Neutral Citation Number: [2019] EWHC 700 (Ch)

Case No: C30BS157

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 26 March 2019

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

Devon Commercial Property Limited	**Claimant**
- and -	
(1) Robert Adrian Barnett	**Defendants**
(2) Robert John Belcher	

- -
- -

Hugh Sims QC and Neil Levy (instructed by **Michelmores LLP**) for the **Claimant**
Simon Davenport QC and Daniel Lewis (instructed by **Kennedys Law LLP**) for the **Defendants**

Hearing dates: 25 July – 3 August 2018

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Approved Judgment

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

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HHJ Paul Matthews :

Introduction

1. This is my judgment on the trial of the claim brought by the claimant, a limited company, against the defendants, chartered surveyors, now retired, but formerly partners in the well-known firm of GVA Grimley Ltd. The claim was begun by claim form dated 16 February 2016, seeking damages for various alleged breaches of duty arising out of the defendants acting as receivers appointed under the Law of Property Act 1925 of a freehold property formerly belonging to the claimant. Particulars of claim were served on 13 June 2016. The acknowledgement of service was filed on 27 June 2016, intimating an intention to defend the whole claim. The defence was filed on 29 September 2016 and a reply was served on the 3 November 2016.

2. I shall have to examine the facts in more detail later on, but a broad outline of the case at this stage can be obtained from the agreed list of issues, part of which, with slight cosmetic amendment, reads as follows:

    1. On 18 August 2005 the claimant acquired the freehold land known as The Bottling Hall, Distribution Depot and Offices, Howden, Tiverton, Devon (title number DN 442449) (the "Property").

    2. The claimant and its connected company called Devon Cider Company Ltd ("DCC") were wholly-owned by Hexshelf 8 Ltd, which was wholly-owned by Mr James McIlwraith and Mr Greg Birchmore. Mr Michael Ralph and Mr Birchmore were also the directors and/or agents of the claimant.

    3. The claimant leased an area of about 70% of the Property to DCC for a term of 5 years from 24 June 2005 at a rent of £370,000 per annum (the "Lease"). DCC used the leased land to run a cider production, bottling and distribution business.

    4. On 20 July 2007 the claimant granted a mortgage of the Property (the "Mortgage") to State Securities plc ("State").

    5. On 30 September 2009 DCC went into administration.

    6. On 4 November 2009 DCC's administrators sold its business and assets to Aston Manor Brewery Co Ltd ("Aston Manor") for £2.3 million and granted a licence to Aston Manor to use the land within the Lease.

    7. On 4 November 2009 State assigned the Mortgage to Aston Manor. Notice of the assignment was given to the claimant by letter dated 13 November 2009.

    8. By 14 December 2009 the claimant had defaulted on the interest payments due under the Mortgage.

    9. On 14 December 2009 Aston Manor served a default notice and appointed the defendants as LPA receivers in respect of the Property under the Mortgage. The defendants were employees of GVA Grimley Ltd.

    10. The defendants owed a duty to the claimant to act in good faith, for a proper purpose and to obtain the best price reasonably obtainable for the Property.

11. Meetings took place between the claimant and the defendants on 17 December 2009 and 11 January 2010.

12. As at 29 January 2010 the sum secured by the Mortgage was £3,466,231.88.

13. In January 2010 a planning appraisal prepared by GVA Grimley for the defendants indicated that the prospect of obtaining residential planning permission for the whole Property was limited.

14. On 18 January 2010 the defendants rejected a proposal by the claimant that the Property should be jointly marketed with local agents, Tomlinson Associates.

15. On 17 February 2010 Emvic Lloyd Ltd ("Emvic") made an offer to buy the Property for £4.25 million subject to contract and vacant possession by 1 May 2010.

16. On 24 February 2010 the defendants surrendered the Lease and granted a new lease to Aston Manor (the "New Lease") for 3 years from 20 February 2010 at a rent of £300,000 per annum with a break clause exercisable by Aston Manor on 6 months' notice.

17. In March/April 2010 GVA Grimley marketed the Property and invited unconditional offers in excess of £4 million. Offers made ranged from £2 million to £3 million.

18. In December 2010 a company called Asphaltic Ltd made an offer of £4.3 million for the Property subject to vacant possession within 6 months.

19. On 24 December 2010 Aston Manor made an offer of £3.2 million.

20. On 25 January 2011 Edward Symmons LLP produced a valuation of the Property for the defendants of £2 million (with vacant possession), £2.25 million (as a bottling plant), and £2.5 million (fully equipped bottling plant with all fixtures and fittings).

21. On 12 May 2011 Aston Manor made a final offer of £2.75 million together with payment of certain costs stated to amount to over £100,000.

22. On 25 May 2011 a sale of the Property was completed to Aston Manor Freeholds Limited (a newly formed subsidiary of Aston Manor) for £2.75 million excluding VAT.

23. There was no surplus on the sale of the Property returnable to the claimant as mortgagor.

3. It will be seen that the factual situation in this case is unusual. First of all, the claimant freeholder had granted a lease of the greater part of its freehold estate to its connected company, DCC. It then mortgaged the whole freehold estate to a mortgagee. DCC went into administration, and the administrators sold its business and assets to Aston Manor, to whom they granted a licence to use the land falling within the lease. Aston Manor then took an assignment of the mortgage from the mortgagee and, on the claimant's default under the mortgage appointed the defendants as LPA receivers.

Those receivers then put an end to the lease and granted a new one to Aston Manor. They later marketed the freehold estate, and ultimately they sold it to a subsidiary of Aston Manor. Essentially, the claimant claims that Aston Manor was a special purchaser and that the defendants did not act correctly in selling the land to Aston Manor, in particular that they did not achieve a high enough price.

4. In summary, the claimant alleges that the defendants owed it a number of important duties, including a duty to act in good faith, to exercise their powers for the purpose of securing repayment of the debt owed to the mortgagee and not for any other purpose, and not to place themselves in a position of conflict or potential conflict, and a duty to take reasonable steps to obtain the best price reasonably obtainable at the material time, taking proper steps to market the Property. The defendants accept that they owed the claimant duties to act in good faith for a proper purpose, namely the realisation of the assets comprised in the security and obtaining repayment of the sum secured, and to obtain the best price reasonably obtainable at the time that the power of sale was exercised, without needing to await or effect any increase in value or improvement of the Property. Subject to that, however, the allegations as to duties are denied.

5. The claimant alleges that the defendants acted in breach of the claimed duties in various ways. These included (i) by placing themselves in a position of conflict of interest and/or acting under the direction or control of Aston Manor, (ii) failing to treat Aston Manor as a special purchaser and failing to market the Property properly, with vacant possession or with the ability to obtain vacant possession at short notice, and (iii) replacing the original lease with the New Lease. The defendants deny all the breaches of duty alleged. The claimant further alleges that the defendants' breaches of duty have caused it significant losses, amounting to several million pounds. The defendants deny causing any such losses.

Procedure

6. Case management and costs and case management conferences were held in March 2017, though the directions given were subsequently amended on several occasions. Disclosure was given by both sides by list in July 2017, although supplemented in the case of the claimant by further lists in August and October 2017, and in the case of the defendants by a further list in November 2017. The directions to trial given included directions as to expert evidence. I shall return to these. Expert reports were exchanged in November 2017, and joint expert statements produced in January 2018. A pre-trial review was held by me on 15 June 2018.

7. At the trial before me the claimant was represented by Hugh Sims QC and Neil Levy, instructed by Michelmores LLP, and the defendants were represented by Simon Davenport QC and Daniel Lewis, instructed by Kennedys Law LLP. On the third day of the trial there was an argument about the scope of the pleaded claim and the impact that that might have on cross-examination of the claimant's witnesses. The defendants had served a Note on the first day of the trial complaining that further particulars of acting in bad faith had been set out in the claimant's skeleton argument, although (for the most part) they had not been referred to in the particulars of claim or even the reply. In the Note, it was argued that particulars of bad faith were like particulars of dishonesty, and had to be specifically set out if they were to be relied upon. But when the matter came to be argued, it turned out to be much narrower than that. Once Mr

Sims QC, for the claimant, confirmed that he was not advancing any case of dishonesty against the defendants, but only one of acting in bad faith or for an improper purpose, the objections fell away, and it was not necessary for me to rule on the matter.

The evidence

8. In this case both factual and expert evidence were tendered. The factual evidence consisted of witness statements from James McIlwraith, Greg Birchmore, Peter Tomlinson, Richard Johnson, Peter Regis, and Gregory Kenney for the claimant, and from Robert Barnett, Robert Belcher, Paul Hobbs and James Ellis on behalf of the defendants. The expert evidence was of two kinds. First, there was evidence from insolvency practitioners: there were reports from Ian Walker, on behalf of the claimant, and Finbarr O'Connell, on behalf of the defendants, followed by a joint statement from them both. Secondly, there was evidence from valuers: there were reports from Hugh Neason, on behalf of the claimant, and Peter Clarke, on behalf of the defendants followed by a joint statement from them both. Exceptionally, each expert valuer produced a supplementary report thereafter.

9. All of these witnesses of fact and of expert opinion were tendered for cross-examination (except Messrs Walker and O'Connell, where the parties agreed during the trial that they would not be so tendered). I record here my impressions of those witnesses.

Witnesses

10. James McIlwraith, a shareholder in and director of the claimant, was a thoughtful witness, who took his time to answer carefully the questions put to him. He was very clear and straightforward, if sometimes rather firm, in his responses, but he accepted correction when he thought it was necessary. Although I do not think that he said anything which he knew or suspected to be untrue, I am afraid that I was sure he had convinced himself that the claimant's case was the right one, and that he saw everything through that prism. So, even when he was faced with obvious questions having answers in favour of the defendants, he still gave answers in favour of the claimant. Accordingly, I cannot accept all his evidence.

11. Richard Johnson was the operations director at Devon Cider Company Ltd from 2005 to 2009. He is a director and company secretary of the claimant. He was a knowledgeable, and straightforward witness, careful in what he said, accepting correction and avoiding exaggeration. He was trying to assist the court. I would describe him as a technician rather than a salesman or a visionary. I accept his evidence.

12. Peter Regis has been a director of Asphaltic Developments Ltd, a property investment company, since 1991. I found him to be a talkative, indeed argumentative, witness, who was verging on the passionate in defence of his friend Greg Birchmore and of the claim made by the claimant. I am afraid that he was unobjective and clearly *parti pris*. I found it difficult to accept his evidence where not corroborated from an independent source or in the documents.

13. Gregory Kenney was from 2007 until April 2016 chairman and 50% shareholder of Emvic Lloyd Ltd, a property development company. He was a calm, even laid-back witness. But he held firm views and maintained strong positions. He came across as an intelligent property wheeler dealer, happy to "puff" the properties which he was developing as might be required. He was also an old friend of Greg Birchmore. I had the strong impression that he was happy to assist his friend by giving evidence in the claimant's favour. I was not confident however about relying on his evidence where it was not corroborated from an independent source or found in the documents.

14. Peter Tomlinson is a chartered surveyor who owns a commercial property agency. He was a straightforward and clear witness, who did not try to be difficult or tricky, and was plainly attempting to the best of his ability to help the court. If he did not know something, he said so. I found him to be a believable witness, and accept his evidence.

15. Greg Birchmore was a clear and engaging witness. He was generally frank and down to earth. But in my view he constantly radiated over-optimism. Moreover, he had some odd views about objectivity, considering that anyone who was paid to advise must be biased. He also seemed to consider that in business the truth was negotiable. Overall, I did not feel confident about trusting his evidence where it was unsupported by an independent source or the documents.

16. Robert Barnett's evidence was attacked by the claimant as "unsatisfactory in many ways" and his credibility was called into question. It is therefore right that I say that, in my judgment, he was a grave and careful witness, occasionally somewhat patrician in manner, as might be expected from the former senior partner of a large and reputable professional services firm. He was generally very precise in his answers, but very properly accepted both comment and criticism. As was to be expected from someone who has been retired for a number of years, giving evidence about events that happened nearly 10 years ago, there were some mistakes, which I attributed to memory lapses, rather than to anything more sinister. In my judgment he was telling the truth as far as he could recall it. So long as not inconsistent with the documents, I preferred his evidence on the crucial events in this case to that of any of the claimant's witnesses.

17. James Ellis is the son of the late Peter Ellis, who was the managing director of Aston Manor Brewery Ltd at the time of the events complained of. He became a director of the company on 5 October 2009. I found him to be a quiet and careful witness, relatively precise, extremely commercial and undoubtedly shrewd. Although I have no doubts about accepting most of his evidence as true, there were some elements where I thought his commercial instincts outweighed other considerations. As a result, I cannot accept his evidence without reserve, unless it is supported by other independent evidence.

18. Paul Hobbs at the material time was a surveyor at GVA Grimley dealing with the marketing of commercial property. I found him to be careful, exact and straightforward witness, clearly telling the truth throughout. He was without doubt trying to help the court, and I accept his evidence without any reservation.

19. Robert Belcher was an engaging, indeed talkative, and knowledgeable witness who gave his evidence in a straightforward and helpful manner. He was transparently honest, and I accept his evidence without any reservation.

20. Hugh Neason was an engaging, open and straightforward witness, anxious to assist the court. But he was careful to restrict himself in the answers which he gave. His evidence tended more to the practical rather than the intellectual side of things. I accept that he was giving me his honest opinion.

21. Peter Clarke was an equally engaging and straightforward witness, who made his points clearly and precisely, but who was keen to help the court and who accepted criticism or correction. He was clearly very well up on his subject. His answers tended to be more intellectual than those of Mr Neason. I accept that he too was giving me his honest opinion.

The burden of proof

22. Before I turn to the facts which I find in this case, I mention the question of the burden of proof. The general rule in civil litigation is that the party who asserts must prove: *Robins v National Trust Company Ltd* [1927] AC 515, 520, per Viscount Dunedin. In *Abrath v North East Railway Company* (1883) 11 QBD 440 (affirmed (1886) 11 App Cas 247), Bowen LJ said (at 456):

> "Whenever litigation exists, somebody must go on with it; the plaintiff is the first to begin; if he does nothing, he fails; if he makes a prima facie case, and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden of proof … is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the onus of proof shifts, and at which the tribunal will have to say that if the case stops there, it must be decided in a particular manner."

23. In the present case, allegations are made that the defendants, as Law of Property Act receivers, breached duties of good faith owed to the claimant. The claimant relies on the defendants' position as justifying a reversal of the usual burden of proof, and as requiring *the defendants* to prove that they did *not* breach their duties of good faith. The claimant put the matter this way in its written submissions (though I have added the numbering):

> "[1] Where there is a sale by a mortgagee to a connected company, the burden is on the mortgagee to prove that the price paid was the best price reasonably obtainable… [2] The same principle should apply to sales by receivers given that in the exercise of the power of sale receivers owe the same equitable duty to the mortgagor as is owed by the mortgagee…"

24. The former proposition ([1]) is uncontroversial. For the latter proposition ([2]), the claimant relies on the decision of the Court of Appeal in *Silven Properties Ltd v Royal Bank of Scotland plc* [2004] 1 WLR 997. In that case the claimants mortgaged properties to the first defendant to secure debts. The claimants defaulted on the mortgages, and the defendant appointed the second and third defendants as receivers under the mortgage (which provided that any such receivers should be the agents of the claimants). The defendants sold the properties, and the claimants sued them, alleging that the properties had been sold at an undervalue. The judge dismissed the claim, and the claimant appealed. The appeal was confined to the question whether

the appointment of the receivers as agents of the mortgagors imposed duties different from those of the mortgagees.

25. Lightman J (with whom Aldous and Tuckey LJJ agreed) said this:

> "22. There is binding authority for the proposition that (again in default of agreement to the contrary) in the exercise of the power of sale receivers owe the same equitable duty to the mortgagor and others interested in the equity of redemption as is owned by the mortgagee: they are both obliged to take care to obtain the best price reasonably obtainable… The critical issue however is whether the receiver (unlike the mortgagee) is under a duty of care in regard to the date of sale and to ensure that steps are taken (in particular in respect of planning and the grant of leases) to realise the full potential of the secured property before sale by obtaining permission or granting the leases.
>
> 23. In a number of respects it is clear that a receiver is in a very different position from a mortgagee. Whilst the mortgagee has no duty at any time to exercise his powers to enforce his security, a receiver has no right to remain passive if that course would be damaging to the interests of the mortgagor or mortgagee. In the absence of a provision to the contrary in the mortgage or his appointment, the receiver must be active in the protection and preservation of the charged property over which he is appointed… Thus if the mortgaged property is let, the receiver is duty bound to inspect the lease and, if the lease contains an upwards only rent review, to trigger that rent review in due time… His management duties will ordinarily impose on him no general duty to exercise the power of sale… But a duty may arise if e.g. the goods are perishable and a failure to do so would cause loss to the mortgagee and mortgagor.
>
> 24. The critical issue raised is whether (as contended by the claimants) the wider management duties imposed on a receiver (but not on a mortgagee) may require a receiver (and in particular a receiver appointed the agent of the mortgagor) to postpone a sale until after steps have been taken (in this case proceeding with an application for planning permission and with the grant of the lease) calculated to increase the price obtainable in some greater than the cost of taking those steps plus the sum representing accrued interest over the period whilst those steps are being taken.
>
> […]
>
> 28. In the context of a relationship such as the present, which is no ordinary agency and is primarily a device to protect the mortgagee, general agency principles are of limited assistance in identifying the duties owed by the receiver to the mortgagor… The core duty of the receiver to account to the mortgagor subsists, but (for example) the mortgagor has no unrestricted rights of access to receivership documents. The mortgage confers upon the mortgagee a direct and indirect means of securing a sale in order to achieve repayment of his secured debt. The mortgagee can sell as mortgagee and the mortgagee can appoint a receiver who likewise can sell in the name of the mortgagor. Having regard to the fact that the receiver's primary duty is to bring about a situation where the secured debt is repaid, as a matter of principle the receiver must be entitled (like the mortgagee) to sell the property in the condition in which it is in the same way

> as the mortgagee can and in particular without awaiting or affecting any increase in value or improvement in the property. This accords with the repeated statements in the authorities that the duties in respect of the exercise of the power of sale by mortgagees and receivers are the same and with the holding in a series of decisions at first instance that receivers are not obliged before sale to spend money on repairs…, to make the property more attractive before marketing it…, or to 'work' an estate by refurbishing it…
>
> 29. In summary, by accepting office as receivers of the claimants properties the receivers assumed a fiduciary duty of care to the bank, the claimants and all (if any) others interested in the equity of redemption… The appointment of the receivers as agents of the claimants having regard to the special character of the agency does not affect the scope or the content of the fiduciary duty. The scope or content of the duty must depend on and reflect the special nature of the relationship between the bank, the claimants and the receivers arising under the terms of the mortgages and the appointments of the receivers, and in particular the role of the receivers in securing repayment of the secured debt and the primacy of their obligations in this regard to the bank. These circumstances preclude the assumption by, or imposition on, the receivers of the obligation to take the pre-marketing steps for which the claimants contend in this action. Further no such obligation could arise in their case (any more than in the case of the bank) from the steps which they took to investigate and (for a period) to proceed with applications for planning permission. The receivers were at all times free (as was the bank) to halt those steps and exercise their right to proceed with an immediate sale of the mortgaged properties as they were."

The appeal was accordingly dismissed. The House of Lords subsequently dismissed a petition for leave to appeal further.

26. The claimant in the present case also relies on a passage from the current edition of Lightman and Moss, *The Law of Administrators and Receivers of Companies*, 6th ed 2017, which reads as follows:

> "13-047 … A receiver is subject to a like duty [as applies to trustees] and is accordingly disqualified from purchasing charged property from the mortgagee and (in the case of a receiver appointed by trustees for debenture-holders) from purchasing debentures from debenture-holders without the leave of the court. Mortgagees are, however, subject to less severe restrictions:
>
> (a) a strict but very limited "self-dealing" rule whereby a mortgagee may not sell to himself or to a trustee for himself; and
>
> (b) a "fair dealing" rule whereby a conflict of interest makes a sale voidable (or the subject of a claim to damages) unless it can be shown (the onus being on the mortgagee or purchaser) that the sale was at full market value.
>
> 13-048 It is considered that where a receiver sells as agent of the mortgagor to a company in which the mortgagee has an interest: (i) the self-dealing rule does not apply, since there are two real parties to the transaction; and (ii) the fair dealing rule is applicable on the basis that the receivership sale involves the exercise of

> the mortgagee's remedies. To be absolutely safe in such a case, the mortgagee can seek a sale by the court."

27. *Silven* shows that a receiver exercising the power of sale under the mortgage owes the same equitable duty to the mortgagor as is owed by the mortgagee. Where a receiver sells to a company in which he or she has an interest, this therefore puts the burden on the receiver to show that he or she took reasonable care to obtain the best price reasonably obtainable or, as it was put in the earlier cases, a proper price. But *Silven* does not show that the same applies where a receiver sells to a company in which *the mortgagee* has an interest. Lightman & Moss are advocating a development of *Silven* in so suggesting.

