



Neutral Citation Number: [2022] EWHC 1987 (Ch)

Claim No: HC-2016-003422

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

The Rolls Building  
7 Rolls Buildings  
Fetter Lane  
London EC4A 1NL

Date: Tuesday, 26 July 2022

**Before:**

**ROBIN VOS**  
**(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)**

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**Between:**

<b>SATYAM ENTERPRISES LIMITED</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>(1) JOHN VINCENT BURTON</b>	
<b>(2) JVB SEVEN PROPERTIES LIMITED</b>	<b><u>Defendants</u></b>

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**Robert-Jan Temmink QC** (instructed by **Teacher Stern LLP**) appeared for the **Claimant**  
**Philip Brown** (instructed under the Direct Access Scheme) and **Faith Julian** (instructed by  
**Richards Solicitors**) appeared for the **First Defendant**

Hearing dates: 7, 8, 11 and 12 July 2022

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**Approved Judgment**  
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**This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Tuesday, 26 July 2022 at 10:30am**

**DEPUTY JUDGE ROBIN VOS:****Introduction**

1. This claim has already been the subject of an eight day trial and an appeal to the Court of Appeal. Unfortunately, the Court of Appeal did not feel able to dispose of the matter based on the findings of fact made by the original Judge and so remitted two specific issues back to this Court, requiring a further four day trial.
2. The claim relates to the transfer of three properties containing 12 flats (“the Croydon Properties”) by the Claimant, Satyam Enterprises Limited to the Second Defendant, JVB Seven Limited (“JVB7”) in October 2012 (“the Transfer”). At the time, Satyam Enterprises Limited was called JVB Five Limited (“JVB5”). All parties have referred to the Claimant as JVB5 and I will do the same.
3. JVB5 claims that the Transfer was at a significant undervalue. It seeks damages from Mr Burton (who was, at that time, the sole director and registered shareholder of both JVB5 and JVB7) in respect of the loss it says it has suffered as a result. JVB5 made a separate claim against JVB7 in respect of what it said was the unpaid purchase price for the Croydon Properties. However, that claim was dismissed by the Judge and this was not appealed.
4. The Judge also dismissed the claims against Mr Burton. He did so on the basis that the Croydon Properties were at all times beneficially owned by a Mr Vidya Sharma (“Mr V Sharma”), a business associate of Mr Burton who had successfully bid for the Croydon Properties at auction in May 2012 and who the Judge found was also the beneficial owner of the shares in both JVB5 and JVB7. There was therefore no transfer of the Croydon Properties at an undervalue (as the beneficial ownership of those properties did not change) and no breach of duty by Mr Burton as he was simply complying with the instructions of the beneficial owner of the properties.
5. The Judge went on to find that, even if there had been a breach of duty by Mr Burton, any breach was authorised by Mr V Sharma as the beneficial owner of the shares in JVB5 so that Mr Burton had no liability as a result of the well-known *Duomatic* principle (*In re Duomatic Limited* [1969] 2 Ch 365) which (broadly speaking) allows shareholders to do anything informally which they could have done by a formal resolution.

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6. JVB5 appealed against the Judge's dismissal of its claim on the basis that the beneficial ownership of the Croydon Properties was not part of either party's pleaded case and also on the basis that the alleged transfer at an undervalue constituted an unlawful return of capital which could not therefore be authorised by the *Duomatic* principle.
7. The Court of Appeal accepted that a court cannot decide a case based on a point which is not pleaded or argued by the parties with the result that the Judge's dismissal of JVB5's claim should be set aside.
8. As far as the second ground of appeal was concerned, the Court of Appeal did not consider that the Judge had made the findings of fact which would be necessary to determine whether there had been an unlawful return of capital nor to determine the amount of any loss suffered by JVB5 as a result of any breach by Mr Burton of his duties as director if there had indeed been an unlawful return of capital. By an order dated 8 March 2021, the case was therefore remitted to this Court in order to determine the following issues:
  - a. Whether the transfer of the Croydon Properties from [JVB5] to JVB7 amounted to an unlawful return of capital such that it could not be ratified under the *Duomatic* principle;
  - b. If so, what damages is [JVB5] entitled to having regard to the true value of the Croydon Properties as at the date of their transfer to JVB7 and giving credit for any sums due to [JVB5] and any liabilities [JVB5] discharged by or on the instructions of either of the defendants."
9. Whilst other issues arise from the parties' pleadings (such as whether the agreement for the sale of the Croydon Properties from JVB5 to JVB7 complied with the Law of Property (Miscellaneous Provisions) Act 1989 and, if not, whether JVB7 could establish an estoppel), given the terms on which the claim was remitted to this Court, the parties accept that any such issues are no longer live. The only issues which need to be determined are those which have been identified by the Court of Appeal.
10. Although most of the facts which are relevant to the issues which I have to determine are disputed, before going any further, it is helpful to set out the background to the transaction in question.

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11. In this context, it is important to note that both parties accept that they are bound by the factual findings made by the Judge following the previous trial. That they are right to do so is clear from the approach of Nugee LJ in the Court of Appeal who looked carefully at the factual findings made by the Judge and made no suggestion that any of those findings should be set aside or were ones that the Judge was not entitled to make.

**Background facts**

12. Mr V Sharma agreed to purchase the Croydon Properties at an auction at the end of May 2012. The total purchase price was £1,096,000.
13. Mr V Sharma had been introduced to a Qatari businessman, Mr Saud Almana who agreed to provide financing of £365,000.
14. In order to find the balance of the purchase price, Mr V Sharma approached Mr Burton with a view to obtaining a loan through Finance and Credit Corporation Limited (“Fincorp”). Fincorp agreed to provide loans totalling £763,000 secured on the Croydon Properties. In fact, the loans arranged by Fincorp came from a number of sources including Rann Investments Limited and Bianca Roden. However, for convenience, I will refer to all of these loans arranged by Fincorp as the Fincorp loan.
15. Due to past problems with an individual introduced to Fincorp by Mr V Sharma, Fincorp would not deal with Mr V Sharma. It was therefore agreed that the loan would be made to JVB5 and that JVB5 would purchase the properties in place of Mr V Sharma. As I have mentioned, Mr Burton was the sole shareholder and director of JVB5 although he held his shares in JVB5 in trust for Mr V Sharma.
16. The Fincorp loan was intended to be relatively short term and had a high rate of interest, being 1.4% for each 30 day period (equivalent on a compounded basis to approximately 18.4% a year).
17. The hope was that the Croydon Properties could be sold at a profit relatively quickly and indeed Mr V Sharma and Mr Burton started marketing the properties in June 2012 before completion of the purchase which took place on 13 July 2012. However, by October 2012, no agreement had been reached for the sale of any of the Croydon Properties.

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18. On 2 October 2012, Mr Burton and Mr V Sharma agreed that JVB5 should sell the Croydon Properties to JVB7. Again, Mr Burton was the sole director and shareholder of JVB7 but held his shares in trust for Mr V Sharma.
19. The agreement to sell was recorded in board resolutions of both companies dated 2 October 2012. Although the authenticity of these documents was challenged by JVB5, the Judge found that the board resolutions were authentic.
20. The resolutions record the total purchase price as £2,230,000 but subject to an “allowance” of £1,134,000. The net purchase price was therefore £1,096,000 which is of course the same as Mr V Sharma agreed to pay at the auction in May 2012. The resolutions stated that each property would be transferred with “all existing corresponding mortgage/loan”. They also provided for Mr Burton to receive a commission of 15% of gross rentals and 2% of gross sales.
21. The Transfer took place on 12 October 2012<sup>1</sup> when the Land Registry transfer form (TR1) was signed. This recorded the purchase price as £2,230,000. There is a contract for the sale dated on the same day which refers both to the headline price and the allowance. The authenticity of this document was disputed at the previous trial. The Judge made no findings as to the authenticity of the contract. However, this was not a point taken by Mr Temmink in the trial before me. To the extent it is relevant I find that it is an authentic document given that it is consistent with (and adds nothing to) the 2 October 2012 board resolutions which the Judge did find to be authentic.
22. JVB7 did not pay the purchase price in cash. It is Mr Burton’s pleaded case that it was agreed that the purchase price would be satisfied by JVB7 agreeing to take over JVB5’s liabilities to Fincorp and Mr Almaná as well as meeting the costs of the original purchase of the Croydon Properties including unspecified sums said to be due to a Mr Amey Aulakh and a Mr Toni Singh for introducing Mr Almaná. One of the questions to be determined is whether this was indeed part of the agreement relating to the Transfer.

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<sup>1</sup> There is some suggestion that the date of the transfer was 16 October 2012. However, as noted by the Court of Appeal, the distinction is immaterial to the issues in this case. I will use the 12 October date as this is the date which appears on the from TR1.

