Neutral Citation Number: [2020] EWHC 1031 (Ch)

Case No: D30BS912

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BRISTOL DISTRICT REGISTRY

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

Date: 01/05/2020

Before :

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

- -

Between :

(1) Carmela De Sena	**Claimants**
(2) Meltor Developments Limited	
- and -	
(1) Joseph Notaro	**Defendants**
(2) S Notaro Group Limited	
(3) Bishop Fleming (a firm)	
(4) Davies and Partners Solicitors (a firm)	

- -
- -

John Blackmore (instructed by **Tozers LLP**) for the **Claimants**
Dov Ohrenstein (instructed by **Ashfords LLP**) for the **First and Second Defendants**
Clare Dixon and Hannah Daly (instructed by **Kennedys Law LLP**) for the **Third Defendant**
Imran Benson (instructed by **DAC Beachcroft LLP**) for the **Fourth Defendant**

Hearing dates: 5-7, 11-13, 18-21, 25-28 November 2019

- -

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.

.....

HHJ Paul Matthews :

Introduction

1. This is my judgment on the trial of a claim brought by the claimants against the defendants in relation to a corporate demerger which took place in relation to a family company, S Notaro Holdings Ltd ("Holdings" or "the company"), on 28 April 2011. The first claimant and the first defendant are siblings. Until the demerger they were both shareholders in and directors of Holdings. The first claimant held 31.25%, and the first defendant 43.75% of the shares in Holdings. The remaining 25% were held by two other siblings, Antonietta ("Netta") Notaro and Letitzia ("Tico" or "Lee") Saban, each with 12.5%. The effect of the demerger was that the first claimant gave up her shares in Holdings, and assets of Holdings or its subsidiaries were transferred to the second claimant, a company formed for the purpose, owned and controlled by the first claimant.

2. In broad terms, the claim against the first and second defendants is that the demerger, and therefore the acquisition of the first claimant's shares in Holdings was procured by undue influence of the first defendant, who also acted in breach of fiduciary duty towards her, and that the second defendant has been unjustly enriched at the expense of the first or alternatively the second claimant. The claims against the third defendant (a firm of accountants) and the fourth defendant (a firm of solicitors) are that, in relation to the demerger they acted in breach of contract (fourth defendant only), breach of fiduciary duties and of a duty of care owed to the first claimant, and in breach of a duty of care owed to the second claimant.

3. In summary, the first defendant denies undue influence and breach of fiduciary duty, and the second defendant denies any unjust enrichment of either claimant. The third and fourth defendants deny that they owed any relevant duties to the claimants, having been retained to act for Holdings in the demerger, and not for the first claimant. I will come back to the claims in more detail later.

4. The background to this matter is as follows. The shareholders' parents, Sabato and Immacolata Notaro, were Italian immigrants who settled near Bridgwater in the early 1950s. They had 10 children. The first claimant was the eldest, born in 1946. Then, in order of age, came Carolina ("Lena"), Rosa, the first defendant, Philip, Nunzio, Netta, Julie, Tina, and Tico. So there were seven girls and three boys. Sabato established a successful building and development business, incorporated in 1965 as S Notaro Ltd ("Ltd"). Nine of his ten children, including the first claimant and the first defendant, followed him into the business, although some later left. The first claimant became a shareholder in Ltd in 1968. She worked with her father for many years until he retired in 1988, when the first defendant became managing director, and she worked with him. Sabato died in 1993.

5. In 1999 Holdings was incorporated as the holding company of a group of companies, namely Ltd, and S Notaro Windows Ltd ("Windows"). Further companies were incorporated and added to the group later, namely S Notaro Developments Ltd ("Developments") (in 2007), and S Notaro Hotels Ltd ("Hotels") (in 2002). A further company S Notaro Land Ltd ("Land") was also incorporated (in 2004), but was held outside the group, although by the same shareholders and in the same proportions. As I understand it, that remains the case today. This litigation is not therefore concerned

as such with Land, although it features briefly in the story. The second defendant was incorporated as part of the demerger process.

Witnesses

6. The following witnesses were tendered for cross-examination: the first claimant, her husband Salvatore De Sena, and her son Antonio de Sena, the first defendant, a former employee of the group Prudence Morgan, David Savill and Andrew Browne of the third defendant, Thomas Brennan of the fourth defendant, and the expert witnesses Neil Gladwin and Martyn Jones (dealing with property valuation), and Geoffrey Mesher and David Butterworth (dealing with share valuation).

7. There were also before me expert reports from Mr Mesher and Mr Sat Plaha in relation to accountants' liability issues. Because of time constraints, and also in the light of reservations which I expressed at an earlier stage in the trial concerning the admissibility of these reports, at least in their entirety, I was invited merely to read and take into account the reports, rather than having their makers tendered for cross-examination.

8. I give here my impressions of all the witnesses tendered for cross-examination.

9. The first claimant was a quiet and often reticent witness, though occasionally emotional in relation to certain matters. She is obviously a very private person. Many of her private feelings were recorded in a diary kept contemporaneously. Although she was born in Italy, she came to this country when she was very young, and therefore speaks English perfectly, with a Bridgwater accent. Notwithstanding this litigation, and the earlier litigation between siblings, she was very polite throughout, and displayed huge loyalty to her family and especially to her parents. She is seven years older than the first defendant and used to look after him when they were younger. It was evident to me that she still found it difficult to criticise him publicly.

10. Although she was clearly highly competent for the administrative role in the group which she took on over many years, including acting as company secretary as well as a director, her approach to the questions she was asked was often rather literal, and she did not always follow complex questions very easily. She sought recognition and respect for her position, and displayed a certain insecurity in some aspects of her evidence. It was clear that she did not like to stand out, feel isolated or be seen as the instigator of difficulties. She accepted that she could be oversensitive. Nonetheless, she gave her evidence in a transparent and straightforward way, and I have no doubt that she was telling me the truth as she believed it to be. But I do think that in certain respects she has convinced herself that she was in the right, and this has influenced her evidence. As will be seen, I do not accept important parts of it, especially parts which seek to draw inferences from primary fact.

11. Her husband, Salvatore De Sena, came to England in his late teens, and Italian is clearly his first language. But his English was completely fluent and I do not think he had any difficulty in expressing his ideas in response to the questions put to him. He was understandably protective of his wife, and displayed a certain animosity towards the first defendant. Nevertheless, he was a straightforward witness and I have no doubt that he was trying to assist the court. However, he was not much involved in the

critical events with which I am concerned, and therefore his evidence in most aspects is rather marginal.

12. Their son, Antonio de Sena, who worked in the part of the business concerned with windows, was supportive of his mother, but gave his evidence in a straightforward and transparent way. I have no doubt that he was telling me the truth in what he said.

13. Prudence Morgan was a very quick-witted, but precise and exact witness. She had been a legal secretary in a previous career, and it showed. She had obviously been a very efficient employee at the group. She gave her evidence in a transparent and honest way, but also with a touch of humour. I accept her evidence without any reservation.

14. The first defendant was a softly spoken witness who thought quickly and gave careful answers. Like his sister, he too had a Bridgwater accent. At the beginning of his evidence he asked for a lot of questions to be repeated because of his hearing difficulty. I noted that this appeared to wear off as his evidence went on. He gave the impression of being a shrewd negotiator and a businessman who was prepared to take risks in order to achieve a better result. When he was being cross-examined on some difficult issues, I noted that his body language sometimes became more aggressive, even though his answers were still softly spoken. Overall, I formed the view that his somewhat subdued evidence in court was probably not how he behaved in his day-to-day business. I think that, at least most of the time, he was telling me the truth as he saw it, though in certain respects I think he has persuaded himself that he was in the right, and that therefore the facts must support him. I have no doubt he could be tough when he thought it in his interests to be so. I treat his evidence with some caution.

15. David Savill was a clear, transparent and obviously honest witness. I accept his evidence without reservation.

16. Andrew Browne was a knowledgeable and evidently experienced accountant, but not necessarily very technical. He gave his evidence openly and transparently, and was clearly telling the truth.

17. Thomas Brennan was a quietly spoken witness, with some hearing problems. His evidence was exact and clear and given in a transparently honest way. I have no reservations about accepting his evidence.

18. Neil Gladwin was a very professional witness, well spoken, clearly telling the truth and trying to help the court. However, somewhat unfortunately, he had originally been part of the team advising the first claimant, and, no doubt unconsciously, this may have affected his evidence. In addition, the solicitors' letter of instruction to him was far from neutral in its presentation of the matter. This may also have affected his evidence. He certainly commented in his report on matters beyond his (otherwise undoubted) expertise.

19. Martyn Jones was another very professional witness, and once again transparently honest. He was a master of the facts of the case and the documents in it, and I felt I could really rely on his evidence. As between his evidence and that of Mr Gladwin, where they differed, I preferred that of Mr Jones.

20. Geoffrey Mesher seemed to me to be a very experienced expert witness, with a great deal to say. I am sure that he was trying to assist the court and on the whole I thought he did so. But his actual professional experience as a practising accountant was rather more narrow than I would have liked for an expert witness.

21. David Butterworth was an impressive witness, clear and straightforward, and a master of his subject. I felt I could rely on his evidence. Where his evidence differed from that of Mr Mesher, I preferred that of Mr Butterworth.

22. I mention here, because it is relevant to something which I discuss later on, that neither Netta nor Letitzia gave evidence, although they are shareholders and directors (in fact only one was a director during the material time). Nor did Chris Biggs, who became the financial controller of the group, give evidence. As will be seen, all three of these played a part in the story of this case.

Factfinding

23. For the benefit of the parties, and any others who are interested, I should say something about how English judges in civil cases decide cases of this kind. First of all, judges are not superhuman, and do not possess supernatural powers that enable them to divine when someone is not telling the truth. Instead they look carefully at all the oral and written material presented, with the benefit of forensic analysis (including cross-examination of oral witnesses), and the arguments made to them, and then make up their minds. But there are certain important procedural rules which govern their decision-making, some of which I shall briefly mention here, because lay readers of this judgment may not be aware of them.

The burden of proof

24. The first is the question of the burden of proof. Where there is an issue in dispute between the parties in a civil case, one party or the other will bear the burden of proving it. This is however subject to some important nuances which I shall mention later. In general, the person who asserts something bears the burden of proving it. The significance of who bears the burden of proof in civil litigation is this. If the person who bears the burden of proof of a particular matter satisfies the court, after considering the material that has been placed before the court, that something happened, then, for the purposes of deciding the case, it *did* happen. But if that person does *not* so satisfy the court, then for those purposes it did *not* happen.

The standard of proof

25. Secondly, the standard of proof in a civil case is very different from that in a criminal case. In a civil case it is merely *the balance of probabilities*. This means that, if the judge considers that a thing is more likely to have happened than not, then for the purposes of the decision it *did* happen. If on the other hand the judge considers that the likelihood of a thing's having happened does not exceed 50%, then for the purposes of the decision it did not happen. It is not necessary for the court to go further than this. There is certainly no need for any *scientific* certainty, such as (say) medical experts might be used to.

Failure to call evidence

26. Thirdly, where a party could give or call relevant evidence on an important point without apparent difficulty, a failure to do so may in some circumstances entitle the Court to draw an inference adverse to that party, sufficient to strengthen evidence adduced by the other party or weaken evidence given by the party so failing. Such a suggestion has been made in the present case. I deal with it in more detail later on.

Reasons for judgment

27. Fourthly, a court must give reasons for its decisions. That is what I am doing now. But judges are not obliged to deal in their judgments with every single point that is argued, or every piece of evidence tendered. Moreover, it must be borne in mind that specific findings of fact by a judge are inherently an incomplete statement of the impression which was made upon that judge by the primary evidence. Expressed findings are always surrounded by a penumbra of imprecision which may still play an important part in the judge's overall evaluation.

Overall

28. So decisions made by civil judges are not necessarily the objective truth of the matter. Instead, they are *the judge's own assessment* of the *most likely facts* based on the *materials which the parties have chosen* to place before the court, taking into account to some extent also what the court considers that they should have been able to put before the court *but chose not to*. And, whilst judges give their reasons for their decisions, they cannot and do not explain every little detail or respond to every point made.

29. In cases where witnesses give evidence as to what happened based on their memories, which may be faulty, civil judges nowadays often prefer to rely on the documents in the case, as being more objective. In *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [16]-[20], an experienced commercial judge, Leggatt J (as he then was), commented on modern research into the nature of memory and the unreliability of eyewitness evidence. In my judgment, the problems of memory over the years mean that the documentary evidence available to the court becomes even more important.

30. Indeed, in the *Gestmin* case, Leggatt J said this (at [22]):

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

31. This approach has been followed in many subsequent cases. Of course, its main application will be in commercial cases (such as *Gestmin* was), because in such cases it is likely that the bulk of the relevant facts and matters are recorded or referred to in written documents. In domestic cases, where typically there are fewer documents, it is less obviously applicable. And, in any event, even where it does apply, it does not mean that a judge should ignore the oral evidence, or even devalue it. In the extract above, Leggatt J made express reference to the usefulness of oral evidence.

32. The present is a commercial case with significant domestic or family overtones, but in any event there are sufficient written records, letters, emails and so on (partly because of the involvement of professional persons, such as lawyers and accountants) as to make the *Gestmin* approach relevant to this case. And the oral evidence stretches back over more than forty years. I will therefore give appropriate weight to both the documentary evidence and the oral evidence, bearing in mind both the fallibility of memory and the relative objectivity of the written evidence, as well as the non-degradation of such evidence over time.

Claims and defences as pleaded

As against the first defendant

33. Given the multiplicity of parties, and the complexity of the various allegations, I will now put a little more flesh on the bones of the claims and defences. In summary, the first claimant pleads two main causes of action against the first defendant. One is undue influence. Indeed, as Mr Blackmore said in closing, this is the primary head of claim in this case.

34. **Undue influence:** This head rests on allegations that, after the death of Sabato in December 1993, the first defendant became increasingly controlling in his conduct towards other family members. In 2003, he commenced a campaign to expel the first claimant from Holdings. In May 2007, as part of this campaign, the first defendant proposed that the Notaro group be demerged and the assets divided between the then four remaining shareholders. However, despite meetings for the purpose, the various parties could not agree on demerger terms, and the transaction did not then proceed.

35. The first claimant then pleads that the first defendant in May 2010 told the first claimant that she would have to leave Holdings, and instructed the third defendant "to prepare a list of assets which purported to represent the value of her shareholding in" Holdings. The proposed transaction was also described as a demerger, but under which the first claimant alone would receive assets from the group and give up her shares, thereby giving control to the first defendant. The first claimant further alleges that on 15 October 2010 she had two meetings with the first defendant, at which the first defendant tried to convince the first claimant to agree to the demerger. The first defendant "continued in the meeting to pressure her and eventually she agreed to sell her shares".

36. The pleading sets out allegations of a number of actions on the part of the first defendant, said to evidence that "he had acquired ascendancy over her which he used for his benefit". Particulars are then given of various ways in which he allegedly exercised influence over the first claimant.

37. These particulars include: (i) determining "what assets [the first claimant] should receive in return for her shares; (ii) determining the values of the assets to be allocated to the first claimant and those retained in the group; (iii) using the third defendant as the group's accountants to persuade the first claimant "that she was receiving a fair value for her shareholding even though no independent valuations have been obtained and unbeknownst to [her] a 15% minority discount had been applied to her shareholding"; (iv) using the fourth defendant as the group's solicitors to prepare the demerger documentation in conjunction with the third defendant; (v) because the third and the fourth defendants were acting for the first defendant and the group in the demerger "it was unconscionable that [the first claimant] should not have had independent legal, accounting and valuation advice"; (vi) taking advantage of his knowledge that the first claimant "was carrying the main burden of the family litigation [and] was under a great deal of emotional pressure" in order "to press home the transfer of her shares"; (vii) instructing the group's "solicitors and accountants on terms of the demerger which gave rise to [the first claimant] receiving less than she was entitled to for her shares; (viii) giving "false information to [the third defendant] for the purpose of obtaining clearance from HMRC … to the demerger"; (ix) making a false statement to a shareholders' meeting of the group on 15 December 2010, *ie* that the first claimant had agreed to the proposed demerger from the group, "with a view to attempting to compromise [her] and further his own aims"; (x) at a further shareholders' meeting of the group on 8 February 2011 attempting further to compromise the first claimant "by causing to have recorded" a minute in which he asked everyone present "if they had any objections to the demerger going ahead. No one had any objections…", thereby implying that the first claimant "was in agreement when he well knew that she was not and was such as to intimidate and compromise [her] so that she would continue to be compliant regarding the sale of her shares and thereby ensuring that there was no record of his unlawful conduct towards [her]"; (xi) "arbitrarily [determining] at short notice the date of the completion of the demerger, thereby depriving [the first claimant] of any opportunity to challenge its terms, consider the documentation, or take independent legal, accountancy and valuation advice."

38. The first claimant further pleads that, on any sale of her shares in Holdings, she was entitled to assets equivalent to the value of her shares, because it was a demerger of assets between shareholders, and also because Holdings was a quasi-partnership. There is also an allegation that the first defendant's acquisition of the first claimant's shares in Holdings was unlawful and at an undervalue.

39. As to the questions of value, and undervalue, the first claimant pleads these on two different bases. The first is based on ascribed underlying asset values used for the purposes of the merger. The second is based on a valuation report in respect of the "actual market value of the shares" in Holdings. In relation to the first, the first claimant pleads that the demerger documentation drawn up by the third defendant on the first defendant's instructions valued Holdings at at least £23 million. She further says that, as a result of the demerger, she received shares in the second claimant with an ascribed underlying asset value of £4,999,492, whereas 31.25% of the purported £23 million value of Holdings would have amounted to £7,187,500. In relation to the second method of valuation, she pleads that the value of 100% of the shares in Holdings was in the range £29,038,000 to £31,623,000, and that therefore 31.25% of such shares would have a value of £9,075,000 to £9,882,000. On this basis the

undervalue on the first claimant's shares would lie in the range £3,406,000 to £4,238,000.

40. Finally, it is pleaded that the consequences of the exercise by the first defendant of undue influence over the first claimant were that the first defendant obtained control of Holdings, including the development land and land bank, whereas the first claimant was "forced to take assets she did not want and which were significantly less valuable than the development land and land bank". In addition, the nature of the assets received by the claimants resulted in the second claimant having a status fiscally disadvantageous to the claimant. Moreover, she transferred her shares in Holdings at an undervalue. The first claimant accordingly seeks the setting aside of the sale of her shares in Holdings and of the demerger, on the grounds of the first defendant's undue influence.

41. **Breach of fiduciary duty:** In addition to the claim based on undue influence, the first claimant also puts forward a case against the first defendant based on breach of fiduciary duty. It is alleged that the first defendant, as the first claimant's brother and as the effective controller of Holdings, owed fiduciary obligations to her in her capacity as a shareholder, including a duty of loyalty and good faith and an obligation to make full disclosure to her in all business dealings with her.

42. It is alleged that he breached those fiduciary obligations in obtaining the transfer of her shares and her removal as a director and employee, in (in summary form) (i) failing to disclose the true value of the assets of the group and imposing his own values; (ii) promoting his own interests at the expense of those of the first claimant as a shareholder in Holdings; (iii) seeking to remove the first claimant as a director of Holdings and to obtain her shares at an undervalue; (iv) forcing the first claimant to take assets which she did not want and which he knew were significantly less valuable than the land bank and development land; (v) diminishing the role of the first claimant as a director and intimidating her by bullying, shouting, threats and pressure; (vi) instructing the third defendant to provide false information to HMRC to obtain clearance for the demerger; (vii) instructing the accountants and solicitors of Holdings to act against the first claimant's interests by preparing demerger documentation by which he obtained her shares at an undervalue; (viii) failing to disclose to the first claimant that she had not received the underlying asset value of her shares; (ix) using the third and fourth defendants to further his own interests and to work against the interests of the first claimant.

43. It is alleged that the consequences of the breach by the first defendant of his fiduciary duty to the first claimant is the same as the consequences of the exercise by him of undue influence over the first claimant, and that the first claimant is accordingly entitled to damages for that breach of fiduciary duty, or alternatively an account of profits.

44. I conclude this section by making clear that the claims made in the Re-Amended Particulars of Claim against the first defendant do not include any claim in duress at common law, or in misrepresentation or conspiracy. In addition, there is no *formal* claim to set aside the demerger as an unconscionable transaction with a vulnerable person. That said, the Re-Amended Particulars of Claim allege (at para 3.1) that the first defendant's 'campaign' against the first claimant from 2004 made her "more vulnerable to pressure", and para 3.8 alleges that at a meeting in 2010 the first

claimant told the first defendant that "her doctor had advised her that she was not well enough to make important decisions".

As against the second defendant

45. The unjust enrichment claims described here were stated by Mr Blackmore to be consequential on the substantive claims against the first defendant.

46. **First claimant:** The first claimant's claim against the second defendant is that it benefitted from the transfer of the first claimant's shareholding in Holdings at an undervalue, in that it received additional assets of £6.7 million. This enrichment was caused by the first defendant's exercise of undue influence over the first claimant, which was unjust, and the first claimant seeks restitution of assets totalling £6.7 million from the second defendant.

47. **Second claimant:** The claim of the second claimant is a further or alternative claim based on the alleged unjust enrichment of the second defendant, on the basis that the additional assets totalling £6.7 million should have gone to the second claimant. This enrichment is alleged to have been unjust on the same basis as alleged in relation to the first claimant, and the second claimant seeks restitution from the second defendant similarly.

As against the third defendant

48. The first claimant makes claims against the third defendant based on two causes of action, breach of fiduciary duty and negligence. The second claimant makes a further or alternative claim against the third defendant based on negligence. By way of background, since 2004 the third defendant had acted for the group and the relevant partner, David Savill (who had moved to the third defendant in 2004), had come from the group's previous accountants, and continued to work in particular with the first claimant as administrator of the group.

