Neutral Citation Number: [2013] EWHC 680 (Ch)

Case No: 3213 OF 2010

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 March 2013

Before :

THE HONOURABLE MR JUSTICE HILDYARD

IN THE MATTER OF UKLI LIMITED
IN THE MATTER OF THE COMPANY DIRECTORS' DISQUALIFICATION ACT 1986

- -

Between :

THE SECRETARY OF STATE FOR BUSINESS INNOVATION AND SKILLS **Claimant**

- and -

(1) MR BALINDER CHOHAN (aka BALLY CHOHAN)
(2) MS LUKHBIR BAINS (aka LUCKY BAINS)
(3) MR SUDHIR SINGH KUNDI
(4) MS SAMEERA SHAIKH
(5) MR NIGEL WALTER
(6) MR ANAND CHANDRAKANT PANCHOLI **Defendants**

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Mark Cunningham QC and **Catherine Addy** (instructed by **Howes Percival LLP**) for the **Claimant**
The Defendants did not appear and were not represented

Hearing dates: 2 & 3 October 2012

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Approved Judgment

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

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THE HON MR JUSTICE HILDYARD

Mr Justice Hildyard :

Nature of proceedings and factual background

1. The Secretary of State for Business, Innovation and Skills ("the Secretary of State") has brought these proceedings on the grounds that it has appeared to him expedient in the public interest that disqualification orders under section 6 of the Company Directors Disqualification Act 1986 ("CDDA") should be made against each of the Defendants with regard to their conduct as directors of a company called UKLI Limited ("UKLI").

2. The proceedings follow the insolvent collapse of UKLI, which went into administration on 22 April 2008 and liquidation on 21 November 2008. At the date of it going into administration UKLI had an estimated deficiency of in excess of £48 million. By the date of its liquidation (21 November 2008) the estimated deficiency was over £70 million.

3. The factual background is described by David Richards J in his judgment at an earlier stage of these proceedings, reported as *Secretary of State for Business, Innovation and Skills v Chohan and others* [2012] 1 BCLC 138. Borrowing liberally and with gratitude from that description I can summarise the relevant background as follows.

4. UKLI carried on a so-called land bank business. This involved the establishment and marketing to the public of schemes whereby small parcels of land forming part of a larger site, which UKLI either owned or over which it had options to purchase, would be sold to investors. It was envisaged that UKLI would or might itself retain or acquire a significant part of the sites in question: and it did so.

5. The suggested attraction of investment by the purchase under these schemes of small parcels of land on these sites was that the sites might receive planning permission, or be rezoned in area plans, such as to make it more likely that planning permission would be granted: and in either case leading to a significant increase in value.

6. As the eventual deficiency might connote, UKLI's business was substantial. It had a sales force of some 60 to 80 people and approximately 5,000 plots were sold on some 17 sites.

7. After concerns developed in April 2006 as to whether the schemes constituted collective investment schemes in contravention of the financial services legislation, the Financial Services Authority ("the FSA") commenced an investigation into UKLI and its business. It concluded that the way the schemes were being operated and marketed was not lawful.

8. These proceedings were issued on 19 April 2010. They were listed for a ten-day trial due to start at the commencement of October 2012. However, as the trial date approached, all but one of the Defendants agreed to give Disqualification Undertakings under section 7(2A) of the CDDA which were accepted by the Secretary of State and made unnecessary proceeding further against the Defendants concerned.

Narrowing of Trial: the Undertakings by Second to Sixth Defendants

9. On the first day of the trial (on 2 October 2012), at the Secretary of State's invitation, I made orders in respect of those Defendants (the Second to Sixth Defendants named above) accordingly. In those circumstances, none of those Defendants appeared at the trial.

10. The trial thus proceeded substantively only against the First Defendant, Baljinder Chohan ("Mr Chohan"); and it did so in his absence.

Service of the Claim Form on Mr Chohan and his acknowledgment of service

11. Initially, Mr Chohan instructed solicitors, whom he instructed to accept service; and it appeared that he intended to engage fully in the proceedings to contest any order for his disqualification. An Acknowledgment of Service of the Secretary of State's Claim Form was provided on Mr Chohan's behalf by his then solicitors in England, Devonshires of 30 Finsbury Circus, London ("Devonshires"), on 7 June 2010. That stated his intention to contest the claim on the grounds that (a) his conduct as a director or shadow director was not as alleged by the Secretary of State and (b) he disputed that his conduct made him unfit to be concerned in the management of a company.

12. Thereafter, there was served on his behalf, under cover of an email from Devonshires dated 3 January 2010, what purported to be a second affidavit, dated 2 January 2011 ("Mr Chohan's Affidavit"). This (which, though described as his second, was in fact the only affidavit served by him in substantive opposition to the proceedings) stated his address as being in Dubai. In Mr Chohan's Affidavit he sought to elaborate the basis of his opposition, which I later describe.

13. However, on 14 June 2011, Howes Percival LLP, the Secretary of State's solicitors ("Howes Percival"), received a letter dated 13 June 2011 enclosing, by way of service, an Order of Registrar Barber dated 7 November 2010, recording that Devonshires had ceased to act for Mr Chohan and ordering them to be removed from the Court record as so acting.

14. Since then, Mr Chohan has not engaged at all in the litigation process; and he has proved elusive. His last stated address was (as indicated above) in Dubai. There was an uncorroborated report that he had moved to the Republic of South Africa. Be that as it may, efforts to trace and contact him appear to have been without success.

15. These efforts to keep him informed (and where necessary to effect personal service) have been sustained nevertheless. I do not think it is necessary to itemise them. I am satisfied that all reasonable efforts have been made in that regard.

Mr Chohan's non-attendance

16. In the event, and perhaps unsurprisingly in the circumstances adumbrated above, Mr Chohan did not attend the trial. Nothing indeed has been heard from him. As indicated above, since filing his Affidavit, he has not engaged in the proceedings at all.

17. It was suggested to me by Counsel for the Secretary of State, Mr Mark Cunningham QC and Ms Catherine Addy, that Mr Chohan's appetite for engaging in these proceedings may have been *"suppressed"* by a previous order made against him in an earlier set of disqualification proceedings. These resulted in him being disqualified for a period of four years commencing on 4 January 2008.

18. That suggestion may well be correct; but I need not determine that: the fact is that Mr Chohan was well aware of these proceedings, and it was his choice, for whatever reason, not to engage in them. His absence being, in my judgment, elective or voluntary, there was no unfairness in proceeding with the hearing: his election left the court with no realistic choice.

The requirements of Section 6 of the CDDA

19. In Mr Chohan's absence, it was left to the Secretary of State to satisfy me, on the basis of the evidence available, that the requirements of section 6 of the CDDA have been fulfilled, and that therefore it is the Court's duty to disqualify Mr Chohan from taking part in the management of a business carried on with the privilege of limited liability.

20. As Timothy Lloyd J (as he then was) put it in *Re Atlantic Computers plc* 15 June 1998, in a passage quoted by Norris J in *Secretary of State v Sullman* [2008] EWHC 3179 (Ch), [2009] 1 BCLC 397 at 399:

> "The point of a disqualification order is, by depriving the respondent of the liberty to take part in the management of a business carried on with the privilege of limited liability, to protect the public both from misconduct of a business by that director and also by deterrent effect in relation to other company directors... A consistent theme in the cases under the Act is that, while the court must consider the extent of a respondent's responsibility… a director cannot avoid his responsibility by leaving the management to another or others…"

21. To satisfy the requirements of section 6 the Secretary of State must persuade the Court that the Defendant was

    (1) a director;

    (2) of a company which became insolvent; and that

    (3) his conduct as a director of that company (either taken alone or taken together with his conduct as a director of any other company or companies) makes him unfit to be concerned in the management of a company.

22. There is no dispute as to UKLI's insolvency. The two other requirements are in issue.

Was Mr Chohan a director in the relevant period?

23. As to (1) in paragraph 21 above, the Secretary of State accepts that Mr Chohan was not a *de jure* director of UKLI. His case is that Mr Chohan was a *de facto* or shadow director in the relevant period, being from April 2006 to March 2007.

24. The paramount purpose of disqualification being the protection of the public from unscrupulous corporate management, it would frustrate a primary objective of the CDDA if a person who actually was responsible, or jointly responsible with others, for such management could escape disqualification by the simple expedient of never formally being appointed as a director. There is no doubt that section 6 extends to *de facto* directors: see *Re Lo-Line Electric Motors Ltd* [1988] Ch 477; and it is expressly provided by section 6 (3C) of the CDDA that "director" includes a shadow director.

25. However, in his Affidavit, Mr Chohan disputed that he was or acted as a director in the relevant period. He stated:

> *"From about March 2006 until March 2007, when I was reappointed as a director, I took no role in the management of UKLI…"*

26. He went on that during the relevant period

> *"all management/operational day to day decision making was made by Nigel Walter, Robin Barton and Sara O'Neill."*

27. He explained that he resigned precisely because he was advised that he should do so, not least having regard to the fact that he was by then facing proceedings for his disqualification in relation to his role as a director and in the management of another company, namely UK Property Fund Managers Limited ("UKPFM"). These are the earlier disqualification proceedings that I alluded to in paragraph 17 above.

28. Mr Chohan dismissed as self-serving the evidence of his role given by, in particular, his co-Defendants; and he contended that the fact that he was not involved in the management of UKLI in the relevant period (March 2006 to March 20007) was supported by documentary evidence in the form of a formal letter from Moore Stephens, Chartered Accountants, to UKLI dated 11 January 2007 explaining their resignation as auditors. This (amongst other things decidedly less helpful to Mr Chohan) stated as follows:

> "The duly appointed directors of the company appear to have no involvement in the running of the business. Instead, the business is run by Robin Barton, Nigel Walter and Paul Charney, none of whom has been formally appointed as a director. Neither the sole shareholder [Mr Chohan] nor the de jure or de facto directors have been prepared to address corporate governance issues with us."

29. In the circumstances, I do not myself read that extract as connoting that Moore Stephens considered Mr Chohan not to be involved in the management and governance of UKLI. I read it as connoting that Moore Stephens considered that (a)

UKLI was not managed by its *de jure* directors at all; (b) day to day management was in the hands of the persons identified; but (c) Mr Chohan was also involved in such a way as would have been of interest to Moore Stephens to discuss. To my mind, the letter plainly indicates concern both as to the manner of UKIL's corporate governance, and Mr Chohan's involvement in it. Whilst obviously not conclusive as to the fact or nature of that involvement, the letter does not support Mr Chohan in the way he suggests.

30. Apart from that resignation letter from Moore Stephens, Mr Chohan's Affidavit largely consisted of repeated assertions that he took no management role, complaints about *"missing evidence"*, insistence that he had seen nothing to suggest that UKLI was operating otherwise than lawfully and in accordance with legal advice, and lengthy remonstrations that the allegations made against him as regards loans to associated companies and dividends to himself (see further below) were misplaced since he had always acted in the best interests of the company (UKLI). This evidence suffered from its lack of specificity and documentary support, being largely based on assertions, though I do accept that it is difficult to prove a negative (that is, that he did not act as a director). The real problem about Mr Chohan's evidence in his Affidavit is that it is both untested and contradicted by evidence from his co-Defendants. Its weight is substantially and inevitably much reduced accordingly.

31. The evidence on behalf of the Secretary of State is as follows:

(1) Mr Elliott Simon Burns ("Mr Burns"), a Chief Examiner in the Investigations Directorate of the Insolvency Service (an Executive Agency of the Department for Business, Innovation and Skills) states in his affidavit of 13 April 2010 ("Mr Burns' Affidavit") that Mr Chohan was *de jure* a director of UKLI between 5 February 2003 and 26 April 2006 and from 5 March 2007 to 22 April 2008 (when UKLI went into administration) but not during the period from 27 April 2006 to 4 March 2007.

