK were Mr Stephen Ford ("Mr Ford") and Mr Richard Monks ("Mr Monks"). They are respectively the first and second defendants in the present proceedings, which (as I shall explain) were eventually begun by a claim form issued by the liquidators of GBR on 22 May 2017. The third defendant is GBRK.

7. Mr Ford had been appointed a director of GBR on 28 September 2010, and Mr Monks on 30 November 2010. By late November 2010, they were each 10% shareholders in GBR, with Mr Davies holding the remaining 80% of the shares: see the Liability Judgment at [2]. According to Mr Davies (*ibid*), this structure:

> "reflected his intention to entrust Mr Ford and Mr Monks with the growth and development of the waste management business at the Ashford Site, while he stepped back from any day-to-day involvement because of various personal difficulties which had affected him during 2010, and moved abroad."

8. As to GBRK, Mr Ford and Mr Monks were the initial shareholders and directors on incorporation, but Mr Ford resigned as a director after a few days on 15 January 2011, and he later sold his shares to Mr Monks in 2013: see [3]. Presumably for that reason, Mr Ford played no active part in the proceedings after they were served on him, and he failed to file any acknowledgment of service. This led in due course to Mr Davies issuing an application for default judgment against Mr Ford, which was adjourned to be dealt with at the Liability Trial.

9. On the first day of the trial, the Liability Judge refused an application by Mr Ford, appearing in person, for permission to file a defence and participate belatedly in the proceedings: see the Liability Judgment at [407] to [411]. It was then agreed to defer the question of what relief should be granted against Mr Ford until the conclusion of the Liability Trial, when (in the light of the Liability Judge's findings against Mr Monks) a default judgment was entered against Mr Ford for equitable compensation: see [412] to [413], and paragraph 2 of the Liability Order.

10. The position of Mr Monks in the Liability Trial was summarised by the Liability Judge, at [6]:

> "As to Mr Monks, his position (broadly) is that the decision to incorporate GBRK in early 2011 was a response to the state *GBR* was in at the time. He says that the waste management business formerly carried on at the Ashford Site was never in fact transferred to it, and so it never had ownership of *the Business;* he says that although he became a director, he never became bound by any contract of employment with GBR; he says that by early 2011 GBR was insolvent (or close to insolvency) and for various reasons was not able to trade lawfully; and he says that in the circumstances he and Mr Ford were concerned about potential personal liabilities to which they might be exposed because of the physical state of the Ashford Site. Mr Monks also says that GBR had effectively been abandoned by Mr Davies, who had misled him (Mr Monks) in various ways, including by saying he was terminally ill and by failing to disclose that he (Mr Davies) was the subject of proceedings under the Directors Disqualification Act, which resulted in him being disqualified as a director for a period of 11 years with effect from 8 October 2010. In short, Mr Monks says that he and Mr Ford were justified in doing what they did in early 2011, and in reality had no choice about it given the situation they were left in by Mr Davies."

11. The Liability Judge then outlined the key events in the history from 2011 until the commencement of the present proceedings in 2017:

> "7. After GBRK had been operating for several months, GBR was struck off the register and dissolved on 18 October 2011. It is common ground that, at the time, neither Mr Ford nor Mr Monks had taken steps to resign as directors of GBR. In the period since then, GBRK has grown to be a successful business (its accounts for 2018 show that for the six months between 1 July and 31 December 2018, it had turnover of £3,592,689 and made profits before tax of £364,329). Mr Monks' position is that this is the result of the hard work he and others have put in, and of the capital they have invested.
>
> 8. In the meantime, Mr Davies says that although he continued to feel aggrieved about the way he had been treated, he was not in a position to do anything about it because he lacked the necessary funds to do so. Much later, in 2016, he says that position was remedied, and he then petitioned for the restoration of GBR to the register under ss 1029 and 1032 Companies Act 2006 …, and for its winding-up on the just and equitable ground under s 122(1)(g) Insolvency Act 1986 …. On 23 January 2017, Ms Deputy Registrar Jones made the Orders sought, restoring GBR to the register but immediately placing it in compulsory liquidation. Joint Liquidators were appointed on 15 March 2017, and on 22 May 2017, the Liquidators initiated the present proceedings. On 25 July 2017,

> the Liquidators assigned GBR's claims against Mr Ford, Mr Monks and GBRK to Mr Davies, and Mr Davies was later substituted as Claimant."

12. The order for a split trial of liability and quantum issues was made by Master Clark on 20 September 2018. She directed that both trials be listed before the same judge, although in the event this was not possible. In a subsequent order made on 26 February 2019, the Master identified the issues for determination at the Liability Trial as:

    i) whether Mr Monks had acted in breach of duty or in breach of contract;

    ii) whether GBRK was fixed with the relevant knowledge to ground a claim in knowing receipt;

    iii) whether the business conducted by GBRK was derived from GBR;

    iv) whether Mr Monks was in principle entitled to an equitable allowance;

    v) whether Mr Davies' equitable claims were barred by reason of his lack of clean hands or laches; and

    vi) whether "the Defendant" (presumably Mr Monks) should be relieved from liability pursuant to section 1157 of the Companies Act 2006.

    The order added:

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

13. At the Liability Trial, Mr Davies was represented by Mr Ben Shaw of counsel, as he was at the Quantum Trial (where Mr Shaw led Ms Chantelle Staynings) and on the appeal to this court. Mr Monks and GBRK were represented at the Liability Trial by Mr John Brisby KC and Mr Alexander Cook; at the Quantum Trial, and on the appeal to us, they were represented by Mr Cook leading Mr Daniel Kessler. Mr Ford appeared in person at both trials, but he has played no part in the appeal to this court. It is a pleasure to record that, on 23 December 2022, it was announced that both Mr Shaw and Mr Cook will be appointed to the rank of King's Counsel.

14. The Liability Judge formed an adverse view of the reliability of much of the evidence given by the two protagonists, Mr Davies and Mr Monks.

15. Mr Davies was the only witness who gave evidence in support of his case. The Liability Judge "did not find him an impressive or entirely reliable witness": see [13]. Apart from his "somewhat chequered history", his evidence was at times "obtuse and evasive", and he was "unwilling to accept straightforward points which were obviously correct, but which did not support his position" (*ibid*). Nevertheless, the Liability Judge found that the "broad contours of the story" told to him by Mr Davies

about events occurring in relation to the Ashford Site in 2010 "were plausible, even if his evidence was unreliable on points of detail": see [14]. The Liability Judge added:

> "I also think that Mr Davies was entirely genuine in expressing a sense of grievance at the way in which Mr Monks had acted in relation to the events described below. In other words, whatever his own shortcomings, Mr Davies really did feel that Mr Monks had acted wrongly and unfairly.
>
> 15. Overall, I feel I must treat Mr Davies' evidence with caution, and test it carefully against the (somewhat limited) documentary record, but I do not discount it entirely."

16. As to Mr Monks, the Liability Judge described him, at [17], as "an ambitious and clever man, with a strong entrepreneurial instinct". At the time of the events relevant to this case, "he already had a track record of success in the waste management industry", and he had a personality which is "competitive and, at times, aggressive".

17. The Liability Judge went on to say, at [18], that he "found Mr Monks to be obtuse and evasive in giving his evidence, including in relation to a number of important points", before concluding, at [19]:

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

18. It is also important to keep in mind the "general nature of the waste management business", which was common ground and was described by the Liability Judge, at [45], in these terms:

> "It is … not a business characterised by customer loyalty. There are few long-term contract arrangements. Certainly, SIK did not have any long-term customer contracts, but instead relied on ad hoc work, although according to Mr Davies some customers used SIK's services on a repeat basis. Mr Monks' evidence, which was not challenged and which I accept on this point, was that a good customer base is only achievable if a company has a good reputation, including for regulatory compliance and good customer service. Or as he put it more graphically, "*You're only as good as your last skip*.""

19. The Liability Judge observed, at [10], that the factual background was complex, and involved "many disputed issues of fact". Before plunging into the detail, he helpfully sought to identify the main points of principle which he would need to resolve. These included:

> "(i) What was the scope of the contractual and fiduciary duties owed by Mr Monks in late 2010 and early 2011, in light of the position of GBR at the time, and was he in breach of those duties in taking the steps he took in relation to GBRK?

> (ii) Given that the Claim Form was issued only on 22 May 2017, more than six years after the incorporation of GBRK on 7 January 2011, are any or all claims against Mr Monks in any event time-barred? ….
>
> ….
>
> (iv) Is GBRK fixed with relevant knowledge to ground a claim against it in knowing receipt, and in any event are claims against GBRK time-barred?
>
> ….
>
> (vii) If it is correct that Mr Monks owes continuing fiduciary duties to GBR even today, with the effect that all unauthorised benefits flowing from any breach of such duties are held on trust for GBR, is Mr Davies entitled to assert a proprietary remedy in respect of such benefits – and therefore to say that, since the benefits in question are effectively the business and assets presently in the name of GBRK, such business and assets are held on constructive trust for him, such that no further trial in the proceedings is needed?
>
> (viii) If Mr Davies is in principle entitled to claim an account of profit, should Mr Monks in principle be entitled to claim an equitable allowance?"

20. The Liability Judge used this list of issues to articulate the remainder of the Liability Judgment. I will not attempt, at this introductory stage, to explain in detail how the Liability Judge then came to the conclusions which are recorded in the Liability Order, although I will need to return to various aspects of the Liability Judgment when considering the grounds of appeal from the Quantum Order. It is important to emphasise, however, that no challenge is made by either side to any aspect of the Liability Order, or to the findings of fact made by the Liability Judge, although there is an issue (which I will need to consider) whether the findings which the Liability Judge made in [272] and [273] about breaches by Mr Monks of the duties which he owed to GBR as a director and fiduciary were intended by him to be exhaustive, or to leave the way open for possible further breaches of duty to be investigated at the Quantum Trial.

21. For now, it is enough to record that the Liability Order provided, under the heading "Relief Consequential upon Judgment", that:

> "1. Mr Monks shall … pay to Mr Davies the sum of £170,685 in respect of funds belonging to [*GBR*] that Mr Monks converted to his own use …
>
> 2. Judgment be entered for Mr Davies (i) against Mr Ford and Mr Monks for equitable compensation; and (ii) against GBRK for knowing receipt.

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

Among other matters, the Liability Order also directed that the Quantum Trial be re-listed with a time estimate of 5 to 6 days, and that the costs of the Liability Trial be reserved to the Quantum Trial. Mr Davies' application for permission to appeal was refused, and (as I have already indicated) he did not seek to renew the application in this court.

Breach of director's duties by Mr Monks

22. The law on the general duties owed by a director to his company is now principally contained in Chapter 2 of Part 10 of the Companies Act 2006 ("CA 2006"). The main relevant provisions are as follows:

> "**170 Scope and nature of general duties**
>
> (1) The general duties specified in sections 171 to 177 are owed by a director of a company to the company.
>
> (2) A person who ceases to be a director continues to be subject–
>
> > (a) to the duty in section 175 (duty to avoid conflicts of interest) as regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director, and
> >
> > (b) to the duty in section 176 (duty not to accept benefits from third parties) as regards things done or omitted by him before he ceased to be a director.
>
> To that extent those duties apply to a former director as to a director, subject to any necessary adaptations.
>
> (3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to the company by a director.
>
> (4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.

172. Duty to promote the success of the company

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to –

> (a) the likely consequences of any decision in the long term,
>
> (b) the interests of the company's employees,
>
> (c) the need to foster the company's business relationships with suppliers, customers and others,
>
> (d) the impact of the company's operations on the community and the environment,
>
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f) the need to act fairly as between members of the company.

…

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

…

175. Duty to avoid conflicts of interest

(1) A director of a company must 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.

(2) This 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).

…

(4) This duty is not infringed –

> (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
>
> (b) if the matter has been authorised by the directors.

> …
>
> (7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties."

23. In deciding that Mr Monks was in breach of the duties which he owed as a director to GBR, and that he had contravened both section 172 and section 175 of CA 2006, the Liability Judge rightly pointed out, at [268], that a finding of breach was not dependent on showing that Mr Monks had misappropriated existing assets of GBR, and that he could also be in breach by, for example, putting himself in a position of conflict and thereby making an unauthorised profit.

24. Accordingly, having directed himself, at [271], that it was necessary to ask "not only whether pre-existing corporate assets of GBR were misapplied, but also, more pertinently, whether [Mr Monks'] *actions* were wrongful", the Liability Judge continued, in a key passage which I need to quote in full:

> "272. As will be readily apparent from the narrative above, the factual background is somewhat confused, and despite my best efforts to decode the evidence, a number of gaps and omissions remain. Notwithstanding that, a number of points are clear, and in terms of *what Mr Monks did*, they include the following:
>
> > (i) He caused the incorporation of GBRK with the intention that it would trade as a waste management business from the Ashford Site.
> >
> > (ii) With that in mind, Mr Monks caused efforts to be made to clear the Ashford Site of waste.
> >
> > (iii) Mr Monks recharged at least part of the cost of clearing the Ashford Site to GBR, even though GBR itself would not have use of the Ashford Site once cleared.
> >
> > (iv) Mr Monks engaged in a process which involved the WML (*Waste Management Licence*) (later Environmental Permit) previously held by GAL being transferred to his new company, GBRK. This was tied to the issue of clearing the Ashford Site. Once the transfer was complete, it gave GBRK regulatory authority to conduct a waste management business from the Ashford Site.
> >
> > (v) Mr Monks acquired, via GBRK and later directly in his own name, a lease of the Ashford Site. The detail of this is obscure. It seems that GBRK entered into a lease with GAL at some point in early 2011 which was backdated to 1 December 2010; but more significantly, Mr Monks, acquired a leasehold interest in his own name in June 2011 from Benchmark.