49. **Breach of fiduciary duty:** It is alleged that a fiduciary relationship of trust and confidence had grown up between the first claimant and the third defendant. It is said that, during the discussions on the demerger proposal in 2007 David Savill met the shareholders and advised them on issues relating to the value and apportionment of assets in the demerger. In relation to the 2010 demerger proposal, it is alleged that David Savill was asked to advise on the fiscal consequences of the transaction, and that he advised the first claimant on her apportionment of assets on 4 and 17 November 2010. A written proposal was prepared by another partner in the third defendant, Andrew Browne in February 2011, who sent a letter to HMRC seeking tax clearance for the demerger. This proposal was considered at a meeting attended by the first claimant on 10 March 2011. In April 2011 Mr Browne produced a further proposal on the basis that the original demerger proposal had been rejected by the shareholders. The third defendant prepared a further clearance letter which was sent to HMRC in April 2011. The relevant documentation to give effect to the demerger was prepared by the third defendant together with input from the fourth defendant.

50. The first claimant alleges that the third defendant's conduct, and in particular advising the first claimant on the value of her shareholding, gave rise to a fiduciary relationship of trust and confidence between the first claimant and the third defendant,

requiring the third defendant act in good faith in advising both the first claimant and the first defendant, in the interests of both of them and not with the intention of furthering the interests of one to the prejudice of the other, or alternatively a duty for the third defendant to advise the first claimant that it had a conflict of interest and that the first claimant should take independent accounting, legal and valuation advice before going forward with a demerger.

51. It is alleged that the third defendant knew that the sale was at an undervalue, and that the third defendant, in breach of fiduciary duty owed to the first claimant either failed to act in good faith towards the first claimant (by favouring the interests of the first defendant to her prejudice) or alternatively failed to advise her that it had a conflict of interest and that she should therefore take independent advice before going forward with the transaction. She alleges that as a consequence of that breach of fiduciary duty she has received assets worth less than the value of her shareholding in Holdings.

52. **Negligence (first claimant):** The second claim against the third defendant is that the third defendant owed a duty of care to the first claimant to act with the skill and care to be expected of a reasonably competent firm of accountants in advising her in respect of the sale of her shares in Holdings. This duty is based on both the background relationship of trust and confidence between David Savill and the first claimant and the assumption of responsibility by the third defendant to advise the first claimant on the sale of her shares. It is pleaded that the first claimant relied on the advice of the third defendant both as to the value of assets which she ought to receive on the sale and the method by which the transaction was to be facilitated by entering into the transaction on 28 April 2011.

53. It is then pleaded that the third defendant was negligent in (i) failing to advise the first claimant that there should be an independent valuation of the assets of the group; (ii) failing to advise her that on any demerger she was entitled to receive assets equating the value of her shares; (iii) failing to ensure that she received a fair value for her shares; (iv) failing to advise her of the terms of the clearance letters written to HMRC; (v) preparing a demerger proposal giving her less than she was entitled to for her shares; (vi) facilitating a reduction in the value of her shares by a second capital reduction in the second claimant; (vii) applying a 15% minority discount to her shares without justification, explanation or disclosure to her.

54. The first claimant claims to have suffered loss and damage as a result of the alleged negligence of the third defendant. This is calculated on two different bases, as already referred to above. Based on the ascribed asset values used for the purposes of the demerger it is stated to amount to the sum of £1,718,008. Based on what are said to be actual share values in 2011 it is stated to be in the range £3.406 million to £4.238 million.

55. **Negligence (second claimant):** The claim of the second claimant in negligence involves the assertion of a duty of care owed by the third defendant to the second claimant to act with the skill and care to be expected of a reasonably competent firm of accountants in advising it on the transfer and receipt of assets under the demerger transaction. The demerger involved the acquisition of the share capital of Holdings, splitting the shares in the second claimant into A and B ordinary shares, and cancelling the B shares, so that there was a transfer of the Holdings shares by the

second claimant to the shareholders of the second defendant (I deal with this in more detail later). It is alleged that the second claimant relied on the advice of the third defendant as to the transfer of the Holdings shares.

56. It is further alleged that the third defendant was negligent and in breach of its duty of care to the second claimant, in that it (i) knew that the first claimant was transferring her shares in Holdings at an undervalue; (ii) knew that the corresponding transfer of the shareholding of Holdings represented assets to which the second defendant was not entitled; and (iii) failed to advise the second claimant that it should only transfer to the second defendant the shares in Holdings which represented the assets to which the B shareholders were lawfully entitled. The second claimant asserts that it has suffered loss and damage as a consequence of this negligence, in transferring to the second defendant to the shares of Holdings, the underlying market value of the assets of which were £6.7 million greater that the B shareholders of the second claimant were lawfully entitled to.

As against the fourth defendant

57. As against the fourth defendant, the claimants make claims which are similar in structure to those against the third defendant though differing factually. In addition, there is an allegation of a personal retainer of the fourth defendant by the first claimant in January 2011. So the first claimant makes claims in breach of contract, breach of fiduciary duty and negligence, and the second claimant makes a claim in negligence only. The background allegations begin with the retainer by the first claimant of Mr Brennan, a partner in the fourth defendant, in June 2000 to advise her in relation to her allegations of the first defendant's unlawful conduct towards her. In the course of that retainer he was told that in 1996 the first claimant had retained Bevan Ashford, solicitors, to advise her on remedies against the first defendant in relation to bullying and intimidating conduct towards her. Later in 2000, Mr Brennan was retained by the group, the first claimant and the first defendant to advise on Philip Notaro's departure from the business. In 2007 he was retained by Holdings and its shareholders, and in 2008 he was retained by the first claimant and the first defendant as the executors of their mother's will in a claim brought against them by their brother Nunzio Notaro. In fact the claim was discontinued shortly before it was due to come to trial.

58. It is further alleged that in March 2011 the fourth defendant, by Mr Brennan, was instructed to advise the shareholders of Holdings on a demerger, and that at that stage the fourth defendant would have known from its historical relationship with the parties that the first claimant was vulnerable and had been the subject of intimidatory conduct by the first defendant, who wanted to remove her as a shareholder and director of Holdings. It would also have known that the first defendant wanted to retain Holdings and its development land and land bank, whereas the first claimant had no wish to sell her shares in Holdings, and there was a conflict of interest between them.

59. The case then is that on 10 March 2011 Mr Brennan and Mr Browne of the third defendant met the first claimant and the first defendant to consider the demerger proposal which Mr Browne had put forward. But this was rejected, and on 8 April 2011 Mr Browne produced a revised proposal, which resulted in the fourth defendant being instructed to prepare demerger documentation based on that revised proposal.

The documentation prepared ascribed a value of £23 million to Holdings, required the incorporation of the second claimant and the second defendant, and the passing of a special resolution by the second claimant for the reduction of its capital.

60. **Breach of contract:** There is no specific pleading of breach of contract. Yet the allegation of a personal retainer by the first claimant (amongst others) of the fourth defendant seems to suggest such a claim. It may be that the allegation is used simply to found a fiduciary duty (dealt with below). But the rule is that, with a few irrelevant exceptions, parties plead facts and not law (CPR rules 16.4, 16.5). The court should deal with whatever legal causes of action are put forward on the basis of the factual allegations.

61. **Breach of fiduciary duty:** On the basis of the historical retainers of the fourth defendant in 2000, 2007 and 2008, and the further retainer in March 2011, the first claimant says that a fiduciary duty of trust and confidence arose between her and the fourth defendant, requiring it to act in good faith in advising both the first claimant and the first defendant, in the interests of both of them and not with the intention of furthering the interests of one to the prejudice of the other, or alternatively a duty for the fourth defendant to advise the first claimant that it had a conflict of interest and that the first claimant should take independent accounting, legal and valuation advice.

62. The allegation that the first claimant parted with her shares at an undervalue is repeated. It is further alleged that the fourth defendant knew that the sale was at an undervalue because it had prepared the documentation which facilitated this transaction, including the agreement dated 28 April 2011, the written resolutions by the first claimant as director of the second claimant dated the same day, the minutes of a board meeting of the directors of the second claimant held the same day, the resolutions at a consequential extraordinary general meeting of the second claimant, and the minutes of a further board meeting held the same day (at which a second capital reduction was resolved to take effect).

63. It is alleged that the fourth defendant was in breach of its fiduciary duty to the first claimant, because it either failed to act in good faith towards the first claimant (by favouring the interests of the first defendant and the other shareholders to her prejudice) or alternatively failed to advise her that it had a conflict of interest and that she should therefore take independent advice before going forward with the transaction. She alleges that as a consequence of that breach of fiduciary duty she has received assets worth less than the value of her shareholding in Holdings.

64. **Negligence (first claimant):** The second claim against the fourth defendant is that the fourth defendant owed a duty of care to the first claimant to act with the skill and care to be expected of a reasonably competent firm of solicitors in advising her in respect of the sale of her shares in Holdings. This duty is based on both the background relationship of trust and confidence between Mr Brennan and the first claimant, and the assumption of responsibility by the fourth defendant to advise the first claimant on the sale of her shares.

65. It is then pleaded that the fourth defendant was negligent in (i) failing to advise the first claimant that on any sale of her shares she was entitled to assets equating to the value of her shares; (ii) failing to advise her that her shares were being sold at an undervalue; (iii) failing to advise her that the fourth defendant had a conflict of

interest and that she should have independent legal, accounting and valuation advice before selling her shares; (iv) failing to advise her of the purpose of the second capital reduction; (v) failing to advise her at all on the terms of the demerger; (vi) (this sub-paragraph appears to add nothing to (iii)); (vii) preparing the documentation for the demerger proposal facilitating the reduction in value of her shareholding by the second capital reduction in the second claimant.

66. The first claimant claims to have suffered loss and damage as a result of the alleged negligence of the fourth defendant. Unlike for the third defendant, this is calculated on one basis only. Based on what are said to be those actual share values in 2011 it is stated to be in the range £3.406 million to £4.238 million.

67. **Negligence (second claimant):** The claim of the second claimant in negligence against the fourth defendant involves the assertion of a duty of care owed by that defendant to the second claimant to act with that degree of skill and care to be expected of a reasonably competent firm of solicitors in advising it on the transfer and receipt of assets under the demerger transaction. There is then a similar pleading as to the structure of the demerger as is put in the claim of the second claimant against the third defendant, and then it is alleged that the second claimant relied on the advice of the third defendant as to the transfer of the holding shares.

68. It is further alleged that the fourth defendant was negligent and in breach of its duty of care to the second claimant, in that it (i) knew that the first claimant was transferring her shares in Holdings at an undervalue; (ii) knew that the corresponding transfer of the shareholding of Holdings represented assets to which the second defendant was not entitled; and (iii) failed to advise the second claimant that it should only transfer to the second defendant the assets to which the A shareholders in the second claimant were lawfully entitled. The second claimant asserts that it has suffered loss and damage as a consequence of this negligence, in transferring to the second defendant the shares of Holdings, the underlying market value of the assets of which were £6.7 million greater than the A shareholders of the second claimant were lawfully entitled to.

Defences of the first and second defendants

69. **General:** In substance, the first and second defendants deny all the claims against them. They say there was no quasi partnership, there was no intimidatory or bullying conduct by the first defendant, there was no campaign to expel the first claimant from the business, the first defendant had no significant influence over the first claimant and no undue influence, there was no coercion and no duress. The first claimant and the first defendant were simply negotiating a commercial transaction whereby in effect the first claimant was selling her shares to the second defendant via a demerger. The first claimant was always free to obtain her own valuations if she thought this necessary.

70. **No *restitutio in integrum*:** In addition, the first and second defendants say that any claim to set aside the demerger is barred by the impossibility of granting *restitutio in integrum* and/or by laches, and also that the claimants would have to be willing to return the rental income accrued since April 2011 (amounting to some £1.6 million)

71. **No fiduciary duty, and no unjust enrichment:** The claims of breach of fiduciary duty are also denied. It is submitted that there was no relevant fiduciary duty, and in particular that the first defendant had no obligation to disclose to the first claimant the "true value" of the assets of the group. Similarly, the claims of unjust enrichment against the second defendant are denied on the basis that there was no enrichment, but if there was any it was neither unjust nor the result of any alleged undue influence but simply the result of a freely negotiated agreement.

Defence of the third defendant

72. The third defendant says it was retained by the group to effect the demerger, and accordingly denies that it owed any personal obligations to the first claimant. But if it did owe such obligations it says it was not in breach of them, because it did not determine the value of the assets transferred to the claimants, and its role was to facilitate a tax efficient demerger. But it also submits that, in any event, the first claimant has not received less for her shareholding than she should have done.

Defence of the fourth defendant

73. The fourth defendant denies knowledge of the course of conduct which the first claimant alleges was carried out against her by the first defendant. It knew that the family sometimes had difficult relations between its members, but also says that the first claimant was a shrewd businesswoman with considerable life experience, and did not think that her will was overborne by the first defendant. The fourth defendant's role in this transaction was to act only as solicitors to the companies. It had no role in negotiating, structuring or agreeing the heads of terms. Moreover, the third defendant was the lead adviser. The fourth defendant accepts that it offered technical advice on legal matters, but says that its role was to document and implement the agreement already reached between the principals. It does not admit that there was a sale at an undervalue. Lastly, it says that the first claimant knew that the fourth defendant acted for the companies only, and had every opportunity to seek independent advice. No reminder of this by the fourth defendant would have led to different actions on her part.

Claims as pressed at trial

74. At the trial, Mr Blackmore on behalf the claimants made clear that there was no argument in this case that there had been an unconscionable bargain which ought to be set aside: *cf Hart v O'Connor* [1985] AC 1000, 1023-24. Nor was there any argument that any misrepresentation by the first or second defendant had generated any fiduciary obligation owed to the claimants. The primary claim was the undue influence claim. Mr Blackmore accepted that undue influence was not to be presumed in this case, but had to be proved. And he also accepted that, if it could be shown that the first claimant had disposed of her shares at an undervalue, that in itself would not demonstrate undue influence. On the other hand, Mr Blackmore said that the court should draw an inference adverse to the first and second defendants because they had failed to call Mr Biggs or the other shareholders in Holdings to give evidence (I deal with this in the next section).

75. So far as concerned the claim based on fiduciary obligations owed to the first claimant, Mr Blackmore said that these fiduciary obligations arose because the

company was in the nature of a quasi partnership. Alternatively, they arose out of a special relationship on the facts between the first defendant as a director of, and the first claimant as a shareholder in, Holdings: see *eg Peskin v Anderson* [2001] 1 BCLC 372, CA (which I consider below).

76. In relation to the claims in unjust enrichment, Mr Blackmore identified the unjust factor as a failure to make disclosure to the first claimant when there was an obligation to disclose, and also the manipulation of property values which was alleged.

77. A point was raised at trial on behalf of the first and second defendants that the relief being sought by the claimants was to unwind the demerger, although the other shareholders in Holdings had not been joined to the proceedings, and therefore the relief sought could not be granted. Mr Blackmore maintained that in the circumstances that the company itself defended the claimants' claims, the company must have consulted its shareholders, and they must have agreed to stand behind the company. Accordingly, there was a kind of issue estoppel which bound the shareholders, without their needing to be joined (I deal with this in more detail later).

78. In relation to the claim against the third defendant, Mr Blackmore made clear that he relied on the series of meetings in which the first claimant and the third defendant had participated, between November 2010 and March 2011. Mr Blackmore accepted that there could be no duty owed by the third defendant to the claimants based on any events which took place before November 2010.

79. In relation to the claim against the fourth defendant Mr Blackmore maintained that the fourth defendant was retained by the first claimant personally as at January 2011. Moreover, he argued, the retainer was to advise, and was not merely for execution only.

Inferences from (lack of) evidence

80. In his closing submission, Mr Blackmore said it was "startling" that neither Netta nor Letitzia, nor Chris Biggs had been called as a witness to give evidence, although they were engaged in the events which led up to the demerger. In para 2.11 of his closing submissions he said:

> "The only evidence being put forward in response is therefore that of [the first defendant]; clearly the lack of corroborative evidence undermines his case."

81. Mr Blackmore did not, however, cite any authority in support of that proposition. But, before I can find the facts in this case, I must first consider how far his proposition holds good. So I have looked at the authorities for myself. In *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, CA, Brooke LJ (with whom Roch and Aldous LJJ agreed) said:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

82. This statement has been quoted with approval and followed in later cases, including *Jaffray v Society of Lloyds* [2002] EWCA Civ 1101, [406]-[407], and *Thames Valley Housing Association v Elegant Homes (Guernsey) Ltd* [2011] EWHC 1288 (Ch), [19]. But, as Sir Ernest Ryder SPT (with whom Sales LJ agreed) made clear in *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882:

"30. … *Wisniewski* is not authority for the proposition that there is an obligation to draw an adverse inference where the four principles are engaged. As the first principle adequately makes plain, there is a discretion *ie* 'the court is *entitled* to draw adverse inferences'." [Emphasis added]

83. More recently, in *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm), Cockerill J, dealing with the same point, said:

"154. In my judgment the point can be dealt with relatively briefly thus:

i) This evidential 'rule' is, as I have indicated above, a fairly narrow one. As I have noted previously ([2018] EWHC 1768 (Comm) at [115]), the drawing of such inferences is not something to be lightly undertaken.

ii) Where a party relies on it, it is necessary for it to set out clearly (i) the point on which the inference is sought (ii) the reason why it is said that the 'missing' witness would have material evidence to give on that issue and (iii) why it is said that the party seeking to have the inference drawn has itself adduced relevant evidence on that issue.

iii) The Court then has a discretion and will exercise it not just in the light of those principles, but also in the light of:

a) the overriding objective; and

b) an understanding that it arises against the background of an evidential world which shifts - both as to burden and as to the development of the case - during trial.

[…]"

84. Mr Blackmore could obviously not have expressly followed the advice of Cockerill J, because her judgment was only handed down in April this year, whereas the trial in this matter took place in November last year. Nevertheless the point is an obvious one. I do not have the benefit of any suggestion by Mr Blackmore as to what point or points in the first defendant's evidence are undermined by the absence of other evidence from otherwise relevant witnesses, and the reasons why the particular witnesses would have had *material* evidence to give on those points. There is a tendency, in modern litigation, to call too many witnesses to give live evidence, even though some of them have little or nothing to add to the evidence of the others. I would not wish to encourage this tendency by fear that, if the parties do not do so, an adverse inference will be drawn against them.

85. In the present case, I bear in mind the following. It is not clear to me on what factual points in the case against the first defendant the first claimant seeks to rely on any such adverse inference. There are a great many factual points in this case, and it cannot reasonably be supposed that the absent witnesses mentioned are relevant to all of them. Nor is it clear to me on which of the points that Mr Blackmore would wish to concentrate each of the absent witnesses could give material evidence. In my judgment, it is simply not enough to say that "the lack of corroborative evidence undermines [the first defendant's] case." I am of course hampered by the lack of any explanation given for the silence of the absent witnesses.

86. It seems to me that there is a range of possibilities. At one end of the spectrum is the possibility that these witnesses consider that the first defendant is telling lies and they will not support his case. At the other is the possibility that they consider that the first claimant's case is hopeless, and there is no need for them to support the first defendant's case. In between the two ends are other possibilities, including a wish not to get involved in the breakdown of a relationship between two siblings and (in the case of Chris Biggs) a wish not to muddy the waters of the case involving his former employer the third defendant. I take into account also the fact that I have seen the main protagonists give evidence, and as a result I have reached a clear view as to the worth of that evidence. In the light of these matters, and of the overriding objective, I do not consider it appropriate to draw any adverse inference against the first defendant by reason of the absence of evidence from Netta, Letitzia and Chris Biggs.

Facts found

87. I have already set out some of the background to this matter. For the purposes of this judgment, it is not necessary for me to deal with every single event which happened in the life of the company since it was founded. I will therefore concentrate on the most important matters which bear on this litigation.

Before 2000

88. As I have already said, nine of Sabato's 10 children joined him in the business, including both the first claimant and the first defendant. The first claimant worked with her father from the age of 10. She translated for him and did all the paperwork for the business. In addition, she helped to look after her younger siblings. The first claimant married in 1967. Her husband came to work for her father in the business. She became a shareholder in 1968. Her siblings also acquired shares in due course. But the first claimant's husband was not a Notaro, and there was no question of his

acquiring shares or becoming a director. Indeed, by 1973, when there was a recession, her husband had to leave and find other work elsewhere. Nevertheless he still helped out in the family business after his own working day had finished.

89. When Sabato retired in 1989, the first defendant became the managing director. He stepped into his father's shoes, having shadowed him for some time. The first claimant continued to look after the administration of the company. Their younger brother Nunzio had already left the company, back in 1983, when Sabato had bought back his shares. The first claimant's evidence was that the period after her father retired was stressful for her, because the first defendant became increasingly controlling, and her GP referred her for counselling. In 1992 she was diagnosed with breast cancer and underwent surgery. Afterwards she continued to work from home. In November 1992 their father became ill with myeloma. He died in December 1993. Thereafter, the first claimant says that dealing with the first defendant became more and more stressful for her. Examples of his behaviour, she says, include making decisions without consulting her, shouting at her, contacting her unexpectedly and abruptly raising issues, demanding to discuss things without warning, and speaking to her without respect. She made notes of occasions on which, in her view, the first defendant spoke to her without respect, even in front of staff or advisers, or treated her with disdain or contempt. But she did not tell anyone at the time, as she did not want any confrontation.

90. In February 1996 the first claimant took legal advice from Bevan Ashford in Taunton. Even so, she says, she was reluctant to talk about her family and "did not tell the lawyers quite everything". Nevertheless, they instructed Mr Blackmore of counsel to advise. As a result of the advice Bevan Ashford sent a letter to the company, referring to the first defendant's conduct as giving grounds for her to petition the court for the company to be wound up on a just and equitable basis. This letter created a stir amongst members of the family, who persuaded her not to pursue the point further and she went back to work at the company. Her evidence, however, is that the first defendant's attitude and behaviour towards her did not change.