28. Since the receiver and the mortgagee are two persons, and not one, and it is the mortgagee rather than the receiver that would benefit from a lower price, there is no 'self-dealing', and no conflict of interest (as I say later). So, as at present advised, I do not see why the 'fair-dealing' rule should extend that far. But, even if I were wrong and it did, that would not mean that, in the general management of the property, the receiver had the burden of showing that *every* act that he or she carried out was carried out in good faith. If an allegation of bad faith in such management is made against a receiver (other than in the conduct of a sale to an associate of the receiver or mortgagee), in my judgment the person so asserting must prove it in the ordinary way.

29. As is well-known, and has been said in other cases, the significance of who bears the burden of proof in civil litigation is this. If the person who bears the burden of proof of a particular matter satisfies the court, after considering the material that has been placed before the court, that *on the balance of probabilities* something happened, then, for the purposes of deciding the case, it *did* happen. But if that person does not so satisfy the court, then it did *not* happen. The system of fact-finding is binary. It is either one thing or the other. There is no room for 'maybe': see *Re B (Children)* [2009] 1 AC 11, [2], per Lord Hoffmann. So what the court does is to decide what, on the material before it, *probably* happened. There is no requirement of *certainty*.

Factfinding

30. On the question of fact-finding, I was referred to the approach to oral evidence adopted by Leggatt J in *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [22]:

> "In the light of these considerations [about the unreliability of memory], the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and

> is honest, evidence based on that recollection provides any reliable guide to the truth."

31. The present is very much a commercial case, and the events which are in subject took place more than 10 years ago. Inevitably, memories (even good ones) will have faded since then. Whilst there are in this case no particularly traumatic events (for example, a car crash or a violent altercation between people) which have to be the subject of fact-finding and then analysis, it seems appropriate to adopt in this case the same approach as Leggatt J suggested for his. However, the judge in that case made clear that the court was entitled, in considering the documentary material, to have regard to the impressions made by the witnesses in cross-examination. Even if documents point one way, to a particular conclusion, the court may still take the view that that conclusion is either more or less likely to be correct in light of the assessment of the witnesses who have given live evidence. The documents are by no means the whole of the story.

32. On the basis of the evidence and the other material placed before me, I find the following facts, taking into account the matters which were common ground between the parties.

The first Devon Cider Company Ltd

33. James McIlwraith studied microbiology and plant biology at university. After university, in 1983 he worked at first for a small traditional cider maker in Gloucester called Blands Cider, on the technical side of the business. Then he moved to Hazelwood Foods, where he set up a new cider factory, and then to Greenhall Whitley, where he rebuilt the cider business. In 1986, with his brother-in-law and other, institutional investors, he bought Inch's Cider Company for £1 million. He expanded it and sold it to Bulmers, then the giant of the cider world, in 1996 for £21 million, of which his profit share was £2 million. After moving to Guernsey and back, he bought a farm in Devon. In 1999 Mr McIlwraith and his brother-in-law set up a company called Devon Contract Packing Limited, initially with a view to packing cider for Knights Cider. However, in 2001 the company also acquired the rights to Churchwards cider, changed its name to Devon Cider Company Limited ("DCC"), and started selling cider itself.

34. DCC also packed cider for another company which I have already mentioned in another connection, namely, Aston Manor. In 2003, Aston Manor approached DCC to see if it was interested in acquiring its Birmingham cider breweries. Having considered the matter, DCC decided that it would be too much of a financial commitment, and that its Birmingham premises were too cramped. So the acquisition did not go ahead, although DCC continued to do business with Aston Manor, including contract packing various products and supplying apple juice concentrate.

35. Gregory Birchmore comes from a background in the motor trade and property development. He owned six franchised car dealerships and four filling stations in the south-west of England. He met Mr McIlwraith in the late 1980s when the latter was with Inch's Cider and he (Mr Birchmore) was supplying contract cars to that company. When Mr McIlwraith's brother-in-law emigrated to Australia in about 2005, Mr McIlwraith suggested that Mr Birchmore join him in the cider business. Mr McIlwraith had the technical expertise, and Mr Birchmore the necessary skills in sales

and marketing, as well as experience in property development. Mr Birchmore was looking for a new project, and agreed to join Mr McIlwraith at DCC.

36. DCC outgrew its existing (rented) premises in North Tawton, North Devon, and Mr Birchmore became aware that Interbrew UK Ltd (later called Inbev UK Ltd, and part of Whitbread) was selling its manufacturing and bottling plant and distribution warehouse in Tiverton, Devon. Mr McIlwraith had actually worked there in the mid-1980s. It was surrounded by houses, and covered a little over 10 acres, but it was much bigger than DCC needed at the time. Nevertheless, he and Mr Birchmore decided it would be a good investment. It was probably the largest "stand-alone" bottling facility of its kind in Europe. It was equipped with two production lines for filling glass (although subsequently one of these was removed and replaced it with a line adapted to fill plastic bottles), and had services such as water, steam and carbon dioxide already piped in. It was highly adaptable to changes in brewing fashions. In order to be able to afford the purchase, Mr McIlwraith and Mr Birchmore expanded both the investment base and the board of directors. They incorporated the claimant company to buy the Property and lease it to DCC.

37. The purchase consideration was £2,750,000 for the land and buildings and £900,000 for plant and equipment. The purchase was funded partly by investors (including Mr McIlwraith and Mr Birchmore) and partly with mortgage finance. Completion of the purchase took place on 1 August 2005. On the same day DCP granted a lease of part of the greater part of the Property to DCC for a term of 5 years, at a rent of £370,000 per annum. This was, as Mr McIlwraith accepted in cross-examination, "a friendly deal in order to pay the mortgage…" rather than an open-market transaction on arms' length terms. Some land, including a warehouse, was retained by DCP and not leased to DCC, and there was also a four-year lease of a social club granted on 1 September 2005 by DCP to the trustees of the Whitbread Sports and Social Club, but this appears to have been surrendered early.

38. DCC not only developed its own brands, but also had a good share of the supermarket own label market. But as a company it still faced a number of difficulties. These included problems experienced with the new plastic bottling plant equipment, which initially was delayed for more than six months, and then failed because of defects. The agreements with supermarkets were rolling supply agreements with deferred payment provisions, rather than fixed contracts. Any delays in deliveries to supermarkets could therefore be very serious, leading to loss of business. Moreover, the excise duty was payable on the products at the time that they left the factory. This amounted to 78% of retail value, which, given the deferred payment provisions, caused cash flow problems. In addition, the company was unable itself to perform some packing agreements it had undertaken with other cider producers, and had to subcontract these to third parties at high costs (so that they were thereby rendered unprofitable, or even loss-making).

39. There were other difficulties too. The Property was surrounded by residential housing, which led to noise complaints and therefore to restrictions on access. In addition, there was no easy access from the Property to the motorway system. As Mr Birchmore said in his evidence, these disadvantages could be mitigated by moving to a new site, either nearer to the M5 motorway, or even in south Wales (where there were favourable government grants available). Mr Birchmore was investigating the value of the Property for loan security purposes, but was also aware of the

development potential of the property. He obtained planning permission for development of the front part of the Property in April 2007. He also obtained valuations of the Property for various scenarios, including continued use, vacant possession, continued use and development of the front part of the Property and complete residential development of the Property. In October 2006 a building company offered £5 million to purchase the freehold in order to redevelop it for residential purposes. But nothing came of this.

40. By the end of 2006 the problems with the bottling line had been resolved, and at last the infrastructure and production facilities at the Property were fully in operation. Nevertheless, the losses caused by the various difficulties already referred to created funding problems for DCC. It started to fall into arrears with HMRC. And, at the same time, DCC's bank, Barclays, notified the company that it wished the company to make alternative banking arrangements. The directors took insolvency advice, which was to put the company through a "prepack" administration. But the directors and shareholders preferred to take a different course. They transferred the DCP shares which they also owned into DCC, so that DCP became a wholly owned subsidiary of DCC. That strengthened the balance sheet of DCC, because the main asset of DCP, the Property, had considerable equity in it. And the Barclays bank facility was refinanced with Halifax Bank of Scotland ("HBOS").

41. So far as concerns HMRC, in about March 2007, DCC entered into a "time to pay" agreement with HMRC. Unfortunately, DCC failed to make the very first payment under that agreement. Mr McIlwraith and Mr Birchmore blame a clerical error at HBOS. But for present purposes it does not matter what the cause was. HMRC began recovery proceedings, and DCC had to obtain further insolvency advice. In the meantime, HBOS imposed funding restrictions (largely as a consequence of HMRC's recovery action).

The first administration, and the second Devon Cider Company Ltd

42. As a result of the further insolvency advice, DCC entered a "prepack" administration on 23 July 2007. In anticipation of this, three new companies were incorporated on 29 May 2007, forming a group structure for the proposed purchase of the business and assets of DCC. The three companies were called Hexshelf 6 Ltd, Hexshelf 7 Ltd, and Hexshelf 8 Ltd. Hexshelf 8 Ltd was intended to be the holding company for the other two. Hexshelf 6 Ltd negotiated with DCC's administrators for, and acquired, the brands and intellectual property rights owned by DCC, and Hexshelf 7 Ltd negotiated for, and acquired, the operating business of DCC, including the lease of the Property. Hexshelf 8 Ltd also acquired the shares in DCP from DCC. The sum of £3,327,000 was paid on completion, with deferred consideration of some £350,000 to be paid in 16 monthly instalments. In order to raise the initial sum, DCP raised a loan of £3,464,000 on the Property by charging it on 20 July 2007 to State Securities Plc ("State"). Hexshelf 7 Ltd entered into an invoice finance facility with Leumi ABL, secured by fixed and floating charges granted on 18 July 2007 over its undertaking and assets. Hexshelf 6 Ltd granted a charge over its intellectual property assets to DCC to secure the purchase price for them.

43. On 16 August 2007 DCC changed its name to DCC Realisations Ltd, Hexshelf 6 Ltd changed its name to Devon Cider Brands Ltd ("DCB"), and Hexshelf 7 Ltd changed its name to Devon Cider Company Ltd ("DCC2"), *i.e.* the name relinquished by the

former DCC. DCP did not change its name. On 24 October 2007, DCC Realisations Ltd went into creditors' voluntary liquidation, with Timothy Bramston appointed as liquidator.

44. In the meantime, Mr Birchmore was continuing to explore the possibility of developing the site and relocating the production plant. Architects were instructed to explore the development potential with the local planning authority. Another offer for the freehold was made by a residential housing developer, Spring Residential, on 29 November 2007, for £6 million. But DCP was not in a rush to sell the Property at that time. The DCC2 business was doing well. Nevertheless, interest from Spring Residential, and also from another builder, Wimpey, continued into 2008. Wimpey even put forward draft heads of terms in February 2008. DCP's architects made applications for outline planning permission for residential units and associated works and also for modernisation and extension of the existing industrial development. But there were objections from the local community, and the local planning authority required further information. The applications were therefore withdrawn in April 2008, although interest continued to be expressed by developers.

45. DCC2 developed a trading relationship with a Belgian brewing company called Konings, which later led to an informal offer of £10 million for a one half share in DCC2. This informal offer never went anywhere because there were some regulatory difficulties within the Belgian company that were never resolved. Interest was also shown at a later stage by a French company, Eclor, in acquiring DCC2 for £20 million. This never developed into a formal offer, because it was overtaken by the financial difficulties which then beset DCC2.

46. As is well known, in 2008 a number of significant financial institutions failed. They included Northern Rock in the UK (in February 2008), which was nationalised, and Lehman Brothers in the USA, in September 2008. In the same month the US Federal Reserve Bank had to take over the mortgage institutions known popularly as Fanny Mae and Freddie Mac. These failures (and others) led to the so-called "financial crunch" in this country and across the world. Both Mr Neeson and Mr Clarke agreed that the UK commercial property market declined during 2008 and had not significantly revived by 2011. The UK economy went into recession, causing a dramatic fall in occupier demand for industrial premises. That is at least part of the changing context in which the rest of this story plays out. It has an impact on at least two aspects of the case. One is that property prices generally fell compared to what was obtainable before. The other is that professional services firms like GVA Grimley found that lucrative property-related work was harder to obtain than previously (as the first defendant accepted in cross-examination).

47. Meanwhile, DCC2 had found that it could only obtain supplies for its cider business on favourable terms from its suppliers if it made "ransom" payments in respect of unpaid debts of the old DCC (now DCC Realisations) due to those suppliers. It also had significant legal and professional costs to meet as a result of disputes arising from the prepack, as well as the deferred consideration payments for its purchase of the business of DCC Realisations. As a result of a failure to pay an instalment of the deferred consideration to the liquidator of DCC Realisations (for which Mr McIlwraith and Mr Birchmore blame the administrators, but it is not necessary for present purposes for me to decide that), the liquidator in March 2008 made demand for the whole of the outstanding consideration, some £936,750.

48. DCC2 was not able to pay this. There were lengthy negotiations with the liquidator, but on 2 June 2009 HMRC presented a winding up petition against DCC2 in respect of unpaid VAT and surcharges, said to total about £280,000. Following negotiations, HMRC agreed not to advertise the petition, but it was not withdrawn, because the liquidator had given notice of his intention to support the petition. The presentation of the petition caused Leumi to freeze DCC2's bank accounts. This meant it could not pay HMRC duty, so as to release goods for sale to customers. DCC2 had to apply to court for a validation order. At the first hearing of the petition, on 15 July 2009, DCC Realisations (in liquidation) was substituted as petitioning creditor. There were then further negotiations with the liquidator, but these came to nothing. DCC2 took further insolvency advice, which was that *that* company should be placed into administration.

The second administration

49. Administrators were duly appointed by Leumi ABL (as chargee over DCC2's undertaking and assets) from the insolvency practice Vantis on 30 September 2009. They sought offers for the business and assets of DCC2. Meanwhile, on 20 October 2009, David Wilson Homes offered DCP £3,812,000 for the Property subject to planning consent for residential development. Although Mr McIlwraith and Mr Birchmore put forward a bid (through a company called Exe Valley Ltd) to the administrators to buy the assets of DCC2 for £2,890,097, the administrators on 4 November 2009 sold the business and assets to Aston Manor for £2,300,000.

50. It appears from the administrators' report to creditors of 18 November 2009 that, although Exe Valley had made the highest of the four offers received, the liquidator of DCC Realisations had refused his consent to the sale to Exe Valley. This appeared to be on the grounds that, as chargee of the intellectual property rights transferred to DCB, he had already sold the brands and goodwill to Aston Manor, and a condition of *that* sale was that Aston Manor should be able to acquire the remaining assets. The administrators prepared an application to the High Court seeking authority to sell to Exe Valley, but Aston Manor then made an improved offer which was accepted by the administrators of DCC2 and the liquidator of DCC Realisations. On the same day, 4 November 2009, Aston Manor took an assignment of the Mortgage from State. Notice of the assignment was given to DCC2 by letter dated 13 November 2009. The liquidator of DCC Realisations also granted Aston Manor a licence to occupy the leased land until the expiry of the Lease in April 2010.

51. Accordingly, the position after 4 November 2009 was that (i) the Property continued to be owned by DCP, but with the charge over it now belonging to Aston Manor, and (ii) the lease of (the greater part of) the Property was vested in DCC2 (in administration), but a licence to occupy the leased land had been granted to Aston Manor, and (iii) the business and assets formerly belonging to DCC Realisations (and then DCC2) now belonged to Aston Manor also. The administrators of DCC2 failed to pay the rent due to DCP in November 2009, which meant that DCP was unable to meet the monthly payment due under the Mortgage to Aston Manor. Aston Manor served notice of default on DCP on 9 December 2009, demanding immediate repayment of the total outstanding, said to amount to £3,563,063. It also said that it would no longer accept instalments. Not surprisingly, DCP did not immediately pay the total sum, and on 14 December 2009 Aston Manor executed the instrument of appointment of the defendants, Messrs Barnett and Belcher, as receivers under the

Law of Property Act 1925. The instrument of appointment was received by the defendants the same day, and accepted by them the following day.

The receivership

52. The first defendant is a surveyor who began working for Grimley & Son, now GVA Grimley Limited, a real estate advisory business, in 1972. He was based in Birmingham. He began to specialise in insolvency in 1980, and in 1992 to act as a property receiver under the Law of Property Act 1925. He has acted on several appointments where the property concerned was sold to the appointor. He was elected senior partner and chief executive officer of GVA Grimley Limited in 2004, and moved to London. In January 2009 he returned to full-time client work. He retired from GVA Grimley Limited in 2012 because his wife had become ill.

53. The second defendant qualified as a surveyor in 1983 and began working for GVA Grimley in 1991. He has always been based in the Bristol office. Most of his qualified working life has involved dealing with property insolvency, and as a property receiver appointed by banks and other lenders. He retired as a director and employee of GVA Grimley at the end of 2016. By his own estimate he has been appointed as a property receiver in relation to more than 200 properties, of different kinds, although the majority of the appointments were within south-west England and south or west Wales.

54. As I have said, on 14 December 2009 the defendants were appointed by Aston Manor under sections 101 and 109 of the Law of Property Act 1925 as receivers in respect of the Property, and they accepted the appointment the following day. Prior to appointment, neither of them had worked with or for Aston Manor or any of its staff. The introduction to the appointment came about because Julian Pallett of Aston Manor's solicitors, Wragge & Co, had worked with the first defendant on insolvency matters when he was based in Birmingham. The first defendant wanted the second defendant to act with him as a joint receiver because he was a director of GVA Grimley based in the Bristol office, who regularly acted as a Law of Property Act receiver. However, although it was a joint receivership, it was the first defendant that generally led the matter, as he was the principal point of contact for Aston Manor.

55. The first defendant met Peter Ellis of Aston Manor on 14 December 2009 in Birmingham, having previously asked Mr Pallett of Wragge & Co. to provide background information about both the insolvency and the Property. No contemporaneous note of this meeting was available. The first defendant understood that Aston Manor thought that the Property could be sold for housing development, which would repay the loan secured by the Mortgage, and the factory could be relocated to the Midlands.

56. It is not clear that any written agreement was come to between the defendants and Aston Manor for the defendants' fees for acting as receivers. The first defendant's evidence was that he would not have taken the appointment without an agreement as to fee. He thought there would be a document, though none has been found. He told me (and I accept) that his fee was £25,000 plus VAT. He said nothing (and was asked nothing) about the second defendant. The second defendant was not asked about this in cross-examination.

57. There is however a letter from the first defendant to Peter Ellis of 1 June 2010 in which the fee was stated to be an estimate, and there were other fees set out for selling the Property (1.5% plus expenses) and for planning work (£10,000). (By March 2011 a spreadsheet of fees and costs shows receivers' fees of £25,000 for the first defendant, and £26,250 for the second defendant, totalling £51,250, a selling fee of 1.25%, planning costs of £7,880, and other costs and expenses of a little over £10,000.) At all events it is clear that this was to be a significant fee-earning engagement for the defendants' firm.

58. The question of an indemnity from Aston Manor to the defendants is not straightforward. The first defendant's evidence in cross-examination was that he thought he had an indemnity from Aston Manor, but could not remember when it was put in place. However, he did not think it was at the first meeting. Nevertheless, he accepted that, if there was no email confirming the indemnity, as appeared to be the case, then he did not have one. The second defendant's evidence in cross-examination was that, though he would not have asked for an indemnity from a high street bank, this appointment came from an unknown appointor, so he reminded the first defendant (as lead receiver) in an email about it. But it appears that none was ever given, both because of the first defendant's evidence about the use of email, and also because none was disclosed during the proceedings, and I so find.

59. On 15 December 2009, the claimant's solicitors wrote to Wragge & Co, saying that they had tried to pay the November mortgage instalment, but that Wragge & Co had refused to provide details to enable them to do so. They also said that the claimant had received an offer of £4 million to purchase the Property, with vacant possession. It was further alleged that Aston Manor was acting for an improper, collateral purpose, and that a claim might be made in due course.

60. On 17 December 2009 the first defendant met Mr McIlwraith together with his solicitor Mr Sacha Pickering of Michelmores, at the offices of Michelmores. From the first defendant's point of view his purpose in taking part in the meeting was to gain further information about the assets and their value, and about how best the lender could be repaid. Mr McIlwraith's view, as expressed to the first defendant, was that Aston Manor would seek to buy the Property as a special purchaser, because there were no other premises which would suit them so well. He therefore wanted the Property to be marketed straightaway, to flush out Aston Manor's interest.

61. The first defendant was also told about Wimpey's earlier interest in purchasing the Property at various price levels depending on planning permission. Because of housebuilders' interest in purchasing the Property, the first defendant considered it was essential to investigate the planning potential of the Property. But he told Mr McIlwraith that the Property should not remain empty whilst the residential planning potential was investigated, because if it did the receivers would have no money to pay all the costs in the meantime.