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23. The Judge found as a fact that the sale from JVB5 to JVB7 was part of an attempted mortgage fraud involving Handelsbanken. The headline purchase price of £2,230,000 was intended to enable JVB7 to borrow a much higher amount from Handelsbanken than would otherwise have been the case. This would have enabled the Fincorp loans to be repaid and would have left a surplus for JVB7 or Mr V Sharma to use for other purposes. As it happened, due to an internal audit of Handelsbanken, the loan was never made.
24. Following the Transfer in October 2012, JVB5 was left holding a separate property (Wickham Lane) which it had acquired in June 2013 as part of a completely separate transaction involving Mr V Sharma's son, Mr Satyam Sharma ("Mr S Sharma"). In early 2013, JVB5 changed its name to Satyam Enterprises Limited and, later in the year, Mr S Sharma was appointed as the sole director and became the sole shareholder of JVB5. The transfer of JVB5 to Mr Sharma is not relevant to the issues I have to decide although the change of ownership and control may explain why JVB5 has brought this claim.
25. JVB7 sold five of the flats in February 2013 to a Mr Raghu. The headline price stated in the TR1 Land Registry transfers was £955,000 but Mr Burton's case is that the true purchase price was £684,000. Part of the Fincorp loan was repaid following the sale in February 2013.
26. A further six flats were sold by JVB7 in December 2013 to a company called Prime Investment 1 UK Limited. This time, the headline price was £910,000 but Mr Burton's case is that the true purchase price was £642,656. The remaining balance of the Fincorp loan was repaid after the sale in December 2013.
27. The sales were effected by way of the grant of new 125 year leases to the purchasers. This left JVB7 holding the freehold of the properties and one studio flat. Mr Burton's case is that these assets were subsequently transferred to Mr Aulakh's son in satisfaction of Mr Aulakh's entitlement to commission for the introduction of Mr Almaná.
28. JVB5 accepts that Mr Almaná was repaid £265,000 following the sales by JVB7. There is a dispute as to whether he received the remaining £100,000.

Approved Judgment**Unlawful return of capital - legal principles**

29. The legal principles relating to an unlawful return of capital are well established and, subject to one point which I will come to, are not in dispute. I will therefore only deal with them briefly. First, however, I need to mention (equally briefly) the *Duomatic* principle as this explains why the question as to whether the Transfer constituted an unlawful distribution is important.
30. As Lord Burrows JSC explained in *Ciban Management Corpn v Citco (BVI) Limited* [2020] UKPC 21 at [31], the *Duomatic* principle is “the principle that anything the members of the company can do by formal resolution in a general meeting, they can also do informally if all of them assent to it”.
31. Lord Burrows also confirmed at [47] that the *Duomatic* principle can apply where the authority or consent is given by the beneficial owner of the shares rather than the registered shareholder, at least where the beneficial owner is taking all the decisions in the relevant transactions. In this case, there is no doubt, based on the Judge’s findings, that both Mr Burton (as the registered shareholder) and Mr V Sharma (as the beneficial owner of the shares) approved the Transfer.
32. However, the *Duomatic* principle cannot be relied on to relieve a director from liability from breach of duty where the transaction is one which the company had no power to carry out. This would of course include an unlawful return of capital (see *Ultraframe (UK) Limited v Fielding* [2003] EWCA Civ 1805 at [40]). Therefore, if the Transfer is an unlawful return of capital, Mr Burton cannot escape liability by relying on the *Duomatic* principle despite the fact that it was authorised by Mr V Sharma.
33. Turning to the question of an unlawful return of capital (which I will refer to for convenience as an unlawful distribution), the basic principle was set out by Lord Walker of Gestingthorpe JSC in *Progress Property Co Limited v Moore* [2010] UKSC 55 at [1] as follows:

“A limited company not in liquidation cannot lawfully return capital to its shareholders except by way of a reduction of capital approved by the Court. Profits may be distributed to shareholders (normally by way of dividend) but only out of distributable profits computed in accordance with the complicated provisions of the Companies Act 2006 ... Whether

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a transaction amounts to an unlawful distribution of capital is not simply a matter of form. As Hoffmann J said in *Aveling Barford Limited v Perion Limited* [1989] BCLC 626, 631: whether or not the transaction is a distribution to shareholders does not depend exclusively on what the parties choose to call it. The Court looks at the substance rather than the outward appearance.”

34. I do not need to go into the detail of the relevant provisions which are contained in Part 23 Companies Act 2006. In this case, JVB5 filed dormant company accounts. Mr Temmink submits that, on this basis, it is clear that it did not have any distributable profits for Companies Act purposes. Mr Burton does not dispute this. I accept that there were no such distributable profits. If there were a distribution, it would therefore have been out of capital and would be unlawful.

35. In *Progress Property*, a sale of shares took place between two companies which had the same parent company (and so were under common control). The shares were sold for £60,000 but might in fact have been worth as much as £4m. It was however accepted that the director who procured the sale (in his capacity as the director of both the seller and the purchaser) genuinely believed that the sale was at market value. Lord Walker explained at [27] that:

“... in cases of this sort the Court’s real task is to enquire into the true purpose and substance of the impugned transaction. That calls for an investigation of all the relevant facts, which sometimes include the state of mind of the human beings who are orchestrating the corporate activity.”

36. Lord Walker went on to draw a distinction at [29] between two different situations which might be found to exist following such an investigation:

“If the conclusion is that it was a genuine arm’s length transaction then it will stand, even if it may, with hindsight, appear to have been a bad bargain. If it was an improper attempt to extract value by the pretence of an arm’s length sale, it will be held unlawful. But either conclusion will depend on a realistic assessment of all the relevant facts, not simply a retrospective valuation exercise in isolation from all other enquiries.”

37. In determining which side of the line any given situation falls, Lord Walker approved of the approach taken by Lord Hamilton in *Clydebank Football Club Limited v Steedman* 2002 SLT 109 who observed at [76] that:



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“... a mere arithmetical difference between the consideration given for the asset or assets and the figure or figures at which it or they are in subsequent proceedings valued retrospectively will not of itself mean that there has been a distribution. If the transaction is genuinely conceived of and effected as an exchange for value and the difference ultimately found does not reflect a payment ‘manifestly beyond any possible justifiable reward for that in respect of which allegedly it is paid’, does not give rise to an exchange ‘at a gross undervalue’ and is not otherwise unreasonably large, there will not to any extent be a ‘dressed up return of capital’. In assessing the adequacy of the consideration, a margin of appreciation may properly be allowed.”

38. As Lord Walker noted, the words quoted by Lord Hamilton are from *In Re Halt Garage* [1982] 3 All ER 1016 and from *Aveling Barford*.
39. It will be apparent then that, for there to be an unlawful distribution in the circumstances of this case, it must first of all be shown (by JVB5 which has the burden of proof) that the Transfer was at an undervalue and that, if so, it was not a genuine arm’s length transaction but one which Mr Burton knew was an improper attempt to extract value from JVB5.
40. It is worth noting that there may also be an objective element to the investigation, as was noted by Lord Walker in *Progress Property* at [19] by reference to the decision of the High Court in *Halt Garage*. In that case a husband and wife owned and ran a garage. The company got into financial difficulties but continued paying remuneration to the husband and wife. The wife however had become seriously ill and was no longer taking any part in the business.
41. Although it was found that there was no impropriety on the part of the husband and wife, Oliver J concluded that the majority of the payments to the wife were, in reality gratuitous distributions to a shareholder out of capital dressed up as remuneration. In reaching this conclusion, Oliver J considered at [1044f] that:

“In the absence of any evidence of actual motive, the Court must, I think, look at the matter objectively and apply the standard of reasonableness.”
42. The disagreement I mentioned earlier relates to Mr Brown’s submission that, in determining whether a transaction has taken place at an undervalue and whether the

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extent of that undervalue results in the transaction being an unlawful distribution, it may be helpful to consider authorities relating to ss 238, 339 and 423 of the Insolvency Act 1986. One of the conditions for the application of these provisions is that a person receives consideration the value of which is “significantly less” than the value of the consideration provided by that person. In particular, Mr Brown refers to two principles applied by the Courts.

43. The first is that, in assessing the adequacy of the consideration, it is not appropriate to look at a single transaction in isolation. Instead, the Court should also consider any linked transaction (*Tailby v HSBC Bank Plc* [2015] BPIR 143 at [86]). Mr Brown relies on this principle in particular in support of a submission that, if the agreement to transfer the Croydon Properties from JVB5 to JVB7 for a net price of £1,096,000 is separate from any agreement to satisfy the purchase price by assuming liabilities of JVB5, those two agreements should be considered together.
44. Given the guidance of the Supreme Court in *Progress Property* at [27] that the Court’s task is to enquire into the true purpose and substance of the transaction by investigating all the relevant facts, I have no doubt that this must be right although there is no need to rely on the authorities relating to the Insolvency Act to reach that result.
45. The second principle relied on by Mr Brown is that the Court may “if it considers it appropriate to do so” in effect give the benefit of the doubt to the person seeking to uphold the transaction by valuing what has left the company at the bottom of a range of values and valuing what has been received by the company in return at the top of any relevant range (*Ramlort Limited v Reid* [2004] EWCA Civ 800 at [104]).
46. The comments in *Ramlort* were however made in the context of interpreting the particular statutory provisions in question. As Mr Temmink pointed out, the Court of Appeal has recently made it clear in *BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112 at [62] that the Insolvency Act and part 23 of the Companies Act 2006 (relating to distributions) are wholly unrelated. The same must follow in relation to the common law principles relating to unlawful distributions out of capital which are expressly preserved by s 851(1) Companies Act 2006.
47. The statutory test contained in the Insolvency Act as to whether there has been a transaction at an undervalue is very different to the test to be applied in determining

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whether there has been an unlawful distribution. There is however no doubt that the Court has some latitude where there is a range of possible values in determining the value of the consideration given or received and so coming to a decision as to whether there has been a distribution in the first place (see the comments of Lord Hamilton in *Clydebank* referred to at [37] above).