> (vi) Mr Monks caused GBRK, early in 2010, to enter into new hire purchase and lease agreements in respect of the equipment previously held by SIK, and which had been used by SIK in operating *the Business* at the Ashford Site. It appears he also caused the transfer to GBRK of certain assets previously owned by Nero, but again used by SIK in *the Business*.
>
> (vii) He took over GBR's O Licence application, which the Traffic Commissioner was persuaded to treat as an application in the name of GBRK, and procured the issue of a new O Licence in the name of GBRK, to be used in the course of the new waste management business to be conducted by GBRK from the Ashford Site.
>
> 273. In my judgment, and leaving aside for the moment any modification to the orthodox position which might be said to arise from GBR being insolvent or of doubtful solvency, each of these steps on the face of it involved Mr Monks in a breach of the duties he owed as a director and fiduciary.
>
> 274. It is convenient to start with section 175, which in any event was the main focus of Mr Davies' case. It seems to me that each of these steps identified above involved a breach by Mr Monks of his duty under CA 2006 section 175. I say that because they each occurred, as Mr Monks well knew, in circumstances where the intention had been that *GBR*, not *GBRK*, would operate a waste management business from the Ashford Site. Indeed, Mr Monks had been engaged – initially as a consultant, but latterly as a director – with the remit of building up that business. GBR therefore had its own, one might say equal and opposite, interest in the matters identified above – i.e., in regularising the position at the Ashford Site by clearing it of waste and obtaining an environmental permit which would allow waste management activities to be carried out; in regularising the terms on which the Ashford Site was occupied by entering into a lease or licence; in regularising the position as regards the use of the plant and machinery necessary to permit a waste management business to be conducted; and obtaining the appropriate licence or licences to permit waste to be transported.
>
> 275. Consequently, in taking these steps identified above, all of which were in the interest of GBRK, Mr Monks was in an obvious position of conflict given his countervailing interest both as a director of, and shareholder in, GBR, which was looking to develop exactly the same trading business, operating from the same premises, as GBRK."

25. The Liability Judge next considered, at [280] and following, whether any of his conclusions were affected "if one assumes that, in late 2010 or early 2011, GBR was

insolvent or close to insolvency." He concluded that this would make no difference, essentially because Mr Monks' fiduciary duties as a director would still be owed to GBR, even if GBR was for any reason unable to take advantage of business opportunities for its own benefit.

26. As the Liability Judge explained, at [287]:

> "As to section 175(4)(a), and the question whether the situation is one which can reasonably be regarded as likely to give rise to a conflict of interest, it seems to me that obviously it can. The conflict arises because of the tension between (1) Mr Monks' directorship of, and ownership interest in, GBRK, on the one hand, and (2) on the other, his *status* as a director of GBR, which gave rise to duties owed to GBR, and which required him to avoid any situation in which he had a countervailing interest – whether or not GBR was itself capable of taking advantage of any relevant property, information or opportunity which might present itself. Thus, it seems to me that Mr Monks was tied in, and in the circumstances unable to take advantage for his own benefit of the situation at the Ashford Site which emerged in late 2010 and early 2011. He might think that unfair, but it is an entirely conventional analysis, and a consequence of the fiduciary obligations he undertook, and which exist for well-established policy reasons, essentially as a deterrent: see, e.g, *Murad & Anor*. v *Al-Sara & Anor*. [2005] EWCA Civ. 959, per Arden LJ at [74]."

27. The Liability Judge dealt with Mr Monks' breach of section 172 of CA 2006 much more briefly, at [302] to [303]. Since the seven matters itemised in [272] were "all concerned with promoting the success of GBRK", it was obvious that Mr Monks could not say that he had discharged his duty under section 172, owed to GBR, in good faith. The Liability Judge also incorporated at this point his later conclusion that Mr Monks' conduct had been dishonest, both subjectively and, by reference to the standards of ordinary decent people, objectively: see [349], referring to the test for dishonesty in Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67, [2018] AC 391.

Other relevant findings in the Liability Judgment

28. To complete the picture on liability, I will briefly describe the conclusions reached by the Liability Judge on the other main points of principle identified by him at [10], and in substance repeated at [247]:

> (a) **Was Mr Monks in breach of contract**? No, because "no finally settled written terms were ever agreed with Mr Monks", and no employment or consultancy contract was ever concluded between him and GBR: see [251].
>
> (b) **Was GBR insolvent in late 2010/early 2011**? No, because the evidence was too sketchy to justify such a conclusion: see [264] to [266].

(c) **Were any of the claims against Mr Monk time-barred**? No, because the normal six-year limitation period for breach of trust claims against a company director in section 21(3) of the Limitation Act 1980 ("LA 1980") was disapplied by section 21(1)(a), on the basis that Mr Monks' breaches of trust were dishonest and therefore fraudulent, and also by section 21(1)(b) in the case of pre-existing property of GBR misappropriated by Mr Monks: see [304] to [350].

(d) **Could Mr Monks be held liable as a director of GBR for any period after the dissolution of GBR on 18 October 2011, given that GBR was restored to the Register of Companies on 23 January 2017**? No, because the deeming provision in section 1032(1) of CA 2006 does not extend to deeming a director to have continued in post during the period of dissolution, or thereafter. It further follows from the rejection of this argument that the current business of GBRK at any date after its dissolution in 2011 could not be regarded as held on constructive trust for Mr Davies: see [371] to [395].

(e) **Should Mr Monks be granted relief under section 1157 of CA 2006**? No, in view of the conclusion that he acted dishonestly: see [351].

(f) **Was GBRK fixed with relevant knowledge to ground a claim against it in knowing receipt, and in any event were claims against GBRK time-barred**? Since Mr Monks was managing director of GBRK at all material times, his knowledge is to be attributed to GBRK and is sufficient to ground a claim against GBRK in knowing receipt: see [352]. As to limitation, it was common ground that Mr Davies' claim against GBRK in knowing receipt was not a claim against a "trustee" for the purposes of LA 1980 section 21(1)(a) or (b), with the consequence that Mr Davies' claims against GBRK were subject to a six-year limitation period: see [353], and Williams v Central Bank of Nigeria [2014] UKSC 10, [2014] AC 1189.

(g) **Was Mr Davies barred from claiming relief against Mr Monks and/or GBRK by laches or by not coming to the court with clean hands**? No, for the reasons given at [355] to [370].

(h) **Should Mr Monks in any event be entitled to claim an equitable allowance**? There is no blanket rule that a dishonest fiduciary can never claim an equitable allowance. The position is, rather, that dishonesty is a factor to be taken into account in exercising the discretion of the court to make such an allowance: see [396] to [400].

29. On this last issue the Liability Judge went on to express a tentative view, at [401]:

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

The Liability Judge then made some further tentative observations on this topic, at [402] to [406].

Mr Davies' election for equitable compensation instead of an account of profits

30. When the Liability Judgment was handed down, Mr Davies was put to his election whether to pursue an account of profits, or an award of equitable compensation, in respect of the breaches of fiduciary duty by Mr Monks and Mr Ford which had been established against them. Mr Davies elected to receive equitable compensation, and this is reflected in paragraphs 2 and 3 of the Liability Order.

The Quantum Judgment

31. The Quantum Judgment is another substantial piece of work, running to 293 paragraphs. The Judge (Mr Holland KC) had the benefit of an agreed List of Issues, which he set out at [10]. Under the heading "Claims against Mr Ford and Mr Monks", paragraph (1) of the List of Issues asked: "How much equitable compensation (if any) is payable by Mr Ford and Mr Monks?" and was sub-divided into nine sub-issues contained in sub-paragraphs (a) to (i). The remainder of the List of Issues, under the heading "Claims against GBRK", comprised eight issues set out in paragraphs (2) to (9).

32. Before setting out the List of Issues, the Judge summarised the primary, and alternative, cases advanced by Mr Davies against GBRK and Mr Monks, as described by Mr Shaw and Ms Staynings in their written closing submissions for Mr Davies.

33. Against GBRK as knowing recipient, Mr Davies sought:

> "(i) a declaration that GBRK holds the freehold of the Ashford Site on constructive trust for Mr Davies (as assignee of GBR); and

> (ii) an account of profits extending to the present day and/or equitable compensation (amounting to the current value of GBRK less the value of the Ashford Site)."

If granted that primary relief, Mr Davies said he was willing not to seek specific relief for "the very significant sums which have otherwise been extracted from GBRK in the form of dividends, remuneration and benefits", save for certain specific categories which were then set out.

34. Mr Davies' alternative case was summarised in these terms:

> "In his alternative case, Mr Davies seeks the following relief against GBRK and Mr Monks, which, he asserts, broadly reflects the commercial intention of the parties in mid-to late 2010, namely that: GBR would take over the trading operations from the Site; Mr Ford and Mr Monks would be entitled to remuneration of £3,000 per month; and … Mr Davies would exit the business in around 5 years.
>
> (1) As against GBRK as knowing recipient, Mr Davies seeks:
>
> (i) a declaration that GBRK holds the freehold of the Ashford Site on constructive trust for Mr Davies (as assignee of GBR); and
>
> (ii) an account of profits extending to 31 December 2015 and/or equitable compensation (amounting to the value of GBRK at 31 December 2015); and
>
> (2) As against Mr Monks, Mr Davies seeks equitable compensation in the form of restoring to Mr Davies all sums which were extracted from GBRK for the benefit of Mr Monks (whether in the form of dividends, remuneration or other unauthorised payments) in excess of the sum of £3,000 per month until 31 December 2015."

35. Before turning to the issues, the Judge first referred to certain passages in the Liability Judgment which he considered it necessary to highlight, whether in order to place the issues in context, or because there was a dispute about their meaning and effect: see the Quantum Judgment at [13] to [55]. He then described the impression he had formed of Mr Davies and Mr Monks when giving evidence, concluding (in short) that he shared the adverse view taken by the Liability Judge of their reliability as witnesses: see [59] to [73]. In relation to Mr Davies, the Judge said, at [63], that he felt constrained to treat his evidence "with caution", and that he was "reluctant to accept anything he says unless it is independently corroborated." With regard to Mr Monks, the Judge said, at [73]:

> "My impression of Mr Monks is that, for all his energy, drive and entrepreneurial flair, he is someone who is quite prepared to tell direct lies or to give vague answers to questions when he

> wants to obscure the truth. I am therefore not prepared to accept his evidence unless it is otherwise corroborated."

36. In his review of the Liability Judgment, the Judge referred to two contemporary documents which throw some light on the intentions of the parties in 2010 and 2011: the "Heads of Terms" document, and the "Handover Note". The Heads of Terms were a first draft prepared by a solicitor, Mr Stuart Butler-Gaillie of Vertex Law, on 2 September 2010, and sent by him to Mr Davies, setting out a proposed new structure for the companies operating from the Ashford Site, and a plan for the development of the business operating from the Site. It was evidently intended to reflect discussions which had taken place between Mr Davies, Mr Monks and Mr Ford. It was headed "subject to contract", and never matured into a concluded agreement, but the Liability Judge found, at [84], that it was "important, in that it gives an indication of Mr Davies' intentions and his vision for the future". He also found that the document was sent to, and received by, Mr Monks on 13 September 2010, and that it reflected "Mr Monks' own suggestion to make use of a factoring arrangement" to be entered into by GBR as the new trading company operating from the Ashford Site. The Liability Judge also held, at [89], that although the Heads of Terms had no contractual force, they evidenced "an understanding that, subject to the proposed factoring agreement being put in place, the parties intended to have discussions about further capital investment in GBR."

37. At about the same time, a bank account in the name of GBR was opened at HSBC, and Mr Davies completed a proposal form for a factoring arrangement with Lloyds TSB Commercial Finance, suggesting a projected turnover figure for the next 12 months of £1.6 million: see the Liability Judgment at [93]. This was the background to the Handover Note, which Mr Davies provided to Mr Ford on 30 September 2010. The document was headed "Hand-over notes & instructions for Paul Ford (as discussed on 28 Sept 2010)", that being the date when Mr Ford was appointed a director of GBR. The Liability Judge also found that Mr Monks "must have been aware at least at a general level of the plans referenced in the Handover Note, some of which related directly to him", although he accepted Mr Monks' evidence that he never saw the Handover note at the time: see the Liability Judgment at [101].

38. Coming now to the Judge's treatment of the issues, I will attempt to summarise his main conclusions, while leaving any fuller treatment of his reasoning (where it is relevant) for my discussion of the grounds of appeal. In what follows, the issues are identified, as they are in the Quantum Judgment, by reference to the List of Issues.

Issue (1): The claims against Mr Monks

Issues (1)(a) and (b): the construction of paragraph [272] of the Liability Judgment.

39. The Judge accepted the submissions of Mr Cook, for the defendants, that, read in the context of the Liability Judgment as a whole, the Liability Judge was clearly limiting his findings of Mr Monks' breaches of duty to the seven matters specifically listed in [272]: see [78].

Issue (1)(c): having regard to the issues determined at the Liability Trial, was it open to Mr Monks to argue at the Quantum Trial that GBR would not have built a waste management business at the Ashford Site (the "Counterfactual Defence")?

40. The Judge rejected Mr Davies' arguments that it was not open to Mr Monks to argue the Counterfactual Defence, either on the basis of issue estoppel, or on the basis of the principle in Henderson v Henderson (1843) 3 Hare 100: see [79] to [91].

Issue (1)(d): If it was open to Mr Monks to rely on the Counterfactual Defence, was the issue whether GBR would have built a waste management business relevant to the quantification of the equitable compensation payable by Mr Monks in respect of the seven matters listed in paragraph [272] of the Liability Judgment?

41. Having considered authorities on the nature of equitable compensation in cases of the present type, the Judge concluded that the equitable compensation payable to Mr Davies fell to be assessed on "the reparative basis", and that it was accordingly open to Mr Monks to raise the Counterfactual Defence: see [92]-[110].

Issue (1)(e): If it was open to Mr Monks to rely on the Counterfactual Defence and to the extent that the issue was legally relevant, would GBR in fact have built a waste management business at the Ashford Site, and (if so) should the Court impose a restriction on Mr Monks' liability to pay compensation similar to the approach of the High Court of Australia in Warman International Ltd v Dwyer (1994-1995) 182 C.L.R.544?

42. On this issue, the Judge heard oral evidence not only from Mr Davies and Mr Monks, but also from Mr Monks' father, Mr David Monks; from two friends of Mr Monks who had invested in GBRK, Mr James Moore and Mr Myles Simmons; and from the expert forensic accountants on each side, Mr Douglas Hall for Mr Davies and Mr Kevin Hayward Crouch for the defendants. The Judge also had the unchallenged written evidence of Mr Davies' brother, Mr Terence Davies. Having considered and analysed the evidence, the Judge concluded that:

    i) The only relevant difference between GBR and GBRK at the date of GBRK's formation in January 2011 was that Mr Monks was an 80% shareholder in GBRK, but only a 10% shareholder in GBR (see [121]);

    ii) Accordingly, "one can and should use, or at least start with, GBRK and the business it had in 2011 as a proxy for GBR and the business it would have had in the counterfactual world" (see [122]);

    iii) In the counterfactual world, "GBR would have been in exactly the same position logistically and financially as GBRK was in the real world, at least until October 2011", but the situation changed at or around that time when Mr Monks' parents invested £95,000, and Mr Simmons invested £200,000, in GBRK in return for shareholdings which they were told represented 10% and 20% of the issued share capital respectively (see [139] to [140]);

    iv) Before those investments were made, "GBRK was, if not insolvent, then in a sufficiently serious financial situation to require an urgent injection of cash (which is what the investors provided)" (see [144]);

    v) In the counterfactual world, GBR could not have traded beyond mid-October 2011, and, as a matter of causation, Mr Davies had not shown that GBR was

caused any loss by reason of Mr Monks' breaches of fiduciary duty beyond early to mid-October 2011 (see [146] and [147]);

vi) Alternatively, adopting the principles set out in Warman International Ltd v Dwyer, any sums generated by GBRK after the loans made by Mr Monks' parents and Mr Simmons "were due entirely to Mr Monks' own efforts and it would not be just or equitable to award compensation for, or in respect of, any period after mid October 2011": see [148].