91. I find that what happened was that the first claimant was content to assist her father and to execute his instructions, even though he evidently controlled the whole business. When her father retired, and her brother took over as managing director, she found it difficult to adjust to the change. There was no alteration in the respective roles of managing director and company administrator, but she did not like the fact that it was now her younger brother (whom she had helped to look after) and not her father making business decisions and giving the instructions. She was the eldest child, and probably expected a greater degree of respect for her position from her younger brother. But the fact is that at that time the first defendant did not hold a majority of the shares in the company. So he could be out-voted on any issue, or even removed, by his siblings, had they wished to do so. Taking all this together, I do not think that there is anything of substance in the allegations of stressful behaviour made by the first claimant against the first defendant during this period. I accept that in her private notes, not written to be seen by others, she complains of the first defendant's behaviour on numerous occasions. But I respectfully do not accept that they represent the objective reality of the situation.

92. Indeed, in many respects they worked well together. Their skills were complementary. The first defendant looked after the business operations, looking out

for land, dealing with the construction business, and so on, whilst the first claimant looked after the administration of the business, collection of the rents, dealing with the regulatory authorities and business advisers. Despite the complaints of the first claimant that she was excluded from participation in the business, it is plain that they cooperated, and that she had all the information that she wished. Her real complaint is that the first defendant did not respect her position as she thought he should.

93. One particular area of cooperation relates to the revaluation of the assets of the company, namely the land and buildings which they constructed on that land. Once or twice a year they would sit down together and go through the list of the company's assets. This was known (somewhat inaccurately) as the 'WIP' or work in progress list. They would discuss stages of development of building sites, sales during the year and rents collected, as well as market conditions generally. They would consider whether values of properties listed needed to be altered to reflect their current view of what they were worth. The first claimant had her own opinions, and sometimes contradicted the first defendant. The agreed figures would be written onto the list by hand and the first claimant would type the new list up and send it to David Savill. These WIP valuations were never the subject of a formal third-party valuation.

Departure of Philip Notaro and introduction to the fourth defendant

94. In 1999 another brother involved in the business, Philip Notaro, clashed repeatedly with the first defendant, and in November 2000 decided to leave. At this time, the first claimant's concerns were, first, that she had not been kept informed by the first defendant of the dispute in its early stages, and second, that it had to be resolved amicably and above all privately, so as not to impinge on their father's name.

95. It was also in 2000 that the first claimant met Tom Brennan of the fourth defendant. They were introduced by her counsel Mr Blackmore. Mr Brennan attended meetings in June about issues between the first defendant and Philip Notaro. The fourth defendant became the company's solicitors, and was involved in the negotiations with Philip Notaro. This matters because it was suggested that Mr Brennan somehow became or should have become aware that the first claimant was vulnerable to pressure from the first defendant. But in my judgment there was simply no basis for Mr Brennan or the fourth defendant to have become aware of any such issues. There is nothing either in his attendance note or the first claimant's diary entries so to suggest.

96. Eventually, Philip agreed a price for his shares with the company, and the first claimant and the first defendant were involved in those negotiations on behalf of the company. Each side was separately represented by accountants in the negotiations. David Savill advised the company. But (as mentioned above) no formal valuations were carried out of the company or its assets. The parties worked from the company's own assets valuation figures, and, once the agreement was reached in principle, the accountants created a tax-efficient structure to implement it.

2003

97. The first claimant's evidence is that by the beginning of 2003 it was "clear that [the first defendant] wanted to get rid of me". It may be that the first defendant, having seen two brothers depart the business, could see advantages for himself if other

siblings did so too. But I do not agree that the first defendant "wanted to get rid of" the first claimant. There were certainly discussions between them on the subject of her retirement. On 11 February 2003, at a shareholders' meeting where the accountant David Savill was present, I find that the first claimant told him that she wished to retire, but that there were issues she wished first to be addressed. One of these was how much she would get for her shares. Others were the future of the windows company in which her son Antonio worked, and the question what would happen to the company's land adjacent to her home.

98. Mr Savill wrote next day to all the shareholders to say that he understood

> "the current position as between the shareholders/directors to be that [the first claimant] broadly wishes to retire at some point in the fairly near future and realise her shareholding whilst [the first defendant] wishes to continue the business. Lee and Netta [the other two sibling shareholders] are currently undecided."

Mr Savill set out a number of options to achieve the shareholders' aims. The first claimant made no complaint to Mr Savill or anyone else that this letter did not accurately represent the position. I reject the view that the first defendant was trying to "get rid of" the first claimant. What he wanted was some clarity from the other shareholders, and in particular the first claimant, as to what was going to happen. Discussions continued, but it was clear that the first claimant did not want to retire immediately.

The genesis of the family litigation

99. In the meantime, Immacolata Notaro, Sabato's widow and mother of the first claimant and first defendant, amongst others, died in April 2004. This focused attention on inheritance tax planning, because the rental properties which the group held would not attract relief from inheritance tax, being investment assets rather than stock in trade. It also gave rise to a dispute about Immacolata's estate. The claim was made by Nunzio, who claimed to represent the interests of other family members (including the other two shareholders in the company, Antonietta and Letizia), against the first defendant and the first claimant as executors of Immacolata's will. The claim was based on allegations of Immacolata's lack of capacity to enter into property transactions with the company, or alternatively of undue influence by the first claimant and the first defendant in relation to those transactions. Under the will, the first claimant inherited Immacolata's house, which fuelled resentment with some of her siblings, who were not mentioned in the will.

100. The first claimant and the first defendant agreed that the first claimant would take the lead in dealing with their defence, and that she would instruct the fourth defendant to act for them. In fact, the court claim was not formally issued until May 2008, but the dispute was unpleasant and stressful for all concerned, split the family, and lasted until 2012. I will return to this litigation later. In November 2004 David Savill moved from Butterworth Jones (where his father Roger had been a partner) to the third defendant, and that latter firm was formally appointed as the company's accountants. By March 2005 Andrew Browne of the third defendant was also involved in advising the company.

101. In her evidence, the first claimant refers to a number of documents (spanning several years) which she says shows that the third defendant was acting for the first claimant as an individual shareholder. However, I do not accept that they show that the third defendant was advising individual shareholders as such against the interests of the company. A company's accountants regularly give generic advice to significant shareholders of a company which is their client without giving up their primary allegiance to the company, and such shareholders know that to be the case. The first claimant also suggests in her evidence that the third defendant acted for the second claimant. I reject this view utterly. The documents concerned are the kind which a professional adviser would send to the opposing party in a transaction for the purpose of soliciting that party's agreement. It is fantasy to suppose that this shows that the third defendant was advising or acting for the second claimant.

2005-2006

102. Reverting to the narrative, in 2005 a new factory was built, apparently without consultation with other directors, and there were discussions about a shareholders' agreement to deal with exit strategies for shareholders. The first claimant says the former showed the first defendant ran the company in a high-handed and domineering way, and that the latter showed that he still wished to remove the first claimant from the company. I do not agree. She further says that she could do nothing about problems caused by the first defendant. I do not agree with this either. The first defendant was the managing director, and it was his job to run the company. But he was also a minority shareholder. If the other directors or shareholders did not like what he did, or had wished to adopt a different agenda they could have outvoted him, or even removed him from office. But they did not do either of these things. In October 2005 there was a meeting between the first claimant, the first defendant, Mr Savill and Mr Browne of the third defendant, to discuss a possible shareholders' agreement. But nothing came of it.

103. At a meeting with the company's accountants (the third defendant) in September 2006, the first defendant said he wished either to retire or to split his interests from the other family members. The accountants discussed the different options open to them and their tax consequences. This made clear the role (neutral as between shareholders) which the third defendant would play in the event of a demerger. The meeting concluded that there would be an update of valuations of assets and a proposal prepared for the division of those assets between them. The third defendant carried out calculations for a demerger, identifying potential tax liabilities. There was also a meeting later in September with Mr Brennan of the fourth defendant, at which the company structure was explained to him. Mr Brennan understood that this was in the context of the first claimant's possibly leaving the company. But nothing was agreed between the first claimant and the first defendant.

2007

104. By early 2007 the first defendant not only had a difficult relationship with the first claimant, but also with the other company shareholders because of the claim threatened by his brother Nunzio. The fourth defendant was engaged to advise the executors, *ie* the first claimant and the first defendant, and Ltd (but not Holdings) in relation to that. At a shareholders' meeting in April, the first defendant said he had lost interest in running the company, and that the shareholders should go their

separate ways. A proposal was put forward to offer Tico and Netta £2.3 million each for their shares. But the first claimant thought the offer was too generous to her sisters. In any event, Tico and Netta rejected the proposal.

105. Demerger proposals were presented to shareholder meetings in May. The evidence of the first defendant was that all the shareholders were agreed in principle that this course should be taken. The first claimant's evidence is that she did not agree to this, pointing out that the same thing had happened the previous year. However, I do not accept that the first claimant expressed dissent from the demerger proposal put forward by the first defendant. On the contrary, she either agreed, or she allowed him to think that she agreed (and accepted that the first defendant would have thought so), so that he proceeded on the basis that the only issue was the split of assets between them. Indeed, the first claimant insisted that the shareholders agree the division *before* the third and fourth defendants were called in. She accepted in cross-examination that she was concerned about her shares losing value, was thinking of parting from her siblings, and thought an agreement with the first defendant could be reached.

106. But, in any event, following these meetings the third defendant prepared figures for a "clean break" arrangement between the shareholders. But this was not pursued, as the first claimant did not accept the division of assets proposed. The first claimant relies on this proposed arrangement as showing that the third defendant was advising her personally as a shareholder as against the interests of the other shareholders and the company. I do not see how she can have thought that, and I do not accept it.

107. I also record that in early May 2007 (following an engagement letter of 27 April 2007) the first claimant and her husband personally engaged Elizabeth Stilwell of the fourth defendant to draw up their wills. For this purpose the first claimant supplied her with details of her shareholdings. Ms Stilwell was a private client solicitor, not a company or litigation solicitor. This was a discrete piece of private work, for which the fourth defendant charged £780 plus VAT (the invoice is dated 20 August 2007).

108. There were meetings during 2007 between the first claimant and the first defendant, and sometimes the third defendant too, to discuss the split of assets, and their values, but they did not resolve the question. The first defendant sought to get the first claimant to make a decision on what she wanted. I find that essentially the first claimant refused to do so. She told the first defendant that there were various matters to be discussed (*eg* her role after demerger, the need for repairs of the housing stock, the division of the land bank), but then did not discuss them with him, let alone resolve them. As I have already said, the first claimant does not like confrontation.

109. In the meantime, on 19 September 2007, there was a meeting between the first claimant and Mr Brennan of the fourth defendant. It is clear that this was a private retainer by the first claimant, where she sought advice about a number of things, including the dispute with Nunzio Notaro, but also her possible retirement. Mr Brennan made a long attendance note, amalgamating instructions, advice and general conversation. The first claimant accepted in cross-examination that she needed to leave the company, but had not decided when. She accepted too that she was being indecisive. She also said in evidence that she would have found it embarrassing to tell Mr Brennan about problems with the first defendant, and accepted that Mr Brennan and the fourth defendant would not have known about any such problems.

110. There were also meetings between the first claimant and the first defendant which Mr Brennan attended in order to facilitate agreement between them after direct negotiations had failed. Mr Brennan was engaged and paid by the company, and not by individual shareholders. As between the shareholders he was neutral. The first claimant accepted that she did not tell Mr Brennan that she was under any pressure from the first defendant. Meetings between the first claimant and the first defendant concerning demerger continued into 2008, but there was still no agreement on the division of assets. The first claimant's diary entries show that she was unhappy with the first defendant's attitude towards her and his failure to compromise. Her complaint was that he belittled her, showed her insufficient respect as a fellow shareholder and director, and tried to ride roughshod over her.

2008

111. In May 2008 proceedings were issued against the first claimant and the first defendant, as executors of the estate of their mother, by other siblings. It was agreed between the first claimant and the first defendant that the first claimant would deal with matters on a day to day basis. She relies on this to explain why she could not disagree with the first defendant about the demerger proposals. I do not accept this. She is (as she accepted in cross-examination) an experienced and able businesswoman, well able to express her point of view. The litigation did not stop her acting as a director of the company, and it did not make her vulnerable to pressure from the first defendant. If she did not wish to disagree with her brother, it was not because of this litigation. It was because of their pre-existing relationship and her aversion to confrontation, especially with him.

112. In any event, in 2008 there was a serious collapse in financial confidence, as a result of the failure of a number of significant financial institutions, here and abroad. These failures (and others) led to the so-called "credit crunch" in this country and across the world. Property values went down, finance was withdrawn, and the market for selling houses dried up. In October 2008, the company revised its internal assets valuations downwards. It had constructed houses, but could not sell them. Renting them out as an alternative to selling them would potentially change their VAT treatment, in that they would no longer be stock for sale, but become rental assets. The important thing was the survival of the business. Questions of division of assets on a demerger of the company became in practice irrelevant, at least for the time being. The first claimant was nevertheless still concerned about the value of the business going down.

2009

113. In 2009 the company's bankers, HSBC did not renew the overdraft facility and offered a three-year loan. In June 2009 the first claimant and the first defendant had a meeting with the bank about forming a new company to build a hotel, financed by HSBC. There was a further meeting in October. In the end the loan proposal fell through. The first claimant was annoyed with the first defendant because she said he did not consult her enough beforehand, so that she was too embarrassed to disagree with him in front of the bank's representative. But she was concerned about the hotel project. This was not, as she claimed, because she did not like the plans and drawings, but instead because it involved taking a large risk, which she was averse to, and because the finance for it would require security from the company, which would prevent or impede her exit.

114. In July 2009 there was a serious attempt to settle the family litigation. A mediation between the parties resulted in an outline agreement which was then considered by the parties and their legal advisers, and whose terms were negotiated in correspondence. But the agreement fell through. In particular, Nunzio insisted that he still had shares in the company.

2010

115. In January 2010 Tina Stone, younger sister of the first claimant and the first defendant, and her husband Eddie, resigned from the company and went to work for Nunzio in his company Notaro Care Homes. They had worked closely with the first claimant in accounts, and so this was a shock to her, particularly as the family litigation brought by Nunzio was still continuing. The third defendant seconded one of its employees, Chris Biggs, to work as a temporary accounting manager. The first claimant was unhappy that Chris Biggs did not consult her, nor treat her with sufficient respect for her position, but instead decided everything in consultation with the first defendant. In February 2010 the first claimant was concerned that the first defendant had ordered a new company car without keeping her informed. In May 2010 there was an argument about Chris Biggs at a shareholders' meeting, and the first defendant said that if the first claimant could not get on with him she should go.

116. Subsequently, the first defendant pressed the first claimant on the question of the division of assets, and asked David Savill to prepare a list of properties to go to the first claimant. The first claimant responded that the list did not represent what her shareholding was worth. In June the first defendant reverted to this proposal. The first claimant complains that she was under 'unbearable' pressure, because she was dealing with the family litigation, and at the same time the first defendant was pressing her to accept his offer. I do not accept that this constituted 'unbearable' pressure. These are the usual kinds of problems with which directors of family companies have to deal. But, in any event, the demerger transaction did not take place until the end of April 2011, nearly a year later. If the pressure really was 'unbearable', the deal would have been done much sooner than this. In fact the demerger was done shortly after her husband Salvatore retired. In her diary for 21 June 2010 the first claimant says "I need to leave & this will be my next project after getting my husband to retire."

117. In July 2010 there was a further meeting in which the first claimant and the first defendant disagreed about the hotel project. The minutes say that if they could not agree, then it "would be the time to consider a demerger". In her witness statement the first claimant denied her attendance at this meeting and challenged the genuineness of this minute, but in cross-examination she accepted its content as accurate. It is consistent with other minutes recording the first claimant's concerns about the project, and also with the explanation given later to HMRC for the demerger, and I am satisfied it represents her views at the time.

118. Further demerger proposals were prepared by the third defendant in August and September 2010. The first claimant complains that she was not consulted over them, and indeed that she only received the spreadsheets showing the asset split from the later version and not the earlier. Somewhat curiously, although she complains of never receiving it, she relies on the August version as showing that the third defendant was advising her personally as a shareholder as against the interests of the other shareholders and the company. As with the earlier version of May 2007, I do not see

how she can have thought that, and I do not accept it. Nevertheless, at a meeting with David Savill on 6 October 2010, she discussed the proposals with him. She expressed views as to what she wanted, including property which she could "add value to". Other meetings to discuss the split took place between the first claimant and the first defendant in October and November. Some of these were attended by David Savill. His evidence in court was that it was clear that there was a negotiation going on between them. The first claimant says Mr Savill was advising her personally by advising on the tax consequences of the deal that the first defendant was promoting as at 15 October 2010. I do not agree. He was advising the company.

119. The first claimant's evidence was that she was being coerced into a demerger that she did not want at all, on any terms. But her personal diary entries are more nuanced than this. An entry for 15 October says that her 'pot' is "not right". Another, of 17 October, says "This proposed agreement is all wrong. Cannot discuss it with my family as do not want any more problems & arguments…" One of 18 October says "He is causing me stress + is bullying me." On 29 October she notes "I just feel bullied & intimidated with what he tells me." On 1 November 2010 she says "He does not realise he cannot bully a decision from me." On 2 November an entry reads "I am a major shareholder & he cannot fob me off with an offer I am not comfortable with…" These entries are consistent with the first claimant's dissatisfaction with the terms offered by the first defendant, rather than with a refusal to demerge at all. Moreover, it shows that the first claimant was not prepared to give in to the first defendant's negotiating style. In my judgment, what this demonstrates is that this was a tough negotiation of a commercial transaction.

120. On 18 October the first claimant spoke to David Savill to say she was unhappy with the 26 August 2010 split of assets. But I do not accept that this meant he or the third defendant was acting for her in the demerger transaction. Then, on 4 November 2010, at the instance of the first defendant, the first claimant had a meeting in Exeter with David Savill. Her diary says that this was "to get advice on my shareholding and if the 'pot' is correct." Somewhat unusually, there is no diary entry commenting on the substance of the meeting. The result of the meeting however was the formulation of a counter proposal, in a document dated 10 November 2010, to the first defendant. She emailed this to David Savill, saying that it "may help to start talks … " The question is whether, as the first claimant says, this demonstrates that the third defendant was acting for the first claimant. In the context of the negotiations between the first claimant and the first defendant, and the long history of Mr Savill's acting for the company, I cannot regard this meeting as having so radically altered their relationship. In my judgment Mr Savill's role was simply that of a catalyst, to get the first claimant to focus on what she actually wanted, and to make up her mind as to what she was prepared to accept in a demerger.

121. On 17 December the company held its AGM, and David Savill was present. After the AGM the first claimant and the first defendant discussed the first claimant's list and (according to the first claimant) rejected her suggestions. The first claimant's diary entry for that day reads, in part,

> "I own 31.25% of this Group & he speaks to me as if I was a piece of rag … I could wind the Company up. Just on his behaviour … he has no right to say things to me that are not justified, he has caused this problem because he will not discuss the issues in a business way.

> […]
>
> After some speaking I was tired & could not cope with [the first defendant] way that he was speaking to me, it was sorted out some compromise on file.
>
> […]
>
> I am a major shareholder & he cannot make all the decisions. To avoid conflict I basically said the adjustments were OK & would put it clearly – but this is not a fair way that I have to sell my shares…"

Once again, I cannot accept that Mr Savill's presence at this meeting and any advice he may have given about the demerger was advice for the first claimant as against the interests of the other parties. Any such advice was instead for the company.

122. The first claimant's evidence was that after that point she "could not face continuing to battle with [the first defendant] with [the third defendant] supporting him and so [she] just gave up and agreed to a demerger." Her diary entry refers to "some compromise list on file". Her witness statement says that a list "was eventually agreed at the meeting". In fact, following the meeting on 17 November 2010 David Savill annotated the first claimant's list of properties of 10 November. This produced a list different both from the first defendant's list of 2 September and the first claimant's list of 10 November. This appears to have been the "compromise list".

123. This list was discussed at a further meeting on 12 December between the first claimant and the first defendant, at which David Savill and Andrew Browne of the third defendant were present. Once more, I cannot regard the third defendant's participation in this meeting as showing that it was advising the first claimant as against the other parties. The meeting noted the demerger agreement in principle, subject to tax. At a shareholders' meeting on 15 December 2010 the first defendant announced that the first claimant had agreed to the demerger, and that the third defendant would prepare the necessary documents and apply to HMRC for tax clearance. The first claimant was present, and neither she nor anyone else expressed any dissent.

2011

124. In January 2011 Andrew Browne of the third defendant prepared the demerger documentation, and it was discussed at a meeting between him, the first defendant and Chris Biggs on 14 January 2011. It was also sent to Mr Brennan of the fourth defendant on 18 January 2011, and discussed with him on 21 January. Mr Brennan told Mr Browne about the family litigation. He consulted Terry Mowschenson QC on the impact of the demerger proposal on that litigation. The fourth defendant quoted for the legal work on the demerger and was formally retained by Holdings to deal with the legal issues arising from the demerger. On 8 February 2011 Mr Brennan sent an engagement letter to the first claimant in her capacity as director of the company, which the first claimant signed for the company and returned by letter of 9 February 2011, which amongst other things said "we are pleased that you are acting for [Holdings]…" Mr Brennan and the fourth defendant were not involved in the negotiations between the shareholders as to the apportionment of assets. A different

firm, Ash Clifford, was retained to deal with the intending conveyancing work to implement the proposal.

125. There was a shareholders' meeting on 8 February 2011, at which the details of the demerger were gone through. The minutes record the first claimant as having "pointed out that she had been uncomfortable about it when she first saw the structure but it is the only way forward to demerger tax efficiently". A paper was prepared by the third defendant on about that date setting out the proposed apportionment of assets on two different bases. In my judgment this does not demonstrate that the third defendant was acting for the first claimant as against the other parties. It was plainly acting for the company.