48. The fact that there may be a range of values is also likely to be relevant to the question as to whether the transaction was intended to be a genuine arm's length transaction or was an attempt to extract value dressed up as an arm's length sale; but there is in my view no principle that the person seeking to uphold the transaction should necessarily be given the benefit of the doubt. Whether or not there has been an unlawful distribution will depend on an investigation of all of the relevant circumstances.
49. Mr Brown adds that, given the claim is against Mr Burton as director and not against the recipient of the alleged unlawful distribution, it is also necessary for JVB5 to establish that there has been a breach of duty by Mr Burton. He submits that this is an additional requirement as a director will only be liable in respect of an unlawful distribution if there is a breach of duty. In this, he is clearly correct, and this is a point made by Lord Hamilton at [58] in *Clydebank* although he notes that in this sort of case "it is difficult to keep [these issues] wholly separate".
50. This difficulty is demonstrated by the conclusion of Nugee LJ at [76] in his decision on the appeal in this case that:

"If however the Transfer was at an undervalue and an unlawful return of capital, then a breach of duty will be established."
51. Given the principles to be applied as set out in *Progress Property*, Mr Brown accepted that, if a sale at an undervalue is found to be an unlawful distribution it would normally involve a breach of duty by the director. In any event, the submissions made by Mr Brown in relation to breach of duty are, in my view, all relevant to the question as to whether or not there was an unlawful distribution in the first place and so I would agree with the Court of Appeal that, on the facts of this particular case, if there has been an unlawful distribution, this will inevitably have been as a result of a breach of duty by Mr Burton.

Approved Judgment**The issues to be determined**

52. I will not analyse the pleadings in detail as the Court of Appeal has done this at [7-18]. Based on this and taking into account the legal principles I have described, the issues which need to be determined are, in my view, as follows:
- 52.1 What were the terms on which it was agreed that the Croydon Properties would be transferred from JVB5 to JVB7?
  - 52.2 What was the value of the Croydon Properties as at 12 October 2012?
  - 52.3 What was the value of the consideration provided to JVB5 in connection with the Transfer?
  - 52.4 Based on these values, was the Transfer at an undervalue?
  - 52.5 If so, did Mr Burton nonetheless believe that the transfer was a genuine arm's length transaction or was it an improper attempt to extract value from JVB5 by the pretence of an arm's length sale?
  - 52.6 If Mr Burton's motivation is unclear, is it objectively reasonable to characterise the Transfer as a genuine sale rather than a disguised distribution?
53. If, having determined these issues, my conclusion is that there has been an unlawful distribution, I will need to consider the measure of damages to which JVB5 is entitled. As identified by the Court of Appeal at [76], this will involve starting with the value of the Croydon Properties at the relevant date and deducting any liabilities of JVB5 discharged by JVB7 and, indeed, also by Mr Burton or any other associated entity. It is also accepted that credit should be given to JVB5 for any rent arising in the period prior to 12 October 2012.

**The evidence**

54. In an order made following a case management conference on 2 June 2021, Deputy Master Dray gave directions as to the evidence which should be available for this trial. In accordance with that order, the Court has received the following evidence:
- 54.1 The original trial bundles.

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- 54.2 A further bundle containing additional documents disclosed by the parties after the case management hearing together with transcripts from the original trial.
- 54.3 A further witness statement from Mr S Sharma. Mr Burton also made an additional witness statement (as he was permitted to do by the order of Deputy Master Dray). However, this witness statement was struck out in its entirety by an order dated 8 June 2022.
- 54.4 Both Mr S Sharma and Mr Burton were cross-examined based on the witness statements which they had provided (in Mr Burton's case, the witness statements which he had provided for the original trial).
55. It is to be noted that the valuation experts did not give any further oral evidence at the trial.
56. At the start of the hearing, Mr Burton made a late application to admit some further documents consisting of supporting papers relating to a valuation report said to be relevant to the condition of the properties as well as some bank statements. I agreed (for reasons given in a separate ruling) to admit the bank statements but not the valuation documents. As it turns out, the bank statements were not referred to.
57. Mr S Sharma's evidence was relatively brief. On occasion, his answers strayed into the realms of speculation and did not really answer the questions put to him. However, this can, to a large extent, be explained by the fact that, very fairly, he accepted that he had little or no knowledge of the management of the Croydon Properties and their sale from JVB5 to JVB7. Overall, whilst I am satisfied that he answered the questions put to him truthfully, his evidence sheds little light on the issues which the Court now needs to determine.
58. In his Judgment following the original trial, the Judge described Mr Burton as a dishonest witness and concluded that he could give little or no weight to anything said by Mr Burton unless independently corroborated. Mr Temmink invited me to take the same view. Whilst I do not go quite that far, I have no doubt that Mr Burton's evidence (and indeed the documentary evidence which he has produced since the previous trial) must be approached with a great deal of caution.

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59. As far as the documentary evidence is concerned for example, Mr Burton was taken to two emails which purport to evidence some of the payments which Mr Burton says he or his companies have made on behalf of JVB5. However, the emails contain discrepancies in that the day of the week does not match up with the date of the email. One of them, for example, was purportedly sent on Monday 31 July 2012, the problem being that 31 July 2012 was a Tuesday. Mr Burton had no explanation for this. There is little doubt that these emails have been fabricated by Mr Burton.
60. As far as Mr Burton's oral evidence was concerned, there were occasions when this was clearly contradicted by the documentary evidence. One example is whether Mr Burton was involved in any other deals with Mr Almaná. He said that he was not. When shown a letter written by him to Mr Almaná referring to other deals, his response was that he had not written the letter. However, the letter was clearly attached to an email from Mr Burton to Mr Almaná which Mr Burton accepted that he had sent.
61. Despite this, I do not however discount Mr Burton's evidence completely. There were some instances where I am satisfied he was doing his best to answer the questions based on his recollection of events. However, given the concerns I have mentioned, I accept that what he says must be carefully tested against the other evidence including, in particular, the documentary evidence and the inferences which can be drawn from that documentary evidence.
62. With this background, I turn now to the terms of the Transfer.

**The terms of the Transfer**

63. In coming to a conclusion on the terms of the Transfer, one of the relevant factors is the purpose for which the Transfer was made. The Judge found at [67] that the purpose was to create a transaction with an artificially inflated purchase price in order to enable new borrowings of a higher amount to be procured from Handelsbanken. Mr Burton accepted this in cross examination.
64. However, Mr Burton's evidence and his pleadings state that the purpose of the Transfer was also to discharge the existing secured borrowings given the high rate of interest which was being paid. His evidence was that the interest that would be paid to

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Handelsbanken would be in the region of 4.5% compared to the Fincorp rate of over 18%.

65. Mr Burton goes on to say that the purpose of procuring a new loan was also to enable payments to be made to Mr Almaná, other third parties who had paid the costs of the purchase of the Croydon Properties (although as will be apparent from what I say below, it does not appear that there are any) and to make payments to Mr Aulakh and Mr Singh for introducing Mr Almaná.
66. Without accepting at this stage what liabilities needed to be paid, in broad terms, I accept this evidence. JVB5 itself in its Particulars of Claim refers to the proposed Handelsbanken loan as being an “intended refinancing” and there can be little doubt that it was intended that the Fincorp loan should be repaid out of the proceeds of the new Handelsbanken loan. From a purely commercial perspective, it would of course be very surprising if a secured lender were prepared to allow further borrowings to be secured on the properties without their own loans being repaid.
67. The documentary evidence relevant to the terms of the Transfer include:
  - 67.1 The 2 October board resolutions of JVB5 and JVB7.
  - 67.2 An agreement between JVB5 and JVB7 said to be signed by Mr Burton on behalf of both companies at a meeting with Mr V Sharma on 11 October 2012.
  - 67.3 The contract dated 12 October 2012.
  - 67.4 The TR1 Land Registry Transfer Forms also dated 12 October 2012.
68. As I have already mentioned, the authenticity of the board resolutions has been confirmed by the Judge at [57]. For the reasons set out above, it is in my view more likely than not that the contract is also genuine.
69. The effect of both of these documents is that the net purchase price for the Croydon Properties was £1,096,000 being a headline price of £2,230,000 less an “allowance” of £1,134,000.
70. Although the form TR1 refers to the full purchase price of £2,230,000 and does not refer to the allowance of £1,134,000, given the accepted purpose of the transaction (to

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procure a greater loan from Handelsbanken than would be justified on the basis of the value of the properties), this is not surprising and does not in my view cast any doubt on the agreement that the net purchase price should be £1,096,000.