(2) As to that period, Mr Burns states in his Affidavit that

a) He had been informed by the Secretary of State's solicitors in the matter, Howes Percival, that UKLI's primary bookkeeper, Ms Sara O'Neil, had confirmed to them that loans and/or payments to the value of approximately £9,000,000 were advanced by UKLI to a number of third parties which were *"initiated and approved by Mr Chohan"*;

b) In a letter dated 6 March 2007 to the Financial Services Authority ("the FSA") Mr Robert Smyth ("Mr Smyth"), the compliance officer for UKLI, described Mr Chohan as *"the controller of UKLI and a number of connected companies"*;

c) In correspondence with Howes Percival, Mr Robin Barton ("Mr Barton"), who was himself described, in the resignation letter of UKLI's auditors (Moore Stephens) in January 2007 [3/678] as a *de facto* director of UKLI, stated that Mr Chohan *"was involved in the major decisions of the Company such as which sites to acquire"* [3/741];

d) In his correspondence with Howes Percival, Mr David Gelb ("Mr Gelb", who managed UKLI's sales team but was never formally appointed a director) agreed with Mr Barton and stated that *"most of the major decisions were taken by Bally Chohan"* whom he also stated to have been part of the *"management team"*, along with Mr Paul Eric Charney ("Mr Charney"), Mr Barton and the fifth Defendant, Mr Nigel Walter ("Mr Walter"), who was never formally appointed as a director of UKLI either, but who was employed by Mr Chohan to be *"managing director"* of UKLI during the relevant period when Mr Chohan was not *de jure* a director.

(3) Ms Joanne Marie Covell ("Ms Covell"), a Chief Examiner in Company Investigations (North) of the Insolvency Service, in an affidavit sworn on behalf of the Secretary of State on 28 February 2012, sets out, at some length, a number of facts and matters which lead her to the conclusions that

e) "Though it is difficult at present to state the precise dynamics of the de facto directorships of UKLI (and this is something for determination at trial once the various witnesses have been cross-examined) it is nevertheless clear that for approximately a year following Mr Walter's recruitment in February/March 2006, he and Mr Chohan were both at the apex of UKLI. The probable position was that Mr Chohan had, and exercised, ultimate authority but, because he was abroad, day to day authority and control was vested in Mr Walter."

f) "In these circumstances Mr Chohan's resignation as a de jure director of UKLI and his assertion that he 'took no role in the management of UKLI' are both inconsistent with the available evidence and create the (false) impression that he was remote from UKLI." Mr Walter discussed with Macfarlanes "…for any new entity to obtain authorisation, it should not be managed…and not be tainted by an association with Mr Chohan…", therefore the impression that Mr Chohan was remote from UKLI and TBP was necessary for TBP's FSA authorisation.

(4) In reaching those conclusions, Ms Covell relies especially on the following:

g) the evidence that Mr Chohan was indeed involved as above stated which was provided by the Second Defendant, Ms Lucky Baines, the Third Defendant Mr Sudhir Singh Kundi ("Mr Kundi"), the Fourth Defendant, Ms Sameera Haikh ("Ms Shaikh") and by Mr Walter and Ms O'Neill (whom Mr Walter describes as the *"key financial manager"*);

h) contemporaneous email exchanges between Mr Chohan and Ms O'Neil, including an email dated 17 July 2006 in which Mr Chohan (giving an address in Riyadh, Saudi Arabia, and describing himself as Executive Director UK Capital Investments Group) stated (using capital letters):

> *"CAN I PLEASE MAKE THIS CLEAR, NO PAYMENTS ARE TO BE SIGNED OFF WITHOUT MY SAY SO>>>>THAT'S ANYTHING…ZERO, ZILTCH."*

i) Internal emails in the relevant period, suggesting continuing involvement by Mr Chohan (although, to my mind, not demonstrating or being consistent only with the exercise of directorial powers or influence);

j) The likelihood that at minuted board meetings held on 19 April 2006 and 31 October 2006 which were attended only by the Sixth Defendant Mr Arnand Chandrakant Pancholi ("Mr Pancholi") interim dividend payments of £1,000,000 and £1,003,601 (each payable to Mr Chohan on the day of the relevant meeting) must have been directed by Mr Chohan, especially the latter, given the email referred to above.

32. To this might be added, I think, the fact that in the letter from Moore Stephens to which I have previously referred, and upon which Mr Chohan chose to place reliance, Moore Stephens' principal concern was that (a) UKLI was not under the control of its *de jure* directors, and (b) Mr Chohan was not prepared to do anything to address the concern thus arising. To my mind, this further supports the suggestion that Mr Chohan had little regard for the proprieties of corporate management, and was indifferent to concerns and dismissive of any requests of him for an explanation in that regard.

33. Also, it is clear from the evidence, and confirmed by the very comprehensive judgment of Chief Registrar Baister in the proceedings against him relating to UKPFM, that Mr Chohan is a forceful and dynamic character, accustomed to lead and direct, and indeed to deference from those with whom he is in business. UKLI was his baby: it is inherently unlikely that he really abandoned it.

34. As Counsel for the Secretary of State accepted, there is no piece of definitive evidence. Further, much of the material is hearsay, and in some cases double-hearsay; most of it is indirect. Cross-examination might well have illuminated the position. It is not satisfactory having to deal with this in the absence of any witnesses, especially in the absence of Mr Chohan himself, where the conclusion I am asked to reach is a contradiction of clear and direct evidence he has given in an Affidavit.

35. However, the course taken voluntarily by Mr Chohan leaves me with no alternative but to make the best overall assessment I can on the evidence available as to Mr Chohan's true role, without the undoubted benefit of cross-examination (which the Secretary of State himself seems to have hoped to rely upon to clarify a murky control structure).

Legal ingredients of de facto *or shadow directorship*

36. In undertaking that task it is necessary to identify what acts or characteristics typically identify and constitute a person as either (a) a *de facto* or (b) a shadow director, and what, if any, are the salient differences between those two categories.

37. Influence over a company's affairs does not of itself suffice. As Millett J (as he then was) explained in *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180, 183:

> "To establish that a person was a *de facto* director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level."

38. Further, as Mr Timothy Lloyd QC, now Timothy Lloyd LJ, pointed out in *Re Richborough Furniture Ltd* [1996] 1 BCLC 507, if there are others responsible for management who were true directors, the person whose actual role is said to constitute *de facto* directorship must be shown to have been acting on an equal footing with the others in directing the affairs of the company. He also suggested (as must, with respect, be correct) that given the penal consequences of the CDDA, if the act complained of could be referable to an assumed directorship or some other capacity, the "person in question must be entitled to the benefit of the doubt."

39. These authorities, and later cases fleshing out their guidance (and see especially *Re Kaytech International plc* [1999] 2 BCLC 351 in the Court of Appeal), provide useful tests: but in determining whether or not a person has acted as a *de facto* director the ultimate question is one of fact, as Jacob J (as he then was) emphasised in *Secretary of State v Tjolle* [1998] 1 BCLC 333:

> "For myself I think it may be difficult to postulate any one decisive test. I think what is involved is very much a question of degree. The court takes into account all the relevant factors… Taking all these factors into account, one asks, 'Was this individual part of the corporate governing structure', answering it as a kind of jury question….There would be no justification for the law making a person liable to misfeasance or disqualification proceedings unless they were truly in a position to exercise the powers and discharge the functions of a director. Otherwise they would be made liable for event over which they had no real control, either in fact or law."

40. A matter of debate has been whether it is a necessary ingredient of *de facto* directorship that the person in question should have been held out by the company as a director, as Millett J considered in *Re Hydrodam* (that being the essential difference, on that analysis, between a *de facto* and a shadow director). Authorities subsequent to *Re Hydrodam* have tended to downplay this ingredient to being a useful indicator, but not an essential requirement: see, for example, the decision of Etherton J (as he then was) in *Secretary of State for Trade and Industry v Hollier* [2006] EWHC 1804 (Ch), [2007] BCC 11 at paragraphs 61 to 81.

41. There is a valuable review and summary of the effect of these authorities in the (unreported) decision of Chief Registrar Baister in the *UKPFM Ltd* proceedings in which Mr Chohan was disqualified [Case No. 3232 of 2006]. Although I have introduced some small variations I agree with the Chief Registrar that the following

characteristics are all relevant, though not every one is required to be established, and there is inevitably some overlap between them:

(1) A *de facto* director must presume to act as if he were a director.

(2) He must be or have been in point of fact part of the corporate governing structure and participated in directing the affairs of the company in relation to the acts or conduct complained of.

(3) He must be either the sole person directing the affairs of the company or a substantial or predominant influence and force in so doing as regards the matters of which complaint is made. Influence is not otherwise likely to be sufficient.

(4) I am not myself persuaded that an "equality of footing" test is required: I prefer the looser fact-based approach advocated by Jacob J, and consider the indicia to be whether the person concerned has undertaken acts or functions such as to suggest that his remit to act in relation to the management of the company is the same as if he were a *de jure* director

(5) The functions he performs and the acts of which complaint is made must be such as could only be undertaken by a director, not ones which could properly be performed by a manager or other employee below board level.

(6) It is relevant whether the person was held out as a director or claimed or purported to act as such: but that, and/or use of the title, is not a necessary requirement, and even that may not always be sufficient.

(7) His role may relate to part of the affairs of the company only, so long as that part is the part of which complaint is made.

(8) Lack of accountability to others may be an indicator; so also may the fact of involvement in major decisions.

(9) The power to intervene to prevent some act on behalf of the company may suffice.

(10) The person concerned must be someone who was more than a mere agent, employee or advisor.

42. Turning now to the concept of a shadow director, which is entirely a creature of statute, the definition in CDDA section 22(5) provides that:

> "'Shadow director', in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act (but so that a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity)."

43. In *Hydrodam*, Millett J considered the two categories, *de facto* and shadow directors, to be distinct and indeed mutually exclusive: the one acting openly with the apparent approval of the company, the other lurking in the shadows. That view has been diluted in subsequent authorities.

44. In *Re Euro Express Ltd, Secretary of State for Trade and Industry v Deverell* [2001] Ch 340, Morritt LJ made clear that he did not consider that "lurking in the shadows" was an essential ingredient to the recognition of a shadow director, and his formulation of the characteristics of a shadow director does not preclude a person acting as both a shadow and *de facto* director (though he declined to consider whether the categories should theoretically be regarded as mutually exclusive, since the case was argued only on the question of shadow directorship). In his judgment, with which the other members of the court (Potter LJ and Morrison J) agreed, Morritt LJ expressed his conclusions on the legal test of a shadow directorship in a number of propositions as follows (see paragraph 35):

> "(1) The definition of a shadow director is to be construed in the normal way to give effect to the parliamentary intention ascertainable from the mischief to be dealt with and the words used. In particular, as the purpose of the Act is the protection of the public and as the definition is used in other legislative contexts, it should not be strictly construed because it also has quasi-penal consequences in the context of the Company Directors Disqualification Act 1986. I agree with the statement to that effect of Sir Nicholas Browne-Wilkinson V-C in *In re Lo-Line Electric Motors Ltd* [1988] Ch 477, 489. (2) The purpose of the legislation is to identify those, other than professional advisers, with real influence in the corporate affairs of the company. But it is not necessary that such influence should be exercised over the whole field of its corporate activities. I agree with the statements to that effect of Finn J in *Australian Securities Commission v AS Nominees Ltd*, 133 ALR 1, 52-53 and Robert Walker LJ in *In re Kaytech International plc* [1999] BCC 390, 402. (3) Whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as a direction or instruction must be objectively ascertained by the court in the light of all the evidence. In that connection I do not accept that it is necessary to prove the understanding or expectation of either giver or receiver. In many, if not most, cases it will suffice to prove the communication and its consequence. Evidence of such understanding or expectation may be relevant but it cannot be conclusive. Certainly the label attached by either or both parties then or thereafter cannot be more than a factor in considering whether the communication came within the statutory description of direction or instruction. (4) Non-professional advice may come within that statutory description. The proviso excepting advice given in a professional capacity appears to assume that advice generally is or may be included. Moreover the concepts of 'direction' and 'instruction' do not exclude the concept of 'advice'; for all three share the common feature of 'guidance'. (5) It will, no doubt, be sufficient to show that in the face of 'directions or instructions' from the alleged shadow director the properly appointed directors or some of them cast themselves in a subservient role or

> surrendered their respective discretions. But I do not consider that it is necessary to do so in all cases. Such a requirement would be to put a gloss on the statutory requirement that the board are 'accustomed to act' 'in accordance with' such directions or instructions. It appears to me that Judge Cooke, in looking for the additional ingredient of a subservient role or the surrender of discretion by the board, imposed a qualification beyond that justified by the statutory language."