62. In his oral evidence (which I accept) the second defendant explained that the insurance premiums on an empty industrial building would be much higher than on an occupied one, especially close to a housing estate. The first defendant's evidence (which I also accept) was that he was concerned to ensure that the Property was properly insured. Accordingly he told Mr McIlwraith that the obvious course would be to try to enter into a lease with Aston Manor, as they were already occupying the

Property. However, the first defendant did not agree any strategy with Mr McIlwraith as to how to deal with the Property. The next day, the first defendant sent an email to Mr Pallett and Mr Ellis confirming the main points of the meeting with Mr McIlwraith and his solicitor.

63. A letter from Michelmores to Wragge & Co on 21 December 2009 asked about the receivers' intentions in relation to a further lease to Aston Manor. It said that if Aston Manor was to vacate the Property in April 2010 the claimant's intention would be to redeem the Mortgage and develop the site, but if Aston Manor was to obtain a further lease from April 2010 the claimant would invest further funds into the Property to redeem the Mortgage. The first defendant welcomed the suggestion of redemption, but said he did not need to respond to questions about Aston Manor's intentions.

64. The first defendant considered that it was necessary to bring the Lease held by DCC2 to an end before any steps could be taken to let or sell the Property. He therefore sought advice from within GVA Grimley about the Lease and Aston Manor's licence. He considered that it made sense to grant a new lease to Aston Manor for a term long enough to enable a developer to have sufficient time to obtain detailed planning permission. On 5 January 2010 he also asked Aston Manor's lawyers for their views on how to end DCC2's Lease. (That advice was given on 6 January 2010, to seek to accept a surrender of the lease.)

Marketing the Property

65. In early January 2010 the first defendant saw an email dated 31 December 2009 from Peter Tomlinson, a commercial property agent. Mr Tomlinson confirmed he had received bids from David Wilson Homes and from Wimpey, subject to planning permission being granted, for the Property, and that he would be happy to act as a joint agent to market the property. He later sent the first defendant copies of the two offers. The former was for £3,812,000, subject to certain conditions, and the latter was for £4 million, also subject to conditions including a lockout period. The first defendant responded on 4 January 2010, saying that he had met Mr McIlwraith, and that he would be in further touch after he had spoken to Mr Birchmore.

66. But in any event the defendants had no intention of retaining Mr Tomlinson when they could rely on colleagues in their own firm, rather than someone who had previously been involved (and whose retention might create difficulties amongst other local agents). Moreover, they could not be certain that Mr Tomlinson would be able to maintain confidentiality if he was retained. When Mr Tomlinson communicated further interest in the Property which had been expressed to him by a third party, and told him that he had sent the third party plans of the Property, as well as revealing that two bids had already been made, the first defendant told Mr Tomlinson that he had no authority to speak to anyone regarding the Property or invite offers on his behalf.

67. The first defendant also copied the offers to the second defendant and to Aston Manor and its lawyers. He considered there was potential for the Property to attract offers in the region of £5 million-£6 million subject to planning and other matters. In his view it was therefore necessary properly to investigate the Property. The first defendant was well aware by this time that Aston Manor hoped to be able to acquire the Property for itself. But he was concerned to market the Property appropriately, so that, if Aston Manor ultimately was able to acquire the Property that would be the result of

the proper procedure being followed, and there could be no claim against the defendants.

68. Whilst the first defendant phrased what he said in terms designed to keep Aston Manor "onside", he was not prepared to act improperly in realising the security, so as to expose himself to a claim from the claimant. For example, in an email from the first defendant to the second defendant dated 19 January 2010, he insisted on a landlord's break at 3 years for redevelopment, 3 years being the time needed to market and sell the Property and obtain planning permission. In the same email he requested the second defendant to "sense check" his decisions. In another email to the second defendant dated 26 January 2010, he said there was a need to appoint Messrs Hobbs and Isgrove formally, as if the defendants were an independent client.

69. The second defendant took a similar view. For example in an email to Mr Hobbs of 3 February 2010, he asked him for formal advice on letter-headed paper, to contribute to "bullet-proofing". In another email to Jo Davies and Mr Hobbs of 20 January 2010, he said that he needed to be in control, so as to demonstrate that he was not "in bed with" Aston Manor. He was clearly alive to the risk of a later dispute with the claimant over the conduct of the receivership.

70. The defendants also met Mr Birchmore in Bristol on 11 January 2010. The purpose of the meeting was to obtain further information about the Property and the interest in it obtained by the claimant, but also to consult Mr Birchmore on the options available and to explain his decisions. The defendants explained that they needed a planning report to understand the development potential for the Property and to decide on a realisation strategy, but also to know what the appropriate terms of any lease should be.

The new lease to Aston Manor

71. Following this meeting the first defendant emailed Mr Ellis and his lawyer Mr Pallett to say that was happy to grant a new lease to Aston Manor, although he would need an independent lawyer to draft that lease, because Mr Pallett of Wragge & Co would not be able to act. Mr Ellis replied that he would like at least a three-year lease. The first defendant forwarded that email to the second defendant to ask what he thought the fair market rent would be. The second defendant directed the question to the appropriate specialist team or person within their firm. In this case that was Paul Hobbs.

72. Mr Hobbs' evidence, which I accept, was that from the beginning of his involvement in this matter the defendants made it clear to him that they thought that their conduct would in due course be scrutinised by the claimant, and that therefore everything should be properly documented, and the files kept in order. In my judgment, having seen him in the witness box, and having formed the clear view that he was a witness of truth, his evidence and his files are of particular significance, particularly in light of the comments of Leggatt J in *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [22], to which I have already referred. I also accept his evidence that he did not consciously make any decision as to valuation in order to favour the defendants. All such valuations were based on his or his colleague Gordon Isgrove's views of the Property and the market. Of course they were (and knew they

were) in the same firm as the defendants, but nevertheless I am satisfied that they did their best to be objective.

73. The second defendant also arranged for members of the GVA Grimley marketing team to visit the Property to prepare particulars for a marketing campaign to begin as soon as possible, and for a colleague who was a planning expert to review the planning position of the Property. The first defendant contacted Mr Bannister of Field Fisher Waterhouse to draft the new lease for Aston Manor, and informed Aston Manor and its lawyers of his appointment and his fees.

74. On 14 January 2010, Mr Hobbs gave advice to the defendants about the need to release a press statement about the Property, that a planning application for alternative use (*eg* residential) on the site might be difficult if it was still being used for employment, and that his provisional thoughts on the open market rent were in the order of £250,000-£300,000 per annum. The defendants agreed that the site was already being used for employment, and therefore the only options were to grant a further lease to Aston Manor, or to leave the Property vacant with no income coming in during the planning permission process.

75. They did not want to leave the Property vacant, as they would have no income to insure it. The defendants agreed that the new lease would have to be for three years, with the tenant being responsible for all repairs and insurance, but having the right to terminate the lease at any time on six months' notice. They considered that that was the best that they were able to negotiate. This was intended to provide an income to the receivers to cover the costs which they would incur, whilst providing certainty to the occupier. Aston Manor were resistant, however, to any *landlord's* break clause. On 15 January 2010 Mr Hobbs provided a short report on the rental value of the Property. He advised that the Property was over-rented, *ie* that the rent of £370,000 per annum was too high for the then poor market conditions.

76. Mr Bannister produced a draft lease for consideration by the defendants. They passed it to Mr Hobbs for his comments on the lease term and another colleague, Jo Davis, on the planning aspects. The defendants were not seeking to create investment value in entering into the lease, but only to ensure that the Property generated income whilst it was marketed and the planning potential investigated. Mr Hobbs reported that he had inspected the property on 21 January 2010 and that a reasonable rent would be in the order of £300,000 per annum exclusive of rates and other outgoings. This was considerably lower than the £370,000 payable by DCC2, but that had been agreed between connected companies, to pay the mortgage interest, and not at arms' length in the open market. Mr Hobbs had noted that the construction of the building was highly specialised, and that the cladding was deteriorating, but also that the building lacked any ability to heat the space. This meant that only basic storage or industry work could be carried out there. Mr Johnson's evidence (which I accept) was that the Property was in poor condition and required substantial investment.

77. The terms of the lease were further considered by the defendants and Mr Bannister. The defendants considered the possibility of inserting a landlord's break clause effective in the event of redevelopment only. In the event, Aston Manor rejected any such suggestion, as they wanted a three-year lease. The defendants wanted to avoid having to manage and pay for empty, specialised premises during the planning process. They recognised that Aston Manor were in a strong negotiating position

because they were already in possession and there was little prospect of finding an alternative tenant at this time.

78. At the end of January 2010 the defendants received the planning appraisal report they had sought from their colleagues at GVA Grimley. It made clear that achieving a change of use to mixed or residential would not be straightforward. One problem was that the claimant had missed the deadline to make representations to the planning authority when the local development framework ("LDF") was being consulted upon. The GVA Grimley report further said that a total of three years would be needed to pursue the planning process. But, since the authority wanted to preserve the Property for employment use, the prospect of obtaining residential consent was limited, and significant work would be needed just to prepare the application for submission.

79. The first defendant considered that the best way to decide whether the Property had development potential was to market it and gauge reaction. In his view it was therefore necessary to continue with the lease negotiations with Aston Manor so that if developers were interested the Property would be income-producing in the meantime. These views were communicated to the claimant by Mr Bannister in an email of 29 January 2010. The first defendant told Mr Bannister on 31 January that he considered a three-year lease to Aston Manor to be appropriate, even though Aston Manor had been pressing for a five-year term.

80. The next day he sent a copy of the planning appraisal report to Mr Birchmore, who lived in Tiverton, and had said he knew the local planning position well. Mr Birchmore duly responded on 6 February 2010 to say that he was sure there were developers who would pay £400,000 per acre for the site with vacant possession. The first defendant considered that the requirement for vacant possession did not make sense, as the planning process would take 2-3 years, during which time the Property would remain empty. The defendants however decided in any event to start marketing and invite offers, once they had secured the new lease to Aston Manor.

81. At the same time there were negotiations between the defendants and Aston Manor over the rent and terms of the proposed new lease. The first defendant relied on Mr Hobbs' report to ask for a rent of £300,000 per annum. Mr Ellis offered £280,000. The first defendant took further advice from Mr Hobbs, who in an email of 3 February 2010 referred to the current state of the lettings market and the risk of a significant void period of in excess of 24 months, and so recommended lowering the rent to £290,000, but sticking out for a tenant's full repairing and insuring lease. There was further discussion, in particular about whether the specialist pipework in the premises was a fixture or not. In a formal letter of advice the same day, Mr Hobbs advised that £300,000 per annum was "still a reasonable open market rental", on the basis of full repairing and insuring covenants by the tenant. In fact the rent finally agreed with Aston Manor was £300,000 per annum, with tenant only breaks at six-month intervals. The old lease was surrendered and the new one granted on 24 February 2010. Unlike the old lease between the claimant and DCC, the new lease extended to the whole of the Property. This relieved the defendants of having to be concerned about any unoccupied part of the Property.

The Emvic Lloyd offer

82. A week before this, on 17 February 2010, the second defendant received an offer from Mr Tomlinson on behalf of a company called Emvic Lloyd Ltd, for £4.25 million with vacant possession by 1 May 2010, so that the company could redevelop the site. The chairman and 50% shareholder of this company was Gregory Kenney, an old friend of Mr Birchmore. Mr Hobbs himself had heard of the other director, Simon Lloyd, but knew him as a commercial property agent in Cardiff, rather than as a property developer. He could find no information on the company's recent projects or other experience. Moreover, he thought this offer was unusual for that market, because it was stated to be subject to vacant possession (so no income stream in place), but was not subject to any survey or planning approvals. Instead it sought an unconditional completion in two months. To Mr Hobbs, the offer was not logical and did not make sense.

83. Mr Hobbs' doubts were shared (independently) by Mr Bannister of Field Fisher Waterhouse in an email of 18 February 2010. He said that Emvic's website said very little about the company, and "looks as if it was more set up as a front!!" He also said "I cannot help feeling that this is an interesting coincidence…" These views at the time were supported by the oral evidence before the court of Mr Kenney himself. Mr Kenney accepted that he had not been to the Property before making the Emvic offer, nor had he even spoken to Mr McIlwraith, he had performed no due diligence, and regarded the offer as "a bit of a punt". Indeed, it was so much of "a punt" that Mr Kenney declined to take any further part in the bidding process once his initial approach had been declined. He said that he "did not need the grief".

84. Emvic owned one asset, a building in Cardiff worth £500,000, funded by (and charged to secure) a loan from Mr Kenney. Its accounts for the period ended 31 March 2010 showed net assets of £11,546. Mr Kenney claimed in oral evidence that he could obtain up to £2 million for acquisition and development of the Property, but having seen him in the witness box I frankly doubt it. In the letter of 17 February 2010 from Mr Tomlinson, there was a reference to "funding will be provided as usual by Allied Irish Bank which has been my clients financiers for many years." But there was no documentary evidence available to back this up. In my judgment, this was not a serious offer. At best, it was a time-wasting exercise, and at worst evidence of an attempt either to talk up the development potential of the land or to derail the proposal of a new lease to Aston Manor. In my judgment it was put forward in order to assist the claimant, rather than as a genuine business proposition.

85. The defendants' contemporaneous view (in an email from the second defendant to the first defendant of 17 February 2010) was that the timing of this offer was calculated to interfere with the letting to Aston Manor. Nevertheless, they very properly responded to it, by letter dated 18 February 2010 saying it was too early to accept such an offer, as no open marketing had yet taken place, and the claimant had said there were others willing to offer more. Indeed, Wimpey had made a conditional offer of £6 million in December 2009, when the Property was not on the market. The defendants informed Mr Tomlinson that the Property was not yet on the market, as planning potential was being investigated, but that Emvic Lloyd should resubmit their offer once the marketing campaign began. In fact, as I have already said, they were not heard of again. In my judgment the defendants behaved entirely properly in relation to the Emvic offer.

Further aspects of marketing

86. On 18 February 2010 the defendants informed the claimant that they would be granting a new lease to Aston Manor and then marketing the Property, in line with views already expressed to them at meetings in December and January. Mr Birchmore responded by email dated 19 February 2010 that he was convinced that local planners would immediately approve redevelopment for solely industrial/commercial activities, but also there would be an "enthusiastic response" to proposals for residential development. He followed this up in late February, telling the first defendant that he was convinced that substantial new offers in excess of the level of debt would be made, and that he himself had obtained finance to bid for the site and continue with a mixed use application. The first defendant thought this was an "overly optimistic" view.

87. In March 2010 the defendants received and reviewed Mr Hobbs' report on marketing the Property and his recommendations for the campaign. He said he was anticipating offers between £2.25 million and £2.75 million, which the defendants thought disappointing, considering that the claimant had referred to earlier conditional offers of £6 million, and also the recent offers of £4 million and £4.25 million from Wimpey and Emvic Lloyd respectively. They asked Mr Hobbs to make clear in the campaign that the defendants expected to obtain unconditional offers in excess of £4 million. Mr Hobbs' evidence (which I accept) was that the marketing campaign was "extremely thorough", including signboards, multiple mailing lists and repeat advertisements in local and national press. In April Mr Hobbs updated the defendants on the process, saying that it was clear that the asking price far exceeded bidders' ideas of the Property's value at that time. Most interest expressed was between £2 million and £3 million, with none at all above £4 million. In his view, however, the occupation of the Property by Aston Manor on a 3 year contracted out basis was not a hindrance to marketing.

The letter before action

88. On 1 April 2010 Michelmores on behalf of the claimant wrote a letter before action to Field Fisher Waterhouse for the defendants, advising them to inform their professional indemnity insurers. The letter made allegations of breach of duty by the defendants in

    (i) failing to keep the claimant informed about the terms of surrender of the old lease, the terms of the new lease, and the Emvic offer;

    (ii) causing loss to the claimant by virtue of the terms of surrender;

    (iii) failing to maximise the value of the Property by granting a three-year lease to Aston Manor which depressed that value;

    (iv) failing to maximise the rent of the Property by accepting less than under the old lease;

    (v) breaching professional ethics generally;

    (vi) ongoing breaches in marketing the Property for offers in excess of £4 million despite the Emvic offer of £4.25 million.

89. Kennedys were appointed by professional indemnity insurers on behalf of the defendants, and replied to the letter before action on 1 July 2010, denying liability. In the meantime, Peter Ellis of Aston Manor sought to have the claimant wound up in order to prevent any claim being formally pursued. A statutory demand was served on the claimant in May 2010.

Planning permission

90. At the end of April 2010, the defendants asked their colleague Mr Stockall about submitting an outline application for residential development of the Property. Mr Stockall explained the amount of information which would be required, which was significant, and the timeframe for the process, including appeals. It appeared that previous planning enquiries by the claimant had not included much of the required information, perhaps because it would have been expensive to acquire. He also advised that, as the local planning authority had recently decided to make economic development a corporate priority for the next two years,

> "the chances of securing permission without property marketing or supply evidence to support a residential scheme across the entire site is limited at this stage".

91. Nevertheless, Aston Manor was in favour of pursuing the possibility of obtaining residential planning permission. Peter Ellis agreed to pay the fees for the GVA Grimley planning consultant, saying

> "it does appear at this stage that planning will be a long and tortuous process to maximise the value so the sooner we get on with it the better."

As a result, a meeting was arranged with planning officials on 26 May 2010. The planning official explained that the local planning authority would be keen to maintain the employment use of the Property, but that a mixed use would be considered. The defendants considered that this supported the idea of selling the Property "as is".

Marketing again

92. However, the defendants also wished to know whether the value of the Property would be affected by taking the lease to Aston Manor out of the equation. Mr Hobbs was again asked to advise. His memorandum of 7 May 2010 said that having Aston Manor in occupation was seen generally as a good thing, as it brought in income which paid a developer's costs for holding it whilst permission was sought and also made the land a performing investment asset if redevelopment became impossible. But, based on the interest so far received (generally £2 million – £3 million), in his opinion the range of likely bids for the land would be similar, though the number of bids might decrease.

93. The first defendant updated Aston Manor on the marketing campaign by email dated 18 May 2010. He set out five immediate options to discuss with the claimant. These were to:

(i) sell now, at £2 million – £3 million after inviting best and final bids;

(ii) the claimant redeems the mortgage;

(iii) Aston Manor funds the defendants to submit an outline planning application;

(iv) the defendants enter a conditional sale agreement with the housebuilder;

(v) the defendants do nothing and collect the rent pending the local development framework report.

94. There was also a sixth possibility (which the first defendant said Mr Ellis would not like), which was to remarket the Property on the basis that Aston Manor vacate it on six months' notice, for an unconditional sale which pays the mortgage and all the costs. His view was that, since as mortgagee Aston Manor was entitled to be informed of all bids, it could overtop the highest by £1 and stay in possession, but that if a bid was received which would pay all the debt and costs then Aston Manor might choose to leave instead.

95. At the end of May an unconditional offer of £3 million was received, still well below both the debt and the value which the claimant put on the Property.

96. In late June 2010 Mr Hobbs advised the defendants that, because the asking price was still in excess of £4 million, the level of enquiries about the Property had significantly declined. Since offers were well below the debt due to the mortgagee, the defendants sought to organise a meeting with the claimant's shareholders to discuss what to do next, as they had considered the Property to be worth far more. But, having had no response from the claimant's solicitors, in early September the defendants decided that they wished to end the marketing campaign, and instructed their advisers accordingly.

97. However, on 16 September the claimant's solicitors emailed the defendants to say that the claimant had been approached by a third party to buy the shares in the claimant, and the Mortgage could accordingly be redeemed. The defendants and their colleagues at GVA Grimley updated all their fee information so that a final redemption figure could be produced. This was finally sent to the claimant's solicitors on 15 October 2010. The claimant complained at the time that the defendants had delayed in providing the redemption figure. But it never came back to them about actually redeeming the Mortgage. However, in the circumstances, the defendants continued to market the Property.

98. Gordon Isgrove by email of 29 October 2010 advised the defendants on their marketing strategy, which the first defendant approved the same day. On 4 November 2010 updated marketing particulars were sent out to the market, seeking offers for an unconditional sale of the Property, subject to the Aston Manor lease. By 3 December 2010, only one offer had been received, which was from Redrow, a housebuilder. It was for an option agreement for 5 years (for a fee of £10,000), to enable planning consent to be obtained. The option would be to purchase the Property at 85% of the market value.

The Asphaltic and Aston Manor offers

99. On 7 December 2010 the defendants were informed that a company called Asphaltic Developments Ltd had made an offer of £4.3 million on the basis of vacant possession within six months. The second defendant by email of the same day informed Aston Manor of the offer. By letter dated 15 December 2010 to Mr Ellis, he said that the options for Aston Manor as mortgagee were:

(i) to accept the offer of £4.3 million on the basis that Aston Manor vacated the Property;

(ii) to overbid the Asphaltic offer;

(iii) for the defendants to hold the Property for the rest of the Aston Manor lease, and remarket it towards the end.

100. On 20 December, Mr Ellis of Aston Manor told the defendants that Aston had decided it would not vacate but would stay until its lease expired in 2013. On 23 December 2010, Mr Hobbs responded to Asphaltic's offer, saying that vacant possession could not be given until the end of Aston Manor's lease, but, if Asphaltic bought now, it would enjoy the rent of £300,000 per annum until then. He invited Asphaltic to contact him to discuss the matter. On 24 December 2010, however, Mr Ellis put forward an offer of £3.2 million (plus costs and VAT) for a new company belonging to Aston Manor to buy the Property, on the basis that Aston Manor continued in occupation.