71. The question then is whether, as Mr Burton suggests in his pleadings and his evidence, there was an agreement that the net purchase price of £1,096,000 should be satisfied by JVB7 assuming the liabilities of JVB5 in relation to the Croydon Properties and, if so, what liabilities this encompasses.
72. Mr Burton's pleadings and evidence as to the liabilities which JVB7 was to assume is somewhat inconsistent. In his amended defence and in his witness statement, Mr Burton refers to four categories of liabilities:
  - 72.1 The Fincorp loan.
  - 72.2 The financing provided by Mr Almaná.
  - 72.3 Sums paid by third parties to meet the costs of the original purchase of the Croydon Properties.
  - 72.4 Commissions due to Mr Aulakh and Mr Singh for introducing Mr Almaná.
73. In cross examination, having been warned by Mr Temmink to think carefully about his answer, Mr Burton's initial response was that the liabilities involved were those to Fincorp and to Mr Almaná. A short time later, he changed his answer saying that JVB7 was to take over all liabilities relating to the Croydon Properties until those properties were sold.
74. Mr Burton has provided a schedule of all of the liabilities which he says have been paid on behalf of JVB5 and which therefore form part of the consideration for the transfer. This includes £9,000 which Mr Burton says he personally contributed to the original purchases of the Croydon Properties, interest accruing on the Fincorp loan after 12 October 2012, expenses relating to the ultimate sale of the Croydon Properties in 2013 as well as management and other expenses relating to the Croydon Properties arising after the transfer in October 2012. Clearly some of this goes beyond the liabilities referred to in Mr Burton's pleadings and witness statements.



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75. Mr Burton's oral evidence in cross examination as to how the agreement that the purchase price would be satisfied by JVB7 assuming liabilities was reached was not particularly helpful. He explained that he would regularly go for a walk with Mr V Sharma during which they would discuss these sorts of matters and that this was how the agreement came about. He went on to say that he would then have put the agreement into the board minutes.
76. However, the problem with this is that the board minutes signed on 2 October 2012 do not reflect what he says the agreement was. The only relevant provision in the board minutes is to the effect that the Croydon Properties were to be transferred along with the existing loans relating to each property. This does however provide some evidence at least supporting Mr Burton's position that JVB7 agreed to assume at least the loan obligations.
77. The agreement between JVB5 and JVB7 dated 11 October 2012 is however slightly more detailed. This provides that JVB7 will "undertake the responsibilities and liabilities of the above properties to include interest on and secured loans from Finance and Credit Corporation, unsecured loan from Saoud Omar Almanan and remit all profits to him after deducting costs of sales and fees/commissions due for rental management".
78. On the face of it, the agreement provides that JVB7 would assume these liabilities in addition to paying the net consideration of £1,096,000. No explanation for this has been provided but, given the other evidence, there can be no doubt that this is simply a mistake as it has never been suggested that JVB7 would both have the obligation to pay £1,096,000 in cash and would also assume responsibility for the existing loans.
79. This document was not referred to by the Judge in his Judgment following the original trial. Its authenticity was not however challenged in the trial before me and Mr Burton was not taken to it in cross examination.
80. Given all these discrepancies Mr Temmink submits that there is no real evidence as to what the deal actually was in relation to the Transfer. However, taking the board resolutions together with the 11 October 2012 agreement as well as Mr Burton's own evidence, there is in my view sufficient support for Mr Burton's case that it was agreed that JVB7 would satisfy the purchase price or £1,096,000 by assuming the liabilities of JVB5 in relation to the Croydon Properties. This conclusion is supported by the fact

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that JVB7 (or other entities connected with Mr Burton) did in fact meet those obligations rather than pay JVB5 a cash sum of £1,096,000.

81. As far as JVB5 was concerned, such an agreement was also clearly necessary from a commercial perspective as it had no means of meeting its liabilities other than out of the proceeds of sale of the Croydon Properties. The liabilities to Fincorp and Mr Almaná alone (excluding any interest due to Fincorp) totalled £1,128,000. These liabilities could not be satisfied if the only consideration for the transfer was the payment of a cash sum of £1,096,000. It would therefore be surprising if an agreement along the lines suggested by Mr Burton had not been reached.
82. For all of these reasons, my conclusion is that, in consideration of the transfer of the Croydon Properties, JVB7 agreed to meet all of the liabilities of JVB5 relating to the Croydon Properties. This is consistent with the terms of the 11 October 2012 agreement (which refers to “the responsibilities and liabilities of the above properties” and then gives examples of what this includes) and is also consistent with Mr Burton’s evidence. I will address precisely what liabilities this covers when I consider the value of the consideration provided.

**The value of the Croydon Properties**

83. This is perhaps one of the most difficult aspects of this case despite the fact that there was a great deal of evidence in relation to the value of the properties.
84. Expert evidence was given on behalf of JVB5 by Richard Alford of Copping Joyce and, on behalf of Mr Burton, by Horace Blackburn of Blackburn Loxley Limited.
85. The Judge at the original trial who had the benefit of hearing the oral evidence of the experts gave a relatively brief overview of his impression of the two expert witnesses although, given his conclusions, he did not find it necessary to address the question of valuation.
86. The Judge clearly preferred Mr Alford’s evidence to that of Mr Blackburn, praising him as “an impressive witness who had carefully considered the valuations which he placed before the court”. He preferred Mr Alford’s methodology and approach and found the comparables he had used to be more compelling.

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87. The Judge was less complimentary about Mr Blackburn noting that he had got off to a bad start by saying in his report that he had never acted for Mr Burton before but having to accept in cross examination that he had known him for 10 years, prepared numerous valuations for him and had indeed valued the Croydon Properties at Mr Burton's request in January 2018 (his report as expert being prepared in October 2018). Apart from concluding that Mr Alford's approach was to be preferred, the Judge did not say anything further about the reports prepared by Mr Blackburn.
88. Both experts prepared their reports based on the RICS definition of market value being:
- “the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction after proper marketing and when the parties had each acted knowledgeably, prudently and without compulsion.”
89. The methodology used by both experts was also the same and was based on an analysis of the prices achieved by comparable properties.
90. The 12 flats in question are contained in three properties, 249 Whitehorse Lane, 22 and 23 Princess Road and 49A Beulah Grove. There are four flats in each property.
91. Each of the experts had available to him previous valuation reports but, unfortunately, not the same reports as each other. Mr Alford had a report which related to the five flats sold by JVB7 in February 2013 prepared in November 2012 by Lambert Smith Hampton (“LSH”) for Shawbrook Bank as the proposed lender and Mr Raghu as the proposed purchaser (being three of the flats at Whitehorse Lane and two of the flats at Princess Road).
92. He also had a report prepared by Anderson Wilde and Harris (“AWH”) dated August 2013 which related to the six flats sold by JVB7 in December 2013 and which was addressed to the purchaser, Prime Investment 1 UK Limited but was stated to be prepared on behalf of ASC Finance for Business as lender and acknowledged that the lender would be relying on the valuation for the purposes of evaluating the loan application and the adequacy of the security.

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93. Mr Blackburn on the other hand had been provided with valuation reports prepared by Ord, Carmell and Kritzler (“OCK”) in June and July 2012 for the purposes of JVB5’s application for a loan from Fincorp.
94. Neither of the experts was able to physically inspect the properties and so relied on the description of the condition of the properties contained in the other reports available to them. In Mr Blackburn’s case, he also relied on some evidence as to condition given to him by Mr Burton.
95. As Mr Temmink has pointed out, the information given to Mr Blackburn by Mr Burton was somewhat disingenuous. What he sent to Mr Blackburn was a copy of an email which had been sent to Mr Burton on 27 June 2012 listing the 12 properties and giving a description of each of the flats but which did not say anything about the condition of those properties. However, when he sent the email to Mr Blackburn (which he sent in response to an email from Mr Blackburn saying that the condition of the properties will have a significant impact on the valuations) he added various comments about the condition of the properties including for example that in relation to all of the flats “everything needs upgrading” and, in relation to one of the flats, that it was “in absolutely terrible condition”.
96. The inference from the way in which this information was provided is that these comments had been made in the email which had originally been sent to Mr Burton in June 2012 and not that they had just been added by Mr Burton when he forwarded the email to Mr Blackburn. There is no doubt that Mr Burton’s comments to Mr Blackburn in respect of the condition of the properties should be disregarded although there is no evidence that they influenced his valuation.
97. The problem with the reports on which the experts were relying is that the descriptions of properties was inconsistent.
98. Mr Temmink submits that I should prefer the description of the condition of the properties contained in the reports available to Mr Alford (the LSH report and the AWH report) on the basis that those valuers physically inspected all of the properties. Mr Brown on the other hand, not surprisingly, suggests that the OCK report provides the best evidence of condition. On balance, I have concluded that the descriptions contained in the OCK report are more reliable.