Issues (1)(f) and (g)

43. These issues, which I need not set out in detail, were interpreted by the Judge as requiring him to assess the amount of equitable compensation, if any, which he was prepared to award, and the basis on which such compensation was to be assessed: see [149]. The Judge considered that he should award equitable compensation on the basis of the value of GBRK on 18 October 2011, that being the date when GBR was struck off the register. Not only was that an appropriate date in all the circumstances, but it was also one of the dates which the experts had addressed in their reports: see [157]. As to the value of GBRK on that date, as a proxy for the value of GBR in the counterfactual world, the Judge would have preferred Mr Hall's valuation of £400,000 to Mr Hayward Crouch's valuation of £280,000, had he not thought that there was "a better and more reliable valuation available on the evidence": see [163]. On the basis that Mr Simmons, in the real world, had actually invested £800,000 for what he was told and considered to be a 20%, but was in fact a 25%, stake in GBRK, and in doing so had made, as the Judge found at [171], a commercial investment on commercial terms, the "best evidence" showed that the value of GBRK in October 2011 was £800,000: see [173]. However, in arriving at a figure for equitable compensation on that basis, it was necessary to give the defendants credit for the sum of £170,685 which had been misappropriated by Mr Monks from GBR and which he had been ordered to repay by the Liability Order. Thus, in the absence of any equitable allowance, the amount of compensation which Mr Monks ought to pay was £629,315: see [174]. The Judge also considered, at [175], that Mr Davies was not entitled to any of the other heads of equitable compensation which he sought, but which all arose from events or transactions after October 2011.

Issue (1)(h): Was Mr Monks entitled to an allowance in respect of services provided by him to GBRK?

44. In the light of the conclusion of the Liability Judge that Mr Monks should "in principle" be entitled to claim an equitable allowance, and the unchallenged evidence of a joint expert, Mr Paul Grainger, on the market rate for the remuneration and/or benefits of a director of GBRK at the relevant time, the Judge concluded that "it would be wrong to allow Mr Monks anything more than the £3,000 per month" which was contemplated by the Handover Note: see [182]. This amounted to £30,000, for the ten months from January to October 2011. The Judge added, in [183]:

> "For the avoidance of doubt, this sum is in addition to any sums which (as set out above) Mr Monks might actually have received from GBRK in the relevant period."

45. Accordingly, after deduction of £30,000 for the equitable allowance, the compensation payable by Mr Monks was reduced to £599,315: see [184].

Issues (1)(i) and (9)

46. These issues related to interest, as to which there is no longer any dispute. The Judge held that Mr Davies was entitled to simple interest at a commercial rate of 2% above Base Rate on the equitable compensation of £599,315 from 1 November 2011, and to compound interest at the same rate, with annual rests, on the sum of £170,685 which Mr Monks had misappropriated from GBR.

Issues (2) to (8): the claims against GBRK

Issue (2): having elected for equitable compensation against Mr Ford and Mr Monks, was it open to Mr Davies to elect for a declaration of constructive trusteeship and/or an account of profits as against GBRK?

47. The Judge held that it was open to Mr Davies to seek a proprietary remedy and/or an account of profits against GBRK on the basis of his claim in knowing receipt, although the court would be astute to avoid any double recovery: see [221] to [230].

Issue (3): was GBRK's liability as a knowing recipient restricted to its receipt of pre-existing property transferred to it in breach of Mr Monks' duties to GBR as set out in paragraph [272] of the Liability Judgment, or did GBRK's liability extend to all business, business opportunities, property, assets, income and benefits received by GBRK in breach of Mr Ford's and Mr Monks' duties as directors of GBR? On either basis, what property was received and when?

48. Having considered relevant authorities, the Judge agreed with Mr Cook's submissions that, for a claim to lie in knowing receipt, the disposition of the relevant property must, itself, be a breach of trust or breach of fiduciary duty: see [248]. In view of his earlier conclusion that the findings of breach of duty in the Liability Judgment at [272] were exhaustive, all of the breaches were time-barred in relation to GBRK apart from the breach identified in the Liability Judgment at [272](v). Accordingly, any claim in knowing receipt against GBRK was limited to receipt by that company of assets or property which resulted from that single breach, i.e. Mr Monks' acquisition in his own name of a lease of the Ashford Site in June 2011 from Benchmark: see [250] to [252].

Issue (4): in respect of which (if any) of GBRK's assets was Mr Davies entitled to a declaration of constructive trusteeship?

49. In his closing submissions, Mr Shaw had confined Mr Davies' claim under this heading to a claim that GBRK held the freehold of the Ashford Site on constructive trust for him: see [253]. After setting out the relevant facts, and the parties' arguments, the Judge held that there was no causative link between any breach of duty

by Mr Monks and the acquisition, for value, of the freehold of the Ashford Site by GBRK: see [264].

50. Indeed, the price paid by GBRK for the freehold appeared to be more than its market value: see [265]. Nor was there any scope for operation of the principle in Protheroe v Protheroe [1968] 1 WLR 519 (CA): see [266].

Issue (5): Should the court refuse an account of profits as a matter of discretion?

51. The Judge declined to order an account of profits against GBRK, for the reasons which he gave in [275].

52. In view of the conclusions which the Judge had already reached, it was unnecessary for him to deal with Issues (6) and (7). The Judge also held, in response to Issue (8), that, since he had dismissed Mr Davies' claim for an account of profits against GBRK, Mr Davies was not entitled to pursue the inconsistent remedy of equitable compensation against GBRK: see [278].

Mr Davies' appeal

53. Mr Davies pursues seven grounds of appeal, which attack various aspects of the Quantum Judgment.

54. In essence, Mr Davies' grounds of appeal raise the following issues:

i) *Ground A* concerns the scope of Mr Davies' entitlement to relief against Mr Monks and GBRK. It challenges the Judge's conclusion that such relief was confined to the seven matters listed in paragraph [272] of the Liability Judgment. The Judge ought to have concluded that all steps taken by Mr Monks in furtherance of his dishonest scheme constituted breaches of duty before the dissolution of GBR on 18 October 2011. Further, the Judge ought to have assessed the equitable compensation payable by Mr Monks, and determined the extent of the GBRK's liability in knowing receipt, on this basis.

ii) *Ground B* concerns the liability of GBRK in knowing receipt, and challenges, as wrong in law, the Judge's conclusion that such liability was confined to GBRK's receipt of pre-existing trust property transferred in breach of Mr Monks' duties. The Judge ought to have concluded that "GBRK's liability extended to any and all business, business opportunities, property, assets [,] income and benefits received by GBRK in breach of Mr Monks' and Mr Ford's duties as directors of GBRK in the Second Period" (i.e. the period from 22 May 2011, when the six-year limitation period began to run, to 18 October 2011, when GBR was dissolved). The Judge should further have concluded that the whole of the value of GBRK's business in mid-October 2011 was generated in the Second Period, and that as at 18 October 2011 "the entirety of GBRK's business was held beneficially for GBR."

iii) *Ground C* has a limited focus. It concerns withdrawals of £21,000 from GBR's bank account in the Second Period, and criticises the Judge for failing to conclude that GBRK was in any event liable in knowing receipt for those

withdrawals, even if (contrary to Ground B) GBRK's liability was in law limited to its receipt of pre-existing trust property.

iv) *Ground D* concerns Mr Davies' alleged entitlement to a proprietary remedy in respect of the Ashford Site, and for various reasons challenges the Judge's conclusion that GBRK did not hold the freehold of the Ashford Site on constructive trust for Mr Davies.

v) *Ground E* challenges the Judge's refusal to order an account of profits against GBRK, and contends that such an account should have been directed until at least 31 December 2015.

vi) *Ground F* concerns the appropriate basis for the assessment of equitable compensation payable by Mr Monks, and alleges that the Judge erred in awarding such compensation on a reparative rather than substitutive basis. In particular, this ground challenges the Judge's refusal to award compensation in respect of the increase in the value of GBRK's business after October 2011, or in respect of any benefits received by Mr Monks from GBRK's business after that time.

vii) *Ground G* concerns the Judge's treatment of Mr Monks' claim for an equitable allowance, and challenges the Judge's decision to grant Mr Monks an allowance of £30,000 in addition to the remuneration which he in fact received in the 10-month period to October 2011.

55. I will now consider these grounds of appeal in turn.

(1) Ground A: The scope of Mr Davies' entitlement to relief

56. The basic issue here is one of interpretation, or construction, of paragraph [272] of the Liability Judgment, quoted in full at [24] above. The question which divides the parties is whether the Liability Judge intended the list of seven breaches of duty by Mr Monks which he itemised in [272] to be exhaustive, for the purposes of establishing Mr Monks' liability to pay equitable compensation to Mr Davies, or whether he intended the list to be non-exhaustive (with the consequence that it was in principle open to Mr Davies at the subsequent Quantum Trial to seek to rely upon further breaches by Mr Monks of the duties which he owed as a director of GBR).

57. By her order of 26 February 2019, Master Clark had defined the scope of the Liability Trial so as to include the issue of whether Mr Monks had acted in breach of duty, while leaving over for any subsequent trial of quantum the issue of the amount of any equitable or proprietary interest in the Business to which Mr Davies might be entitled, if (as later happened) he were to succeed in the Liability Trial and then elect for equitable relief as opposed to an account of profits: see [12] above.

58. The Liability Judge dealt at length with the question whether Mr Monks was in breach of his duties as a director of GBR, at [252] to [303] of the Liability Judgment. In performing this task, he had to contend with a confused picture of the facts disclosed by the totality of the evidence, and with unreliable oral evidence given to him by Mr Davies and Mr Monks. Having made an assessment of the position of GBR in late 2010, in the 13 numbered sub-paragraphs of [262], the Liability Judge said, at [263]:

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

This formed the background to the section of the Liability Judgment headed "Breach of duty: Discussion and Conclusion", which began at [267] and included the critical paragraph with which we are now concerned.

59. The Liability Judge began this discussion, as I have already noted, by correcting what he described as "a misplaced emphasis" in the way the case had developed, concentrating "on the question of what existing corporate assets GBR had, and whether they had been misapplied". As the Liability Judge explained, at [268], the "real focus" should be on the duties owed by Mr Monks in his capacity as a director of GBR, and whether he was in breach of those duties, "for example by putting himself in a position of conflict and thereby making an unauthorised profit". The Liability Judge then quoted from the judgment of Jonathan Parker LJ in Re Bhullar Bros Ltd [2003] EWCA Civ 424, [2003] BCC 711, at [27] and [28], where he had rejected the notion that "it is a pre-requisite of the accountability of a fiduciary that there should have been some improper dealing with the property "belonging" to the party to whom the fiduciary duty is owed, that is to say with trust property…", and said that where a fiduciary has exploited a commercial opportunity for his own benefit, the relevant question is "simply whether the fiduciary's exploitation of the opportunity is such as to attract the application of the rule".

60. Having thus guided himself, in a judgment from which no appeal has been brought, the Liability Judge then continued as follows in the critical paragraphs [271] to [273], which for convenience I will repeat, with the Liability Judge's emphasis, but omitting the seven itemised sub-paragraphs of [272]:

> "271. In light of these comments, in my judgment the proper approach to assessing whether Mr Monks was in breach of duty …involves one asking not only whether pre-existing corporate assets of GBR were misapplied, but also, more pertinently, whether his *actions* were wrongful.
>
> 272. As will be readily apparent from the narrative above, the factual background is somewhat confused, and despite my best efforts to decode the evidence, a number of gaps and omissions remain. Notwithstanding that, a number of points are clear, and in terms of *what Mr Monks did*, they include the following:
>
> …
>
> 273. In my judgment, and leaving aside for the moment any modification to the orthodox position which might be said to arise from GBR being insolvent or of doubtful solvency, each of these steps on the face of it involved Mr Monks in a breach of the duties he owed as a director and fiduciary."

61. The argument that the Liability Judge did not intend the seven itemised points in [272] to constitute an exhaustive list derives some obvious support from the introductory words "they *include* the following" (my emphasis). If the list was meant to be exhaustive, one might expect the Liability Judge to have said something like "they comprise" or "they are" the following. In his submissions for Mr Davies, Mr Shaw builds on this point. He says that the key issue on the pleadings which had to be determined at the Liability Trial was whether Mr Monks had engaged in a dishonest scheme to divert business to GBRK, and that the seven actions taken by Mr Monks, as listed in [272], were enough to lead the Liability Judge to conclude that Mr Monks had committed dishonest breaches of his duties. On an ordinary and natural reading of the paragraph, the Liability Judge was not seeking to provide a comprehensive list of all the steps taken by Mr Monks in furtherance of his dishonest scheme. If the list were intended to be comprehensive, the Liability Judge would have said so, and would have given consequential directions expressly limiting Mr Davies' entitlement to relief. The most glaring example of this, submits Mr Shaw, is that nothing is said in [272] about Mr Monks' actions in causing customers to contract with GBRK rather than GBR. The diversion of customer contracts to GBRK was an integral part of Mr Monks' dishonest scheme, and an obvious breach of his duties as a director of GBR. An enquiry into the value of such contracts fulfilled by GBRK rather than GBR would therefore be a matter for the Quantum Trial, and it was not foreclosed by the absence of any explicit mention of the point in [272].

62. In support of this last point, Mr Shaw drew our attention to a short passage in the transcript of the hearing for consequential directions which took place on 24 March 2020. At that hearing, Mr Cook, then appearing as junior counsel for the defendants, submitted that the relief granted to Mr Davies in the Liability Order should expressly be confined by reference to the seven matters identified in the Liability Judgment at [272]. So far as one can tell from the transcript, there was no oral discussion of the issue, but the Liability Judge did not accept Mr Cook's suggestion, saying:

> "I think it's clear enough actually. I don't think we need to modify the language, the order obviously has to be [*read*] in light of the judgment, so I would suggest that we leave the language as is."