45. Since then, the Supreme Court has confirmed in *Re Paycheck Services 3 Ltd, Revenue and Customs Commissioners v Holland* [2010] UKSC 51 at [91] [110] that the differences between *de facto* directors and shadow directors may have been overstated in *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180; and as Robert Walker LJ (as he then was) observed in *In re Kaytech International plc* [1999] 2 BCLC 351 at 423:

> "…the two concepts do have at least this much in common, that an individual who was not a *de jure* director is alleged to have exercised real influence (otherwise than as a professional adviser) in the corporate governance of a company. Sometimes that influence may be concealed or sometimes it may be open. Sometimes it may be something of a mixture, as the facts of the present case show."

46. It is now, I think, clear that (a) the same sort of evidential indicia are likely to be relevant to establishing both shadow and *de facto* directorship and (b) a person may act as both, the one in fact shading into the other.

47. Even so, it may still be necessary to distinguish between the two categories in determining the extent of their culpability. Thus, in *Ultraframe (UK) Ltd v Gary Fielding and Others* [2005] EWHC 1638 (Ch), Lewison J (as he then was) stated (at paragraph 1289) that

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

48. Lewison J went on to stress that the real question is as to the nature of the activities undertaken, and not a label attached to their perpetrator. In this case, of course, the question whether Mr Chohan assumed and was in breach of fiduciary duty is not directly in issue, although it may affect the question of the proper disqualification period. But, at least as regards his responsibility, if demonstrated, for dividends and loans made improperly, I consider Mr Chohan plainly was in a fiduciary position, whether he is regarded as acting as a *de facto* or as a shadow director.

49. As to the appropriate label for him, in my judgment this is a case, as I suspect are so many, where both are appropriate, since his involvement and influence were consistent, but the manner of its exercise was changeable. I have concluded that the material is sufficient to warrant the finding that Mr Chohan was, as Ms Covell concluded, (a) directly involved in financial decisions, including loans and dividends, and in those areas (at least) properly characterised as having acted as a *de facto* director (albeit that he was not held out as such); and (b) in other areas of UKLI's activities, the person capable of and, where he chose, in fact ultimately exercising, real and probably decisive influence in the management of UKLI in the relevant period, albeit from afar, and to some extent in and from the shadows.

50. In other words, this is a case where Mr Chohan's influence was sometimes express and direct, sometimes indirect or implicit; but it was, in my judgment, pervasive, and in terms of having the final say, probably substantially unaffected by his formal resignation, even though his day to day engagement was inevitably reduced.

51. I have placed particular reliance in this regard on the email quoted at paragraph 31(4)(h) above, the consistency of the evidence given by others involved in the management of UKLI, the inherent probabilities that Mr Chohan would have wished to retain control of the company he wholly owned in the relevant period as in the years before and after, and the advantages to him in appearing not to be a director.

52. As to the evidence of others involved in UKLI's management, that of Mr Walter (who acknowledges that whilst Mr Chohan was apparently not acting as a director, he (Mr Walter) accepted the title of "acting managing director", though never appointed *de jure*) and of Ms Sara O'Neill ("Ms O'Neill", UKLI's primary book-keeper, who sometimes referred to herself as "Head of Group Finance" and sometimes as "Group Finance Manager"), seems to me to be of particular import. Their evidence was:

(1) In the case of Mr Walters (and I quote from his second witness statement dated 16th November 2011):

> *"I believe Mr Chohan was the only person who was involved in and had knowledge of all those aspects of UKLI's business for which a managing director would be responsible. He had a management team in place reporting to him, ie Mr Charney, Mr Barton, Sara O'Neill, the sales directors, IT and HR departments in the UK, together with a number of global directors of his international companies."*
>
> …
>
> *"All the sales directors would have reported to me… I would then report regularly to Mr Chohan."*

(2) In the case of Ms O'Neill (and I quote from her witness statement dated 17th November 2011):

> *"Whilst the day-to-day running of the Finance Department was my responsibility, I reported to and took instructions from Mr Chohan throughout my time at UKLI. I did not report to or*

> *take instructions from Mr Walter. Anything out of the ordinary involving additional funding to other companies would be agreed with or instructed by Mr Chohan."*

53. I acknowledge, as regards the evidence of those involved in the day to day management of UKLI, who were also made parties in these proceedings, that they may be said to have had a personal interest in presenting their role as subsidiary to, and subject to the direction of, Mr Chohan: the less their responsibility, the better their defence. Once again, Mr Chohan might have exposed them in cross-examination. As it is, whilst expressing no view as to the extent of their own responsibility, I accept the evidence as demonstrating Mr Chohan's involvement as a *de facto* or shadow director, both in relation to the Second Scheme's promotion and implementation and in relation to the financial affairs of UKLI.

54. That conclusion is of itself not determinative of Mr Chohan's role in, and responsibilities and obligations in respect of, the particular matters on which the Secretary of State relies as justifying his disqualification. Put another way, my conclusion brings Mr Chohan within the embrace of section 6 CDDA as a director for the purposes of section 6(1)(a); but it does not answer whether and to what extent he was culpably involved in and responsible for the activities and payments of which the Secretary of State makes complaint.

55. I shall elaborate later on the issue of Mr Chohan's actual role and legal responsibilities in relation to the matters of which the Secretary of State makes complaint.

The case for the Secretary of State

56. I turn first to consider the basis of the Secretary of State's case that the business and activities carried on by UKLI whilst Mr Chohan was a director involved breaches of regulatory prohibitions, and that Mr Chohan procured payments out of UKLI from funds improperly raised from investors for his own purposes and benefit and without regard to the best interests of UKLI.

57. The Secretary of State's case has two limbs:

(1) The first is that UKLI was, in the relevant period, operating (to Mr Chohan's knowledge and at his ultimate direction) a land banking scheme which was, on true analysis, an unauthorised and prohibited collective investment scheme ("CIS"): this is referred to as "the Land Banking Allegation";

(2) The second is that Mr Chohan caused UKLI to make loans, and pay dividends, that were not in the interest of UKLI and its customers: this is referred to as "the Loans and Dividends Allegation."

I deal with each in turn.

The Land Banking Allegation: legal framework

58. The statutory framework for the Land Banking Allegation is to be found in the Financial Services and Markets Act 2000 ("FSMA").

59. Section 19 of FSMA creates the general prohibition against unauthorised conduct in the United Kingdom ("UK") of a regulated activity (as defined). The section provides as follows:

> "(1) No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is –
>
> (a) an authorised person; or
>
> (b) an exempt person."

60. UKLI was not at any time an authorised person or an exempt person.

61. Section 22 of FSMA defines "regulated activity" as an activity of a kind specified by an order made by HM Treasury. The relevant Order is the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, Article 51 of which provides that

> "establishing, operating or winding up a collective investment scheme"

is a specified activity.

62. As such the unauthorised establishment, operation or winding up of a CIS is a breach of the general prohibition. By virtue of section 23 of FSMA, such a contravention is also a criminal offence.

63. The meaning of a CIS is defined in section 235 of FSMA. That definition is as follows:

> "235 *Collective investment schemes*
>
> (1) In this Part 'collective investment scheme' means any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.
>
> (2) The arrangements must be such that the persons who are to participate ('participants') do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions.
>
> (3) The arrangements must also have either or both of the following characteristics–
>
> (a) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled;

> (b) the property is managed as a whole by or on behalf of the operator of the scheme.
>
> (4) If arrangements provide for such pooling as is mentioned in subsection (3)(a) in relation to separate parts of the property, the arrangements are not to be regarded as constituting a single collective investment scheme unless the participants are entitled to exchange rights in one part for rights in another.
>
> (5) The Treasury may by order provide that arrangements do not amount to a collective investment scheme–
>
> (a) in specified circumstances; or
>
> (b) if the arrangements fall within a specified category of arrangement."

64. The section, which is drafted in broad terms and seems plainly intended to have a very wide scope, is not without difficulty in its application. Some of these difficulties, and the uncertainties they have caused to practitioners, prompted the Financial Markets Law Committee ("the FMLC") to commission a report ("the FMLC paper") by Michael Brindle QC and Richard Stones of Lovells LLP (now Hogan Lovell LLP). The FMLC paper is an admirable dissection of the various difficulties.

65. The section was reviewed by the Court of Appeal in *Financial Services Authority v Fradley* [2006] 2 BCLC 616 (CA); and, more recently, it has been helpfully analysed by David Richards J in *Sky Land Consultants plc* [2010] EWHC 399 (Ch): see especially paragraphs 8 to 17 of his judgment, which plainly take account of a number of points made in the FMLC paper.

66. As identified by David Richards J, there are some preliminary points which may be made about the section; and I quote from paragraph 13 of his judgment:

> "There are some preliminary points which may be made about the section. First, it is drafted in broad terms. In *FSA v Fradley*, Arden LJ commented at para 32 that 'it is drafted at a high level of generality and it uses words, such as "arrangements" and "property of any description" which have a wide meaning'. I will refer again to the scope of 'arrangements'. Secondly, as Arden LJ again observed, contravention of the general prohibition in s.19 may result in the commission of an offence, so s.235 is not to be interpreted so as to include matters which are not fairly within it. Thirdly, and importantly, it is not an essential element of a collective investment scheme that the property which is the subject of the scheme is pooled. The obvious examples of collective investment schemes, such as unit trusts, do involve pooling but as s.235(3) makes clear pooling may be, but does not have to be, an element. As the FMLC paper states at para 3.14 the criteria in s.235(3)(b):

> *'and the contrast with the alternative of "pooling", makes it clear that arrangements can (in the absence of an exclusion) amount to a CIS even though each participant is entitled to a distinct part of the property if all such property is "managed as a whole""*

67. As to the specifics of the section, and adopting the analysis in the FMLC paper and the guide provided by David Richards J, it seems to me that the crucial requirements of the definition of CIS are

    (1) the negative requirement that the participants in the scheme "… do not have day to day control over the management of the property…" (see section 235(2), the test being the factual position, rather than to any right of control); and

    (2) the positive requirement that the "arrangements" for participation in the scheme have either or both of the following characteristics:

        a) the pooling of the contributions of the participants and the profits or income out of which payments are to be made to them;

        b) the property is managed as a whole by or on behalf of the operator of the scheme (see section 235(3).

68. The word "arrangements" ordinarily has a wider ambit than agreement or contract: the focus of the section being on the intended operation of the scheme in practice, the arrangements may qualify as such even if not stated or intended to be legally binding.

69. Thus:

    (1) As explained by David Richards J in *Sky Land Consultants*, to fall within the subsection the arrangements must (i) be with respect to property of any description, (ii) enable the participants to participate in or receive profits or income by becoming owners of the property or any part of it or otherwise, and (iii) have as their purpose or effect the participation in or receipt of profits or income "arising from the acquisition, holding, management or disposal of the property."

    (2) The arrangements may be such even if they are not legally binding or contractual in nature: it is enough that the parties share an intention or expectation with regard to the achievement of a common object: see *The FSA v Asset LI Inc (t/a Asset Land Investment Inc) & Ors* at paragraph 160.

70. Further, as to section 235(2):

    (1) The application of section 235(2) is to be assessed according to what the arrangements actually were and "the reality of how [they] are operated": their practical substance and intention rather than their theoretical form and presentation: see *per* Andrew Smith J in *The FSA v Asset LI Inc (t/a Asset Land Investment Inc) & Ors* at paragraph 169 and *Sky Land Consultants* at paragraph 76.

(2) It is clear on the authorities that some of the participants have day to day control and intend to exercise it: "unless the arrangements are such that all participants have such control, the condition in section 235(2) is met even as regards those who do": again see *per* Andrew Smith J in *The FSA v Asset LI Inc (t/a Asset Land Investment Inc) & Ors* at paragraph 170.