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99. The first reason is that, whilst none of the descriptions are particularly detailed, the comments contained in the OCK report are, in my view, more helpful than the AWH report. For example, in relation to Princess Road, the OCK comment is that “the flats themselves, with the exception of the basement flat at number 23 are in satisfactory condition benefiting from central heating and clean and tidy fixtures and fittings, decorations and carpets. Kitchens and bathrooms are adequate. The basement flat at number 23 requires refurbishment. The kitchen and bathroom are rather old and decorations and floor coverings are badly marked.”
100. The ASH report on the other hand simply describes the properties (e.g. “the ceilings are of plasterboard and decorated”) without saying anything about the condition. The only comments on condition are that the fitments are “modern” and that the flats generally are in “modernised” condition. The position is similar in relation to Beulah Grove.
101. LSH say more about Princess Road. In particular they say that the flats had been refurbished recently, which is inconsistent with the OCK report which notes that the properties are only in a satisfactory condition and that the kitchens and bathrooms are adequate. Given that it there was no suggestion by either party that the flats were refurbished after the purchase in May 2012 and before the Transfer it would be surprising if this is not something which would have been noticed or mentioned by OCK.
102. The inability of OCK to inspect all 12 flats is a factor to take into account. However, they were able to inspect three of the four flats at Princess Road. Although they were only able to inspect one flat at Whitehorse Lane, JVB5’s architect provided them with floor plans and provided photographs of the inside of the flats.
103. At Beulah Grove, OCK were able to inspect two of the four flats and have assumed that the remaining two are in a similar condition to the two which they inspected. This seems a reasonable assumption given that AWH describe all of the flats as being in reasonable condition, the only additional comment being that the fitments in one of the flats are slightly dated.
104. There is however another reason why I prefer the OCK report. In my view, the evidence before the Court gives rise to a strong inference that the sales of the properties by JVB7 were connected with mortgage fraud in a similar way to the sale from JVB5 to JVB7.

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105. As I have already explained, the total purchase price for the sale of the properties in February 2013 is stated to be £955,000. Mr Burton's evidence, however, which is supported by the information extracted from the client account of the solicitors acting for JVB7, is that the proceeds of sale were in fact only £684,000. Mr Temmink refers to correspondence between the solicitors confirming the direct payment of £271,000 from Mr Raghu to JVB7. However, there is no evidence that this payment was actually made. Bearing in mind that the initial correspondence between solicitors referred to an agreement to purchase the properties for £650,000 and that, on the face of it, there is no reason why part of the consideration should be paid separately, it is in my view more likely that Mr Burton's evidence on this point is correct. In relation to the December 2013 sale, the headline price was £910,000 and the solicitor's client account confirms Mr Burton's evidence that the proceeds of sale were in fact £642,656. In each case, the proceeds were just over 70% of the stated price.
106. Whilst there may be other explanations for this discrepancy, based on this evidence and on Mr Burton's open acceptance of his involvement in these sorts of arrangements both at the original trial and at this trial it is in my view more likely than not that these transactions were part of a similar arrangement and that JVB7 was a willing participant in those arrangements. It is perhaps no coincidence that the valuations prepared by LSH and AWH precisely mirror the headline purchase price, despite the fact that the actual price paid was only about 70% of this figure.
107. Mr Temmink referred to the Judgment of the Judge at the original trial dealing with consequential matters. In this, the judge notes that whilst the transfer from JVB5 to JVB7 was connected with mortgage fraud, what he described as the underlying transaction (the purchase of the Croydon Properties and their onward sale to third parties at a profit) was not dishonest.
108. Mr Temmink submits that a finding by me that the onward sales were connected with mortgage fraud would be inconsistent with this conclusion. I do not agree. The Judge was dealing with the question of costs and was not looking specifically at the nature of the onward sales. He was quite right to conclude that buying properties in the hope of selling them in the future at a profit is not dishonest. However, he said nothing about whether the way in which those onward sales were structured might or might not have been dishonest.

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109. In the light of these factors, my conclusion is that the description contained in the OCK report is more likely to be an accurate reflection of the condition of the properties.
110. Both experts were asked to prepare an addendum to their reports to show how their valuations would change if they were prepared on the basis that the condition of the properties reflected that description contained in the reports prepared by the other. On this basis (i.e. based on the condition of the properties set out in the OCK report), Mr Alford reduced his valuation from £1,661,600 to £1,561,600. Mr Blackburn's original valuation, which was of course based on the condition of the properties contained in the OCK report in the first place, was £1,200,000.
111. Having considered the reports provided by the experts and the transcripts of their evidence at the original trial, I also prefer the general approach of Mr Alford. There are a number of reasons for this:
- 111.1 He clearly had a more independent and open-minded approach than Mr Blackburn. This was demonstrated for example by the fact that, having seen Mr Blackburn's report, he accepted some of the points made by Mr Blackburn and reduced his initial valuation from £1,746,600 to £1,661,600.
- 111.2 Mr Blackburn on the other hand showed an unwillingness in cross examination to accept any criticism of his approach. When asked to produce an addendum to his report reflecting the condition of the properties as described in Mr Alford's report, in relation to two of the properties rather than making an adjustment based on the assumed condition of the properties, he took a single comparable identified by Mr Alford, converted that into a price per square foot and then applied the result to each of the flats in the two properties without any distinction between one bedroom or two bedroom flats.
- 111.3 In doing so, he apparently ignored his own opinion, expressed in his oral evidence, that the properties should not be valued based on a single comparable but that the value should be determined taking into account all of the comparables in the round or, at least, a minimum of three comparables.

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- 111.4 Generally speaking, I consider Mr Alford's comparables to be more carefully chosen, being properties that were closer in proximity to the properties being valued and also, in some cases, closer in description to those being valued.
- 111.5 Mr Alford had a greater focus on the location of the comparable property whereas Mr Blackburn considered that finding a comparable with a date of sale closer to the valuation date was more important. No doubt the truth is that both are important but Mr Blackburn's refusal even to consider properties sold more than six months either side of the valuation dates seems surprising.
- 111.6 In addition, in relation to quite a number of the comparables, Mr Blackburn had difficulty explaining in cross examination either why a particular property was a suitable comparable for the particular flat being valued or, alternatively, how he had reached a particular valuation in the light of a given comparable. Mr Blackburn was also generally unwilling to place any weight on Mr Alford's comparables as he said he could not verify the information about those comparables, despite accepting that Mr Alford would have done his research diligently.
- 111.7 On the face of it, the figure arrived at by Mr Blackburn makes no sense. His valuation as at 12 October 2012 is £1,200,000. Applying Mr Brown's proposed 10% reduction for a bulk purchase (see below), this represents a figure of £1,080,000 which is less than the amount for which the properties were purchased at auction in May 2012. This cannot be right in circumstances where Mr Burton himself accepted that the price achieved at an auction would be less than that achieved by way of a private sale and where Mr Blackburn's own evidence was that between June and December 2012, property prices in the area had risen by 8-10%.
112. I therefore take as my starting point that the figures produced by Mr Alford based on the condition of the properties as set out in the OCK report which, as I have mentioned, totals £1,561,000. I do however accept Mr Brown's submission that some adjustments need to be made to this figure.
113. First, the valuations have been produced on the basis that each of the flats will be sold individually. However, it is clear from the evidence that this was never the intention.



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The correspondence relating to marketing in June 2012 for example refers to parties interested in buying a number of flats. There is no evidence of correspondence concerning the possibility of purchasing a single flat. This is of course all supported by the fact that, when the flats were ultimately sold, one sale comprised five flats and the other comprised six flats.

114. Mr Alford accepted in his evidence that a discount of at least 10% for a bulk purchase would be appropriate. Mr Temmink draws attention to correspondence in June 2012 which makes clear that no discount for bulk purchase would be offered. However, the reality is that, at that time, it did not in fact prove possible to sell the flats. In my view it would therefore be appropriate to apply a 10% discount to reflect the likelihood that any sale would be a bulk sale of a number of flats to an investor. This reduces the valuation to £1,405,440.
115. In addition, Mr Alford accepted that there was of course a range of possible values, that range being a difference of 10% between the highest figure and the lowest figure. In his view, the values he proposed would be in the middle of the range. The bottom of the range would therefore represent a reduction of 5% on the values put forward by Mr Alford. In recognition of the fact that Mr Blackburn's proposed figures are significantly lower and taking account of the fact that his comparables do still have validity, it would be appropriate in my view for the valuation to reflect the lower end of the range of values implied by Mr Alford's figures. This would reduce the valuation to £1,335,168.
116. Of course, it might be said that the best evidence for the value of property is an actual transaction which shows what a third party is prepared to pay. In relation to these properties, the purchase by Mr V Sharma/JVB5 at the end of May 2012 is such a transaction, as is the sale of five of the flats to Mr Raghu which completed in February 2013 at a price of £684,000. However, the documents show that this transaction was initially agreed in November 2012 at a purchase price of £650,000.
117. In cross examination, Mr Burton agreed that the price paid for a property at auction was likely to be less than would be paid on a private sale following a proper period of marketing. This is reflected in the fact that a valuer might value a property on a "90 day" basis or on the basis of market value. The 90 day basis of valuation would typically be used for auction purposes and is lower than the market value.

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118. Mr Temmink suggested to Mr Burton that the difference between the two values might be 10%. Mr Burton rejected this but did not suggest an alternative figure. OCK did however value the properties in question on both a 90 day basis and a market value basis. The difference between the figures suggested by OCK in their June/July valuations ranges between 6.6% and 7.7%. If the higher figure of 7.7% is used, this would increase the value of the properties, if purchased on the open market rather than at auction, from £1,096,000 to £1,180,392.
119. Mr Blackburn's evidence at the original trial was that between June 2012 and December 2012, the Nationwide House Price Index in Croydon had increased by between 8-10%. The period between the purchase of the properties at the end of May 2012 and the sale in October 2012 was approximately four and half months. Based on an increase over the six month period of 10%, the pro-rated increase would be 7.5%. This would increase the value of the properties to approximately £1,269,000 which is just under 5% less than the figure of £1,335,000 derived from Mr Alford's figures.
120. On the other hand, based on Mr Alford's figures but applying the reductions for a purchase in bulk and using the bottom end of a 10% range (i.e. a further 5% reduction), the value of the five flats which were agreed to be sold in November 2012 at a price of £650,000 would be approximately £632,000. This is about 2.8% less than the value agreed at that time or 7.6% less than the ultimate sale price in February 2013.
121. I should stress that I am only using these figures to sense check the figure of £1,335,000 derived from Mr Alford's figures based on the condition described in the OCK report and applying the adjustments I have identified resulting in a further 15% discount. It can be seen that his figure sits between the values which might be implied from the actual market transactions.
122. My conclusion therefore is that the value of the properties as at 12 October 2012 was £1,335,000. This therefore fixes one side of the equation in determining whether the transfer was at an undervalue.