101. The defendants agreed that both offers needed to be considered. As to the Aston Manor offer, the defendants agreed that they should seek another valuation of the Property, independent of GVA Grimley. They considered using the same valuer as the claimant had used, in order to save costs, but decided against this on the basis that the valuer would be conflicted.

102. As to Asphaltic, the defendants agreed that they should discuss the matter further, to see if it would bid subject to the lease to Aston Manor. Mr Ellis was so informed by the first defendant. He replied on 6 January 2011 that he was unhappy with what he regarded as continuing delays in recovering Aston Manor's money. Mr Hobbs chased Asphaltic on 10 January 2011. As a result of this contact, the defendants became aware that its director, Peter Regis, was a good friend of Mr Birchmore's. This made the defendants sceptical of the genuineness of the offer. But, in any event, on 14 January 2011 Asphaltic confirmed to Mr Hobbs that it was no longer interested in the Property.

103. On about 20 January 2011, Edward Symmons was instructed to value the Property independently. Aston Manor was informed of this, and the need for the valuers to visit the Property. It accepted the need for an independent valuation. The draft valuation report was received on 4 February 2011, providing for a range from £2 million to £2.5 million, depending on the exact terms. The top of the price range was for the Property as a full bottling plant including all fixtures and fittings but excluding tenants' plant, with vacant possession. After taking legal advice from Mr Bannister, the defendants decided not to show this report to Aston Manor, even though it had appointed them, because it was also the potential purchaser. They recognised there was a risk that Aston Manor might reduce its offer.

104. On 16 February 2011 Mr Bannister on behalf of the defendants informed the claimant's solicitors that they intended to accept Aston Manor's offer of £3.2 million, but would give the claimant five days to indicate whether it intended to redeem the Mortgage. The substance of the claimant's reply was to question the five day deadline, but not to indicate any intention to redeem. The defendants instructed Mr Hobbs that they would accept Aston Manor's offer, subject to contract, redemption of the Mortgage by the claimant or a higher offer received before exchange of contracts. In the meantime, however, Mr Hobbs was to keep the Property on the market. The next day the second defendant informed Aston Manor of all this. On 24 February 2011 Aston Manor's solicitors emailed the second defendant saying they understood the sale had now been agreed and seeking heads of terms. The second defendant instructed Mr Bannister to draft the contract.

Final negotiations and sale of the Property

105. However, a month later, on 25 March 2011, Aston Manor's solicitors told the defendants' solicitors, without warning or explanation, that it was withdrawing its offer for the Property, and substituting an offer of £2.3 million. The defendants informed Aston Manor that if it did not increase its offer or provide a sufficient explanation, the Property would be remarketed. At the same time they sought advice within GVA Grimley on Aston Manor's revised offer. The advice of Mr Hobbs was that the offer was too low, and if it was not increased then the Property should be remarketed. On 30 March 2011, Edward Symmons were also asked for their opinion, and by letter dated 31 March 2011 they agreed that the revised offer was below the market value. They further advised that the defendants negotiate with Aston Manor to obtain a better offer, but that, if that failed and there were no other offers, then, in light of the full marketing campaign already carried out, the offer of £2.3 million should be accepted.

106. Mr Hobbs provided the defendants with a formal report on 1 April 2011, setting out the marketing campaign, and highlighting the Emvic Lloyd offer of £4.25 million, which went nowhere, and the Aston Manor bid of £3.2 million. His advice was that a fresh marketing campaign would be unlikely to produce unconditional offers above the £2 million to £2.5 million price range. He confirmed his earlier advice that, given (amongst other things) the "special purchaser" status of Aston Manor, £2.3 million was too low, but said that a revised offer at £2.6 million to £2.7 million would however be appropriate.

107. On 4 April 2011, the defendant's solicitor informed Aston Manor's solicitor that two separate property consultants had advised that the offer was too low, and invited Aston Manor to reconsider. On 6 April 2011 Aston Manor produced a revised offer of £2.75 million. Mr Hobbs' advice was that this was in line with the defendants' original expectations and was significantly greater than any other offer current available to proceed, and should be accepted. On 7 April 2011 Edward Symmons also advised that the offer be accepted. On the same day Mr Bannister on behalf of the defendants advised by email that the revised offer of £2.75 million was accepted. Contract and completion took place simultaneously on 25 May 2010, with a new subsidiary of Aston Manor taking a transfer of the Property.

The cases at trial in summary

The claimant

108. The case made at trial by the claimant was summarised in its written closing submissions as that the defendants

> "breached their duty to obtain the best price and acted for an improper purpose".

The defendants

> "knew or should have known that [Aston Manor] presented a conflict/challenge to [their] objectivity, as they were both appointee and the most likely purchaser".

But the defendants

> "wrongly allowed the receivership to be directed and/or influenced by [Aston Manor], for the benefit of [Aston Manor] and to the detriment of the shareholders"

of the claimant.

109. The conflict referred to was that Aston Manor,

> "in its role as special purchaser, would wish to secure the freehold [of the Property] as cheaply as possible (in conflict with its role as mortgagee), and use the receivership as a means to that end".

Aston Manor was a special purchaser because it

> "had very recently acquired the business and assets of [DCC] (trading as a cider producer, bottler and distributor) … and entered into occupation of purpose-built trading premises… under a precarious short-term licence … DCC was Aston Manor's principal competitor in the own label cider market in the UK, and the acquisition, subject to completion of the final piece of the jigsaw (the site), removed a competitor and bought market share … But, highly unusually, they were also the [defendants'] effective appointor … This particular, and highly unusual feature, resulted in an obvious conflict, of which the [defendants] were on notice but failed to manage."

The defendants

110. The defendant's case at trial, again as summarised in their closing submissions, was

> "that they acted reasonably at all times in the circumstances they found themselves in".

These circumstances were that (i) the cider business carried on at the Property had already been sold, (ii) Aston Manor were the mortgagees of, and therefore entitled to information about offers to buy, the Property, (iii) by the time the defendants were appointed Aston Manor were already in occupation of the Property, (iv) the defendants needed to lease the Property to provide an income before the Property could be sold, (v) Aston Manor were the only likely tenant, (vi) the Property was widely marketed but attracted no real offers at a level consistent with the claimant's

ambitions for it, and (vii) Aston Manor was the only real purchaser available. The defendants deny both that they were in breach of duty in entering into the new lease with Aston Manor, and that the Property was sold at an undervalue.

The expert evidence on the duties of LPA receivers

111. In addition to the factual evidence to which I have already briefly referred, two kinds of expert evidence were adduced. One was evidence of value of the Property at the relevant time, put forward by valuation experts. I will come back to that. The other was evidence relating to the duties of Law of Property Act receivers. This, if admissible, would or might be relevant to the issues arising in this claim. I must therefore deal specifically at this stage with the question of the admissibility of that evidence.

General

112. By its order of 27 March 2017, the court gave permission to the parties to adduce expert evidence in the field of

> "corporate rescue and recovery, in particular in relation to receivers, to address the issue relating to the alleged breaches of duty of the defendants".

113. Two points arise. One is that the defendants were not appointed to act as "corporate rescue and recovery" agents, and in my judgment should not be judged by the standards of such agents. That would imply functions in relation to the finances of the claimant, either attempting to turn it round or to wind it up efficiently, as a company doctor or a company undertaker respectively. But the defendants were appointed to act as Law of Property Act receivers of *the Property*, and had no functions in relation to the claimant, or, for that matter, DCC2.

114. The second point is that, with the benefit of hindsight, this form of order was not altogether a good idea. Permission to adduce expert opinion evidence should always be tied to specific issues between the parties which arise on the basis of the statements of case. In addition, consideration should be given to how far the opinion evidence sought could qualify as expert opinion evidence, and, by identifying potential witnesses, the court can also consider whether such witnesses are likely to possess the necessary expertise.

115. In the present case, the parties put before the court reports from two insolvency practitioners who have acted on a number of occasions as LPA receivers. Ian Walker, a partner in the firm of Begbies Traynor, was instructed on behalf of the claimant, and Finbarr O'Connell, a partner in the firm of Smith and Williamson, was instructed on behalf of the defendant. As I have already said, in the event neither of them was tendered for cross-examination, the parties having agreed that I should simply read the reports. But there is a more fundamental issue, and that is the admissibility of the evidence which they sought to give.

116. On day 6 of the trial (1 August 2018) I flagged up to the parties in open court the fact that I had concerns about this evidence. Counsel discussed the matter over the short adjournment, and after the adjournment told me that, in view of the shortness of time remaining, and having noted my concerns, they had agreed to submit the evidence of

the expert witnesses on receivership in writing, without tendering the witnesses for cross-examination.

Admissibility

117. I therefore consider the question of admissibility here, without the benefit of specific argument. In English law, evidence of opinion (as opposed to fact) is generally inadmissible. Expert evidence is a form of opinion evidence that *is* admissible under certain limited conditions. As it is put in s 3(1) of the Civil Evidence Act 1972,

> "Subject to any rules of court made in pursuance of … this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence."

118. The first point therefore is that it can only be tendered by someone who is qualified as an expert. This is someone who

> "satisfies the court that he has a sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving any of"

the issues in the case. But not all expertise counts for this purpose. The "expertise in question" must be

> "a recognised expertise governed by recognised standards and rules of conduct capable of influencing the court's decision on any of the issues which it has to decide" (see *Barings plc v Coopers & Lybrand* [2001] PNLR 22, [45]; *The RBS Rights Issue Litigation* [2015] EWHC 3433 (Ch), [13]-[14]).

119. On the basis of the CVs attached to their reports, I am satisfied that Mr Walker and Mr O'Connell (who are the witnesses put forward in relation to Law of Property Act receiverships) amply possess expertise in accountancy in general and in insolvency procedures in particular. They also have some experience in Law of Property Act receiverships (Mr Walker more than Mr O'Connell). And of course there is no reason in principle why an accountant (or anyone else) cannot become an expert in such receiverships, so as to be able to give expert opinion evidence admissible in legal proceedings in relation to them.

120. But on any view the defendants themselves have far more experience of acting as Law of Property Act receivers than have the witnesses. And, in particular, neither of the witnesses put forward appears to have any experience of a case (which is this case) where the receiver sold the property to an associate of the appointor. Given that much of the focus of the claimant's case is on the question of conflict caused to the receivers in such a case, this is of considerable importance. The first defendant, on the other hand, has had several such cases. Accordingly, I am not satisfied, on the evidence before me, that either of the witnesses put forward possesses sufficient *appropriate* expertise in the field of Law of Property Act receiverships. In another case, of course, the evidence of experience may be different, and sufficient to justify a different conclusion.

121. An expert can also give evidence of fact. For example, a forensic pathologist carrying out a post-mortem examination can give both factual evidence (of what he or she found on examination) and opinion evidence (the cause of death). But the expert cannot and does not usurp the function of the court in *finding* the facts. Thus the expert's opinion is to be based on facts which are *assumed* (even if, in rare cases, the assumption is based on the witness's own factual evidence): see *JP Morgan v Springwell* [2006] EWHC 2755 (Comm) [21].

122. In any event, not all opinion evidence given by an expert is admissible. First of all, the expression of opinion of what the expert would have done in the same situation is inadmissible: *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] 1 Ch 384, 402. Secondly, expert opinion evidence is generally admissible in civil proceedings only if it complies with the regime in CPR Part 35. (I say 'generally' because there are exceptions: *Rogers v Hoyle* [2015] QB 265, CA.) Rule 35.1 provides that

> "Expert evidence shall be restricted to what is reasonably required to resolve the proceedings".

123. What is "reasonably required to resolve the proceedings" was discussed by Warren J in *British Airways plc v Spencer* [2015] EWHC 2477 (Ch), [68]. The first question on each issue is whether it is *necessary* to have expert evidence in order for that issue to be resolved. If the issue simply cannot be resolved otherwise, it must be admitted. If the issue *can* be resolved without expert evidence, the next question is whether it would nevertheless be *of assistance* to the court in so resolving it. If so, the third question is whether, looking at the proceedings as a whole, expert evidence on that issue is "reasonably required" to resolve the proceedings. If evidence is not reasonably required to resolve any particular issue, it is hard to see that it could ever be reasonably required for resolving the proceedings.

124. This approach means that it is necessary to focus on the issues between the parties which have to be resolved by the court. This is in line with the idea that the court's permission to adduce expert evidence should be tied to those specific issues. In the present case the starting point is paragraphs 37 and 38 of the particulars of claim, in which allegations are initially made against the defendants of the existence of duties owed by the defendants to the claimant and of breaches of those duties by the defendants.

125. Paragraph 37 reads as follows:

> "The Receivers owed the following duties:
>
> (1) a duty to those interested in the property over which he is appointed to act in good faith, including in particular DCP; and
>
> (2) in the context of the sale of the Property, that duty of good faith required (a) their powers to be exercised for the purpose of securing repayment of the debt owed to the mortgagee and (b) for that purpose alone and no other purpose or independent and conflicting interest of the mortgagee and (c) the Receivers not to place themselves in a position of conflict or potential conflict; and

(3) a duty, including to DCP, to take reasonable steps to obtain a proper price; and

(4) in the context of the sale of the Property, "proper price" meant (a) the best price reasonably obtainable at the material time and (b) taking proper steps to market the Property."

126. Paragraph 38 of the particulars of claim is as follows:

"The Receivers were in breach of the above-mentioned equitable and/or common law duties as follows:

(1) The Receivers knew or ought to have known that Aston Manor was a special purchaser by no later than 17 February 2010;

(2) The best price reasonably obtainable from in or about 17 February 2010 was by giving notice to Aston Manor of their eviction and/or marketing the Property with vacant possession and with the ability to evict at short notice;

(3) Further in any event it strengthened Aston Manor's negotiating position, weakened that of the Receivers, to surrender the Lease and grant the New Lease on the terms stated on 20 – 24 February 2010: before the grant of the New Lease, on 24 February 2010, Aston Manor would have been required to pay £370,000 per annum and could have been removed from the Property at any time and/or in any event by no later than 23 June 2010. After the grant of the New Lease Aston Manor had the chance to break the New Lease on 6 months' notice, but could not be required to vacate for 3 years;

(4) At the time when the Emvic Offer was received, on 17 February 2010, the Receivers would have been able to secure vacant possession to enable the Emvic Offer to be accepted;

(5) The Receivers received the Emvic offer of £4.25 million for the Property on 17 February 2010, on the basis of vacant possession and subject to contract. The Receivers had sufficient time before then to assess the value of the Property, both as to open market value and also on the basis that one interested party, Aston Manor, was a special purchaser, and decide whether to accept or reject this offer;

(6) If the Receivers had obtained the informal valuation advice they received subsequently from Mr Hobbs of GVA Grimley, by 5 March 2010, and if they had received it before they decided to reject the Emvic offer on 18 February and enter into the New Lease on 24 February, they would have known that the best price reasonably obtainable was not going to be achieved by rejecting the Emvic offer and entering into new tenure arrangements which removed their ability to accept that offer and/or preserve its value as an offer against which Aston Manor would have to bid against;

(7) Alternatively, if, which is denied, the Receivers ought not to have reasonably obtained valuation advice by 18 February 2010, then they ought to have taken it at this time, before rejecting the Emvic Offer and/or taking the steps in granting the New Lease to Aston Manor on the terms they did;

> (8) Ultimately the Property was sold for £2.75 million to Aston about a year after the Receivers' appointment. As a result DCP, the mortgagor, received nothing from the sale. Ostensibly the mortgagee, Aston Manor, may also have suffered a shortfall, but given it (via its subsidiary company) was also the buyer, it was not negatively affected by that shortfall. This demonstrates the conflict the Receivers have placed themselves in: having granted the New Lease the only way the Receivers could improve on the offer was to secure vacant possession, and to do so by evicting their appointor, but they could not do that having granted the New Lease;
>
> (9) DCP will rely on the events leading up to what occurred on 17 – 24 February 2010, and after into 2011, as set out above, to support the inference that the Receivers were in a position of conflict and/or potential conflict and not acting for a proper purpose during the period 17 – 24 February 2010 and thereafter, and instead were acting under the direction or control of Aston Manor, who had an ulterior and co-lateral improper purpose as occupier and prospective buyer in getting the Property for a small sum as possible;
>
> (10) In all the circumstances, the Receivers failed to act in good faith and obtain the best price reasonably obtainable."

127. In relation to paragraph 37 of the particulars of claim, the defendants accept in paragraph 37 of the defence that the defendants owed two duties to the claimant:

> "(a) to act in good faith and for a proper purpose, namely the realisation of the assets comprised in the security and obtaining repayment of the sum secured; and
>
> (b) to obtain the best price reasonably obtainable at the time that the power of sale was exercised. This duty does not extend to awaiting or affecting any increase in value or improvement of the property."

Subject to that, the formulation of the defendant's duties in paragraph 37 is denied.

128. In relation to paragraph 38 of the particulars of claim, there is a general denial in paragraph 29 of the defence that the defendants acted in breach of their duties, whether as alleged or at all. There is also a plea that the defendants obtained the best price reasonably obtainable at the time that the Property was sold. It is admitted that Aston Manor was known to be a "potential 'special purchaser'," but denied that it was *in fact* a 'special purchaser,' as defined in the RICS Red Book.

129. The defence goes on in paragraph 30 to make other factual averments in relation to achieving the best price reasonably obtainable on sale of the Property, and as to whether the Emvic offer should have been accepted. It also denies that there was any conflict, whether of duty or interest on the part of the defendants, that the defendants were acting under the direction or control of Aston Manor, or that the defendants were acting for an ulterior or collateral purpose or knowingly or negligently assisting in such a purpose.

130. The issues raised in paragraph 37 of the particulars of claim and paragraph 28 of the defence are issues of law. They are for the court and not for the witnesses, however expert. The issues raised in paragraph 38 of the particulars of claim and paragraphs 29

and 30 of the defence are largely issues of fact which the expert witnesses are unable to help resolve, since such witnesses have no personal knowledge of the events giving rise to these proceedings, and are to *assume* the facts on which their opinions are based. In their joint statement dated 26 January 2018 the experts set out 14 issues, and then summarised their agreement and disagreement on those issues. The first four of these (including the scope of the duty of good faith under issue 2) are plainly matters of law for the court. Issues 5, 7 to 11 and 13 are matters of fact, and not for these witnesses. Issue 6 does not seem to me to be a matter of expertise at all, since it relates to property owners in general rather than LPA receivers in particular. Issue 14, dealing with the reasonableness of certain actions, is a matter of law for the court. On the other hand, issue 12, asking whether the defendant's actions fell below the standard of care required of a reasonably competent LPA receiver in the circumstances of the case, is certainly a matter for an expert, assuming that there is a relevant expertise. But it is the only one.

131. However, as to that one remaining issue, I have to say that I am, at present, doubtful that there exists an expertise in acting as an LPA receiver which can amount to

> "a recognised expertise governed by recognised standards and rules of conduct capable of influencing the court's decision on any of the issues which it has to decide" (referring to *Barings plc v Coopers & Lybrand* [2001] PNLR 22, [45].

132. I express this doubt for a number of reasons. First, an LPA receiver is, when all is said and done, simply a specialised form of agent, acting on behalf of a mortgagor or mortgagee managing and selling or otherwise exploiting land and interests in land (and sometimes other assets) in order to satisfy debts secured on it or them. It is a management function, of the kind that is done day in, day out by many people, albeit more or less temporary, but usually carried out at a time of stress and pressure.

133. Although the court could not normally decide that the conduct of a medical practitioner fell below the standard of care required of a reasonably competent practitioner without expert medical evidence, the court regularly decides that the conduct of motor car drivers falls (or does not fall) below the standard required of a reasonably competent driver, without any expert driving evidence at all. Whilst I am far from equating the actions of LPA receivers with those of motor vehicle drivers, I am clear that, in the ordinary run of cases at least, the court really does not need expert evidence to be able to tell when somebody manages or sells land or interests in land badly. As Dr Samuel Johnson is reported once to have said,

> "You may scold a carpenter who has made you a bad table, though you cannot make a table." (Boswell's *Life of Johnson*, ed Abott, 1923, 90).

134. Even in more complex cases, the court does not receive expert opinion evidence from professional trustees or company directors in order to decide whether trustees or company director defendants had a conflict, or owed and breached duties to others. And, as I said to Mr Sims QC, on day 6, no-one, in a case about mortgagees' duties in selling a property, calls expert evidence from a bank or other mortgagee as to such duties.

135. Second, there is no professional qualification required in order to be eligible for appointment as an LPA receiver. Thus, in the present case the defendants themselves

are qualified surveyors. Surveyors are, it seems to me, the obvious candidates for this work, in a way that other professionals may not be. They deal with land and interests in land all the time, valuing it, managing it, seeking planning permission for it, letting and selling it. On the other hand, both of the witnesses who have prepared expert reports on LPA receivership are in fact qualified accountants and licensed insolvency practitioners. But LPA receivership need not, and often does not, involve any insolvency at all.