71. For the purposes of section 235(3):

(1) section 235(3)(a) stipulates that as a characteristic of CIS fee contributions of the participants, the profits or income out of which payments are to be made by them are pooled;

(2) a further or alternative characteristic of a CIS is that "the property is managed as a whole by or on behalf of the operator of the scheme": in this case the Secretary of State also relies on this limb of the subsection: in both *Sky Land Consultants* and the *Asset Land* case, the Secretary of State relied only on section 235(3)(b), relating to collective management of the property and not on section 235(3)(a);

(3) what constitutes "management" is helpfully addressed in both *Sky Land Consultants* and *Asset Land.* The following passage from the judgment of David Richards J in *Sky Land Consultants* at paragraphs 77 to 79 illustrates the ingredients of the scheme before him, another land banking scheme:

> "77. ….What constitutes management is dictated by the property. Some property, short-dated deposits for example, require active and constant management. The management of property of long-term nature may involve only intermittent activity.
>
> 78. As regards the land in question, management could be said to involve (i) long-term goals, such as planning permission, development and sale, and (ii) the short-term physical stewardship of the land. The latter was of no real concern to the investors. This was not intended to be an investment in agricultural land…
>
> 79. The purpose was to make a profit from an actual or prospective change from agricultural to residential or other use. The management of the property, so far as relevant to the investors, was taking steps with a view to planning permission and developing or selling the land. Such activities fall naturally within the ambit of management of the land…"

72. Unless the specific, but not exhaustive, definition of "operator" in section 237(2) (as amended in 2011) applies, the question of who is the operator will be one of fact: it will ordinarily be the person who in fact is managing the property as a whole.

Land Banking: factual context

The First Scheme

73. The Secretary of State's case originally extended to two land banking schemes marketed by UKLI.

74. The first such scheme ("the First Scheme") was in operation between 5 March 2003 and 15 March 2006. In that period, under the aegis of the First Scheme, UKLI sold plots on 15 sites with sales amounting to over £41 million.

75. In September 2005, the solicitors then acting for UKLI had sought Counsel's advice on whether the First Scheme constituted a CIS; and Counsel had advised that, based on his instructions, it did not.

76. However, in March 2006, the FSA published draft guidance (which was eventually adopted as section 11 of the Perimeter Guidance Manual of the FSA Handbook, "PERG 11") which stated that schemes which provided for the sponsor to obtain planning permission (as did the First Scheme) could involve a CIS. Following that, a different firm of solicitors acting for UKLI (Macfarlanes), became concerned that the First Scheme might, on that basis, be in contravention of the prohibition, and contacted the FSA.

77. Especially given the considerable emphasis put in UKLI's customer brochure (which was also on the UKLI website) on its skill and experience in obtaining planning permission, and its commitment to seeking it on behalf of all concerned in the scheme, the FSA took the view that the First Scheme was indeed a CIS.

78. Faced with that, UKLI withdrew the First Scheme and, consulting also with the FSA, took legal advice on how to operate a land banking scheme which was not a CIS.

79. Although, as indicated, the First Scheme was originally relied on by the Secretary of State as itself demonstrating unfitness on the part of the then directors of UKLI, including Mr Chohan, it was not relied on before me for that purpose. In her affidavit, Miss Covell said simply this:

> *"It is also appropriate to record, on behalf of the Secretary of State, that it is no longer intended to pursue the allegation of unfitness regarding the First Scheme (see paragraph 8 to 12 of Mr Burns' Affidavit) against Mr Chohan."*

80. No explanation was then or is now offered of this change of tack. I am left to assume it was because the First Scheme was (a) initially approved and (b) withdrawn as soon as the FSA indicated its view that it contravened the general prohibition, and was inconsistent with PERG 11. It may well be that the fact that part of the purpose of the scheme that later replaced it ("the Second Scheme") was to make provision for customers of the First Scheme who would otherwise have faced shortfalls (because their investments could not be repaid in full) also weighed with the FSA. At all events, I must focus exclusively under this head on the replacement scheme ("the Second Scheme") on which the Secretary of State now exclusively relies in the context of the Land Banking Allegation.

The Second Scheme

81. The Second Scheme was in operation between 15 March 2006 and 31 January 2008. During that time, UKLI's sales of plots amounted to some £27,698,430.

82. The Second Scheme, as proposed by UKLI on 19 April 2006 (following discussions with the FSA), was designed by Macfarlanes and Mr Michael Blair QC with a view to it not being a CIS. It went through various modifications designed to meet the FSA's objections.

83. This is, of course, a central plank of Mr Chohan's defence. Mr Chohan contended in his Affidavit that he should not be criticised, let alone disqualified, for a scheme designed and modified on the advice of lawyers; and that in any event he personally had had nothing to do with its formulation, promotion or implementation.

Relevant features of the Second Scheme

84. I turn first to the features of the Second Scheme and then to the competing views that developed as to whether or not it constituted a CIS. In that regard, I think it helpful to record the iterative process between the FSA and UKLI in relation to that structure, especially since that process is a useful way of illustrating the nature of the issues involved.

85. The essential elements of the new arrangements proposed provided for UKLI

    (1) to offer to sell plots of land but without undertaking or assuming any responsibility to apply for planning permission;

    (2) itself to retain up to 25% of each site being sold, in respect of which it would apply for rezoning into a local development framework (with the likely consequence, if the application succeeded, that plots purchased by UKLI customers would also fall within the rezoning proposals).

86. In addition, UKLI also proposed to provide for its customers in the First Scheme by offering to transfer them (by assigning UKLI's contractual obligations) to a new entity called The Berkeley Partnership Limited ("TBP"), which would be regulated.

87. The latter was obviously also of concern to the FSA, since if (as was the working assumption) the First Scheme was an unauthorised CIS, the contract between UKLI and its customers would not be enforceable by UKLI (see section 26 of FSMA): but that might be of no practical avail to the customer if (as was the case) UKLI was not in a position to repay monies subscribed in full.

88. The features of the Second Scheme initially approved orally by Macfarlanes and Mr Blair QC were confirmed later (after further discussions with the FSA) by Mr Blair in a written Opinion dated 4 May 2006 ("Mr Blair's Opinion"). The following extracts from that Opinion convey its diagnosis and prescription, and the quite subtle distinctions on which these were based:

    (1) Mr Blair defined his brief as being "to advise whether there is a way that the Company or a successor company can continue to operate lawfully, and not

simply cease to trade, on the assumption that the business will, in the not too distant future, be covered by FSA authorisation."

(2) He described the rationale and effect of PERG 11; and summarised the criteria to be satisfied for a scheme to comply both with the guidance and FSMA as follows:

> *"To be safe, the 'scheme' must ensure that the owners actually control the management of their property (and that any management that is carried out on their behalf by the promoter is done 'on an individual basis'). And the scheme must ensure that the owners are not subject to rights or duties, as against the promoter, or anyone else, that could lead to the conclusion that they were locked into any kind of collective management or development of the land."*

(3) To ensure no contravention, Mr Blair emphasised that the approach to planning permission would have to be substantially different. He made clear that

> *(a)* *"The literature, the contractual and conveyancing documentation, and the telephone scripts would all be altered. Not only would there no longer be any obligation to apply for planning permission within a specified period, but the papers would drop any reference to planning permission.*
>
> *Instead, the papers would refer to the advantages of the property being rezoned. Rezoning is different from planning permission in several respects, the most crucial for our purposes being that it does not necessarily come about for any specific piece of land through any specific application by that particular landowner, but is capable of happening on the application of other landowners, or even as a result of an initiative by a local authority.*
>
> *Further, the papers would carefully avoid giving the impression to any potential purchaser that the Company was intending to apply for rezoning either for its retained land or for the land of any purchasers."*
>
> *(b)* *"The papers would also ensure that no purchaser was entitled to expect the company to assist him in the eventual disposal of the land to a developer or other would-be owner. The concept would be that the potential developer would have to deal with each of the plot owners individually, or through an association of them if such a grouping were to develop naturally between them."*

(4) He advised that: *"as long therefore as the 'substance' of the transaction is one for the sale of land for investment purposes with no element of collectivisation of any process for obtaining planning permission or re-zoning, the Company has, in my view, successfully avoided the problems about planning permission that characterised the previous business model"* [i.e. the First Scheme].

(5) He warned nevertheless that *"this is unfortunately not the end of the story. In order to be able to carry out its affairs, as it wishes to, within the letter of the answer to question 21 of PERG11.3, the Company will need to be able to show that it does not have 'any other control over the land as a whole'. I do not, I fear, have instructions on much of the other aspects of the ownership and control of the land under this new proposal. However, it seems clear to me that the effect of the arrangements, in substance, must be that the individual owners are indeed in control of their land. The list of things that accordingly needs to be gone into will include:*

a. exterior fencing to the estate as a whole…

b. insurance against personal injury to entrants, including trespassers, and perhaps against fire, flood etc;

c. cropping (will the land be let to a farmer while it is still a green field, and, if so, will he pay rent to individual plot owners?)

Another way of looking at this is to see what the owners would have to do if they were required to be self-reliant in relation to their ownership of the property…"

89. Thus, Mr Blair's May 2006 advice was premised upon certain factual assumptions as to the way that the Second Scheme would be presented and implemented, both in the case of UKLI, and in the case of its customers. But on the basis of those assumptions, that advice was to the effect that, as reformulated, the scheme would not constitute a CIS and accordingly would not attract the prohibition and potential penalties under the financial services legislation.

90. A central problem with those assumptions, as it seems to me, is that they tended to ignore what was always likely to be the true nature of the investment made as viewed by UKLI's customers/investors; and the real dispute between the parties as regards the lawfulness of what was done is as to whether the manner in which the Second Scheme was actually promoted and managed conformed with the assumptions on which that advice was based, and if not, whether there was a contravention of the relevant prohibition.

91. It is fair to note that the FSA demonstrated from the outset a degree of scepticism as to whether the legal construct could and would be implemented in practice. Its scepticism was exacerbated when (on 3 February 2007) an unsolicited email advertising the Second Scheme was received by an employee of the FSA. The email contained a link to a website which listed a number of forthcoming seminars about UKLI's activities and a video featuring Mr Walter on behalf of UKLI.

92. On 6 February 2007, the FSA formally commenced an investigation into UKLI under section 168(3) of FSMA in order to determine whether, in actual fact, UKLI was still operating an unregulated CIS.

93. In the course of that investigation, the FSA obtained marketing materials used by UKLI, including a brochure entitled *"Guide to Buying Strategic Land"* and the video referred to above (and also a promotional DVD version).

94. The FSA's approach to the advice that UKLI had received and its views on this material were stated in a letter dated 23 May 2007 to the company under the heading "UKLI's Current Operations". This too is quoted at length in David Richards J's judgment; but, to remove the need for cross-referencing, it may assist to set it out again:

> "In relation to UKLI's current operations, our attention has recently been drawn to various matters which have caused us some concern.
>
> We note that in your 'Proposal to the Financial Services Authority', sent to us in April 2006, you advised us at paragraph 2.1(d) that UKLI would apply for the 25% of the land that it owns on its sites to be rezoned into a Local Development Framework, with the consequent likelihood that any freehold plots purchased by customers which adjoin UKLI's plot would also fall within the rezoning proposals.
>
> By a letter dated 11 May 2006 UKLI's solicitors, Macfarlanes, enclosed a copy of an opinion received from Michael Blair QC, in which he considered the lawfulness of UKLI's proposed plan. Mr Blair stated at paragraph 26 of that opinion that UKLI's new papers (literature, contractual and conveyancing documentation and telephone scripts) would refer to 'the advantages of the property being rezoned'. At paragraph 27 however he qualified that statement, noting:
>
> 'Further, the papers would carefully avoid giving the impression to any potential purchaser that the Company was intending to apply for rezoning either for its retained land or for the land of any purchasers.'
>
> At paragraph 30 he further stated: 'As long as the substance of the transaction is one for the sale of the land for investment purposes with no element of collectivisation of any process for obtaining planning permission or rezoning, the Company has, in my view, successfully avoided the problems about planning permission that characterised the previous business models'.
>
> The FSA agreed with Mr Blair's views on this point, and considered that as he had given UKLI clear guidance as to how to avoid its new scheme having the element of collectivity that would lead to it falling within the ambit of section 235 of the

Act. We therefore assumed that UKLI would comply with that guidance.

Recently, however, our attention has been drawn to the manner in which UKLI actually markets its scheme to potential investors, and we are concerned to note that the guidance given by Mr Blair has not been adhered to. In particular we have seen a copy of a brochure entitled 'Guide to Buying Strategic Land'. That brochure contains the following statements:

- 'We reserve up to £500,000 per site to promote our retained land for rezoning within its local authority framework. Once a site has been rezoned, its value, as we will demonstrate in this guide, can increase significantly.'

- 'We do everything possible – reserving up to £500,000 of our resources per site – to promote our retained land to be rezoned for residential development'.

- 'The exceptional potential returns from land come with getting the site rezoned … Achieving rezoning is a very expensive, highly skilled process … our land and planning team submits its initial representation for the local authority to consider. A series of further submissions and public inquiry appearances follow as the local authority refines and finally adopts its development plan.'