**The value of the consideration**

123. In determining the value of the consideration, it is of course necessary to identify the liabilities which are said to form part of the consideration. As I have already found,

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based on Mr Burton's evidence and on the 11 October 2012 agreement, this comprises all of the liabilities and obligations of JVB5 in relation to the Croydon Properties.

124. Although I accept that it was understood that JVB7 would meet any liabilities and obligations relating to the Croydon Properties after the transfer in October 2012 (such as repairs, maintenance, costs of future sales etc.), these were obligations of JVB7 as the owner of the Croydon Properties and not obligations of the JVB5. They do not therefore in my judgment form part of the consideration.
125. A more difficult question arises in relation to the interest on the Fincorp loan relating to periods after the Transfer as this, legally, remained an obligation of JVB5 and I will come on to deal with this.
126. Mr Brown has provided a helpful schedule setting out the items claimed by Mr Burton to form part of the consideration and so I will go through each of the items on that schedule.

**Mr Almaná**

127. It is accepted that Mr Almaná provided financing of £365,000 and that this amount was due to him. The precise arrangements with Mr Almaná are not clear but JVB5 does not dispute that the obligation to repay this sum was a liability of JVB5. This is in any event confirmed in a board resolution of JVB5 signed on 21 June 2012. On this basis, the agreement of JVB7 to repay this amount forms part of the consideration and should be valued at the face amount of £365,000.
128. The question as to whether or not the amount was in fact repaid is, in my judgment, irrelevant to the question as to whether or not it formed part of the consideration for the Transfer. It is however potentially relevant to the determination of any loss if there has in fact been an unlawful distribution and it is convenient to deal with it here.
129. JVB5 accepts, based primarily on bank statements, that Mr Almaná has been repaid £265,000. £165,000 was paid on 28 February 2013 (i.e. just after the first tranche of sales by JVB7). A further £100,000 was received by Mr Almaná on 15 December 2013 (shortly after the sale of the second tranche of properties by JVB7). There is an email chain between the solicitor acting for JVB7 and representatives of Mr Almaná

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evidencing further payments of £75,000 on 6 January 2014 and of £25,000 on 13 January 2014. There are however no bank statements verifying the payment of these amounts.

130. JVB5 questions whether Mr Almana has been repaid in full based on evidence from Mr S Sharma that he and JVB5's solicitor visited Mr Almana in 2019 and that he told them that he had not been paid everything he was owed.
131. Mr Temmink also refers to an email purportedly from Mr Burton to Mr Almana dated 4 August 2020 in which Mr Burton asks Mr Almana for confirmation that he had been paid everything he was owed in relation to the Croydon Properties. Mr Burton denies having sent this email. However, Mr Almana forwarded the email to JVB5's solicitors and to Mr S Sharma saying that he had not received "my total payment plus my investment". Mr Almana does not however elaborate on what he thinks he might be owed.
132. As Mr Temmink was at pains to point out to Mr Burton in cross examination, it is clear that Mr Almana was involved in a number of deals with Mr V Sharma and Mr Burton. Given the passage of time between the transactions relating to the Croydon Properties and Mr Almana's email in August 2020 (6-8 years) and given that Mr Almana was not available for cross examination and did not provide a witness statement, it is impossible to be confident that anything Mr Almana felt he was owed related to the Croydon Properties.
133. Based on the contemporaneous documentary evidence, it is in my view more likely than not that Mr Almana did in fact receive repayment of the full £365,000. The email chain is clear and the timing of the payments coincides with the sale of the second tranche of properties by JVB7. I therefore find as a fact that these payments were indeed made and that they related to the £365,000 advanced in relation to the Croydon Properties.

**Mr Burton**

134. Mr Burton's pleaded case is that the total cost of the purchase of the Croydon Properties was £1,137,000 inclusive of expenses. He says that this was financed as to £365,000 from Mr Almana, £763,000 from Fincorp and the balance of £9,000 was paid by him

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personally. There is however no documentary evidence of the payment of £9,000 by Mr Burton.

135. Looking at the records from the client account of Simkins, the solicitors acting on the purchase, the only funds coming in are those from Mr Almaná and from Fincorp. These sums were sufficient to meet all of the costs of the purchase. Indeed, there was a surplus of £12,210.15 which was paid by the solicitors to Mr Burton's company, Mary's Way Limited.
136. In cross examination, Mr Burton explained that he had given Mr V Sharma £9,000 towards expenses relating to a lady friend of Mr Almaná who attended the auction at which the Croydon Properties were purchased. This is inconsistent with Mr Burton's witness statement which says that the funds were paid to the solicitor and says nothing about expenses of the lady friend. In the light of this, I do not accept that these funds were paid by Mr Burton or, if they were, that they were part of the costs of the purchase of the Croydon Properties. In my view, this does not therefore form part of the consideration for the Transfer.

**Fincorp**

137. There is no dispute that the principal amount of £763,000 was received by JVB5 and was a liability of JVB5. There is however a difference of view as far as interest is concerned.
138. Mr Temmink accepts that the consideration includes interest for the three months between the acquisition of the Croydon Properties on 13 July 2012 and the sale of the properties to JVB7 on 12 October 2012. This interest, together with valuation fees passed on by Fincorp to JVB5 totals £33,993.99.
139. Mr Brown however submits that all of the interest paid to Fincorp up to the repayment of the loans following the sale of the Croydon Properties forms part of the consideration. This is on the basis that JVB5 remained liable for the loan and interest and, as agreed, JVB7 met that liability. On this basis, the total interest and valuation fees forming part of the consideration would be £162,396.47.

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140. Whilst it is true that the repayment of the Fincorp loan and the payment of interest in respect of the Fincorp loan continued to be a liability of JVB5, it would not in my view be right to treat the interest which accrued after the sale of the Croydon Properties to JVB7 as part of the consideration for the Transfer.
141. It is clear that the dealings between the parties were very informal, the result of which was that not all legal steps were taken to give effect to what had been agreed. The 11 October 2012 Agreement for example records that JVB7 will “undertake the responsibilities and liabilities of the above properties to include interest on and secured loans from Finance and Credit Corporation”.
142. It might therefore have been expected, had the parties been unconnected, that steps would have been taken for JVB7 to take over the legal responsibilities and liabilities under the Fincorp loan by way of a novation and for JVB5 to be discharged. Had this happened, JVB5 would of course no longer have been liable for interest and JVB7 would have become liable instead. Any future payments of interest by JVB7 would not therefore have formed any part of the consideration. In my view, the position cannot be any different just because these formal steps were not taken.
143. As between JVB5 and JVB7, the interest after 12 October 2012 was a direct liability of JVB7 to Fincorp. It should also be noted that Fincorp agreed to the Transfer and therefore presumably expected future payments to be made by JVB7 rather than JVB5 given that JVB5 no longer had any assets or income.
144. This conclusion makes sense from a commercial perspective given that it was now JVB7 that was in control of any sale or refinancing of the properties and therefore the timing of the repayment of the Fincorp loan and also bearing in mind that any rent which arose in relation to the properties after 12 October 2012 belonged to JVB7 and not to JVB5.
145. The interest arising on the Fincorp loan after 12 October 2012 is not therefore part of the consideration for the Transfer. It is a cost incurred by JVB7 in electing to leave the loan outstanding. The value of the consideration relating to the Fincorp interest (together with the valuation fees) is therefore £33,993.99.

Approved Judgment**Mr Aulakh**

146. Mr Burton's case is that sums had been promised to Mr Aulakh (and to Mr Singh) for introducing Mr Almana and that part of the agreement when the Croydon Properties were transferred to JVB7 was that JVB7 would assume liability for this obligation.
147. Mr Burton was unable to say exactly what the agreement was with Mr Aulakh. His evidence was that this was an agreement between Mr V Sharma and Mr Aulakh. Mr Burton's understanding was that it was hoped that Mr Almana would provide further funding for various different property investments and that Mr Aulakh would receive a commission of somewhere between £100,000-£300,000 depending on how much Mr Almana invested.
148. This evidence is supported by an email (to which Mr Burton was not referred during cross examination and which was also not referred to in the parties' submissions to the Court) from Mr Aulakh to Mr Burton dated 12 September 2012 in which Mr Aulakh says that Mr V Sharma has agreed that Mr Aulakh will get £150,000 for making the Croydon deal happen and that he will get double that if he can "get the amount up to £1,000,000". There has been no suggestion from JVB5 that this email is not authentic.
149. Mr Burton goes on to say in his witness statement that any liability to Mr Aulakh was satisfied by transferring the studio flat at Whitehorse Lane to Mr Aulakh's son. He also says that the freehold of the various properties was transferred to Mr Aulakh's son. The total amount said to be due to Mr Aulakh is £125,000.
150. There is again some support in the documentary evidence for what Mr Burton says as there are office copy entries showing that the freehold of Beulah Grove was transferred to Mr Ajay Aulakh on 23 May 2014 and that the freehold of Princess Road was transferred to Mr Ajay Aulakh on 8 August 2014. The office copy entries relating to Whitehorse Lane are inconclusive as they show that Flat 2, Whitehorse Lane and the freehold of Whitehorse Lane were sold to what appears to be third parties in 2016. However, there is an exchange of emails between Mr Aulakh and Mr Burton on 3/4 June 2012 which confirms the intention to transfer the freehold and Flat 2 Whitehorse Lane to Mr Aulakh's son.

