**Neutral Citation Number: [2023] EWHC 1903 (Ch)**

**Claim No: BL-2021-000102**

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**BUSINESS LIST (Ch D)**

**Remote Hand-Down**

**27 JULY 2023**

**BEFORE:**

**I.C.C. JUDGE JONES SITTING AS A HIGH COURT JUDGE**

**B E T W E E N:**

**(1) OAK FOREST PARTNERSHIP LIMITED (IN LIQUIDATION)**
**(2) OAK PROPERTY PARTNERS LIMITED (IN LIQUIDATION)**
**(3) DAVID ANTHONY INGRAM**
**(as Joint Liquidator of the First Claimant and as Liquidator of the Second Claimant)**
**(4) HANNAH DAVIE**
**(as Joint Liquidator of the First Claimant)**

**Claimants**

**-and-**

**(1) MERCANTILE INVESTMENT HOLDINGS SA**
**(a company incorporated under the laws of St Kitts and Nevis)**
**(2) HEVER HOTEL MANAGEMENT LIMITED**
**(3) HEVER SPA AND WELLBEING LIMITED**
**(4) BLAKEMORE HOTELS PROPERTY HOLDINGS LIMITED**

**Defendants**

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**Matthew Collings K.C. and Tim Calland** (instructed by **Howes Percival LLP**) for the **Claimants**
**Clifford Darton K.C. and Eleanor Vickery** (by **direct access** for the **Defendants**)

**Hearing dates: 10-12 and 15-18 May 2023**

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**This judgment was handed down remotely at 10.00 am on 27 July 2023 by circulation to the parties or their representatives by email and by release to The National Archives."**

# 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.

**.....27/7/23.....**
**I.C.C. JUDGE JONES**

## I.C.C. Judge Jones:

## A) Introduction

### A1) The Claims

1. This case concerns transactions, the grant of 999 year common parts leases, which followed the freehold purchases of "Hever Hotel" ("**Hever**") on 5 August 2011 by Oak Forest Partnership Limited (**"C1"**) and of "Needham House Hotel" ("**Needham**") by Oak Property Partners Limited (**"C2"**) on 28 March 2013. The aim of the purchases was for the properties to be run as hotels/conference centres and for the rooms to be sold to investors ("**the Investors**") on terms that they would also receive a part of the income generated by their respective rooms from the running of the hotel.

2. Whether these were collective investment schemes which should have been but were not subject to the regulatory protection of the ***Financial Services and Markets Act 2000*** is a matter for another case. However, it is clear that such investments should be for sophisticated investors or for those relying upon professional advice because of the inherent risks (including reliance upon the actions of the hotel owner and/or of any managers used) and the legal issues involved. Sadly the Investors, many of whom live in the Far East, have discovered the risks of such investments the hard way. So too other creditors including those who lent to C1 to purchase Hever. C1 was placed into creditors' voluntary liquidation on 13 February 2017 and C2 on 21 June 2017.

3. On 23 May 2013 the first of the challenged 999 year leases demised the common parts of Hever ("**the Hever Common Parts Lease**") to White Linen Hotels & Resorts Limited ("**WL**"). On 1 April 2015 the common parts and facilities of Needham were demised (**"the Needham Lease")** to Stevenage Conference Centre Limited (**"SCCL"**). The claims are brought against the Defendants as successors in title to those lessees: Mercantile Investment Holdings SA (**"1D"**), Hever Hotel Management Limited (**"2D")** and Hever Spa and Wellbeing Limited ("**3D**") for the Hever Common Parts Lease; and Blakemore Hotels Property Holdings Limited (**"4D"**) for the Needham Lease.

4. Therefore, although there is one claim form, there are two claims independently affecting each of the two separate properties owned by different legal entities. Similarities concerning the facts and matters of the separate causes of action have caused them to be brought and to continue to trial in one set of proceedings. Whether that was correct procedurally is now water under the bridge subject to the issue of court fees which is also not the subject of this judgment.

5. The purchase price paid to the unconnected third party vendor for the freehold of Hever by C1 was principally raised from unconnected lenders (**"the Hever Lenders"**): as to £1 million from Silver Birch Developments SA, repayable on demand after 1 February 2012, and as to £1,107,851 from Northern Placements Limited, repayable on demand after 1 October 2012. The loans were agreed to be secured by a legal charge over the freehold (**"the Hever Lenders' Charge"**) but

either no charge was executed or the executed charge was not registered at H.M. Land Registry prior to the grant and registration of the Hever Common Parts Lease. On 28 June 2013 part of the freehold estate known as **"Dairy Cottage"** was transferred to C2.

6. For the purpose of running Hever as a hotel, C1 had entered into **"the Hever WL Management Agreement"** with WL on 1 July 2011. Hotel rooms were demised ("**The Hever Room Leases**") on 999 year leases at premiums to Investors between 21 October 2011 and 4 July 2014. Buy-back rights were granted to the Investors to be exercised at the end of the 4th or 5th years of purchase.

7. The Hever Common Parts Lease granted to WL just under two years later was made without a premium for a term of 999 years and seven days from 24 June 1997. The rent provisions can be summarised as £50,000 a year for five years, £100,000 for the next five, and annual increases of 12.5% for the remainder of the term. By a deed of variation (**"the Hever CPL Variation"**) made 30 March 2015 the rent was reduced to a peppercorn if demanded. This too is a challenged transaction.

8. Four subsequent Hever transactions are also challenged: On 26 June 2015 1D was granted a charge over the Hever Common Parts Lease (***"the WL:1D Hever Charge"***) as security for some £1.6 million lent to WL and for further advances. The monies lent were the sums collected by WL from Investors pursuant to purported lending by 1D to assist them purchase their respective Hever Room Leases. That lending was secured by legal charges over the demised rooms. On 29 December 2016, 1D in reliance upon the WL:1D Hever Charge took possession of the Hever Common Parts Lease demise. WL was placed into creditors' voluntary liquidation on 6 January 2017. On 15 June 2017 1D, as mortgagees in possession, sold the Hever Common Parts Lease to 2D.

9. On 10 August 2017, 2D transferred part of the demise used principally for the purposes of a spa to 3D ("**the Anne Boleyn Lease**"). On 17 October 2017 the remaining Hever Common Parts Lease was transferred to 3D except for its demise of Dairy Cottage which remains registered in D2's name. All of those estates have been registered at H.M. Land Registry except, as mentioned, the Hever Lenders Charges and the Anne Boleyn Lease, although a separate title number for the latter has been conferred.

10. The pleaded claim resulting from the challenged transactions can be summarised as follows:

    a) The Hever Common Parts Lease was granted without authority. As a result it was not granted by C1 and should be declared void. That is because those who executed the lease were not exercising the powers of directors for the purposes for which those powers were conferred and did not act in the way that they considered, in good faith, would best promote the success of C1 for the benefit of its members having regard to the matters listed within s.172 of the Companies Act 2006 (**"section 172 CA"**). Instead, its grant was to prevent the Hever Lenders obtaining security of any value through the Hever Lenders Charge. There was no commercial purpose for the Hever Common Parts Lease on the terms granted. There was no premium paid.

b) In any event the Hever CPL Variation by reducing the rent to nil was for the purpose of depleting and depleted the value of C1's assets. Its only benefit was for WL. It too was an abuse of power and executed without authority.

c) The legal consequences of a void transaction flowed through to 1D, 2D and 3D in turn notwithstanding the registration of their title at HM Land Registry. That was because none of them can rely upon apparent or ostensible authority. None were purchasers for value acting in good faith and without notice of the fact that their predecessor held the title on trust for C1 absolutely. This arose due to their respective connections with C1 and its appointed director and shadow or acting director. In particular because all the companies concerned were run by Mr Ron Popely whose project this was and who controlled every aspect of it.

d) Even had that not been the position, the transfer of the Hever Common Parts Lease was void because C2 was not a party despite being the owner of part of the interest in reversion on the Hever Common Parts Lease as a result of the transfer of Dairy Cottage.

e) In the further alternative, an absence of consideration and the circumstances of the execution and assignment of the Hever CPL Variation meant it is a transaction for which the court should grant relief under ***section 423 of the Insolvency Act 1986*** (**"section 423 IA"**). It should be set aside taking into consideration the role and knowledge of the subsequent lease owners.

11. Insofar as those claims need to prove knowledge on the part of the Defendants, the Particulars of Claim assert:

a) Mr Ron Popely as a shadow director of C1 was at the centre of the decision to grant the Hever Common Parts Lease and of all later relevant decisions. Mr Paul Gould was an appointed director from incorporation to 28 July 2010, Mr Darren Popely (Mr Ron Popely's son) from 28 July 2010 to 11 July 2013, and Mr Stephen Dickson from 11 July 2013 until liquidation. They were accustomed to act in accordance with Mr Ron Popely's directions and instructions.

b) Mr Darren Popely was the director of WL who executed the Hever Common Parts Lease on its behalf, and Mr Paul Gould was its company secretary at the time. Mr Ron Popely was also a shadow director of WL. The knowledge of WL was the same as the knowledge of C1. The same applied when the Hever CPL Variation was executed except that Mr Paul Gould was then the director and Mr Darren Popely was no longer an officer of WL.

c) At the time 1D was granted the WL:1D Hever Charge (registered in June 2017), Mr Ron Popely was its sole shareholder and beneficial owner. He was also a shadow director of 1D. Its sole appointed director was Mr Stephen Dickson, since 11 July 2013. 1D at all material times had the knowledge of Mr Ron Popely and of Mr Stephen Dickson concerning the grant of the Hever Common Parts Lease and the Hever CPL Variation.

d) 2D's sole appointed director from incorporation to 15 May 2017 was Mr Paul Duthie, a nephew of Mr Ron Popely. He was succeeded by Mr James Godwin from 15 May 2017, a long-time associate of Mr Ron Popely. Whilst the purchase

of WL's interest in the Hever Common Parts Lease on 15 June 2017 from 1D was purportedly for a premium of £400,000, only £20,000 was paid but not by 1D, and the purported balance secured by the WL:1D Hever Charge. It was or ought to have been apparent to 2D (based upon the connections above and from the facts that its original grant was without a premium and from the reduction in rent to a peppercorn, and in the absence of any other explanation) that the grant of the Hever Common Parts Lease and the Hever CPL Variation had involved a breach of duty.

e) 3D had the same knowledge as 2D because Mr James Godwin was its sole director and registered member from its incorporation on 23 June 2017 and, therefore, at the time of transfer by 2D. He was a nominee for Mr Ron Popely.

12. The freehold of Needham was purchased from an unconnected third party by C2 on 28 March 2013. Substantial building works were undertaken before it could open in 2016. 70 hotel rooms were demised ("**The Needham Room Leases**") to Investors on 999 year leases at premiums and with buy-back rights. WL managed the hotel building works until 26 March 2015 when it was replaced by SCCL Limited (**"SCCL"**).

13. On 1 April 2015 C2 demised the Needham Lease, described on the front page of the registration form as *"Lease relating to Common Parts and Facilities The Needham House Hotel"*, without premium for a term of 999 years and seven days from 25 December 2012 to SCCL. The rent was a peppercorn if demanded. On 16 June 2017, the Needham Lease was assigned by SSCL to 4D.

14. The claim resulting from those transactions can be summarised as follows:

a) The Needham Lease was granted without authority to the knowledge of all those who claim an interest in it. As a result it was not granted by C2 and should be declared void. That is because those who executed the lease were not exercising the powers of directors for the purposes for which those powers were conferred and did not act in the way that they considered, in good faith, would best promote the success of C2 for the benefit of its members having regard to the matters listed within ***section 172 CA*** including the interests of creditors by reason of C2's insolvency. That is because its grant without a premium, at a peppercorn (if demanded) rent, depleted the value of C2's assets, and had no genuine commercial purpose. The grant was for the purpose of benefiting SCCL at C2's expense.

b) Further or alternatively its purpose was to ensure that the Investors who were or were soon to be able to contractually require C2 to buy back their respective Needham Room Leases could not obtain any effective remedy against C2 now that it owned a freehold subject to the registered Needham Lease.

c) 4D cannot rely upon ostensible authority by reason of its and SCCL's knowledge resulting from the connections with C2 and their respective officers and (where appropriate) shadow director(s). In particular the fact that Needham was under the control of Mr Ron Popely in the same way that he controlled Hever. His knowledge was SCCL's and 4D's knowledge. SCCL

and then 4D did not act in good faith. They were not purchasers for value. They had notice of the facts causing the Needham Lease to be void.

d) In any event the absence of consideration and the circumstances in which the Needham Lease was executed mean it was a transaction for which the court should grant relief under ***section 423 IA***. It should be set aside taking into consideration the role and knowledge of the subsequent lease owners.

15. Insofar as those claims need to prove knowledge on the part of the Defendants, who were not the original parties to the Needham Lease, the Particulars of Claim assert:

a) Mr Darren Popely was the appointed director of C2 from incorporation until 17 June 2016. He was joined by Mr Sevgi Ermetal on 1 July 2015. On 17 June 2016 Mr Kevin Hanafee replaced Mr Darren Popely. He remained in office at the date of liquidation but Mr Ermetal ceased to be a director on 30 June 2016. Mr Gould was company secretary from incorporation to 1 October 2015. Mr Ron Popely was at all material times a shadow director of C2.

b) At the time the Needham Lease was granted to SCCL, its sole appointed director was Mr Paul Duthie. Mr Ron Popely was at all material times a shadow director.

c) Through Mr Ron Popely and the appointed directors who were his nominees, and taking into consideration the terms of the grant, in particular the absence of a premium and the pepper corn rent, SCCL knew the grant was a breach of duty and also knew the true purpose of its grant as alleged above concerning the Investors who wished their Needham Room Leases to be bought back. SCCL did not enter into the transaction in good faith.

d) 4D was incorporated on the date SCCL assigned the Needham Lease to it, 5 May 2017. That day Mr Paul Duthie transferred his shares in SSCCL to 4D. Its sole appointed director and shareholder was at all material times Mr Paul Duthie. Mr Ron Popely was at all material times a shadow director. Mr Duthie was his nominee. As at 5 May 2017 4D, through Mr Paul Duthie and Mr Ron Popely, knew the above-mentioned circumstances in which C2 granted the Needham Lease to SCCL.

## A2) The Defences

16. Although, conveniently, there is only one statement of case for all Defendants, the statements of truth were from each of them and, therefore, the Amended Defence was drafted from the premise that each Defendant was addressing the claim against them and the facts and matters known to them.

17. The factual starting point of the pleaded Defence in respect of Hever is that C1 was never itself going to operate the hotel business, a conference venue and hotel. Its role would be to sell the Hever Room Leases. It intended to rely upon Chateauform SA (**"Chateauform"**), a reputable and well established unconnected company, who had provided pre-purchase projections indicating a realistic turnover in excess of £2.5 million a year if renovations were carried out, or another party to provide the

necessary hotel management. For the purpose of selling the Hever Room Leases, C1 had the opinion of Chateauform that a 10% return for each of the Investors should be achievable.

18. The Defence acknowledged that Mr Ron Popely had identified the potential of Hever as a hotel/conference centre including for the sale of Hever Room Leases. This original idea and its pursuit had been passed on to his son, Mr Darren Popely. Although Mr Ron Popely had been disqualified as a director for 9 years from 9 September 2003, his involvement with Hever from the date of C1's incorporation on 5 July 2010 and Hever's purchase on 5 August 2011 was always only as a consultant pursuant to an agreement dated 28 July 2010, extended for a further 2 years on 29 July 2013. In any event, C1's decision process was at all material times only attributable to the directors: Mr Paul Gould from its incorporation to the appointment of Mr Darren Popely on 28 July 2010. His appointment ceased on 11 July 2013 when he was replaced by Mr Dickson.

19. WL managed Hever under the Hever WL Management Agreement made 1 July 2011. Mr Gould had been appointed its sole director on incorporation on 4 June 2010 and was joined by Mr Darren Popely from 1 May 2011 until 10 October 2014 when he returned to being the sole director. On 27 May 2011 WL had entered into an agreement for Chateauform (**"the Hever WL/Chateauform Agreement"**) to operate Hever's conference facilities.

20. The freehold purchase was first intended to be financed by a secured £1.5 million bridging loan from Northern Placements Limited and thereafter by long term loans from Silver Birch SA and "Allegro" or "White Rose". The bridging loan was granted and extended whilst the long term lending was delayed. Ultimately, the freehold purchase was financed by loans from Northern Placements Limited, "Allegro" and Mr Ron Popely. No charge was executed and the need for execution was not raised with C1 until May 2013. As a result, the Hever Lenders Charge was granted to Silver Birch SA to secure repayment of its £1 million loan.

21. The Hever Common Parts Lease was granted to WL because Chateauform required substantial and expensive restorations for Hever's conference facilities to be carried out by WL. WL could not be expected to invest in the fabric without a proprietary interest, and would not otherwise have done so. That was the basis for Mr Darren Popely, as C1's director, granting the Hever Common Parts Lease. C1 was solvent at the time. WL assumed *"very substantial liabilities for rates, taxes and outgoings and the repair, insurance, decoration, maintenance, rebuilding and reinstatement of the Hever Common Parts"* instead of C1. It was a decision binding C1 and there was no breach of the director's duties.

22. It follows that WL when executing the Hever Common Parts Lease on 23 May 2013 could rely upon the lawful acts of C1, acting, as it did, through the same director. In the alternative, reliance would be placed upon the ultimate beneficial owners of 1D and WL, Mr Ron Popely and Mr Paul Gould, having sanctioned, approved or ratified the director's decisions. Each of the Defendants respectively acted in good faith and acquired their interests in the Hever Common Parts Lease for value and without notice of any wrongdoing. In any event, the absence of steps having been taken to address what would be on C1's case a voidable not void transaction prevents any claim being made.

23. The Hever CPL Variation was decided at a meeting on 31 May 2013 attended by C1's director, Mr Darren Popely, Mr Ron Popely, Mr Stephen Dickson, and Mr Gould. WL was incurring far more than the £1.4 million spent on developing Hever's facilities anticipated before the Hever Common Parts Lease had been granted. It could not also pay the rent *"whilst the new facilities are brought online"*. A peppercorn rent would increase the prospects of success for the project, to C1's benefit and the benefit of the Investors. Professional advice was followed, namely a desktop valuation of the Hever Common Parts Lease compared with the sums spent by WL on renovation and refurbishment. In addition, the existing WL covenants would remain in place.

24. The Hever PL Variation occurred at a time when C1 was solvent and there was no reason to believe it would become insolvent. The variation was and is binding upon the parties to the deed and was sanctioned, approved or ratified by C1's then shareholder, 1D, and/or by Mr Ron Popely, the ultimate beneficial owner of C1 at the time. Although C2, owner of Dairy Cottage, did not execute it, its director (Mr Darren Popely) consented or acquiesced. Further, even on C1's case, the variation would be voidable and the Hever CPL Variation has not been avoided. In any event, no claim can be brought against the 1-3 Ds taking into account also their absence of notice of wrongdoing or want of authority and that they acted in good faith and acquired their interests in the Hever Common Parts Lease for value.

25. As to the case that ***section 423 IA*** applies: The Hever CPL Variation was a transaction for good consideration because WL continued to operate Hever, finance the renovation and equip the common parts. It reduced the risk that Investors would ask to buy-back their leases and maintained the continuation of the covenants by WL under the Hever Common Parts Lease.

26. As to the specific claims as pleaded against 1-3Ds, who were not party to the original grant of the Hever Common Parts Lease or the Hever CPL Variation:

    a) 1D was a secured creditor of WL from 26 June 2015 pursuant to the WL:1D Hever Charge registered on 29 June 2015. 1D took possession of the demise by the Hever Common Parts Lease on 29 December 2016. It transferred the Hever Common Parts Lease to 2D on 15 June 2017 for £400,000. For the purpose of payment, 1D lent 2D £380,000 in return for a charge (**"the 1D:2D Charge"**) over the Hever Common Parts Lease.

    b) On 10 August 2017 2D assigned the Anne Boleyn Lease to 3D for £120,000 subject to the continuing application of the 1D:2D Charge with the intention of creating an independent spa business. A change of plan led to 2D transferring the Hever Common Parts Lease to 3D by a transfer dated 16 October 2017 (although the part relating to Dairy Cottage remains registered in the name of D2). The 1D:2D Charge was discharged as a result of repayment of the whole £380,000 loan on 8 March 2020.

    c) 1D, 2D and/or 3D have acted in good faith and good consideration has been paid or provided without notice of any breach of duty or other wrongdoing.