- 'Once a site has been successfully rezoned, the value of the land will increase dramatically. It is at this stage that we recommend all investors on the site sell to the highest bidding developer … we strongly recommend you exit your investment at the same stage as we do'.

- 'By promoting our land for rezoning with the local authority we are confident that we will increase its value significantly, should we be successful'.

- There is a calculation of the 'potential returns on your land' based on rezoning of the 'parcel of land' being achieved, showing a potential new value for the parcel of land of £69,580 as against a typical cost of £20,000 (i.e. with a profit of £49,580).

The FSA is aware that extracts from this booklet form the basis of the regular seminars which UKLI invites members of the public to attend, and at which attendees are given the same message: that an investor can expect UKLI to achieve the rezoning of the site, including any plot which they buy, resulting in a large increase in value.

> The FSA has also seen two short marketing videos that UKLI distributes to potential investors. They contain statements from Brian Smith, the Planning Director for UKLI such as: 'We promote land with the local authorities to achieve its rezoning for development' and 'I also oversee the Planning Department to ensure that they use their strong expertise to promote the sites in the best possible way'. Nigel Walter states 'When we promote land to get rezoned there is a dramatic increase in value'. This statement is overlaid on screen with the figures '250% to 400%'. Further, UKLI's website also states that 'From our point of view we are looking to sponsor a site to be rezoned (or allocated) for residential use'.
>
> The FSA is extremely concerned by the way in which UKLI is marketing its current scheme. The FSA considers that any form of representation or indication made to the participants that rezoning will be sought by the firm in respect of the land that it retains is liable to make the arrangements a collective investment scheme because such steps will be essential elements in facilitating access to the profits that will be the main/sole factor behind the investor's decision to purchase the plot to begin with. In addition, we consider that seeking rezoning of the land is management as a whole because the firm cannot realistically seek rezoning only in relation to the land that it owns.
>
> We are particularly concerned as Mr Blair's opinion clearly stated that UKLI should not give the impression to any potential purchaser that it was intending to apply for rezoning either for its retained land or for the land of its investors. The FSA advised UKLI that it was content with UKLI's proposals on the basis of this opinion, in the expectation that UKLI would comply with its Counsel's guidance. Clearly this is not the case. Investors to whom UKLI marketed on the above basis will have the clear expectation that UKLI will apply for rezoning of the retained land (although I note in this regard that only on some occasions does UKLI clarify which land will be the subject of its application)which will also inevitably benefit their own land, and that it is intended that once rezoning has been granted they will sell their land to a developer, thus achieving a profit. The FSA considers that this amounts to a collective investment scheme.
>
> Given the concerns outlined in this letter, please confirm that UKLI will cease selling plots of land to investors in the UK, and to cease seeking new investors in breach of the Act until this matter is resolved. Please will you let me have your confirmation of this by Friday 1 June 2007."

95. Following a holding reply (dated 5 June 2007) to this letter from Decherts, after they had replaced Macfarlanes as UKLI's solicitors, the FSA received a more substantive

response in the form of a letter from Decherts dated 15 June 2007 (and sent by email). This reply enclosed a further Opinion from Mr Michael Blair QC ("Mr Blair's Further Opinion", dated 13 June 2007).

96. Mr Blair's Further Opinion, in summary, reaffirmed his advice that UKLI's arrangements, as he understood them, did not constitute a CIS, nor contravene PERG 11. Mr Blair disagreed, in particular, with the FSA's conclusion that rezoning of the land constituted management of the whole simply because rezoning necessarily had to apply to the whole and not just the part of the land retained by UKLI. His view was premised (a) on his perception of the factual arrangements and (b) his construction of section 235 FSMA.

97. As to (a), Mr Blair carefully set out the facts as he understood them to be from his instructions, as follows:

> "a. UKLI has retained, by way of 'retained land', a significant proportion of each of the sites plots within which it offers for sale to potential purchasers;
>
> b. UKLI does not carry on any activities, nor hold itself out as doing so, in relation to the obtaining of planning permission over any of the plots or over the retained land;
>
> c. UKLI does, however, seek to secure the 'rezoning' of the retained land, as a preliminary to any possible subsequent stage of obtaining planning permission; and it holds itself out to potential purchasers as seeking to secure rezoning for the retained land;
>
> d. UKLI does not carry on any activities, nor hold itself out as doing so, in relation to the obtaining of rezoning in respect of any of the plots;
>
> e. There is no contractual provision between the current purchasers and UKLI which either obliges or entitles UKLI to carry on any activities in relation to the obtaining of rezoning or planning permission in respect of the plots; nor is there any contractual provision obliging or entitling the purchasers to carry on any such activities, or preventing them from doing so;
>
> f. UKLI's marketing material indicates that if and when the land has been rezoned, UKLI will 'recommend' to the plot owners that they should sell to the highest bidding developer, but there is nothing in any of the contractual material to require the plot owners to do so;
>
> g. The only obligations relating to the potential change of status of the land are:

i. A covenant by the plot owners 'not to oppose any planning application for residential development or other change of use both in relation to the Retained Land and to the [plot]', and

ii. Arrangements in the transaction documents for each plot, whereby an agreement in favour of the previous owners of the whole site (entitling them to a share in any increase in value obtained through planning change) is made binding on each of the plot owners individually through their entering on completion into a specific and tailor-made deed of charge and deed of covenant with those previous owners."

98. His analysis, put shortly, was that what UKLI was doing did not involve arrangements such that "the property is managed as a whole by or on behalf of the operator of the scheme" within the meaning of section 235(3)(b) FSMA since

(1) an application for rezoning does not have to be made by the owner of any relevant property, let alone the owner of all of it: such an application does not involve the applicant in anything concerned with its ownership of property at all, let alone its "management" within the meaning of section 235(3)(b) of FSMA;

(2) the process of managing an application is not management of property either;

(3) furthermore, any management was restricted to the land retained, and involved no management of the site as a whole (of which the retained land formed but a part).

99. Though noting that he had not seen the marketing videos, Mr Blair also expressed the view that none of the extracts quote in the FSA's letter of 23 May 2007 caused him any concern.

100. The FSA did not accept either this analysis or the factual premises on which it was undertaken, for reasons it explained in a letter to Decherts dated 5 July 2007.

101. As to the factual premises, the FSA accepted that (a) UKLI retained a significant proportion of each of the site plots ("retained land") and (b) UKLI was not carrying on the activity of obtaining planning permission over either the plots as a whole or its retained land, nor holding itself out as doing so.

102. However, the FSA did not accept that (c) UKLI in fact confined itself, nor that it held itself out as confining itself, to seeking rezoning for its retained land: on the contrary, its marketing materials indicated that its applications for rezoning extended to the whole site of which the retained land was a part, and the calculation of "potential returns on your land" promoted to investors was based on rezoning of the whole parcel of land. For the same reasons, the FSA did not accept (d) that UKLI carried out no activities in respect of rezoning in respect of plots other than its retained land.

103. Further, whilst accepting that there was no contractual provision obliging or entitling UKLI to carry on activities in relation to the obtaining of rezoning or planning permission, the FSA did not accept (e) that this was determinative in the context of

section 235, since the word "arrangements" in that section extends to non-contractual arrangements and understandings, and UKLI's activities in managing and obtaining rezoning, and its promotional material telling potential investors that this was what it would indeed do, fell within the scope of the section accordingly.

104. Similarly, the FSA did not accept that (f) the (admitted) absence of any contractual provision requiring plot owners to sell to the highest bidding developer detracted from the point that the arrangements were within the scope of the section.

105. Furthermore, the FSA considered (g) that the express provisions for (i) a covenant by the plot owners "not to oppose any planning application for residential developments or other change of use both in relation to the Retained Land and to the [plot]", and (ii) arrangements in the transaction documents for each plot, whereby an agreement in favour of the previous owners of the whole site (entitling them to a share in any increase in value obtained through planning change) is made binding on each of the plot owners individually through their entering on completion into a specific and tailor-made deed of charge and deed of covenant with those previous owners, comprised the true intended extent of the arrangements for the potential change of status of the land.

106. The FSA formed and expressed the view that, albeit without contractual commitment, the true intent and expectation of UKLI and all participants, as apparent from its promotional material and in line with the representations in fact made to participants and the arrangements they in fact subscribed to, was that the participants would (a) leave it to UKLI to (b) manage the whole with a view to obtaining its rezoning, and thus (c) pave the way for planning permission for the whole, as the means of securing (d) an increase in value of whole and (e) sale to the highest bidding developer, so as to yield (f) profits on the sale of the whole in which (g) all plot-owning participants would share.

107. The iterative process, now becoming reminiscent of a game of ping-pong, continued with the provision of a further advice from Mr Blair (dated 20 July 2007). In this he confirmed his view that the Second Scheme was not a CIS, either in the way it was structured, or (as far as he was aware) in the way it was being implemented. He did not address its promotional material.

108. His further advice focused especially on what he identified as being an undecided point in relation to the construction of section 235(2): that is, whether the reference in the sub-section to participants not having *"day to day control over management of the property, whether or not they have the right to be consulted or give directions"* (as an indicium of a CIS) is to the management of the site to be rezoned, or to the particular plot owned by the participant. Mr Blair contended that the more natural way of reading the sub-section was to confine the meaning of *"the property"* to the plot owned by the participant, such that (as he put it) "it is enough for the person seeking to escape section 235 to show that each participant has got day to day control over the management of his piece of property even if he does not also have control of the management of the rest."

109. Mr Blair also disagreed with the FSA's approach to section 235(3)(a) and (b). As to section 235(3)(a), he rejected as "inherently unlikely" the FSA's contention that the "pooling" which is one of the defining characteristics of arrangements constituting a

CIS "occurs when rezoning is applied for", since the consent or acquiescence of participants in the rezoning application could not fairly be depicted as a "contribution", and any profits would not be shared, but arise out of the (voluntary) sale by each participant of his own land. As to section 235(3)(b), Mr Blair dismissed the FSA's argument that the application for rezoning could be regarded as management of the property as a whole.

110. Neither, therefore, convinced the other. Mr Blair focused on the scheme as devised and the construction of the words of the sub-sections: the FSA focused on the substance of the investment offered as portrayed in UKLI's marketing material; the different focus resulted in conflicting views.

111. Correspondence between the FSA and UKLI continued between 20 July 2007 and 30 November 2007 with regard to a number of matters, and especially the actual operation of the Second Scheme, but also as regards arrangements for UKLI to offer investors who had participated in the First Scheme their rights under section 26 FSMA. Notably, repeated requests by the FSA that UKLI should cease to market the Second Scheme until resolution of the matter did not result in UKLI doing so.

112. In late November 2007, UKLI, through Decherts, proposed alterations to its marketing communications to make clear, as regards rezoning of the sites that (a) UKLI might promote its own retained land for development, but would not commit to doing so and (b) UKLI would not have any obligation to promote and would not promote the plots of land purchased from it to be allocated for development. However, this did not allay the FSA's concerns; as Ms Irving in its Enforcement Division wrote (in a letter to Decherts dated 30 November 2007):

> "Looking at the substance of the scheme, it is evident to us that it is part of the arrangements made between UKLI and its investors that UKLI will make an application for rezoning of the land and, if successful, will thereby confer a substantial benefit on the investors. Without such an understanding, we are unable to understand why an investor would acquire a plot. This is particularly so given the fact that UKLI's amended brochure still talks of figures for potential growth of 300 and 328%. That, in our view, establishes a clear and sufficient link between the rezoning application and the plots for the former to be (to the extent necessary to fall within the scope of section 235) management of the scheme (namely the plots).
>
> Accordingly, none of the proposals…are acceptable to the FSA."

113. Further discussion continued in early 2008: but no satisfactory resolution was achieved.

114. The Secretary of State's case is that, in this case, the way the Second Scheme was in fact promoted and implemented comprised "arrangements" that were in breach of section 235 FSMA 2000 as involving both the "pooling" and the "management" characteristics that were the subject of the prohibition described above. The fouc of the complaint is on the disparity between the factual assumptions on which the

scheme's design and the advice on it was premised, and the nature of the scheme as it was sold to investors.

The questions to be addressed in determining whether the Second Scheme was a CIS

115. As it seems to me, the following questions arise in determining whether the business in question constituted a CIS:

(1) What was the object of the investment solicited?

(2) How was that object proposed to be achieved?