136. The disparity between the defendants' professional qualifications and those of the experts is important for another reason. It is a strong thing to say of a professional person that his or her actions fell below the standard required of a reasonably competent professional. Normally one would expect to hear expert evidence from other professionals *similarly qualified*. So, for example, medical practitioners frequently give expert evidence about the standard expected for medical practitioners, accountants do so about accountants, architects do so about architects, and so on. But here accountants are giving purportedly expert opinion evidence to criticise or support the conduct of surveyors, albeit acting as LPA receivers. That leaves me unhappy. As I have said, these witnesses do have *some* experience in acting directly as LPA receivers, though much less than the defendants, but none at all of acting in a case where the property is sold to the appointor or its associate. I am unhappy at the thought of judging experienced LPA receivers who are surveyors by the opinions of less experienced accountants who are insolvency practitioners but also, amongst other things, sometimes act as LPA receivers.

137. Third, the Association of Property and Fixed Charge Receivers (also known as NARA, from its original name of Non-Administrative Receivers Association) is a voluntary organisation which does important work in raising standards, but registration is still voluntary rather than obligatory. There is no single professional organisation of which I am aware which compulsorily regulates LPA receivers, imposes common standards or subjects such receivers to disciplinary proceedings in appropriate cases. Of course, this may change in the future. All professional bodies began life as voluntary organisations.

138. This is tied to a further point. Although a number of professional bodies have together sponsored a voluntary examination for property receivers (the Registered Property Receivers Scheme examination), it is not compulsory. I accept that in practice banks and other lenders are likely to prefer to appoint those with some qualifications rather than none, but, as I have said, the position remains that a mortgagee may appoint anyone he or she likes, qualified or unqualified, to act as an LPA receiver. Of course, as with professional bodies coming into existence, going forward that may change too.

139. But I emphasise that I am simply expressing doubt. I do not need to decide the point in the present case. This is because I am satisfied that, even if there were such a recognised expertise, and even if it were possessed by the two witnesses put forward by the parties, it certainly would not be "necessary" for there to be such expert evidence in order to resolve the issues in this case, and neither would such expert evidence be "reasonably required" to resolve the proceedings. It might perhaps be *of assistance* to the court, or it might not, but in the context of the proceedings as a whole, it is not sufficiently so to be regarded as "reasonably required" within CPR

Part 35, as understood in *British Airways plc v Spencer* [2015] EWHC 2477 (Ch), [68].

140. For all these reasons, in my judgment, the opinion evidence put forward in the reports of Mr Walker and Mr O'Connell is inadmissible, and I have therefore excluded it from consideration.

The expert evidence of valuation

General

141. The expert evidence of valuation was provided by Hugh Neason and Peter Clarke. Both are qualified surveyors, Mr Neason having over 30 years' experience in both Exeter and London, and Mr Clarke almost 20 years' valuation experience, in the Midlands and in London. Each of them has experience of both commercial and residential, including development property valuation, and both have extensive experience of giving expert valuation evidence in court. They are both well qualified to give expert evidence of the value of commercial property. Neither of them, however, was an expert on the cider market, or even the drinks market more generally. So I cannot accept that either of them was qualified to give opinion evidence about the strength of the cider market, or indeed the strength of particular companies within that market (such as Aston Manor). That would have required an appropriate stock market or industrial analyst, which neither of them is.

142. Each witness made an original expert report, and then both joined in a joint statement in which the degree of agreement and disagreement was set out. Then, and unusually, each expert witness made a separate supplemental report. Finally, each of them was cross examined at the trial. I have already set out my impressions of the two witnesses concerned. Both witnesses were giving me their honest opinions, although Mr Neason's were more practical than intellectual, whereas Mr Clarke's tended more to the intellectual. All this gave me a wealth of material, and an opportunity to assess that material.

Mr Neason

143. Mr Neason adopted the view not only that Aston Manor was a special purchaser, but also that the Property was a "Trade Related Property". The RICS Red Book defines this latter concept in the following terms:

> "Certain classes of real property, which are designed for a specific type of business and that are normally bought and sold in the market, having regard to their trading potential".

144. The International Valuation Guidance Note 12 defines them in these terms:

> "Individual properties, such as hotels, fuel stations and restaurants that usually change hands in the marketplace while remaining operational. These assets include not only land and buildings but also fixtures and fittings (furniture fixtures and equipment) and a business component made up of intangible assets, including transferable goodwill".

145. Mr Neason makes clear that such properties are distinguished from other commercial properties in that it is the Trade Related Property itself and its use that provides "the fundamental source of income generation". Such properties are generally valued using the

> "profits method of valuation, sometimes called the income approach. This is a market-based concept where a potential purchaser, and therefore the valuer, estimates the maintainable level of trade and future profitability that could be achieved by a competent operator of the business conducted on the premises, acting in an efficient manner."

146. I am bound to say that I find it hard to accept the view that the Property should be valued on the basis that it is a Trade Related Property. (As I shall note shortly, so does Mr Clarke.) It does not seem to me to resemble at all the examples of such properties given in the International Valuation Guidance Note 12 relied on by Mr Neason. Hotels, fuel stations and restaurants (and no doubt cafes and bars, as well as casinos and perhaps even other places of public entertainment) seem to me to be quite different from factories – even specially designed factories – carrying on an industrial activity. The occupier of such a factory does not carry on a trade or business with the public of the kind postulated in the definition, which business can be sold to a purchaser together with the premises, to which goodwill probably attaches. In my view the Property is not a Trade Related Property (as defined) at all.

147. However, probably as a result of the designation of the Property as a Trade Related Property, Mr Neason's approach to its valuation is to assess the level of special value by reference to how much it might have been worth to Aston Manor. This leads him to give an opinion about the strength of the cider market, something which (as I say) lies outside his expertise. For example, in paragraph 11.46 of his first report, he says

> "There is sufficient published information relating to the growth of the cider market from 2010 onwards, details of some of which is attached at the Appendix 7, to suggest that there would have been demand from this sector of the market."

Moreover, he has gathered information relevant to this question by himself, using the Internet. His conclusion, "to *suggest* that there would have been *demand*" (emphasis supplied) is in any event weak. But in my judgment, so far as Mr Neason's opinion on the level of special value depends upon the strength of the cider market, in suggesting how much cider companies might be prepared to pay for premises such as the Property, it is simply inadmissible.

148. In deciding what was the value of the Property, Mr Neason appears also to have taken into account the amount that he concludes Aston Manor "could have *afforded* to pay" (emphasis supplied). For example, in paragraph 11.31 of his report he says

> "In my opinion it is therefore likely that, prior to the grant of the New Lease, Aston might reasonably have decided that they could afford to pay a sum based on a multiple of their operating profit in order to maintain the business, weighed against the cost and risk of having to find alternative premises."

149. Again, the conclusion is weak, in saying that Aston Manor "*might reasonably have decided* that they could afford to pay…" (emphasis supplied). But in any event, this

also depends to some extent on the strength of the cider market, and therefore on stock market or industrial analysis. In addition, however, it involves another expertise, namely, the ability to analyse a company's accounts, such as is found in forensic accountancy. For example, in paragraphs 11.27 and 11.28 of his report, he says

> "11.27 Finally, I have also reviewed historic trading information for Aston obtained from Companies House which shows the following pattern …
>
> 11.28. I note from the published accounts of Aston that the profit in 2010 and 2011 was adversely affected by one off costs and if these items are excluded the actual performance and increase in EBITDA would have been somewhat greater. It is in any event clear that the trading business of Aston was growing organically in the period leading up to the purchase of the business of Devon Cider Company Ltd with a subsequent jump in turnover following the acquisition as would be expected with acquisition of the DCC business which itself had a turnover in excess of £20m per annum."

But this too is outside Mr Neason's expertise. To this extent his opinion is also inadmissible.

150. Lastly, Mr Neason's valuation of market rent including special purchaser value is based in particular upon the RICS Valuation Information Paper 2, which relates to

> "the capital and rental valuation of restaurants bars public houses and nightclubs".

But (as I have already pointed out) the Property is none of these.

151. What is perhaps most surprising about Mr Neason's evidence is that, using the methodology of what Aston Manor could have *afforded* to pay, he reaches the view (at 11.31) that

> "There is no clear comparable evidence to support as to what that figure might be but I think it reasonable to conclude that it could have been in the range of £10–£15m."

152. To admit that there is no evidence, but nevertheless to assert that a reasonable figure "*could have been* in the region of X", is just not the language of valuation. Instead, it looks to me like guesswork. Mr Neason then says that

> "on the assumption that they were not actually aware of what other interest or offers there had been … I am of the opinion that Aston as a special purchaser would have been prepared to pay a figure in the range £7.5m-£10m prior to the grant of the New Lease."

153. No explanation or reasoning is given for the leap from what Aston Manor could *afford* to what it would be *prepared* to pay. Mr Neason then goes on to say that, after the new lease had been granted, Aston Manor were in a stronger position. Nevertheless, his opinion is that Aston Manor would still have been prepared to pay a premium to acquire the freehold. He concludes:

> "on this basis I am of the opinion that, following grant of the new lease, they might have been prepared to pay a sum in the range £5 – £7m."

Once again, no evidence or other reasoning is given for the amount or proportion of the reduction made to the earlier figure by reason of the existence of the new lease.

154. Moreover, Mr Neason does not explain how Aston Manor could possibly have decided to spend even £5 million, let alone £7.5 million, on a property without planning permission (and no prospect of obtaining it in the short term) that no-one else was willing to buy for even £3 million at the relevant time, and which even in the exuberant days *before* the financial crunch of 2008 only commanded a top offer of £6 million from a housebuilder without any due diligence and assuming full residential planning permission (which as I say on the evidence would have been difficult to obtain).

155. In the light of these matters, I do not think that I can place any reliance on Mr Neason's opinion evidence of valuation at all. It is based on a false premise, partly inadmissible, partly unsupported by appropriate reasoning, and in its conclusions frankly incredible. But I also note that he agreed that at the time of sale the state of the general industrial and property development market was poor. And he also agreed that Aston Manor was unlikely to have agreed to a landlord's break-clause. I also note that in his supplementary report he accepted that

> "there would have been little appetite in the funding market for a speculative scheme at the [Property]".

Mr Clarke

156. The opinion evidence of Mr Clarke was more conventional. His original report begins with some background and history of the matter, then moves on to discuss the Property, including environmental and other risk factors attaching to it, and also mentions planning considerations and the existence of the lease to Aston Manor. He then gives a commentary on the property market at the relevant times (in February 2010 and in May 2011, in particular) and deals also with comparables. He comments that there were very few transactions at the relevant time that were comparable to the present, either in the owner occupier/vacant possession market, or the investment market.

157. From a valuation point of view, he considers that the Property would appeal to a purchaser either as a specialist brewing bottling plant investment property or as a potential residential redevelopment site. He considers that it would also have been attractive as a potential industrial/warehousing development site in the strong market of 2006-07, but in the poor market conditions of 2010 and 2011 this was no longer the case.

158. As to the brewing bottling plant possibility, he considers that the Property could be regarded as a 'regular' industrial warehouse building, with adaptations, but capable of being returned to general use quickly and easily. The cost of returning the building to general use would be something, but not great. Mr Clarke says

> "At worst, it might depress the rental value by a few pence per square foot".

On the other hand a brewing/bottling concern would see these adaptations as a benefit rather than a demerit, thus making it a special purchaser to some extent.

159. Mr Clarke considers the drop in rent from £370,000 under the old lease to £300,000 under the new as "reasonably reflective of the fall in the market over the 5 year period". But he still regards the new rent as too high for a straightforward industrial property (rather than a brewing/bottling facility). For that purpose he would regard the market rent at that time as £215,000 per annum, and the difference would be attributable to the status of Aston Manor as a special purchaser. However, in his view it is unlikely that there was any other prospective tenant in the brewing/bottling industry who would have been prepared to pay a similar rent at that time. Accordingly no prospective purchaser would rely on the assumption that if Aston Manor did not take up the lease there would be another such concern prepared to take it at the same rental level.

160. As to development potential for residential, Mr Clarke considers that, without what he calls an abortive marketing campaign (to demonstrate the lack of demand for industrial premises in order to overcome objections regarding loss of employment land), the prospect of obtaining residential planning permission was even more remote than GVA's best case of 3 years. He therefore considers that it was a sound decision by the defendants to enter into the new lease with Aston Manor, securing a rent higher than the market rent. His view is that, with little prospect of obtaining planning permission, it was unlikely that any purchaser could be found who would pay a price reflecting residential land values except under a contract conditional on such permission being granted. But, however superficially attractive the Property might appear to a housebuilder, detailed consideration of the planning permission by a prospective purchaser would reveal the difficulties. In his view, in light of market conditions in 2010 and 2011 there would have been

> "no discernible increase in value of the Property due to the prospect of residential development in the medium-term".

161. What that meant was that there were only two categories of purchaser for the Property at the relevant time. One was an investor purchasing for an income return who might seek redevelopment in the medium to long term, and the other was the sitting tenant as a special purchaser. If however vacant possession had been obtained, there would also have been a vacant possession purchaser. But that would have been the lowest value. Mr Clarke values that at £1,925,000.

162. As to the sitting tenant as special purchaser, Mr Clarke notes Aston Manor's occupation for specialist use and paying a premium rent, meaning it would only vacate in order to relocate elsewhere. He notes however that according to the evidence there were limited options for Aston Manor to move elsewhere. A properly advised purchaser would recognise that Aston Manor had "a greater inertia" than other industrial businesses. In other words, it would be more likely to stay. Accordingly, the purchaser would have considered in 2010 that there was more likely to be income from Aston Manor for 3 years than that it would exercise the break clause and leave. Given the market at the time, purchasers of properties with short-term income sought to purchase at or slightly above vacant possession value. So Mr Clarke values the reversion on this basis, *ie* vacant possession value plus extra value for the benefit of lease income.

163. Mr Clarke does not consider that Aston Manor would have paid any more for the property simply because it was the mortgagee. On the other hand, he accepts that it

would have paid more as sitting tenant. So he accepts that Aston Manor could be regarded as a special purchaser because it was a sitting tenant, but not because it was a mortgagee. However, the amount of the extra price would depend on the negotiating strengths of the two parties. In the present case he considers that Aston Manor had a stronger negotiating position. Nevertheless, in his view there should still be some uplift.

164. As a result, Mr Clarke values the Property

> "on the basis of capitalising the rent for the balance of the lease term and then assume the reversion to the vacant possession value of £1,925,000."

He uses a yield of 13% which he says

> "fairly reflect the market conditions at that time".

For February 2010, the valuation is £2,475,000. For May 2011, the valuation is £2,250,000. The difference between the two represents the value of the lease rental so far paid. The valuation figure for May 2011 is £500,000 below the actual sale price to Aston Manor at that time. For Mr Clarke, this represents the value of the special purchaser overbid.

165. In his supplementary report, Mr Clarke deals with a number of points. One of these is the approach to valuing Trade Related Property. I have already quoted the Red Book and International Valuation Guidance Note definitions above (at [143]-[144]), and will not repeat them. Mr Clarke gives as his examples of such property "hotels, public houses and petrol-filling stations". He adds that "to some extent" other properties such as

> "managed workspace properties, self-storage properties and nursing homes, private hospitals and private schools"

may also be such properties. All of these, of course are places where the public attend to use the service provided by the occupier of such property. Not so the Property.

166. Mr Clarke says it is not fair to describe the Property as "Trade Related Property" simply because it has access to an appropriate water supply and space for effluent disposal and has been adapted to enable brewing. In his view this is simply a regular property adapted to a specific use. If that were sufficient to be a Trade Related Property, then

> "virtually every industrial property, where an industrial process is carried on, would have to be regarded as a Trade Related Property … "

167. In fact, in cross-examination Mr Clarke accepted that his report was wrong about this aspect of the Property, and that it had actually been built for Whitbread specifically as a brewery and bottling hall, rather than adapted from a general industrial building. But he said that nevertheless it could still be characterised for valuation purposes as if it *had* been so adapted. In cross-examination he also said that office blocks, industrial buildings and shops were not valued or sold by reference to the potential earnings of the businesses carried on there but by

> "the property market and the value for properties for general purposes".

168. I have already expressed my view that the Property should not be considered a Trade Related Property within the Red Book and International Valuation Guidance Note definitions. Mr Clarke's views support my own conclusion. But in addition Mr Clarke considers that Mr Neason's application of the trade related property valuation method is flawed in three key respects.

169. First, he says that Mr Neason has arrived at an EBITDA rent which is greater than his assessed market rent for the Property. Yet the market rent includes not only the value of the Property as a brewery/bottling plant but also the special value arising from the fact that Aston Manor would be purchasing as a sitting tenant. Yet the EBITDA rent ought to be less, because it does not include the special value attributable to Aston Manor alone. Secondly, he criticises Mr Neason's exclusion of plant and machinery in his valuations. Thirdly, he says Mr Neason has confused the trade related property valuation with the enterprise value, *ie* taking account of the whole business and not simply of the land and buildings. For him the enterprise value of the *business*

> "is not helpful or relevant in determining the value of *the Property*" (emphasis supplied).

170. In the circumstances I do not think it is necessary to express any concluded view on these criticisms. But I am bound to say that the third of them seems to me to be unanswerable. What Mr Neason says in *his* supplementary report (produced after that of Mr Clarke), criticising Mr Clarke for a "lack of understanding of Trade Related Property Valuations", is that

> "11.7.1 … The valuation of Trade Related Property assumes a continuation of the existing business and expectations of future trading potential and the business element of the valuation is therefore inseparable from the property element."

With respect to Mr Neason, I believe that that is exactly Mr Clarke's point.

171. Mr Clarke also deals with the question whether the marketing of the Property should have involved

> "a formal tender or informal sealed bids, in order to maximise the 'Special Value'."

He considers that a formal tender leading to an immediate binding contract on acceptance, is so onerous and costly for intending vendors and potential purchasers alike (because on the one hand they have to provide a lot more information upfront and on the other do more due diligence and arrange finance before making any bid) that it is rarely used and only ever when there is a high level of interest from many parties. In his view it is never used where there is only a single party bidding.

172. By contrast, an informal sealed bid invites final and best offers subject to contract. But there is no contractual commitment. In his view this would not have elicited much extra value because (i) Aston Manor would have a feel for the level of competition, (ii) the market was oversupplied at the time and potential purchasers would simply

have looked elsewhere, and (iii) Aston Manor were mortgagees entitled to be informed of the best bid submitted, and could then overbid.

173. Mr Clarke's valuation was criticised by the claimant on a number of grounds which I summarise as follows (the numbers beyond 5 do not correspond to those in the claimant's closing submissions, but I trust they are nevertheless right):

1. Mr Clarke had no recent experience in valuing trade-related properties. He used general industrial warehouses as comparables, from which he derived a value per square foot which he then scaled up to the Property; but it is not a general industrial warehouse.

2. He provided an investment valuation using a yield most favourable for the defendants to arrive at a valuation of £2.475 million at February 2010, but did not exhibit his workings; moreover the defendants did not view the Property as an investment property.

3. He turned that into an investment valuation for May 2011 using the same methodology, producing a valuation of £2.25 million, lower than all the other valuations.

4. He assumed that the difference between that figure and the price paid by Aston Manor (£500,000) must represent special purchase value.

5. He had not been instructed to express any views on breach of duty, but was doing so by the end of the joint statement, and this was a logical necessity to justify his assertion that he had identified special purchase value.

6. He concluded that the negotiating strengths were skewed towards Aston Manor after the new lease, which supports the claimant's view that the grant of that lease made obtaining the best price more difficult.

7. His rental figures were way out of kilter with Mr Neason and Mr Hobbs.

8. He conceded in cross-examination that his definition of trade related property in his report was not correct.

9. His notion of EBITDA rent made no sense.

10. He insisted on the need for a particular market to be of a certain size before it could be recognised.

11. His view on the inefficacy of sealed bids was based on the assumption that the defendants would have told the appointor about them.