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151. The timing of these transfers, being shortly after the December 2013 sale of the second tranche of the Croydon Properties, is in my view consistent with the transfers relating to the payment Mr Burton says was due to Mr Aulakh in relation to the Croydon Properties deal.
152. During cross examination, Mr Burton explained that Mr V Sharma owed Mr Aulakh £1m. His evidence was that the payment of the introduction fee to Mr Aulakh had also been treated by him as reducing the loan owed by Mr V Sharma by an equivalent amount. It is not clear how any payment to Mr Aulakh could both be a fee for introducing Mr Almana as well as a part repayment of the loan due from Mr V Sharma but, as Mr Brown suggested, there is no reason why Mr Aulakh should not agree to a reduction in the loan balance if he wanted to do so.
153. On balance, given that the emails from Mr Aulakh and the office copy entries support Mr Burton's evidence, I have concluded that Mr Aulakh was indeed owed money for introducing Mr Almana to the Croydon Properties deal. Mr Aulakh in his email suggests that the figure was £150,000 whereas Mr Burton's evidence is that it was £125,000. Given that Mr Burton has been consistent on this point, I accept his evidence.
154. It is clear from Mr Burton's evidence and from Mr Aulakh's email that the agreement with Mr Aulakh was an agreement between Mr V Sharma and Mr Aulakh. The liability is also not referred to in the 11 October 2012 agreement although that document does not purport to be an exhaustive list of all the liabilities relating to the Croydon Properties. However, given that the Croydon Properties project was taken over by JVB5, that the resolution signed by JVB5 on 21 June 2021 specifically refers to the funding from Mr Almana and that Mr Aulakh ultimately received payment from JVB7, it is in my view reasonable to infer from this that the obligation, which clearly relates to the funding provided by Mr Almana, became a liability of JVB5 and so does form part of the consideration for the Transfer.

**Fees paid to Madhu**

155. Between July 2012 and November 2012, a gentleman called Madhu was paid a total of £8,500 by Mr Burton's company, Property Partners Walthamstow Limited. Mr Burton's evidence is that Mr V Sharma had insisted that Madhu be employed to oversee the management of the Croydon Properties, attending to matters such as a collection of



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rent but also being involved in the marketing of those properties. Whilst Madhu worked for about 30 hours a week and was not involved in any of the other properties owned by Mr Burton or his companies, Mr Burton accepted that Madhu did, during that time, carry out other work for Mr V Sharma as instructed by him.

156. The final payment to Madhu of £1,000 was made after 12 October 2012 (the previous payment having been on 10 October 2012). This final payment cannot therefore form part of the consideration for the reasons I have already given.
157. As to the remaining £7,500, Mr Temmink also made the point that Mr Burton was entitled to a commission of 15% of the gross rents in return for managing the Croydon Properties and so it should be expected that any payment to Madhu should be funded by Mr Burton out of this commission.
158. Whilst there is some force in this, I accept, based on Mr Burton's evidence (which is confirmed by the correspondence at the time), that Madhu's responsibilities went beyond the day to day management of the properties as they included matters relating to the sale of the properties. On the other hand, it is clear that part of his time was spent dealing with matters for Mr V Sharma which did not relate to the Croydon Properties.
159. Based on the evidence it would in my view be appropriate to treat one-third of the amounts paid to Madhu prior to 12 October 2012 as liabilities of JVB5 and therefore as part of the consideration. This amounts to £2,500.

**Fastway – replacement furniture**

160. On 24 September 2012, Property Partners Walthamstow paid Fastway £1,970 for furniture. Mr Burton claims that £1,867 of this relates to the Croydon Properties. However, there is no evidence of this. The documentary evidence contains one invoice from Fastway for £375 for furniture to be delivered to Whitehorse Lane on 12 September 2012. I accept that this is part of the consideration for the transfer but given Mr Burton's acceptance that some of the furniture would have been for other properties, I do not consider that, in the absence of documentary evidence, any further amounts were liabilities of JVB5.

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161. The annual insurance premium for the Croydon Properties was £2,524.92. Mr Burton claims for two years although the Croydon Properties were not of course owned by JVB5/JVB7 for two years. There is no evidence as to whether there was any refund of any part of the premium when the properties were sold.
162. In any event, based on the principle that liabilities arising after 12 October 2012 are liabilities of JVB7 and not JVB5, I accept Mr Temmink's submission that only three months of the premium forms part of the consideration. The balance is an expense of JVB7 as the owner of the Croydon Properties. This amounts to £631.23.

**Other expenses**

163. All of the other expenses claimed arose after 12 October 2012 and are not therefore liabilities of JVB5 and do not form part of the consideration. The only exception to this is an estimated figure of £1,500 for repairs and maintenance for which there is no documentary evidence either as to what costs and expenses were incurred and whether they relate to the period before or after 12 October 2012. I accept that it is likely that there was some expenditure on repairs and maintenance. However, on the basis that JVB5 only held the properties for three months out of a total ownership period of 18 months I can only accept that this proportion of the total was a liability of JVB5 and is therefore part of the consideration. The amount is £250.
164. Based on the above, the total value of the consideration is approximately £1,290,754. Mr Temmink submits however that JVB7 must give credit for the rent collected on behalf of JVB5 during the period for which it owned the Croydon Properties. In principle, I accept this subject to the deduction of 15% being Mr Burton's agreed commission for managing the properties.
165. Mr Temmink has calculated the rent for these three months to be £31,864.56. However, it appears that he has inadvertently taken four months rent rather than three. I calculate the correct amount to be £23,898 which, after deducting 15% commission is £20,313. This is JVB5's money and it therefore reduces the amount of the consideration as the assumption must be that it has been used to meet some of the liabilities which would otherwise form part of the consideration such as the interest due to Fincorp.

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166. It must also be right to deduct the surplus funds from the original purchase and which were paid by the solicitors to Mr Burton's company. These funds also belonged to JVB5 and must again be assumed to have been used to meet some of the liabilities listed above. The amount in question is £12,210.15.
167. Taking this into account, I find that the total value of the consideration provided by JVB7 for the transfer of the Croydon Properties was £1,258,190.
168. With the benefit of hindsight, this means that the Croydon Properties were transferred from JVB5 to JVB7 at an undervalue of approximately £77,000 or around 5.75% of their value.
169. I therefore need to go on and consider whether this was nonetheless believed by Mr Burton to be a genuine arm's length transaction or whether it was an attempt to extract value from JVB5 by the pretence of an arm's length sale.

**Extraction of value or arm's length sale?**

170. The key question is which side of the line drawn by the Supreme Court in *Progress Property* this transaction falls. Mr Temmink accepts that it is for JVB5 to show, on the balance of probabilities, that Mr Burton knew the Transfer to be an improper attempt to extract value from JVB5 under the pretence of an arm's length sale.
171. Mr Burton's case is that he was not in breach of his duties as a director of JVB5 as it received proper or adequate consideration in respect of the Transfer. It is implicit in this that Mr Burton is saying that he believed that this was a genuine market value transaction.
172. Mr Brown submitted that an individual may know that a transaction is at an undervalue but not be in breach of that person's duties as a director. He suggested that this would depend on all of the other circumstances, relying on *Aveling Barford* as authority for this. However, I cannot accept this. Hoffmann J's parting comment at [633c] was that:
- “It was the fact that it was known and intended to be a sale at an undervalue which made it an unlawful distribution.”
173. In any event, in my view, JVB5 has not succeeded in establishing that Mr Burton knew that the Transfer was at an undervalue or intended to extract value from JVB5 whether

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for his own benefit or for that of Mr V Sharma under the disguise of an arm's length sale and so the point does not arise.