27. The pleaded, factual starting point for the Defence in respect of Needham is that Mr Ron Popely and his son, Mr Darren Popely, initiated the involvement of C1, WL and Chateauform with their plans for Hever in 2010. That working relationship led to

Chateauform identifying for them an interest in the idea of establishing a conference centre to the north of London. Lawfully, Mr Ron Popely entered into a three year consultancy agreement with C2 on 1 August 2012, just over a month before the expiry of his disqualification. All of his actions at Needham were as a consultant.

28. On 28 March 2013 C2 purchased Needham as a property investment for £2,400,000 plus £480,000 VAT. The plan was always for someone else to operate the conference venue and hotel and for C2 to sell the Needham Room Leases to the Investors with the premiums being used to pay for renovations as well as to provide a capital buffer. Four of the Needham Room Leases were granted on 28 March 2014, the fifth, and last, on 21 December 2016. The buy-back rights of the first three would not arise until 28 March 2018.

29. WL was to run the business. A 10 year management agreement (**"the WL Needham Management Agreement"**) was made between C2 and WL on 1 February 2013. It was terminated as a result of WL (working with Chateauform) having failed to open Needham by 31 January 2015.

30. The delay meant the project was in a parlous state and SCCL was formed to finance and supervise the completion of the renovation and to open Needham by 31 January 2016. By an agreement dated 16 March 2015 (**"the SCCL Needham Agreement"**) SCCL covenanted that it would fulfil the lessee covenants when C2 granted SCCL the Needham Lease in consideration for a peppercorn rent, performance of the covenants, completion of the renovation and opening of Needham for business. This would include SCCL financing the completion of the renovation of Needham's common parts.

31. Accordingly the Needham Lease was granted on 1 April 2015. SCCL assumed *"very substantial liabilities for rates, taxes and outgoings and the repair, insurance, decoration, maintenance, rebuilding and reinstatement of the Hever Common Parts"*. There was no breach of director's duties, the grant was for a proper purpose and C2 was a solvent company. It would also protect the Investors and minimise the risk of them exercising their buy-back options. The directors of C2 also considered that it would be able to honour the buy-backs if required by finding other Investors to purchase the buy-back rooms.

32. In any event it would be wrong to attribute the knowledge of those acting for C2 when making its management decisions to SCCL. Furthermore, all such decisions and steps taken by C2 were sanctioned, approved or ratified by 1D and/or Mr Ron Popely as the ultimate beneficial owner of C2 and 1D prior to 2 May 2015. Alternatively ratified by Mr Dickson as shareholder, director and ultimate beneficial owner of 1D and C2 from 2 May 2015.

33. Further, any default of C2 would only result in the Needham Lease becoming voidable. It has not been avoided and cannot affect third parties acting in good faith and who have acquired interests for value without notice of wrongdoing or want of authority.

34. As to third parties, SCCL assigned the Needham Lease to the 4D for £250,000 on 16 June 2017. The knowledge of SCCL through Mr Duthie was also 4D's knowledge because he was also 4D's director. The transaction being for the purpose of separating

the operating business from the asset. 3D and 4D acted in good faith, for value and without notice.

35. It is pleaded (in effect) that the matters above mean ***section 423*** will not apply. Furthermore a limitation period defence will apply in respect of claims for breach of duty and want of authority.

## B) The Trial

### B1) Those Who Did Not Attend

36. As the summary of the statements of case shows, none of the Defendants were party to the challenged transactions. The key players concerning those transactions appear from those cases to have been Mr Ron Popely, Mr Darren Popely, Mr Dickson and Mr Paul Gould. The latter died during 2020.

37. The Defendants filed and served a statement from Mr Ron Popely. The extent of his involvement over the years and the capacity in which he acted is in dispute. Nevertheless it was plain that he would be a key witness at least when addressing the circumstances of the purchases of Hever and Needham, the grants of the long leases, and the Hever CPL Lease. As stated above, the Claimants assert that he was the ultimate owner and controller of both projects not only at the time of those events but also subsequently. Mr Collings K.C. made clear that detailed cross-examination had been intended.

38. Mr Ron Popely did not attend the trial. This was attributed by the Defendants to his ill health. However, the medical evidence was nowhere near sufficient to justify that conclusion even though he has a serious condition(s). The evidence was not up to date, there was no opinion upon his present condition nor a prognosis. There was no medical evidence addressing whether he was able to travel from Gibraltar or in any event able to give evidence whether at the trial in this country or remotely. It was made clear at the beginning of the trial when this matter was raised that the Court would be able to provide remote access if required. Not only was this proposal not accepted but there was no apparent investigation as to whether it could be achieved. In the circumstances summarised above, I do not accept he could not give evidence although I anticipate it would have had to have been remotely.

39. The Defendants did not ask to have Mr Ron Popely's witness statement admitted in evidence as they were entitled to under ***the Civil Procedure Rules***. No adverse conclusion can be drawn from that but potentially an adverse conclusion should be drawn from the Defendants not calling him. It is a conclusion, however, which Mr Collings K.C. does not ask me to make in circumstances where he considered he had more than enough evidence to sustain the Claimants' case in any event.

40. That evidence includes the facts and matters Mr Popely did not dispute when he gave his 9 year undertaking dated 21 April 2022 and expiring 11 May 2031 for the purposes of his second disqualification under ***the Company Directors' Disqualification Act 1986***. The disqualification resulted from his conduct as a director of C1. Those facts and matters stand as evidence admissible within this trial

in the context of them having been accepted for the purposes of his disqualification. Although, Mr Darton K.C. was right to observe that those admitted facts do not bind the Defendants, they are plainly of potential importance and some are to be contrasted with significant parts of the Defence as set out above in particular when they read as follows (as summarised):

a) Mr Ron Popely caused C1 to enter into an agreement with 1D which had the effect that C1 would not receive the balance of mortgage funds due from 1D until the respective mortgages were paid in full upon the completion of each 10 year mortgage. The amount lost to C1's cashflow as at the date of its liquidation was £4,118,367. This occurred with full knowledge that the Investors had rights of buyback for the Hever Hotel Room Leases which would be enforceable on the 4th year of the anniversary of their respective investment.

b) On 23 May 2013 he *"caused and/or allowed"* C1 to enter into the Hever Common Parts Lease with WL. He did so knowing two of C1's creditors *"were seeking repayment of, and contractually due security for, their liabilities, which remained due in full as at the date of [C1's liquidation]"*. Mr Ron Popely did so having been advised by solicitors that the transaction would leave C1's freehold interest in Hever *"worthless"*. The transaction had the *"immediate consequences ... [of reducing] the value of [C1's] freehold property by £1,498,294 ..."*.

c) C1 *"had forsaken receipt of at least £4,781,000 from a connected company; had made payments totalling £3,550,212 to two connected companies, £1,910,000 of which was due to be repaid but not until January 2023; and had made further payments totalling £5,965,728 from total funds received by [C1] totalling £9,640,264"*.

d) He *"caused and/or allowed"* the Hever CPL Variation. There was no consideration and the consequence was the removal of any right C1 had to receive rent from WL. He did so knowing: This would reduce C1's income if the rent would otherwise have been paid; C1 faced the potential buy-backs referred to in (a) above; C1 had forsaken *£4,781,000 from a connected company; had made payments totalling £11,051,505 from funds received totalling at least £11,051,609 including a balance of £3,550,212 paid to two connected companies, £1,910,000 of which was due to for repayment but not until January 2023"*.

e) Mr Ron Popely had acted as a director of C1 whilst disqualified from the date of its incorporation until 9 September 2012 when the disqualification ceased. The disqualification entered into on 10 September 2003 had also been for 9 years. He had done so knowing it was a breach of his disqualification undertaking.

41. Mr Ron Popely was not the only person who had given a disqualification undertaking and made a witness statement to be used at the trial but who was not called by the Defendants to give evidence. **Mr Stephen Dickson** was disqualified for 7 years from 29 April 2022 for his conduct as a director of C1 having admitted:

a) He had "caused or allowed" the Hever CPL Variation for no consideration removing WL's obligation to pay rent.

b) He did so at a time when he had the knowledge set out in respect of Mr Ron Popely at sub-paragraph (d) of paragraph 40 above.

42. The reason given by the Defendants for his non-attendance was that whilst they had the information to enable them to contact him, he had not been responding to their communications. Mr Collings K.C. decided not to take any point from this.

43. Another person disqualified is **Mr Darren Popely**. The Defendants did not serve or file a witness statement from him. He was disqualified for 9 years from 18 May 2022 as a result of his conduct as a director of C1. The breaches of duty admitted by him can be summarised as follows:

a) Allowing C1 to enter into an agreement with a connected mortgagee [who must be 1D] whereby C1 would not receive the mortgage funds to which it would otherwise have been entitled until the mortgages were paid in full [it must be by the Investors] at the end of their 10 year terms. This left C1 without those funds, which were part of the purchase price for the Hever Hotel Room Leases, and in circumstances of the Investors having rights of buyback. At the date of liquidation 1D owed C1 at least £4,118,367, whilst C1's liabilities totalled at least £14,325,906 including at least £8,349,950 due for Investor buy backs.

b) He caused or allowed C1 to grant the Hever Common Parts Lease with a connected party, WL, despite the immediate consequence that the value of C1's freehold property was reduced by £1,498,294.

44. Although the fact that Mr Darren Popely was not called by the Defendants might have led to an adverse inference, this too was not sought by Mr Collings K.C.. As a result I have not drawn an adverse inference from non-attendance for any of the three.

### B2) Those Who Gave Evidence for the Claimants

45. **Mr Ingram** made a witness statement in his capacity as a joint liquidator. It follows that he does not have personal knowledge of events prior to his appointment. On the other hand, he will have gained knowledge from carrying out his statutory functions and duties and, of course, as agent of C1 and C2 will in effect have their knowledge. That said, issues potentially arise for such a witness when applying ***"Practice Direction 57AC – Trial Witness Statement in the Business and Property Courts"*** to the extent that its exclusions for ***Insolvency Act 1986*** orders (including, therefore, ***section 423*** relief) and ***CPR, Part II, PD 49A Companies Act 1986*** matters made within ***paragraph 1.3 of PD 57AC*** do not apply.

46. ***Practice Direction 57AC*** caused the Defendants to apply at the beginning of the trial to strike out substantial parts of Mr Ingram's witness statement. The grounds were that passages marked blue were irrelevant and not agreed, those marked purple were narrative and/or argument and those marked red were matters of expert evidence. In addition, the application asked for permission to rely upon witness statements from Mr Nimesh Patel and Mr Dean Upton who had not previously provided evidence and upon second witness statements from Mr Godwin and Mr Duthie. That was not opposed.

47. I decided it was necessary at the beginning of the trial to adopt a pragmatic approach to the application applying the overriding objective. Basically, there was no point using up valuable time arguing whether matters were relevant or were narrative and/or argument unless and to the extent that this was an issue needing to be resolved before cross-examination. It was not. I also noted that it was extremely unlikely that the status of the evidence, admissible or not, would be other than obvious by the time of submissions so that it would be unnecessary even then to address the matter. Mr Darton K.C. having been provided with the opportunity to review his position in the light of my observations limited this part of the application to the issue of expert evidence.

48. That too needed, at least in the first instance, a pragmatic approach. The objections essentially concerned analyses of company bank statements and of the companies' filed and management accounts. Mr Darton K.C. submitted that all references to them had to be redacted being opinion evidence. His position was that the Claimants must be left to resort to the documentation within the Court bundle to establish the facts and matters they wished to rely upon.

49. I decided that this submission presented an unrealistic approach applying the overriding objective. In particular:

    a) A statement identifying the contents of the relevant documents could save considerable court time. For example, reference to an identified total for a category of payments recognisable within exhibited bank statements (such as sums made to a particular entity over a specified period) is preferable to the Court during the trial having to read and add up each item during a page by page trawl by counsel with or without a witness. Obviously if there was a dispute over the sum calculated, that would need to be investigated via the exhibited documents to the extent it was necessary to do so but that was not being asserted. It is far better to use the witness statement to assist in identifying whether there was such a dispute than to redact it and raise the issue for the first time during cross-examination.

    b) What became clear was that the application was being made in part without having first identified why or how the figures produced by the evidential analyses (or which would have been produced by the court's own scrutiny of the relevant pages and entries) were objected to. Potentially, therefore, the arguments relied upon as to admission of evidence, which would inevitably use up valuable time, might turn out to be wholly unnecessary. The Practice Direction was being relied upon without due consideration of the practicalities of the trial.

    c) It also became apparent that on occasions the first issue was not whether the evidence was expert evidence but whether the evidence sufficiently explained the analyses. However, that did not need investigation at the beginning of the trial.

50. In those circumstances I concluded that the best course was to ask Mr Collings K.C. to open the case in detail (which was also necessary in any event because documents could not be put to Mr Ron Popely) and, as a result, to explain why the documentation

addressed within the challenged evidence was being relied upon and the bases for submitting that its evidence established the facts and matters relied upon.

51. Unfortunately (but without any criticism of his carefully presented, detailed opening) that course still did not make entirely clear whether and, if so, to what extent the application was necessary. The cause of that appeared to be the problem that the evidence challenged as "expert" was only intended to be used (if at all) during cross-examination as evidence in reply to undermine evidence to be relied upon by the Defendants, if adduced, to support their defence. Mr Collings K.C. could not provide explanations for use until the Defendants' evidence had been given.

52. In those circumstances I went through the relevant parts of the statement concerning Hever and identified the parts I considered should remain and those which should be treated as expunged subject to the right of either side to review the position if it caused a problem during the trial. Essentially that led to inclusion of financial information which was no more than the transposition of evidence that could be found in or drawn from the evidence in the agreed bundle. This identification was also subject to further consideration during the trial should inclusion cause difficulties for cross-examination including unfairness. There was no such requirement.

53. Looking at Mr Ingram's witness statement on that basis, his evidence identified the following (amongst other facts and matters) from bank statements (figures which were not challenged by the Defendants as being inaccurately calculated from the statements) which I considered admissible as mathematical calculations not opinion:

    a) Between 2010 and 2014 the following received the following total sums from C1 out of total payments out of £8,886,636.96 as against total receipts of £11,051,608.90 (£9,297,702.69 from the sale of Hever Room Leases): Heltfield Properties Limited (**"Heltfield"**), a building company belonging to Mr Ron Popely managed by Mr Darren Popely that carried out works at Hever and Needham received £2,072,850; Hillingdon Developments Limited (**"Hillingdon"**), a connected company involved in the development of a site at Sidcup, received £1,138,500; WL £2,497,611.85; Silver Birch Developments Limited £78,450; and Sapling FT Limited (**"Sapling FT"**), a connected company, £2,010,000.

    b) Similarly, the calculations from C2's bank statements for 2013-2016 for payments totalling £10,651,237.84 as against receipts totalling £14,149,932.00 (£10,563,707.27 from the sale of Needham Room Leases) revealed that from C2: Heltfield received £3,517,000; Hillingdon £28,000; WL £843,329.64; MySave £253,167; C1 £305,000; Sapling FT £1,061,081; and Needham £93,520.

54. In the circumstances explained above, I accept those figures as mathematically correct. In many ways it was a shame that Mr Ingram's evidence analysing the financial information had not been the subject of directions for production of an account showing what monies were received, moved around and disbursed by the various companies concerned with Hever and Needham. It became evident that there was plainly a circulation of money between a group of companies connected to the same people. However, that would have been very expensive and would have involved a number of issues concerning the record keeping accuracy. In the

circumstances neither side sought to rely in any great detail upon the financial information whether with reference to the filed or management accounts or to any other financial information to be found within the trial bundles except for the bank statements. Obviously I must adopt their approach.

55. Mr Ingram also exhibited various correspondence from Mr Darren Popely responding to information sought from him pursuant to a liquidator's statutory duties and functions. Whilst in the trial bundle it and similar communications with others were not specifically relied upon by either side. In those circumstances I will not do so either.

56. Mr Ingram's witness statement referred to the also Anne Boleyn Lease when he explained that he had subsequently agreed to its registration subject to relevant undertakings. He also informed the Court that he had obtained restrictions at HM Land Registry to protect the interests arising from undertakings given by 2, 3 and 4Ds in relation to common parts areas at Hever and Needham. These have not been referred to me but (obviously) should be in the event that it is relevant to do so for the purposes of addressing consequential relief when judgment is handed down.

57. Subject to the above, I need only expressly refer to Mr Ingram's evidence further (including his cross-examination) insofar as it is necessary to do so when making findings of fact or reaching other decisions.

### B3) Those Who Gave Evidence for the Defendants

58. **Mr Godwin's** evidence was given on behalf of 2 and 3Ds as their sole director. He described himself as having *"a strong background in construction"* with a long track record of project managing hotel projects. He explained that his involvement with those companies stemmed from his work for MySave Limited, a building company for which Mr Darren Popely was his boss (and the director) after Mr Nigel Luck, who had introduced him to the work, had left more or less when he started work in 2015. Mr Godwin explained that he and Mr Gould were the *"key players"* on the Needham Project once Mr Darren Popeley had left. It was in February 2015 that he first became aware of Hever. His evidence addressed his knowledge of the Hever roles of Mr Ron Popely and Mr Gould in particular. He knew Mr Ron Popeley as *"the deal maker"* who had found the site, negotiated the purchase and also certain tenancy agreements.

59. His evidence was that that he had discussions with Mr Dickson and Mr Gould about the opportunity for him to take over the management of Hever from Chateauform. The view was that Chateauform was not running it very well as a conference centre and apparently its relationship with White Linen had deteriorated. He understood: *"Paul Gould's company held the lease of the buildings for the non-room areas and Steve Dickson was the managing director/owner of [1D] who'd facilitated the funding of the redevelopment [of Hever] … Chateauform was a tenant who operated the premises and Paul Gould was effectively the landlord …"*. This led to Mr Godwin staying at Hever and giving Mr Gould feedback. Chateauform left and Mr Gould *"got some people in"*. A hotel management specialist "Countrywide" was involved. Mr Gould asked him *"to run the operating company"*.

60. Mr Godwin's evidence was that he agreed and became the director and shareholder of Good Hotel Management Limited, a company Mr Gould had formed. Whilst Mr Godwin thought this occurred on 1 October 2016, he later found that he had been appointed as director/shareholder from 13 July 2016 when the company was formed. His role from October was to oversee the operation of Good Hotel Management Limited which employed a general manager and other staff. He had the overseeing assistance of Countrywide who under the terms of a formal contract in effect fulfilled the role of hotel manager and were paid £7,000 a month by Good Hotel Management Limited.

61. He described this opportunity in terms of having been *"sold a dream"*. "*So at the time I was effectively being offered the chance to take a struggling business, an operating hotel, and try to turn it into a profitable enterprise. It was important to Paul [Gould] for me to do this, because Paul had room owners to pay. That was the driver, there were room owners that needed revenue to be generated."*

62. From his evidence, therefore, Mr Gould was the key player and overall little was said about Mr Ron Popely. The credibility of this evidence will need to be addressed in the context of the contemporaneous evidence. However, it will be important to remember throughout that the evidence needs to be considered from two perspectives so far as Mr Godwin is concerned. First by reference to the objective facts and second from the basis of his personal knowledge of those facts. For example, even if Mr Gould is found to be a pawn for Mr Ron Popely, he may not have known that. I will adopt that approach and, therefore, need not expressly repeat it.

63. Mr Godwin's evidence was that when WL ceased trading *"the relationship then went from White Linen to [2D]and the license to occupy was between Good Hotel Management and [2D] … [who] took over from White Linen as landlord"*. His explained that 2D was incorporated on 22 June 2016 with Mr Paul Duthie as director and he was *"appointed as director (shareholder) on 15 May 2017 nearly a year later but a couple of weeks before [2D] agreed to take the Hever Common Parts Lease"*. He explained it was standard practice to separate the company owning a hotel from the trading company.