In my view, this point is of little weight. Of course, the question would have been settled beyond argument if the wording suggested by Mr Cook had been included; but the Liability Judge's rejection of the suggestion does not in my judgment imply that he was giving a green light to attempts to broaden the scope of the relief granted at the forthcoming Quantum Trial. As I read the Liability Judge's brief comments on the transcript, he was simply observing that the Liability Order would have to be read in the light of the Liability Judgment, and this then takes one back to the question of interpretation of [272] read in its context.

63. One of the questions which the Judge had to determine at the Quantum Trial was precisely this issue, which Mr Davies had clearly pleaded in his Points of Reply in relation to quantum issues. The Judge considered the question in the Quantum Judgment at [75] to [78]. He accepted Mr Cook's submissions, saying at [78]:

> "I think that, when read in the context of the judgment as a whole, it is quite clear that the [*Liability*] Judge was limiting his

> findings as to Mr Monks' breaches of duty to the matters specifically listed in paragraph 272. In my view the judgment cannot be read any other way…"

64. The Judge gave three reasons for reaching this conclusion. First, he considered that the word "they" in the phrase "they include the following" more naturally refers back to the words "a number of points are clear", and not to the words "in terms of what Mr Monks did". As a matter of grammar, that appears to me to be correct, and I did not understand Mr Shaw to argue the contrary. Secondly, the Judge relied on the terms of a number of subsequent paragraphs in the Liability Judgment, which in his view confirmed that the Liability Judge was limiting his ruling on Mr Monks' breaches to those matters specifically identified in [272]. The relevant paragraphs, for the record, are [273], [274], [275], [303], [322], [325], [326], [338] and [395]. It is unnecessary for me to set out those paragraphs, because Mr Shaw accepts in paragraph 34 of his skeleton argument in this court that the Judge was correct to conclude in the Quantum Judgment that the Liability Judge had limited his ruling on Mr Monks' breaches of duty to the seven matters listed in [272]. Mr Shaw says, however, that it does not follow from this that the Liability Judge had intended to prevent Mr Davies from relying, at the Quantum Trial, on other steps taken by Mr Monks in furtherance of his dishonest scheme.

65. The third point relied on by the Judge was the rejection by the Liability Judge of Mr Davies' contention that Mr Monks and Mr Ford continued to owe general duties as directors of GBR after the dissolution of GBR on 18 October 2011. In the Judge's view, the rejection of that argument was inconsistent with any ruling that everything done by Mr Monks and Mr Ford at the Ashford Site between 7 January 2011 (when GBRK was incorporated) and 18 October 2011 (when GBR was dissolved), constituted an actionable breach of duty. As to this point, I am inclined to agree with Mr Shaw that it does not help on the construction of [272], because the argument which the Liability Judge rejected, at [395] of the Liability Judgment, was focused on the position after the dissolution of GBR, and not on the position before that date.

66. Since the question raised by Ground A is one of interpretation of the Liability Judgment, it is a question of law upon which we are free to make up our own mind. It is not necessary for us to be satisfied that the Judge's reading of [272] was an unreasonable one. The question is simply whether it was correct in law, applying the ordinary principles of construction of a written document. The conclusion which I have reached is that the Judge's interpretation was indeed correct, for the following reasons.

67. In the first place, it seems clear to me, when [272] is read in the context of the Liability Judgment as a whole, that it contains the only findings of breach of duty by Mr Monks which the Liability Judge felt able to make on the basis of the confused and unsatisfactory evidence before him. He must have known that it was his function in the split trial to decide all issues of liability, including whether Mr Monks had breached his fiduciary duties as a director of GBR. On that issue, the Liability Judge discharged his duty, to the best of his ability, by making the seven specific findings of breach recorded in [272]. The subsequent references to this paragraph in the Liability Judgment support the clear inference that this was as far as the Liability Judge felt able to go. They give no support to the idea that he intended his findings in [272] to

operate as a provisional, or incomplete, list of breaches, which the parties would in principle be free to supplement by further findings sought at the Quantum Trial.

68. Had that been the Liability Judge's intention, I would have expected him to say so expressly. It would also have been a surprising position for him to adopt, given the strong public interest in finality in litigation. The whole point of a split trial is to achieve finality on all issues of liability, and this purpose would be subverted if the parties were to be free to seek more extensive findings of liability at the Quantum Trial. Still less, as it seems to me, could the Liability Judge have envisaged that the parties should be free to add to the list in [272] by relying on findings made by the Liability Judge elsewhere in the Liability Judgment, without adducing any further evidence. If Mr Davies thought that the Liability Judge should have gone further than he did in making findings of breach of duty by Mr Monks, he should have appealed the Liability Order on the basis that it failed to spell out the basis on which Mr Monks was to be liable to pay equitable compensation to Mr Davies; but he did not do so.

69. Secondly, I am not deterred from reaching this conclusion by the fact that paragraph 3 of the Liability Order directed that "the nature, extent, and quantum of…equitable compensation payable by…Mr Monks…" be determined at the forthcoming Quantum Trial. It seems to me implicit in this direction, read in context, that the subsequent determination of those issues was intended to be premised on the findings of liability made in the Liability Judgment. If it were otherwise, the evident purpose of a split trial would be undermined, and Mr Davies would be given another opportunity to establish issues of liability which should have been decided, if at all, first time round. This point is reinforced, to my mind, by the fact that the Quantum Trial was to be conducted, if practicable, by the Liability Judge himself: see paragraph 7 of the Liability Order. Consistently with this interpretation, Mr Davies did not, in the event, seek to adduce any further evidence on issues of liability at the Quantum Trial, or to plead any further specific alleged breaches of duty by Mr Monks which ought to be found by the Judge at the Quantum Trial.

70. Thirdly, although the use of the word "include" in [272] does at first sight provide some support for the interpretation advanced by Mr Davies, I am satisfied that it cannot bear the weight which he would attribute to it. In my view, the use of the word reflects no more than the unsatisfactory state of the evidence, and the acknowledgment by the Liability Judge at the beginning of [272] that "a number of gaps and omissions remain". It follows from this that the list of specific findings in [272] was unlikely to be complete, but that did not turn it into an invitation to revisit the issue at the Quantum Trial.

71. Fourthly, I am unimpressed by the absence of a positive finding by the Liability Judge that customer contracts intended for GBR were diverted by Mr Monks to GBRK. It is not obvious to me that this must have occurred, in a business environment where customer loyalty was typically non-existent, and the Liability Judge may well have concluded that this was one of the many matters on which he was unable to make a reliable finding.

72. Finally, the brief comments made by the Liability Judge at the hearing to deal with consequential matters on 24 March 2020 do at least make it clear that he intended the Liability Order, as it stands, to be interpreted in the light of the Liability Judgment. I return to the simple point that I would expect the Liability Judge to have said so, and

to have given specific directions, if he intended issues of liability to be revisited at the Quantum Trial.

73. For these reasons, I would dismiss the appeal on Ground A.

(2) Ground B: Was the liability of GBRK in knowing receipt confined to the receipt of pre-existing trust property transferred in breach of Mr Monks' duties?

74. I can deal with this issue relatively briefly, because in my judgment the recent decision of this court in Byers v Saudi National Bank [2022] EWCA Civ 43, [2022] 4 WLR 22 ("Byers"), which was handed down on 27 January 2022, clearly establishes not only that a defendant must have received trust property (or its traceable proceeds) before he can be liable in knowing receipt, but also that the transaction whereby he received the relevant property must itself have constituted a breach of trust or fiduciary duty, such that the claimant could in principle have asserted a proprietary claim to the property in the hands of the defendant.

75. This was in substance the conclusion which the Judge reached, after a careful review of the authorities pre-dating Byers: see the Quantum Judgment at [231] to [249]. In summarising his conclusions, the Judge said this:

> "247. Thus, property acquired directly by GBRK, or contracts entered into directly by GBRK cannot be assets capable of being described as property or assets received by GBRK on trust for GBR. Further, the mere fact that GBRK entered into contracts and subsequently did business with third parties which contracts could have been entered into by GBR, does not make the prospect or expectation that GBR had of entering into those contracts an asset of GBR which can be knowingly received by GBRK.
>
> 248. Further, I agree with Mr Cook when he submits that the disposition of the relevant property must, itself, be a breach of trust or breach of fiduciary duty. I do not accept Mr Shaw's submission there is no need for the breach of duty to be the direct cause; that a "reasonable relationship" is all that is required…
>
> 249. Thus one cannot, in my judgment, simply assert, as Mr Shaw does, that everything that GBRK had acquired by 18 October 2011 was acquired in dishonest breach of Mr Monks' duties as a director of GBR. In order to make good a claim in knowing receipt, the claimant has to point to specific assets or property acquired as a result of a specific breach or breaches of duty."

76. The Judge then observed that, in the light of the findings of the Liability Judge that confined the breaches of duty by Mr Monks to the specific matters set out in [272] of the Liability Judgment, and the six-year limitation period applicable to any claim against GBRK in knowing receipt, any such claim would in any event be limited to receipt by GBRK of assets or property resulting from the breach of duty identified at

[272](v), that is to say the acquisition by Mr Monks in 2011 of a leasehold interest in the Ashford Site: see the Quantum Judgment at [250] to [252]. All of the other breaches identified in that paragraph occurred within the First Period, with the consequence that any remedy for receipt of the property or assets which GBRK derived from those breaches would be time-barred. Accordingly, if the other members of the court agree with me that Mr Davies' appeal on Ground A should be dismissed, there appears to be little, if any, practical scope for a case in knowing receipt against GBRK to get off the ground. That consideration reinforces my belief that this is not an appropriate occasion for a further detailed review of the law on knowing receipt. I will therefore begin by picking out a few key passages from Byers which are alone enough to show why Ground B is misconceived.

77. The main issue of law in Byers, which does not arise in the present case, was whether a claim in knowing receipt is defeated where the beneficiary's equitable proprietary interest was extinguished under the law applicable to the transfer of the relevant property to the defendant. This court upheld the decision of the trial judge, Fancourt J, that in such circumstances the claim was bound to fail, because from the moment of receipt the defendant took the property free of any interest of the claimants and had good title. In order to reach this conclusion, this court conducted a detailed review of the law of knowing receipt, in the judgment of the court handed down by Newey LJ (sitting with Asplin and Popplewell LJJ).

78. As the court recorded in Byers at [14], the classic ingredients of a claim in knowing receipt, as stated by Hoffmann LJ in El Ajou v Dollar Land Holdings PLC [1994] 2 All ER 685 at 700, require the claimant to show:

> "first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty."

The recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt: see [15], referring to the decision of this court in Bank of Credit and Commerce International (Overseas) Ltd v Akindele [2001] Ch 437 at 455.

79. At [17], the court in Byers observed that Hoffmann LJ's summary of the essential requirements of a knowing receipt claim in the El Ajou case has continued to be treated as accurate in subsequent case law, with the consequence, stated in [18], that:

> "Liability in knowing receipt thus derives from the combination of "the beneficial receipt … of assets which are traceable as representing the assets of the plaintiff" and "the recipient's state of knowledge" having been "such as to make it unconscionable for him to retain the benefit of the receipt". Neither is enough on its own. While it is essential that the defendant should have "received the property of another", liability is not considered to be "triggered by the mere fact of receipt"; there must also be unconscionability. On the other hand, dishonesty is not required: the fact that the defendant

> must have received relevant property makes a lesser test of fault appropriate."

80. The need for a receipt of trust property by the defendant was reinforced by the court at [22], where it said:

> "A defendant must have received trust assets, not just benefited from them."

81. The court then turned, at [24], to consider the question "whether a knowing receipt claim is possible where, although the defendant has or had property which was formerly trust property, the claimant never had a proprietary claim in respect of it against the defendant", for example where the recipient of trust property is a bona fide purchaser for value. After a detailed discussion and review of the case law on this topic, the court concluded at [79]:

> "In short, a continuing proprietary interest in the relevant property is required for a knowing receipt claim to be possible. A defendant cannot be liable for knowing receipt if he took the property free of any interest of the claimant. It follows that, as the Judge held, "absent a continuing proprietary interest in the Disputed Securities at the time of registration, the claim in knowing receipt as pleaded will fail"."

82. In his oral submissions to us, Mr Shaw (on behalf of Mr Davies) sought to marginalise Byers, by saying that it was only binding authority for the proposition that liability in knowing receipt requires a receipt of property, and not that the property must be subject to a pre-existing and continuing trust in the hands of the recipient. I hope that the short passages which I have quoted from Byers are enough to show why I am unable to accept this submission, which is in my view contrary to established principles dating back at least to the El Ajou case in 1994.

83. Mr Shaw also tried to find support for Mr Davies' case in two leading authorities which are not really about knowing receipt at all. The first is FHR European Ventures LLP v Mankarious [2014] UKSC 45, [2015] AC 250 ("FHR"), affirming on different grounds the decision of the Court of Appeal at [2013] EWCA Civ 17, [2014] Ch 1. The second is the decision of this court in the Bhullar case, to which I have already referred.

84. The decision of the Supreme Court in FHR finally settled the vexed question "whether a bribe or secret commission received by an agent is held by the agent on trust for his principal, or whether the principal merely has a claim for equitable compensation in a sum equal to the value of the bribe or commission": see the judgment of the court, delivered by Lord Neuberger of Abbotsbury PSC, at [1]. The Supreme Court answered this question in the affirmative, holding the general equitable rule to be that in such cases the agent is to be treated as having acquired the benefit on behalf of his principal, so that it is beneficially owned by the principal who therefore has a proprietary remedy in addition to his personal remedy against the agent, and can elect between them: see the judgment at [7] and [46] to [50].

85. FHR therefore concerned the nature of the primary claim which the principal could pursue against the errant fiduciary. It was not a case about the secondary, or accessory, liability of a third party who had, in one way or another, become involved in the wrongdoing of the agent. Such accessory liability is traditionally analysed in English law under the headings of "dishonest assistance" and "knowing receipt". We are concerned with the scope of the admitted liability in knowing receipt of GBRK, which did not itself owe any fiduciary duties to GBR. The relevant person who owed those duties to GBR was Mr Monks, and it was his breach of those duties which gave rise to the primary claim for an account of profits or equitable compensation vested in GBR and pursued by Mr Davies as assignee of GBR's liquidator.

86. The passages in the judgment of the Supreme Court in FHR on which Mr Shaw principally relies are contained in the court's prefatory analysis of the wider legal background and some of the decided cases. In particular, he relies on the passage in [7] where the court said, with our emphasis:

> "However, the centrally relevant point for present purposes is that, at least in some cases where an agent acquires a benefit which came to his notice as a result of his fiduciary position, *or pursuant to an opportunity which results from his fiduciary position*, the equitable rule ("the rule") is that he is to be treated as having acquired the benefit on behalf of his principal, so that it is beneficially owned by the principal. In such cases, the principal has a proprietary remedy in addition to his personal remedy against the agent, and the principal can elect between the two remedies."