(3) What, if anything, were investors required to do to facilitate the achievement of that object?

(4) Did the above involve either or both (a) pooling of contributions and profits or income or (b) management of the plots as a whole?

(5) Does the above fall within section 235 FSMA?

116. As to (1) in paragraph 115 above, and as in the *Sky Land Consultants* case, the object of the investment solicited was plainly, in my judgment, to enable investors to benefit from an increase in the collectivised value of the individual plots they were invited to invest in, which was to be brought about by rezoning the entire site of which such plots formed a part. The object was not an investment in the land itself with a view to its use and profit thereby: the object was profit from an enhanced value generated by rezoning of the site, and thus the prospect of sale of each plot with the potentiality of planning permission.

117. As to (2) in paragraph 115 above, and again as in the *Sky Land Consultants* case, the object of enhancing the value of the site and each plot in it in consequence of a successful application to be undertaken by UKLI for rezoning of that site, was to be achieved deploying UKLI's expertise and experience, and funded (at least in part) out of the amounts subscribed by such investors.

118. As to (3) in paragraph 115 above, none of this required or in reality involved any commitment on the part of investors to the physical stewardship of the various plots. I have seen nothing to suggest that any of the investors envisaged being or intended to be involved in the management of that investor's plot for any purpose other than realising the hoped for profit in the intended way; and in any case, sub-section 235(2) FSMA is satisfied even if only some of the investors do not have day-to-day control over the management of the property: see below.

119. Thus, the commitment of each investor/site owner to UKLI's application for rezoning was all that was required or (for the most part, at any rate) envisaged. Whilst each investor, being owner of his plot, could sell it at a time of his choosing, that is not what was intended or likely to happen. The intention and what was likely was that the site as a whole would be sold, so as to ensure maximum benefit from the uplift in profit from rezoning.

120. As to (4) in paragraph 115 above, in this case, the Secretary of State submits that the arrangements above described have both characteristics identified in section 235(3)

FSMA. In relation to section 235(3)(a) the Secretary of State relies on the following: (i) the objectives of the arrangements depend upon the contribution by each plot owner of his plot for the purpose of the application for rezoning and the use of subscription monies to fund the process, and (ii) the increased value and (potential) profit engendered if rezoning of the site is achieved is spread across the plots.

121. As it seems to me, the applicability of section 235(3)(a) depends upon whether (i) the plot owners can truly be said to "contribute" their plots by joining in the application for rezoning and (ii) the increase in the potentiality and thus value of the land and thus profit from it can properly be said to be "pooled". I have to say that I was provided with very little guidance on this at the hearing. Given my conclusion in relation to the alternative way of demonstrating a collective investment scheme (see below), I need not express a concluded view and in circumstances where I do not consider that I have had full argument I prefer not to do so. My inclination would be that this limb is not satisfied, because (in agreement with Mr Blair in his Further Advice dated 20 July 2007) I am not persuaded that the arrangements involve an act fairly described as pooling of contributions; and nor am I persuaded, given that each plot owner may sell his plot when he chooses, that the arrangements involve a pooling of profits or income.

122. Turning to the second alternative characteristic, what constitutes "management" is helpfully addressed in both *Sky Land Consultants* and *Asset Land.* I have already cited (see paragraph 71 above) a passage from the judgment of David Richards J in *Sky Land Consultants* at paragraphs 77 to 79, which seems to me substantially to apply in this context also.

123. Bearing in mind the necessity to look at substance rather than form, it seems to me clear that the arrangements in reality were for UKLI to realise the common objective of all the participants by doing what was necessary with their support to obtain rezoning of the site: that was what the plots were bought for and it is the purpose to which their ownership was directed.

Conclusion that the Second Scheme was a CIS within section 235 FSMA

124. My conclusion is that the arrangements in question, in the manner in which they were in reality operated, and (in my view, almost inevitably in the real world), involved the collectivisation of the plots with the objective of investment profit from the site, all managed by UKLI. In my judgment, this is amply supported both by UKLI's marketing brochures and presentations (see above) and by emails which suggest that those responsible for UKLI's management understood that its business involved such collectivisation.

125. The following extracts from two emails from David Gelb, one dated 21 November 2006 and the other dated 22 November 2007, illustrate this:

> (1) *"As a company, UKLI strategically acquire land sites in line with the government policy… Our directors have a background in gaining planning permission to build large scale developments… I have included a brochure for your perusal which summarises some of the key personnel from within the company as well as a complete description of how the*

> *investment works… We maintain a vested interest in all our sites, this demonstrates our absolute confidence in our own business model, by retaining approximately a third of the land for ourselves. The remainder is made available for re-sale to private and commercial investors at a marked up price that covers all future expenses in relation to getting the site rezoned for development. Approximately £500,000 is allocated to each site to ensure that they get allocated in the quickest possible timeframe. The key for UKLI is to get the site zoned for development and that is where the money is to be made. I have attached an excellent article on the whole process for your perusal. 80% of the value of any of the site is made once the site is zoned and that's when most clients will sell their investment to a developer for a large mark-up. Once the potential investor acquires land through UKLI there are no further costs, apart from a small payment to HM Land Registry to register their title to the land. My commitment to my clients is that I will endeavour to provide them with a tailored, well priced investment over a 5 year period…"*
>
> (2) *"UK Land Investments is the largest and most prominent land retailer in the country with over 2000 acres of prime development land within its prestigious portfolio… Our business model adopts the exact same principles as those utilised by large property developers over the last 3 decades. We are experts in sourcing sites which we believe will be allocated for development within 3–7 years. Typically we retain about 1/3 of each project and a minimum of £500,000 is put aside for the promotion of the land at a local and regional level. Our investment partners will obtain freehold title to their parcels with a view of generating between 100%–400% returns on investment…"*

126. I note in passing that in point of fact, UKLI never did spend £500,000 on promotion of each site, though it did make provision for such expenditure in its accounts. This was another reason for Moore Stephens's resignation as auditors: and see paragraph 146 below. This too is a matter of which I infer Mr Chohan was aware, given his close involvement in UKLI's financial affairs.

127. A further example of the way UKLI in fact operated the Second Scheme is provided by an email dated 11 October 2007 to an investor from Mr Ronnie McKay ("Mr McKay", UKLI's Senior Business Development Manager). In reply to the investor's questions as to how the scheme worked, Mr McKay explained:

> *"…we as a company would sell our portion of the retained land to a developer and would advise our clients to do likewise; outline planning permission would then be done by the developer and could take a further 18 months. The site we are offering at the moment has no allocation status on it; our planning team has sourced these sites under the same criteria as they did previously and the expectations are that these sites*

> *will be allocated within a 3–5 year period… Individuals would never be able to influence a planning department's decision to have a site status changed, our planning department would be responsible for ongoing talks and representations to have the retained land allocated. Individual land owners would benefit from that… you can expect more than the estimate… Borehamwood is likely to return 100–150% on allocation, Bromley West you can expect a return of around 300–400% over a 5 year period."*

128. To my mind these extracts illustrate the reality that in the manner in which it in fact was promoted and operated, the Second Scheme was a classic collectivised land banking scheme. What UKLI was offering and selling was a share in a collectivised investment scheme: the fact that the unit or share of each investor (and the reference in the second e-mail to "investment partners" may be noted) happens to be represented by title to land does not alter the true character of what is on offer.

Mr Chohan's role in the context of the Second Scheme

129. As indicated above, when addressing the issue (in effect) as to whether or not Mr Chohan was a director in all but name, it seems to me to be relevant and indeed necessary to consider what (if any) active part Mr Chohan played in relation to the activities in question.

130. It will already be apparent that the construction and development of the scheme was largely left to the lawyers. Nevertheless, as it seems to me, the evidence demonstrates that Mr Chohan was well aware of the process, and of the questions raised by the FSA, and of the risk that UKLI was indeed operating a collective investment scheme. Further, the evidence discloses that Mr Chohan recognised that the only real safety lay in establishing a body regulated by the FSA, but encouraged his management to carry on regardless in the meantime.

131. In doing so, there is at least one example of him seriously misrepresenting the attitude of the FSA and the inherent risks. Thus, on 24 August 2006 Mr Chohan sent an email attaching a "Quarter Three Report on International Growth" by "the Chairman" to *"London Staff; Birmingham Staff; St Albans Staff; Glasgow Staff; Accounts"* including the following:

> *"In the UK, the Perimeter Guidance issued by the FSA assisted the UKLI Group in fast tracking its Quarter 2 & 3 intentions – … to establish an FSA regulated vehicle to create a new income stream for the business – real estate and land funds. The UK has seen a number of companies within the industry closed down for its practices, but the manner in which UKLI Group conducts its business has been impeccable, and the FSA who have had meetings with members of the Management team in London, have seen no cause for concern."*

That was less than accurate, and was made either knowing it to be false or with reckless disregard as to whether or not it was true or false: in truth, the FSA had, and had expressed, ongoing concerns about the way in which UKLI was conducting its

business and its view that it was promoting a collective investment scheme, both prior to and subsequent to August 2006.

132. I reject any suggestion that Mr Chohan did not himself appreciate the way the Second Scheme was being promoted and implemented notwithstanding the FSA's continuing concerns. Mr Chohan sought to present himself as detached from management: but not only does the documentation, and the evidence of those he charged with day to day management, belie this; it is also, to my mind, inconceivable in the circumstances that Mr Chohan was not aware of what was going on.

133. Indeed, in his affidavit Mr Chohan does not claim to have been unaware of the fact and way that the Second Scheme was being implemented; and although he claims that he *"was not aware of the details of that process"*, that leaves plenty of room for him to have been aware, as I infer and hold that he was, of the promotional material (and especially the brochure), of the FSA's continuing concerns.

134. Nor does it preclude knowledge (which I infer from the nature of his involvement, the extent of his interest, and the oral and documentary evidence as a whole that he actually had) of what was generally appreciated by UKLI's management to be the true nature of the Second Scheme in terms of its actual operation: that is, the sale of plots in a collectivised site controlled and managed by UKLI with a view to generating a profit for itself and investors from the rezoning of the whole.

135. Furthermore, I infer from Mr Chohan's strict control of spending and UKLI's financial matters that he would also have known that the promotion and implementation of the Second Scheme involved other more detailed misrepresentations.

136. Of course, Mr Chohan might have been able to offer an explanation or cast a different light on all this, had he chosen to participate in the trial. I am very conscious that in his second Affidavit he denied any involvement otherwise than that to be expected of a 100% owner, and in any event assumed that all that was being done was in accordance with advice. The fact remains that he chose not to attend; and the documentary record does not appear to support his depiction of events, which is also contradicted by the other *de facto* directors.

137. Further, the fact that a person is the 100% owner of a company, and thereby in reality in a position to exert control, does not insulate him from being treated as a *de facto* or shadow director by the expedient of purporting to rely on his influence in that other capacity (as shareholder). It is the exercise, rather than the source, of power usually reserved to a director (typical of a *de facto* director), or the influence and control over those acting as directors (typical of a shadow director), that is important.

Conclusions as to Land Bank Allegation

138. In all the circumstances, I have concluded that the Secretary of State's case that (a) the Second Scheme, in the manner in which it was in fact promoted and operated, was a collective investment scheme, and that Mr Chohan was (b) well aware of the collectivised nature of what was offered, and the FSA's concerns but (c) sanctioned and encouraged UKLI and those to whom he entrusted day to day management to

proceed nevertheless and notwithstanding the risks and (d) acted in that regard as if he were the company's managing or predominant director is well founded.

139. I have considered carefully Mr Chohan's contention that he and UKLI were entitled to rely on the fact that the Second Scheme was devised by experienced solicitors and counsel. However, I have concluded that this does not avail Mr Chohan.

140. In my judgment, the reality is that, whether or not the scheme could have been promoted and operated lawfully in practice as contrasted with theory, it was not so in fact.

141. In any event, in my judgment, the technical distinctions relied on by the advisers to prevent collectivisation, by reserving management, ownership and control of each plot to the individual investor, and ensuring no suggestion of any collectivised management of any of the processes of applying for rezoning and ultimately disposing of the site and realising a profit, did not reflect the reality of the way the Second Scheme was promoted and in fact intended to be implemented. I do not feel able to conclude that the advisers were positively misled; but I have no doubt that the full picture was not presented to them.