64. His evidence was that after 1D had taken *"possession of the lease from [WL]"* or at some stage earlier he had had a conversation with Mr Dickson concerning a scheme for selling hotel rooms on fractional timeshare ownership terms. Mr Godwin explained: *"As part of that process there was the opportunity to earn money to pay for the lease so we did a deal based on [2D] taking the lease from [1D] in place of White Linen, and then providing Steve and his guests with fully serviced rooms on a discounted, nightly rate (I think it was £37.50 a night per person … [in fact £37]) and over that time effectively buy the lease"*. The price for the Hever Common Parts Lease was agreed with Mr Dickson at £400,000 with a £20,000 cash deposit. He said 1D was paid in full.

65. Therefore, his evidence was that whatever may have happened before whether involving Mr Ron Popely or not, 2D purchased the Hever Common Parts Lease for good consideration and without any knowledge of any issues concerning the grant of the Hever Common Parts Lease and the Hever CPL Variation.

66. 2D subsequently sold off "the Anne Boleyn Suite" to 3D for £120,000 *"to section off the Anne Boleyn suite because there was a health and spa company interested in operating that as a separate spa"*. However, because this left a *"messy"* structure, the Hever Common Parts Lease was transferred to 3D for £200,000 on 16 October 2017 (except for its Dairy Cottage demise). 3D had been incorporated on 23 June 2017 and he has always been its sole director and shareholder. He said this transfer to 3D was the idea of 2D's accountants although he *"didn't understand it too much [him]self"*.

67. Covid led to the closure of Hever around October 2020. It re-opened as a property offering medium term lets and this business was operated by South East Country Lets Ltd which had a lease agreement with 3D. A few rooms were let on an AirBNB basis. A lease agreement has also been made with Life Fit Gym, the spa operator. 43 rooms are owned by 1D as mortgagees in possession and 41 by Investors. 3D did not have any *"direct connection"* with 1D for the use of the rooms. 1D and the Investors dealt with South East Country Lets Ltd. It is operated by Catherine and Dawn, the owner, who were management working for Hever Resort Hotel when it ceased trading.

68. His evidence was that *Mr Ron Popely did not have any involvement in my companies which operated the [Needham] hotel"*. The only exception being when a practical problem arose, such as drainage issues. Then he might telephone Mr Ron Popely to ask whether he had any useful information to assist, he having had a long association with Hever. Mr Ron Popely might tell him, for example, where a manhole was or that it was necessary to scrape around in a leafy corner behind the tennis courts.

69. As a general observation upon Mr Godwin's evidence, he did not come across as someone with hotel business acumen or the knowledge and ability to run Hever in a management sense, as opposed to an operation sense involving, for example, the running of the bar or ensuring maintenance was carried out. More importantly for my decision, I had concerns over the reliability of Mr Godwin's evidence throughout his cross-examination because his recollections within his witness statement did not match the contemporaneous documentary evidence concerning Mr Ron Popely's role and involvement with Hever. That applied before and after 2D and then 3D became the owners of the Hever Common Parts Lease.

70. His description of Mr Gould as the key player also jarred with the contemporaneous documentation and the fact that he was, as recognised by Mr Upton (another of the Defendant's witnesses and referred to below) principally an employee having ceased to be a director of C1 on 28 July 2010. In addition, Mr Godwin was unable to explain how he came to assert that Mr Ron Popely did not have any involvement with 2D and 3D except for the telephone conversations described above when his involvement was identified within the contemporaneous emails. I will address this in detail during the findings of fact but for reasons which will become apparent when making those findings, I not only decided that I should treat his evidence with considerable caution but ultimately rejected important parts of his evidence as unreliable.

71. **Mr Neil Gorman** made his statement as a director of 1D. He had been appointed to that office on 18 February 2021 following the resignation of Mr Dickson. His evidence in chief dealt with whether he recollected witnessing the execution of specified documents but nothing more. During cross-examination he denied that Mr Ron Popely had asked him to be a director, stating that Mr Gould had approached him to ask for help. He had known Mr Gould for many years and had helped him with

Sapling FT Limited becoming a director on 21 September 2020. His background was investment banking and he helped out in his retirement. Overall his evidence was that he had little relevant knowledge, although he confirmed 1D no longer had any interest in these proceedings having sold the Hever Common Parts Lease for £400,000 to 2D. He is Mr Ron Popely's nephew and unfortunately the contemporaneous evidence will establish that his witness statement failed to disclose important facts.

72. **Mr Paul Duthie** gave evidence as 4D's director. He has been its registered member from incorporation to date. 4D became the registered member of SCCL on the same day as its formation, 5 May 2017. Mr Duthie was SCCL's registered member from incorporation and its sole director until 1 March 2020 when he was replaced by Mr Edward Townsend. He described himself as a construction manager. From his evidence one would conclude that Mr Ron Popely had no (or very limited) involvement with Needham and Hever. The person in control and giving instructions was Mr Gould. His credibility as a reliable witness turned, in the same way as Mr Godwin's, upon the reliability of that evidence when viewed against contemporaneous documentation. As to that, Mr Duthie expressly stated that Mr Ron Popely was not involved in the trading of Needham, SCCL or 4D.

73. Mr Duthie's evidence was that he was first involved with Needham as a project manager for Heltfield, at first jointly with Mr Nigel Luck, whilst Needham was closed as a hotel. He thought Heltfield was employed by C2 until a point when WL started building work. WL moved on to use MySave Limited for which he was also project manager. His evidence was that Mr Gould was in charge of WL and a director of both construction companies, effectively his boss. It was Mr Gould who asked him to be a director and shareholder of SCCL when Chateauform pulled out and the works were only 60% complete.

74. The aim, he explained, was to get Needham open and he agreed to this but on the terms that SCCL would have a 999 year lease to run the hotel. He said he would not otherwise have agreed to it. The works were completed with SCCL continuing to employ MySave Limited for that purpose in consideration for the Needham Lease. Indeed SCCL carried out subsequent additional works. When Needham opened in January 2016 (the works being nearly complete but continuing for a further two years) SCCL used Countrywide Hotels Limited as managers. Mr Duthie said he would be on site every week.

75. Following a conversation with Mr Gould, the Needham Lease was transferred to 4D for £250,000 to keep ownership separate from trading. 4D continued the works and took over the debt SCCL owed to MySave Limited. In his second statement he emphasised that he is the sole director and shareholder and in full control of 4D. In addition that SCCL paid substantial monies in council tax, renovations, repairs and maintenance of Needham since March 2015.

76. Mr Duthie explained that he had no involvement with Hever but knew the operations were similar. He knew of the involvement of Mr Gould and Mr Godwin.

77. Mr Duthie's evidence concerning the involvement of Mr Gould and the contrasting absence of involvement of Mr Ron Popely was consistent with the evidence of Mr Godwin. It too suffered, therefore, when compared with the contemporaneous documentation. His evidence under cross-examination, which continued the theme

that Mr Gould was running everything, simply added to the conclusion that he too was an unreliable witness. The same applies to his evidence concerning expenditure by SCCL in respect of the works. The financial information obtained from the bank statements of C2 and the absence of a bank account for SCCL led to the further undermining of his credibility. There are also other grounds for reaching such a conclusion to be identified when addressing the findings of fact.

78. **Mr Upton** was called without objection being taken to the late service of his statement. He is a chartered accountant who worked with UNL Chartered Accountants. They were used by Mr Gould in his role as internal management accountant for (amongst others) C1, C2, WL, 2D, 3D, 4D, SCCL, Heltfield and Mysave Limited. He would produce the draft trial balances to be used by UNL to generate statutory financial statements and corporation tax returns. It is to be noted that this evidence during cross-examination undermined the evidence of Mr Godwin and Mr Duthie who sought to present Mr Gould as the person who ran everything and to hide the involvement of Mr Ron Popely. I accept the evidence of Mr Upton that Mr Gould had a controlling hand over the informal group of companies that were involved with the Hever and Needham projects but in his capacity as an employee with accounting and company structure responsibilities. He operated under instructions and the contemporaneous documentation makes clear who had that role.

79. Mr Upton's evidence was limited to accountancy issues that he had identified from the evidence of Mr Ingram. He did not address either in chief or cross-examination the issues of the extent of Mr Ron Popely's involvement in the Hever and Needham projects. Nor the knowledge of 2D, 3D and 4D concerning the Hever Common Parts Lease, the Hever CPL Variation or the Needham Lease. Nothing was made of his evidence in submissions as a result except to the extent mentioned above. Namely that all of the companies named in the previous paragraph were sufficiently connected to have Mr Gould employed as their internal accountant and to use the same external accountants.

80. **Mr Nimesh Patel** was also called without objection. He is a chartered certified accountant who also worked for UNL Chartered Accountants, and in doing so worked closely with Mr Upton. He identified Mr Ron Popely as an entrepreneur but explained that his dealings concerning WL, SCCL and 4D were with Mr Gould until his death.

81. Initially Mr Patel carried out internal book-keeping for WL. He explained it was making a loss, had insufficient cash and would borrow from other companies; it not having traditional bank lending. He described *"the companies connected with both Hever and Needham hotels [as] connected companies"* who did not deal at arms' length. The inter-related accounts of the companies within this informal group would require *"tidying up"* at the year end. He did not identify Mr Ron Popely's involvement but it was clear from his evidence that the companies in respect of which UNL Chartered Accountants were retained were in reality a group. His evidence was consistent with Mr Upton's. Mr Patel also raised accountancy issues arising from the evidence of Mr Ingram and filed accounts but these will only need to be addressed to the extent it is necessary to do so. However, to the extent that occurs I will need to consider whether the true financial position was reflected in the accounts.

## B4) Expert Evidence

82. The order for expert evidence made 16 December 2021 was for not more than 2 experts to opine upon: (i) the value of the covenants provided by WL and/or SCCL; (ii) the value of the works carried out by WL and/or SCCL to renovate the Hever and Needham hotels; and (ii) the value of the consideration provided by C1 and C2.

83. The second of those issues was resolved by agreement to the effect that the real issue was not the value but who paid for the works. As a result, there is a *"Schedule of Construction Invoices & Credit Notes"* which identifies the invoices for the relevant works and the identities of those invoiced. Whilst the invoiced sums are not agreed, in that they are the subject of the reports of the quantity surveyors instructed as experts, it is not necessary to determine whether they accurately reflect the value of the works carried out. It is sufficient that the sums involved were significant. As a result those experts were not called.

84. The experts for the other two issues were: Mr Richard Parkinson, MRICS, for the Claimants; and Mr Jonathan Harris, FRICS, for the Defendants. Whilst both experts were cross-examined in some detail concerning their reports, I should state that I found both experts assisted the Court in accordance with their duties, they were both careful and co-operative, both plainly experts in their field and for the avoidance of doubt I have no criticisms of them within the context of their CPR duties.

85. Both experts found the issues upon which they were asked to opine difficult in the context of the facts. That is understandable but it made the evidence including the joint statement difficult to follow. As a result, the expert evidence at trial started with a "hot tubbing" session to clarify from both experts the approach they considered appropriate and best for the purpose of valuing Hever and Needham, and their respective long leases in the circumstances of hotel businesses. There was overall agreement and it set the underlying groundwork for consideration of their opinions.

86. Mr Parkinson's approach to the valuation of the consideration provided by C1 and C2 for the Hever CPL Variation and the Needham Lease was extensively criticised by Mr Darton K.C.. Mr Parkinson's approach, adopted because of the difficulties for valuation, was not too dissimilar to a summary assessment of costs. In effect he took an item by item approach but then viewed it from a global perspective based upon his experience and knowledge. He identified his concluding opinions as "stand back" valuations. In particular, he started with the value of Hever's freehold, looked at the common parts and the proportion they might bear to the freehold value upon their 999 year demise and asked if the figure he had reached was reasonable and realistic. Whilst Mr Darton K.C. made inroads into the approach taken to reach a value before taking that "stand back" approach, I have concluded that the stand back approach reflected an acceptable opinion based upon the experience Mr Parkinson had. It was an approach which was reasonable taking into consideration the difficulties and evidence upon which I was satisfied I should rely subject to considering and where appropriate contrasting the evidence of Mr Harris.

87. As to the value of the consideration given by C1 when granting the Hever Common Parts Lease, Mr Parkinson opined a value of £947,942 or £723,462 plus fixtures and fittings. The figure of £990,318 appeared in the experts' joint statement being £765,000 plus fixtures and fittings. Mr Harris in the joint statement considered the

maximum value would be £400,000, the price of its sale in May 2017, but with significant reduction for the 2013 date. In his report he valued it at £240,000 being the consequential reduction of C1's freehold interest. I will refer to it further only to the extent necessary when reaching my decision.

88. Mr Parkinson's report concluded that the WL covenants could not be valued independently of the Hever Common Parts Lease value. He also noted in this context that the covenants in many cases replicated the obligations for which the owners of the Hever Room Leases would have to pay the hotel management a service charge. For the purpose of a value between C1 and WL, he could not identify any commercial reason for C1 demising the common parts for 999 years bearing in mind WL had been trading unsuccessfully and had not paid a management fee (whether referable to a fixed fee or percentage of turnover). He noted the absence of a premium which a third party might provide should they identify a different (i.e. more successful) trading *"angle"*. In all the circumstances he considered the covenant strength to be poor.

89. Mr Harris's opinion was that an investment valuation was appropriate to capitalise the receivable income and opined a gain for C1 of £165,000. This was based upon his comparison between receipts under the C1:WL Management Agreement and the rent to be received under the HL Common Parts Lease.

90. Both experts opined that WL gave no consideration in March 2015 when entering into the Hever CPL Variation. In contrast C1 gave the consideration of the reduction of the rent to a peppercorn. The difference between Mr Parkinson and Mr Harris concerning the consideration given by C1 for the release of the covenant within the Hever Common Parts Lease to pay rent and its replacement by a peppercorn came down to a figure of £875,000 from Mr Parkinson and £510,000 (taking the corrected figure) for Mr Harris.

91. It is a difference attributable to the figure each used for the yield. The submissions did not appear to consider the difference important for the purpose of deciding the claim and I need only address it further to the extent it is necessary to do so when doing so. I note that Mr Harris also valued the Hever Common Parts Lease with vacant possession at nil both at the time of grant and at the date of the Hever CPL Variation.

92. Mr Parkinson's valuation of the consideration SCCL gave in April 2015 for the Needham Lease was also that he could not value the assumption of the covenants' liabilities. Effectively the same reasons given in respect of Hever applied. Mr Harris valued a loss of £240,000. Mr Parkinson valued the consideration given by C2 to SCCL at £1,190,000. Mr Harris valued this at nil.

## C) Submissions

93. Both sides' counsel produced extremely helpful "speaking notes" for the purposes of their submissions and, as a result, I need only set out an outline summary of the approach each has asked me to adopt. There is much which will not be referred to at this macro-level but the details can be referred to when setting out my decisions insofar as it is necessary to do so.

94. Mr Collings K.C. submitted for the Claimants that the evidence as a whole established that Mr Ronald Popely was not only behind the purchase of Hever and Needham, the grant of the Hever Common Parts Lease, the Hever CPL Variation and the Needham Lease but has continued to be the ultimate controller of the projects carried out at the expense of C1's and C2's creditors and Investors which has at all material times been intended to benefit him, his family and those connected to them. For that purpose he and Mr Calland relied (amongst other matters) for their submissions upon: (i) the admissions of fact within Mr Ronald Popely's disqualification undertaking; (ii) the connections between those involved in Hever and Needham; and (iii) the contemporaneous documentation including email communications evidencing Mr Ron Popely's continuing active involvement notwithstanding his 2003, nine year disqualification.

95. Assuming that is established, their case is that the disponees of the leasehold interests are tainted with the knowledge of Mr Popely and cannot claim to be purchasers acting in good faith without notice. As a result they should be bound by the decisions which this Court should make concerning the original grants of the Hever Common Parts Lease, the Hever CPL Variation, the Anne Boleyn Lease, and the Needham Lease. Namely that they were granted pursuant to a "fraud on the power" of the directors and being without authority are void.

96. Their submissions observed that 1D, despite defending the claim, no longer has any interest. They submitted that none of the Defendants can claim in truth to have provided value for the interests they purported to acquire and none can claim to have acted in good faith and without notice. Whilst the Defendants rely upon expenditure on buildings works and other renovations, the reality was that Mr Popely caused C1 and C2 to raise £ millions from the Investors and their money has been used as the source of funding.

97. Their submissions led them to the conclusions that: (i) the Hever Common Parts Lease, the Hever CPL Variation, including the Anne Boleyn Lease, and the Needham Lease were granted without authority and are void; alternatively (ii) the Hever CPL Variation and the Needham Lease should be set aside under ***section 423 IA***.

98. As to them being void, Mr Collings K.C. relied upon cases including ***Hopkins v TL Dallas Group Ltd*** [2005] 1 BCLC 543 at [88] per Lightman J to submit that an agent (i.e. a director) does not have authority to act contrary to the principal's (i.e. the company's) interest. If that is established, the transaction concerned was a nullity unless apparent or ostensible authority could be relied upon (see ***Criterion Properties Plc v Stratford UK Properties LLC*** [2004] 1 WLR 1846 at [31] per Lord Scott and ***GLHM Trading Ltd v Maroo*** [2012] EWHC 61 (Ch), at [170]-[171] per Newey J including the reference to the judgment of Nourse LJ in ***Heinl & Others v Jyske Bank (Gibraltar) Ltd*** [1999] Lloyd's Law Reports 511). It was submitted that the respective Defendants' knowledge prevented such reliance.

99. It was next submitted that if the dispositions were void, that fact should be given effect by rectification of the registers at H.M. Land Registry. As to that, Mr Calland made extremely good closing submissions referring to the Court's power to rectify a register pursuant to ***section 65 and Schedule 4 to the Land Registration Act 2002*** ("***Sch 4 LRA"***). It was his submission that the necessary "mistake" existed because registration of each disposition only occurred because the Registrar did not know the

true fact that each was void (referring to ***NRAM v Evans*** [2017] EWCA Civ 1013 at [49]-[52]). He submitted that the resulting jurisdiction was not limited to the original entry following grant but also applied to the subsequent entries of successor in title, the 2-4 Defendants as appropriate. He referred me in particular to ***MacLeod v Gold Harp Properties Ltd*** [2015] 1 WLR 1249 (CA), at [93] and [95] per Underhill LJ on the basis that he decided this was the position because the law under the previous ***Land Registration Act 1925*** (**"*the LRA 1925*"**) had not altered (see ***Argyle Building Society v Hammond*** (1985) 49 P&CR 148, at p.158 per Slade LJ; and ***Norwich & Peterborough Building Society v Steed*** [1993] Ch 116, at 137C per Scott LJ.). This he submitted was not a case on the facts for which any of the Defendants could rely upon the ***paragraph 3(2)*** exception of ***Sch 4 LRA*** for proprietors in possession. First, possession was disputed. Second, their knowledge and actions meant either ***paragraph 3(2)(a) or (b) of Sch 4 LRA*** applied to remove them from the exception (referring to ***Sainsbury's Supermarkets Ltd v Olympia Homes Ltd*** [2006] 1 P&CR 17, at [94]-[95] per Mann J.).

100. Mr Darton K.C. did not dwell on the facts concerning the grants of the Hever Common Parts Lease, the Hever CPL Variation and the Needham Lease. First because the Defendants were not party to them and second because their intended reliance upon the potential evidence of Mr Popely and Mr Dickson caused them considerable difficulty doing so bearing in mind the disqualification undertakings. In reality he also faced very high hurdles of fact derived from the contemporaneous documents.

101. However, he did observe that it was not put to the Defendants' witnesses in cross-examination, and nor was it alleged in the Particulars of Claim, that the Hever Common Parts Lease, the Needham Lease or the Deed of Variation were shams. It was not put to the Defendants' witnesses, James Godwin, Neil Gorman and Paul Duthie, that they were a party to the dishonest purpose that is said to have lain behind the original transactions or knew of any dishonesty. The evidence of Mr Godwin that 2D had paid a £20,000 deposit out of its bank account and assumed a liability for the £380,000 balance was not challenged. In addition, the Claimants have not adduced evidence as to the 'Avoidance Purpose' that the Defendants are alleged to have had for the purposes of s***ection 423 IA***.