126. At the same time, Messrs Browne and Brennan conferred on the question of obtaining tax clearance from HMRC. Mr Brennan amended Mr Browne's draft letter of 8 February 2011 to HMRC. A draft had also been shown to the first claimant, who raised no objections. The letter was sent in final form on 11 February 2011. In part it said:

> "Holdings and its subsidiaries have a number of critical decisions to be taken regarding their future strategy and operations. Historically the group has operated as a housebuilder. The board and shareholders have in the last few years been considering a number of projects, including a significant investment in building and operating a hotel and leisure resort on land it currently owns. This development would require significant funding and is a higher risk than current trading activities.
>
> Mrs C De Sena has opposing views to the other shareholders and directors regarding the future investments of the group." This has created difficulties and has resulted in the group not making appropriate investment decisions.
>
> The shareholders have been unable to resolve their commercial decisions and therefore have decided that the group should be demerged. The demerger would allow Mrs C De Sena to continue to operate her demerged business on a traditional basis Group whilst allowing the remaining shareholders to undertake the hotel and other investments.
>
> The proposed demerger will pass certain development sites to Mrs C De Sena and leave the remaining development sites and other assets (including the hotels/leisure site, in the ownership of the remaining shareholders)."

In cross-examination the first claimant accepted that the contents of this letter were accurate.

127. There was a further meeting on 10 March 2011 to review the demerger structure. Various issues were raised, but the first claimant raised no concerns about the demerger. She did however raise the question of a piece of land (the old factory land) that she wanted, because it was directly in front of her mother's house (which she had inherited) and her son's house. At that meeting, Mr Brennan made clear to both the first claimant and the first defendant that the fourth defendant was acting only for the company and not for the shareholders. A point was raised by Mr Brennan about remedies after the demerger of purchasers of houses for defective work constructed

before. As a result, the third defendant agreed to consider revisions to the proposal. In the meantime, on 8 March 2011 HMRC had written to give tax clearance to the demerger. This was reported to the shareholders at a meeting on 14 March 2011. An issue was raised by Letizia as to the timing of her own leaving the company, but she expressed the view that only one shareholder could leave at a time. The first claimant did not suggest that Letizia should leave instead of her.

128. On 21 March 2011 the first claimant met David Savill in Exeter. I accept his evidence that he advised her to obtain independent advice before going through with the demerger, and that she responded that she would consider seeking advice from her personal accountant, Nigel Gamblin. He gave her a note headed "Impact of any undervalue". In my judgment, if there had been any lingering doubt in the mind of the first claimant as to whether the company's advisers were in fact acting for her as against the interests of the other parties, the meeting with Mr Brennan and this meeting would have dispelled it. The first claimant knew, at least from this time on, that she could not rely on the company's advisers, and would have to find her own advice, if she wanted any.

129. There was also an alternative proposal being considered, for the company to buy back the first claimant's shares. On 28 March, at a meeting with the first claimant, the first defendant sought to change tack and proceed with the alternative buy-back rather than with the demerger. The first claimant refused, saying that the value offered for the shares was out by £2 million. There was a further meeting the following day, after which the first claimant wrote in her diary "I am 32 of co. when I leave he is SNL. I must be paid what I am worth." On 30 March she wrote in her diary that the buy back was "no good for me 2m out… The deal is not viable. I am saving them the demerger route…" None of these diary entries supports the view that the first claimant did not wish to leave at all. All of them suggest instead that she simply wanted more money to leave.

130. On the following day she attended a meeting of charity trustees at solicitors Clarke Wilmott Clarke. On 1 April 2011 she had a telephone conversation with her accountant Nigel Gamblin. She also had a meeting on 18 April 2011 with accountants Milsted Langdon about the charity. It is thus clear that at this time she could have had full access to professional advice about the demerger/buy back transaction, if she had so wished. But, bearing in mind the clear warning from David Savill on 21 March, referred to above, it is clear that she chose not to.

131. On 5 April 2011 emails passed between Andrew Browne and Chris Biggs about revising the wording of the plan to refer to the agreed list of properties rather than to a particular value, in case values changed thereafter, one way or the other. The first claimant sees this as sinister, but in my judgment it was reasonable, to pre-empt arguments that one side or the other is doing better or worse as a result of possible changes in value. It cuts both ways, and not just against the first claimant. In an email to Andrew Browne of 6 April 2011, Chris Biggs says that both the first claimant and the first defendant "have seen the revised note and both appear happy … there are a few amendments they would like to see … " In cross-examination the first claimant accepted that Chris Biggs thought she was happy with the demerger proposal. A revised demerger proposal was circulated by the third defendant on 7 April. The proposal included properties plus £400,000 in cash.

132. By 11 April 2011 the alternative proposal for a share buy-back had been abandoned as giving rise to large liabilities to tax. The demerger proposal has been revised so that Ltd would continue to be the main trading entity, which would overcome the defective building work problem previously identified. Mr Brennan commented on the revised proposal to Chris Biggs. At a shareholders' meeting on the same day (at which neither Mr Browne nor Mr Savill was present), Chris Biggs circulated a spreadsheet showing that the first claimant would obtain value equal to a discount of 15% on 31.25% of the value of the company. Indeed, that is what the document says on its face.

133. The first claimant in her witness statement complained that this was not pointed out or explained at the meeting. In it she said she understood that she would swap her shareholding of 31.25% of the company for assets worth 31.25% of the group, *not* discounted to 26.4%. However, in cross-examination, the first claimant accepted that Chris Biggs had indeed explained the spreadsheet to her at the meeting, and that she had understood what the 15% discount was as a result. She therefore understood that she was not going to receive 31.25% of the assets of the company. It was nothing to do with the third defendant, but was simply the result of the negotiation between the shareholders about the asset split. And at the meeting the revised demerger proposal was approved.

134. Following the meeting the first defendant instructed the fourth defendant to continue with the proposal, with a view to completing it by the end of April. Because the demerger proposal contemplated was now slightly different from that for which tax clearance had already been received, the third defendant sent a second tax clearance application letter to HMRC on 11 April. HMRC wrote back agreeing to this by later dated 13 April, received by the third defendant on 18 April. Completion was fixed for 28 April 2011, apparently in accordance with the first defendant's wishes. The first claimant complains of being kept out of the loop at this stage, but, given that the shareholders (including her) had seen the proposal and apparently all agreed it, it is hard to see what role there was for her before completion, unless some unforeseen point arose and had to be discussed.

135. On 14 April 2011 Chris Biggs asked David Savill how the first defendant could make a sizeable gift tax efficiently to the first claimant on her retirement. On 18 April 2011 Chris Biggs emailed Tom Brennan to tell him the name chosen for her corporate vehicle (the second claimant) and that the cash element in the first claimant's 'pot' had gone up from £400,000 to £470,000. On 19 April a question was raised by Mr Brennan as to whether the first claimant was to be required to waive not only her contractual but also any *statutory* employment rights she might have. In fact she was not required to waive the latter, as this would have required the first claimant to be separately advised. So the first claimant retained any such claim as she might have.

136. On 20 April 2011 Mr Brennan received a list of the properties to be transferred to the second claimant. He had no role in their selection or negotiation. On 26 April 2011 the first claimant met solicitor Ian Parker of Ash Clifford Solicitors and went through the paperwork relating to the properties she was taking on from the company. According to her diary, she expressed no concerns to him. At about this time the first claimant's son Antonio told her "Don't sign if you don't want to". In cross-examination the first claimant accepted that neither Netta nor Letizia was aware of any concerns she might have. On 27 April the first claimant spoke to the first

defendant about the scope of the covenant that she wanted in relation to the lakes. She wanted one limiting use of the lakes to recreational uses only. He declined to give her this. She wrote in her diary that she had spoken to him about the covenant, but "He has his normal tantrums, he will not give in. I have now given in he has bullied me into a decision. He has won again only left for me to liquidate co." By this I understand that, the first claimant having failed to persuade the first defendant to give her what she wanted, her only weapon left was the nuclear one of applying to wind up the company. She overlooked simply refusing to go.

137. At this point in the narrative, it is also right for me to say that I was not persuaded that there was a better deal that could have been negotiated by the first claimant with the first defendant or the company. Having heard the witnesses, and especially the first claimant and the first defendant, I consider that the first defendant had been pushed as far as he would go, and that there was no real prospect of the first claimant obtaining a better deal from him or from the company.

138. Also on 26 and 27 April 2011, Mr Brennan of the fourth defendant sent to Mr Browne and Mr Savill of the third defendant (i) draft minutes relating to the capital reduction of the second claimant (which was a part of the demerger scheme to be implemented), (ii) draft resolutions relating to the sale of properties from Holdings to the second claimant, and (iii) draft minutes relating to a second capital reduction of the second claimant. The first claimant was of course the sole director and shareholder of the second claimant. She claims that these documents show that the third defendant was acting for the second claimant. I do not accept this. The third and fourth defendants were retained by the company to prepare all the documents for the demerger. If the first or second claimant had wished to take her or its own advice on the documents put forward for execution, she or it was at liberty to do so.

The demerger

139. On 28 April 2011, the day fixed for the signing of the documents, the first claimant's husband told her "Don't sign if you don't want to…" It is clear that the first claimant knew she had a choice. Indeed, in her witness statement she said she did not intend to sign, and that she would not have gone to the meeting if she had thought she would end up signing. I find this to be a bizarre explanation. It would have been far easier for her, and less embarrassing all round, if she had simply sent a message saying that she was not signing, and stayed at home. Nevertheless, she went to the meeting, and she signed the demerger agreement. She says that a "complete calm came over me and I just signed all the documents placed in front of me not even taking in what I was signing in respect of which I received no explanation or advice." No one who saw her do this could possibly have imagined that she was doing other than agreeing to the transaction.

140. The demerger was complicated, and involved nine steps, all completed within minutes of each other:

1. The shares of Holdings in Windows were acquired by Windows, so that Windows left the group.

2. The second claimant was created, with the first claimant as sole shareholder.

3. All the shares in Holdings were transferred to the second claimant, in exchange for shares in the second claimant.

4. Agreed properties were transferred from Ltd to the second claimant, leaving the purchase price unpaid, and Ltd granted the second claimant an option to acquire two other properties for £1 each.

5. Holdings declared a dividend to the second claimant of £5,469,492, which cleared the debt for the transferred properties, and left a cash payment on top of £400,000.

6. The second claimant's share capital was divided into two classes, A and B, giving entitlement to two different classes of assets, A and B. The B assets were the shares in Holdings. The A assets were everything else.

7. The first claimant's shares in the second claimant were redesignated A shares, and the other shareholders' shares redesignated as B shares.

8. The second claimant cancelled the B shares in return for the transfer of the B assets to a new company which later became known as Group. This was the first capital reduction of the second claimant.

9. The first claimant then made a second capital reduction by converting £2.2 million of share capital into distributable reserves, thus enabling a cash dividend to be paid to the first claimant on completion.

I find that every step was explained to the first claimant and to the other shareholders by Mr Brennan. The result of these steps was that the first claimant became the sole owner of the share capital of the second claimant, and the second claimant owned all the property assets transferred, and the options granted, by Ltd.

141. It will be seen that the steps set out above include two capital reductions. Because these capital reductions feature in the complaints that have been made on behalf of the claimant, I will say something further about them. The first capital reduction was an integral part of the demerger process. The process was intended to separate the business and assets of the company into two separate companies, each with its own assets. This was begun by creating a new company, the second claimant, which the first claimant would own. The first claimant's share capital was divided into A and B shares, each class being entitled to different assets. The A assets were those intended for the first claimant, and would remain with the second claimant. The B assets with those intended for the remaining shareholders in the company (the first defendant, Netta and Letitzia). At a certain point in the process the B class of shares would be cancelled, in return for the assets corresponding to that class being transferred to a new company (the second defendant), which would issue shares in itself to the B shareholders. This cancellation necessarily reduced the capital of the second claimant. But it reduced it from an initially inflated level to the level at which it was always intended to finish. In itself it cannot have caused any loss to the first claimant. It was merely part of the process.

142. The second capital reduction was different. It was not a *necessary* part of the demerger process, but in the circumstances it was a desirable one. The reason it was included was because of the "transfer value" ascribed to the properties which the first

claimant was receiving. This meant that the second claimant would be left with a negative profit and loss position at the end of the demerger. The cancellation of the B shares and the transfer of their assets to the second defendant (the first capital reduction) would be written off (in the sum of £7,187,500) to the profit and loss account. But the second claimant had received a dividend of £5,469,492 from Holdings earlier in the process. Therefore, the second claimant would be left with a negative balance of £1,718,008 (the difference between £7,187,500 and £5,469,492). As a result, it would be unable to declare a dividend to the benefit of the first claimant, as she wished. To remove this 'dividend block', the second capital reduction involved the cancellation of £2,200,000 of share capital, increasing the profit and loss position by the same amount. This would leave a distributable profit of £481,992. The accounting experts agreed that the second capital reduction was no more than a paper transaction and had no effect on the value of the first claimant's shareholding in the second claimant.

After the demerger

143. Following completion, the first claimant resigned from her directorship, and Netta was appointed in her place. All the shares in Holdings had been transferred to Group (which had been incorporated on 26 April) at step 8 above. The result of the demerger was that the shares in Group for the future were divided between the first defendant (63.64%), Letizia (18.18%) and Netta (18.18%). But the first claimant remained a director and company secretary of Land, still having a 31.25% shareholding.

144. The first claimant worked on that day as usual, and also the next one. For a few days after that, however, she was upset and could not sleep. She did not tell her husband how she felt, partly through embarrassment and partly from fear for his reaction. There was also the family litigation to consider, and also her son Antonio, still working in Windows. Nevertheless she says she was horrified to find that the staff at the company knew about the demerger. As to that, the evidence of Prudence Morgan, the first defendant's personal assistant from 2000, was that it was not common knowledge amongst employees that the first claimant intended to retire, although she herself was aware of the transfer of properties to the second claimant. During the time that she continued to come into the office after the demerger, the first claimant's treatment by others remained the same, and no-one knew that she had officially left. I observed both Prudence Morgan and the first claimant in the witness box, and I prefer the evidence of Prudence Morgan on this point.

145. Now a consultant rather than an employee, the first claimant continued to work in the offices until the end of July 2011. She used her work computer for her private matters. It was password protected. She also had a locked filing cabinet in her office. In September 2011 she had an operation to remove her gall bladder. Thereafter she continued to work until April 2012. She was also working on the family litigation until the claim was withdrawn in August 2012, with no order as to costs. She complains that she was not paid for this work "even though it involved the Notaro Group because [Ltd] was a defendant." This complaint is misconceived. Parties to litigation are not paid for their time spent on defending their interests, unless they have made an agreement with others to that effect, or (in the case of litigants in person) they are awarded costs in respect of their time spent.

146. The first claimant further complains that she did not realise she had no office from which to run her corporate vehicle, the second claimant, and had to use a spare bedroom in her house, until she had an office built behind her garage. She also says she did not realise the implications of its being an investment company rather than a trading company. She says that, on a rent roll of some £220,000-240,000 gross per annum, she struggled to repair properties in her portfolio. She also complains that after the demerger the company went ahead with projects on its land, obtaining planning consent and so on, but there was no provision in the deal for her to receive an uplift in her compensation (a form of 'overage'). These complaints are also misconceived. She agreed to a demerger, meaning that for the future she was on her own, and that her and the company's fortunes now ran on entirely separate paths. Unless she bargained for the use of office space, funds to repair her properties and overage in respect of company projects in train or in prospect at the time of her departure (which she did not), she could not be entitled to any of these things from the company.

147. On 16 May 2011, half of the shares in the second claimant were transferred by the first claimant to her husband Salvatore De Sena. In June 2012 she was advised about the transfer of shares in the second claimant to discretionary trusts. In July 2012 the family litigation about Immacolata's estate was discontinued with no order as to costs. In January 2013 each of the first claimant and her husband transferred 265,500 shares in the second claimant to a (separate) discretionary trust.

148. In November 2013 the first claimant consulted Mr Brennan about the possibility of bringing a claim against Nunzio to recover the loss suffered as a result of the demerger deal, on the basis that the family litigation had worn down the first claimant so that she was unable to withstand what she called the "bullying" behaviour of the first defendant. They attended a consultation with Terence Mowschenson QC in London, who advised that (in the first claimant's words) "there was no prospect of a case" against Nunzio. In 2016 she met Mr Savill about concerns she had about the properties in her portfolio and the fact that she had had to pay tax on the cash element of her 'pot'.

149. In November 2016 the first claimant sought legal advice about a possible development of the land owned by Land, of which she was still a director and in which she held 31.25% of the shares. The first defendant had been unable to agree terms for a joint venture with a third party, and came up with the idea of a joint venture with Ltd. He produced heads of terms for the first claimant to sign. She was wary of doing so as she was the only shareholder in Land who was not also in Ltd. She went to see Mr Blackmore again, this time on direct access. He asked her what had happened since they last met and she told him of the demerger. Her witness statement says, "It was then that I first understood that in certain circumstances such a deal can be set aside by the court." Mr Blackmore introduced her to her present solicitors, Tozers. They sent letters of claim in March 2017, and issued proceedings on her behalf on 7 April 2017.

The expert evidence

General

150. Most evidence given at trial is evidence of *fact*. As a general proposition, evidence of *opinion* is not admissible. But *expert* opinion evidence is an exception to this general rule, now governed by section 3(1) of the Civil Evidence Act 1972. Expert evidence is a common and usually a helpful feature of modern litigation. As its name suggests, and as provided for by section 3(1), it is different from evidence of *fact* in that it involves the witness, who must possess sufficient expertise in the relevant subject-matter, giving his or her *opinion* as to one or more issues arising in the proceedings. An expert witness is to *assume* the facts for the purposes of giving such opinion evidence: see *JP Morgan v Springwell* [2006] EWHC 2755 (Comm), [21].

151. There is no reason why an expert witness cannot also be a witness of fact to some extent (*eg* where a relevant thing or place is examined and then described by the expert, preparatory to giving an opinion: see *eg Rogers v Hoyle* [2015] QB 265, [27], [31], CA), but the two processes are distinct and must not be confused. On the other hand, the expert cannot usurp the functions of the court in finding the facts or interpreting the law. Nor can the expert witness give evidence of what he or she would have done in the particular situation: *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] 1 Ch 384, 402. Moreover, and importantly, expert evidence must be restricted to that which is *reasonably required* to resolve the proceedings: CPR rule 35.1. Mere desirability or helpfulness is not enough: see *British Airways plc v Spencer* [2015] EWHC 2477 (Ch), [68].

Expert evidence on accountants' liability relating to demergers

152. There were three kinds of expert evidence tendered at the trial. These related to (i) property valuation (Mr Gladwin for the claimants and Mr Jones for the defendants), (ii) share valuation (Mr Mesher for the claimants and Mr Butterworth for the defendants) and (iii) aspects of accountants' liability (Mr Mesher for the claimants and Mr Plaha for the third defendant). No point arises on the admissibility of the first two kinds of expert evidence. These are clearly subjects of expertise, and the witnesses concerned were clearly expert in these fields. In relation to the last of these, however, at an early stage I raised a question as to the admissibility of such evidence. The directions order made by Mr Justice Birss in June 2018 provided in part as follows:

> "17. The Claimants and the Third and Fourth Defendants (collectively) shall each have permission to adduce oral expert evidence from an accountant on the issue of scope and breach of duty so far as the claimant's case against the Third and Fourth Defendants is concerned…"

153. I have no doubt that the skill and knowledge required to advise a client how to carry out a demerger in a lawful and efficient way is properly the subject of a recognised expertise for this purpose. I am also in no doubt that the opinion of an expert in this field that a person professing to exercise this skill did or did not exercise it to the level reasonably required of a person holding himself or herself out as possessing it is admissible where a question arises as to whether it was so exercised.

154. What caused me to express doubts about the expert evidence tendered in the field of demerger expertise in this case were:

1. The assumption made by the parties that, no doubt because accountants regularly advise clients on demergers such as to acquire the relevant expertise, therefore *any* accountant, whether he has the experience of advising clients on demergers or not, is qualified as an expert witness in this field. Birss J was not ordering that *any* accountant had the necessary expertise. His order was made against the backdrop of the existing law. He was therefore ordering that an accountant *who had the necessary expertise* could give the expert evidence in question.

2. The tendering of evidence as to whether the third defendant owed a duty of care to the claimants (especially in relation to case law specifically identified for the purpose) and if so what the scope of that duty was. The court's earlier direction referred to the *scope*, though not in fact to the *existence*, of the duty. But that was to be read against the general law, which prohibits expert evidence on matters of law. The court's direction cannot make inadmissible evidence admissible. What the judge undoubtedly meant was that the experts could give opinions on whether, and if so by how far, the third defendant had undershot the standard reasonably expected of reasonably competent accountants carrying out the functions of the third defendant in relation to the demerger transaction.

3. The tendering of evidence as to various questions of fact, including the terms of the contractual retainer that the third defendant had with the company.

155. I consider first the question of the experience of the experts in relation to demerger transactions. For this purpose, I have looked at the *curricula vitae* attached to their reports. Mr Mesher's says that he obtained his university degree in 1993, and has specialised in 'forensic accounting' since 1997. He qualified as an accountant doing audit/transaction work. In the list of his 'professional specialisms', there is no reference to demerger transactions. Mr Plaha's CV does not state that he has any experience in demerger transactions. Nor does that of Mr Pooler, who I understand assisted him. After I raised this with counsel, I received a supplementary document, dealing with Mr Mesher's experience in more detail. (I also received one from Mr Butterworth, though I am not concerned with him here.)

156. The document relating to Mr Mesher said frankly that he did not "claim to be an expert in 'demergers' *per se*", but that during the period 1993 to 2010 he worked for KPMG and was "exposed to various M&A transactions". From 2010 to 2012 he was a partner in Grant Thornton's forensic accounting team, where he continued to deal with the drafting of sale and purchase agreements and the mechanics of post-transaction accounting. From 2012 he has been practising in his present firm of forensic accounting where he has dealt with many post-transaction disputes, and assisting clients with untangling their business arrangements sometimes calculating the value of shareholdings in section 994 claims. I am afraid that this simply does not demonstrate expertise in demerger transactions, even though I accept that he will have had the opportunity to see one or more such transactions, and may even have participated in them. But that does not make you an expert in demergers. And it is for the expert witness tendered to demonstrate the expertise, not for the court to assume it.