87. The Supreme Court then began its review of decided cases by referring at [13] to:

> "a number of 19th century cases not involving bribes or secret commissions, where an agent or other fiduciary makes an unauthorised profit by taking advantage of an opportunity which came to his attention as a result of his agency and judges have reached the conclusion that the rule applied."

In this context, the court referred at [14] to the Privy Council case of Cook v Deeks [1916] 1 AC 554, and to the more recent decision of the Court of Appeal in Bhullar:

> "In … *Cook v Deeks* …, a company formed by the directors of a construction company was held to have entered into a contract on behalf of the construction company as the directors only knew of the contractual opportunity by virtue of their directorships. In *Phipps v Boardman* [1964] 1 WLR 993 (affirmed [1965] Ch 1992, and [1967] 2 AC 46), where agents of certain trustees purchased shares, in circumstances where they only had that opportunity because they were agents, Wilberforce J held that the shares were held beneficially for the trust. More recently, In *Bhullar v Bhullar* [2003] 2 BCLC 241, the Court of Appeal reached the same conclusion on similar facts to those in *Cook* (save that the asset acquired was a property rather than a contract)."

88. The court then quoted from the judgment of Jonathan Parker LJ in Bhullar, at [28]:

> "where a fiduciary has exploited a commercial opportunity for his own benefit, the relevant question, in my judgment, is not whether the party to whom the duty is owed (the company in the instant case) had some kind of beneficial interest in the opportunity: in my judgement that would be too formalistic and restrictive an approach. Rather, the question is simply whether the fiduciary's exploitation of the opportunity is such as to attract the application of the rule."

89. Mr Shaw also took us to passages in the judgment of the Court of Appeal in FHR, including in particular the discussion by Lewison LJ of Cook v Deeks and Bhullar at [43] to [47].

90. In relation to Cook v Deeks, Lewison LJ gave a "somewhat simplified" description of the facts at [43]:

> "The Toronto Construction Company Ltd was a building contractor. Deeks was one of its directors. The company had been the successful tenderer for a number of construction projects for the Canadian Pacific Railway. Deeks negotiated with the Canadian Pacific Railway for a contract for a new construction project, but on his own account rather than on account of the company. Deeks then formed a new company, the Dominion Construction Company, for the purpose of entering into the new contract, which it did."

91. Lewison LJ then described the result, in these terms:

> "44. The upshot was that Deeks was regarded as holding the contract on behalf of the company. Lord Buckmaster LC [*giving the advice of the Privy Council*] continued, at p.564:
>
> "If, as their Lordships find on the facts, the contract in question was entered into under such circumstances that the directors could not retain the benefit of it for themselves, then it belonged in equity to the company and ought to have been dealt with as an asset of the company."
>
> 45. Again this is not a case in which the principal had a pre-existing interest in the chose in action (i.e. the new contract) which case into existence as a consequence of the breach of duty. Nor did the Privy Council say that the opportunity itself "belonged" to the company. What "belonged" to the company in equity was the contract. On the other hand the Privy Council did not make any declaration of trust but ordered the taking of an account. On the face of it this would appear to be a personal remedy. But the account was ordered not only against Deeks and his co-directors but also against the Dominion Construction Co. Since the Dominion Construction Co. was not itself a

> fiduciary, the order against it could only be justified on the basis that it was in knowing receipt of trust property. Thus the principal must have had a proprietary interest in the contract."

92. This passage is of some interest, because (as Lewison LJ acutely observed) the making of an order for an account against the Dominion Construction Co., which was not itself a fiduciary, could on the face of it only be justified on the footing that it was in knowing receipt of trust property. However, this aspect of the matter was not considered at any length in Lord Buckmaster's judgment (see p.565), and the law of knowing receipt was then in its infancy. The more important point, as it seems to me, is that the contract itself was clearly regarded as the relevant trust property, and the case therefore provides no support for the notion that a mere business opportunity, which has not matured into an actual contract, can itself constitute an item of property which could be the subject of a claim in knowing receipt: compare the further observations of Lewison LJ in FHR (CA) at [57] to [59].

93. With regard to Bhullar, it is again helpful to refer to the summary of the facts given by Lewison LJ in FHR (CA) at [47]:

> "Bhullar Bros Ltd owned property in Huddersfield. Two of the directors of the company discovered that the next door property was on the market. They put in a bid for it which was accepted; and the property was transferred to a newly incorporated company called Silvercrest Ltd. At the conclusion of the trial of an unfair prejudice petition Judge Behrens declared that Silvercrest Ltd held the property on trust for Bhullar Bros Ltd and ordered the directors to procure its transfer to Bhullar Bros Ltd at the price that Silvercrest Ltd had paid. His decision was affirmed by this court."

94. The most important point to note about Bhullar is that it too was not a case about knowing receipt, nor was there any close focus in the judgments, either in this court or at first instance, on the precise juridical nature of the relief granted against Silvercrest Ltd. The reason for this may well have been that the proceedings were an unfair prejudice petition under what is now section 994 of the Companies Act 2006. If the court is satisfied that such a petition is well founded, section 996(1) then provides that "it may make such order as it thinks fit for giving relief in respect of the matters complained of". Accordingly, it was unnecessary to analyse the precise nature of Silvercrest Ltd's interest in the property, because it was clearly open to the court to order the errant directors to procure its transfer to Bhullar Bros Ltd in exercise of the court's very broad powers to grant appropriate relief to remedy the unfairly prejudicial conduct of the company's affairs. I also respectfully agree with Mr Cook that the main focus of the arguments in this court was on the question whether the directors were in breach of their fiduciary duty, and not on the nature of the relief which should be granted following the trial judge's findings that they were in breach.

95. For all these reasons, I remain wholly unconvinced that Mr Davies can in principle pursue a remedy in knowing receipt against GBRK which would extend beyond the well-established principles recently restated by this court in Byers. In particular, I can see no basis for concluding that such a remedy should extend beyond pre-existing trust property transferred in breach of Mr Monks' fiduciary duties, or that it could

somehow embrace the entirety of GBRK's business as at the date of GBR's dissolution in October 2011. In my view, the Judge reached the right conclusion on this issue, and Ground B of the appeal must be dismissed.

(3) Ground C: The withdrawals of £21,000 from GBR's bank account during the Second Period

96. This issue concerns a relatively small amount of money, £21,000, which according to the evidence of Mr Monks' and GBRK's own expert accountant, Mr Haywood Crouch, was received into GBR's bank account with HSBC between May and August 2011, and thus during the Second Period when claims in knowing receipt against GBRK were not time-barred. The source of the £21,000 was GBR's debt-factoring arrangement with Lloyds TSB. In paragraph 3.6 of his first report dated 2 March 2021, Mr Haywood Crouch expressed the opinion that "it appears likely that the £21,000 received from May to August 2011 was withdrawn and/or utilised for the benefit of GBRK."

97. Mr Davies' basic complaint under this ground is that the Judge failed to make any findings of fact about the withdrawal and utilisation of the £21,000, even though Mr Shaw had asked the Judge in his closing submissions to conclude that all withdrawals from GBR's bank account from January 2011 onwards, including in particular the £21,000, were for the benefit of GBRK's business. Mr Shaw had submitted that, as a dishonest fiduciary, the onus was firmly on Mr Monks to account for his dealings with trust property: Mr Monks had been questioned in cross-examination about the £21,000, but had been unable to offer any convincing explanation of how GBR rather than GBRK benefited from these withdrawals.

98. We were taken to the transcript of this part of Mr Monks' cross-examination, where his evidence was to the general effect that he had used the £21,000 to pay various historic creditors of GBR, and its predecessor company, SIK. He said that he did so in order to enhance his personal business reputation, and not to benefit GBRK. He even went so far as to say that "in theory, I was acting like an insolvency practitioner. There was money spare, so I paid the people. They were owed the money from the last company, so I paid them."

99. It is important to remember that this ground of appeal is not directed at establishing a personal liability of Mr Monks to account for the £21,000 by way of equitable compensation, but rather at establishing that GBRK was liable as a knowing recipient of the money. For that purpose, it has been clear since the decision of this court in Byers, if it was not clear before, that Mr Davies needed to show that the £21,000 was received by GBRK in circumstances which satisfied the tests for accessory liability in knowing receipt. No doubt, this requirement might have been met if it could be shown that Mr Monks received the money from GBR in his capacity as a director of GBRK, and then used it to benefit GBRK, for example by paying that company's debts. That was not Mr Monks' evidence, however, and Mr Haywood Crouch went no further than expressing his view that it was "likely" the money was used to benefit GBRK. We were told that Mr Haywood Crouch was cross-examined on this part of his evidence, but he was understandably unwilling to express a firmer view.

100. Against this background, it seems clear to me that any claim in knowing receipt against GBRK in respect of the £21,000 must fail, for the simple reason that there was

no finding in the Liability Judgment that this sum was received by GBRK. Nor did the Liability Judge make any findings about these particular withdrawals, even though disclosure of the relevant bank statements had been given before the Liability Trial, and Mr Davies had also relied on them in September 2018, when he filed a witness statement opposing an application for security for costs.

101. At the Liability Trial, Mr Davies succeeded in a claim for the withdrawal of £170,685 from GBR's bank account, on the footing that this was a breach of Mr Monks' duties and he converted the money to his own use: see paragraph 1 of the Liability Order. There was no appeal against that order, and the money has been duly paid by Mr Monks. If Mr Davies wished to obtain a further finding that £21,000 of GBR's money, whether or not included in the £170,685, had been received by GBRK, he should have sought a finding to that effect at the Liability Trial. He did not do so, nor is there any reference to it in the list of Mr Monks' breaches of duty in [272] of the Liability Judgment. In my view, it was simply too late for Mr Davies to seek to repair this omission at the Quantum Trial, and this may explain why the Judge did not deal with the point explicitly.

102. Further and in any event, there was conflicting evidence before the Judge on what was done with the £21,000, and even if we were satisfied that the Judge was at fault in making no findings in relation to that evidence, we are in no position to make a new finding of fact that there was knowing receipt of the £21,000 by GBRK, and that all the requirements of accessory liability on the part of GBRK were satisfied. The only way to deal fairly with the issue would be to remit it to the Judge, but neither side asked us to take that step in relation to this issue alone, and I am satisfied that it would be wholly disproportionate to do so for such a comparatively small sum.

103. For these reasons, I would dismiss the appeal on Ground C.

(4) Ground D: *The Ashford Site*

104. The basic issue here is whether Mr Davies is entitled (in right of GBR) to assert a proprietary interest in the Ashford Site, the freehold of which is now vested in GBRK. The Judge considered this issue in the Quantum Judgment at [253] to [269], and rejected the various ways in which Mr Davies' claim to a proprietary interest was advanced. As I shall explain, I consider that the Judge was right to do so, with the consequence that this ground of appeal too must be dismissed. In what follows, I will refer to the Ashford Site simply as "the Site".

105. The relevant facts are a little complex, and the chronology is important. The facts are conveniently set out by the Judge at [254], in 12 sub-paragraphs (a) to (l). No challenge is made by either side to the accuracy of that summary, on which the following account is largely based:

    i) Until June 2011, the Site was owned by Mr Davies' company, GAL, subject to a mortgage and charge in favour of Barclays Bank. As found by the Liability Judge, there was no formal arrangement for GBR to occupy and trade from the Site, but the intention (as reflected in the Handover Note) was that GAL would remain the owner of the Site, and the mortgage would be serviced by payments from the income generated by GBR (which would take over the operations at the Site and fund the acquisition of new vehicles and equipment). A draft

Licence Agreement to allow GBR to occupy the Site was produced, but never formally concluded: see the Liability Judgment at [108]. Although Mr Monks was not a director of GAL, he was aware of the Barclays mortgage and the ownership of the Site: see the Liability Judgment at [157] to [164].

ii) At some date before 17 March 2011, GBRK took a lease of the Site from GAL ("the First Lease"). The grant of the First Lease was procured by Mr Monks in breach of his duties as a director of GBR, and it was entered into without the consent of Barclays. It is common ground that any claim in knowing receipt against GBRK in respect of the grant of the First Lease would be time-barred. The term of the First Lease was 7 years (less one day) beginning on 1 December 2010.

iii) On 23 June 2011, the Site was sold by receivers acting on behalf of GAL to an unconnected third party called Benchmark Realty Limited ("Benchmark") for £527,000. On the same day, Benchmark granted a concurrent lease of the Site to Mr Monks for a term beginning on 1 December 2010 and terminating on 29 November 2017, i.e. on the day before the expiry of the First Lease ("the Second Lease"). The Second Lease was expressly made subject to the First Lease. The rent under the Second Lease was £60,000 per annum for the first three years, rising to £75,000 for the next two years, and to £85,000 for the remainder of the term. According to the joint valuation expert, Mr Monkhouse, in the Quantum Trial, this was, if anything, above the market rent at the time, which he said was £45,000 per annum. In taking the Second Lease in his own name, Mr Monks had again acted in breach of his fiduciary duties to GBR: see the Liability Judgment at [272] (v).

iv) Some four and a half years later, on 24 November 2015, Mr Monks assigned the residue of the term under the Second Lease to a company of which he was a 50% shareholder and director, called Greenbox Resources Limited ("Greenbox"). On the same day, Greenbox entered into what was called a "Renewal Lease by reference to an Existing Lease", namely a reversionary lease of the Site commencing immediately on the expiry of the term of the Second Lease on 30 November 2017 and ending on 29 November 2025 ("the Third Lease").

v) On 1 July 2016, GBRK purchased the freehold interest in the Site from Benchmark for £800,000, subject to the Second and Third Leases. By a deed of surrender also dated 1 July 2016, Greenbox surrendered both the Second Lease and the Third Lease, thus enabling GBRK to be registered as the unencumbered freehold proprietor of the Site. In Mr Monkhouse's view, the market value of the freehold interest in the Site as at 1 July 2016 was £490,000 with the benefit of the various leasehold interests, and £565,000 with vacant possession. It thus appears that GBRK may have purchased the Site for a sum substantially in excess of its then market value.

106. Against this background, the first main argument advanced by Mr Davies at the Quantum Trial was that the grant of the Second Lease to Mr Monks on 23 June 2011 (and so within the Second Period) had secured GBRK's occupation of the Site, which had previously been precarious because Barclays Bank never gave its consent to the First Lease. Since the First Lease was not surrendered by GBRK, and since the

Second Lease was expressly made subject to it, the effect of the linked transactions on 23 June 2011 (so it was said) was, in substance, to reinforce the benefit to GBRK of the First Lease, and this reinforced benefit should therefore be treated as knowingly received by GBRK in the Second Period, with the consequence that it was held by GBRK on a constructive trust for GBR freed from the limitation defence.