102. Mr Darton K.C. also submitted that there was no evidence of absence of authority. His submission being that if the decisions taken which resulted in C1 and C2 entering into the three deeds (or any of them) were considered to involve some breach of duty owed to C1 and C2, that would still not mean that the directors did not have the power and authority to cause them to enter into their respective deeds. Even if it did, he submitted, the relevant deed would be voidable not void. He relied in particular upon the decisions of Millett J. (as he then was) in ***MacMillan Inc v Bishopsgate Investment Trust Plc and others (No.3)*** [1995] 1 W.L.R. 978, of the Court of Appeal in ***Hely-Hutchinson v Brayhead*** [1968] 1 QB 549 and of the Privy Council in ***Howard Smith Ltd v Ampol Petroleum Ltd*** [1974] A.C. 821. The transactions had not been avoided before registration of the Defendants' respective interests and, therefore, those interests have priority in any event.

103. The submissions for the Defendants included the alternative argument that the acts of the directors of C1 and C2 in entering into the transactions attacked were informally either sanctioned / approved in advance or ratified after the event by Mr Ron Popely

and later Steve Dickson (as ultimate beneficial owners of C1 and C2), so as to remedy any want of authority. In doing so, the ***"Duomatic principle"*** was relied upon. Mr Collings K.C. responded to the effect that there was no evidence of any such decision(s), as required, and that such decision(s) would not assist anyway because they could not sanction, approve or ratify the misfeasance.

104. Mr Darton K.C. also submitted that the Claimants' approach ignored the fact that, in each case, the impugned transactions were executed by deed (see ***section 46 of the CA 2006*** and ***Bowstead "On Agency" at [8-034]***)

105. Mr Darton K.C. did not accept that the Court had jurisdiction to rectify the entries in the land registers of the Defendants as subsequent disponees even if the transaction were void or that such jurisdiction should be exercised. The jurisdiction depended upon a mistake and there was no mistake registering the subsequent dispositions made to the respective Defendants for valuable consideration (see ***section 132 LRA*** and ***Midland Bank Trust Co Ltd v Green*** [1981] AC 513 at 532, Lord Wilberforce) by proprietors who pursuant to ***sections 29, 52(1) and 58(1) of the LRA*** were to be treated as holding the legal and beneficial title of relevant lease when making their disposition (see ***Swift 1st Ltd v Chief Land Registrar*** [2015] EWCA Civ 330, **Megarry & Wade: The Law of Real Property (9th ed.)** at [6-116], ***Mars Capital Finance Limited v Zahid Hussain and others*** [2021] EWHC 2416 (Ch)).

106. Mr Darton K.C. covered all bases by adding that even if the submission above did not meet with favour, the Claimants could not establish (as they had to) that the ***paragraph 3(2)*** exception of ***Sch 4 LRA*** did not apply to the respective Defendants as proprietor in possession (see ***section 131 LRA*** and also ***Baxter v Mannion*** [2011] EWCA Civ 120 and ***Balevents Ltd v Sartori*** [2014] EWHC 1164 (Ch).

107. Mr Darton K.C. submitted that the Claimants had not pleaded that the dispositions to and the registrations of the Second, Third and Fourth Defendants as leasehold proprietors of the Hever Common Parts Lease, the Anne Boleyn Lease and the Needham Lease, respectively, were mistakes and nor can they be found to be by the Court. The Second, Third and Fourth Defendants were each entitled to be registered as proprietors because in each case their vendors had good title to sell. He further submitted that it was not put to Mr Godwin or Mr Duthie in cross-examination that the companies of which they are directors, and which are now the relevant registered proprietors who would be affected by an order for alteration, (i.e., the Second, Third and Fourth Defendants) had, by fraud or lack of proper care, caused or substantially contributed to the registrations now incorrectly claimed to have been mistakes.

108. As to the ***section 423 IA*** claims, the Defendants' argument that the Hever Lease and the Needham Lease had no commercial value was no longer pursued. It was submitted that the required purpose of avoidance has not been established. In any event the relevant Defendants were purchasers for value and acted in good faith and without notice. It was submitted that in any event the Court should not exercise its discretion to grant relief.

109. Finally, a limitation period defence has been raised but whilst not withdrawn, Mr Darton K.C. anticipated that it was unlikely to apply or be needed depending, of course, on the outcome in the judgment.

## D) The Facts

### D1) Introduction

110. The facts divide between the period before and the period after the involvement of 2D in respect of Hever and 4D in respect of Needham. On one level, as will be seen, the period before can be dealt with briefly. The documents unequivocally establish that Mr Ron Popely was throughout the true owner and organiser of C1 and C2 as well as the other connected companies involved in the building and hotel management of the Hever and Needham projects. This was established by the evidence notwithstanding the registration of others as members and/or directors because they were his nominees. Further, 1D was at all material times his company in terms of ultimate ownership (as established below) and as the registered member and director from 14 October 2010 until 2 May 2015. 1D was the sole registered member and, therefore parent of C1 from 6 July 2012 and of C2 from 5 April 2015.

111. Those facts are relevant to the second period because they will go to the answer of the questions: whether the 2-4Ds were independent of Mr Ron Popley or whether in truth he continued to be involved with the projects; and if so, whether his knowledge belonged to or should be attributed to all or any of them? Those questions are plainly relevant to the issue of whether the Claimants, if they establish their case during the first period, are able to pursue remedies against any of the Defendants. As a result, the brief summary of facts above, that is self-evident from the contemporaneous documentation, needs to be addressed in detail to provide a clear picture of the role of Mr Ron Popely during the first period. That detail will then need to be considered as the background to the start of the second period and to the issue of the knowledge of each of the Defendants.

### D2) Events Relevant to the Grant of the Hever Common Parts Lease

112. On 5 July 2011 C1 purchased Hever's freehold title with the assistance of loans of £1 million from Silver Birch Holdings SA and £1,107,851 from Northern Placements Limited. A management agreement had already been entered into between WL and Chateauform dated 27 May 2011 to commence on 1 July 2011. At this time Mr Gould was C1's appointed director and company secretary. He was also its sole member, as defined by ***section 112 of the CA*** so that his registration did not necessarily make him or evidence him to be the true beneficial owner of the shares. On 29 September 2011 he was replaced by Silver Birch Development SA.

113. In addition, Mr Gould was a director of WL but ceased to be its sole registered member when he was replaced by 1D on 5 June 2011. This was a company beneficially owned by Mr Ron Popely. It continued to be the sole registered member until 1 July 2014 when replaced by Mediterranean Resort Management Limited.

114. Notwithstanding Mr Gould's director's appointment and registration as the member of C1, I am satisfied from the facts and matters appearing below that Mr Ron Popely

controlled, and acted as a director of C1 and will have been the sole beneficial owner (assuming no divesting for tax or similar reasons for which there is no evidence).

115. Those conclusions are reached notwithstanding the fact that Mr Ron Popely's disqualification under the ***CDDA*** continued to run and would not expire until 9 September 2012. He should not have had anything to do with the management of C1 whether when acting as a consultant pursuant to a consultancy agreement with C1 dated 28 July 2010 or otherwise. It is noted that the authenticity of that agreement has been challenged and no evidence has been provided to substantiate it is a contemporaneous, as opposed to being a back dated document as alleged. However, it matters not. First because the issue is what he did, not whether he can rely upon the written terms of an appointment as a consultant. Second, because he has admitted for the purposes of his second disqualification that he acted as a director of C1 from the date of its incorporation on 5 July 2010 until the expiry of his disqualification. He did not attend as a witness at this trial and there is no evidence to refute that admission. This is just one set of facts which justify a "bad character direction".

116. The Claimants have also raised issue with and do not accept the authenticity of many other documents. In particular, purported board meeting minutes for C1. Their concern being that the contents have been written after the event to try and justify and/or hide Mr Ron Popely's true involvement. Whether contemporaneous or not, any attempt to suggest that Mr Ron Popely was no more than a consultant was factually incorrect.

117. The following selection of documents pre-dating the formation of C1 (there are others but it is unnecessary to refer to all of them) establish on the balance of probability that the Hever project was his idea, it was his project and he would play an active role in its future implementation:

a) First, a memorandum dated 18 June 2010 from Ms Phelan, a lawyer acting for the Hever Lenders. Ms Phelan was a partner of Stephen Bullock & Company located in Gibraltar, a firm which provided the legal services required for the formation and operation of companies. Silver Birch Development SA's corporate director was Strategic Management SA, one of Ms Phelan's companies. It addressed Mr Ron Popely's background to the purchase of Hever from Petchey Leisure with its references to his prior involvement with the Hever Estate. It described that involvement in terms that ranged from the purchase and development of land, the building of a golf course and the conversion of an old dairy farm into a hotel. It was written that Mr Ron Popely had himself initially run Hever as a hotel.

b) Second, a minute of a meeting on 19 April 2010 between Mr Ron Popely, Mr Darren Popely and Mr Gould evidenced that Mr Ron Popely identified the possibility of Hever's purchase, considered the price (£3 million) to be reasonable and anticipated that his contacts would be able to produce the funding, in particular through his lawyer.

c) Third, a minute of a meeting between the same people on 13 May 2010 recorded that Mr Ron Popely had identified the potential final purchase (£2.75 million), and that his financing enquiries appeared to be productive. He was to pursue Heads of Terms but *"he"* had not committed to any deal as yet.

d) Fourth, a memorandum dated 18 June 2010 addressed to a potential lender of a secured £1 million included the following facts and matters:

i) Hever would be purchased by an off-shore entity. Ms Phelan would provide a director and shareholder and Mr Ron Popely's building company would take care of all renovation, refurbishment and further development

ii) Mr Ron Popely had "shaken hands" on the purchase of Hever for £2.75 million with the person running the Petchey Group. For reasons stated he thought he could reduce the price (to £2.5 million) and anticipated that the terms of payment may include an eighteen month deferred £1.5 million.

iii) Mr Ron Popely did not intend living at the hotel or running it on a day to day basis. He did not want the current time share arrangements to continue. He wanted to use a management company and for there to be a leaseback of hotel rooms.

iv) The leaseback of hotel rooms was a "route" Mr Ron Popely had started to look at several years before when he had previously owned Hever and before he had sold it to RMI (Gibraltar) Limited (which were subsequently taken over by Petchey Leisure). At that time rooms were sold in Hong Kong for about £100,000 each, about a dozen a week. There were still four rooms owned by investors, the others having been bought back by RMI (Gibraltar) Limited. It was noted that if £100,000 could be obtained today in Hong Kong and China, there would be a 50% profit for each room based upon the £2.75 million currently agreed with a handshake. English agents might also be used.

v) Mr Ron Popely was also considering developing Hever, another 50-100 rooms, using some of the 30 acres he still owned. He had a well-versed team to achieve this, a team he had used for decades.

vi) The proceeds from the sale of the Hever Room Lease would pay the balance of the freehold purchase price as deferred consideration and would repay C1's borrowing. The proceeds should also finance the further development unless the loans were converted to equity.

e) Fifth an email sent by Ms Oliver, a solicitor acting for C1, to Ms Phelan on 2 July 2010 referred to her having just been instructed by Mr Ron Popely in connection with the Hever purchase and asking for details about the loan Ms Phelan had arranged (noting that in another document Ms Phelan stated that she is a director of the lender). It is Ms Phelan who by email sent 7 July 2010 pressed Ms Oliver for the Hever Lenders Charge, a first priority charge.

118. Those documents all pre-date the formation of C1. It is apparent from them that C1 would be formed for Mr Ron Popely to pursue his project. There is nothing from which to conclude that Mr Gould or, indeed, Mr Darren Popely would be controlling the Hever project or that it would be for their personal benefit as owner(s) of the company to be used to buy Hever.

119. Turning to events and examples of Mr Ron Popely's control after C1's incorporation, it is apparent nothing changed: a purported minute dated 8 July 2010 of a meeting of C1 attended by Mr Gould, Mr Ron Popely and Mr Darren Popely referred to Mr Gould having become the shareholder and director for formation purposes. He was to be replaced as soon as possible. Accordingly, Mr Darren Popely succeeded Mr Gould as director of C1 on 28 July 2010. Silver Birch Development SA, which appears to be one of Mr Ron Popely's building companies, succeeded him as C1's sole member on 29 September 2011. 1D became the sole member on 6 July 2012.

120. There is no evidence to suggest either Mr Gould or Mr Darren Popely owned the beneficial interest of the shares. The evidence referred to above establishes on the balance of probability that the shares were held by them for Mr Ron Popely, the controller and ultimate owner of the Hever project. Those conclusions are also sustained by an email sent on 28 July 2010 by Ms Oliver to Ms Phelan. It referred to Mr Ron Popely looking to buy one or more of the vendor companies rather than the land at Hever if that was their only asset. 28 July 2010 is also the date on the consultancy agreement between C1 and Mr Ronald Popely.

121. There were problems over the Hever conveyancing which need not be detailed but the documentation also evidenced that it was Mr Ron Popely who dealt with this for C1. There is no evidence of Mr Darren Popely or even Mr Gould having any involvement.

122. The Silver Birch Holdings SA £1 million loan agreement dated 30 July 2010 required a first priority charge to be granted by C1 and registered against Hever's title at HM Land Registry. It also required a guarantee from Mr Ron Popely, which he signed and dated 10 August 2010. A further indication that he was not merely a retained consultant but the man behind and controlling C1. The terms of the loan included a profit share agreement in relation to 10% of the net sale proceeds from any sale or disposition of 57 hotel rooms as detailed in a document dated 31 July 2010. The loan agreement was executed by Ms Phelan for Silver Birch Holdings SA and Mr Darren Popely as the appointed director for C1.

123. According to a purported minute of a C1 meeting on 15 August 2010, attended by Mr Ron Popely, Mr Darren Popely and Mr Paul Gould, Mr Ron Popely confirmed receipt of the £1 million. Strangely this was before C1 had exchanged contracts and completion did not occur until 5 July 2011 at a price of £2,549,992 with registration at HM Land Registry on 5 August 2011. Equally as strangely, Silver Birch SA allowed completion without having received an executed legal charge. It is unclear from the documents and in the absence of Mr Ron Popely as a witness, how this occurred. However, there is no dispute that security had been agreed and that the agreement was specifically enforceable.

124. The August/September 2010 correspondence revealed that exchange of contracts was delayed by practical issues over title and a building survey yet to be completed. It was not until October that a survey had been obtained and as at 20 October Ms Phelan in an email to Ms Oliver referred to two additional loans of £500,000 each or perhaps one for £500,000 and the other for £1 million.

125. By the beginning of November the purchase price had been reduced to £2.7 million to take account of works required at Hever. An email of Ms Phelan sent to Ms Oliver on 16 December 2010 indicated that she was working with Mr Ron Popely to obtain

potential financing for future room owners to be able to borrow up to half the price of a Hever Room Lease (at that stage incorrectly being thought of in terms of sales of freehold title) by mortgage with repayment to be financed from the room rental income. Confirming Mr Ron Popely's true role are the following words within the email: *"... but you know what Ron is like ... he plans to build more [than the 57 units currently existing]!!"*. It all centred on Mr Ron Popely, it was all about him. In a further email sent 6 January 2011 the idea was even raised of Mr Ron Popely personally guaranteeing the mortgage repayments by the owners of the future, relevant Hever Room Leases. Hardly the actions of a mere consultant.

126. Mr Ron Popely undoubtedly continued to be the central figure in and organiser of the Hever project whether with regard to the purchase, the mechanisms for the sale of Hever Room Leases (for example, he agreed to the sale of 999 year leases as evidenced by a Ms Phelan email sent to Ms Oliver on 10 January 2021) including addressing complications concerning existing rights, the paperwork (with him often being copied into emails) and the marketing of the Hever rooms.

127. Further examples of Mr Ron Popely's involvement included emails sent to Ms Oliver on 12 January 2011. He gave instructions concerning *"The [ten year] Operating agreement"*, including details of the income payments to be made to the owner of a Hever Room Lease and the inclusion of service and management charges in the leases.

128. It is also evident from the emails at this time that he intended C1 to own Hever and a management company to look after the hotel subject to lessee contributions. The draft leases and the Hever Room Management Agreement were sent to him for approval. In contrast, there are no indications of Mr Darren Popely's or, indeed, Mr Gould's involvement in these management decisions other than within the occasional purportedly contemporaneous meeting minutes. Even if created at the time, insofar as they showed anything other than Mr Ron Popely's control, they were clearly drafted to establish a smoke screen.

129. The email communications between January and March 2011 showed that the management agreement would be with WL. It had been incorporated on 4 June 2010. Its formation member and director was Mr Gould. He was replaced as a member by 1D, Mr Ron Popely's company, on 5 June 2011. Mr Darren Popely was appointed a co-director on 1 May 2011 and his appointment continued until 10 October 2014. However, there is no doubt from the evidence below and certainly when applying the balance of probability test that WL was always part of the formal (between 4 June 2013 and 1 July 2014 by reason of 1D's registration as the sole member) and informal group of companies controlled by Mr Ron Popely. This is supported by the evidence of the accountants referred to above.

130. The email communications established that WL would enter into an agreement with Chateauform, the established organiser and manager of conference events and hotels. It was Mr Ron Popely who was sending details and drawings concerning the works for the available conference facilities to Chateauform towards the end of March 2011. At this stage, the price for the sale of a Hever Room Lease was being set at about £160,000. A marketing agreement was made on 11 March 2011 between C1 and Principal Choice Limited.

131. It was Mr Ron Popely who instructed Mr Darren Popely by email sent 4 April 2011 to open a bank account for C1 and *"to change paul to me re hillingdon"* with him stating he would find funds for C1 to pay Heltfield, his building company. This was entirely consistent with the works being paid for by C1 and not WL. By 18 April 2011 Ms Phelan was emailing Mr Ron Popely concerning the sale documentation for the Hever Room Leases, copying in Mr Dickson who was responsible for achieving sales.

132. On 1 May 2011 Mr Ron Popely wrote to Mr Gould on behalf of and on the notepaper of 1D concerning its proposed loan to WL. In a further letter to Mr Gould of WL, signed by Mr Ron Popely the same day with hand written amendments, it was provided that 1D required Mr Darren Popely to be their representative on WL's board. There is no dispute that 1D was Mr Ron Popely's company.

133. There seem from the trial bundle to have been several forms of a 5 June 2011 loan agreement between 1D (with different names but nothing turns on that) and WL including one signed by Mr Ron Popely for 1D and Mr Gould for WL. However, the essence of the agreement was for 1D to lend WL (with rights of redemption) up to £2 million. It would be interest free until 31 December 2016 and at 6% thereafter. It would be secured by a first priority charge on the Hever Common Parts Lease *"when construction is completed"*.

134. That would suggest a straight forward loan arrangement. However, the drawdown provisions revealed otherwise: Having provided for the date of drawdown as 30 September 2011, it was then written that 1D *"intends to lend amounts to purchasers of [The Hever Room Leases]. [Wl] will manage these rooms' rentals … WL shall deduct payments due by room owners to [1D] each quarter in satisfaction of their liabilities to the lender. [WL] may retain these amounts and they will be treated as if they have been paid to [1D] and thereafter loaned to [WL] … [who] shall inform 1D of the individual amounts each quarter"* (***"the 1D:WL £2 Million Loan Agreement"***). The charge would be cancelled upon repayment of principal and interest.

135. Therefore, subject to the application of the law of the island of Nevis, it appears that the 1D:WL £2 Million Loan Agreement to WL would be drawn down (up to £2 million) from the repayments Investors should pay to 1D for the money 1D had lent them to enable them to pay part of the purchase price of their Hever Room Lease sold by C1. Those monies would be collected by WL and be available as its loan facility from 1D. The sums retained would be treated as secured loans by 1D to WL. It was also a term that 1D would become the sole member of WL pending preparation of the charge and the provision of an undertaking to register it.