157. In these circumstances, I do not see how either Mr Mesher or Mr Plaha has acquired sufficient experience in carrying out demerger transactions as to be able to claim an expertise in it. I emphasise that it is just not enough to be a 'forensic accountant'. It is

not the experience of giving 'expert' evidence in court that makes you an expert. Those firms that provide expert witness services really ought to have learned by now that expertise is acquired by doing the thing in question, usually over many years, and that merely being an accountant (or anything else) for a long time does not mean that you thereby become an expert in *everything* that accountants (or whatever it may be) commonly do.

158. Strictly speaking, that is an end to the question of the evidence on accountants' liability issues. But there is a second point, and this is whether the evidence that they give in their reports is admissible at all. The report of Mr Mesher (on behalf of the claimants) in relation to accountants' liability, sets out in section 3.1 the questions which he was asked by the claimants' solicitors to consider. These are as follows (where 'AB' refers to Andrew Browne, 'BF' to the third defendant, 'CDS' and 'C1' to the first claimant, 'DS' to David Savill, 'MDL' to the second claimant, and 'SNHL' to Holdings):

> "(i) What were the terms of the contractual retainer which BF had with SNHL group of companies (the "Group")?
>
> (ii) Was the Group's retainer limited to BF's functions as auditor?
>
> (iii) If so, should BF have entered into a further contractual retainer to advise the Group on a demerger?
>
> (iv) In order to advise the Group on a demerger would it have been necessary to have the assets of the Group independently valued?
>
> (v) What are the circumstances in which BF could act for the Group and also advise the shareholders on a demerger?
>
> (vi) In particular, would BF need clear written instructions from each of the shareholders that there was no conflict of interest inter se and that the terms of the demerger had been agreed?
>
> (vii) BF's case is that it was acting for the Group and not the shareholders. If it became apparent to BF (or if BF ought reasonably to have concluded) that there was no agreement between all the shareholders as to the terms of the demerger, should BF have:
>
> > (a) advised CDS that it could not continue to act for her and that she should be independently advised; and, or
> >
> > (b) ceased to act for any party on the demerger?
>
> (viii) would a reasonably competent chartered accountant in the position of DS or AB have considered it necessary to record in writing any suggestion given orally to C1 (none being admitted) firstly as to the conflict of interests and secondly that she should obtain separate accountancy of valuation advice?
>
> (ix) do you consider that BF came under a duty of care to CDS or MDL, having regard to the principles set out in the case of *BCCI (Overseas) Ltd (in Liquidation) v Price Waterhouse*, namely:

(a) the precise relationship between the adviser and the advisee;

(b) the precise circumstances in which the advice came into existence and in which the advice was communicated to the advisee and whether the communication was made by the adviser or by a third party;

(c) the presence or absence of other advisers and the degree of reliance which the adviser intended or should reasonably have anticipated would be placed on its accuracy by the advisee and the reliance in fact placed on it;

(d) the presence or absence of other advisers on whom the advisee would or could rely; and

(e) the opportunity, if any, given to the advisee to issue a disclaimer.

(x) What was the scope of BF's duty, if so, and when did it arise?

(xi) would a reasonably competent firm of chartered accountants in BF's position have:

(a) sent the February and April 2011 clearance letters to HMRC in the circumstances then prevailing;

(b) failed to advise CDS that she was not receiving the equivalent of the market value of her shares in SNHL/SNL;

(c) drawn up demerger proposal which gave rise to CDS receiving less than she was entitled to for her shareholding in SNHL;

(d) applied a minority discount and/or a bulk or portfolio discount to the assets retained by the group and/or those transferred to MDL;

(e) applied such a discount without justification or notice to CDS;

(f) failed to advise CDS of the fact, reason for and implications of the second capital reduction in MDL;

(g) failed to advise CDS of the consequences of MDL being for fiscal purposes an investment rather than a trading company?"

159. I have to say that I have never before seen such an extraordinary set of questions put to a witness being asked to give expert evidence. Questions (i), (ii) and (iv) are mixed questions of law and fact, both of which are for the court and not this witness. Question (iii) is not relevant, given that the third defendant obviously *did* advise on a demerger. Questions (v) and (vii) are questions of law for the court. Questions (vi) and (viii) are, to the extent that they are relevant at all, questions of law for the court. Question (ix) is one of the most egregious and naked usurpation of the functions of the court that I have ever seen. Moreover, since it refers only to one authority (and that more than 20 years old, when there have been many relevant decisions since), even if it were admissible, it would be of no use to the court. Question (x) is almost as egregious and objectionable. I am unable to regard the answers to any of these

questions as admissible evidence in this case. I am astonished that these questions were asked at all, and almost as astonished that they were answered.

160. Question (xi) is better than the rest. It concentrates on important aspects of the *Bolam* test for professional negligence, namely whether a reasonably competent firm of accountants in the position of the third defendant would have done certain things. But it does not ask whether the conduct of the third defendant in doing or failing to do those things fell below the standard reasonably required of the reasonably competent firm of accountants. There is usually a range of reasonably possible responses to a given situation, and what the *Bolam* test seeks to do is to ask whether the particular defendant's actions fell outside that range. Nevertheless, the position remains that I am not satisfied that Mr Mesher has sufficient expertise in demerger transactions to answer the question.

161. The expert report dated 14 August 2019 of Mr Plaha (to which Mr Pooler contributed) on behalf of the third defendant states in para 1.8 (using similar abbreviations to those in the report of Mr Mesher):

> "I have been instructed to prepare an expert report dealing with scope and breach of duty as alleged by the Claimants and in particular:
>
> (a) whether BF had a duty to advise MDL and/or CDS personally, and specifically:
>
> (i) in circumstances where BF were engaged by SNHL and/or the Notaro Group from whom were BF entitled to take instructions?
>
> (ii) Were BF engaged formally to act for CDS personally?
>
> (iii) Did BF assume responsibility to advise CDS personally?
>
> (iv) Were BF formally engaged to act for MDL?
>
> (v) Did BF assume responsibility to advise MDL?
>
> (b) Comment upon the following issues that would only be relevant if the Court were to determine that BF owed a personal duty to CDS and/or a duty to MDL (which BF denies):
>
> (i) The advice which CDS should have received in relation to the alleged duty to advise her to obtain an independent valuation of assets. In particular, what with the duty of a reasonably competent firm of accountants have been and, in the circumstances of this case, did the actions of BF fall short of that standard?
>
> (ii) BF's duty to advise CDS on the impact of the bulk transfer discount on her and/or MDL.
>
> (c) Explain the reasons for the second capital reduction and comment on:
>
> (i) What was the reason for the second capital reduction; and

(ii) The effect of the second capital reduction on the value of CDS's shareholding in MDL.

(d) Comment on the allegations in relation to the Clearance Letters."

162. Question (a) is just as objectionable as questions (ix) and (x) were in Mr Mesher's report. They are questions of law for the court. The first sentence of question (b) (i), the first 15 words of the second sentence and the whole of question (b)(ii) are also questions of law, and likewise objectionable. The remainder of question (b)(i) is acceptable. Question (c)(i) is a question of fact, which is also for the court (and on which the witness has none but hearsay evidence to give). Question (c)(ii) is partly a matter of law, but partly a matter of share valuation expertise, which I do not understand Mr Plaha (or Mr Pooler) to claim to possess. Question (d) is hardly a proper question at all. Nevertheless, some of the comments made in the report are helpful as showing the practice of accountants. Overall, therefore, there is only a little of the report which I would regard as admissible expert evidence, assuming the sufficient expertise of the writer of the report. But, as I have also said, insofar as the expert evidence given relates to the practice of demerger transactions, I do not regard either Mr Plaha or Mr Pooler as such an expert.

163. Overall, therefore, in relation to the evidence on accountants' liability, I have disregarded both sides' reports. I deprecate the (undoubtedly significant) expense which has been wasted on this aspect of the case, but it behoves the parties and their lawyers, when permission is given for such evidence to be obtained and adduced, in implementing that permission to pay close attention to the rules regarding the admissibility of expert evidence. Permission to adduce expert evidence on a topic by calling an accountant (or anyone else), is not a licence to ignore the rules as to what expert evidence is, and who can give it, or the conditions under which it is admissible in legal proceedings.

Other expert evidence

164. In relation to the expert evidence on property valuation and share valuation, there are no such similar problems, either with the expertise of the witnesses, or with the admissibility in principle of the substance of the evidence which they give. There is however a dispute between the parties about whether the evidence is *relevant* to the issues to be decided. Later in this judgment, I discuss in more detail the question whether a company shareholder on a demerger is entitled to a proportion of the assets of the company equivalent to the proportion that the shareholding bears to the entire share capital. To anticipate that discussion, I conclude that she is not, for the reasons then given. Accordingly, it is argued by the first and second defendants that, in the absence of a claim for breach of warranty or misrepresentation (neither of which is made here), evidence of the value of individual properties, or their collective value, and evidence of the value of the shares in the company, is simply irrelevant: see paragraph 300 of the first and second defendants' closing submissions.

165. **Property valuation evidence:** The submission has considerable force in relation to the evidence of share valuation (I will come back to this). But even in relation to evidence of property valuation, where there is ordinarily a reasonably liquid open market for such assets, I still consider that there is some force in this submission, at least so far as questions of *liability* are concerned. In my judgment, the first claimant's

entitlement on a demerger (in contrast to a winding up) is *not* to a proportion of the objective market value of the shares, but instead (as I say later) to what she can negotiate with the other parties. Whilst in ordinary cases it may be interesting to the parties concerned to know what, objectively speaking, may be the value of the assets about which they are negotiating, it is not *necessary* to have an objective professional valuation in order for the parties to agree. Nor is it necessary that what is agreed between the parties should correspond with any such objective professional valuation. I can sell my house, and you can agree to buy it, for whatever price we agree, even if it is nothing like any objective market value (too much *or* too little), and, in the absence of any vitiating factor, the contract is perfectly valid.

166. I say "in ordinary cases" because some cases are extraordinary. The question of an undervalue does matter in the context of certain causes of action. In particular, it matters in relation to cases where the transaction was an unconscionable one with a vulnerable person. But (as I also say later) that is not argued in this case.

167. However, in case I am wrong about this, I go on to consider the valuation evidence put forward in more detail. There is however a preliminary point which I need to deal with. This is the criticism by the claimants that the defendant's expert on property valuation (Mr Jones) fails to take into account the fact that the demerger carried out in accordance with section 136 of the Taxation and Chargeable Gains Act 1992 was a "scheme of reconstruction". The point, as I understand it, is that this term is so defined that one of the conditions required for such a scheme to qualify under section 136 is that there is "continuity of business," that is, that the business, or substantially the whole of the business carried on by the demerging company is carried on by the successor company or companies. Accordingly, say the claimants, that *excludes* sale or transfer of any of the assets from one side to the other, as the proposed division of assets must fairly reflect the same balance of asset class as was held by the business prior to the demerger. In other words, the two demerging companies must be mirror images of each other.

168. I reject this submission. The whole point of this demerger, as understood by HMRC, was that the shareholders of the demerging company disagreed about future policy, and would split the business so that one part of it would pursue more risky opportunities than the other. That was what HMRC accepted and consented to in their tax clearance letters. In my judgment, that would necessarily involve the pursuit of different levels of risky business by each of the demerging parts of the company. In practice, it would be likely to mean (as indeed it did) the transfer of less risky assets to one side, and of more risky assets to the other. So the premise of the argument is not made out. But, even if the claimants were right, I do not understand what impact this point would have. A valuation is a valuation. Value, and therefore valuation, is based on what a property could be sold for. Nothing in the legislation cited requires that, where a valuation is being carried out of properties which are the subject of a demerger, they should be valued on some other basis. There is nothing in this point.

169. The experts on each side agreed on the valuation of the majority of the properties, but disagreed on eight of them. The claimants' revised valuations of these eight properties came to £7,855,000, whereas those by the defendants' expert came to £5,045,000. So far as concerns the evidence in relation to the value of the properties themselves I have already stated that I prefer the evidence of Mr Jones to that of Mr Gladwin, where they differ. But in any event Mr Gladwin (the claimant's expert)

accepted that some properties are harder to value than others, and that small differences of opinion on *eg* the chance of achieving a change of use can result in very different differences in value. Having considered the matter, I accept Mr Jones's assessment of the value of the eight disputed properties.

170. The next problem is the question of a discount for a bulk rather than individual sale of the properties. The experts agreed on a 25% bulk discount in relation to the properties that were transferred to the second claimant. But whereas the defendants' expert expressed the view that the discount to be applied to the properties that were now owned by Group should be 42.5%, the claimants' expert declined to express a view (even in cross-examination, where the question was put to him three times), though he did agree that a more diverse portfolio (such as was retained by Group) would be likely to lead to a higher discount. I accept the view of Mr Jones for the defendant, that a 42.5% discount for the properties retained by Group is appropriate.

171. **Share valuation evidence:** Turning to the evidence of share valuation, the problem here is that there is no open market for private company shares as there is for land and buildings. The shares cannot be easily sold outside the company because of transfer restrictions in the articles and the lack of a shareholders' agreement. The internal market consists of the company itself, the first defendant and his other two sisters. So the defendants' argument that the expert evidence is irrelevant in my judgment has even more force. This is not an unfair prejudice petition where the 'fair' value of the shareholding would be relevant. A shareholder such as the first claimant has rights to share in profits and to share in a surplus of assets on a winding-up. But she has no *right* to demerge. What matters, as I say hereafter, is what the first claimant can *negotiate*. In other words, the best evidence of the value of the shares is what in fact the first claimant *did* manage to negotiate, with perhaps a backward glance at her brother Philip some 11 years earlier. Nevertheless, I consider the position as if the evidence of share valuation were relevant to the issues in the case.

172. The main difference between the share valuation experts related to the question of a discount for a minority shareholding. Mr Mesher was originally of the view that there should be no such discount, because "the value of the shares does not presuppose that the buyer would immediately sell the portfolio properties in one go." And in the joint experts' statement Mr Mesher commented that "Fair value without any discount is implied in a demerger situation." On the other hand Mr Butterworth for the defendants was of the opinion that there should be a discount to the first claimant's 31.25% interest of between 25% and 35% to reflect its minority status. And Mr Mesher in the joint statement agreed that, *if* a discount was deemed appropriate by the court, Mr Butterworth's range of 25%-35% would be reasonable in the circumstances. As I said in earlier in this judgment, having see both experts give evidence, where they differed I preferred the evidence of Mr Butterworth. Accordingly I consider that, to the extent that the evidence is relevant, a discount should be applied of 30% to reflect the first claimant's minority shareholding.

173. Mr Mesher, the claimants' share valuation expert, accepted in cross-examination that on the *claimants'* property values the second claimant was worth £6,032,113. He had earlier accepted in cross-examination that, if the first claimant *had* managed to sell her Holdings shares to a non-shareholder third party, she would not have received more than £5.6 million. In fact, the *defendants'* expert's property valuations (which I have accepted) were £5,616,000, before the discount of 25% for sale in a single

transaction. In these circumstances, it is difficult to see what loss the first claimant could have suffered.

The Law

174. As I have set out earlier in this judgment, there have been a number of different heads of claim advanced against the various defendants in the present case. In relation to most of them, however, there was little or no difference between the parties as to the relevant law. I will therefore deal with that law in this section of my judgment as shortly as I can. Before I do that, however, I will just mention a point which was not argued, but which forms the assumption upon which the rest of the arguments in the case are based. This is a case in which the claimants have come to court seeking to set aside a transaction carrying into effect an apparently agreed demerger. The first claimant signed all the relevant documents. She accepts that the other parties would have thought she was agreeing to the transaction. She now comes to court to say that she never wished to enter the transaction at all and that if she did appear to consent it was because of undue influence, breach of fiduciary duty or some other vitiating factor.

175. In English law, the person who signs a written contract is, in the absence of some such vitiating factor, bound by that contract, even if that person privately did not agree with it (or some term or terms in it) and did not wish to enter into it, whether in that form or at all. Commercial life could not be carried on if a person could outwardly demonstrate assent to a contract but later say that she was not bound because she had a private reservation, not communicated to the other parties. There is more than one way to explain this juridically. But I need to pause to consider this debate now, because it does not matter for the purposes of this judgment whether it is because the outward expression of assent constituted by the signature amounts to a representation upon which the other parties to the contract relied, so as to constitute a contract by estoppel, or whether it is because of what some commentators have called the "objective theory of contract".

176. As to the former, in the famous case of *Smith v Hughes* (1871) 6 QB 598, where a purchaser agreed to buy oats by sample, believing them to be old oats, but they were new oats, and no misrepresentation had been made to him by the vendor, Blackburn J said (at 607):

> "I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman* v. *Cooke* [(1848) 2 Exch 654, 663]. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

177. As to the latter, in *Dunhill v Burgin* [2014] 1 WLR 933, SC, a case about a consent order entered into by a person lacking capacity to conduct the proceedings, Lady Hale (with whom all the other members of the court agreed) said:

> "25. … In *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599, the Court of Appeal held that a contract made by a person who lacked the capacity to make it was not void, but could be avoided by that person provided that the other party to the contract knew (or, it is now generally accepted, ought to have known) of his incapacity. As Mr Rowley points out on behalf of the defendant, this rule is consistent with the objective theory of contract, that a party is bound, not by what he actually intended, but by what objectively he was understood to intend."

Accordingly, the battleground in the present case is in substance whether there is any basis for setting aside the otherwise effective demerger agreement or (if not) for compensating the claimants for the first claimant's having entered into it, and so suffering loss.

Undue influence

178. In relation to undue influence, the leading case is *Royal Bank of Scotland plc v Etridge* [2002] 2 AC 773, HL. There are two kinds of conduct with which the doctrine is concerned. One is improper conduct, such as wrongful pressure or coercion, but sometimes even misrepresentation. This is usually called '*actual* undue influence'. The other arises from abuse of a protected personal relationship giving rise to a duty on the dominant party to deal fairly with the other. This is usually called '*presumed* undue influence'. In the former case, the improper conduct must be alleged and proved by the claimant. In the latter case, it is for the dominant party to show there was no abuse of the relationship.

179. In *Etridge*, Lord Nicholls explained it this way:

> "8. Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage. An example from the 19th century, when much of this law developed, is a case where an impoverished father prevailed upon his inexperienced children to charge their reversionary interests under their parents' marriage settlement with payment of his mortgage debts: see *Bainbrigge v Browne* (1881) 18 Ch D 188.
>
> 9. In cases of this latter nature the influence one person has over another provides scope for misuse without any specific overt acts of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. He abuses the influence he has acquired. In *Allcard v Skinner* (1887) 36 Ch D 145, a case well known to every law student, Lindley LJ, at p 181, described this class of cases as those in which it was the duty of one party to advise the other or to manage his property for him. In *Zamet v Hyman* [1961] 1 WLR 1442, 1444-1445 Lord Evershed MR referred to relationships where one party owed the other an obligation of candour and protection.

> 10. The law has long recognised the need to prevent abuse of influence in these 'relationship' cases despite the absence of evidence of overt acts of persuasive conduct. The types of relationship, such as parent and child, in which this principle falls to be applied cannot be listed exhaustively. Relationships are infinitely various. Sir Guenter Treitel QC has rightly noted that the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type: see *Treitel, The Law of Contract*, 10th ed (1999), pp 380-381. For example, the relation of banker and customer will not normally meet this criterion, but exceptionally it may: see *National Westminster Bank Plc v Morgan* [1985] AC 686, 707-709.
>
> 11. Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place."

180. In the same case Lord Hobhouse said:

> "103. Actual undue influence presents no relevant problem. It is an equitable wrong committed by the dominant party against the other which makes it unconscionable for the dominant party to enforce his legal rights against the other. It is typically some express conduct overbearing the other party's will. It is capable of including conduct which might give a defence at law, for example, duress and misrepresentation… Actual undue influence does not depend upon some preexisting relationship between the two parties though it is most commonly associated with and derives from such a relationship. He who alleges actual undue influence must prove it."

181. In *Libyan Investment Authority v Goldman Sachs* [2016] EWHC 2530 (Ch), referred to in closing submissions, the claimant claimed that certain disputed investments made with the defendant (giving exposure to equities without amounting to their purchase; so-called 'synthetic derivative trades', comprising a put option and a forward) should be set aside on the grounds of undue influence. Rose J (as she then was) referred to the decision of the House of Lords in *Etridge*, and commented on the concept of actual undue influence.

182. She said:

> "136. There are two ways in which a party seeking to set aside a bargain can establish undue influence. The claimant can prove actual undue influence if he can point to specific instances of unconscionable conduct or he can rely on a presumption that undue influence has occurred because certain circumstances have arisen. Within actual undue influence there are also two strands. The first is where there has been an improper threat of some kind, or, the [claimant] contends, where there has been an improper inducement. For this kind of actual undue influence there is no need to establish any particular relationship between

> the parties. An example of this is *Mutual Finance Ltd v John Wetton & Sons* [1937] 2 KB 389 where a company was improperly persuaded to execute a contract of guarantee under the implicit threat that one of the directors would be prosecuted for forgery. There was no pre-existing relationship between the parties in that case. One issue between the parties in the present case is whether this kind of actual undue influence encompasses not only threats but also improper inducements.
>
> 137. The second kind of actual undue influence is where the nature of the relationship between the parties to the disputed transactions is such as to place on the stronger party a duty to behave to the vulnerable party with candour and fairness. If the stronger party then acts in breach of that duty, the transaction can be set aside for undue influence. I shall refer to the relationship that can form the basis of a claim of actual undue influence as a 'protected relationship'. […]."

183. One question which arises, adverted to by Lord Nicholls and Lord Hobhouse in *Etridge*, is how far undue influence overlaps with the doctrine of duress. In *Holyoake v Candy* [2016] EWHC 3065 (Ch), Nugee J considered this question. He said:

> "406. In the present case it is not suggested that the relationship between CPC and Mr Holyoake was either such as to give rise to a presumption of undue influence or was a protected relationship of the kind referred to by Rose J [in *Libyan Investment Authority v Goldman Sachs*]. The case is solely put as one of actual threats, menaces and coercion. As appears from the citations from both Lord Nicholls and Lord Hobhouse in *Etridge*, there is in such a case a considerable overlap with the common law doctrine of duress, and indeed *Chitty* at §8-067 suggests these cases are now probably better viewed as cases of illegitimate pressure (covered by the doctrine of duress)."