174. In all the circumstances, I will deal with these shortly. Given my conclusion on the question of Trade Related Property, the first criticism is misconceived. But the fact that Mr Clarke did not have experience of Trade Related Property valuations since the 1990s does not disqualify him from giving evidence about them. At best it goes to weight. Whilst it would have been preferable if Mr Clarke had exhibited his workings, the yield he used was a matter for his judgment on the comparables he had. As a result, I do not consider that the second criticism is made out. Nor is the third

criticism. Since he was using a different methodology to other valuers, it is not surprising that his value at May 2011 was different from the others. But valuation is not an exact science. The fourth criticism is a strange one. Mr Clarke accepts that Aston Manor was a special purchaser that would pay more. His valuation at May 2011 is for *non*-special purchasers. Therefore the price actually paid by the special purchaser logically should be different *by the special value*. As to the fifth criticism, I have ignored any expressions of opinion as to breach of duty. The sixth criticism is fatally flawed by the claimant's error (as I say later) that it was the duty of the defendants to obtain the best price on sale at the time they sold, but *without* the lease that they had earlier decided to grant. As to the seventh criticism, I accept that Mr Clarke's rental figures were different from those of the others, but, on the critical value of what was the proper price for Aston Manor to pay for its lease, Mr Clarke and Mr Neason were apart by only 11%, which is a tolerable variance in the circumstances. The eighth criticism is unjustified. Mr Clarke accepted that it was no part of the official definition of a Trade Related Property that it had "no other useful purpose". But it was not put to him, and he did not accept, that in para 4.01.04 of his first report he was setting out the official definition of a Trade Related Property, which (according to the allegation) he then got wrong. The ninth criticism is unfair. Mr Clarke explained in cross-examination that he was using the term "EBITDA rent" in what he himself called "strange terminology", which he then explained (at transcript 7/1081/4-14). It may be old-fashioned, or even strange, but to me his language was clear, and I understood it. The tenth criticism is equally unfair. It is not "curious" to need to see sufficient examples of a type of sale in order to feel comfortable about using it for a valuation methodology. And his ignorance of the cider market is understandable. After all, he is not an expert on the cider market. Just like Mr Neason. Lastly, the eleventh criticism depends on the notion that it would be wrong for the defendants to tell the mortgagee about the bids. But it would not. The mortgagee is different from every other person in the marketplace. Only the mortgagee has a debt to be repaid, which the mortgagor has through its own default not repaid, and the mortgagee is entitled to know what offers are being made to buy the property so as repay that debt.

175. Accordingly, I conclude that there is nothing in any of the 11 points made by the claimant about Mr Clarke's evidence. For myself, I am satisfied that Mr Clarke's valuation evidence is robust and admissible, in contrast to that of Mr Neason. If it mattered, therefore, I would find that the market value of the Property in its then condition in February 2010 as £2,475,000 and in May 2010 as £2,250,000, but that the value to Aston Manor as a special purchaser as at May 2011 was £2,750,000.

The issues

176. The list of issues agreed between the parties in March 2018 does not replace the statements of case, but it is a useful summary of issues, to which both sides have had regard in making submissions. I will therefore set out here the second section of that list, namely "Issues in dispute", in a slightly modified form to reflect the language I have used so far in this judgment, and also omitting references to paragraphs in statements of case. There are 17 such issues, although issue 2 is subdivided into seven parts. The 17 issues fall into three groups, namely "Duty and breach issues" (nos 1-3), "Valuation issues" (nos 4–14), and "Quantification issues" (nos 15–17).

177. *Duty and breach issues*

1. Did the defendants' duty of good faith require them (a) to exercise their powers only for the purpose of securing payment of the debt owed to the mortgagee, (b) for no other purpose or independent and conflicting interest of the mortgagee, and (c) not to place themselves in a position of conflict or potential conflict of interest?

2. In respect of each of the following breaches of duty: (a) did the defendants in fact act as alleged by the claimant; and (b) if so, did they act in breach of any duty to the claimant?

i) Did the defendants act in breach of duty by (a) placing themselves in a position of conflict of interest and/or (b) acting under the direction or control of Aston Manor?

ii) Did the defendants act in breach of duty (a) by failing to treat Aston Manor as a Special Purchaser, and as a result (b) by failing to market the Property to the brewing and drinks industries, and (c) by failing to invite sealed bids?

iii) Did the defendants act in breach of duty by failing to market and/or sell the property (a) with vacant possession, or (b) with the ability to obtain vacant possession at short notice?

iv) Should the defendants have been prepared to leave the Property vacant for any period of time so as to be able to market and/or sell the Property with vacant possession?

v) Did the defendants act in breach of duty by replacing the Lease with the New Lease?

vi) Did the defendants act in breach of duty by failing to (a) assess the value of the Property and/or obtain valuation advice before rejecting the Emvic offer, and (b) entering into the New Lease, and (c) accept the Emvic offer of February 2010?

vii) Having regard to the answers to the above issues did the defendants act in breach of the duty (a) to act in good faith and for a proper purpose, and/or (b) to act with the care required of a reasonably competent LPA receiver?

3. If (a) the defendants acted as alleged by the claimant above; and (b) in doing so acted in breach of their duties to the claimant, what (if any) loss did this cause?

178. *Valuation issues*

4. Was there demand for a brewing/bottling facility from potential purchasers other than Aston Manor at the relevant time?

5. Is it appropriate to value the Property on a trade -related basis?

6. What was the market value of the Property as a general industrial property (excluding any uplift from its use as a brewing/bottling plant, any Special Value to a Special Purchaser and the impact of the New Lease) at the date of sale?

7. What effect (if any) did the grant of the New Lease have on the above value?

8. What was the market rent of the Property (excluding any Special Value to a Special Purchaser)?

9. What was the market rent of the Property (including any Special Value to a Special Purchaser)?

10. What (if any) Special Value should have been obtained on any sale to Aston Manor as a Special Purchaser?

11. Should formal tenders or sealed bids have been invited?

12. Did the defendants place appropriate weight on the Edward Symmons' January 2011 valuation?

13. As a matter of law, which party bears the burden of proof?

14. Taking into account the answers to the above issues (a) what was the best price reasonably obtainable for the Property at the time the Property was sold, and (b) what was the best rent reasonably obtainable for a lease of the Leased Land?

179. Quantification issues

15. If (a) the Property was not sold for the best price reasonably obtainable, or (b) the New Lease was not at the best rent reasonably obtainable for release of the Leased Land, what (if any) sum is the defendant liable to pay to the claimant by way of damages or equitable compensation?

16. Is the claimant entitled to interest on any sum found to be due to it?

17. If the claimant is entitled to any interest (a) should such interest be simple or compound interest, (b) if compound, should interest be compounded at monthly or other rest periods, (c) what rate of interest should be awarded, and (d) for what period should interest be awarded?

The law

180. In the agreed list of issues set out above, issue no 1 is plainly a matter of law. The defendants accept that a receiver owes the mortgagor a duty to act in good faith in the course of his appointment. This is set out in paragraph 38 of their skeleton argument for trial, as the last sentence of an extract taken from the advice of the Board of the Judicial Committee of the Privy Council (given by Lord Templeman) in *Downsview Nominees v First City Corporation* [1993] AC 295, 315. However, that final sentence does not appear in the printed version in the Law Reports (at least, certainly not in the position suggested by the quotation), nor indeed in the typescript version as handed down by the Board.

181. But, in *Medforth v Blake* [2000] Ch 86, Sir Richard Scott V-C (with whom Swinton Thomas and Tuckey LJ J agreed) said this (at 103B):

> "(1) A receiver managing mortgaged property owes duties to the mortgagor and anyone else with an interest in the equity of redemption.

> (2) The duties include, but are not necessarily confined to, a duty of good faith."

182. The meaning of 'good faith' for this purpose is not entirely clear. Later in his judgment in the same case, Sir Richard Scott V-C said that

> "the concepts of negligence on the one hand and fraud or bad faith on the other ought, in my view, to be kept strictly apart."

After further discussion, he concluded:

> "In my judgment, the breach of a duty of good faith should, in this area as in all others, require some dishonesty or improper motive, some element of bad faith, to be established."

183. However, in the later case of *Horn v Commercial Acceptances Ltd* [2011] EWHC 1757 (Ch), [77], Peter Smith J, after considering *Niru Battery Manufacturing Company & Anr v Milestone Trading Ltd & Ors* [2003] EWCA Civ 1446, [150], [177]-[181], rejected the submission "that dishonesty has to be established for a person to be in breach of good faith". (The judge's decision in the case was upheld on appeal without this point being referred to: [2012] EWCA Civ 958.)

184. *Medforth v Blake* and *Horn v Commercial Acceptances Ltd* were both cases involving a receiver's duties towards the mortgagor, just as the present case is. *Niru Battery Manufacturing Company & Anr v Milestone Trading Ltd & Ors*, on the other hand, was not. It concerned the defence of change of position in good faith to a claim in restitution. At first instance, Moore-Bick J said:

> "I do not think that it is desirable to attempt to define the limits of good faith; it is a broad concept, the definition of which, insofar as it is capable of definition at all, will have to be worked out through the cases. In my view it is capable of embracing failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty itself."

This passage was approved by Clarke LJ on appeal, and has been applied more recently in *Armstrong DLW GmbH v Willington Networks Ltd* [2013] Ch 156, [107] (Stephen Morris QC), and *O'Neil v Gale* [2013] EWHC 644 (Ch), [44] (David Donaldson QC), both also restitution cases where good faith in change of position was in issue.

185. In *Fattal v Walbrook Trustees (Jersey) Ltd* [2010] EWHC 2767 (Ch), a claim was made that trustees had acted in breach of trust. On an application to amend the particulars of claim, the question was whether an exoneration clause (which did not apply to dishonest actions and omissions) would bar the proposed amended claim. It was argued that the amended claim was one of dishonesty, and that therefore the exoneration clause did not apply.

186. In that case, the judgment of Millett LJ in *Bristol & West Building Society v Mothew* [1998] Ch 1, 20, was relied on:

> "Even if a fiduciary is properly acting for two principals with potentially conflicting interests he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other… I shall call this 'the duty of good faith'. But it goes further than this. He must not allow the performance of his obligations to one principal to be influenced by his relationship with the other. He must serve each as faithfully and loyally as if he were his only principal.
>
> Conduct which is in breach of this duty need not be dishonest but it must be intentional. An unconscious omission which happens to benefit one principal at the expense of the other does not constitute a breach of fiduciary duty, though it may constitute a breach of the duty of skill and care…"

187. Lewison J held that the claim proposed by the amended particulars of claim was not a claim of dishonesty, but was consistent with conduct falling short of dishonesty. Accordingly the trustees were entitled to rely on the exoneration clause, the claim as proposed to be pleaded had no real prospect of success, and the amendment was accordingly refused.

188. I bear in mind that the context of some of the authorities cited is different from that of the present case. This might well matter if some of those contexts were criminal law or public law. But, in analysing different kinds of civil liability in private law (and defences to such liability) into their constituent elements, it seems to me that, absent a specific statutory context, "good faith" ought to mean more or less the same thing. Taking all of these authorities into account, therefore, I conclude that a breach of the duty of good faith owed by a receiver to the mortgagor must involve intentional conduct amounting to more than mere negligence, and encompassing either an improper motive or an element of bad faith, but it need not amount to dishonesty.

189. It is equally clear law that the mortgagee has no duty to exercise his powers to sell, take possession or appoint a receiver or otherwise to preserve or improve his or her security: see *Silven Properties Ltd v Royal Bank of Scotland plc* [2004] 1 WLR 997, [13]-[16], per Lightman J, giving the judgment of the Court of Appeal. But if the mortgagee does take possession, he or she assumes a duty to take reasonable care of the property: see *Downsview Nominees*, 315B. And, although the mortgagee owes no duty to the mortgagor to sell at any particular time, and is not bound to postpone in the hope of obtaining a better price, if he or she does exercise the power of sale the mortgagee will owe a duty to the mortgagor to take reasonable care to obtain a proper price at the time of the sale: *Downsview Nominees*, 315C, referring to *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, CA; *Silven*, [19].

190. As I have said earlier in this judgment (at [27]), a receiver of the mortgaged property appointed by the mortgagee owes the same duty to the mortgagor as the mortgagee in relation to sale of the property (*Silven*, [22]). But a receiver has no right to remain passive if to do so would damage the interests of the mortgagor or the mortgagee. Instead he or she must be active in the protection and preservation of the charged property: *Silven*, [23]. But that does not require the receiver to await or effect any increase in value in the property before selling it: *Silven*, [28]. The receiver is not managing the mortgagor's property for the mortgagor's benefit, but instead is managing the mortgagee's security for the benefit of the mortgagee: *Silven*, [27].

191. However, where the receiver is exercising the powers of sale and management conferred on him or her by the mortgage, the receiver is doing so for the purpose of securing repayment of the debt owing to the mortgagee, and therefore he or she must exercise those powers in good faith and for the purpose of obtaining repayment of the debt: see *Downsview Nominees*, 312D-E. For this purpose it is sufficient if the receiver is exercising the power at least in part for a proper purpose, *ie* that at least one of the purposes for which the power is exercised is a proper one (*Meretz Investments NV v ACP Ltd* [2007] Ch 197, [314], [335], reversed in part on other grounds [2008] Ch 244, CA).

192. In this context a proper purpose is one to protect or realise the security or otherwise to secure repayment of the debt. That is what the security is granted for. Exercising the powers of management or sale attached to that security so as to protect or benefit some other, collateral interest of the creditor, *eg* to disrupt enforcement of a lower ranking security (*Downsview*), to assist a friend or relative to avoid the consequences of security of tenure legislation in relation to a tenancy granted by that person (*Quennell v Maltby* [1979] 1 WLR 318, CA), or perhaps to injure a commercial competitor (Lightman & Moss, 13-011), would therefore not be a proper purpose.

193. There is obviously no rule as such that forbids a receiver to place himself or herself in a position where the mortgagee's and the mortgagor's interests conflict or may conflict. On the contrary, those interests conflict from the outset, and the receiver is entitled, indeed will usually be bound, in exercising the powers for a proper purpose, to prefer the interests of the mortgagee: see *Downsview*, 312H-313B. The conflict of interests envisaged in issue 1 is different. It arises when the mortgagee (who owes a duty to the mortgagor in selling the mortgaged property to take reasonable care to obtain a proper price for the property) or its associate (in which the mortgagee is interested) seeks to buy the property itself. The interest of the mortgagee in purchasing for as low a price as possible conflicts with its duty to take reasonable care to obtain a proper price. So the mortgagee cannot buy at all, as this would be a breach of the equitable self-dealing rule, and the associate can only buy safely where it proves that the sale was in good faith and the mortgagee took reasonable care to obtain a proper price at the time: *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349, PC.

194. Where the mortgagee appoints a receiver, and the receiver exercises the power of sale to sell to the mortgagee's associate, then, as I have said, there is no self-dealing, and the receiver does not have the same interest as the mortgagee in minimising the price. He or she does not benefit directly from any lower price. The receiver's interest lies instead in performing the role properly so as to earn fees. Those fees are earned whether the price is high or low, so long as reasonable care is taken that it is a proper one. The receiver may be tempted to gratify the mortgagee's desire for the associate to purchase cheaply for other, improper reasons, for example to continue to earn fees from the current appointment or to secure further appointments in the future, but that is quite different. Thus, in my judgment, the receiver in a case where the sale is to an associate of the appointor does not have a conflict of duty and interest as such.

195. My conclusions on good faith and conflict of interest dispose of that part of the claimant's case which depends on showing that the defendants put themselves into a position of conflict of duty and interest by allowing a company in which the appointor

was interested to buy the property. In my judgment, the defendants did not thereby put themselves into such a position of conflict.

Failure to act in good faith and for a proper purpose

196. At trial, the claimant relied on some twenty facts and matters to demonstrate that the defendants had failed to act in good faith and for a proper purpose. In closing submissions the claimant has argued that the oral evidence has confirmed the inferences which it invited the court to draw. I will therefore set out and deal with these various facts and matters in turn.

197. The first was the

> "undocumented meeting held by Mr Barnett with Mr Ellis on the day of the appointment (14 December 2009), coupled with the absence of file notes or notes of any prior contact".

This was said to have discussed a process

> "in 2 phases involving the grant of the New Lease (phase 1) and later disposal of the freehold to Aston Manor (phase 2)".

In other words, it is argued that a scheme to procure the freehold of the Property for Aston Manor was conceived and agreed to be implemented from the very outset. The claimant relies in particular on the lack of any contemporaneous note of the meeting between the representative of the mortgagee and the lead receiver.

198. In my view, the claimant is reading far too much into the absence of a contemporaneous note. This was an initial meeting for the lead receiver to gain an idea of what the mortgagee was seeking to achieve. It could only be one part of the jigsaw. What the first defendant got from the meeting, as I have already held, was that Aston Manor thought that the sale of the Property for housing development would repay the loan secured by the Mortgage, and the bottling plant could be relocated to the Midlands. That was at that stage a plausible scenario, but very far from the only possible scenario. I am satisfied that there was no agreement, even in outline, at this meeting that the receivers would, as part of a preconceived plan, first grant a new lease to Aston Manor and then sell the freehold to them. The absence of a contemporaneous note, whilst perhaps unfortunate in view of the allegations now made, does not demonstrate bad faith or improper purpose.

199. The second was what the claimant refers to as the

> "fact that at 17 December 2009 meeting [with Mr McIlwraith and his solicitor] Mr Barnett regarded it as his main objective to suggest that Aston Manor's occupation should be extended, presumably as contemplated by the strategy discussed on 14 December 2009".

The claimant argues that the first defendant relied on the idea of a lengthy planning application to persuade the claimant to accept a new lease for Aston Manor, but that this idea was a pretence which was soon abandoned.

200. I do not accept this argument. It was clear to the first defendant, and Mr McIlwraith accepted, that the Property would not sell quickly, and that it was large and expensive to hold, and so the receivers needed an income in the meantime, which could be obtained by letting it. It was similarly clear and accepted that there was interest from developers and that the planning potential therefore needed to be investigated, so that it could be properly marketed and a proper price obtained. But that investigation would take some time. That therefore meant the grant of a contracted-out lease for 2 to 3 years. Finally, it was likewise clear and accepted that Aston Manor were not going to vacate the Property before the existing lease expired, and Aston Manor could, and perhaps should, become a tenant under a new lease. I specifically reject the notion that investigation of planning potential was a pretence on the part of the receivers. On the contrary, I am satisfied that it was genuine. As I have found, Aston Manor itself was keen that the planning potential be pursued, in order "to maximise the value". In any event, receivers are entitled to change both their minds and their strategy as the receivership unfolds.

201. Thirdly, there was what the claimant calls

> "Mr Barnett's own early appreciation of his vulnerability to criticism for lack of independence."

Reference is made to an email that he sent on 22 December 2009 to Peter Ellis at Aston Manor and Mr Pallett at Wragge & Co saying that

> "it would help prove my independence if I were able to say to Michelmores that following our meeting I have asked you if you have the DCP files and that you have agreed to hand them over to Wragge & Co with immediate effect…"

for onward transmission to the claimant. The claimant says that this evidence demonstrates that the first defendant's approach

> "was to wish to give the outside world the appearance of independence, so as to obscure the truth of the matter which was that he had allowed his independence to be compromised by his desire to acquiesce in Aston Manor's strategy…"

202. I reject this argument. It is quite clear to me that the first defendant genuinely wished to demonstrate his independence, of which he was protective, but was trying to do so in a manner which he calculated would not upset Aston Manor, his appointor. The first defendant could see that there was the potential for an argument, and even litigation, with the claimant in the future, and wished to protect his position accordingly. At the same time he wished to make clear to Aston Manor that he foresaw these future problems, but that Aston Manor themselves were in a position to assist in demonstrating that independence. He was in effect saying that it was in their interests as much as in his that they should help him to demonstrate his independence. This was not improper, and nor does it show bad faith. It is clear from an email from Mr Ellis to Tim Bramston (liquidator of DCC Realisations) dated 24 March 2010 that Mr Ellis understood how important it was that the defendants should in fact be independent, and thus exempt from criticism by the claimant, because he understood that Aston Manor would end up paying for their defence. A similar point is made by an email to the first defendant from Mr Pallett on behalf of Aston Manor dated 2

November 2010, in which Aston Manor complained of "continued delay" in the sale of the Property.

203. Fourthly, the claimant relies on an email sent by the first defendant on 21 December 2009 to Mr Pallett at Wragge & Co, which, it is said "signalled his intention to grant Aston Manor a new lease". However, this email did not give any such clear signal. In fact it said

> "in due course if I as LPA receiver am going to grant [Aston Manor] a new lease then I will have to use a different lawyer to W & Co to draft the lease".

And the fact that the first defendant had not yet changed solicitors supports the view that the decision had not yet been taken, even though he was evidently thinking about it.

204. The claimant argues that the defendants granted the new lease for three years to Aston Manor, not because this would cover the time it was expected to take to obtain planning permission, which it regards as a "spurious" justification, but instead because the defendants knew that Aston Manor intended to stay at the Property for up to three years before relocating. I have already rejected the notion that granting a three-year lease whilst the question of planning potential was progressed was a pretence. In my judgment, this was a genuine attempt by the defendants to ensure that the property was properly marketed in accordance with their duty to take reasonable care to obtain a proper price. Following the meetings with Mr Ellis on the one hand and Mr McIlwraith on the other, and the email of 21 December 2009, the first defendant had reached a clear view as to how to take the matter forward sensibly and safely, and that was to grant a contracted-out lease to Aston Manor, assuming suitable terms could be agreed. The email of 21 December 2009 is perfectly consistent with that.