136. Should there have been any evidence that this facility was used to pay for the Hever works, this arrangement would mean that 1D lent money to WL for that purpose creating a debt owed to 1D. However, there is no evidence at this stage in the chronology or later to show WL paying for the works whether using this facility or not.

137. Mr Ingram's review of WL's bank statements has failed to identify any payments by WL to 1D. His calculations of the payments of the "mortgage" payments that would otherwise have been received by 1D from WL's collections was £1,922,186.08. He did not receive sufficiently detailed financial accounting information from WL to enable him to ascertain whether those amounts were included as creditors in its

accounting reports. However, this mathematical calculation was not challenged or demonstrated to be incorrect by other evidence. It does not matter if it is precisely accurate because it certainly provides the flavour of the scale of the monies involved. What he did not find was payment by WL for the Hever works. Instead, C1's bank statements evidenced its payments to the principal builders, Heltfield (£3,517,000). Those statements also show that C1 paid WL £843,329.64. There is nothing to suggest this had anything to do with payment for Hever's building works.

138. By 13 June 2011 Savills were writing to Mr Ron Popely in response to his invitation to them to offer C1 their planning consultancy services for Hever. His hands on approach continued.

139. By a loan agreement dated 20 June 2011 Pepa Ltd offered C1 a three month, unsecured loan of £200,000 with a drawdown date of 30 June 2011 at an interest rate of 10% to be guaranteed by Mr Ron Popely. An email from Ms Phelan to Ms Oliver sent 28 June 2011 referred to her expecting to be able to send £1.5 million from 1 or 2 companies by 30 June 2011. It appeared that one would be Allegro Fund SA (**"Allegro"**) to replace the short term lending of Pepa Ltd on its loan's redemption date. Allegro and Silver Birch SA would have joint first charges. Two other emails from her that day referred to transfer problems and made clear that Mr Ron Popely remained centre stage including his instruction to her *"to act like we can complete today"*.

140. Delays meant a £1-1.1 million bridging loan (approximately) was required with the details provided by an email from Ms Phelan to Ms Oliver with only Mr Ron Popely copied in. It was to be treated as an additional loan from Silver Birch SA, although apparently lent by Northern Placements Limited, and to be secured by the Hever Lenders Charge. All these communications involved Mr Ron Popely, who was checking the currency rates. He remained at the centre of everything.

141. On 1 July 2011 a loan agreement was made between C1 and Northern Placements Limited for £1,118,127.51 to be drawn down on 5 July 2011 and repaid by 1 October 2012 at a rate of 6% payable quarterly and secured against Hever in agreed form as a first priority charge. Its repayment was guaranteed by Mr Ron Popely. Again evidencing his control and ultimate ownership.

142. This was effectively bridging finance whilst waiting for £1.5 million from Allegro or Silver Birch SA. In an email the same day Ms Phelan observed to Ms Oliver that she was *"not too worried about the charge – but we will need to register when we are sorted re: funding. There should just be 2 companies on the CH1, i.e. Silver Birch and the other will be Allegro, or possibly White Rose instead"*. Ms Oliver recorded in an email that day that Mr Darren Popely had signed the charge form. That appears from the trial bundle to refer to a Land Registry "CH1" form. The lenders for entry on the register were named as Silver Birch Holdings SA (£1.2 million), Allegro Fund SA (£500,000) and White Rose Investments Limited (£1 million). Nothing flows from the change from Silver Birch SA to Silver Birch Holdings SA.

143. There was also a profit share agreement between C1 and Northern Placements Limited set out in a letter dated 1 July 2011 concerning 57 rooms at Hever and the entitlement to both 10% of their net proceeds of sale and a Hever Room Lease of an additional room with the intention that it would be leased back to the management

company operating Hever in return for rental income. It appears from the evidence that the terms were based upon the first phase of Hever's development starting before the expiry of eighteen months.

144. The Hever WL Management Agreement was made on 1 July 2011. WL would operate Hever for C1 for a ten year term subject to renewal terms. It noted that WL would use Chateauform to operate the conference facilities. WL would ensure maintenance and repairs to the standard required to preserve the hotel's quality. It would receive financial support from C1 *"for rental payments up to the quarter to 31st December 2013 to enable [WL] to pay its debts as they fell due"*. Those rental payments were not identified with the only payment obligation by WL being a management fee. That fee would not be payable until after 31 December 2013 when £20,000 a year would be paid plus 5% of WL's annual turnover. It appeared from termination provisions that a turnover in excess of £2.5 million was anticipated. That being so, the income for C1 would be at least £145,000 after 31 December 2011. There was no reference to the Hever Room Leases and third party rights under the ***Contracts (Rights of Third Parties) Act 1999*** were expressly excluded.

145. Although it was not spelt out in clear words, the fact that a management fee would be paid by WL to C1 leads to the objective conclusion of construction that WL would be operating its own business for its own profit. Accordingly, the fact that it had to provide accounts to C1 was consistent with the fee including 5% of the turnover and with the termination provisions. The provision that WL acquired *"all the powers to manage … with rights and responsibilities for all the revenue and expenses generated by its management"* was to be read as meaning that WL kept the revenue and paid the management expenses including any maintenance and repairs. However, it had no obligation to carry out improvements and no obligation to account for any sums that might be due to those with any rights (then or in the future) over the hotel rooms. This further evidences the fact that WL would not have paid for the building works.

146. Money transfer problems continued for C1, delaying completion. Mr Ron Popely was kept informed and the contemporaneous correspondence established that he addressed the problems. Finally, the purchase of Hever completed on 5 July 2011 for £2,549,992. Completion relied upon the secured lending, guaranteed by Mr Ron Popely as set out above, of Silver Birch Holdings SA (£1.2 million), Allegro Fund SA (£500,000) and White Rose Investments Limited (£1 million). A copy of the register of title as at 30 November 2017 recorded a lease registered before completion, namely on 8 February 2005 concerning a first floor flat, unit 57. Otherwise C1 could execute the Lenders Charge and it could be registered without any other adverse entries.

147. On 27 July 2011 Mr Ron Popely instructed Mr Gould to ensure that WL had enough funds to pay the wages or to take any required funds from C1. Another example of their true roles and capacities. Similarly as to roles and capacity, on the same day he instructed Mr Darren Popely not to sign anything else apart from the charge form concerning Allegro or White Rose because C1 had not drawn down anything.

148. On 9 August 2011 Mr Ron Popely raised concerns over the aptitude of Mr Dickson, responsible for sales to Investors in Hever and instructed Mr Darren Popely to place an advertisement for a sales and marketing executive with Far East experience. The email demonstrated Mr Dickson's true status as an employee and the true role of Mr Darren Popely as someone who acted on Mr Ron Popely's instructions. It is further

evidence of his hands on control which continued to be evident from the email communications concerning what appeared to be every management aspect of C1, Hever and its business.

149. The Claimants also emphasised an email from Mr Darren Popely sent 10 August 2011 in which he asked his father whether it was okay to pay two relatively small sums. Whilst it is not clear whether this specifically concerned Hever, it too demonstrated their relationship in business. Mr Ron Popely was in charge. He was at the centre of the communications within the trial bundle and at the core of the issues that arose throughout concerning Hever.

150. There were expressions of concern from Ms Phelan that he should not be delegating issues to Mr Dickson concerning the drafting of documents relevant to the sale of the Hever Room Leases. Her view was that this was beyond the skills of a salesman. For example she wrote: *"Ron knows Steve cannot take care of things like this, which is why he ends up calling me"*). The fact of delegation is of course further evidence of his control. Ms Phelan's position with regard to documentation issues being, for example, *"we just need to get Ron under control!!"* and Ms Oliver writing, for example, *"Once I have Ron's final confirmation, I will let you have the revised draft Lease [etc]"* and *"Here is the full set of paperwork in accordance with Ron's instructions"*).

151. It is also clear from emails at this time that Mr Ron Popely remained the "hands on" decision maker concerning the final forms of the drafting required for the sale of the Hever Room Leases. This included the offer to potential Investors of the option to take a 50% mortgage from 1D.

152. Subsequent emails from Mr Dickson suggest that Ms Phelan's assessment of his limited skills and role may be unfair. For example, his 12 October 2011 email which contained a full report of his activities indicated a wide role and ability to carry it out. However, the important points were that it was a report by email sent to Mr Ron Popely and to him alone and that his role as a subordinate to Mr Ron Popely was clear. Mr Darren Popely and Mr Gould were not copied in. It may be noted that Ms Phelan was also far from generous in her assessment of the skills of Mr Paul Gould. Whether her opinion was accurate or not, it evidences his employee status and role.

153. The loan from Pepa Ltd fell due during September 2011 but was set off by its purchase of the Hever Room Lease for unit 12. By 21 September the first sale to an Investor, a member of the public, was up and running and another two or three were in the pipe line. The emails showed that Mr Ron Popely remained in control and, for example, organised the money required for the arrangements with Pepa Ltd and the signing of the necessary documentation. On 22 September 2011 Ms Phelan reminded Ms Oliver that she was unable to register the Hever Lenders Charge until the final finance was received and the bridging loans repaid.

154. An agreement dated 29 September 2011 entitled *"Assumption of Liability Agreement"* was made between 1D and C1 (**"the 1D:C1 Hever Room Mortgage Agreement"**). In a subsequent statutory declaration Mr Ron Popely stated he signed for 1D and Mr Daren Popely for C1. There are two executed versions. One described Mr Ron Popely as *"Director"* of 1D and the other had that description crossed out and replaced by *"authorised signatory"*.

155. In essence the 1D:C1 Hever Room Mortgage Agreement provided that 1D (if it decided to do so) would *"fund"* up to 50% of the purchase price of any Hever Room Lease by providing a loan secured on the Hever Room Lease to the purchasing Investor. If that was to be the case, C1 would notify the Investor that 1D had assumed the Investor's obligation to pay the relevant balance of the purchase price. The Investor would repay 1D's loan over a 2-10 year period with interest.

156. However, there was a twist. The 1D:C1 Hever Room Mortgage Agreement was entered into on the basis that 1D was described as *"the borrower"* and C1 *"the lender"*. 1D would not pay any money to C1 upon completion of the purchase of the relevant Hever Room Lease. Instead 1D would only *"account"* to C1 for the unpaid balance of the purchase price (up to 50%) within five business days of 1D *"having received all of the principal payable pursuant to the relevant Loan Agreement [with the Investor]"*. That is to say, at the end of the 2-10 year loan period assuming receipt of the monies from the purchaser Investor.

157. Subject to the law of the island of Nevis being applied to produce a different result, and there has been no such suggestion, the 1D:C1 Hever Room Mortgage Agreement meant: 1D did not lend the purchase price to the Investor. It was the collector of the monies the Investor would think (unless there was full disclosure of this agreement) they were repaying to 1D as a result of the full purchase price having been paid to C1 on completion using the mortgage funds lent by 1D. The Investor's "repayments" would in fact be payment of the balance of the purchase price not the repayment of funds paid by 1D to C1 and lent to the Investor purchaser. Having collected the unpaid balance of the purchase price in full, 1D would hand over the balance of the purchase price provided by the Investor to C1.

158. This also meant that the 1D:WL £2 Million Loan Agreement applied to the money Investors thought were their repayments of the monies lent to them by 1D, whereas in fact the money represented repayment of the unpaid balance of the purchase price which C1 had not received and would not receive until 1D had collected the full unpaid balance for the individual Investor after its collection by WL and potential use by WL for its own business. That is to say the facility constituted the money 1D would otherwise have held as agent and presumably trustee for C1.

159. It is plain from the email correspondence preceding this agreement that its concept and terms had been proposed by and in their final form had the approval of Mr Ron Popely. A purported C1 board minute recorded the circumstance of such arrangements as: C1 wanted to make commercial loans to buyers of its hotel rooms but a third party lender *"would be better"* because it would *"enhance the sale"*. There is no evidence to suggest the true nature of this scheme was disclosed to the Investors.

160. It may be that Mr Ron Popely saw nothing wrong with this scheme because the Investors would achieve the same result in that payment of their mortgage instalments would clear their liability for the balance of the purchase price and the interest payable upon that balance. C1 would accept their payments to WL as payment of the balance whether C1 received the money or not. Whether that was the case or not, he did not give evidence and it is not for this trial to address the rights and wrongs with regard to the Investors. However, of relevance and significance for this case is the fact that this evidence established (at least for the period leading up to the involvement of 2D, 3D and 4D) that Mr Popely was not only the person controlling the Hever project

but that he did so by dictating the dealings of all of the companies involved with Hever. This was his project and the only conclusion to be reached on the balance of probability is that he was the ultimate owner of all the companies he connected with the project he controlled. As will be seen, nothing occurred subsequently to alter this conclusion which would still be reached even if a beyond reasonable doubt test applied.

161. Hever's registered title as at 30 November 2017 recorded that 81 Hever Room Leases were registered at HM Land Registry from 4 November 2011 through to and including 4 July 2014. Using the lease for unit 9, dated 21 October 2011, the terms of the long leases can be described as follows (excluding the details):

a) The lease for a term of 999 years (that lease starting 24 June 1997) was sold for a premium (for that lease £160,000). It included the right to use the remainder of Hever for access and egress and to have all the property services provided to and easements, rights and benefits connected with the demised room. WL was a party as the management company.

b) The lessee would pay all taxes etcetera attributable to the room. Subject to the obligations of WL, the lessee would be responsible for the room's repair and decoration. WL would have rights of access. There could be no assignment, underletting or parting with possession of part of the room.

c) WL covenanted to pay taxes etcetera, keep the building insured, decorate the reserved property and keep the building in repair for which services the lessee would pay as part of a service charge, which included payment on account, one thirteenth of WL's costs charges and expenses. The service charge would also include a payment of one sixty fourth of WL's costs charges and expenses in complying with a list of covenants in a separate part of the relevant schedule involving common areas (eg repair of footpaths and parking spaces) and facilities (eg storm pipes etcetera).

162. Going forward, Mr Ron Popely continued to be in overall control with a hands on approach. Another example of facts and matters leading to that conclusion was the approach towards Mr Gould, also demonstrating his position and role, set out within an email from Mr Ron Popely to Mr Darren Popely. It concerned bailiffs having attended Hever to recover unpaid business rates. Mr Gould was blamed and described as *"a complete waste of space"* because he had not paid them. Mr Ron Popely wrote that he would deal with the bailiffs in the morning. This further illustrated Mr Ron Popely being openly in charge and Mr Darren Popely taking instructions from him. Mr Gould was only an employee and administrator.

163. The contemporaneous documentation showed that Mr Ron Popely remained the central figure for the Hever project, controlled the finances including the arrangements to be made for even quite small payments and personally addressed a wide panoply of operational issues. He was the one, for example, who gave instructions for the address to which C1's bank statements, trading invoices and construction invoices should be sent and as to how details of Investor payments should be kept. He was personally involved with architects concerning the building works for Hever.

164. Continuing with the facts chronologically, a loan agreement with Allegro dated 31 January 2012 was signed by C1 to borrow £500,000 from 1 February 2012 for a term of 1 year at 6% interest secured by first priority charge registered against Hever also with a guarantee from Mr Ron Popely.

165. C1's business continued and sales of Hotel Room Leases continued to be pursued during May. On 30 May Mr Ron Popely as a director of C1 signed a *"rating agreement"* with business rates specialists concerning alteration of the rating list for Hever. In June he kept a close eye on building works, for example raising issue with the building of a retaining wall as well as continuing to deal with management matters including those concerning the Hever Room Leases.

166. On 20 June 2012 WL entered into an agreement with RW Invest LLP for them to act as agents *"to arrange the introduction of owners of rooms at [Hever] to [WL] to facilitate the owner entering into a 10 year rental management agreement"*. On the same date 1D also entered into an agreement with them concerning the introduction of people intending to borrow to finance the purchase of the Hever Room Leases.

167. A letter from Mr Darren Popely, as director, to a Hever Room Lease owner dated 21 June 2012 enclosed their rental statement and recorded that construction of the auditorium including an extension to the restaurant, new offices and six new seminar rooms had been completed. A third and final conference building, an addition to the Anne Boleyn suite would start in August. There would be further rental statements sent over time but it is considered unnecessary to do more than note that fact rather than to refer to each one within the trial bundle.

168. C2 was incorporated on 13 July 2012. Mr Ron Popely was the shareholder, Mr Darren Popely the appointed director and Mr Paul Gould the company secretary. Mr Ron Popely remained the member of C2 until he was replaced by Poplar Estates Limited on 1 August 2013. As at 5 April 2015 1D, Mr Ron Popely's company, became the member in its place. It is to be concluded from those facts that Mr Ron Popely was the beneficial owner and would be the ultimate controller of C2 and the Needham project including the companies he connected with it. A conclusion supported by the further facts and matters below.

169. A purported minute of a meeting that day, which recorded the attendance of Mr Ron Popely, Mr Darren Popely, Mr Paul Gould and Mr Dickson, explained that the intention behind the formation was to purchase Needham and to develop it as a hotel and conference centre with room sales as had occurred at Hever. Chateauform might be the operator. Mr Ron Popely was purportedly to be a consultant and there was a service agreement dated 1 August 2012.

170. On 23 July 2012 an email from Ms Phelan to Mr Ron Popely provided the information concerning C1's lending for Hever: There had been no repayment of the £1 million loan from Silver Birch Holdings SA drawn down on 2 August 2010 and a proposed repayment schedule was set out. Funds from Allegro totalling US$400,000 with a further US$100,000 due on 27 July 2012 had been/would be used to repay part of Northern Placements Limited's finance which had been received on 5 July 2011 totalling £1,118,127.51. Allegro's finance would be converted into Hever Room Leases, as had occurred for Pepa Ltds's £200,000.

171. During August 2012 Mr Ron Popely dealt with (amongst other matters) a right of way dispute concerning Hever. There was also a need for Hever loan documentation to be signed. It had been sent by Ms Phelan to Mr Darren Popely on 23 July 2012. His response on 22 August (apparently having been chased) was that he needed Mr Ron Popely to go through it with him. Ms Phelan's next day response was that the documentation was in *"precisely … the terms agreed for all loans … The documents were discussed with your father. He promised several times that the documents would be signed and given to me. They have'nt been"*. It is plain Mr Darren Popely's role as director was no greater than to sign what his father had arranged and agreed. In fact, as she wrote on 4 September 2012, the loan documentation remained unsigned despite the money having been lent for over a year.

172. There need be no further reference to September or October. Heads of Terms for the purchase of Needham by C2 for £2.4 million were dated 3 November 2012. They were signed by Mr Ron Popely for C2 on 3 December 2012.

173. A report to a Hever Room Lease owner to be signed by Mr Darren Popely dated 12 December 2012 recorded that the major refurbishment works had been completed at Hever both for hotel infrastructure and accommodation. A distributed revenue statement was referred to as being enclosed. On 18 December 2012 Ms Oliver sent her preliminary report on Needham's contractual documentation, title and the structure of the purchase to Mr Ron Popely.

174. A valuation report dated 21 December 2012 for C2 opined upon Needham's investment value with reference to two types of room to be demised on long leases having been provided together with a draft WL management agreement, a profit and loss projection and an occupancy forecast. Emails from Ms Oliver in January 2013 continued to evidence Mr Ron Popely as the controller of the Needham project. It was also to him that Chateauform's requests for project updates were sent.

175. A ten year, unsecured loan agreement dated 11 January 2013 was signed by C1 as lender of £2,010,000 to Sapling FT. The maturity date was 10 January 2023. It was signed by Mr Darren Popely for C1 and by Mr Ron Popely for Sapling FT.

176. Towards mid-January 2013 completion of the Needham purchase was being discussed with Mr Ron Popely by Ms Oliver and she and he communicated over the contractual provisions. On 17 January 2013 Mr Darren Popely informed Mr Ron Popely of letters complaining there were outstanding accounts. It is unclear to what this was referring but Mr Ron Popely's response was to *"Put £10k in from oak"*, which presumably is C1. He also recorded that £1 million had been transferred to Sapling FT. These facts and matters are part of the extensive evidence that demonstrated his control not only of C1 and Hever but also of C2 and the Needham project.