184. This decision was also referred to in closing submissions. But the present too is not a case where it was argued that there was presumed undue influence or a protected relationship. Accordingly, it chimes with an intervention I made at that time, when I asked whether the first claimant's case was not really one of duress, and referred to the decision of the House of Lords in *Williams v Bayley* (1866) L.R. 1 H.L. 200. In that case a son forged his father's indorsement to promissory notes. The bankers insisted on a civil settlement with the father, under which he gave security for the debt, failing which the unspoken assumption was that a criminal prosecution would follow. The civil settlement agreement was held invalid for illegitimate pressure. In argument Sir Roundell Palmer, for the father, had submitted (at 206):

> "It is impossible to doubt that when a father knows that his son has committed forgery the holder of the forged instrument possesses a power, and exercises an influence over him, which the law considers undue pressure, and therefore will not allow securities obtained from him under such pressure to be enforced against him."

185. This submission was successful. In giving judgment, Lord Westbury said (at 218-19):

> "The question, therefore, my Lords, is, whether a father appealed to under such circumstances, to take upon himself an amount of civil liability, with the

> knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with the certainty of conviction, can be regarded as a free and voluntary agent? I have no hesitation in saying that no man is safe, or ought to be safe, who takes a security for the debt of a felon, from the father of the felon, under such circumstances. A contract to give security for the debt of another, which is a contract without consideration, is, above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he ought to do it or not, whether it is prudent to do it or not, is altogether taken away from a father who is brought into the situation of either refusing, and leaving his son in that perilous condition, or of taking on himself the amount of that civil obligation."

Breach of fiduciary duty

186. In relation to breach of fiduciary duty, there is a threshold question as to what the word 'fiduciary' means in English law. Particular care must be taken in using comparative materials, because different systems have taken different approaches. (This is especially true in relation to continental Europe, where linguistic problems such as 'false friends' often lurk unnoticed.) I was referred to *Bristol & West Building Society v Mothew* [1998] Ch 1, CA, where Millett LJ in a well-known passage said (at 18):

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work *Fiduciary Obligations* (1977), p 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."

(Staughton LJ gave a concurring judgment. Otton LJ agreed with both judgments.)

187. What Millett LJ is dealing with here, as it seems to me, is the *content* of fiduciary obligations, rather than their *genesis*. That is why he cites with approval the statement by Paul Finn (later a judge of the Federal Court of Australia) that it is the nature of the obligations that comes first. All that Millett LJ says about the way in which fiduciary obligations arise is that there are "circumstances which give rise to a relationship of trust and confidence", without further elaboration. But I do not accept that Millett LJ meant that whenever there is a relationship of trust and confidence there must be a fiduciary obligation, or, worse, that *all* the obligations owed in that relationship are fiduciary obligations.

188. Indeed, this same point had been made made by Dawson J in the earlier Australian High Court case of *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 71:

> "A fiduciary relationship does not arise where, because one of the parties to a relationship has wrongly assessed the trustworthiness of another, he has reposed confidence in him which he would not have done had he known the true intentions of that other. In ordinary business affairs persons who have dealings with one another frequently have confidence in each other and sometimes that confidence is misplaced. That does not make the relationship a fiduciary one. A fiduciary relationship exists where one party is in a position of reliance upon the other because of the nature of the relationship and not because of a wrong assessment of character or reliability."

So the question is, what more is needed?

189. An obvious example is a person accepting a trusteeship of property or the directorship of a company. A person *agreeing* to act as trustee or company director voluntarily assumes the obligation to act in the best interests of the beneficiary or company and to subordinate his or her own (save as may be permitted by the constitutive documents or some form of informed consent). It is not simply a relationship where the weaker party reposes confidence in the stronger. On the other hand, a *constructive* trustee is treated *as if* he or she *were* a trustee because of some other sufficient factor, *eg* taking the property with knowledge of the trust, or dishonestly assisting a breach of trust. In such a case fiduciary obligations are imposed rather than assumed, albeit for good policy reasons.

190. In *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, to which I have already referred, Mason J said (at 96-97):

> "The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position."

191. I add only that, with very great respect to Millett LJ and to Mason J, in my judgment it is unwise to refer to a *person* as 'fiduciary' rather than to an *obligation*. This is because, if a person is labelled a 'fiduciary', there is a temptation to regard *every* obligation owed by that person as fiduciary, which is not necessarily correct. It is surely better to reserve the word 'fiduciary' to describe the content of particular *obligations*, so as to distinguish those owed by a particular person which *are* fiduciary from those owed by the same person which are not.

192. Indeed, in *Re Goldcorp Exchange Ltd* [1995] 1 AC 74, 98A, Lord Mustill for the Privy Council said:

> "To describe someone as a fiduciary, without more, is meaningless. As Frankfurter J. said in *S.E.C. v. Chenery Corporation* (1943) 318 U.S. 80, 885-86, cited in Goff and Jones, *The Law of Restitution*, 4th ed. (1993), p. 644:
>
> > 'To say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as

> a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?'"

193. An example given by Fletcher Moulton LJ (as he then was) in *Re Coomber* [1911] 1 Ch 723, 728, and cited to me in closing, was that of the fiduciary relation between himself and an errand boy bound to bring back his change. The obligation to return with the change could properly be described as fiduciary, but this was clearly not true of all the obligations owed by the errand boy to his client.

194. In the context of the claim against the first defendant (the claimant's fellow director and shareholder), the claimants refer to *Peskin v Anderson* [2001] 1 BCLC 372. In that case the claimants, who had ceased to be members of the Royal Automobile Club (either through deliberate retirement or because they had failed to pay their subscriptions) complained that they were excluded from so-called "windfall" payments made to members arising through the sale of the club's motor services business to third parties. Contrary to what might have been supposed, the club was in fact a proprietary club owned by a limited company, in which the 'members' were all shareholders. The defendants included the directors and members of the club committee. The claims against them were for damages for breach of fiduciary duties of disclosure and for being wrongfully deprived of the opportunity to make a fully informed choice as to whether or not to continue their membership of the club. The basis of the claims was that the defendants, in breach of a fiduciary duty alleged to be owed by them to the claimants, failed to disclose to them the plans, discussions, proposals, investigations and instructions relating to the de-mutualisation of the club and the sale of the motor services business.

195. Ordinarily, directors of a company owe fiduciary duties to the *company*, and not to *shareholders*. But in that case the Court of Appeal discussed circumstances in which directors of a company may come to owe fiduciary duties to the shareholders as well. Mummery LJ (with whom Simon Brown and Latham LJJ agreed) put it this way:

> "33. The fiduciary duties owed to the company arise from the legal relationship between the directors and the company directed and controlled by them. The fiduciary duties owed to the shareholders do not arise from that legal relationship. They are dependent on establishing a special factual relationship between the directors and the shareholders in the particular case. Events may take place which bring the directors of the company into direct and close contact with the shareholders in a manner capable of generating fiduciary obligations, such as a duty of disclosure of material facts to the shareholders, or an obligation to use confidential information and valuable commercial and financial opportunities, which have been acquired by the directors in that office, for the benefit of the shareholders, and not to prefer and promote their own interests at the expense of the shareholders.
>
> 34. These duties may arise in special circumstances which replicate the salient features of well-established categories of fiduciary relationships. Fiduciary relationships, such as agency, involve duties of trust, confidence and loyalty. Those duties are, in general, attracted by and attached to a person who undertakes, or who, depending on all the circumstances, is treated as having assumed, responsibility to act on behalf of, or for the benefit of, another person. That other person may have entrusted or, depending on all the circumstances,

> may be treated as having entrusted, the care of his property, affairs, transactions or interests to him. There are, for example, instances of the directors of a company making direct approaches to, and dealing with, the shareholders in relation to a specific transaction and holding themselves out as agents for them in connection with the acquisition or disposal of shares; or making material representations to them; or failing to make material disclosure to them of insider information in the context of negotiations for a take-over of the company's business; or supplying to them specific information and advice on which they have relied. These events are capable of constituting special circumstances and of generating fiduciary obligations, especially in those cases in which the directors, for their own benefit, seek to use their position and special inside knowledge acquired by them to take improper or unfair advantage of the shareholders.
>
> 35. The court has been referred to the valuable and detailed surveys of the authorities, expounding the special circumstances which justify the imposition of fiduciary duties on directors to individual shareholders, in the judgments of Court of Appeal in New Zealand in *Coleman v Myers* [1977] 2 NZLR 225 (especially pp 323-325, 328-330) and of the Court of Appeal of New South Wales in *Brunninghausen v Glavanics* [1999] 46 NSWLR 538 (especially pp 547-560). In both of those cases fiduciary duties of directors to shareholders were established in the specially strong context of the familial relationships of the directors and shareholders and their relative personal positions of influence in the company concerned."

196. It will be seen that Mummery LJ concentrates on voluntary assumption of responsibility, and on circumstances which are to be treated as such voluntary assumption. In that case, however, the claim failed, both at first instance and on appeal. Mummery LJ said:

> "59. There was nothing special in the factual relationship between the directors and the members in this case to give rise to a fiduciary duty of disclosure. In particular there were no relevant dealings, negotiations, communications or other contact directly between the directors and the members; the actions of the directors had not caused the members to retire when they did; and, probably most important of all, prior to March 1998 there was nothing sufficiently concrete and specific, either in existence or in contemplation, for the directors to disclose to the members."

197. The claimants also refer to *Ratiu v Conway* [2006] 1 All ER 571, CA, where a solicitor succeeded in a defamation claim against a former corporate client (Regent) and its directors who alleged to the vendor of certain property that he, in his capacity as solicitor for the clients' corporate vehicle (Pristbrook), had misused confidential information imparted to him by that company that the vendor had accepted its unconditional offer for that property. The jury found that the allegation was not justified and that the defence of qualified privilege was vitiated by malice. The Court of Appeal allowed the appeal on the basis that the trial judge misdirected the jury. In so doing, the court considered the obligations of a solicitor in such circumstances, and, in particular, whether duties of trust and confidence were owed by the solicitor, not only to the corporate client, but also to the claimants as shareholders and directors of that company.

198. Auld LJ (with whom Laws and Sedley LJJ agreed) said:

> "78. There is, it seems to me, a powerful argument of principle, in this intensely personal context of considerations of trust, confidence and loyalty, for lifting the corporate veil where the facts require it to include those in or behind the company who are in reality the persons whose trust in and reliance upon the fiduciary may be confounded.
>
> 79. Such was the approach of this Court in *Johnson v Gore Wood* [1999] BCC 474, at 485, where the issue was whether it was arguable so as to defeat an abuse of process application that solicitors to a company alleged to have been negligent in its advice to the company, also owed a duty of care to its controlling shareholder, Ward LJ, giving the judgment of the Court, held, at page 485C-E, that it was arguable, citing with approval the reasoning of Staughton J (as he then was) on a similar issue in *R P Howard Ltd v Woodman Matthews & Co (a firm)* [1983] QB 117:
>
> > '… arguments of a very similar nature prevailed in the judgment of Staughton J in … *Howard v Woodman Matthews …*where the solicitor knew that the company was a family company effectively run by Mr Witchell from whom they received their instructions. He held at p 121A:
> >
> > > "In my judgment, in the circumstances of this case, Mr Witchell as well as the company was the client of Mr Mason. That seems to me to reflect the reality of the situation. Mr Mason knew that Mr Witchell … was the company. He probably knew that Mr Witchell derived his livelihood and some profit from the company, and was vitally concerned in its well-being. Mr Witchell had first been his personal friend, and had then come to him in connection with other matters for legal advice, both as the representative of the company and in a personal capacity. When Mr Witchell sought his advice on … [a matter concerning the company] Mr Mason owed a contractual duty of care both to the company and to Mr Witchell".'
>
> 80. Nor, in my view, should it matter in principle, where a fiduciary duty is engendered by a contractual relationship, whether the client has entered into a direct contractual relationship with the fiduciary or through an agent or, in the case of a corporate client, through the use of a nominee company, as Regent used Pristbrook in this case.
>
> 81. It is also important to remember that the issue of fiduciary relationship is usually tried by a chancery judge in direct claims of breach of trust or other fiduciary duty as a mixed question of law and fact. In the context of defamation it is in this instance transposed into a supposed issue of objective fact for a jury as to whether a defendant can justify not only his understanding of his relationship with the other party, but also the validity of the complaint of a violation of that relationship. In such a context there may well be a greater imperative, already signposted in some of the authorities to which I have referred, for allowing reality to prevail over technical aspects of corporate law."

199. The claimants also refer to another solicitor-client case, *Longstaff v Birtles* [2002] 1 WLR 470, CA, where Mummery LJ (with whom Laws LJ and Sir Anthony Evans agreed) said:

> "1. This case powerfully demonstrates the importance of the paramount duty of a solicitor to observe fiduciary obligations in his personal dealings with a client and even with a former client. A solicitor proposing either to buy property from, or to sell property to, a client is under a duty to cause the client to obtain independent advice. That duty may endure beyond the termination of the retainer, which initially formed the professional relationship of solicitor and client : see Snell's Principles of Equity (13th Ed) para 11-83. *The source of the duty is not the retainer itself, but all the circumstances (including the retainer) creating a relationship of trust and confidence, from which flow obligations of loyalty and transparency.* As long as that confidential relationship exists the solicitor must not place himself in a position where his duty to act in the interests of the confiding party and his personal interest in acting for his own benefit may conflict. Breach of that duty may result in the setting aside of the transaction or, if that is no longer possible, in the award of equitable compensation for resulting loss." (Emphasis supplied, in order to show the single sentence cited by the claimants.)

200. On the other hand, in *Sharp v Blank* [2017] BCC 187, shareholders in Lloyds Bank plc complained of breaches of fiduciary duty allegedly owed to them by directors of the company. Nugee J said:

> "12. I take it therefore to be established law, binding on me, that although a director of a company can owe fiduciary duties to the company's shareholders, he does not do so by the mere fact of being a director, but only where there is on the facts of the particular case a 'special relationship' between the director and the shareholders. It seems to me to follow that this special relationship must be something over and above the usual relationship that any director of a company has with its shareholders. It is not enough that the director, as a director, has more knowledge of the company's affairs than the shareholders have: since they direct and control the company's affairs this will almost inevitably be the case. Nor is it enough that the actions of the directors will have the potential to affect the shareholders – again this will always, or almost always, be the case. On the decided cases the sort of relationship that has given rise to a fiduciary duty has been where there has been some personal relationship or particular dealing or transaction between them.
>
> 13. … If [the director] is to be held to owe fiduciary duties to the individual shareholders, there must be something unusual in the nature of the relationship which gives rise to it. That no doubt explains why the cases where such a duty has been held to exist mostly concern companies which are small and closely held, where there is often a family or other personal relationship between the parties, and where, in almost all cases, there is a particular transaction involved in which directors are dealing with the shareholders, from which the directors often stand to benefit personally. The imposition of a fiduciary duty in such circumstances reflects the fact that directors who have a close family or other personal relationship with shareholders, and are entering into transactions with

> them, may be tempted to exploit that relationship to take unfair advantage of the shareholders for their own benefit."

On considering the allegations made in that case, the judge held that there was no special relationship in the case which gave rise to fiduciary duties owed by the directors to the shareholders.

201. In the context of professional advisers, I bear in mind also the statement of Lord Millett (with whom the rest of their Lordships agreed) in *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222. Although this was a case concerning accountants who were providing litigation support services, he was in fact considering the example of an injunction sought against a solicitor by (i) a present, and (ii) a former, client, to restrain action for a different client. In the first case it turned on the actual or potential conflict of interest between the two clients. In the second case it did not.

202. Lord Millett said (at 235C-D):

> "Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence."

Unjust enrichment

203. In relation to unjust enrichment generally, I was not referred to any general statements of principle, whether in the case law or in the textbooks. At this stage, therefore, I content myself with a quotation from Goff and Jones, *The Law of Unjust Enrichment*, 9th edition by Mitchell, Mitchell and Watterson (footnotes omitted), by way of overview:

> "1-09. A claimant must show three things to make out a claim in unjust enrichment: that the defendant was enriched, that his enrichment was gained at the claimant's expense, and that his enrichment at the claimant's expense was unjust. If these requirements are satisfied, the further question arises, whether there are any defences to the claim. If there are not, the court must decide what remedy should be awarded. An additional consideration is that some overriding legal principle may justify the defendant's enrichment and thereby nullify the claimant's right to restitution."

204. On one point I was however specifically referred to *Costello v MacDonald Dickens & Macklin* [2012] QB 244, CA. This deals with the relationship between the principles of unjust enrichment and contracts made between the same parties and dealing with same or connected subject-matter. In structural terms, it refers in effect to the last sentence of the quotation from *Goff & Jones* above. In this case the claimant builders had constructed houses pursuant to a contract with a limited company (Oakwood), on land belonging personally to the directors and shareholders of the company. The claimants were not paid for their work, and they sued the company to judgment,

which however was not satisfied. They also claimed successfully against the directors and shareholders in unjust enrichment. The Court of Appeal allowed the appeal of the directors and shareholders against the award in unjust enrichment.

205. Etherton LJ (as he then was, and with whom Pill and Patten LJJ agreed) considered that there were two points of principle at stake. The first does not concern us. As to the second, he said this:

> "21. The second point of principle is whether a restitutionary claim should be allowed to undermine the contract between Oakwood and Mr and Mrs Costello, that is to say the way in which the parties chose to allocate the risks involved in the transaction. The parties arranged the transaction as one in which legally enforceable promises were made only between Oakwood and the respondents, even though the benefit of the contract was to be conferred on Mr and Mrs Costello. The obligation to pay for the respondents' services, and so the risk of non-payment, was contractually confined to Oakwood. If a claim was permitted directly against Mr and Mrs Costello, it would shatter that contractual containment. It would also alter the usual consequences of Oakwood's insolvency, which was one of the risks assumed by the respondents in contracting with Oakwood, since a direct claim against Mr and Mrs Costello would improve the respondents' position over Oakwood's other unsecured creditors.
>
> […]
>
> 23. I am clear … that the unjust enrichment claim against Mr and Mrs Costello must fail because it would undermine the contractual arrangements between the parties, that is to say the contract between the respondents and Oakwood and the absence of any contract between the respondents and Mr and Mrs Costello. The general rule should be to uphold contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations, and, in so doing, have similarly allocated and circumscribed the consequences of non-performance. That general rule reflects a sound legal policy, which acknowledges the parties' autonomy to configure the legal relations between them and provides certainty, and so limits disputes and litigation."

Negligence

206. The claimants referred me to the decision of the Court of Appeal in *BCCI (Overseas) Ltd v Price Waterhouse* [1998] PNLR 564. That was a case where the three plaintiffs were companies in liquidation, Holdings, Overseas and SA. The latter two were the wholly owned subsidiaries of the first. The defendants were two separate groups of auditors, PW and EY. EY had conducted the audits of two of the three plaintiffs, namely Holdings and SA. PW had conducted the audit of the remaining one, Overseas. But all three plaintiffs alleged that both auditing groups had conducted their audits of the plaintiffs negligently, causing them all loss. The claim by Overseas against EY was struck out by the judge, on the basis that EY owed no duty of care to Overseas. The investors appealed, and the Court of Appeal allowed the appeal.

207. Sir Brian Neill (with whom Nourse and Brooke LJJ agreed) said (at 586-88):

"Having considered these approaches and many of the authorities to which we were referred in the course of argument I shall now attempt a summary of the guidance which I have been able to extract.

The fact that all these approaches have been used and approved by the House of Lords in recent years suggests:

(a) that it may be useful to look at any new set of facts by using each of the three approaches in turn, though it may be noted that in some cases, such as *Henderson* (*supra*), the use of the incremental approach may be sufficient to show that responsibility has been undertaken.

(b) that if the facts are properly analysed and the policy considerations are correctly evaluated the several approaches will yield the same result. In this context I should refer to the speech of Lord Hoffmann in *Stovin v Wise and Norfolk CC* [1996] AC 923. In the course of his speech Lord Hoffmann made reference to the two-stage test (the precursor of the three-fold test) proposed by Lord Wilberforce in *Anns v Merton LBC* [1978] AC 728. At page 949 Lord Hoffmann continued:

> 'This [the two-stage test] involves starting with a prima facie assumption that a duty of care exists if it is reasonably foreseeable that carelessness may cause damage and then asking whether there are any considerations which ought to "negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may arise". Subsequent decisions in this House and the Privy Council have preferred to approach the question the other way round, starting with situations in which a duty has been held to exist and then asking whether there are considerations of analogy, policy, fairness and justice for extending it to cover a new situation: see for example Lord Bridge in *Caparo* (*supra*) … It can be said that, provided that the considerations of policy, etc., are properly analysed, it should not matter whether one starts from one end or the other.
>
> On the other hand the assumption from which one starts makes a great deal of difference if the analysis is wrong. The trend of authorities has been to discourage the assumption that anyone who suffers loss is prima facie entitled to compensation from the person (preferably insured or a public authority) whose act or omission can be said to have caused it. The default position is that he is not.'

The threefold test and the assumption of responsibility test indicate the criteria which have to be satisfied if liability is to attach. But the authorities also provide some guidance as to the factors which are to be taken into account in deciding whether these criteria are met. These factors will include:

(a) the precise relationship between (to use convenient terms) the adviser and the advisee. This may be a general relationship or a special relationship which has come into existence for the purpose of a particular transaction. But in my opinion counsel for Overseas was correct when he submitted that there may be an important difference between the cases where the adviser and the advisee are dealing at arm's length and cases where they are acting 'on the same side of the fence'.

(b) the precise circumstances in which the advice or information or other material came into existence. Any contract or other relationship with a third party will be relevant.