205. Fifthly, the claimant relies on the first defendant's

> "willingness to act in tandem with Wragge & Co, Aston Manor's solicitors, in late December 2009/early January 2010, until forced to accept the obvious conflict…"

The conflict referred to is the specific conflict of duties that would arise for the solicitors in advising the receivers and Aston Manor in relation to the proposed lease between them. In fact, the first defendant had already flagged this up in his email to Wragge & Co referred to above. In evidence, the first defendant accepted that he should have found other solicitors sooner to deal with the lease question. But I cannot accept that the fact that he did not do so demonstrates that he was colluding with Aston Manor, or seeking to act otherwise than in accordance with his duties. It is very convenient for receivers who, at the outset of the receivership, have no immediate cash with which to pay bills to ask the mortgagee's solicitors for legal advice. The mortgagee's solicitors will have all the relevant documents and be fully up to speed, and therefore will cost less than any newly instructed firm. And the costs will probably be paid directly by the mortgagee in any event.

206. The first defendant's evidence in cross examination (which I accept) was that in the vast majority of Law of Property Act receivership appointments the receivers sought

advice from the introducing solicitors. That was also true in this case. Exactly when receivers should instruct someone else is a matter of judgment. If the first defendant was late in doing so, then on the face of it that is all it is. If he wished to collude with Aston Manor he did not need to instruct the same solicitors. Indeed, to cover his tracks it might be better if he did not. What he did does not show bad faith or an improper purpose.

207. Sixthly, the claimant relies on the first defendant's

> "adoption of a strategy to force DCC out to benefit Aston Manor by granting them medium term security of tenure via a new lease",

and refers to an email sent on 29 December 2009 by the first defendant to the second defendant. This email said that he wanted to invoice DCC

> "for everything possible in addition to the rent so that the so that the Administrator seeks to surrender their lease back to me so that we don't have to deal with them and we can then grant [Aston Manor] a new long lease".

The claimant argues that the first defendant needed to surrender its lease in order to be able to grant the new lease to Aston Manor.

208. In my judgment, this argument goes nowhere. The new lease to Aston Manor is a fact. Whether it was granted as a result of collusion with Aston Manor to give it security until it relocated to the Midlands (as the claimant argues) or in order to allow the planning potential of the Property to be explored and thus the obtaining of a proper price (as the defendants say), the fact is that there was an outstanding lease which needed to be dealt with before the new one could be granted. Doing a deal with the existing leaseholder to surrender that lease does not demonstrate that the claimant is right.

209. Seventhly, the claimant relies on the defendants'

> "positive refusal in January and February 2010 to take active marketing steps until that strategy (the grant of the New Lease) had been achieved, including their refusal to engage with Mr Tomlinson and others".

Reliance is placed on a number of emails passing variously between the first defendant and Mr Tomlinson, the second defendant and Mr Ellis, and between Mr Belcher and Mr Hobbs and the first defendant in the period 4 January 2010 to 24 March 2010. The claimant argues that the defendants refused to allow agents to market the Property because they had decided "from the outset to grant Aston Manor a new lease". Moreover, it says that this was inconsistent with the defendants' "duty to obtain the best price reasonably obtainable".

210. I reject this argument too. As to the former point, as I have already said, neither the mortgagee nor the receiver is bound to sell at all, or to sell at any particular time. It follows that the timing and the nature of any marketing campaign was a matter for them, and not for the claimant, to decide. As and when they decided to sell, the choice of agent was for them. They were not obliged to use Mr Tomlinson (or any other local agent) at all. As to the latter point, the claimant puts the defendants' duty too high. It

is *to take reasonable care*, in the event of a sale, to obtain a proper price, or (as modern cases put it) the best price reasonably obtainable. But in any event it could not be a breach of the duty (however formulated) to refrain from selling, and therefore from marketing, until they chose to.

211. As a matter of fact, this complaint seems to be inconsistent with the following one, *ie* that the defendants had in January 2010 decided to press on immediately with selling the Property unconditionally, rather than wait to see what the planning investigations revealed. But, in any event, the claimant's complaints misunderstand the nature of the defendants' role as receivers. They were in place to recover the debt due from the claimant to the mortgagee, in the mortgagee's interests, at a time of their choosing. They were not in place to advance the commercial or other interests of the claimant.

212. The eighth point on which the claimant relies is the first defendant's

> "open acknowledgment on 5 January 2010 in correspondence with Peter Ellis that pursuit of marketing rather than planning consent 'should result in [Aston Manor] being able to buy the property for significantly less than the value with residential consent,' a strategy which Peter Ellis confirmed."

The claimant argues that this email was "flagrantly contrary to [the first defendant's] duty to obtain the best price". In fact, what the first defendant said was that, having received offers from David Wilson Homes and Wimpey, he had decided to market the Property now in order to seek an unconditional sale "in view of the time and uncertainties involved".

213. I reject the claimant's argument. The defendants owed a duty to the claimant, in the event of a sale, to take reasonable care to obtain a proper price for the Property at the time it was sold. If it was sold with the benefit of planning permission for residential development, it would obviously command a higher price than if it was sold immediately but without such permission. Any immediate purchaser would have the choice between all the uncertainty of applying for planning permission, or the certainty of exploiting it as it was, albeit less lucratively than if there was residential planning permission. But the size of the offers which had already been received persuaded the first defendant that the proper price for the Property even without planning permission would be enough to repay the debt.

214. Self-evidently, a proper price for the Property without planning permission would be lower than a proper price with such permission. If Aston Manor or its associate was the successful purchaser *at the proper price* without planning permission then what the first defendant said would be correct, and he would not be in breach of his duty to obtain that proper price. The first defendant was simply informing Peter Ellis of what he had decided to do but, as he said, making no commitment to him. As I have already said, there is no duty on a mortgagee or a receiver to sell at any particular time, or to effect or wait for any particular improvement in the value of the property before doing so.

215. Ninthly, the claimant relies on what it calls "the secrecy attendant on the adopted strategy", and refers to an email of 5 January 2010 from the second defendant to Jonathan Gould of GVA Grimley. In fact, that email says

> "In confidence. You can now see strategy."

It forwarded an email dated 5 January 2010 from the first defendant to Mr Pallett of Wragge & Co, saying

> "I need to get rid of the lease to Devon Cider Ltd in order to be able to grant a new lease to [Aston Manor],"

suggesting ways to achieve this, and asking for Mr Pallett's views. (His advice was received on 6 January 2010). The claimant argues that the approach demonstrated was "the consequence of the [defendants'] decision to put the New Lease in place before taking any steps to market the Property for sale."

216. I reject this argument also. As I have held, by this stage the first defendant had decided that it would be sensible to grant a new lease to Aston Manor. In light of the emails from Mr Tomlinson, it is not surprising that the second defendant, in passing on the email from the first defendant to one of their colleagues at GVA Grimley, emphasised the need for confidentiality. In context, I consider this entirely understandable and not at all sinister.

217. Tenthly, the claimant relies on the first defendant's alleged

> "decision by 11 January 2010 to proceed to grant the New Lease on terms requested by Peter Ellis, before receiving any valuation advice, knowing Aston Manor was a 'captive tenant' but on terms which even Peter Ellis acknowledged to be 'very favourable'."

I cannot accept this as a fair summary of the position. The first defendant did not say that he would grant a lease to Aston Manor on the terms requested by Peter Ellis. That lease had still to be drafted, and the first defendant made clear that he would need an independent lawyer. In an email of 14 January 2010 the first defendant put forward to Peter Ellis his views on the terms of the proposed lease. In particular, it was stated that the rent was "to be agreed". To that end, the defendants sought the advice of the appropriate person within their own firm, namely Mr Hobbs.

218. He prepared a report dated 15 January 2010. What Peter Ellis in fact said (in an email of 3 February 2010) was that "*by comparison to the existing lease* the proposed terms are very favourable" (emphasis supplied). Of course the comparison reflected the fact that the old lease was not negotiated at arms' length, and was intended to cover the interest which the claimant was paying on its mortgage loan. Moreover, the defendants did not say that Aston Manor was a "captive tenant". In the email relied on, which is dated 3 February 2010, and was sent in reply to that of Peter Ellis, the first defendant said "*McIlwraith will argue that* we have a captive tenant…" (emphasis supplied). The claimant nonetheless argues that the grant of the new lease was intended to be and was for the benefit of Aston Manor. It says that the defendants could simply have left the licence in place and renewed it on similar terms for a 6 month period to allow for marketing.

219. Once again, the claimant has overlooked the fact that the decision as to whether to grant a lease or a licence or otherwise how to manage the Property so as to raise money to repay the debt was one for the defendants, and not for the claimant. The

duty owed by the defendants was to take reasonable steps to obtain a proper price in the event of a sale. Here what was proposed was a new lease, and the first defendant expressly sought advice on what the proper rent for that would be. In any event, the defendants did not agree the rent before receiving appropriate advice, and did not accept that Aston Manor was a "captive tenant", only that *the claimant would argue this*. There is nothing in this point.

220. The eleventh point on which the claimant relies is the defendants'

> "reaction to Emvic's offer, on 17 February 2010, as an attempt to 'spoil the letting' rather than an opportunity to obtain repayment and their decision to grant the New Lease regardless without obtaining any prior independent valuation advice."

The claimant argues that the fact that the defendants did not regard the Emvic offer as sufficient to investigate further before granting the new lease to Aston Manor or to obtain robust valuation advice shows how determined they were to complete the new lease, and that the defendants "had no grounds on which to believe there would be no third-party purchasers requiring vacant possession within less than a three-year period" (who would be in effect excluded by the completion of the lease).

221. I reject this argument. I have already held that the Emvic offer was not a serious one, and that the defendants behaved entirely properly in relation to it. It was either an attempt by a friend of Mr Birchmore to talk up the development value or, as the defendants considered, an attempt to spoil the letting. It was for the defendants, and not for the claimant, to decide whether, when and on what terms the Property should be let. If, upon letting, the defendants did not take reasonable care to obtain a proper price, that would be a different matter. But that is not the complaint. Moreover, the email of 17 February 2010 relied on was followed up by an email from Mr Bannister to the first defendant of 18 February 2010, saying that the question was whether the Emvic offer would clear the debt and was a fair market price at that time. Later the same day, the first defendant replied, saying that the settlement was complex, but that he thought the Emvic offer value *would* clear the whole debt. He took into account the Wimpey offer of 2009 and the fact that it was not yet being marketed, and decided that he was happy to grant the lease to Aston Manor.

222. The twelfth point on which the claimant relies is what it says is

> "the fact that Peter Ellis felt able to rely on Mr Barnett to protect his interests as if they were his own, as he recorded in his email on 14 January 2010 and Mr Barnett's own recognition by 19 January 2010 that he was 'too close' to Aston Manor."

The claimant says that this shows that the first defendant in fact allowed his independence to be compromised.

223. In fact, what Mr Ellis's email to the first defendant does is to ask for a capped fee for the legal costs of the drafting of the lease, and then to ask,

> "May I leave it to you to protect my interests as if they were your own!"

I do not read this as Mr Ellis relying on the first defendant to protect his interests generally, or even in relation to legal costs. Mr Ellis was not a naïve individual. He was an experienced and successful businessman. Here he was trying, rather unsubtly, to negotiate an extra advantage for himself, namely a cap on the legal fees. In any event, the first defendant did not agree "to protect his interests", or anything like it. So this does not show that the first defendant's independence was compromised. In his email of 19 January 2010 to the second defendant, the first defendant said

> "I am getting too close to [Aston Manor] and I need you in Bristol to act as a sense check on everything for me please."

This does not show that the first defendant allowed his independence to be compromised. On the contrary, it showed he was well aware of the risks, and was taking precautions to *prevent* his independence from being compromised. In my judgment it was a very proper thing to say. If, as the claimant alleges, he had been in cahoots with Aston Manor, he would hardly have said this.

224. The thirteenth point on which the claimant relies is what it calls

> "the fact that the reports from GVA from January 2010 onwards were obtained to give the appearance of being independent when they plainly were not and was subject to revision by the receivers."

A number of documents are referred to in this connection. The claimant argues that, because they commissioned reports from their own colleagues at GVA Grimley, they were able to have input which they would have found more difficult to do if a truly independent agent had been instructed.

225. I reject this argument too. The fact that the defendants relied on the reports of their colleagues at GVA Grimley in the early stages but always commissioned outside reports before taking important steps, such as selling the Property to Aston Manor, shows both that they regarded their colleagues' reports as reliable but also that they realised they would be regarded by others as less independent than reports prepared by third parties. (The first defendant's comment about obtaining "independent advice" from a third party is to the same effect.) Their colleagues at GVA Grimley were a known quantity and in their view less likely to be indiscreet or leak information, and that too was a factor. Accordingly, I reject the notion that the defendants commissioned reports from their colleagues in order to appear to give the impression of being independent.

226. The fourteenth point on which the claimant relies is the first defendant's

> "expressed desire to agree a 6 month tenant only break so as to avoid creating enhanced investment value because that might assist DCP to raise finance to repay the debt…"

The claimant refers to an email of 14 January 2010 from the first defendant to Mr Ellis, which says,

> "The terms have to ensure that we dont create a lease which improves the investment value and helps the Shareholders of [the claimant] raise finance to

> redeem the mortgage. This will be hindered by the suggested tenants only break clause on 6 months notice."

In his statement the first defendant described this email as poorly worded. The claimant says that this is clear evidence of bad faith.

227. I do not accept the claimant's argument. Once again it is important to recall that the duty owed by the receivers to the mortgagor is to take reasonable steps to obtain a proper price for the Property if a sale takes place. In particular, there is no duty to assist the mortgagor out of his financial difficulties. There is no duty to create a lease which helps the mortgagor to raise finance. The first defendant had a choice as to how much he explained to Peter Ellis. The email was plainly written to keep him "on side". It could undoubtedly have been differently worded, and still given the same information. But in my judgment it does not demonstrate bad faith.

228. The fifteenth point on which the claimant relies is the first defendant's

> "initial willingness to share GVA's valuation and planning advice with Aston Manor, and which can be contrasted with the [defendants'] later reluctance to share such information when they knew of DCP's claims."

The claimant argues that the sharing of valuation information with Aston Manor guided its offers for both rent and sale price, and that this should have been avoided by a conflicts management agreement.

229. I do not accept this argument. This is not evidence of bad faith either. In principle, the defendants could share information relevant to realising the security with the mortgagee Aston Manor without breaching any duty of good faith. That the defendants appear to have changed their minds about doing this at a later stage does not make it a breach of that duty either. The critical question is whether the defendants took reasonable care to obtain a proper price (not a price *higher* than the proper price). Whether they shared the information with Aston Manor was a judgment call. In my judgment it was not a breach of duty. Even if (contrary to my view) sharing the information with Aston Manor did not amount to taking reasonable care, *ie* were negligent, the price obtained at the end of the day *was* a proper one by reference to the valuation evidence, including the independent Edward Symmons' report of January 2011 and their further advice in March 2011 and April 2011.

230. The sixteenth point on which the claimant relies is the "provision of misleading information". The claimant refers to an emails of 8 January 2010 and 18 January 2010. The email of 8 January 2010 was from the first defendant to Michelmores asking for information as to the rent paid by DCC to the claimant before his appointment, saying that he was "having little to do with them at the moment". However, he had been speaking to the administrators a few days before. The email of 18 January 2010 was from the second defendant to Mr Birchmore saying that the action of an unknown person in pushing the possible sale of the Property around the market was "irritating as we have not agreed what to do yet." In fact, by that date the defendants had decided to let the Property to Aston Manor for three years, and sell the Property subject to that. The claimant argues that these emails indicate the general approach which the first defendant adopted in his dealings with others, and indicates acting otherwise than in good faith.

231. The first defendant knew that what he was saying in these emails was at best misleading, at worst simply untrue. But he had no obligation to say anything at all, and gained little from saying these things, other than the social advantage of not annoying the persons he was emailing. Indeed, many people do not regard such "white lies", told in order to make personal relationships easier, as wrong at all. If he had not said "having little to do with them at the moment" in the first email and "we have not agreed what to do yet" in the second, there could be no complaint under this head. I am not persuaded that any harm was caused to the claimant by these two statements. If there were more significant untruths proved, then these two smaller ones might well "indicate the general approach". But that is not what I have found.

232. The seventeenth point on which the claimant relies is

> "the encouragement, from February 2010, of the attempt to wind-up Hexshelf 8 Ltd so as to stifle any claims against the [defendants] and the fact that Peter Ellis looked to Mr Barnett for guidance on such matters".

The claimant argues that it was no part of the first defendant's role to involve himself "in conduct designed to snuff out any claims which might properly be made against him".

233. I reject this argument. A receiver, like anyone else, is not obliged to stand idly by whilst another person prepares to make a claim against him or her. The receiver may take any lawful action to defend or prevent the claim being made. It is not a breach of the duty of good faith owed by a receiver for him or her to encourage another person to take such lawful action. It is notable that Peter Ellis in his email of 24 March 2010 to Tim Bramston (the liquidator of DCC Realisations) specifically said that

> "the Receiver has been diligent in ensuring that his actions are fully justified".

Mr Ellis's expressed concern was that Aston Manor would end up paying for the defendants to defend themselves against the claimant's future claims.

234. The eighteenth point on which the claimant relies is

> "Mr Barnett's confirmation to Peter Ellis that Aston Manor could over bid by £1 to acquire the freehold when asking him to consider the option of remarketing with 6 months vacant possession".

The claimant refers to the first defendant's email of 18 May 2010 to Peter Ellis, where having discussed five options, he says:

> "I need to talk to you about another option (which you will not like) which we may have to consider if we are put under pressure: 6 Remarket inviting bids on the basis that [Aston Manor] will vacate (on say 6 months notice) if an unconditional sale can be achieved which repays the mortgage and all costs in full. I think it very unlikely that such a bid will be made with such a negative planning situation, but if we do this and the best bid is only say £3m then we are all bullet-proof. If someone offers £4m then you can bid £4m + £1 and you buy it into an SPV yourself so [Aston Manor] can stay in the factory."

The claimant argues that this was conduct encouraging Aston Manor to buy at the lowest possible price.

235. I do not accept this argument. The first defendant was laying out a range of six possible options which might be open to the defendants as receivers. Overbidding the previous highest bid by £1 is not unlawful, and indeed *ex hypothesi* makes that the highest bid (so that would be the best price reasonably obtainable). Here the first defendant was discussing the ways in which the receivership might play out, but putting it in words which he thought would appeal to his appointor. In my judgment, he was not encouraging Mr Ellis to take this course of action at all, but merely pointing out the obvious. In fact (as the first defendant had surmised) Peter Ellis was not interested in this option at all, as his response showed. If the first defendant had used more neutral terms there could have been no objection. The tone used here is understandable in context, and does not show bad faith or improper motive.

236. The nineteenth point on which the claimant relies is

> "the failure to disclose [any indemnity from Aston Manor to the defendants] in these proceedings".

The claimant says it was and remains unclear whether any indemnity was given by Aston Manor at the outset of the receivership. I do not understand how this can demonstrate lack of good faith. First of all, it might be the case that there never was such an indemnity. Indeed, that is what I have found on the (limited) evidence before me. But even if there were, the fact that it has not been disclosed by itself would tell me nothing. It certainly would not tell me that the defendants conducted the receivership in bad faith. And, if it should have been disclosed in the proceedings, pursuant to the ordinary disclosure process, but was not, there are procedural remedies which the claimant should have sought, but evidently did not. There is nothing in this.

237. The twentieth point on which the claimant relies is the

> "absence of any attempt to bid Aston Manor up from £2.75m, notwithstanding its known position as a special purchaser."

The claimant refers to an email sent by the first defendant to the second defendant on 7 September 2010, which says

> "Notwithstanding B&F are not bidding anyway."

238. The abbreviation "B&F" in this email in my judgment refers, not to a person, but to the question of inviting "best and final" bids, which was the subject of this email and earlier ones in the same chain. The sentence is ungrammatical in that there is no subject for the verb phrase "are not bidding". Nevertheless, the claimant argues that the reference to "B&F" is a reference to Aston Manor. I think it more likely that the missing subject of the verb phrase was itself Aston Manor. However that may be, the claimant goes on to argue that the process was set up in such a way that Aston Manor would bid only after having seen the best and final bids of others.

239. Mr Hobbs' advice letter of 1 April 2011 specifically referred to Aston Manor's position as a special purchaser as a factor in his advice that its bid of £2.3 million was too low. That letter advised the defendants that he recommended

> "an offer at £2.6-£2.7 million reflecting a margin above all other genuine unconditional offers".

Six days later Aston Manor improved its offer from £2.3 million to £2.75 million, and the following day Edward Symmons advised that this offer should be accepted. The bid of £2.75 million was in fact significantly higher than the top of the range recommended by Mr Hobbs after taking into account the special purchaser status of Aston Manor. So the 'bidding-up' on account of that status had already occurred. There is accordingly nothing in this point, and I reject it.

Conclusion on breach of duty of good faith and improper purpose

240. With the minor exception of the misleading emails in the sixteenth point above (para [230]), which have not been shown to have caused any loss, I have not found anything in the evidence to suggest bad faith or improper purpose on the part of the defendants. Moreover, there are a number of emails and other matters which tend to show the defendants' good faith and independence from Aston Manor in the conduct of the receivership. The emails include the "help me prove my independence" email in fact relied on by the claimant (see para [201] above), emails between the defendants on the need for independent legal advice (29 December 2009) and to be able to justify the terms of the lease (19 January 2010), and the email instructions of 11 March 2010 to Mr Hobbs to market the Property initially at a level in excess of £4 million (which would generate a return for the claimant) rather than the £2.25 - £2.275 million advised by Mr Hobbs.