177. In an email to Chateauform sent 20 January 2013 Mr Ron Popely referred to the Hever business having broken even in 2012 with a good profit expected for 2013. The remaining building works would complete at the end of February. It was stated that *"<u>Room sales funded the extensive works</u>"* (my underlining for emphasis in the light of the Defence asserting WL paid). This is a clear contemporaneous admission that the building works had been paid using C1's funds. It was also written that once the works were paid for, the proceeds of Hever Room Lease sales would be available to

repay the loans. There was no reference to the 1D:C1 Hever Room Mortgage Agreement or to the 1D:WL £2 Million Loan Agreement.

178. There is no reason not to accept the admission of payment as fact. Indeed, it is obvious that must have been the case because the Hever Room Lease sales were the only apparent source of significant funds outside of C1's borrowing. In addition, it is consistent with Mr Ingrams' calculations from C1's bank statements. There is no evidence that the money was paid by WL using funds borrowed from 1D. It is to be borne in mind, therefore, that whatever WL's role had been concerning the management of the Hever building works, they were paid for by C1.

179. As at 21 January 2013 Ms Phelan informed Mr Darren Popely and Mr Gould about the potential for a sale of "Hever mortgages", about twenty in the amount of approximately £2 million. She asked them to think about how three specified conditions could be met concerning such a sale. There was no apparent explanation for why Mr Ron Popely was not included in the email. However, he was clearly involved with this proposed transaction as evidenced by an email Ms Phelan sent to him and Mr Ashley Marks of Excellion Capital on 28 January 2013. In that email she described Mr Ron Popely as: *"the principal involved in the Hever Hotel project"*. Based on all that has gone before, plainly an accurate description. There followed a flurry of emails on 30 January concerning financial issues, all involving Mr Ron Popely.

180. It is to be noted, therefore, that Mr Ron Popely having created a scheme including the 1D:WL £2 Million Loan Agreement and the 1D:C1 Hever Room Mortgage Agreement was now seeking to generate funds from the outstanding secured debt of the Investors. Purportedly this was derived from 1D's loans paid on completion for the balance of the purchase price for various Hever Room Leases. In fact, as explained previously, that money had not been paid by 1D but was being collected by WL on behalf of 1D to be paid to C1 in due course subject to it first being potentially lent to and, therefore, to be repaid by WL. This case does not ask the court to address the rights or wrongs of any of those arrangements but such machinations demonstrate Mr Ron Popely's approach to his business dealings.

181. A document entitled "Heltfield Properties Ltd" identified the value of works at Hever's conference centre with construction completion due in March 2013 £400,000.

182. On 1 February 2013, C2 entered into a ten year management agreement (with potential extensions) for Needham with WL. C2 would furnish, outfit and fully equip the hotel, whilst WL would oversee and control the refurbishment and fitting out to the requirements of Chateauform. The opening would be by 31 January 2015 at latest and WL would then operate the hotel and conference centre, already having an agreement with Chateauform to operate the conference facilities. In essence the terms of the management agreement repeated those of the Hever Management Agreement.

183. By email sent on 5 February 2013 Mr Ron Popely gave C2's solicitor irrevocable authority to sign the Needham purchase contract. It is clear from this, the signing of the Heads of Terms, and all the email correspondence relevant to Needham that this too was Mr Ron Popely's idea, scheme and project. He was the controller, as he was and remained for Hever.

184. Mr Darren Popely, as director of C1, signed a report to Silver Birch Holdings SA dated 12 February 2013 concerning repayment of its loan for Hever. It was recorded that 22 units had been sold, the majority with a 50% mortgage *"from"* 1D. It was reported that repayment was taking longer because the project including sales had taken longer than expected. There was no reference to the fact that 1D had not lent any money. It was stated that the net sale proceeds of the Hever Room Leases were used to pay for the further development of the conference facilities and of additional rooms rather than repaying borrowing. There was no suggestion this money came from WL and no evidence that it did. Unsurprisingly this report did not meet with a favourable response sent on 13 February 2013 on behalf of a Lender to whom no repayments had been made.

185. Contracts for the sale and purchase of Needham to C2 for £2.4 million with a 10% deposit were dated 13 February 2013. Mr Ron Popely gave the instructions to exchange to the solicitors on behalf of C2 that afternoon by email. Further evidence of this being his transaction through C2.

186. On 15 February 2013 WL entered into a ten year management agreement with Chateauform for the conference facilities at Needham. In summary, renovation and refurbishment work were to be carried out and financed by WL in accordance with Chateauform's specifications as agreed with WL. They had to be completed before the facilities could open and a timetable had been agreed. This was a condition for the start of the conference centre business and achievement of the annual plan. Thereafter Chateauform would be obliged to maintain the premises, which would be treated as an operating expense. There were terms for agreeing and providing an annual investment budget. Chateauform's annual remuneration would be calculated from a base management fee, trademark fees and commercial fees with reimbursement for costs and expenses incurred on WL's account. It was signed by Mr Ron Popely for C2.

187. A loan agreement dated 4 March 2013 between Sapling FT. another of Mr Ron Popely's companies, and C2 provided for a two year loan of £1.34 million to be drawn down by C2 on 5 March 2013 at a rate of 4.5%. This funding was presumably connected with the ten year, unsecured loan agreement dated 11 January 2013 made by C1 to Sapling FT.

188. During March 2013 Mr Ron Popely was concerned with Hever and its sales of Hever Room Leases in Hong Kong together with completion of Needham and emails passed between himself and Mr Dickson.

189. An agreement dated 24 March 2013 entitled an *"Assumption of Liability Agreement"* between 1D and C2 (**"the 1D:C2 Needham Room Mortgage Agreement"**) was made upon the same terms as the 1D:C1 Hever Room Mortgage Agreement. There was a subsequent statutory declaration from Mr Ron Popely stating he signed it for 1D and Mr Darren Popely for C2. The TR1 for completion of the Needham purchase was dated 28 March 2013. It was apparent that Mr Ron Popely wanted to apply the scheme he had used for Hever to Needham.

190. The next day, 25 March 2013, Mr Ron Popely wrote to Ms Oliver telling her he wanted to transfer Hever's freehold. Yet further evidence of his true role and ultimate ownership. There was an email from Ms Oliver sent 2 April to inform Mr Ron Popely that the transfer would not be easy because of the Hever Hotel Room Leases and the

buy-back provisions. She also made reference to the fact that the purchase by C1 would be subject to VAT if chargeable but there had been no VAT election by the vendor, as she described it.

191. The emails prior to 5 April 2013 did not explain Mr Ron Popely's email to Ms Phelan of that date in which he wrote: *"do not call text or email me as I will not reply as I want nothing more to do with you. The loans will be repaid and we will honour our financial obligations"*. However the catalyst for such a response arose, it became apparent in later emails, from her reaction to Mr Ron Popely refusing to provide the Hever Lenders Charge.

192. Before turning to those emails it should be mentioned that in an email sent 14 May 2013 Ms Oliver provided Mr Darren Popely with a completion statement for Needham showing that *"Oak"* had paid £1.9 million odd with the balance of just under £865k appearing to have been provided from the sale proceeds of Hever Room Leases, although that is not entirely clear. By email sent 20 May 2013 Mr Ron Popely confirmed his authority for Mr Nigel Luck to sign the *"attachments/appendix to the contract between [C2] and Chateauform"*.

193. Returning to the issue of the refusal to execute the Hever Lenders Charge: An email sent on 19 May 2013 by Ms Phelan to Ms Oliver asked for a scanned copy of the completed charge documents. A further email from her the next day stated that the charge for which Silver Birch, Northern Placements Limited and Allegro were entitled had to be registered. It attached the loan documents. Ms Oliver's email to Mr Ron Popely sent 21 May referred to Ms Phelan having called and emailed her and to her letting Mr Ron Popely have a copy of the signed charge as soon as she located it. An email from her to Ms Phelan stated she would get the signed charge as soon as she could.

194. This correspondence led to an email from Mr Ron Popely to Ms Oliver of 21 May under the heading *"Hever"*. He instructed her that a 999 year lease should be issued to WL *"for all the site other than those rooms that are leased for £120k pa [with] No restriction on development or subletting"*. By reply that day Ms Oliver wrote: *"Is this instead of transferring the freehold as it would ultimately make the freehold interest worthless …"*. The response did not address this but merely mentioned rent reviews.

195. On 22 May Mr Ron Popely wrote in his first morning email to Ms Oliver entitled *"Hever - Charges"*: *"... these loans were to be exchanged for [rooms] ... issue the lease ... We will not consent to the charge she will have to go to court if she want[s] it*". In his second email that morning he wrote: *"She knows there is no charge. <u>So we issue the lease to w linen</u>. She will have to go to court to get the charge"* (underlined for emphasis).

196. The words are underlined for the obvious reason that they identify Mr Ron Popely's underlying intention for the "issuing" of the Hever Common Parts Lease to WL. He knew the Hever Lenders (SilverBirch Holdings SA, Northern Placements Limited and Allegro) were entitled contractually to the Hever Lenders Charge and that they (through Ms Phelan) were insisting (understandably) upon its execution and registration to protect their interests. It is quite apparent that Mr Ron Popely saw the prior registration of the Hever Common Parts Lease as a mechanism to at least cause the Hever Lenders difficulties by reason of the prior rights it would obtain through

that registration. His expressed justification for this approach was that they should convert the loans into Hever Room Lease purchases but there was no contractual justification for this or for the refusal to execute and/or permit registration of the Hever Lenders Charge.

197. There can be no doubt that Mr Ron Popely's knowledge, intentions and decisions are to be attributed to C1 based upon all of the facts above. I find as a fact, therefore, that C1's purpose for the Hever Common Parts Lease was to give WL rights which through registration would have priority to the Hever Lenders Charge as and when/if it was registered at HM Land Registry. Indeed the Hever Lenders would have to go to court to obtain the security they were contractually entitled to. That finding is entirely consistent with the machinations of Mr Ron Popely's business world, with the evidence of his bad character, and specifically with the facts accepted within his 2022 disqualification undertaking.

198. The Hever Common Parts Lease was dated 23 May 2013 and demised Hever's common parts and facilities to WL for a term of 999 years and 7 days from 24 June 1997. There was no premium. The rent can be summarised as £50,000 a year for five years, £100,000 for the next five, and Anneual increases of 12.5% for the remainder of the term. There were the usual long lease covenants including good and substantial repair and decoration covenants and a forfeiture provision. Its approval by an authorised director is evidenced only by Mr Darren Popely's execution of deed but it is plain from the facts above that this occurred on the instructions of Mr Ron Popely. It was apparent from the emails that he had one issue in mind and one objective, to thwart the contractual rights of the Hever Lenders to the Hever Lenders Charge.

199. There was no document acknowledging the termination of the Hever WL Management Agreement made on 1 July 2011. However, the relationship had clearly altered. WL now had the right to exclusive possession of the common parts. Therefore, it was running its business for which it had previously been required to pay a management fee and 5% of turnover from its own premises in return for an annual rent. The covenants in the Hever Common Parts Lease applied and will have replaced WL's obligations to carry out the maintenance required to ensure the hotel's quality at its expense.

200. On 28 May 2013 Ms Phelan continued her emails to achieve registration of the Lenders Charge and was fobbed off. There was no mention to her of the Hever Common Parts Lease. It was registered at HM Land Registry on 31 May 2013.

201. There was no actual evidence that any other matters, including the ability of WL to pay the rent, was considered at this stage when granting the Hever Common Parts Lease. The first written evidence for that was a purported minute of a meeting held on 31 May 2013. The absence of such consideration was entirely consistent with the fact that the Hever Common Parts Lease was only granted to thwart the Hever Lenders obtaining the security to which they were contractually entitled. However, the minute of the 31 May 2013 meeting attended by Mr Darren Popely, Mr Paul Gould, Mr Stephen Dickson and Mr Ron Popely recorded that:

a) The Hever Common Parts Lease was granted because expenditure of £1.4 million by WL on developing the Hever facilities at Chateauform's request was inconsistent with WL only having a licence.

b) WL could not afford the rent *"whilst new facilities are brought on line"*. There were further costs to be incurred updating the facilities and WL could take responsibility for upgrading some of the rooms.

c) Mr Gould considered the rent of £50k a year inequitable and that it should be reduced. He suggested it should be reduced to a peppercorn to increase the prospect of the future success of the project to the benefit of C1 and the owners of the Hever Room Leases. This proposed amendment to the Hever Common Parts Lease *"was agreed, by [Mr Darren Popely] for [C1] and [Mr Gould] for WL"*.

202. I reach the following conclusions concerning the content of that minute based upon the evidence and findings above:

a) Whether this minute is contemporaneous or not, the matters as set out in sub-paragraph (a) above are contradicted by the previous specified evidence that the works at Hever were paid for by C1. Its statement of the reason for the grant was contrary to the clear evidence and resulting finding above and was false. I reach the conclusion that this assertion of purpose was contrived.

b) It was agreed that the rent to be paid under the Hever Common Parts Lease should in fact be a peppercorn. It was plainly a decision by Mr Darren Popely as the appointed director of C1 and by the appointed directors of WL (Mr Darren Popely and Mr Gould) and of the overall controller of both parties, Mr Ron Popely. Plainly it would be and was implemented. It was also entirely consistent with WL's financial position and with the absence of any previous consideration as to how WL could pay the rent as required by the deed itself. It was entirely consistent with the fact that the Hever Common Parts Lease was only granted to thwart the Hever Lenders.

c) The suggestion that C1 would benefit from the absence of payment of rent was at best misconceived. As to the Investors, their income for the use of their rooms was unaffected. They too did not benefit unless it had been the intention that the payments of rent by WL would increase the charges they would have to pay to WL under their Hotel Room Leases. Obviously that should not have been the case.

### D3) Events Leading to the Hever CPL Variation and the Needham Lease

203. Part of Hever's freehold title, namely "Dairy Cottage" was transferred by C1 to C2 by a "TP1" dated 25 June 2013 as registered at HM Land Registry on 28 June 2013.

204. On 17 July 2013 C1 through Ms Oliver delivered to the Registrar of Companies a charge dated 16 July 2013 described in the "MR01" as being a fixed not floating charge over Hever granted to Silver Birch Holdings SA. The "CH1" detailed the amount secured as £1 million at an interest rate of 6% a year repayable in full with interest on or before 1 February 2012. The "CH1" was stamped by Companies House on 17 July 2013 and a certificate issued accordingly.

205. Emails revealed that during July 2013 Mr Ron Popely continued to be actively involved in Needham and Hever frequently liaising with Ms Phelan, although in the context of friction between them. However, Ms Oliver's delivery of the "CH1" appears to have been her unilateral decision. By the end of the month he was taking the position, as supposedly advised, that the "CH1" should not be registered at HM Land Registry. His email sent to Ms Oliver on 29 July recorded that "*we have been advised not to register [it] … We have no signed agreements, and from what I have seen neither have you …"*.

206. On the same day Mr Dickson signed a letter purporting to extend Mr Ron Popely's consultancy agreement dated 28 July 2010 for 2 years for a fee of £10,000.

207. Ms Phelan by email sent 5 August 2013 to Ms Oliver pressed for registration of the Hever Lenders Charge at HM Land Registry. This request was passed on to Mr Ron Popely and Ms Oliver noted that the only charge she could try and register was *"an old one dated and signed on file"*. Mr Ron Popely's response was in effect to block Ms Phelan. He also involved a solicitor, Mr Pope. Ms Oliver on contacting Mr Pope drew attention to the problem that the limitation period for registration of the executed charge at HM Land Registry had long expired. In addition, the charge sent to Companies House had been executed by Mr Darren Popely when he was not a director, noting that Mr Darren Popely had also advised *"that some of the signatures on [it] are forgeries"*.

208. An email from Mr Darren Popely sent to Ms Phelan on 12 August 2013, copied to Mr Ron Popely, sought confirmation that C1 had made payments to Silver Birch SA totalling £78,800 between 5 November 2012 and 1 August 2013 and to Northern Placements totalling £50,000 (although all but £5,000 being paid to "Diversified", £30,000) and Silver Birch SA (£15,000). The dispute over registration (despite the charge having been delivered on 17 July 2013) continued during the month and there was a lengthy client letter from Mr Pope setting out his understanding of the position.

209. That letter was addressed to Mr Dickson as the sole director but its opening paragraphs made clear that its contents were derived from his correspondence with Mr Ron Popely and Mr Darren Popely and that the solicitor was seeking Mr Dickson's authority as the appointed director for his future instructions to come from both of them. Whilst the letter was mentioned in opening, the detailed contents were not relied upon by either side. It is sufficient without mentioning other documents referred to, most of which are addressed above, to observe from its contents that:

    a) The right to and existence of both the charge to secure the Silver Birch Holdings SA lending were recognised together with the profit share agreement with the lender dated 30 July 2011 concerning the sale proceeds of fifty seven remaining Hever rooms.

    b) Mr Darren Popely executed the charge when he was a director.

    c) There was also a purportedly signed loan agreement dated 31 January 2012 and a profit share agreement for the remaining fifty five Hever rooms. Mr Darren Popely denied signed the loan agreement but the guarantee by Mr Ron Popely was not signed. There was an addendum to the profit share agreement also dated 31 January 2012 addressed to an Allegro sub-fund.

d) The position concerning C1's borrowing from Northern Placements Limited and the share profit share agreement was essentially the same. Mr Darren Popely also denied it was his signature upon the loan agreement which required a charge to be granted.

e) At this date 68 Hever Room Leases had been registered at HM Land Registry. Mr Darren Popely expected the remaining building works to be completed by the end of the year and all rooms sold by early 2014. A schedule of payments to Silver Birch Developments Ltd, owned by Mr Ron Popely, one of his construction companies, was provided.

f) C1 had not repaid the loans as "anticipated", the Hever Lenders Charges was not registered and the profit share agreements had not been enforced. This enabled C1 to use the money which would otherwise have been paid to the Hever Lenders to fund further development to increase the value of Hever (underlined for emphasis in the light of the Defence that WL obtained the Hever Common Parts Lease in the circumstance of it having paid for the works).

g) C1 wanted the loans to remain in place, to repay them over the next few years and to defer the profit shares. The options for achieving this would be to dispute the loan and profit share agreements, to reach new lending agreements or to combine both options.

h) Advice to achieve the options was given including on the prospects of Silver Birch Holdings SA registering with HM Land Registry and enforcing its charge.

210. On 19 August 2013 Heltfield raised an interim account invoice to *"Oak Partners Ltd"* for works at Hever and Needham totalling £240,000. There was no breakdown either between the two hotels or with regard to the total sum and no detail of works carried out. There was a further, similarly drafted interim account dated 5 September 2103 for £360,000. Subsequently Heltfield issued a credit note dated 1 October 2013 for £600,000. It issued two invoices (in similar form to the previous ones) dated 1 December 2013 to C1 for works at Hever and Needham totalling £312,000 and £480,000. On 18 September 2013 "Bluebell Cemetery" invoiced C2 for £66,350 in respect of landscaping at Needham. C2 was also invoiced on 30 November 2013 by Mysave Limited for work carried out at Needham (£3,917.20) as agreed with Mr Luck. None were addressed to WL.

211. Mr Ron Popely remained actively involved in the management of C1, as evidenced, for example: by an email to Ms Julie Veal entitled *"RV:Goldbond Rates"* in which he instructed her to transfer the sums which Sapling FT could not transfer (1700 Euros) from C1's account; and his email dated 1 September 2013 in which he instructed Mr Pope to say that the *"loan agreements had not been signed by the company"*.

212. He was equally still involved with C2 as evidenced by an email he sent to Mr Dickson concerning a *"great idea"* for the creation of a new company/companies to hold the mortgages being obtained from Investors purchasing the Needham Room Leases which company/companies could be sold. His instructions to Mr Gould and to Mr

Dickson by email sent 7 October 2013 were that he *"want[ed] this out by next week"*. This was a further example of them acting on Mr Ron Popely's instructions.