> (c) the precise circumstances in which the advice or information or other material was communicated to the advisee, and for what purpose or purposes, and whether the communication was made by the adviser or by a third party. It will be necessary to consider the purpose or purposes of the communication both as seen by the adviser and as seen by the advisee, and the degree of reliance which the adviser intended or should reasonably have anticipated would be placed on its accuracy by the advisee, and the reliance in fact placed on it.
> (d) the presence or absence of other advisers on whom the advisee would or could rely. This factor is analogous to the likelihood of intermediate examination in product liability cases.
> (e) the opportunity, if any, given to the adviser to issue a disclaimer.
>
> It will be remembered that counsel for EW submitted that it was necessary for Overseas to plead and prove that EW knew and *intended* that Overseas would rely on its work and on statements made by it: see paragraph 6.7 (*supra*). It seems that at one point at least in his judgment the judge accepted this submission: see J9 line 45. In support of this submission counsel referred to some passages in the authorities including the following sentence in Lord Oliver's speech in *Caparo* (*supra*) where he said at page 654D:
>
> > 'To widen the scope of the duty to include loss caused to an individual by reliance upon the accounts for a purpose for which they were not supplied and were not intended would be to extend it beyond the limits which are so far deducible from the decisions of this House.'
>
> But I am quite satisfied that the general trend of the authorities makes it clear that liability will depend not on intention but on the actual or presumed knowledge of the adviser and on the circumstances of the particular case. Indeed, elsewhere in his judgment in *Caparo*, Lord Oliver, having referred to *Smith v Bush* (*supra*) made it clear that an expressed intention that advice shall not be acted upon by anyone other than the immediate recipient 'cannot prevail against actual or presumed knowledge that it is in fact likely to be relied upon in a particular transaction without independent verification': see page 639A."

208. Parts of this extract were summarised by Mr Blackmore in para 10.2 of his closing submissions as

> "the principles giving rise to a duty of care by a firm of accountants, namely
>
> (i) the precise relationship between adviser and advisee;
>
> (ii) the precise circumstances in which the advice came into existence and which the advice was communicated to the advisee and whether the communication was made by the adviser or by a third party;
>
> (iii) the presence or absence of other advisers and the degree of reliance which the adviser intended or should reasonably have anticipated would be placed on its accuracy by the advisee and the reliance in fact placed upon it;
>
> (iv) the presence or absence of other advisers on whom the advisee would or could rely; and
>
> (v) the opportunity, if any, given to the advisee to issue a disclaimer."

209. For completeness, I note that Mr Blackmore's summary does not precisely correspond to the words used by Sir Brian Neill, and that some important qualifications have been omitted. For example, in relation to item (i) above (relationship between adviser and advisee), Sir Brian made clear that there may be an important difference between cases where the adviser and advisee are on the same side of the transaction and cases where they are on opposite sides.

210. However, much of the same ground was covered by the House of Lords in a more developed form in the later decision of the House in *Customs & Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181, to which I was referred by the defendants. In that case Lord Bingham said:

> "4. The parties were agreed that the authorities disclose three tests which have been used in deciding whether a defendant sued as causing pure economic loss to a claimant owed him a duty of care in tort. The first is whether the defendant assumed responsibility for what he said and did vis-à-vis the claimant, or is to be treated by the law as having done so. The second is commonly known as the threefold test: whether loss to the claimant was a reasonably foreseeable consequence of what the defendant did or failed to do; whether the relationship between the parties was one of sufficient proximity; and whether in all the circumstances it is fair, just and reasonable to impose a duty of care on the defendant towards the claimant […]. Third is the incremental test, based on the observation of Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 481, approved by Lord Bridge of Harwich in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 618, that
>
> > 'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed".'
>
> […] I content myself at this stage with five general observations. First, there are cases in which one party can accurately be said to have assumed responsibility for what is said or done to another, the paradigm situation being a relationship having all the indicia of contract save consideration.
>
> […] Thus, […] I think it is correct to regard an assumption of responsibility as a sufficient but not a necessary condition of liability, a first test which, if answered positively, may obviate the need for further enquiry. If answered negatively, further consideration is called for.
>
> 5. Secondly, however, it is clear that the assumption of responsibility test is to be applied objectively (*Henderson v Merrett*, p 181) and is not answered by consideration of what the defendant thought or intended.
>
> […]
>
> The problem here is, as I see it, that the further this test is removed from the actions and intentions of the actual defendant, and the more notional the

> assumption of responsibility becomes, the less difference there is between this test and the threefold test.
>
> 6. Thirdly, the threefold test itself provides no straightforward answer to the vexed question whether or not, in a novel situation, a party owes a duty of care. […]
>
> 7. Fourthly, I incline to agree with the view […] that the incremental test is of little value as a test in itself, and is only helpful when used in combination with a test or principle which identifies the legally significant features of a situation. The closer the facts of the case in issue to those of a case in which a duty of care has been held to exist, the readier a court will be, on the approach of Brennan J adopted in *Caparo v Dickman*, to find that there has been an assumption of responsibility or that the proximity and policy conditions of the threefold test are satisfied. The converse is also true.
>
> 8. Fifthly, it seems to me that the outcomes (or majority outcomes) of the leading cases cited above are in every or almost every instance sensible and just, irrespective of the test applied to achieve that outcome. This is not to disparage the value of and need for a test of liability in tortious negligence, which any law of tort must propound if it is not to become a morass of single instances. But it does in my opinion concentrate attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole."

211. In *CGL Group Ltd v Royal Bank of Scotland plc* [2018] 1 WLR 2137, [60] Beatson LJ (with whom McFarlane and Lewison LJJ agreed) said of this case that

> "It was stated that there is no single test or touchstone that may be used to determine whether a defendant owes a duty of care in respect of pure economic loss: see Lord Bingham at [4] - [8], Lord Hoffmann at [35], Lord Rodger at [51] - [53], Lord Walker at [69] and Lord Mance at [93]."

I add only that Lord Bingham's fourth point (para [7]) was cited with approval by the Supreme Court in *James-Bowen v Metropolitan Police Commissioner* [2018] ICR 1353, [23], and his fifth point (para [8]) was cited with approval by the Court of Appeal in *Property Alliance Group v Royal Bank of Scotland plc* [2018] 1 WLR 3529, [61].

212. More recently still, *Swynson Ltd v Lowick Rose LLP* [2014] PNLR 27 is the case of a claim by a lender company and its ultimate owner against the provider of information and encouragement about the prospects of the borrower, said to have been given negligently by the defendant. It was argued that the defendant assumed a duty of care towards the ultimate owner because it knew he would rely on the advice given (in fact he lent money directly as well), and because he was the human agent standing behind the lender.

213. Rose J (as she then was) said this:

> "33. What I draw from these authorities are the following propositions. First, when considering a claim based on advice given by a professional person, it is

> useful to ask whether the professional person assumed responsibility for the advice to the claimant. Secondly, the test of whether responsibility has been assumed is an objective test and does not depend on the thoughts and intentions of the advisor. […] Thirdly, the advisor's knowledge that a third party might rely on the advice and might suffer loss if the advice is inaccurate is not a sufficient basis for the law to infer an assumption of responsibility. […] Fourthly, liability is established only if the claimant can show that he has relied on the advice. […] [T]he advisor must know or ought to know that a person to whom the advice is given will place reliance on it and that person must indeed place reliance on it.
> […]
> 35. […] None of the many cases in which duties of care for advice have been explored has suggested that where advice is given to a company it is also given to the human agents who receive that advice on behalf of the company so as to give rise to a parallel duty of care owed to them in their personal capacity, whether they are directors, shareholders or funders of the company. A company has no ears to hear advice nor eyes to read emails and due diligence reports other than the ears of the people with whom the adviser discusses the advice or the eyes of the people to whom the emails and reports are sent. It may well be that the owners of those ears and eyes stand to lose personally if the advice is negligently given. That does not mean that the adviser assumes responsibility for the advice to them as well as to the company, even if the adviser is well aware of what is at stake for them personally."

(I add that this case progressed to the Court of Appeal, and finally to the Supreme Court, but not on these points.)

214. In these circumstances I do not think I would be justified in accepting the invitation on behalf of the claimants to test the question of the existence of a duty of care owed by professional advisers such as the third and fourth defendants to the first claimant by reference only to the criteria set out in the judgment of Sir Brian Neill in the *BCCI* case. It seems to me that the appropriate approach for me to take in considering whether in the present case there was a duty of care owed to the first claimant is to consider all three of the tests referred to by Lord Bingham in paragraph [4] of his speech and see whether they lead in the same direction, bearing in mind also the qualifications referred to by Rose J in *Swynson Ltd v Lowick Rose LLP*. In so doing, I will of course take account of the points made by Sir Brian Neill in the *BCCI* case.

Discussion

215. Having found the facts, and discussed the relevant law, I will now apply the law to the facts. Earlier in this judgment, I summarised the claims and defences as pleaded, and then made some further comments on the claims as pressed at trial. I will deal with them in the same order.

216. **Undue influence:** As against the first defendant, the primary claim (and it is in fact the primary claim in the whole proceedings) is the claim in undue influence. The main allegations are that the first defendant became increasingly controlling after 1993, in 2003 started a campaign to expel the first claimant from Holdings, in 2007 proposed a demerger, in 2010 told the first claimant she would have to leave Holdings, and put pressure upon her until she agreed to the first defendant's terms. Despite a reference in para 2.13 of the claimants' closing to "the presumption of undue influence", I

understood the first claimant to accept that her case was not one of presumed undue influence, and she did not argue that it is a case of a 'protected legal relationship' as described by Rose J, but instead has to be proved as one of *actual* undue influence. As the authorities make clear, this involves pleading and proving "overt acts of improper pressure or coercion such as unlawful threats", and that this overlaps with the principle of duress at common law.

217. However, I have some difficulty in seeing that the case advanced on behalf of the claimants, in the re-amended particulars of claim, includes any allegations of such "overt acts of improper pressure or coercion." But, to the extent that it does, I have no hesitation in saying that such a case has not been proved. I do not say that the first defendant did not put *any* pressure on the first claimant. I accept that his business style could be self-centred, brusque and occasionally abrasive. He was every inch a businessman, who looked out for the interests of his company, but who also, as between himself and his fellow shareholders, looked out for himself. That is not wrong. To put pressure on another person to do a deal that you would like to do is not without more wrong. The mere fact that the other party is a fellow shareholder does not make it wrong either, provided you observe the corporate governance rules contained in the articles of association, any shareholders' agreement, and company law generally. And it is not right to characterise it as 'bullying'.

218. The business relationship between shareholders is not the same as a relationship between family members and should not be judged as if it were. In my judgment, it does not make any difference that the first claimant was handling the family litigation on behalf of herself and the first defendant. In any event, the first claimant was not a timid housewife, inexperienced in business. On the contrary, she was an experienced businesswoman, used to dealing with professional advisers in relation both to the corporate business and to her personal affairs. In my judgment the first claimant has not proved any conduct on the part of the first defendant which can properly be regarded as acts of *improper* or *illegitimate* pressure or coercion. This was a case of a hard negotiation by experienced business people in a commercial transaction, and nothing more. As a result, the claim in undue influence must fail.

219. It is not strictly necessary, therefore, for me to deal with issues of causation and loss. But I think it is appropriate for me to deal at least with the allegation made not only against the first defendant but also against others, either as a basic allegation or as the foundation for further allegations, that it was wrong for the first claimant not to receive assets equating in value to 31.25% of the value of the company. In his closing on behalf of the claimants, Mr Blackmore says:

> "3.1. CDS was a 31.25% shareholder in SNHL, which was the holding company of the Notaro 'Group' of companies. The net value of SNHL was described by JN to be £23 million… And is evidenced in the Clearance Letters to HMRC from BF, that on the demerger each shareholder should receive the percentage of the total assets represented by his or her shareholding. Therefore in CDS's case she should have received 31.25% of £23 million, viz £7,187,500, whereas she received properties in cash totalling £5,469,492, a shortfall of £1,718,008. In fact the Savill's report evidences that the true position was that CDS on the demerger should have received 31.25% of £39,748,700, viz £12,421,468."

220. I have already said that I do not accept the claimants' experts' valuations, and prefer those of the defendants' experts. But in any event, in my judgment, the assumption that the first claimant was entitled to a pound for pound equivalence between her share in the company and the assets she received is entirely without foundation. It suggests, for example, that she owned that percentage of the company's assets. But that would be an elementary error, exploded long ago in the House of Lords' decision in *Macaura v Northern Assurance Co Ltd* [1925] AC 619, where the question was whether a shareholder of the whole of the share capital in a company had an insurable interest in the property of the company. Lord Buckmaster said (at 626-627):

> "[N]o shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up."

Lord Sumner and Lord Wrenbury said the same thing, and Lord Atkinson and Lord Phillimore agreed with Lord Buckmaster. His dictum was recently cited with approval by Lord Sumption (with whom the other members of the Supreme Court agreed) in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, [8].

221. The true position is that the entitlement of a shareholder in an English company is, as Lord Buckmaster said, to share in any profits made while the business is carried on, and to share in the distribution of any surplus if and when the company is wound up. (There are also certain other remedies now available, for example in circumstances where conduct unfairly prejudicial to members can be proved, but we are not concerned with those now.) Accordingly, on a *demerger*, which is a consensual transaction, and not as one of right, a demerging shareholder has no *entitlement* to any particular amount of assets, but only to what she can obtain by negotiation. This was, incidentally, accepted by both the share valuation experts in the present case. It is also reflected in the sale of Philip Notaro's 5500 shares in Ltd (more than the first claimant's) for £1,083,628 in 2000, *with* the benefit of professional advice. As the first and second defendants say, there is no suggestion that the company increased five times in value between 2000 and 2011.

222. So the basis of the value of the first claimant's shares is not an arithmetical proportion of the value of the company's assets, nor a "fair" value (as it might be on a successful unfair prejudice petition under s 994 of the Companies Act 2006), but simply what she can negotiate with a purchaser. This was not a quoted company, but a private company *without* the benefit of a shareholders' agreement but *with* restrictions on share transfer, so the external market for a minority stake would be practically non-existent. The internal market was restricted to the company, the first defendant, Netta and Letizia. In my judgment there is no basis for saying that the first claimant's shares were disposed of by her in the demerger transaction at an undervalue.

223. That is enough to dispose of the first head of claim, but in case the matter goes further I deal with the further question of what remedies could be awarded, and in particular whether the transactions complained of could be reversed and *restitutio in integrum* made. One problem is that not all the parties who would be involved in undoing the transaction are parties to this litigation. Of the companies involved in these transactions, only Group is a party (as the second defendant). Yet the first claimant was a shareholder in Holdings. On the face of it, therefore, she would have to be

returned to that position (and the dividend declared by Holdings to the second defendant of £5.5 million would have to be reversed). But Holdings is not a party, and so would not be bound by any order made in the litigation. The second defendant would also have to give back properties that had been owned by Ltd to that company.

224. Netta and Letitzia before the demerger held shares in Holdings, but afterwards held none. On the other hand they acquired shares in Group. They would need to be joined to the proceedings in order to reverse those parts of the transaction that concern them. Similarly with Windows, Antonio and Sabato, because Holdings transferred its shares in Windows to Antonio and Sabato as part of the demerger.

225. Finally, the first claimant is no longer the sole shareholder in the second claimant. Shares have been transferred to her husband Salvatore and the trustees of two trusts. These further parties would need to be bound by the orders made in the litigation. There would also be tax issues to be considered, both in relation to corporation tax and stamp duty land tax. In addition, the claimants would have to return the rents received on the various properties (which are said to amount to £1.6 million since 2011). They have not said that they are able and willing to do this, and I do not think I can simply assume it.

226. I do not say that *all* these matters are incapable of being resolved. In certain limited respects, it may be possible, for example, to deal with the *products* of assets received by the parties rather than with the assets themselves which were given up in the demerger: compare *Bainbridge v Bainbridge* [2016] WTLR 943. On the other hand, I do not see how the notice procedure in CPR rule 19.8A could be applicable. By reference to rule 19.8A(1), it is not a claim relating to the estate of a deceased person, or to property subject to a trust, and, as at present advised, it is not a claim relating to the *sale* of any property, because fundamentally that is not the nature of a *demerger* (but of course I accept that I have not heard any argument on this point). So in principle it would be necessary to join the relevant persons as parties and give them the opportunity to be heard on the undue influence claim.

227. Yet the claimants have chosen to make and plead claims against the particular defendants, and not the others. In principle (and subject to a point which I will come to) only they are bound by the result of these proceedings, and the claimants cannot be compelled to sue others they do not wish to: *cf Dollfus Mieg v Bank of England* [1951] Ch 33, 38. Here, of course, there would have been power to add the other persons as parties under CPR rule 19.2(2)(a), (b), on the basis that in this way the court can resolve all the issues arising in the proceedings. Yet still the claimants have chosen not to apply to add the other persons. In my judgment, on the facts of this case it would be an abuse of process to do so at this very late stage. The claimants should have seen this coming and acted sooner. There must be some finality in litigation.

228. Mr Blackmore sought in the oral part of his closing to deal with arguments about the non-joinder of relevant parties by saying that these other parties might be bound by a form of estoppel. He argued that it was issue estoppel. This was not developed, no authorities were cited, and I have difficulty in understanding how it would work. But I do not think that it can be *issue* estoppel. Even if the court had decided that the first defendant had procured the demerger by means of undue influence on the first claimant, that decision (or the relevant issue) would bind only the parties to it and their "privies". I accept that the first claimant's husband, and the trustees of their

settlements, claim under the first claimant, and cannot be in a better position than her. But at present I do not see how Holdings, Netta or Letizia claim under any party to the litigation, nor (if it is relevant) that they encouraged or incited the first defendant to behave as he did, and therefore I see no reason why they should be regarded as "privies" for this purpose, all bound by the decision in the same way as the parties are.

229. In fact, in the way that Mr Blackmore explained his estoppel argument orally, it sounded to me more like a form of *representational* estoppel. He said that the second defendant decided to defend the claim, which must have been discussed with the shareholders, and they must have agreed to stand behind the company. Yet it is not pleaded by the defendants that their non-joinder means that the remedy sought by the claimants cannot be obtained. The claimants relied on this *failure* so to plead, and did not themselves join the shareholders, thereby acting to their detriment. But with respect that does not work either. The parties themselves do not have to plead law or legal consequences. But even if the first defendant had a duty to plead the nonjoinder point, the other shareholders themselves would have no duty to speak, nor to volunteer to be joined. Their silence is no representation on which the claimants can rely. The claimants could have sued whom they wished, but they chose not to sue, or later to apply to join, the other shareholders. In my judgment there is no estoppel here.

230. In circumstances where the proper persons are not all before the court, and no application has been made to join them, where no indication has been given that the claimants would be willing to make restitution by restoring the rents received from the properties, and – most importantly – the business of the Notaro Group has been carried on for the last several years on the higher risk basis eschewed by the first claimant, but in whose success she now wishes with hindsight to share, I have no hesitation in saying that it would not be an appropriate case, even if a case of undue influence approved, for undoing the demerger transaction, because the parties cannot be restored now to the position that they would have been in. Whether in such a case some other remedy could be awarded, such as equitable compensation, is another matter. If I had been of opinion that the case on undue influence was proved, it would probably be necessary for an enquiry to take place.

231. In any event, there is also the question of the extent to which the first claimant has affirmed the demerger transaction, in particular by the second claimant (obviously at the direction of the first claimant) selling properties in the portfolio long after having acquired knowledge of all the facts necessary to constitute her claim. Indeed, the latest one was sold in May 2019, some two years after this claim had been brought, and therefore well after she had presumably been advised by her present legal team that she had a cause of action. Although it was not cited to me in argument, in *Peyman v Lanjani* [1985] Ch 457, the Court of Appeal held that in order to lose the right to rescind a contract which was induced by deception, a party had to have knowledge not only of the facts but also of the *right* to rescind: see at 488 (Stephenson LJ), 496-96 (May LJ), and 500 (Slade LJ). The latter point has been questioned, but that does not matter here. On any view, by selling to third parties one or more of the properties which were in the first claimant's 'pot' and transferred to the second claimant, with knowledge of the facts *and* their legal rights flowing from them, the claimants have affirmed the demerger transaction and cannot now claim its rescission.

232. In addition to that, there is the question of laches. The claimants have waited almost six years after the demerger transaction was done to bring these proceedings. The defendants say there is no good reason for the delay. In *Fisher v Brooker* [2009] 1 WLR 1764, HL, a case about the ownership of a copyright in a song composed in 1967 but where proceedings were not brought until 2005, Lord Neuberger (with whom all their lordships agreed) said:

> "64. Fifthly, laches is an equitable doctrine, under which delay can bar a claim to equitable relief. In the Court of Appeal, Mummery LJ said that there was 'no requirement of detrimental reliance for the application of acquiescence or laches' - [2008] EWCA Civ 287, para 85. Although I would not suggest that it is an immutable requirement, some sort of detrimental reliance is usually an essential ingredient of laches, in my opinion. In *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221, 239, the Lord Chancellor, Lord Selborne, giving the opinion of the Board, said that laches applied where 'it would be practically unjust to give a remedy', and that, in every case where a defence 'is founded upon mere delay … the validity of that defence must be tried upon principles substantially equitable.' He went on to state that what had to be considered were 'the length of the delay and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy'."

233. In the present case the defendants say that there has been a long delay since the demerger, during which time the properties transferred to the second claimant have not remained the same, not merely physically, but also being subjected to different legal relationships with third parties, such as tenancies and charges. Indeed (as already mentioned), some of them have been sold. I accept this submission. I am also bound to say that, for the same length of time, the Notaro group has conducted its affairs on the basis that it was able to take the risks that it wished, free of the first claimant's reservations and objections. I do not see why the claimants, having deliberately chosen and followed what seemed to them to be a low-risk path, holding a portfolio of assets for which an open market exists, should now be entitled (with the benefit of hindsight) to claim the benefits of the higher risks which the group has taken, apparently successfully, holding itself together in an illiquid form. Even if the claimants had established their undue influence case, I would not have granted relief in these circumstances. That would not have been fair.