107. This argument was rejected by the Judge, who pointed out that Mr Davies' claim against GBRK, as a non-fiduciary third party, was based purely on knowing receipt. The Judge reasoned that there could be no claim in knowing receipt against GBRK in respect of the First Lease, either before or after its reinforcement in June 2011, because it was originally granted in the First Period and any claim based on it was therefore time-barred. Further, the fact that the First Lease became more secure after 23 June 2011 had nothing to do with the grant of the Second Lease. Rather, it was due to the purchase of the freehold of the Site by Benchmark, which was content to allow the First Lease to continue concurrently with the Second Lease. The Judge then said, at [260]:

> "Thus the supposed benefit to GBRK derived not from the grant of the Second Lease, but rather from the prior transfer of the freehold to Benchmark. Further, and in any event, I do not think that the supposed benefit or advantage of gaining greater security can possibly constitute an asset or property the receipt of which can found a claim for knowing receipt."

108. Before us, Mr. Shaw criticised the Judge for taking an over-compartmentalised view of Benchmark's acquisition of the freehold of the Site and Mr. Monks' entry into the Second Lease on the same day. He also argued that the Judge erred in law in concluding that the benefit of security of occupation obtained by GBRK on 23 June 2011 was not capable of founding a claim in knowing receipt. I agree with Mr. Cook, however, that the second of these criticisms cannot survive the judgment of this court in Byers. It is now clear that a receipt of pre-existing trust property is a necessary ingredient of a claim in knowing receipt, and it is not enough that a defendant has merely obtained a benefit from trust assets: see Byers at [22]. In my judgment, it is impossible in law to regard the enhancement of GBRK's security of tenure under the First Lease brought about by the linked transactions of 23 June 2011 as constituting a receipt, or renewed receipt, of trust property. That point alone is enough to dispose of this way of putting Mr. Davies' claim to a proprietary interest in the Site based on the First Lease.

109. Mr. Davies also advanced an alternative case at the Quantum Trial, which was founded on the alleged status of Greenbox as a constructive trustee of the Second Lease for GBR. It will be recalled that Mr. Monks had originally taken the Second Lease from Benchmark in his own name, in breach of the fiduciary duties which he owed to GBR. The breach of duty was not negated by the fact that the Second Lease was granted on fully commercial terms, not least because Mr. Monks' evident purpose in taking it was to enhance the security of tenure of GBRK in trading from the Site. Moreover, the Second Lease was taken at a time when GBR was still in existence. However, it was later assigned by Mr. Monks to Greenbox on 24 November 2015, more than four years after GBR had been dissolved.

110. Mr. Davies' argument in the Quantum Trial, as summarised in his counsel's skeleton argument in this court, was that if Greenbox had acquired the ***freehold*** of the Site in 2016, an application of the strict equitable rule in Keech v Sandford (1726) Sel. Case. Ch 61 and Protheroe v Protheroe [1968] 1 WLR 519 (CA) would have resulted in Greenbox acquiring the freehold as trustee. It was not open to Mr. Monks and GBRK to escape the operation of that rule by (a) causing GBRK rather than Greenbox to acquire the freehold, and then (b) causing Greenbox immediately to surrender the Second Lease to GBRK.

111. In my view, there are several difficulties with this argument, a number of which were identified by the Judge. For present purposes, it is enough to focus on the premise of the argument, namely that the rule in Keech v Sandford (or, more accurately, the extension of that rule in Protheroe v Protheroe) would have applied if the freehold had been acquired by Greenbox in 2016, with the result that Greenbox would then have held the freehold on trust for GBR. The rule in Keech v Sandford, as stated by Lord Denning MR in Protheroe v Protheroe at 521, is that "if a trustee, who owns the leasehold, gets in the freehold, that freehold belongs to the trust and he cannot take the property for himself". It has often been pointed out that Lord Denning's statement of the rule was in fact inaccurate, because Keech v Sandford itself concerned a renewal of a lease, not a purchase of the freehold: see Snell's Equity, 34th edition, paragraph 7 – 045 and the cases there cited. Nevertheless, there is no doubt that the extension of the rule in Protheroe v Protheroe is good law, and that it represents a further illustration of the underlying principle that a fiduciary may not place himself in a position of conflict between his duty and his personal interest.

112. In my judgment, however, it cannot be said that, in 2016, Greenbox held the Second Lease in a fiduciary capacity, for the simple reason that the person to whom any duty would have been owed, namely GBR, was no longer in existence. The most that could be said, as the Judge rightly recognised at [262], was that "the Second Lease remained impressed with a trust in favour of GBR as a result of Mr. Monks' previous breach of duty in taking the lease in the first place". Even assuming that this trust could somehow have revived when GBR was later restored to the register, I do not see how it could have extended to a hypothetical purchase by Greenbox of the freehold during the interim period when GBR did not exist. Furthermore, the actual purchase of the freehold was made not by Greenbox, but by GBRK, which itself never stood in a fiduciary relationship with GBR, and therefore cannot have owed fiduciary duties to GBR at any time.

113. As for the Second Lease, it was surrendered by Greenbox and therefore ceased, by operation of law, to exist as a separate item of property. See Barrett v Morgan [2000] 2 AC 264, where Lord Millett said, at 270 F:

> "If a tenant surrenders his tenancy to his immediate landlord, who accepts the surrender, the tenancy is absorbed by the landlord's reversion and is extinguished by operation of law."

See, too, Allen v Rochdale Borough Council [2000] Ch 220 (CA) at 229-231, where this court held that the surrender of a leasehold interest destroys any equitable claim to trace into the leasehold interest or its proceeds.

114. The Judge reached his conclusion that the proprietary claim to the Site failed without any regret: see [269]. As he there explained, if he had been minded to make a declaration that the Site was held on trust for GBR or Mr. Davies, it would then have been necessary to give credit to GBRK for the £800,000 which it spent in acquiring the freehold. On the evidence before the Judge, that may have been a considerable overvalue, even though the purchase was at arm's length. Mr. Davies has not appealed against the Judge's conclusion on this point. It seems, therefore, that any victory by Mr. Davies founded on the purchase of the reversion might well have been a Pyrrhic one.

115. For completeness, I should also mention a brief suggestion in Mr. Davies' skeleton argument that, in the further alternative, the Judge "ought to have concluded that the estate in land created by the Third Lease continues to exist for GBR's benefit". In agreement with Mr. Cook, I consider that the short answer to this contention, which was not advanced below, is that the Third Lease, like the Second Lease, was surrendered. There cannot be a proprietary claim in respect of something which no longer exists.

(5) Ground E: Should the Judge have ordered an account of profits against GBRK as a knowing recipient?

116. The Judge considered this issue at [270] to [275] of the Quantum Judgment. He recorded Mr. Davies' submission that GBRK was only able to build a valuable business as a result of Mr. Monks' dishonest scheme to divert business from GBR. It would be manifestly unjust, said Mr. Davies, to allow Mr. Monks or GBRK to keep the profits of that business. The Court has the necessary flexibility to fashion an account of profits so as to achieve an equitable result. Since GBRK was still exploiting the Site at the date of the Quantum Trial, this would in principle justify an account of profits from 22 May 2011 until the present day. In short, as a result of Mr. Monks' dishonest conduct, GBRK was given a springboard that enabled it to conduct a profitable business after that date.

117. The Judge then reminded himself of his findings that:

i) in the counterfactual world in which Mr. Monks and Mr. Ford were not in breach of their fiduciary duties, GBR would have traded in the same way as GBRK did, but only until mid-October 2011;

ii) Mr. Davies was entitled as against Mr. Monks to equitable compensation assessed as the value of GBRK in mid-October 2011;

iii) GBRK did not hold the entirety of its business, assets and undertaking as a constructive trustee for GBR as at 18 October 2011, and any claim in knowing receipt against GBRK was confined to the receipt of assets or property resulting from Mr. Monks' breach of duty in taking the Second Lease in his name; and

iv) Mr. Davies' claim that GBRK held the Site on trust for him must be rejected.

118. The Judge then referred to authority on the circumstances in which an account of profits may be ordered against a knowing recipient, even though he is not a fiduciary.

He quoted from the judgment of Lewison J in the Ultraframe case (Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638), including the propositions, at [1579] and [1580], that:

> "The ordering of an account is an equitable remedy. It is not discretionary in the true sense. It is granted or withheld on the basis of equitable principles. But one of those principles is that of proportionality…… one of the grounds on which an account may be withheld is that the taking of an account would be a disproportionate response to the gain that appears to have been made, or to the nature of that which has been misused….."

119. The Judge also referred to the later decision of this court in Novoship (UK) Limited v Mikhaylyuk [2014] EWHC Civ 908, [2015] QB 499, where the court (comprising Longmore, Moore-Bick and Lewison LJJ) said at [107]:

> "Where a claim based on equitable wrongdoing is made against one who is not a fiduciary, we consider that …… there is no reason why the common law rules of causation, remoteness and measure of damages should not be applied by analogy."

120. On the question of discretion, the court then said at [119]:

> "We consider that where a claim for an account of profits is made against one who is not a fiduciary, and does not owe fiduciary duties then, as Lord Nicholls said in the *Blake* case [2001] 1 AC 268, the court has a discretion to grant or withhold the remedy. We therefore agree … that the ordering of an account in a non-fiduciary case is not automatic. One ground on which the court may withhold the remedy is that an account of profits would be disproportionate in relation to the particular form and extent of wrongdoing …"

121. Having thus directed himself, in terms which have not been challenged on this appeal, the Judge gave three reasons for declining to order an account of profits against GBRK. His first reason was that there was "no relevant knowing receipt" to ground an order for an account of profits, given that "there was no receipt by GBRK of any property as a result of the grant of the Second (or indeed the First) Lease". The second reason was that the Judge had "declined to hold that GBRK held the entirety of its business on trust for GBR as at 18 October 2011 or indeed at [*any*] subsequent other date." The Judge then expressed his third reason as follows:

> "Further, and in any event, I have already held that Mr Davies is entitled to receive equitable compensation from Mr Monks in the sum representing the value of GBRK as at mid-October 2011, the date beyond which I have held that, in the counterfactual world, GBR would not have been able to trade. In my judgment, to order an account of profits against GBRK in addition to the equitable compensation would, in the circumstances, be to grant Mr Davies double recovery or to enrich him unjustly. The value of GBRK as at mid-October

> 2011 gives him all that to which, in my judgment, he is entitled as a result of Mr Monks' breaches of duty. The value of GBRK as at that date takes into account the profits which that company had made in the relevant period. Thus I would, in any event, decline to grant him the discretionary remedy of an account against GBRK."

122. Mr Davies makes a number of criticisms of the Judge's reasoning and conclusion on this issue, but I am unpersuaded that they have any substance. It is conceded that the Judge directed himself correctly on the law, and that one of the grounds on which a judge may legitimately refuse to order an account of profits against a knowing recipient is that it would be disproportionate to do so. Further, the scope for any such account would, on the most favourable view to Mr Davies, be extremely limited, in the light of the Judge's conclusion that the only potentially relevant breach of duty to ground an account would be Mr Monks' taking of the Second Lease in his name for the benefit of GBRK. For the reasons which I have already given in dismissing other grounds of appeal, I consider that the Judge was right to take that view. In those circumstances, it was in my judgment well within the scope of the Judge's discretion to refuse to order an account on the basis that it would serve no useful purpose, and it would add nothing of any real value to his award of equitable compensation to Mr Davies based on the value of GBRK's business on 18 October 2011 when GBR was dissolved.

123. I would accept that the Judge's reference to "double recovery" in this context was slightly inaccurate, because Mr Davies was in principle entitled to seek equitable compensation against the primary wrongdoer, Mr Monks himself, and an account of profits against GBRK based on its secondary liability as a knowing recipient. Strictly speaking, an issue of double recovery would arise only at the stage of enforcement of any overlapping orders obtained by Mr Davies against the two defendants which were based on the same facts. In substance, however, it seems to me that the Judge was plainly entitled, and indeed correct, to conclude that, in the light of his other findings, and the effect of the limitation period, it would be an exercise in futility to order an account of profits against GBRK.

124. I would therefore dismiss the appeal on Ground E.

(6) Ground F: what is the correct basis of assessment of equitable compensation against Mr Monks?

125. The issue raised by this ground relates to the Judge's award of equitable compensation against Mr Monks for his breaches of fiduciary duty. The Judge decided that the compensation should be assessed on what he termed a "reparative" basis rather than a "substitutive" basis, and rejected Mr Davies' arguments in favour of the latter basis. The question is whether the Judge was right to do so.

126. This is an area of the law which is unfortunately bedevilled by confusing terminology and a lack of general agreement on how the underlying concepts should be analysed and labelled. At a high level of generality, however, two main types of compensation claim against trustees have been recognised in the case law. In one of the leading textbooks on the subject (Underhill and Hayton, Law Relating to Trusts and Trustees,

(20th Edition)), the editors explain the distinction between the two types of claim as follows (paragraph 91.11):

> "Equity recognises two types of compensation claim against trustees, which will be termed substitutive performance claims and reparation claims. Substitutive performance claims are claims for a money payment as a substitute for performance of the trustees' obligation to produce trust assets *in specie* when called upon to do so. Claims of this sort are apposite when trust property has been misapplied in an unauthorised transaction, and the amount claimed is the objective value of the property which the trustees should be able to produce. Reparation claims are claims for a money payment to make good the damage caused by a breach of trust, and the amount claimed is measured by reference to the actual loss sustained by the beneficiaries. Claims of this sort are often brought where trustees have carelessly mismanaged trust property, but they lie more generally wherever a trustee has harmed his beneficiaries by committing a breach of duty. … Each type of claim is sometimes described as a 'restitutionary' claim, but this usage is best avoided, both to avoid confusing the two types of claim with one another, and to avoid confusing the trustee's liability in either case with a liability in unjust enrichment: loss-based liability for equitable wrongdoing differs from gain-based liability for unjust enrichment, and it is clear that in this context the word 'restitution' is used to mean 'compensation'. In modern times, it has also become common to describe each type of claim as a claim for 'equitable compensation', and this, too, can lead to confusion because it may be unclear from the context of particular cases which type of claim a court has in mind when using this expression."

127. As the editors observe in the second footnote to the above passage:

> "In the context of substitutive performance claims it is often said that the trustee must effect 'restitution' or 'restoration' of the trust assets for which he has failed to account."