213. Prior to that *"great idea"* Mishcon de Reya on behalf of Chateauform addressed the marketing of the Needham Room Leases to Investors in a letter to C2 dated 25 September 2013 written for the attention of Mr Darren Popely and Mr Ron Popely. It referred to the sales brochure which advertised the investment in Needham. The brochure described a *"proven model"* by the sale of hotel rooms priced from £180,000 to £200,000 with a 10 year, 10% fixed income return and a secure exit strategy at year five. Mr Collings K.C., when taking the Court to that document drew attention to a number of matters which fell within his description of the brochure as a "tissue of lies".

214. Mr Collings K.C. drew attention in particular to: (i) the reference to Chateauform as though it was their brochure or, at least, was a document endorsed by them including statements that *"the hotel's management has now been taken over by Chateauform"* and that Chateauform operated WL; (ii) the description of Needham as a *"completed and operational hotel"* and the inclusion of 4 February 2013 as the sale and investment launch date despite the date for completion of the works required to be completed before opening could occur having been March 2016, which is a date accepted in the Defence; (iii) the statement that C2 anticipated spending £3.4 million on refurbishment to the standard of Chateauform hotels; (iv) the assertions that C2 had launched Hever and had worked with Chateauform to sell rooms in Hever to investors; and (vi) the representation that 50% non-status finance was offered by C1 with mortgage repayments to be deducted from the quarterly rental income.

215. The views of Chateauform concerning the false advertising of its involvement were made quite clear by Mishcon de Reya. No punches were pulled when that firm expressly referred to false suggestions, misleading impressions, specific untruths, misleading statements, and the commission of fraud under ***section 2(1) of the Fraud Act 2006***.

216. The resulting settlement of the claims identified by Mishcon de Raya was dated 9 October 2013. It included personal undertakings from C2, Mr Darren Popely and Mr Ron Popely to ensure (in summary) that such advertising material would be removed and not repeated. Insofar as further evidence of bad character and lack of reliability is required, this document is in itself sufficient for a bad character direction. A conclusion that can be reached without having to address the specific allegations in any further detail.

217. During September 2013 Ms Phelan was emailing Mr Ron Popely concerning the goals for Hever and in that email noted: *"Unit sale proceeds are not being used to repay loans. They were initially used to finance additional construction … [which] ended at the beginning of March 2013 … [but she did] not know what subsequent unit sale proceeds have been used for"*. Her aim (in summary) appeared from the email to be to have Mr Ron Popely appreciate that the loans of the Hever Lenders could be called in but to propose refinancing to resolve their dispute. It is clear he remained in control of Hever from his email to solicitors sent 8 October 2013 addressing Hever payments having been processed. The fact that the next step referred to in the email concerned Needham also evidenced his continued control over that project.

218. According to a sales report sent to Ms Phelan, as requested by Mr Darren Popely, by 12 December 2013 twenty seven Hever Room Leases had been sold by C1 for a total of £5.1 million with the majority of the lessees having raised mortgages of up to 50% of their purchase price totalling £1.27 million meaning C1 had received (subject to completion costs) £4.973 million. These large sums explain how C1 was able to afford the works using the monies received upon the sales of the Hever Room Leases. Another 19 rooms were identified as *"reserved"*. There was no reference to the 1D:CL Hever Room Mortgage Agreement or to the fact that the money purportedly raised on mortgage from 1D had not been lent by 1D.

219. On 19 November 2013 a solicitor's attendance note entitled *"Hever Hotel"* recorded that Mr Ron Popely had given instructions that the Hever Lenders Charge should not be released. It was also noted that *"RP is thinking about selling the freehold of Hever. They have already granted a long lease to [WL] and the reversion is only worth about £500k. They need the cash because they have sold the rooms and granted mortgages of 10 years (capital and interest) but the money is slow to come in"*. The bases for that valuation are not provided and it is not known whether consideration was given to the fact that no rent would be received for the demise of 999 years.

220. There were further attendance notes concerning Mr Ron Popely's instructions and resulting communications concerning the Hever Lenders Charge. By 19 December 2013 Ms Phelan was emailing him with the description: *"You are a liar and a fraudster"*. The email made clear that she was furious to see the above-mentioned sales report which showed: *"Of course you have retained every single penny of the sale proceeds and [C1] has failed to make any repayments of the loans that are overdue"*. She described the updates she had been receiving, apparently from Mr Dickson, as *"misleading"* and *"dishonest"* and was *"considering whether [his] actions are fraudulent in design. He should be disqualified as a director"*.

221. Mr Dickson had been appointed a director of C1 on 11 July 2013 when Mr Darren Popely left (allegedly misappropriating company money). However, the previous communications summarised above including the reference to Mr Ron Popely considering the sale of the freehold all lead to the continuing clear result and conclusion on the balance of probability that Mr Dickson was subject to Mr Ron Popely's control. Hever and Needham remained his projects for his companies under his ultimate ownership. That is sustained by the further evidence of his continued control below.

222. A further email to Mr Ron Popely sent by Ms Phelan on 20 December 2013 repeated the substance of her allegation against him but also alleged that lies had been told by Mr Ron Popely and Mr Darren Popely concerning Needham too. There was no doubt from the tenor of her emails that she knew Mr Ron Popely as the man behind both projects. He responded on 20 December 2013 by giving project updates including that C1 had made a loss of £55k up to November 2013 *"which considering all the disruption with the works is not bad"*.

223. Emails during January 2014 from/to Mr Ron Popely show that Chateauform was aware of the problems between him and Ms Phelan, was being kept informed generally about C1's financial position, and was also aware he had health problems. Solicitor's attendance notes also show Mr Ron Popely continued to investigate the sale of the Hever freehold and the difficulties registration of a charge in favour of

C1's lenders might cause. There was reference to an offer of £450,000 that had been received by the beginning of the year.

224. On 6 January 2014 Heltfield issued a credit note to *"Oak Partners Ltd"* for *"£792,000"* with invoices to be provided when work was completed. The January emails showed Mr Ron Popely and Ms Phelan discussed refinancing through a third party. An email she sent to Mr Ron Popely on 13 February 2014 showed they had fallen out again due to the *"usual empty promises and excuses"*.

225. A report of Mr Hanafee dated 18 February 2014 entitled *"Needham Stevenage"* identified concerns with regard to the business model being used largely because of the cost of the building works and issues over the likely success of Chateauform generating the required sales revenue. Under the further heading *"Chateauform Hever"* he observed that the absence of sufficient Hever Room Lease sales would mean investors would not receive their returns. Included within the proposals were alteration of the *"payment [Chateauform] relationship from % of investment to share of room profit"*, and their removal from involvement in sales and marketing. Hever was described as being *"in really good condition, with adequate standards and just a small amount of capital expenditure required to further upgrade the facilities"*.

226. By letter dated 26 February 2014 solicitors for Northern Placements Limited (still being unsecured) enclosed a statutory demand for some £1.22 million upon C1. Meanwhile Mr Ron Popely's plan to sell 1D and, therefore, the mortgages, was pursued with legal advice sought. It appeared that Mr Steve Dickson was involved but Mr Ron Popely remained in control.

227. By the beginning of March 2014, Mr Hanafee on behalf of C1 was looking to find another operational company to run the conference centres at Hever and Needham. The communications showed Mr Ron Popely continued to address financial matters involving the Hever Lenders. He also made a brief witness statement to support C1's application to restrain presentation of a winding up petition by Northern Placements Limited, informing the court that he was not *"registered as a director of [C1]"* and confirming the truth of the evidence in support provided by Mr Dickson to the extent the information was within his direct knowledge. That was a witness statement, to use Mr Collings K.C.'s words, *"peppered with reference to Mr Ron Popely"* and his involvement with C1's management including during the period of his disqualification. A fact apparently raised by Ms Phelan in her evidence in answer for Northern Placements Limited.

228. A solicitor's attendance note recorded that Mr Ron Popely *"agrees to court action"*. Another made 19 March 2014 recorded that Mr Ron Popely had been advised that he *"is a shadow director"* and that Mr Ron Popely was *"thinking about re-structuring the group"*. This record sustains the findings made to date that Mr Popely controlled the projects and the companies concerned and that he was their ultimate owner.

229. An attendance note of 11 April 2014 addressed the issue of Mr Ron Popely having acted in the management of a company whilst disqualified. It recorded that he *"understood he was managing the business"*. Other attendance notes recorded that the concept of consultancy did not work.

230. It is plain from all the communications that Mr Ron Popely was giving instructions to C1's lawyers not Mr Dickson, the appointed director. An attendance note of 15 April also recorded that settlement was agreed between Mr Ron Popely for C1 and Ms Phelan during a telephone conversation. The application was not pursued and Mr Ron Popely and Ms Phelan continued to communicate over settlement.

231. On 12 March 2014 C1 wrote to WL with regard to its Hever management agreement recording that C1 would *"provide rental support up to the quarter to December 2014 to the extent that payments to Hever owners are not covered by operations .. [and] agree that all fees are cancelled"*. This is shrouded in uncertainty as to its meaning and extent. An executed amendment dated 1 May 2014 specified that the support would be "*for payments made in strict compliance with the Rental Management agreements in place"*. Its meaning was not investigated during the hearing.

232. Also on 12 March 2014 Mr Darren Popely signed a letter authorising 1D to offer incentives to Hever Room Lease owners for early redemption of their mortgages, a 15% capital discount and waiver of accrued interest. This was implemented during April.

233. On 31 March 2014 Heltfield raised an invoice to *"Oak Partners Ltd"* (presumably C1 and certainly not WL) for works at Hever and Needham totalling £1.235 million as an interim account without any breakdown.

234. An agreement dated 28 April 2014 to be entered into between C1 and 1D, Northern Placements Limited, Allegro Investments SA, Silver Birch Holdings SA and International Legal Consultants Limited was drafted on Mr Ron Popely's instructions. It included:

    a) Acknowledgment by C1 that existing agreements it had included: (i) a Northern Placements Limited (St Vincent and The Grenadines) secured loan facility of £1,118,127.51 to be repaid, as originally agreed, on 1 October 2012 with £618,127.51 outstanding; (ii) an Allegro Investments SA (St Vincent and The Grenadines) secured loan facility of £500,000 to be repaid as originally agreed on 31 December 2012 with the whole sum outstanding; (iii) a Silver Birch (Nevis) secured loan facility £1,000,000 to be repaid as originally agreed on 1 February 2012 with the whole sum outstanding; (iv) profit share agreements with all three lenders; and (v) an International Legal Consultants Limited (Nevis) consulting fee agreed orally at £125,000 on 22 January 2014.

    b) The provision that those agreements would remain in force subject to specific changes. In addition, that 1D consented to the security required to be granted over Hever by pledging the benefits of the charges it held over Hever Room Leases.

235. There was no indication within the various emails concerning its drafting, the revisions and finalisation that Mr Dickson had been involved except that his signature would be required upon execution. Finalisation took time and included further issues concerning registration of security which need not be detailed other than to note that in the meantime the loans were still not being repaid (for example the email from Ms Phelan to Mr Ron Popely sent 8 May 2014) until £150,000 was transferred by 1D from mortgage payments received from Hever Room Lease owners on or about 13

May 2014. Although why this occurred when the terms of the 1D:C1 Hever Room Mortgage Agreement provided that 1D would keep those monies and lend them to WL has not been explained. The implication consistent with what has gone before is that Mr Ron Popely controlled what happened according to what he considered necessary.

236. By the end of April Hever Room Lease owners were asking C1 what was happening and expressed concern at the lack of information provided concerning the investment.

237. It was suggested by the Claimants that email correspondence during May evidenced that the consultancy agreement between C1 and Mr Ron Popely dated 28 July 2010 was created at this time. That need not be decided because whatever the terms of the consultancy agreement, the evidence has established that Mr Ron Popely took management decisions and acted as though a director whose requirements and instructions were to be followed by all others acting for C1 (whether an officer, an employee or a third party). The point being that whatever the agreement provided on its face and whatever any of C1's minutes (contemporaneous or not) may have recorded, the evidence established that he has not only been involved in management decisions but had also been in overall control of and actively involved in the management of the Hever and Needham projects and all the connected companies concerned.

238. Issues between Mr Ron Popely and Ms Phelan concerning repayment of the Hever Lenders continued through to June and into July 2014. Some of the Investors who purchased Hever\Needham Room Leases redeemed their mortgages or, accurately, paid the balance of the purchase price remaining due and had the security provided to 1D released.

239. On 28 June Mr Ron Popely emailed Mr Dickson (in summary) thanking him for his work over the past couple of years (since he *"had moved to me"*) but identified specific problems that needed to be sorted ranging from VAT to the sale of packaged mortgages. Again emphasising his control, it ended with a request for plans.

240. On 30 June Heltfield raised a further interim account invoice to "*Oak Partners Ltd"*, for works at Hever and Needham totalling £549,600. On 31 July 2014 Heltfield invoiced C2 for payment for works carried out at Needham to date in the sum of £1,245,000.

241. The email correspondence during July and through to the end of the year did not take matters further but by 18 August, Counsel had provided an Advice upon an intimated class action against WL by purchasers of Hever and Needham Room Leases concerning the failure to pay investment income returns. On the instructions received, he opined the claim was fallacious.

242. By 15 September 2014 Chateauform enquired about the estimated end date for the renovation work at Needham. On 28 September Mr Dickson gave notice to Mr Ron Popely of his decision to leave and asked *"to have me taken off Oak with immediate effect"*. It appeared that by September 2014 only snagging work was left at Needham. On 30 September Heltfield raised a further interim account invoice to *"Oak Partners Ltd"* for works at Hever and Needham totalling £450,000. On 22 October 2014 Bluebell Cemetery raised an invoice to C2 for Needham landscaping of £60,000. On

31 December 2014 Heltfield raised another interim account invoice to *"Oak Partners Ltd*" for works at Hever and Needham totalling £510,400. The only payee(s) was/were C1 and potentially C2 if they were included as the *"Oak Partners Ltd"*.

243. By an email dated 23 December 2014 addressed to Ms Oliver but marked for the attention of Mr Ron Popely, Chateauform addressed a constructive meeting. The email referred to their exploitation and investment budgets and marketing action plan for Hever and its conference centre in 2015. Approval was sought for a number of operational issues involving Chateauform and also WL. They too knew he was in charge.

244. An email from Ms Oliver to Mr Darren Popely, copied to Mr Ron Popely, sent 14 January 2015 referred to a notice by an Investor to exercise their buy-back rights for a Hever Room Lease for £180,000. The notice would expire on 20 January 2016 and appears to have been the second buy-back. Mr Gould expressed his hope that Mr Dickson, still director of sales, could find the money. On 23 January Chateauform emailed Ms Oliver, for the attention of Mr Ron Popely, referring to a meeting on 21 January and to the fact that WL's decision in breach of the management agreement not to put a pre-opening budget in place for Needham prevented Chateauform preparing for the opening.

245. By invoice dated 1 February 2015 MySave Limited, of which Mr Darren Popely was a director, sought payment from *"Oak Partners Ltd"* of £90,000 for work at Needham. There was a further invoice for the same sum dated 1 March 2015. The correspondence within the trial bundle is intermittent at this stage. However, by letter dated 4 February 2015 and signed by Mr Darren Popely, C2 gave 30 days' notice terminating WL's appointment as manager of Needham because the hotel had not opened by 31 January 2015 as the agreement required.

246. A letter from Chateauform's Group Legal Manager dated 4 February 2015 was sent to C2 as owner and operator of Needham and to WL as the management company of Needham on behalf of an Investor. It related to misleading promotional material including references to Chateauform stated to be untrue. The response by letter dated 16 February, signed by Mr Gould, requested the enclosures apparently not received.

247. By email sent to Ms Oliver and Mr Ron Popely on 25 February 2015, Mr Gould identified SCCL as the newly incorporated company which would *"receive the lease at [Needham] at Peppercorn rent"*. Plainly in all the circumstances detailed above, Mr Gould had been acting on Mr Ron Popely's instructions. It was incorporated that day and Mr Duthie was appointed the director and registered as it member. Mr Duthie during cross-examination recollected that he was aware of this and had been involved in discussions but the underlying impression was that he was more concerned with building works than with such details. He could not remember whether the rent was a peppercorn.

248. The very fact that SCCL was formed on Mr Ron Popely's instructions for the purpose he intended in regard to his project, and bearing in mind all the findings above concerning his overall control and ownership, the conclusion must be on the balance of probability that Mr Duthie was intended to be no more than a nominee for Mr Ron Popely who would be the ultimate owner of SCCL. Taking also into consideration Mr

Duthie's lack of reliability as a witness, I reject his evidence to the contrary and also rely upon the following further matters to sustain that decision.

249. On 27 February 2015 Ms Oliver sent Mr Ron Popely by email the Hever CPL Variation for him to have executed by the directors of C1 and WL before its registration at HM Land Registry. He was the controller. Mr Gould was copied in. Ms Oliver informed Mr Gould by email sent 2 March 2015 that the Needham Lease was ready to be signed by a director of C2 and by SCCL.

250. On 3 March 2015 there was a meeting between WL (attended by Mr Ron Popely, Mr Gould and Mr Darren Popely) and Chateauform concerning their relationship and the way forward at Hever and Needham. WL agreed to inform Chateauform by 2 April whether Needham would open and, if so, to notify the date although it would not be before September 2015.

251. The solicitors, Sheppersons, by letter dated 5 March 2015 reported to Mr Ron Popely upon the Hever CPL Variations, the Needham Lease and their execution requirements. Mr Ron Popely addressed marketing issues in his email to Chateauform sent 5 March further to the previous meeting. On 6 March WL wrote to Chateauform informing them of WL's dismissal as managers at Needham and mentioning that there were discussions with C2 concerning their reappointment. WL blamed Chateauform attributing the cause of their dismissal, delay in opening, to them.

252. During March 2015 steps were taken by Mr Hanafee to find a new manager for both Hever and Needham with established companies being asked to submit business proposals, such as Countrywide Hotels Limited and Sunlight Group. Mr Hanafee reported upon Hever and Needham and the search for a new manager in an "Operator Report" addressed to Mr Ron Popely, Mr Gould and Mr Darren Popely. Mr Duthie doubted he saw this email, although he may have picked up a copy, and I have with regard to all his evidence borne in mind his dyslexia, but he accepted in cross-examination that he was probably at the meeting. That being so, he must have appreciated the role of Mr Ron Popely notwithstanding his evidence to the contrary which has continued to be evidenced by the documents referred to. The very fact that he was invited to the meeting indicated that he was sufficiently involved in the Needham project not only to be invited but also to know who found, initiated and controlled the project.

253. An agreement dated 16 March 2015 was made between C2 and SCCL (**"the SCCL Needham Agreement"**). It recited that SCCL *"had been incorporated with the object of completing the works by January 2016, maintaining and managing [Needham]"*. It provided that C2 would grant SCCL a lease of the common parts and facilities pepper corn rent which would include covenants for SCCL to observe in addition to the obligation *"to observe and perform the covenants conditions and obligations on the part of the landlord contained in the [Needham Room Leases]…"*. SCCL covenanted that it would fulfil the lessee covenants

254. Mr Duthie, SCCL's sole registered member and director at the time, explained that Mr Gould had organised this. They had discussed it but he could not help with what he described as *"the intricate detail"* of the agreement during cross-examination. In reality if he had been other than a nominee shareholder and director, he would have known precisely what his (both as owner and director) company was committing itself

to and why. His evidence at trial concerning the agreement led to the opposite conclusion.

255. There was also a document entitled *"Schedule of Works pursuant to paragraph 2 of the Agreement 16th March 2015"*, which presumably referred to the second recital of the agreement. Mr Collings K.C. drew attention to the different type face to suggest it was written subsequently. It certainly does not appear from its type face to be part of the SCCL Needham Agreement but I cannot and do not reach that conclusion on the evidence before me.

256. The Hever CPL Variation deed provided that it was made on 30 March 2015. It varied the Hever Common Parts Lease by reducing the rent to a peppercorn. The Hever Common Parts Lease otherwise remained in full force and effect. That reflected the position already reached some eight days after the Hever Common Parts Lease had been executed. The "AP1" for registration of the Hever CPL Variation was apparently signed by the conveyancer on 10 March 2015. It was lodged with HM Land Registry.