234. **Breach of fiduciary duty:** The second claim against the first defendant is that of breach of fiduciary duty. The problem for the first claimant is to show that the first defendant, as a fellow director and shareholder, owed fiduciary duties, not only to the company, but also to *her*. I have referred to the relevant authorities above. In my judgment, this head of claim fails at the first hurdle, because the first claimant is unable to show that the first defendant owed her (as opposed to the company) any fiduciary duties. As the authorities examined earlier show, no such duties arise by virtue of the mere fact of the first defendant's being a director, but only because there is a 'special relationship' between the director and shareholder.

235. Almost always in those cases where such a 'special relationship' is found to exist, the claimant is not a fellow *director*, but simply a fellow *shareholder* of the defendant, and there is a serious imbalance in power and access to information. That is not this case. In the present case, both the first claimant and the first defendant had precisely

the same access to information, and (as directors) precisely the same authority in relation to the conduct of the company's business, save only that the first defendant was the managing director. There is no allegation made that the first defendant did anything *as managing director* (rather than as director) which caused a fiduciary relationship to arise with the first claimant.

236. But, in any event, the first claimant's claim suffers from the problem that she was (and she knew she was) in the position of a businesswoman negotiating against another businessman on the terms on which she would surrender her shares in the company. Accordingly, their interests were intrinsically opposed. She cannot possibly have believed that the person with whom she was negotiating on behalf of the company owed a fiduciary duty *to her* to put *her* interests first and the company's (or his) interests second. That is just fantasy. Even if somehow she believed it, it was not true. The first defendant did not engage to act on her behalf or for her benefit, and no reasonable director of a commercial company in the position of the first claimant would have thought that he did. In my judgment, there was no 'special relationship' such as to call into existence a fiduciary duty owed by the first defendant to the first claimant.

237. By way of an alternative to the argument that there was here a 'special relationship' between a director and shareholder, the claimants argued that this company was akin to a quasi-partnership, and that *therefore* the shareholder/directors owed each other fiduciary duties. I reject this submission. First of all, even if the company could be regarded as a quasi partnership for one purpose (for example in considering the question whether a petition for the winding up the company on the just and equitable ground could be maintained), that does not mean that it would be a quasi partnership for any other, let alone all purposes, including (if this in fact be the consequence) that the shareholder/directors owe each other fiduciary duties, just as if they were partners of a partnership.

238. Secondly, I do not accept that this company could properly be regarded as a quasi-partnership in any meaningful sense of the phrase. Although the very early history of the business carried on by Sabato Notaro is not clear, the business certainly did not begin as a partnership between individuals, let alone as a partnership between the first claimant and the first defendant (amongst others). It is clear that, until he retired from the business, Sabato Notaro controlled everything. Thereafter, he left it to his children, who had never agreed to be partners in anything. They were accordingly from the beginning operating in a framework subject to corporate governance rules, including the articles of association and the general company law. There is no justification for seeking to treat this therefore *as if it were* a partnership. The rules of company law apply.

239. Even if there had been such a special relationship, or a quasi-partnership, giving rise to a fiduciary obligation, the main allegations against the first defendant are in substance that he failed to disclose the true value of the assets of the group (as these could only be determined by an independent valuation) and failed to disclose to the first claimant that she had not received the underlying asset value of her shares. But no independent valuation had been carried out of the group's assets, and therefore the first defendant did not have any information to fail to disclose. In substance, the allegation is one that the first defendant had an obligation to procure an independent valuation of the group's assets, something which the first claimant herself never

sought (though she had as much power to do so as the first defendant). Moreover, she knew that no such independent valuation had ever been obtained. In my judgment, the first defendant had no such obligation. Even if he had had one, a breach of it could not be causative of any loss, because even without a professional valuation the first claimant was still complaining before the demerger that the assets in her 'pot' were not equal to the value of her shares.

240. Moreover, I am satisfied that, to the extent that he preferred his own interests *as a shareholder* to those of the first claimant *as a shareholder*, for example in seeking to persuade her to agree to a demerger, he was entitled to do so. The allegations against the first defendant of seeking to obtain her shares at an undervalue, forcing her to take assets that she did not want, diminishing her role as a director and intimidating her, and instructing outside advisers to provide false information to HMRC, further his own interests and act against her interests are simply not made out. So even if the first defendant had owed fiduciary duties to the first claimant, the first claimant would not have proved any breach of them. As a result, the question of remedies for breach of fiduciary duty does not arise. Even if they did, the first claimant would still face the problems of laches and affirmation which have already been referred to.

241. I said earlier that there was no formal claim in the Re-Amended Particulars of Claim that the demerger was an unconscionable transaction with a vulnerable person, although the statement of case alleges (at para 3.1) that the first defendant's 'campaign' against the first claimant from 2004 made her "more vulnerable to pressure", and para 3.8 alleges that at a meeting in 2010 the first claimant told the first defendant that "her doctor had advised her that she was not well enough to make important decisions". Indeed, Mr Blackmore confirmed at trial that he was not making such a claim. This was a wise position to adopt. In my judgment, the first claimant was not a vulnerable person within the meaning of the equitable doctrine: see *eg Snell's Equity*, 34th edition, 2020, para 8-042. Instead, she was an experienced business woman who dealt with business decisions day in, day out, as well as being a charity trustee. The terms of the demerger transaction were not oppressive in the sense that they shock the conscience of the court. On the contrary, even if the first claimant considers that she did not receive enough, she still received several million pounds' worth of assets. Moreover, it is not even alleged, let alone proved, that the first defendant knowingly took advantage of the first claimant's alleged vulnerability in a morally culpable way.

242. **Unjust enrichment:** Mr Blackmore accepted that the claims in unjust enrichment against the second defendant were consequential on the substantive claims against the first defendant. Without the wrong of the undue influence there would be no *unjust* enrichment. So in the circumstances that the claim in undue influence fails they too fall away. But in any event, even if the undue influence were proved, it cannot be the case that *both* the first claimant *and* the second claimant would have a claim against the second defendant in unjust enrichment to the value of the additional assets received. This is because such a claim is based on the enrichment complained of being *at the expense of the claimant*. It is obvious that, if the second defendant were enriched by the additional assets received, this could be only at the expense of one or other of the claimants, but (in the present circumstances) not *both*.

243. I did not hear detailed argument on this point. Provisionally, however, it seems to me that, if undue influence had been proved in this case, any enrichment would have been

at the expense of the first claimant, who was persuaded to enter into the transaction giving up rights which she ought not to have given up. There is a further point, and that is whether it is appropriate to regard a transaction entered into by means of undue influence can ever amount to an "unjust enrichment". This is because *ex hypothesi* the transaction is flawed, and the primary remedy is to set the transaction aside, thus reversing the enrichment. So there would be no enrichment. If, on the other hand, for some reason (for example affirmation or laches) that remedy were not available, then it might amount to 'enrichment', but because there was a defence to the claim it could not be regarded as 'unjust'. But as I say I heard no argument on this point, and this is a more difficult question. So I think it better that I express no view. There is also the point raised as to whether the underlying contract can affect the operation of the principles of unjust enrichment, as in *Costello v MacDonald Dickens & Macklin* [2012] QB 244, CA. Again, this does not arise in the circumstances and I prefer to express no view.

The third defendant

244. **Breach of fiduciary duty:** As against the third defendant, the first claimant makes claims based on breach of fiduciary duty and negligence. As to the first of these causes of action, I have already discussed the genesis of fiduciary duties. In so doing, I concluded that it was not enough, for a fiduciary obligation to arise, that there should be a relationship of trust and confidence (in the broad sense) between the first claimant and another person (such as the third defendant). Originally, the first claimant relied on advice to shareholders by David Savill in 2007, advice to the first claimant on fiscal consequences and on apportionment of assets in 2010, and the clearance letters written to HMRC in March and April 2011. I have already found that the 2007 advice to shareholders was not advice to the first claimant personally as against the interests of the other shareholders. I have also found that the 2010 advice on apportionment of assets was not advice to her personally as against the interests of other shareholders, and at the meeting of October 2010 with David Savill he was advising the company and not her.

245. At trial, in fact, Mr Blackmore accepted that there could be no duty owed to the first claimant based on events prior to November 2010, when the first claimant had a meeting with David Savill, and the AGM of the company took place. The clearance letters in 2011 were written on behalf of the company *and* the shareholders, because that is the common format of such applications for tax clearance. That does not imply, and I have not held, that the third defendant was assuming obligations of a fiduciary nature to the first claimant which could give rise to the consequences alleged on her behalf. Moreover, by the time the demerger transaction was in train, from late 2010 onwards, the first claimant knew very well that the third defendant was retained by the company and not by her personally. Very sensibly, at the meeting between Mr Savill and the first claimant on the 21 March 2011, he told her to obtain independent advice.

246. In my judgment, in relation to the demerger transaction, the third defendant was not assuming any fiduciary obligations towards the first claimant, and the first claimant knew that the third defendant was acting for the company and not her. The third defendant reasonably believed that the first claimant was agreeing to the transaction and did not appear to be at a disadvantage or otherwise vulnerable. There is nothing else in the case which requires that the third defendant be subject to fiduciary

obligations to the first claimant in respect of the demerger transaction, and I hold that it was not.

247. In case I am wrong, I go on to consider what the position would have been if there had been any such fiduciary obligations owed to the first claimant. First of all, in relation to any allegation of conflict of interest, the first claimant knew that the third defendant was acting for the company. By continuing in the transaction, she must have consented to this. Moreover, the third defendant advised her to obtain independent advice. So the only question is whether the third defendant intentionally furthered the interests of the company to her prejudice. But this allegation is not made out. In particular, the third defendant simply acted on the values provided by the company, which (as I have described) were prepared by the first claimant and the third defendant jointly. It did not supply information to the first defendant intending that he keep and use it for his own personal purposes, but only for the purposes of the company. Nor did it manipulate the values of assets allocated to the first claimant. So the allegation of breach of fiduciary duty is without foundation.

248. **Negligence:** So far as concerns the allegations of negligence against the third defendant, I have already made clear that the third defendant was acting throughout for the company and not for the first claimant as against the interests of the company and the other shareholders. In the demerger transaction, it was clearly "on the other side of the fence". It is also clear that, judged objectively, the third defendant did not assume responsibility to the first claimant for what it said and did in the transaction. Nor, in my judgment, is this a case where the third defendant should be treated by the law as having done so. Turning to the so-called "threefold test", I accept that loss to the first claimant was a reasonably foreseeable consequence of what the third defendant did or failed to do. However, I do not consider that the relationship between the parties was one of sufficient proximity for a duty of care to be imposed, and neither do I consider that in all the circumstances it is just and reasonable to impose such a duty. The first claimant knew how to obtain professional advice, was advised to obtain professional advice, and could easily have done so. She chose not to. That does not entitle her to rely on the professional adviser to the other side in the transaction to look after her interests. As for the incremental test, in the circumstances of this case, where an experienced business woman deliberately chose not to be professionally advised in a commercial transaction, it would not just be an *incremental* change to hold that the third defendant owed the other side in the transaction a duty of care: it would be revolutionary. Each of the three tests points away from imposing a duty of care in the circumstances. Overall, I cannot accept that it would be appropriate for the law to impose a duty of care on the third defendant in this case.

249. In case I am wrong about the imposition of a duty of care, I go on briefly to consider the consequences if there were such a duty. I have already set out above (at [52]) in summary form particulars of the alleged negligence of the third defendant. I deal with these matters using the same numbering:

(i) the third defendant *did* advise the first claimant to obtain independent advice; but failing to advise that there should be an independent valuation would not have been a breach of duty because the third defendant reasonably believed that the first claimant knew the values of the property;

(ii) the first claimant had no entitlement to receive assets equating to the value of her shares;

(iii) since she had no such entitlement, it would be a matter of negotiation what she received, and no duty of care could extend as far as alleged;

(iv) the first claimant in fact read drafts of both letters to HMRC and so she knew the terms, but in any event she accepted at trial that they were true so it would make no difference;

(v) as I have said, the first claimant was entitled to what she could negotiate; that was what the proposal prepared by the third defendant was based on;

(vi) the second capital reduction did not reduce the value of her shares, and it was explained to her;

(vii) the first claimant confirmed in oral evidence that Chris Biggs explained the discount to her at the time, and she knew that she was not getting value equivalent to 31.25% of the company's assets.

250. If, contrary to what I have held, there were any such duty of care, and any such breach of duty, the next question is whether it would have caused any loss to the first claimant. As I have already held, the first claimant was already dissatisfied with what she was getting in the demerger transaction, even before it was done. Moreover, she knew she was not receiving 31.25% of the assets of the Group, and that a 15% discount had been applied. In addition, she chose not to obtain any independent valuation or professional advice for herself, despite suggestions that she should do so. (Even if she had, I see no basis for supposing that she would have been any more frank with that adviser that she had been previously.)

251. In these circumstances, I am not persuaded that, had the third defendant advised her that there should be an independent valuation, that she was not getting 31.25% of the assets of the group, that a 15% minority discount been applied (and why), and that she was not receiving a fair value for their shares, she would not still have entered the demerger transaction. On the contrary, I think she would have done. Any failure to advise the first claimant to obtain a professional valuation of the assets could not be causative of any loss because the first claimant would not have asked for one to be carried out anyway. Moreover, I am not persuaded that any better deal could have been negotiated by the first claimant than the one which she did negotiate. So, even if she had shown she would not have entered the demerger, she would still be locked into the company, with an illiquid and effectively unsaleable minority stake.

252. A claim in negligence against the third defendant is also advanced by the second claimant. In my judgment, if (as I have held) there was no duty of care owed by the third defendant to the first claimant, for similar reasons there was none owed to the second claimant either. In case I am wrong about this, I briefly consider the position if such a duty existed. I have already set out above (at [55]) in summary form particulars of the alleged negligence of the third defendant. As to these matters, using the same numbering, the problem for the second claimant is that the allegations all depend on the idea that the first claimant was entitled to 31.25% of the value of the assets of the company on the demerger. But that is without foundation.

253. On a demerger, she was, as I have already held, entitled to what she could negotiate. Accordingly, it cannot be said that the first claimant was transferring her shares in Holdings at an undervalue, that the transfer of such shares represented assets to which the second defendant was not entitled or that they represented assets to which the B shareholders were not entitled. There can, therefore, be no question of a breach of duty by the third defendant consisting of *knowledge* of any of these matters. But in any event the third defendant was not acting as a valuer, was not involved in ascribing values to the properties or the company shares, and did not know whether the values ascribed were accurate or not.

254. If I were wrong, and there were any such duty of care, and any such breach of duty, I would have to consider whether it would have caused any loss to the second claimant. The controlling mind was that of the first claimant, and I have already held, even if she had been advised as she complains she was not, that she would have gone on with the demerger transaction. Accordingly, I am not satisfied that any breaches of duty that might be proved would have caused loss to the second claimant.

The fourth defendant

255. **Breach of contract and breach of fiduciary duty:** I turn to the claims against the fourth defendant. The first claimant makes claims for breach of contract, breach of fiduciary duty and also in negligence. So far as concerns claims for breach of contract and breach of fiduciary duty, the first claimant originally relied on the retainers of the fourth defendant in 2000, 2007 and 2008, and March 2011. Each of these retainers was separate. In 2000, it was about the company's breakup with Philip Notaro. In 2007, it was a private retainer by the first claimant and her husband for making their wills, and a further meeting between the first claimant and Mr Brennan in September for (amongst other things) advice about possible retirement. In 2008 the fourth defendant was retained to deal with the family litigation, on behalf of the first claimant and the first defendant as executors.

256. By the time of the trial, Mr Blackmore maintained that the fourth defendant was retained personally by the first claimant in January 2011, when the fourth defendant was asked to quote for the legal work involved in the demerger. In fact the retainer was not finalised until March 2011, but in any event the retainer was one *by the company*, to prepare legal documents for the purposes of the demerger (but not to advise on the substance of the demerger transaction). Indeed, it was the first claimant who received the retainer letter from the fourth defendant, obtained the first defendant's signature to it on behalf of the company, and sent it back.

257. The first claimant accepted that, in the only meeting they had before the completion meeting, on 10 March 2011, Mr Brennan had told her that he and the fourth defendant were acting for the company only. Moreover, by the time the fourth defendant was retained, the asset allocations and other substantive elements of the demerger were already decided, and the fourth defendant's role was essentially that of "execution only". Whilst it is possible for a professional adviser such as a solicitor to act for two principals who have conflicting interests, that is not what happened here. There was no conflict of interest.

258. In these circumstances, in my judgment any argument that the first claimant had personally retained the fourth defendant to advise *her* on the substance of the

demerger is hopeless. Absent that, there is nothing special in the relationship between the first claimant and the fourth defendant which pushes the case into fiduciary territory. Accordingly, any argument seeking to erect either a contract or a fiduciary relationship on the same facts is equally doomed to failure.

259. In case I am wrong, I go on to consider what the position would have been if there had been any such contractual or fiduciary obligations owed to the first claimant. First of all, in relation to any allegation of conflict of interest, as with the third defendant, the first claimant knew that the fourth defendant was acting for the company. So, by continuing in the transaction, she must have consented to this. Realistically, therefore, the only question is whether the fourth defendant intentionally furthered the interests of the company to her prejudice. But in my judgment this allegation fails. In particular, the fourth defendant had nothing to do with the valuation of the company or the properties. It simply acted on the values provided by the company. It prepared legal documents for the demerger, for the purposes of *the company*. So the allegations of breach of contract and of fiduciary duty are without foundation.

260. **Negligence:** so far as concerns the claims against the fourth defendant in negligence, there was a prior relationship between the first claimant and the fourth defendant, including discrete retainers by her on specific matters, as well as advice given to the company as such, and also acting for the first claimant and the first defendant in the family litigation against their siblings. But in my judgment none of this would have told the fourth defendant that the first claimant was anything other than an experienced businesswoman able to speak her mind, and especially would not have told it that she was a vulnerable person who had been subject to intimidation and who did not wish to sell her shares at all. In January 2011 the fourth defendant was approached to quote for legal work on the demerger and formally retained *for the company* thereafter, the first claimant personally handling the engagement letter and obtaining the first defendant's signature on it.

261. The first claimant accepted at trial that she knew (and I have found that she was expressly so told by Mr Brennan) that the fourth defendant was acting for the company only. The fourth defendant's role was essentially to prepare the legal documentation for a deal which had already been agreed, a kind of "execution only" role. It was not advising anyone on the merits or the substance of the transaction. Objectively judged, on the facts I have found the fourth defendant did not assume any responsibility towards the first claimant, but only towards the company (and that limited to preparation of legal documentation, rather than substantive advice on the merits of the demerger). For much the same reasons as in relation to the third defendant, I hold that each of the three tests for imposing a duty of care to the first claimant points away from imposing one in these circumstances. In my judgment it just would not be right to do so here.

262. But, in case I am wrong about the imposition of a duty of care, I go on briefly to consider the consequences if there were such a duty. I have already set out above (at [63]) in summary form particulars of the alleged negligence of the fourth defendant. I deal with these matters using the same numbering:

(i) the first claimant had no entitlement to receive assets equating to the value of her shares;

(ii) the first claimant had to no entitlement to anything except what she had negotiated (in which the fourth defendant played no part), and the fourth defendant had no knowledge of the figures or the values of the shares or the underlying properties;

(iii) Mr Brennan did not have a conflict of interest, and had told the first claimant in terms that he was acting for the company, but in any event Mr Savill of the third defendant had told the first claimant to obtain independent advice about the demerger, and she did not; even if she had, she would not have told the new adviser everything; so if the fourth defendant did not advise her to do so it could not cause any loss;

(iv) Mr Brennan did in fact explain the second capital reduction; but even if he had not it would have caused her no loss, but on the contrary enabled her to do what she wanted (declare a dividend), as I have already held;

(v) the fourth defendant's role was not to advise on the substance of the demerger terms but to prepare the legal documents to give effect to the agreed transaction, so any duty of care would be similarly limited; but even were it not so limited, Mr Savill of the third defendant had told the first claimant to obtain independent advice about the demerger, and she did not; so if the fourth defendant did not advise her to do so it could not cause any loss;

(vi) this adds nothing to (iii);

(vii) the second capital reduction did not reduce the value of the first claimant's shareholding in the second claimant.

263. A claim in negligence against the fourth defendant is also advanced by the second claimant. In my judgment, if (as I have held) there was no duty of care owed by the fourth defendant to the first claimant, for similar reasons there was none owed to the second claimant either. In case I am wrong about this, I briefly consider the position if such a duty existed. I have already set out above (at [66]) in summary form particulars of the alleged negligence of the fourth defendant. As to these matters, the position is essentially the same as in relation to the second claimant's claim against the third defendant.

264. The allegations all depend on the idea that the first claimant was entitled to 31.25% of the value of the assets of the company on the demerger. But that is without foundation. On a demerger, she was, as I have already held, entitled to what she could negotiate. Accordingly, it cannot be said that the first claimant was transferring her shares in Holdings at an undervalue, that the transfer of such shares represented assets to which the second defendant was not entitled or that they represented assets to which the B shareholders were not entitled. There can, therefore, be no question of a breach of duty by the fourth defendant consisting of *knowledge* of any of these matters. But even if such a breach were possible, the fourth defendant was not involved in the negotiations or concerned with the allocation of assets between the demerging parties, and had no knowledge of any undervalue or lack of entitlement to assets.

Conclusions

265. In my judgment all the claims against all the defendants fail, and must be dismissed. In view of the current Covid-19 pandemic, I invite the parties to submit any submissions in writing that they wish in support of any consequential orders that they seek, by 4 pm on 5 May 2020 in the first instance, with copies to all other parties, and by the same time on 7 May 2020 in reply to any other party's submissions (if so advised), with copies as before. I will thereafter determine matters on paper, unless I consider that an oral hearing is needed, when one will be arranged to take place by telephone conference.

266. I am extremely grateful to the parties and their legal teams for their considerable assistance during the trial, and for their patience in waiting for this judgment, which was held up by pressure of other work, personal illness and then the coronavirus pandemic.