That language is reflected in the traditional rules relating to substitutive performance claims, as set out in paragraph 91.12. By contrast, reparation claims are described in the following terms at paragraph 91.47:

> "Reparation claims are claims that trustees should make good the harm which the beneficiaries have suffered as a consequence of the trustees' breach of duty. Unlike substitutive performance claims they depend on the assertion that the trustees have committed a wrong, and the award made is calculated by reference to the loss suffered by the beneficiaries as a result of the trustee's wrongdoing, including the loss of a chance to avoid a detriment or make a gain."

128. The leading case in the Supreme Court on the topic of equitable compensation is AIB Group (UK) PLC v Mark Redler & Co Solicitors [2014] UKSC 58, [2015] AC 1503 ("AIB"). The leading judgments in AIB were delivered by Lord Toulson JSC and Lord Reed JSC, with whom the other three members of the court simply agreed. In a helpful passage, Lord Toulson explained:

> "64. All agree that the basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law. Where there has been a breach of that duty, the basic purpose of any remedy will be either to put the beneficiary in the same position as if the breach had not occurred or to vest in the beneficiary any profit which the trustee may have made by reason of the breach (and which ought therefore properly to be held on behalf of the beneficiary). Placing the beneficiary in the same position as he would have been in but for the breach may involve restoring the value of something lost by the breach or making good financial damage caused by the breach. But a monetary award which reflected neither loss caused nor profit gained by the wrongdoer would be penal.
>
> 65. The purpose of a restitutionary order is to replace a loss to the trust fund which the trustee has brought about. To say that there has been a loss to the trust fund in the present case of £2.5m by reason of the solicitors' conduct, when most of that sum would have been lost if the solicitors had applied the trust fund in the way that the bank had instructed them to do, is to adopt an artificial and unrealistic view of the facts.
>
> 66. I would reiterate Lord Browne-Wilkinson's statement [in Target Holdings Ltd v Redferns [1996] AC 421 at 436] … about the object of an equitable monetary remedy for breach of trust, whether it be sub-classified as substitutive or reparative. As the beneficiary is entitled to have the trust properly administered, so he is entitled to have made good any loss suffered by reason of a breach of duty."

129. To similar effect, Lord Toulson said at [73]:

> "Monetary compensation, whether classified as restitutive or reparative, is intended to make good a loss. The basic equitable principle applicable to breach of trust, as Lord Browne-Wilkinson stated, is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach."

130. The decision of the Supreme Court in AIB was delivered on 5 November 2014, nearly four months after the court's decision in FHR which had been given on 16 July 2014. Lord Neuberger PSC was a member of the court in each of the two cases, as was Lord Toulson. Both cases had been argued before the Supreme Court in June 2014. In those circumstances, it seems to me that, if and to the extent that there may be any tension

between the principles of equitable compensation as stated by Lord Toulson and Lord Reed in AIB, and the "prefatory comments" made by Lord Neuberger in FHR as a prelude to the court's decision that a principal may assert a proprietary claim to a bribe taken by his agent, the fuller and later treatment of the subject in AIB should prevail. In particular, I am satisfied that it would be wrong to interpret Lord Neuberger's background comments in FHR at [7] as stating a general rule that in *all* cases where an agent acquires a benefit "as a result of his fiduciary position, or pursuant to an opportunity which results from his fiduciary position", the rule is "that he is to be treated as having acquired the benefit on behalf of his principal, so that it is beneficially owned by the principal."

131. Further and in any event, Lord Neuberger was clearly not intending to state a universal principle in that passage, because he merely said that it applies "at least in some cases". Bribes and the taking of secret commissions are persistent scourges of commercial life which fully justify the most stringent remedies against agents who take them, but it by no means follows that the same principles should be translated, in their entirety, to the generality of cases where compensation is sought from an erring fiduciary. In such cases, as it seems to me, the right approach is that the principal may seek a substitutive remedy in respect of existing trust property which is misapplied by the agent, or an account of profits made by the agent, but that if the principal elects not to seek an account of profits, he should be confined to a reparative remedy compensating him for any actual loss caused by the breach of duty.

132. In my judgment, that is in substance the position in the present case. At the Liability Trial, Mr Davies obtained an order that Mr Monks should pay him £170,685 in respect of funds belonging to GBR which Mr Monks had converted to his own use. This was, in effect, a substitutive remedy in respect of assets of GBR which Mr Monks had misappropriated. It was therefore appropriate that he should be ordered to repay the full amount of those monies, together with compound interest: see paragraph 1 of the Liability Order, and paragraph 3 of the Quantum Order. As regards further relief against Mr Monks, Mr Davies elected not to seek an account of profits, but instead to obtain an order for equitable compensation. The reasoning of the Judge in the Quantum Judgment that such compensation should be awarded on a reparative basis was in my judgment impeccable, and I would therefore dismiss this ground of appeal.

(7) Ground G: The equitable allowance granted to Mr Monks

133. This ground of appeal raises a short point about the computation of the equitable allowance which the Judge found should be granted to Mr Monks as a deduction from the equitable compensation payable by him. The Judge discussed this issue at [176] to [183], beginning with the point that the Liability Judge had already expressed the view that Mr Monks should "in principle" be entitled to claim an equitable allowance, on the basis that his efforts and capital investments since early 2011 had contributed to the growth and success of GBRK: see the Liability Judgment at [401]. Although the Liability Judge had expressed that view "somewhat tentatively", by the date of the Quantum Trial it was common ground that Mr Monks was, in principle, entitled to such an allowance. Furthermore, the parties had instructed a joint expert, Mr Paul Grainger, whose unchallenged evidence was that the market rate for the remuneration and/or benefits of a director of GBRK as at January 2011 was £89,815 (comprising a salary of £81,650 and a bonus of £8,165): see [177].

134. Nor was there any dispute before the Judge about the principles which should govern the making of an equitable allowance to an errant fiduciary. It was agreed that the grant of an allowance is a matter for the discretion of the trial judge: see, for example, Murad v Al-Saraj [2005] EWCA Civ 959 at [88] (Arden LJ) and the cases there cited. Also of relevance is the limitation expressed by Lord Goff of Chieveley in Guinness PLC v Saunders [1990] 2 AC 663 at [701]:

> "the exercise of the jurisdiction is restricted to those cases where it cannot have the effect of encouraging trustees in any way to put themselves in a position where their interests conflict with their duties as trustees."

In relation to that point, the Liability Judge had already said, at [401]:

> "It seems to me that the sort of allowance I have in mind does not fall foul of the limitation identified by Lord Goff in Guinness v Saunders: it does not have the effect of relaxing the scope of the duties owed by a fiduciary or of encouraging a breach of such duties to say that, in the case of a breach, unauthorised benefits should be disgorged but subject to some allowance for the efforts made by the fiduciary in contributing to the development or growth of those benefits."

135. In relation to the factual background, the Judge referred, at [178], to the Handover Note, in which it was recorded that each of Mr Davies, Mr Monks and Mr Ford had agreed to "take out" £3,000 per month, and the Judge also found, at [179], that Mr Monks must have been aware "of the fact that he was at least initially, only to receive £3,000 per month from what was a newly incorporated company". The Judge further found, at [180], that "Mr Monks in fact received payments from GBRK in the period to December 2011 of £78,000." He continued (*ibid*):

> "Whilst this, of course, does not necessarily directly affect the question of whether and to what extent Mr Monks is entitled to an allowance in respect of equitable compensation which he is ordered to pay GBR, it does at least show that he was in fact remunerated for his efforts in the real world. Further, the receipt by him of such sums would, in my view, have to have been taken into account in the valuation of GBRK as at October 2011 as it would have been a factor contributing to the financial state of GBRK as at that date. So, to an extent, an award of equitable compensation based on the value of GBRK has already taken into account certain payments made by that company to Mr Monks."

136. The Judge then stated his conclusions, as follows:

> "182. On the facts here, I am prepared to grant Mr Monks an allowance to recognise the skill and effort which he displayed in building up the business of GBRK. However, in my judgment it would be wrong to allow Mr Monks anything more than the £3,000 per month which I find was contemplated by

> the agreement described in the Handover Note. Whilst he had not seen the Handover Note itself, he has not proved that he was unaware of those parts of the arrangement that related to him. I would be very surprised indeed if he was unaware of the fact that his remuneration was, at least initially, intended to be £3,000 per month. Further, and in any event, he was being brought into GBR by Mr Davies specifically to use his skill and experience to grow the business. It is reasonable to anticipate that he would initially receive less than the market rate for the job he was doing in the expectation that his salary and the value of his shareholding would grow in time.
>
> 183. That is all I intend to allow him: £3,000 per month for 10 months, that is £30,000. For the avoidance of doubt this sum is in addition to any sums which (as set out above) Mr Monks might actually have received from GBRK in the relevant period."

137. The simple point made by Mr Davies in support of this ground of appeal is that there appears to be a contradiction between (a) the Judge's statement, in [182], that it would be wrong to allow Mr Monks anything more than the £3,000 per month contemplated by the Handover Note, as reflected in the first sentence of [183], and (b) the second sentence of [183] which, ostensibly for the avoidance of doubt, says that this sum is additional to any sums which Mr Monks "might actually have received from GBRK in the relevant period", including presumably the £78,000 referred to in [180]. The difficulty with this submission, however, is that the second sentence of [183] was, we were told, added by the Judge in response to a request for clarification which was made to him after the draft judgment had been circulated to counsel. In adding the second sentence, the Judge was therefore expressly addressing the question whether the £3,000 per month was additional to, or should be set off against, any sums which Mr Monks had actually received as remuneration from GBRK in the first ten months of 2011. Nor can I detect any ambiguity in the Judge's answer: the two sums were cumulative, and not to be set off against each other.

138. In the light of that unambiguous language, the Judge's earlier comments in [182] must in my judgment be read in a way which is consistent with his ultimate conclusion. On that basis, the correct interpretation of [182] has to be that the Judge was confining his comments to the quantum of any allowance to be made to Mr Monks in excess of the sums which he had actually received from GBRK during the relevant period. Since the quantum of any allowance was a matter for the Judge's discretion, the grounds upon which it can be attacked are very limited, and in practice it would be necessary for Mr Davies to show that the Judge's ultimate conclusion was one which no reasonable judge could have reached. I agree with Mr Cook that this heavy burden of proof is not satisfied, with the consequence that this ground of appeal must fail.

139. I am to some extent encouraged in reaching this conclusion by Mr Cook's further point that the true status of the £78,000 received by Mr Monks from GBRK in 2011 is far from clear, especially in view of the Judge's previous finding, at [125], that substantial sums were owing to Mr Monks on his director's loan account throughout 2011. It is therefore not self-evident that the £78,000 paid to Mr Monks was intended

to be remuneration for his services. Furthermore, any proper calculation of net benefit to Mr Monks during that period might also need to take account of guarantees which he gave to support GBRK's borrowing. The weight which I can attach to these further points, however, is very limited, in the absence of clear findings by the Judge on the precise nature of the £78,000 payments, and his apparent willingness to accept that they may all have constituted remuneration. Nor are any of these points raised in the defendants' respondent's notice. I therefore prefer to base my decision on what appears to me to be the clear wording of [183] and the width of the Judge's discretion.

140. For these reasons, I would also dismiss this ground of appeal. Since I have reached the same conclusion in relation to all the other grounds of appeal, it follows that I would dismiss Mr Davies' appeal in its entirety. It remains, however, to consider the cross-appeal of Mr Monks and GBRK, to which I now turn.

The cross-appeal: What was the value of GBRK as at 18 October 2011?

Introduction

141. The cross-appeal challenges the methodology and quantum of the Judge's valuation of GBRK as at 18 October 2011 (the date of dissolution of GBR). The Judge took this value as a proxy for what would have been the value of GBR on that date if Mr Monks and Mr Ford had not breached their fiduciary duties as directors of GBR, and thus as an appropriate measure of the equitable compensation which Mr Monks should pay to Mr Davies (in right of GBR) on a reparative basis.

142. As I have already briefly explained, the Judge assessed the value of GBRK on 18 October 2011 as £800,000, by extrapolation from the investment of £200,000 in return for 25% of the shares in GBRK which had been made in early October 2011 by a long-standing friend and business acquaintance of Mr Monks, Mr Myles Simmons. The Judge reached this conclusion even though different methodologies, resulting in substantially lower valuations, were adopted by the two expert forensic accountants who gave evidence on this issue, Mr Doug Hall of Smith & Williamson LLP for Mr Davies and Mr Haywood Crouch of BDO LLP for Mr Monks and GBRK.

143. It is no longer in dispute that if, as I have held, the Judge was right to assess the equitable compensation payable by Mr Monks on a reparative basis, the Judge was also right to take the value of GBRK on 18 October 2011 as the basic measure of that compensation. The ground of appeal which Mr Monks and GBRK have permission (granted by Arnold LJ) to pursue in this court is framed as follows in the respondent's notice:

> "The learned Judge erred in finding, as a matter of fact, that the value of GBRK as of October 2011 was £800,000 when:
>
> (i) the opinion of both valuation experts was that GBRK was worth substantially less than this, and

> (ii) the Judge found that GBRK was insolvent at the time and so, as opined by both valuation experts, it should be valued on a net asset basis."

The Judge's treatment of the issue

144. The Judge dealt with the valuation issue at [159] to [173]. He began his discussion by recording, at [160], that both experts had adopted a net asset valuation for GBRK as at 18 October 2011. He then explained that Mr Haywood Crouch had assessed the value at that date as £280,000, but Mr Hall had finally arrived at the higher figure of £400,000. The Judge explained why he preferred Mr Hall's approach, and then said at [163]:

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

145. The Judge continued:

> "164. However, it seems to me that there is contemporaneous evidence as to what someone considered was the actual value of GBRK as at early to mid-October 2011: that is what Mr Simmons actually invested for what he was told and considered was a 20% (in fact a 25%) stake in the company.
>
> 165. Both experts agreed that the investment made by Mr and Mrs Monks Senior [*i.e., the parents of Mr Monks*] was not an arm's-length transaction and could not therefore be relied upon for valuation purposes. In accounting terms (IVS 104) Mr and Mrs Monks were parties who had a "particular or special relationship" with GBRK and Mr Monks.
>
> 166. However, the experts agreed that Mr Simmons was not technically such a party."

146. The Judge then quoted, at [167], an extract from Mr Hall's first report dated 2 March 2021, where at the end of a section headed "Value implied by actual transactions", he said in paragraph 10.7.15:

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

The Judge then referred to further extracts from Mr Hall's written and oral evidence, including passages in which Mr Hall accepted that the question

whether or not Mr Simmons' investment was made at arm's-length was a question of fact for the Judge.