174. JVB5 was saddled with very expensive borrowing which was intended to be short term and which was unsustainable in the longer term (the interest charge significantly exceeding the rental income). It had been trying to sell the properties since June 2012 but had failed to do so.
175. It was therefore decided to transfer the Croydon Properties to JVB7 in order to refinance the existing borrowings at a lower rate of interest and (dishonestly) to raise additional borrowings by falsely representing the price at which JVB7 had purchased the Croydon Properties. Had it happened, this additional borrowing would not however be an extraction of value from JVB5. Instead, it would be an extraction of value from the lender, which it no doubt would not have provided had it known the true position.
176. Mr Temmink took Mr Burton to a number of documents in relation to his knowledge or belief as to the value of the Croydon Properties. A number of these related to correspondence with potential lenders. Mr Burton's response was that he did not actually believe the figures stated in the correspondence. Given his previous history in relation to mortgage fraud, this has a ring of truth about it.
177. Mr Temmink also referred Mr Burton to an asset list extracted from Mr Burton's computer which, based on transactions relating to two of the properties shown on the schedule, Mr Temmink suggested must have been created in either October or November 2012 although Mr Burton could not confirm this. The schedule shows the combined value of the Croydon Properties as £1,110,000 but only shows borrowings of £490,000 rather than the £763,000 borrowed from Fincorp. Mr Burton was unable to explain this.
178. It is possible, as Mr Temmink suggested, that the schedule anticipated the five disposals to Mr Raghu which, it appears, was agreed sometime in November 2012. If so, the value of £1,110,000 would relate to the remaining seven properties, demonstrating, says Mr Temmink, that Mr Burton believed them to be worth significantly more than the original purchase price. However, in my view, this is speculation. Even Mr Temmink was unable to explain the remaining figures for the borrowings shown on the schedule

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given that, after the sale of these five flats, the Fincorp borrowing was significantly less than £490,000.

179. In any event, if the schedule was prepared in November 2012 after the deal with Mr Raghu had been agreed, it does not shed much light on what Mr Burton may or may not have believed prior to 12 October 2012 in relation to the value of the Croydon Properties.
180. Some reliance was also placed by Mr Temmink on an email sent by Mr Burton to Mr V Sharma in July 2012 suggesting that he had secured a “very profitable portfolio”. Mr Burton’s explanation for this was that Mr V Sharma had asked him to send the email so that he could show it to Mr Almaná. This is consistent with the evidence given by Mr Burton at the original trial and I accept it.
181. Mr Burton freely admitted that he had been told by Mr V Sharma that the properties were worth in the region of £1.4m-£1.5m. However, he dismissed this as optimism on the part of Mr V Sharma noting that approximately 38 people had visited the properties in the early stages of marketing but that none of the properties had been purchased.
182. Mr Temmink draws attention to the fact that Mr Burton had given a personal guarantee of the Fincorp borrowings, suggesting that he would only do so if he was confident that the properties were worth more than had been paid for them. It is not at all clear why Mr Burton agreed to do this given that, on his case, his only economic benefit from the arrangements related to his commission in respect of the rent and on any future sale of the properties.
183. I accept that giving a personal guarantee denotes a degree of confidence that the borrowings will be repaid. However, I note that the Fincorp borrowings were only 70% of the original purchase price of the Croydon Properties and so there would have to be a significant fall in value before Mr Burton’s guarantee would be called upon. It cannot in my view be inferred from this that Mr Burton believed that the Croydon Properties were worth significantly in excess of their purchase price.
184. In cross examination, Mr Burton asserted that he had addressed his mind to the value of the Croydon Properties in the context of the transfer to JVB7 and had considered that no valuation was necessary as he believed that they had not changed significantly in

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value since the purchase at auction. He mentioned his recollection that the Nationwide House Price Index had actually fallen during the relevant quarter (which I take to mean June – September 2012). I do not however accept this last part of Mr Burton’s evidence in the light of Mr Blackburn’s evidence at the original trial that the Nationwide House Price Index had in fact increased over the period.

185. The evidence shows that Mr Burton hoped that the properties would be sold at a profit. It is in my view also likely that he believed that they were worth more than the amount paid at auction as he accepted that the price achieved in a private sale could be expected to be higher than that at auction. But given that the Transfer was only just over four months after the purchase it is perhaps not unreasonable for Mr Burton to consider that the value cannot have changed all that much and that a formal valuation was not necessary.
186. Bearing in mind that, despite Mr V Sharma’s hopes and expectations, it had not proved possible to sell the properties and that a concern that a sale may not take place for some time can be inferred from the desire to refinance the properties (notwithstanding that the proposed refinancing also had other purposes), the evidence does not, in my judgment, show that Mr Burton had formed any settled view that the value of the properties was significantly in excess of what had been paid for them nor that he had any intention of transferring value from JVB5 to JVB7.
187. I also consider the evidence shows that, in general terms, Mr Burton did give some thought to the value of the Croydon Properties and to the consideration for the Transfer. This is to some extent borne out by the documentary evidence including the 2 October 2012 board resolutions which set out the headline price and the “allowance”.
188. The net purchase price could of course have been any figure up to £2,230,000. However, the “allowance” was deliberately set at a figure which gave a net purchase price equal to the amount paid at auction. This, of itself, shows that the value was at least considered even though, based on what I have said above, Mr Burton may have thought that the Croydon Properties were worth more than this on a private sale.
189. However, the fact that it was agreed that JVB7 would, in satisfaction of the purchase price, take over JVB5’s liabilities also shows an appreciation that a payment of

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£1,096,000 would not have been sufficient from the point of view of JVB5 and that a higher value was appropriate.

190. In my judgment, Mr Burton genuinely believed that an arrangement whereby JVB7 would meet all of JVB5's obligations, which he knew included, at least, the amounts outstanding to Fincorp, Mr Almana and Mr Aulakh and therefore totalled in excess of £1,250,00, was a reasonable deal for JVB5.
191. In my view, this is supported by the fact that there can, on any basis, have been no incentive to transfer value from JVB5 to JVB7 given that the shareholders and directors of both companies were the same and the obligations of JVB5 in relation to the Croydon Properties were being assumed by JVB7 so that no creditors would lose out as a result of the transfer. Had JVB7 agreed to pay what I have now found to be the full market value of the Croydon Properties, this would simply have given rise to distributable profits within JVB5 which Mr Burton/Mr V Sharma could have extracted in the normal way.
192. I appreciate that JVB5 was then transferred to Mr S Sharma along with the property at Wickham Lane which JVB5 continued to own. However, it is not suggested that this played any part in the decision to transfer the Croydon Properties to JVB7 nor that this provided a reason for wanting to transfer value out of JVB5. Indeed, it would be surprising if that were the case given that the Croydon Properties and Wickham Lane were all purchased by JVB5 at around the same time.
193. Mr Temmink also relies on the fact that, in his submission, the Transfer conferred no benefit on JVB5 but instead was designed to benefit Mr V Sharma and/or Mr Burton by allowing further funds to be raised from Handelsbanken which could then be used for other purposes. Whilst this clearly was one of the objectives, as I have found, it was also intended that, if there were to be a refinancing, this would inevitably result in the repayment of the Fincorp loan and no doubt some or all of the other liabilities which formed part of the consideration for the Transfer.
194. This would, in my view, have been a significant benefit to JVB5 given that, as I have already mentioned, the Fincorp loan was unsustainable in the longer term. It is true that, as a result of the Transfer, JVB5 was deprived of the opportunity of making any profit on the ultimate sale of the Croydon Properties. However, it is a perfectly

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reasonable decision for a company to sell assets in order to remove liabilities rather than to retain those assets in the hope of making further profits in the future.

195. It is of course also true that JVB5 continued to have a legal liability to Fincorp even after the Transfer. However, this needs to be viewed against the intention and expectation of the parties that a loan would be procured from Handelsbanken in short order which would enable the Fincorp loan to be repaid. As I have said, had this happened, it would have been a significant benefit to JVB5.
196. In my view, the situation here is similar in some ways to that faced by the Court in *Clydebank*. In hindsight, there is an arithmetical difference between the value of the Croydon Properties and the consideration given by JVB7. However, the transaction was genuinely intended to be a sale at market value and was not a dressed up return of capital. A proper margin of appreciation should therefore be allowed in assessing the adequacy of the consideration. The difference is not so large that it cannot be explained as anything other than a disguised distribution.
197. In contrast, the situation is very different from that in *Aveling Barford* where the director clearly knew and intended that the sale should take place at a significant undervalue at a time when the company was in severe financial difficulties and had exhausted all of its credit facilities. In that case there was of course clear motivation for seeking to extract value from Aveling Barford and transfer it to the defendant company. There is no evidence of any such motivation in this case.
198. Had there been any doubt about Mr Burton's motives, given my findings as to the reasons for and the terms of the Transfer, it would not in my view, in the light of what I have said above, be objectively reasonable to characterise the Transfer as an unlawful distribution rather than a genuine sale.
199. My conclusion therefore is that, although the transaction took place at an undervalue, there was no unlawful return of capital. I do not therefore need to consider whether there was any breach of duty by Mr Burton.
200. I also do not need to consider the quantification of any loss suffered by JVB5 although, if I had to do so, I see no reason to depart from the figures I have found above. The loss would therefore be the value of the Croydon Properties less the net consideration



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given after taking account of the rent due to JVB5 for the period of its ownership and the surplus funds from the original purchase.

201. Mr Brown suggested that any losses should be reduced by the costs and expenses which JVB5 would have had to incur had it sold the Croydon Properties to a third party. However, I do not accept this. The sale was not to a third party but to JVB7 and so there is no reason to deduct any costs and expenses other than those which JVB5 in fact incurred in relation to that transaction. It is not suggested by Mr Burton that there were any such expenses.

**Conclusion**

202. As a result of my finding that there has been no unlawful return of capital by JVB5, its claim against Mr Burton must be dismissed.