The Loans and Dividend Allegations

142. I turn to the Loans and Dividend Allegations. The gist of these allegations is that during his directorship of UKLI (both *de jure* and *de facto*) Mr Chohan improperly caused UKLI to advance unsecured loans exceeding £12 million to entities either owned or controlled by, or connected with, him, and to make dividend payments which UKLI could not afford in sums of approximately £1,366,433 in aggregate for 2006. There is some dispute about both figures; but even allowing for that (for example, the amount of inter-company loans may have been overstated) the fact remains that (a) loans of very considerable amounts were made with no security and proved irrecoverable and (b) dividends were paid which made it impossible for UKLI to meet other commitments.

Unsecured loans

143. The loans in question are described in Mr Burns's Affidavit and in a later Affidavit ("Mr Manning's Affidavit") made on 27th February 2012 by Mr Lee Anthony Manning (a partner in Deloitte LLP and one of the joint administrators and then joint liquidators of UKLI).

144. Mr Chohan had ceased to participate in the proceedings by the time of Mr Manning's Affidavit. In Mr Chohan's second Affidavit, he did, however, address the loan allegations. His case is simple: he accepts that the loans were made and that the recipients were related companies; but he maintains that these *"transactions were all properly conducted and for the benefit of UKLI"*.

145. He seeks to categorise the loans made as follows:

(1) what he depicts as private equity loans to fund acquisitions of and operation of businesses which would support UKLI's distribution of products: he says that *"UKLI was effectively vertically integrating its business"*;

(2) what he depicts as loans to "start up overseas offices to help sell land that UKLI was unable to sell in the UK due to clients losing interest in those particular sites, or sites which were unpopular and difficult to sell in the UK market. These included UKLII India, Malaysia, Saudi Arabia and Hong Kong." He adds that "these operations were bolstered by operations in Dubai called Chorus Direct International which essentially trained staff for these sites";

(3) what he depicts as loans to businesses "which would help UKLI in its planning promotion for its existing portfolio of sites. One of the key areas UKLI targeted was Health Care as it felt due to the growing demand for Care Homes if it became both an operator and specialist in this area it would help planning applications which would be made on its existing portfolio of sites in the South East."

146. A table (prepared by the office-holders) showing the names of each of the companies to which such loans were made, and the directorships and shareholdings of each also, is attached to this judgment. I do not think it necessary to go through each loan: it is not for me to determine the state and circumstances of each lending; it is to decide whether overall this allegation supports the Secretary of State's allegation and case for disqualification. I shall take examples in each of Mr Chohan's categories.

147. An example of a borrower falling within Mr Chohan's first category (see paragraph 145 above) is Chorus Direct Limited, which Mr Chohan wholly owned (though indirectly through an intermediate holding company). As to these loans:

(1) UKLI loaned, at Mr Chohan's direction, some £1,905,918 over the course of February to September 2006, to enable Chorus Direct Limited to purchase all the business and assets of a 250-seat call centre, and to provide funds for a re-engineered business model and working capital.

(2) The interest rate was set at 8% per annum; but no interest repayments were to be made for the first year, with interest and capital to be repaid over the remaining 15 years of the agreement (which was in writing).

(3) No security was sought or provided.

(4) According to UKLI's auditors in 2006 (Moore Stephens) Chorus Direct Limited was making losses at the dates of the loans.

(5) Mr Chohan blames the Scottish Development Agency and the DTI for the failure of this company: he says the one did not support it, and the other encouraged potential customers not to deal with it; but however that may be, it never had any substantial assets and fail it did (and it has been dissolved).

(6) At the date of administration the joint administrators calculated the amount of the outstanding debt to be £2,338,716.

(7) Such was the deficiency that the joint administrators accepted £15,000 in full and final settlement, since they considered that they would not have achieved a better outcome in a liquidation.

148. An example of a borrower in the second of Mr Chohan's suggested categories in paragraph 145 above is UK Land Investments International Limited ("UKLII"), which was also wholly owned by him. As to these loans:

(1) UKLII was the overseas selling arm of UKLI, and appears to have had various branches.

(2) Mr Chohan cites the branch in India as an example of the way UKLI benefited from loans to UKLII's overseas offices. Thus, he extols the *"professionals… promoted the UKLI website to the top ranking site…this massively benefitted the UK sales operation…"* No further evidence of benefit to UKLI is provided.

(3) Again, the loans made were considerable: it appears that some £3,926,000 in loans and the value of properties may have been advanced; the loans were on terms set out in loan documentation set in place after the event at the request of UKLI's auditors.

(4) The loans were each unsecured.

(5) UKLII failed, having ceased to trade.

(6) At the date of the administration the joint administrators calculated the amounts outstanding to be £1,989,931; they issued demands for repayment on 9 May 2008. It was found that UKLII retained no assets and the claim was abandoned.

149. Mr Chohan's third category as summarised in paragraph 145 above was loans to companies providing care homes, of which perhaps Learning Disability Care Group Limited ("LDCG") is a prime example. As to LDCG:

(1) It appears that UKLI advanced at least £558,592 to LDCG in the period from 26 April 2004 to 1 September 2006.

(2) No loan agreement has been found. UKLI took no security for the loans.

(3) At the time of the first advances LDCG had been incorporated for 18 months.

(4) On 17 November 2004 LDCG filed dormant accounts for the period ending 31 March 2004. It appears not to have had an active trading history until the period ending 31 March 2005.

(5) Between 16 June 2004 and 8 April 2008 LDCG granted security over its assets on 9 occasions.

(6) At the date of administration the amount of its unsecured debt to UKLI was calculated by the joint administrators to be £558,592; demand for repayment of the loans was made on 9 May 2008.

(7) No substantial recoveries were made, despite legal proceedings covered by conditional fee arrangements.

150. In substance, therefore, all these unsecured loans proved (at least for the most part) irrecoverable. The Secretary of State's case is also simple: indeed, Counsel on his behalf submitted that it was self-evident that these unsecured loans to companies in which Mr Chohan was interested and never had the means to repay cannot have been in UKLI's best interests.

151. Further, in their letter of resignation as auditors of UKLI, written pursuant to section 394 Companies Act 1985 and dated 11 January 2007, Moore Stephens, Chartered Accountants, stated (amongst other things) as follows:

> *"…We have not been provided with any evidence that the company has a commercial rationale for making these loans…*
>
> *…*
>
> *As at 30 September 2006 the sums loaned had been financed by:*
>
> *i. A £5 million bank facility from Clydesdale Bank drawn down in March 2006*
>
> *ii. £2.3 million advanced by individuals for deposits in respect of sales of land plots which have not yet been completed*
>
> *iii. £1 million of unpaid trade creditors*
>
> *iv. Unpaid corporation tax liabilities of £1.5 million*
>
> *Unpaid PAYE liabilities of £324K*
>
> *…*
>
> *We also noted that pursuant to legal obligations the company has made a provision for £500,000 plus VAT for costs relating to obtaining planning permission on each site from which plots have been sold. As at 28 February 2006, the total provision stood at £7.6 million but the company does not have the funds to incur this expenditure…"*

152. These figures are not verified; and their explanation is incomplete. But they suggest that UKLI was not in a financial position to lend, and it cannot objectively have been in its interests to lend, large unsecured sums to Mr Chohan's associated companies, especially since the signs were, and events proved, that they were in no position to repay.

153. I note also that in the light of the substantial eventual deficiency, these loans were in effect undertaken at the expense and to the material detriment of investors who never had any interest (whether direct or indirect) in the borrowing companies.

154. Of course, it may be that Mr Chohan, had he attended and been cross-examined, might have demonstrated real commercial justification for the various loans; and I

have had well in mind both that the mere fact that a loan proves irrecoverable does not mean that it was improperly made and that the latitude allowed to directors in the exercise of their commercial judgment is broad.

155. As it is, however, lending unsecured, and funded by borrowings or unpaid debts, to companies associated with Mr Chohan which had not the assets or prospects of making repayment does not seem to me to fall within the generous ambit afforded to directors in making commercial decisions. Put shortly, on the evidence available, at least some of these loans, and perhaps all of them, cannot have been in the best interests of UKLI.

Dividends

156. The third limb of the Secretary of State's case is that Mr Chohan procured the payment of dividends to himself that UKLI could not afford, and which Counsel depicted as constituting a reckless misuse of company money under the colour of improper dividends declared at inadequately constituted board meetings, purportedly as interim dividends and without any proper basis or reference to reliable accounting material.

157. The particular dividends of which complaint is made were as follows:

(1) an interim dividend in respect of the period ending 31 August 2006, purportedly declared at a board meeting held on 26 April 2006 in favour of Mr Chohan in the sum of £1,000,000, payable that day; a minute of that board minute was signed by Mr Pancholi, though no directors are stated as having been present: and the minutes purport to confirm compliance with sections 263 and 270 of the Companies Act 1985;

(2) an interim dividend in respect of the period ending 31 August 2007, purportedly declared at a board meeting held on 31 October 2007 in favour of Mr Chohan in the sum of £1,003,601 payable that day; a minute of that board meeting was signed by Mr Kundi, he being the only director recorded as having been present; again the minutes purport to confirm compliance with sections 263 and 270 of the Companies Act 1985.

158. These interim dividends were declared at a time when Mr Chohan was aware, as was Mr Pancholi in April 2006 and Mr Kundi in October 2007, that the FSA had concerns over the way in which UKLI was operating and had stated that investors should be informed of their rights to compensation under section 26 FSMA. Further, on 5 April 2006, UKLI had advised the FSA that if, in accordance with section 26, it repaid customers their investments made in the context of the First Scheme, it would become insolvent. I infer (from the fact of his *de facto* or shadow directorship and his acute interest in UKLI's affairs and relationship with the FSA) that Mr Chohan was aware of this at the time of the declaration of each interim dividend.

159. In his second Affidavit, Mr Chohan was brief in his response to the Secretary of State's concerns. He stated merely that

(1) he *"was not responsible for day to day operations and…not an accounts person"*; then adding (in a sentence to my mind confirmatory of his role as, at

least, a shadow director): *"Often I would suggest a transaction and others would then implement it, setting up the loan transactions or treating payments as dividends"*;

(2) he *"needed to see a breakdown of the sums it is alleged I received as I believe I was credited with dividends which were then injected into commercial deals"*;

(3) "*the dividends that were paid were not monies that I personally received, rather they were sums that were drawn out of the business in order to be invested in related businesses. On occasions when such investments were being made I was advised that the investments should be dealt with by way of dividends. I did not deal with such matters and I did not receive those monies in lieu of remuneration."*

160. It is apparent from details (in a spread sheet) of a directors loan account operated for Mr Chohan that dividend declarations were the mechanism whereby Mr Chohan kept his loan account down and that, to this end, dividends were in fact not paid to him in cash but credited and applied in reduction of Mr Chohan's running account.

161. There are various loan account spread sheets in evidence: two sets provided to Howes Percival (as solicitors for the Secretary of State) by Ms Sara O'Neill (UKLI's primary book-keeper, who sometimes referred to herself as "Head of Group Finance" and sometimes as "Group Finance Manager") and another set provided by UKLI's joint liquidators.

162. There are inconsistencies between the spread sheet records: for example, one spread sheet provided by Ms O'Neill shows dividend credits of £1,000,000 in April 2006 but only £366,431.31 on 31 October 2006; whereas the joint liquidators' spread sheet included reference to a dividend of £1,003,601 credited on 31 October 2006, but has no entry for any dividend in April 2006. However, I understand it to be accepted now that what happened was that the £1,000,000 April 2006 dividend was indeed credited, but the October 2006 dividend declaration was reduced to £366,433 when it became apparent that this would suffice to reduce Mr Chohan's loan account sufficiently.

163. What all this shows is that dividend policy was a function of and dictated by Mr Chohan's needs, without any or any appropriate consideration by independent directors or reference to accounting material or the interests of UKLI.

164. Given the prospective liabilities of UKLI under section 26 FSMA, and its uncertain financial position and prospects, I am satisfied that these dividends cannot reasonably have been thought to be in the best interests of UKLI or indeed proper to declare and pay (even in the reduced amount in the case of the October dividend).

165. Although I am not sure that it really affects the analysis, for comprehensiveness I should perhaps record that Mr Chohan's suggestion that he injected the sums due to him by way of dividend into commercial deals is not borne out by the evidence. The loan account spread sheets, in all their versions, for the most part record personal expenditure (cleaning, car hire and repair, shopping, hotel and restaurant bills and the like). Mr Chohan seems to have used UKLI to fund his personal expenditure, using dividend "payments" to credit against the debits.