241. The other matters to which I refer above include

i) The fact that Aston Manor wanted a lease for longer than three years, but did not obtain it;

ii) The fact that the first defendant included the option of remarketing the Property in May 2010 which (as he said) Aston Manor would not like, and yet that was in fact what happened;

iii) Peter Ellis' unhappiness with the defendants' change of "direction", as set out in the email of to the second defendant of 6 January 2011;

iv) The fact that the defendants followed Mr Hobbs' advice to remarket the Property on the open market following the reduced offer of £2.3 million by Aston Manor, rather than sell it to Aston Manor at that price;

v) The non-disclosure of the Edward Symmons' report of February 2011 to Aston Manor, on the basis that that might lead Aston Manor to reduce its offer.

242. My conclusion on this part of the case is that, in substance, the defendants have not been shown to have acted in breach of their duty of good faith or for an improper purpose.

Failure to take reasonable care to obtain a proper price

243. I will deal with the issues in this part of the case in the order in which they were presented in the written closing submissions, using the list of agreed issues at [177] above.

Agreed issue 2 ii (a)

244. The claimant argues that Aston Manor was a special purchaser of the Property because of (i) the marriage value between the three year lease and the freehold reversion, (ii) the avoidance of the issue as to which parts of the plant and equipment at the Property were (a) part of the land, (b) tenant's fixtures, and (c) its own chattels, (iii) the avoidance of the costs removing those parts which Aston Manor would be entitled to remove at the end of the lease, and (iv) the desire to keep competitors from setting up in competition there.

245. The RICS "Red Book" definition of special purchaser in force in 2010 was that contained in the 6th edition, as follows:

> "A purchaser to whom a particular asset has Special Value because of advantages arising from its ownership that would not be available to general purchasers in a market. (Special Purchaser)."

And "Special Value" is defined as

> "an amount above the Market Value that reflects particular attributes of an asset that are only of value to a special purchaser."

246. The valuation experts agreed in their Joint Statement that Aston Manor was a special purchaser, "solely due to being sitting tenant, owners of the process plant and equipment and carrying on brewing/bottling activities". By the end of the trial, the defendants appear to have accepted that Aston Manor was indeed such a special purchaser. For myself, I accept that the first three characteristics relied on by the claimant made Aston Manor a special purchaser within the then Red Book definition. Only Aston Manor was the tenant of the Property, and therefore had the advantages of marriage value and the avoidance of the other problems referred to. But I am not sure that the fourth characteristic could do so. It is true that if Aston Manor had the Property it could stop a competitor setting up there in competition. But that is true of any competitor too, and would make all drinks companies special purchasers. That was not contended for here, and it is not necessary to resolve the point.

Agreed issue 2 ii (b)

247. The claimant says that the defendants should have marketed the Property to the brewing and drinks industries as a bottling plant. It says interest was expressed and offers made by foreign brewers such as Konings and Eclor. The defendants say that Mr Birchmore marketed the Property to developers, and that he must have acted with Mr McIlwraith's authority. So there was no reason why he could not have marketed to drinks and brewing companies too. More importantly, the defendants argue that the Property over which the defendants were appointed receivers was just land and buildings, and not a bottling plant, because all the equipment required for a bottling

plant had been already sold to Aston Manor as part of the business which they bought from the administrators of DCC2. The offers by Konings and Eclor were for DCC2 as a company, *ie* the whole business and undertaking.

248. I agree with the defendants. The informal Konings and Eclor offers were made in the buoyant period before DCC2 went into administration, and were for a half share and the whole respectively of DCC2, *ie* the whole business and undertaking, and not (or not just) the land and buildings. There is no reason to suppose that they or any other drinks company would have been particularly interested in such a large industrial unit *without* the specialist bottling equipment and other chattels which Aston Manor had bought. But, if they were or might have been, then, in view of the interest which the claimant had in clearing its debt and recouping what it considered to be its equity, I cannot believe that the claimant and its shareholders would have missed any opportunity to inform a potential purchaser that the Property was on the market. In any event, the evidence of Richard Johnson, the operations manager at DCC, which I accept, was that the Property was well known within the drinks industry. Lastly, and as I have held, there was extensive marketing of the Property by GVA Grimley in March and April 2010, in various media. It is simply not credible that drinks and brewing companies in the market for such premises were not aware that the Property was available. Yet interest overall was (as I have said) generally between £2 million and £3 million. In my judgment there is nothing in this point about marketing to drinks and brewing companies.

Agreed issue 2 ii (c)

249. The claimant complains that the defendants should have used a 'sealed bid' process to deal with the special purchaser position of Aston Manor, or else should have given notice to it so that it would no longer be a special purchaser. As to the first of these, Mr Neason's evidence was that sealed bids were "normal" where there was known to be a special purchaser. That may be so, but it does not mean that they are compulsory. The argument is that sealed bids drive up the price. The defendants' view is that sealed bids do not have the effect of driving up the price where there are no competitors.

250. The question for me however is whether the defendants took *reasonable care* to obtain a *proper* price. There is no *guarantee* of one. The key feature of the present case is that, by the time it bid in December 2010, Aston Manor was the only bidder at its level. (The Asphaltic offer of £4.3 million was made on the basis of vacant possession, which Aston Manor was unwilling to give. The only offer *subject* to Aston Manor's lease was by a housebuilder, Redrow, for a 5 year option, to enable planning consent to be sought and hopefully obtained.) The defendants were advised on the marketing and sale process by their colleagues at GVA Grimley. The process advised did not include sealed bids. In fact the defendants withheld the Edward Symmons' report from Aston Manor because it was significantly lower than the Aston Manor offer, and they feared a reduction if Aston Manor knew. It is not necessary for me to decide this point. The fact is that Aston Manor did reduce its offer, and then at the defendants' prompting increased it slightly, to a level *above* the independent valuation. There is no evidence that Aston Manor would have been willing to pay any more. In my judgment this process took reasonable care to obtain a proper price.

Agreed issue 2 iii & iv

251. The claimant argues that

> "the optimal position was for the [defendants] to market the Property with Aston Manor in occupation but to have the ability to obtain vacant possession at short notice… The [defendants] were in that optimal position when they were appointed. Their subsequent steps prejudiced that optimal position on the pretext this would assist in maximising a planning gain for [the claimant's] benefit."

252. Essentially, this is a complaint that the defendants did not negotiate a different deal with Aston Manor when granting the new lease to it. The claimant accepts that part of the optimal position was that Aston Manor was in occupation, thereby producing an income for the receivership. The criticism is that there was no landlord's break clause.

253. I do not accept this complaint, which is suffused with the benefit of hindsight. The position inherited by the defendants on their appointment was that Aston Manor was already in occupation of the leased land under a licence. It was obviously necessary for an income to be produced, as Mr McIlwraith agreed, and for that purpose Aston Manor was the obvious candidate to pay it. As to the break clause, the evidence of the defendants was clear (and I accept it) that they negotiated as best they could, but could not obtain a full repairing and insuring lease *with* a landlord's break clause. Aston Manor would not invest in the bottling plant or upgrade the Property without sufficient security of tenure. For them this was enough time to relocate to the Midlands. A landlord's break clause would take that away, and so Aston Manor refused to agree to it.

254. This was a commercial negotiation, in which the defendants obtained an income at a proper rate for up to three years, by which time the planning position would be clear, and, the lease being contracted-out of the Landlord and Tenant Act 1954, Part II, the defendants were assured of regaining possession. Essentially the claimant's complaint reminds me of the visitor's question "How do I get to X from here?" followed by the answer, "Well, I would not start from here." I do not consider that the defendants can be regarded as negligent (let alone anything worse) in relation to the steps they took at the time they took them.

Agreed issues 2 v and 2 vi (b)

255. The claimant complains that the grant of the new lease to Aston Manor should not have been made, as counter-intuitive and with unusual terms, at a rent which was too low, and including the Retained Land without proper explanation. The defendants could have rolled over the licence arrangement, or granted a short term lease for no more than 12 months. Mr McIlwraith's evidence was that he had a valuation done, to arrive at what he called the market rent to be paid by DCC, which was to be the same as the interest that DCP was paying on its loan, which was at a market rate. Finally, there is a complaint of a lack of independent valuation advice after the defendants took up their appointment. Such advice should, it is said, have included the potential impact of granting the new lease to Aston Manor.

256. I reject this complaint, which consists to some extent of elements which I have already rejected. First, the decision whether to lease the land was for the defendants as receivers. It is not for the claimant to say that they should not have done so. As I have said before, the duty owed by the defendants to the claimant was to take reasonable

care to obtain a proper price. But they owed no duty to the mortgagor either to lease or not to lease the Property, for a longer or a shorter term, to continue with the licence rather than grant a lease, or to do any of these things at any particular time.

257. As to the level of rent, the evidence of Mr Hobbs (which I accept) was that the property was over-rented (for the reasons he gave) and that a proper rent would be £300,000 per annum, which was as it happens what was ultimately agreed with Aston Manor. Mr McIlwraith agreed in evidence that the original rent of £370,000 per annum was negotiated between two connected companies, and not on the open market. But he said he had a valuation done, which, however, was not produced. I do not accept that any valuation which Mr McIlwraith had done at the (earlier) time that the Property was leased to DCC was a valuation of the then market rent of the premises. His avowed object, as he told the court, was to secure a rent valuation which matched the interest which the claimant was paying on its loan. In any event, that lease was granted before the financial crisis of 2008 had taken hold, and cannot be relied on to show what the market rent was at the time the new lease to Aston Manor was granted in 2010. I am satisfied that the defendant took reasonable care to obtain a proper rent for the lease.

258. The other terms of the lease were the product of a commercial negotiation. So far as concerns the term of the lease, I have already rejected the argument that the justification for a three-year term put forward by the defendants, *ie* that it would allow for a proper investigation of planning and development potential, was a pretence. Mr McIlwraith himself accepted that the term of the new lease was designed to fit with that investigation. I have already dealt with the fact that the new lease extended to the whole of the Property whereas the old lease was more restricted. The defendants did not wish to be left with any unoccupied land. That was their decision. I do not think it is open to question by the claimant, because the decision whether to lease and how much to lease was one for them. But, if it mattered, I would hold that it was an entirely reasonable decision in the circumstances.

259. Lastly, there is the question of the absence of independent valuation evidence of the Property immediately after the defendants' appointment, which should have included the potential impact of granting the new lease. I reject this part of the complaint also. It was a matter for the defendants whether they leased the land or not and then whether they sold it or not, and at what time. Their duty was to take reasonable care to obtain a proper price *if and when they did so*. That reasonable care does not involve obtaining independent valuation advice immediately after appointment, or at any rate, not necessarily, and in my judgment not in the circumstances obtaining here.

Agreed issue 2 vi (a) and (c)

260. The claimant complains that the defendant's decision to grant the new lease, thereby precluding themselves from accepting the Emvic offer was a breach of duty, even though the claimant

> "does not believe the Emvic offer was the best price reasonably obtainable".

The claimant says that the defendants should have obtained a valuation so that they could decide whether or not to accept the Emvic offer.

261. I reject this complaint. The Emvic offer was, as I have already held, not a serious one, and was undertaken not for the purpose of acquiring the Property for development, but either to talk up the development value for the benefit of the shareholders of the claimant, or to spoil the lease to Aston Manor. But in any event the defendants owed no duty to the claimant not to grant the new lease. The decision whether to do so was theirs and theirs alone, as I have already held. And, at the time of that offer the defendants had not yet begun to market the Property. They properly invited Emvic to resubmit a bid later. Emvic did not do so. There is moreover no satisfactory evidence that it would have been able to finance any such bid. So it would never have gone anywhere. In these circumstances any action of the defendants precluding themselves from accepting the Emvic offer cannot be a breach of any duty owed by the defendants to the claimant.

262. Criticism is made by the claimant of reliance by the defendants on the Edward Symmons valuation. It is said first of all that the valuation was obtained too late, in that the new lease had already been granted to Aston Manor. This is in substance an attempt to repeat the criticism already made (and rejected) that the new lease should never have been granted. It fails for the same reasons as it did the first time.

263. There is also criticism of the methodology adopted by Edward Symmons. I accept that the defendants cannot escape liability by retaining an apparently competent professional adviser. Their duty extends to ensuring reasonable care was taken by that adviser: see *Raja v Austin Gray* [2003] BPIR 725, CA, [29]-[36], following *Cuckmere Brick Co v Mutual Finance Ltd* [1971] Ch 949, 973A-F, per Cross LJ. The claimant says the Edward Symmons approach was flawed, as the valuation of February 2011 was reached by taking the market value with vacant possession and uplifting by 25% for a special purchaser, using the rent originally paid as a comparator to obtain the percentage uplift. In fact it was based also on comparable valuations, and the final figure was in line with Mr Hobbs's valuation. In any event, Aston Manor paid significantly more than the Edward Symmons valuation. The claimant also says that this valuation takes no account of the front part of the Property. But (so far as I can see) this was not pleaded, and it would not be fair to deal with it now 'on the hoof', without any proper opportunity for response. In any event, if there were any added value, it would be likely to be modest at best. The rent for the whole Property under the new lease was less than the rent for the bottling plant under the old lease.

264. On this material, I am satisfied that Edward Symmons took reasonable care. In any event, the Edward Symmons valuation was only a cross check, because it was not the only basis upon which the defendants decided to accept the Aston Manor offer. It was the best offer in the circumstances, and supported not only by the Edward Symmons valuation but also that of Mr Hobbs, whose evidence was tested in cross-examination before me, and which I accept. In my judgment, the defendants took reasonable care to obtain a proper price.

Conclusion on duty to take reasonable care to obtain a proper price

265. My conclusion on this part of the case is accordingly that no breaches of duty have been established by the defendants against the claimant. In particular, the defendants did not place themselves in a position of conflict and act under the direction and control of Aston Manor. Nor did they fail to treat Aston Manor as a special purchaser. It was not a breach of their duty that they failed to obtain better terms from Aston

Manor in the commercial negotiation which they carried out. They were entitled to grant the new lease when they did, and they were entitled to sell the Property when they did. They took reasonable steps to obtain a proper price both in relation to the lease to Aston Manor and ultimately in the sale. The fact that the defendants might have done better if they had left the property vacant, or leased or sold at a different time, even if correct (as to which I make no finding) is irrelevant.

Causation, loss and valuation

266. In these circumstances, it is not strictly necessary for me to consider questions of causation and loss. But, in case this matter should go further, I make the following comments.

267. The claimant in its written closing submission argues that,

> "where a defendant's breach of fiduciary duty is established but evidence of loss is absent or sparse, the court is entitled to presume against the defendant that the loss to be compensated is the 'highest value'."

In my judgment, this puts the matter too high. Mere absence or sparseness of evidence of loss is not enough. What I do accept is that, if the claimant proves a breach of duty, but *the actions of the defendant* prevent the claimant from adducing evidence to prove the value of his loss, the burden can properly be put on the defendant to show that the value was zero; otherwise it can be presumed to be the highest possible: compare *Amory v Delamirie* (1722) 1 Strange 505.

268. In its written closing submissions, the claimant submits as follows on causation, loss and valuation (using the issues identified in the agreed list, referred to above at [178]):

> "Issue 4. There was a relatively buoyant beer and particularly cider production market at the relevant time which the [defendants] ought to have exploited.
>
> Issue 5. A trade-related approach to valuation is appropriate for the reasons explained by Mr Neeson at paragraphs 11.14-11.33 of his main report.
>
> Issue 6. The market value of the Property as a general industrial property (excluding any special purchaser value) at the date of sale was £3.25 million before the New Lease.
>
> Issue 7. The grant of the New Lease had a substantial depressive effect on the valuation of the Property.
>
> Issue 8 & 9. The market rent of the Property was £335,000 p.a.
>
> Issue 10. The special value which should have been obtained from Aston Manor was £7.5 million-£10 million.
>
> Issue 11. A process of obtaining formal tenders or sealed bids should have been undertaken.
>
> Issue 12. The [defendants] placed undue weight on the Edward Symmons 11 February 2011 report which was after a decision had been made to sell to Aston

> Manor and did not specifically contemplate a potential sale to Aston Manor as a special purchaser.
>
> Issue 13. The [defendants] bear the burden of proof, applying settled legal principles.
>
> Issue 14. The experts agree that the amount of special value cannot be assessed with any degree of accuracy. This is therefore a case in which the Court can and should apply the 'highest value' principle of law explained above. It is also a case in which on his own admission [the first defendant's] "day books" were destroyed sometime after he had been sent the letter of claim in April 2010. Those books may well have contained reference to conversations with Aston Manor which were otherwise unrecorded (such as the important pre-receivership meeting). In those circumstances, it is submitted that any doubt as to what interest would have been generated from other buyers if the [defendants] had generated genuine competition is properly resolved against them. It cannot be assumed that had the job been done properly there would not have been a speculator with knowledge of Aston Manor's interest willing to bid up the price. Accordingly, the best price reasonably obtainable for the Property was £10 million. The best price reasonably obtainable for release was the rent then prevailing, of £370,000 pa, which did not need replacement or renegotiation before a sale could be effect[ed], alternatively, if the lease was to be renegotiated, at £335,000 p.a."

269. I have already dealt in substance with these issues, but comment briefly as follows:

> 4. There was no admissible evidence before me of the buoyancy or otherwise of the beer and cider markets at the time.
>
> 5. I have already given reasons for disagreeing that a trade-related approach to valuation was appropriate in this case.
>
> 6. I accept Mr Clarke's evidence on this point.
>
> 7. I accept Mr Clarke's evidence on this point.
>
> 8 & 9. I accept Mr Clarke's evidence on this point.
>
> 10. I have already given reasons for disagreeing with this.
>
> 11. I accept Mr Clarke's evidence on this point.
>
> 12. I have already given reasons for disagreeing with this.
>
> 13. I have already given reasons for disagreeing with this.
>
> 14. The 'highest value' principle referred to does not apply. No actions of the defendants have prevented the claimant from adducing evidence of its claimed loss. Whether the expert evidence adduced does or does not show the amount of any special value, it is not the result of anything which the defendants have done. The reliance by the claimant on the destruction of the first defendant's day books is pure speculation, as it is not known whether they contained any records of conversations with Aston Manor not otherwise disclosed. But even if they did they would be far too

remote for the purposes of the principle. The "best price reasonably obtainable for the Property" of £10 million and the best rent of £370,000 per annum for the lease cannot be sustained on the evidence before the court.

270. I have already referred above to the evidence of valuation. In my judgment, on the values which I have found, even if (contrary to my view) the defendants had been in breach of duty, such breach would not have caused any loss. In my judgment, the claimant's loss on the Property, and its shareholders' palpable sense of grievance, are (as in so many other cases that the courts have seen in the past few years) the result of the damage done to the residential and commercial property markets by the financial crunch of 2008 and the economic crisis which followed it.

271. The claimant borrowed money secured against a valuation of the Property in the good times, and found that it was no longer enough in the bad. That is not the defendants' fault. Meanwhile, the business of the claimant's associated company also went under. That is not the defendants' fault either. The sense of grievance has been bolstered by the no doubt galling fact that a trade rival bought up the assets and undertaking of the business, and also managed to obtain the mortgage on the property, giving it a position from which ultimately to seek to obtain the Property itself. It has also been (over-optimistically) bolstered by the judicious hewing of extracts from emails and other correspondence, to create an impression of some kind of conspiracy between the trade rival and the defendants. But I am satisfied that there was nothing of that kind here.

Conclusion

272. I hope that I have dealt with all the issues which arise, and have specifically addressed at least the main arguments addressed to me: *cf Weymont v Place* [2015] EWCA Civ 289, [6]. In accordance with the reasons which I have given, therefore, I dismiss the claim.

Envoi

273. Before I part with the case, however, I must record that I have greatly appreciated the clear and concise submissions of counsel, and the meticulous preparation of the bundles by the solicitors. I am also grateful for the co-operation shown by the parties and their lawyers to each other and to me during the trial, and indeed afterwards.

274. I am of course sorry for the length of time it has taken me to prepare the complete judgment. As the parties know, this was the composite result of the earlier long trial of which I informed the parties at the time, my own illness last autumn, and the pressure of other work. In light of the delay in the preparation of this judgment since, I should make clear that, immediately after reserving judgment, I spent some time reviewing my notes, recording my impressions of witnesses, and drafting the main structure of my judgment. And I had the considerable benefit of written skeleton arguments, a full transcript of the evidence and arguments, and also full written closing submissions.

275. In addition, I am grateful for the patience of the parties whilst they waited for judgment, and their further assistance, for example when a file from the trial bundle went missing through no fault of theirs. A judge giving judgment can rarely if ever

please all the parties. Sometimes, indeed, he or she pleases none. But I can at least assure the parties in this case that I have listened carefully to all the evidence and considered all the arguments made to me.