147. The Judge then discussed the view expressed by Mr Haywood Crouch, in various passages of his written evidence, that Mr Simmons "had the traits of a special purchaser", although he too acknowledged in the experts' Joint Statement that the question was ultimately one of fact for the Judge. The Judge also quoted this passage from Mr Haywood Crouch's cross-examination:

> "Q. Yes. I think the point I am trying to make is that the very best evidence of what something is worth is what somebody in the market actually pays for it. So, the only way that you can – the only accurate way of doing it is to market something and find out how much somebody is in fact prepared to pay. Without that, all that you can do is try and anticipate what that person would be willing to pay; do you accept that?
>
> A. Yes."

148. The Judge next referred to the evidence of Mr Simmons, who had filed a witness statement and been cross-examined on it. The Judge assessed his evidence as follows:

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

> 171. My clear view is that, whilst Mr Monks approached Mr Simmons because of their pre-existing friendship, Mr Simmons' investment was clearly an arm's-length one. Mr Simmons was, and is, clearly a businessman in his own right and, although he knew of the company's financial state and the risks involved, he was clearly investing a significant sum for a future return. His investment was a commercial one on commercial terms.
>
> 172. Thus, despite Mr Simmons indicating that he did not think GBRK was worth £1 million at that time, his investment is clearly evidence of what both Mr Monks and an independent third party thought GBRK was worth at the time. This is despite what I have already concluded was the parlous state of its finances in October 2011. To my mind, this is unsurprising. As I have already stated, Mr Monks clearly thought that the conduct of a waste management business at the Site was one that had considerable potential. He had effectively stolen that business from GBR. He had invested considerable amounts of his own time and money. He had persuaded his parents to re-mortgage their house to provide cash flow. He offered Mr Simmons 20% (in fact 25%) of the equity for an investment of £200,000. GBRK made a trading profit in its first year."

149. The Judge then stated his conclusion:

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

Submissions

(a) Mr Monks and GBRK

150. The position of Mr Monks and GBRK, as stated in their skeleton argument in support of the cross-appeal, is that the Judge was wrong in his factual finding as to the value of GBRK in October 2011, and that Mr Simmons' investment did not in any event reflect the value of GBR at that date. If their appeal succeeds, they ask us to substitute the higher of the two expert valuations for the value found by the Judge, and thus to award equitable compensation of £400,000 plus interest.

151. Mr Monks and GBRK submit that the Judge's error can be analysed in terms of two overlapping contentions:

(a) he had no good reason to reject the valuation methodology of the two experts; and

(b) he was wrong to find that Mr Simmons' investment, at a time when (as the Judge found) GBRK was insolvent, or nearly insolvent, was indicative of the market value of GBRK.

152. With regard to the valuation methodology of the two experts, there was a large measure of agreement between them by the time of the Quantum Trial. The approach of Mr Haywood Crouch, which remained unchanged throughout the proceedings, was based on the net assets of GBRK at the relevant time, which (after appropriate adjustments) yielded a net sum of £280,000. Mr Hall, for his part, had initially estimated the value of GBRK on 31 December 2011 as £660,000, based on a multiple of EBITDA, but in the Joint Statement he revised his estimate downwards to £450,000, and in his supplemental report he further reduced his estimate of the equity value of GBRK to £296,000. Since, however, this was less than GBRK's reported net assets, Mr Hall increased his valuation to £400,000 to reflect the net asset position.

153. Moreover, although both experts were aware of, and commented upon, the transactions in GBRK's shares in early October 2011, neither of them considered that the value implied by those transactions reflected the true value of GBRK at the time. In those circumstances, the Judge needed cogent reasons to depart from the methodology agreed by the experts, and to arrive at a valuation which significantly exceeded the range of values provided by them. As to the difference of opinion between the experts, Mr Monks and GBRK do not challenge the Judge's preference for the final value of £400,000 advanced by Mr Hall.

154. In relation to Mr Simmons' investment, Mr Haywood Crouch considered that it was not made at arm's-length, and that it carried no weight because the value of GBRK which it implied fell so far outside the range that he and Mr Hall had both independently calculated. As for Mr Hall, he did consider that Mr Simmons' investment was made at arm's-length, but he nevertheless saw its relevance as being only to provide support for his more generous £400,000 valuation. The Judge gave no reasons, let alone cogent ones, for disagreeing with Mr Hall's view, as stated in cross-examination, that Mr Simmons' investment was a "credibility check" in favour of his valuation of £400,000.

155. In support of their second main contention, that Mr Simmons' investment did not in any event reflect the true market value of GBRK in October 2011, reliance is placed on a number of points, including the Judge's findings about GBRK's lack of solvency in early October 2011. In particular, the Judge found, in [144], that at that date:

> "GBRK was, if not insolvent, then in a sufficiently serious financial situation to require an urgent injection of cash (which is what the investors provided)."

Since an insolvent company cannot lawfully trade, there could be no justification for valuing GBRK on a "going concern" basis. Furthermore, Mr

Simmons' investment was not indicative of the entirety of the value of GBRK, because he bought only 25% of the shares. The only evidence of the value of GBRK as a whole was that provided by the experts. Nor was it appropriate to extrapolate from Mr Simmons' investment as a measure of the equitable compensation owed to GBR, in circumstances where Mr Simmons' own evidence was that he would not have invested in GBR at all, because it was not majority-owned by Mr Monks, and was instead controlled by Mr Davies.

(b) Mr Davies

156. Mr Davies submits that the cross-appeal involves a challenge to the Judge's evaluation of a pure issue of fact, namely the value of GBRK's business in October 2011. The Judge found that the best available evidence of that value was the value implied by Mr Simmons' investment on a non-discounted basis (i.e., without a discount to reflect the fact that Mr Simmons was acquiring a minority stake in the company). The Judge's decision to proceed in this way cannot be challenged. The best evidence of what something is worth is what a real person pays for it in the real world.

157. Mr Davies further submits that there is no conflict between the expert evidence and the Judge's approach. Both experts agreed that evidence of an actual arm's-length transaction was relevant, and rightly accepted that it was for the Judge to decide the significance of Mr Simmons' investment.

158. Nor is there any substance in the alleged inconsistency between the Judge's approach and his findings about GBRK's solvency at the relevant date. Properly understood, the Judge's finding was that GBRK was only insolvent on a cash flow basis, and this was then remedied by the funding provided by Mr Monks' parents and Mr Simmons. The Judge's finding that Mr Simmons invested on a commercial basis was amply justified by the evidence, and cannot be challenged on appeal.

Discussion

159. For the reasons which follow, I consider that the submissions for Mr Davies are correct, and there are no grounds on which this court should interfere with the Judge's approach or conclusion on this issue. Indeed, after Mr Cook had opened the cross-appeal, we only found it necessary to call on Mr Shaw for assistance on some limited aspects of the evidence on which we wished to be sure that we had the full picture. Those aspects comprised (a) the potentially relevant parts of the expert reports, (b) potentially relevant extracts from the transcript of the oral evidence given by Mr Monks, Mr Simmons, Mr Hall and Mr Haywood Crouch, and (c) the Judge's findings on the insolvency, or otherwise, of GBRK in October 2011. Mr Shaw was able to satisfy us that nothing in this material should cause us to change the preliminary view which we had already formed after hearing Mr Cook's able submissions.

160. There was no disagreement between the parties about the general legal principles which apply to an appeal on issues of fact, or against a trial judge's evaluation of expert evidence. For a recent summary of the well-established principles which an appeal court should follow on an appeal on a pure

question of fact, see Volpi v Volpi [2022] EWCA Civ 464, [2022] 4 WLR 48, at [2] and [3] (Lewison LJ, with whom Males and Snowden LJJ agreed). In particular, an appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong, in the sense that no reasonable judge could have so concluded. An appeal court must also resist the temptation to indulge in "island-hopping" in the sea of evidence, and must also assume, in the absence of compelling reason to the contrary, that the trial judge has taken the whole of the evidence into his consideration, whether or not he expressly mentions it. To state the obvious, this court does not have the advantages which the Judge had in receiving all of the written and oral evidence at the Quantum Trial, and of observing the witnesses give their oral evidence.

161. As to expert evidence, there is no rule that it is entitled to special consideration, or that a trial judge is obliged to accept expert opinion. That is the case even where the expert evidence is uncontroverted: see Volpi at [4], and the recent decision of this court in Griffiths v TUI (UK) Ltd [2021] EWCA Civ 1442, [2022] 1 WLR 973, where the leading judgment was delivered by Asplin LJ. The other two members of the court, Nugee and Bean LJJ, agreed with Asplin LJ's statements of principle, except that Bean LJ dissented on the question (which does not arise in the present case) whether a party is bound to cross-examine an expert before challenging the expert's evidence in closing submissions. As Asplin LJ said, at [40]:

> "There is no rule that an expert's report which is uncontroverted and which complies with CPR PD 35 cannot be impugned in submissions and ultimately rejected by the judge. It all depends upon all of the circumstances of the case, the nature of the report itself and the purpose for which it is being used in the claim."

See too [50], [69] and the judgment of Nugee LJ at [82].

162. The position might be different if, as Mr Cook's argument at times appeared to suggest, the position was that both experts were agreed that Mr Simmons' investment, even if made at arm's-length, was irrelevant to the issue of valuation, and if they had both adhered to that view in cross-examination. In those circumstances, it may well be that a Judge would have needed to give cogent reasons for adopting a different approach: see Griffiths v Tui (UK) Ltd at [50] and [69]. But I am satisfied that this would not be a fair way to characterise the expert evidence on this point which the Judge had to consider. The extracts from Mr Hall's evidence which were quoted by the Judge included the fact, noted in his initial report, that Mr Simmons' investment "in what appears to have been an arm's-length transaction implies the market value of all of GBRK's shares at the date they were acquired in October 2011 was £800,000". Furthermore, his report expressly referred in paragraph 10.7 to the possibility of valuing the shares in a company "by reference to the value implied by any previous transactions in the shares".

163. While it is right to say that Mr Hall did not himself use this methodology except to support his revised valuation based on net asset value, he also

expressly accepted that it was for the court to decide whether Mr Simmons' investment had been made at arm's-length. This was also accepted by Mr Haywood Crouch, who said in the Joint Statement at paragraph 4.45:

> "It is a question of fact whether the investments made in GBRK in October 2011 and later were arm's-length transactions.
>
> …
>
> Mr Haywood Crouch does not consider in his view that the investment by Mr Simmons was arm's-length and has proceeded on that basis."

It seems to me implicit in this statement that, if the Judge were to determine as a matter of fact that Mr Simmons' investment was made at arm's-length, then it would be open to the Judge to rely on it as a valuation tool. Further support for that view is then found in the passages from Mr Haywood Crouch's cross-examination quoted by the Judge at [168], where he accepted that "Ultimately…it is a matter for the court."

164. Once it is accepted that the expert evidence, taken as a whole, did not preclude the Judge from placing reliance on Mr Simmons' investment, it seems to me that he was fully entitled to take the view that it provided the best contemporary evidence of the value of GBRK provided that the investment was made at arm's-length and on a commercial basis. That was a pure issue of fact, as both experts rightly accepted, and the Judge's findings to that effect cannot be challenged on appeal. It is true that Mr Simmons' investment was for only 25% of the shares, but it was a real commercial transaction, and the legitimacy of extrapolating from it had been recognised, in principle, by Mr Hall. Similarly, Mr Haywood Crouch accepted, in paragraph 4.46 of the Joint Statement, that "a minority shareholding will often attract a discount for…lack of control", and that "if Mr Simmons' investment was considered to be arm's-length, this would imply a market value of GBRK as at the date of Mr Simmons' investment greater than £800,000". In fact, the Judge was not prepared to go further than Mr Hall's undiscounted extrapolation, but the important point for present purposes is that the principle of extrapolation from the price paid for a minority shareholding was clearly acknowledged by both experts.

165. I am further satisfied that there is no substance in the argument that Mr Simmons' equity investment in GBRK cannot be used as a proxy for the value which GBR would have had if Mr Monks and Mr Ford had acted in accordance with their duties. The argument is that, in those circumstances, Mr Simmons would never have invested in GBR at all, because it was under the control of Mr Davies, whereas GBRK was controlled by Mr Monks. The short answer to this point, as Mr Shaw contends, is that Mr Monks and GBRK do not have permission to appeal against the Judge's conclusion that the value of GBRK should be taken as a proxy for the value which GBR ought to have had in October 2011. It is not therefore open to them to argue, as part of the

cross-appeal, that the value of GBR would have been less than the value of GBRK at that date.

166. The final point which I need to mention concerns the Judge's findings about GBRK's solvency. Although the Judge's reasoning in [143] and [144] of the Quantum Judgment is in some respects a little unclear, I agree with Mr Shaw that there is no clear finding that GBRK was insolvent in early October 2011 on both a balance sheet and a cash flow basis, and the Judge's main focus is on the point that GBRK was probably not in a position to pay its debts as and when they fell due, or in other words that it may well have been insolvent on a cash flow basis. Hence the need for an urgent injection of cash, which was provided by Mr Monks' parents and Mr Simmons. It is enough to say that I am unable to find anything in the Judge's cautious findings on this point which would make it illegitimate to value the company as a whole on a going concern basis after the injections of cash had been made.

167. For these reasons, I would dismiss the cross-appeal.

Disposition

168. If the other members of the court agree, it follows that both the appeal and the cross-appeal will be dismissed in their entirety.

Lady Justice Asplin:

169. I agree that both the appeal and the cross-appeal should be dismissed for the reasons given by Sir Launcelot Henderson in his detailed judgment.

170. In relation to Ground B, I should also reiterate that although the passages from the Byers case, to which Sir Launcelot refers, make the point quite clear, liability in knowing receipt requires the receipt of property which was subject to a pre-existing and continuing trust in the hands of the recipient. As Sir Launcelot points out at [82] the relevant principles in this regard date back at least to the El Ajou case.

171. Further, in relation to the cross-appeal, I should add that although the circumstances were very different in the Griffiths case, I agree that the principles apply here. There is no rule which entitles expert evidence to special consideration or that the trial judge is required to accept expert opinion even where it is uncontroverted. In any event, in this case, neither the experts' reports nor their evidence in cross-examination precluded the Judge from placing reliance on Mr Simmons' investment as the best contemporary evidence of GBRK's value provided that he found that the investment had been made at arm's length and on a commercial basis. He did so and there is no appeal in that regard.

Lady Justice Macur:

172. I also agree that the appeal and cross-appeal should be dismissed for the reasons given by Sir Launcelot Henderson.