Conclusions as to loan and dividend allegations

166. The gaps and some uncertainties in the evidence have caused me some concern; the more so without the benefit of anything like the usual dialectic process to illuminate such matters which contested proceedings usually provide.

167. However, as it seems to me, a director normally owes a duty to account for monies received by him and by those connected with him; and Mr Chohan's failure to fulfil that duty by his voluntary disengagement from these proceedings should not encourage me to make inferences in his favour unless plainly appropriate.

168. In these circumstances, and on the substantially untested evidence available to me, I have concluded that the Secretary of State's allegations against Mr Chohan that he procured UKLI to make improper loans and dividends are also made out.

Is Mr Chohan "unfit to be concerned in the management of a company"?

169. The question then is whether Mr Chohan's conduct "makes him unfit to be concerned in the management of a company" (see section 6 CDDA). If it does, then the court must disqualify him: see *ibid.*

170. The test for unfitness, section 9 CDDA, and the guidance given in Schedule 1 to the CDDA in that respect, have been the subject of analysis, exploration, elaboration and refinement in a multitude of cases.

171. In my view, the following propositions may be derived from the case law:

(1) The court is required by section 9 CDDA to have particular regard to the matters mentioned in Schedule 1 to that Act;

(2) However, Schedule 1 to the CDDA is not exhaustive: the court is entitled to take into account other conduct in order to determine the question of unfitness: any misconduct of a person exercising the powers of a director may be relevant;

(3) "Unfitness" is ultimately a question of fact, or, as Dillon LJ stated in *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164, "what used to be pejoratively described in the Chancery Division as 'a jury question'": but, as the authorities demonstrate, a less pejorative and possibly more accurate description may be a "value judgment" (see *Re Grayan Building Services Ltd* [1995] Ch 241 at 255D). As such, that determination of unfitness involves a comparison with a standard of behaviour against which the conduct complained of may be measured;

(4) Accordingly, as explained by Hoffmann LJ (as he then was) in *re Grayan* at 254G:

> "The judge is deciding a question of mixed fact and law in that he is applying the standard laid down by the courts (conduct appropriate to a person fit to be a director) to the facts of the case."

(5) It being a major concern of the CDDA to raise standards and to protect those who deal with companies which have the benefit of limited liability from directors

who have in the past departed from such standards, a finding of unfitness does not depend upon a finding of lack of moral probity: the touchstone is lack of regard for and compliance with proper standards, and breaches of the rules and disciplines by which those who avail themselves of the great privileges and opportunities of limited liability must abide (see *per* Henry LJ in *Re Grayan*) ;

(6) Equally, ordinary commercial misjudgement is in itself insufficient to demonstrate unfitness (see *per* Browne-Wilkinson V.C. (as he then was) in *Re Lo-Line Electric Motors Ltd* [1988] Ch 477, 486): risks that have eventuated may in retrospect, and with the wisdom of hindsight, appear to have been taken wrongly, but the purpose of limited liability is to provide some protection from risk-taking, subject to proper standards of care and compliance with duty;

(7) As, again, Hoffmann LJ put it in *re Grayan*, the court

> "must decide whether that conduct, viewed cumulatively and taking into account any extenuating circumstances, has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies."

(8) Although the touchstone of unfitness should reflect the public interest in promoting and raising standards amongst those who manage companies with the benefit of limited liability, the test is always whether the conduct complained of makes the defendant unfit, and not whether it is more generally in the public interest that a person be disqualified: thus, for example, the question is whether the present evidence of the director's past misconduct makes him unfit, not whether the defendant is likely to behave wrongly again in the future;

(9) In each case the court must consider the director's personal responsibility: it is his personal conduct which is in issue, and it is not sufficient to assume responsibility for some departure from required standards in the management of the company from the fact of his being a director;

(10) Nevertheless, a "broad brush" is not inappropriate (see *Re Barings plc (No 5)* [1999] 1 BCLC 433, 483, approved by the Court of Appeal [2001] BCC 273, 283), and "responsibility" is not confined to direct executive responsibility for the particular misconduct, and a failure to engage in proper supervision, review or scrutiny of the activities of delegates or fellow directors may suffice (see *Re Skyward Builders plc, Official Receiver v Broad* [2002] EWHC 2786 (Ch) at para. [393]);

(11) The court must consider any allegations of misconduct both individually and in the round: *Re Copecrest, Secretary of State for Trade & Industry v McTighe (No. 2)* [1997] BCC 224 (CA).

172. Taking into account the matters mentioned in Schedule I to CDDA, and having regard to the tests above adumbrated, I consider that the conduct of Mr Chohan as above described, both in respect of the individual allegations and in the round, constituted a sufficient departure from the standards to be expected of him to make him unfit to be concerned in the management of a company.

173. In reaching that conclusion I confirm that I have taken full account of considerations that might militate against it and especially

(1) the fact that the Second Scheme was carefully devised by experienced solicitors and respected Queen's Counsel;

(2) the fact that Mr Chohan was advised to and did resign as a *de jure* director after his difficulties in the context of UKPFM;

(3) the fact that it was Mr Walter who was the Managing Director whilst Mr Chohan was not, and Mr Walter who had day to day conduct of the business during that period;

(4) Mr Chohan's insistence that, although he was *"aware that there was a Second Scheme and that it was being implemented…I was not aware of the detail of that process and I was not involved in the management of it"*;

(5) the fact that his loan account with UKLI was apparently carefully maintained, and he took care to ensure its reduction to comply with statutory prohibitions;

(6) the fact that he may have injected monies of his own into related companies to which loans were made.

174. However, in my judgment:

(1) the theory of the Second Scheme departed, perhaps inevitably, from both the practical realities and the manner of its promotion and implementation;

(2) for the reasons I have given, I consider that Mr Chohan's resignation as a *de jure* director was more a matter of form than substance: his influence remained substantially undiminished, he remained UKLI's principal directing mind, and I consider that in all probability he was well aware of the way that the Second Scheme was being promoted and implemented, and of the FSA's concerns in that regard (which he chose to downplay or ignore);

(3) Mr Chohan's loan account demonstrates that he used UKLI as a bank: the records are imperfect and in part conflicting; and UKLI was exposed both to risk and to cash flow difficulties whilst the loans remained outstanding;

(4) Further, the dividends were not justified having regard to the financial position of UKLI, were funded at the expense of other creditors (including the Crown), and were paid at the direction of Mr Chohan without any discernible regard to the interests of UKLI;

(5) Mr Chohan's suggestion that he ploughed back the amounts he received by way of dividend into commercial activities for the benefit of UKLI and its associated companies is belied by the fact that so many entries in the loan account relate to his personal expenditure.

175. In light of my conclusions a Disqualification Order is mandatory.

Period of disqualification

176. It remains, therefore, for me to determine the fitting period of disqualification, within the prescribed range of two to 15 years.

177. The Court of Appeal has provided guidance concerning the exercise of the discretion conferred on the court in two cases: *Re Sevenoaks Stationers (supra)* and *Re Westmid Packing Services Ltd, Secretary of State for Trade and Industry v Griffiths* [1998] 2 All ER 124.

178. These (and especially the latter) make clear that although disqualification is not strictly a punishment, the court is engaged in something akin to a sentencing exercise, requiring it to determine the appropriate period according to a sliding scale of culpability. With the assistance of those guidelines, the court is, however, to adopt a broad brush.

179. In this case, the Secretary of State, in suggesting an Order in the top *Sevenoaks Stationers* bracket of 11 to 15 years, has particularly emphasised the following points:

(1) the seriousness of Mr Chohan's conduct, which Mr Cunningham QC depicted as "involving criminal conduct and raising compelling concerns about his probity and integrity";

(2) the fact that Mr Chohan has already been the subject of a previous Disqualification Order;

(3) the very substantial amounts of money invested in UKLI and lost by investors;

(4) the large number of complaints received by the liquidators from members of the public about UKLI, which I need not rehearse but the flavour of which can be summarised as being that investors perceived the way that the Second Scheme was marketed to them as convincing at the time, but in retrospect thoroughly misleading and untrue;

(5) Mr Chohan's role as the principal directing mind of UKLI, his knowledge of and involvement in the promotion and implementation of the Second Scheme, and his direct responsibility for loans and dividends that could not reasonably be justified as being in the interests of UKLI;

(6) Mr Chohan's sustained efforts to disguise and deny that role;

(7) the fact that, for example, Mr Walter agreed to give a Disqualification Undertaking for a period of 10 years, and the period imposed in relation to Mr Chohan should adequately distinguish his greater culpability.

180. Against these factors, I think I should take into account that

(1) UKLI did take advice on the Second Scheme, and Mr Chohan may not have entirely understood the extent of departures from the theoretical model, nor the technicalities and subtleties of the distinctions on which the theoretical model was based and the difficulties of abiding by them in practice;

(2) these proceedings have run for a considerable period already, during which Mr Chohan has been in jeopardy (although for much of that time Mr Chohan's previous disqualification period has been running);

(3) Mr Chohan had been granted leave to act as a director of UKLI pursuant to section 17 CDDA.

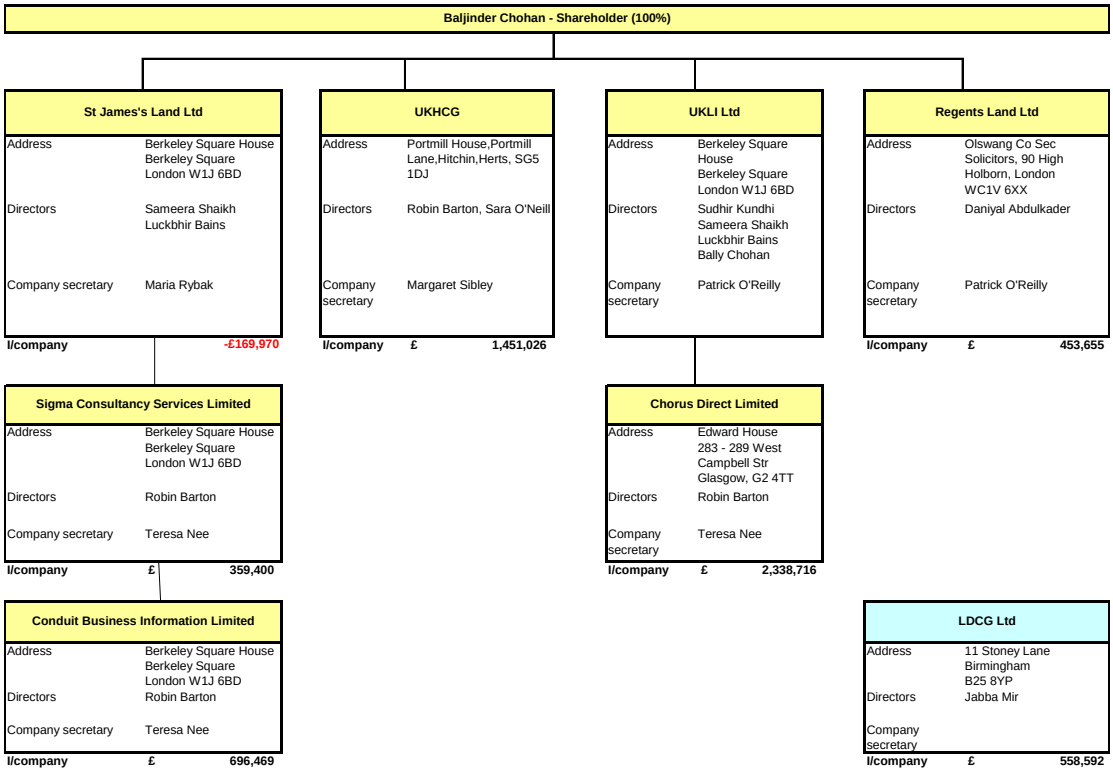
181. Taking these factors into account, and considering the matter in the round, I consider that this is a case falling within the top bracket of the three identified in *Re Sevenoaks Stationers.* In my judgment, the appropriate period of disqualification in the case of Mr Chohan is 12 years.

Form of Order

182. I invite Counsel for the Secretary of State to draw up a minute of order accordingly.

183. Any consequential issues may then be dealt with after this judgment is formally handed down.

UK 'Inter-company' Parties



International 'Inter-company' Parties