257. MySave Limited submitted an invoice dated 31 March 2015 to *"Oak Partners Ltd"* for car park works at Needham totalling £69,500. Talks were continuing with Chateauform concerning their role at Hever where the results had been *"disappointing"* to quote from an email of Mr Gould before a meeting in Paris for which Mr Ron Popely was marked as an absentee in the minutes. The correspondence that followed included Mr Ron Popely.

258. The Needham Lease was made 1 April 2015. It was for a term of 999 years and 10 days and started 25 December 2012. The yearly rent was a peppercorn payable on demand. In summary the demise included all the common parts of the premises and grounds of the Needham House Hotel and Conference Centre estate. It contained a forfeiture provision relating to the obligations within the Sixth and Seventh Schedules which were in a similar form to the Hever Common Parts Lease and, therefore, need not be repeated except to note that there were covenants to repair and maintain but no covenant to carry out building works. It was registered at HM Land Registry.

259. Mr Duthie stated during cross-examination that he signed the Needham Lease without legal advice trusting Mr Gould. Although he also added that he would have read it and gone through the details, his evidence left the clear impression that his role was to do what Mr Gould asked of him. It is apparent from all that has gone before that the requests were made on the instructions or to give effect to the instructions of Mr Ron Popely.

260. Mr Duthie also explained that MySave Limited would pay for all the works to be carried out to enable Needham to open by January 2016 but would recover the costs from SCCL. However, he could not explain why MySave Limited invoiced C2, as will appear below, although he accepted, as put to him by Mr Collings K.C., that SCCL never had any money of its own. Bearing in mind my findings concerning his lack of reliability as a witness and the bases for that, together with the absence of any contemporaneous evidence to support his assertion of cost recovery, I reject that evidence. He described SCCL as having acted as project manager of the works MySave Limited carried out. There was no independent quantity surveyor.

261. Applying all the facts and matters set out above including the specific findings of fact concerning Mr Ron Popely's control, it is clear and I find on the balance of probability that this mirroring of the Hever Common Parts Lease by the grant of the Needham Lease was part of his design and that this too supports the finding that SCCL was in truth ultimately owned and controlled by him and used by him for that purpose. Obviously that finding will need to be monitored if subsequent documentation or other evidence suggests otherwise but at this stage I am satisfied both from the written and oral evidence that Mr Duthie was a nominee for Mr Ron Popely in his member and director status for SCCL. As will be seen from the further evidence, the position did not alter.

262. The facts and matters above weigh heavily against Mr Godwin's evidence describing his involvement with Needham from February 2015 insofar as it presented a scenario of Mr Gould being the key player. That scenario was first raised in the context of having described Mr Ron Popely as *"the deal maker"* who had found the site, negotiated the purchase and also certain tenancy agreements. Bearing in mind that Mr Godwin took an active role in the Needham project whilst employed by MySave Limited I cannot accept that he would not have appreciated from the hands on involvement of Mr Ron Popely evidenced by the documentation that Mr Ron Popely was the man in control both of Hever and Needham. There is no evidence to support the proposition that Mr Ron Popely and/or Mr Gould misled Mr Godwin by hiding the true position and role of Mr Ron Popely. There is no reason to suppose that Mr Gould would have done this and the documentation leads to the conclusion that Mr Ron Popely did not seek to hide his involvement other than through the use of nominees as members and directors.

263. The same conclusion applies to the conversations Mr Godwin had with Mr Gould concerning Hever and Mr Godwin's future role there. It has been seen how hands on Mr Ron Popely was and that it was his project and he was the ultimate "boss". It is wholly unrealistic to accept that Mr Gould would have had detailed discussions with Mr Godwin concerning that future involvement without disclosing those facts to him. I do not accept that he would have been led to believe that Mr Gould was effectively the landlord (as asserted) or, at least, not without disclosing that the man ultimately in control was Mr Ron Popely. That conclusion applies both when Mr Godwin was being asked to keep an eye, as he described it, on Chateauform and when the proposition that he should take over the Hever Common Parts Lease through a new company formed by Mr Gould was discussed. Those conclusions are sustained by the findings below which show that Mr Godwin failed to disclose Mr Ron Popely's continuing involvement with Hever and, unfortunately provided evidence seeking to establish a very limited involvement.

264. The same conclusions for the same reasons apply to the evidence of Mr Duthie concerning Needham and, to the little he mentions it, Hever. The proposition that his very close friend (as he described him), Mr Gould, would have been presenting himself as the person in control without mentioning Mr Ron Popely and the fact that he was the founder of the Needham project and the person in overall control is not credible. The proposition that from his understanding Mr Ron Popely had nothing to do with Needham and Hever when Mr Ron Popely took such an active role as set out above and Mr Gould worked for him is also incredible.

### D4) Events Leading to 1D's Possession of Hever

265. By letter dated 17 April 2015 C1 gave notice terminating the Hever Management Agreement with WL upon the expiry of thirty days. However, by a letter dated 24 April 2015 WL was then authorised to continue their activities at Hever until 31 December 2015 and monthly thereafter.

266. On 2 May 2015 Mr Dickson became the registered member of 1D in place of Mr Ron Popely but there is no evidence to suggest any change in the beneficial ownership of the issued share capital. He also replaced Mr Ron Popely as the appointed director that day and this appointment continued until 18 February 2021 when Mr Luck was appointed.

267. On 17 June 2015 Mr Ron Popely asked Chateauform for a site meeting at Hever. He was not standing down from his involvement and control of the Hever project. In the meantime outstanding work was being carried out at Needham. In addition, another buy-back notice was received. It had a completion date of 21 June 2015 at a price of £180,000.

268. A draft Rental Management Agreement dated 21 June 2015 was created to be made between Good Hotel Management Limited and the to be identified Hever Room Lease owner. It included a draft recital that Good Hotel Management Limited had been incorporated to manage Hever for the to be named owner.

269. On 26 June 2015 WL granted the WL:1D Hever Charge registered at Companies House over the Hever Common Parts Lease in favour of 1D. It was registered at HM Land Registry on 2 October 2015. The "CH1" provided that 1D had lent WL *"£1,640,794 and further amounts advanced as loans equivalent to Mortgage Instalments collected from Third Parties at [Hever] and [Needham] up to the year ending 31/12/2015"*. It is also provided that 1D was obliged to make further advances.

270. The WL:1D Hever Charge gave effect to the security provisions of the WL:1D £2 Million Loan Agreement but in circumstances of: (i) 1D not having lent money to the Investors; (ii) 1D in fact being a collector for C1/C2 of the unpaid balance of the purchase price for the relevant Investors' Hever/Needham Room Leases plus interest and holding the money for payment to C1/C2 once the whole of the balance was paid by an Investor; and (iii) WL collecting the Investors' payments and having access to C1/C2's resulting funds as a loan facility under an agreement with 1D with the consent of C1/C2.

271. An email of 30 June 2015 appears to have been sent by WL, signed by Mr Gould, to Hever Room Lease owners starting with the false proposition that *"there is no connection between [WL] and [C1]"*. It proposed a new management agreement and represented that WL had met the mortgage payments due from the Hever Room Lease owners *"regardless of whether there was sufficient income to cover them"*.

272. The correspondence within the trial bundle for June and July 2015 did not take the matter further. Works were continuing at Needham and Mr Ron Popely was still giving instructions. Mr Sevgi Ermetal became a director of C2 on 1 July 2015. C1 extended Mr Ron Popely's consultancy agreement for another 12 months by letter

dated 29 July 2015, although query whether this was returned signed by Mr Ron Popely as requested. Heltfield had a County Court judgment debt registered against it on 9 July for only £3,586. MySave invoiced *"Oak Partners Ltd"* not SCCL on 28 August 2015 for £320,000 as an interim accounts for works at Needham.

273. By email sent 1 September 2015 Ms Phelan asked to see the Hever CPL Variation registered on 7 April 2015. She did not appear to have previously appreciated that the Hever Common Parts Lease had been granted to WL. In any event, it appeared from an email sent on 15 October 2015 by Ms Phelan to Ms Oliver, copying in Mr Ron Popely, that she then discovered the registration of the WL:1D Charge granted by WL.

274. Its effect on the rights of the Hever Lenders was inevitably of great concern to her and she wrote that she expected the Hever Common Parts Lease to be *"disposed of without delay"* together with the WL:1D Charge. The response sent 16 October was that the Hever Common Parts Lease and the WL:1D Charge only related to the leasehold title and had *"no bearing on the freehold title over which the Lenders have an Equitable Charge dated 16 July 2013 … registered … on 28 January 2014"*. On 21 October 2015 Ms Oliver wrote to Mr Ron Popely about the Hever Room Lease buybacks.

275. There was a meeting on 27 October 2015 between WL and Chateauform at Hever to discuss marketing and sales, as well as the operating budget for Hever and the position at Needham. Mr Ron Popely did not attend. An undated management agreement (**"the Needham Countrywide Management Agreement"**) between C2 and SCCL and Countrywide Hotels Limited relating to Needham was executed by SCCL and Countrywide Hotels Limited at or about this time.

276. On 4 November 2015 Ms Oliver provided Mr Ron Popely with lists concerning the details of the Hever Room Lease purchases. On the 9th she sent him and Mr Gould title entries showing the WL:1D, registered Charge. Whether this information was required due to financial concerns or not, by 21 November 2015 WL was proposing a CVA. The proposal relied (amongst other financial information) upon land and building fixed assets valued at £1,259,436.

277. MySave rendered an invoice dated 30 November 2015 to *"Oak Partners Ltd"* for work at Needham House as an interim account in the sum of £300,000. The same sum, still without breakdown, was invoiced on 30 November 2015.

278. An email from Mr Gould to Chateauform sent 5 December 2015 referred to the minutes and documents he had received for a 2015-2016 budget meeting on 27 October 2015 concerning Hever's operations. He wrote that whilst he had said Mr Ron Popely was not a director, he had not stated that he was not authorised to sign the contract referred to. He recorded that he had said that WL was no longer the manager of Needham.

279. By email sent 12 December 2015 Mr Ron Popely enquired of Ms Oliver whether the buyback rights might expire if not completed on the due date for completion. She responded on 14 December 2015 to the effect that the issue of time was whether a notice was served on the 4th or 5th Anniversary as required. Mr Ron Popely's hands on approach had not changed.

280. WL's CVA nominee convened a meeting of creditors for its voluntary arrangement by letter dated 16 December 2015. The meeting held on 7 January 2016 was adjourned to the 20th when the proposals were approved. They recorded that £1.7 million odd was owed to 1D, the secure creditor, and valued the Hever Common Parts Lease at £490,000 in the context of an estate agent's opinion that it had a very limited use without the residential units. That opinion has not been examined but raises obvious inherent questions when a business can be run using the common parts in circumstances of the residential units being available for that business. However, that can be ignored for the purposes of these facts and the proposal was not the subject of submissions.

281. On 15 January 2016 Mishcon de Reya acting for Chateauform wrote a detailed letter. It alleged that WL had conspired with Mr Ronald Popely and with Mr Darren Popely to deliberately abandon the Chateauform Needham contract to cause damage to Chateauform. It was stated that their client was preparing to issue legal proceedings.

282. By the end of January 2016 Mr Ron Popely was dealing with the claims of an owner of a Hever Room Lease concerning its management by WL and its responsibility to pay the 10% guaranteed return. Buy-back requests continued to be made and Mr Ron Popely was also concerned with rental arrears owed to Hever Room Lease owners as evidenced by an email from Ms Oliver sent to him on 8 February 2016.

283. C1 sought the opinion of counsel as to whether the buyback provisions could be avoided. The opinion was negative. Emails in early March 2016 from Ms Oliver to Mr Ron Popely showed their serious concerns over whether C1 could complete their buyback obligations. It appeared from emails sent to Mr Ron Popely by Ms Phelan on 9 March that he was looking to sell Hever. It was Mr Ron Popely who was deciding what to do in the face of the current problems and emails at this time show it was he who sought the advice of Ms Oliver concerning the steps that should be taken.

284. Mr Ron Popely's hands on control at Needham was demonstrated in far less important terms by his email of 15 March 2015 which asked Mr Stevens to *"get the NMRO to inspect the Electricity meter at Needham"*. This is simply an indication of the extent of his day to day involvement. He was copied in generally concerning the ongoing building works.

285. By letter dated 16 March 2016, C2 acknowledged to SCCL for the purposes of the Needham Lease that Needham had been opened and their contractual obligations satisfied. It appeared from an email of Ms Oliver sent to Mr Ron Popely on 23 March 2016 that completion was awaited for a number of Needham Room Leases and numerous unilateral notices were registered at HM Land Registry. In a later email of 31 March she recorded that there had been no sale of Needham Room Leases since 2 December 2014.

286. Another email from Ms Oliver to Mr Ron Popely and Mr Darren Popely sent on 23 March 2016 enclosed a *"CH1 charge"* to sign, date and register at Companies House. The *"CH1"* dated 30 March 2016 was for a charge granted by SCCL to Mysave Limited (**"the SCCL:MySave Charge**") to secure all monies and liabilities due and owing for the time being. It was registered at HM Land Registry against the title of the Needham Lease on April 2015. Whilst this would provide MySave Limited with security if SCCL was liable for its works, MySave Limited was invoicing *"Oak*

*Partners Ltd"*, presumably C2 rather than C1, and C2's bank statements show payments to it totalling £253,167 as well as £3,517,000 to another of Mr Ron Popely's building companies, Heltfield. In the absence of Mr Ron Popely this could not be investigated further.

287. On 31 March 2016 MySave Limited cancelled two invoices by issuing credit notes to *"Oak Partners Ltd"* for £320,000 and £300,000 in respect of Needham interim account works.

288. By email sent on 3 April 2016 Mr Ron Popely was given information concerning the mortgages for Hever/Needham Room Leases that had been redeemed.

289. By letter dated 21 April 2016 solicitors acting for Silver Birch SA made demand upon C1 for repayment of its loans totalling just over £1.343 million.

290. An agreement was made between WL and Countrywide Hotels Ltd on 16 May 2016 for Countrywide Hotels Ltd to provide consultancy services for three months for to prepare Hever to trade. On 18 May 2016 Auriga Estates Limited provided C1 with a valuation in respect of Hever of a long leasehold interest with a term of *"99 years, on a per room basis ... subject to its operation under a proposed management agreement with Countrywide Hotels Limited"* and assuming a 5% return. The investment value per room was opined at £250,000. They were also instructed to consider the yield from sales of rooms on a fractional basis with a price of £7,000 per week. They opined a gross yield of 15%, net of 11.15% and a resale yield of 8.15%.

291. On 3 and 10 June 2016 applications by creditors for C2's administration were dismissed (a decision later set aside on appeal). On 17 June 2016 Mr Hanafee was appointed a director of C2 in place of Mr Darren Popely. An email sent by Ms Oliver to Mr Ron Popely on 27 June 2016 identified 10 buy-backs without stating whether they were for Hever and/or Needham. One should have completed in February, one was due to complete on 21 June but the others had completion dates from December 2016 to October 2018. She was unable to answer Mr Ron Popely's enquiry of 17 June as to *"whether or not an owner could enforce the buyback against a successor in title of Oak"*.

292. Plainly Mr Ron Popely's hands on control now required him to consider the financial future of the project not only in the light of WL's voluntary arrangement but in circumstances of financial pressure on C1 and C2. Both companies faced the capital costs of room buy backs and C1 did so in circumstances of its loan from Silver Birch Holdings SA having been called in.

293. 2D was incorporated through Mr Gould on 22 June 2016. There was no written or oral evidence of any meeting or discussion leading to that event but it is to be implied from his control that Mr Ron Popely will have decided that a new company was at least potentially needed to replace the ailing WL. Mr Duthie was registered as its sole shareholder and appointed its sole director. That remained the position until Mr Godwin was registered in his place on 1 May 2017 and was appointed sole director on 15 May 2017. Mr Hanafee became sole director of C2 on 30 June 2016.

294. Good Hotel Management Limited was incorporated on 13 July 2016 also through the services of Mr Gould. This suggests that Mr Ron Popely was considering two

companies might replace WL. One to hold the Hever Common Parts Lease and the other to manage Hever should this prove necessary. Mr Godwin was registered as the shareholder and appointed as the sole director of Good Hotel Management Limited on 13 July 2016. However, he was not informed of this (yet further evidence of Mr Ron Popely's control using Mr Gould for company formation and also of Mr Goidwin's nominee capacity) and his evidence was that he had believed his registration and appointment occurred from 1 October 2016.

295. An email from Mr Dickson sent to solicitors, Clarke Kiernan, on 28 July 2016 sought advice as to whether *"Oak"* should be liquidated and whether the buy-back clauses should be treated as onerous contracts. Mr Ron Popely was copied into the email. On 29 July 2016 Mr Ron Popely in response to an email from the solicitor addressed to him and Mr Dickson informed the solicitors by email that 1D had had no involvement with the sales agents or sale brochures relevant to the sale of room leases.

296. By letter dated 27 July 2016 solicitors acting for some of the Hever and Needham Investors wrote a pre-action protocol letter to 1D concerning demands received for purported arrears relying in part upon the arrangements between 1D and C1 and C2 whereby 1D had not provided any mortgage funds as represented to the Investors who had entered into mortgages in reliance upon such representations.

297. By letter dated 22 September 2016 Silver Birch SA made demand upon the guarantee of C1's liabilities by Mr Ron Popely in a sum of just over £1.343 million. The financial pressure was intensifying.

298. Mr Godwin's evidence was that his role from October 2016 was to oversee Good Hotel Management Limited's operation at Hever. It employed a general manager and other staff. He had the overseeing assistance of Countrywide Hotels Limited who under the terms of a formal contract in effect fulfilled the role of hotel manager and were paid £7,000 a month by Good Hotel Management Limited.

299. The management terms between Good Hotel Management Limited and White Linen were not specifically explained in his witness statement except to the extent that Good Hotel Management Limited would keep the net profits. It was apparent from his evidence that he knew the *"room owners"* would receive an income and he referred to White Linen as the landlord *"responsible for collecting money and paying the room owners … [until it] …went into receivership"* [meaning presumably its CVA]. He said he *"had no knowledge of how Hever Hotel came to be owned by the room owners, who owned the freehold of the hotel or how Paul [Gould] came to be landlord of Hever"*. He still worked at Needham and continued to do so until about October 2017.

300. Mr Collings K.C. made play of the fact that Mr Godwin had had very little experience in hotel management. Mr Godwin's background being the construction of hotels not their operation. His response was that his experience involved in particular modular construction resulting in the delivery of a finished operational hotel. He explained that this had provided him with contact with hotel managers and, as a result, experience of getting hotels up and running. I agree with Mr Collings K.C., however, that Mr Godwin's lack of experience made him a surprising choice but I do not find (and Mr Collings K.C. does not suggest) this to be more than a minor footnote within the context of my findings as to the reliability of his evidence.

301. On 1 October 2016 an agreement was made between C1, Good Hotel Management Limited and Countrywide Hotels Ltd for Countrywide Hotels Ltd to provide services operating, marketing, managing and supervising Hever.

302. Mr Godwin described Hever's financial position in October 2016 as *"struggling to break even"* in particular as a result of *"unplanned maintenance events"*. However, he said he decided from cash flow forecasting that Hever would become profitable, having paid its debt, within five to seven years. He went on to say: "*So at the time I was effectively being offered the chance [by Mr Gould] to take a struggling business, an operating hotel, and try to turn it into a profitable enterprise. It was important to Paul [Gould] for me to do this, because Paul had room owners to pay. That was the driver, there were room owners that needed revenue to be generated."* He twice described Mr Gould during his evidence in chief as being *"effectively the landlord"* once before and once after his reference to the 1 October 2016 management agreement with C1, Good Hotels Limited and Chateauform.

303. There would be no doubt from Mr Godwin's evidence in chief if read alone that Mr Gould was running Hever and that Mr Ron Popely had little, if anything, to do with it. That evidence included important discussions between himself and Mr Gould concerning the running of Hever. There was no evidence, however, to justify any suggestion that Mr Gould would have hidden his true role as employee and the fact that he acted on Mr Ron Popely's instructions. Yet it is clear from all of the evidence considered above that this was the true position. Mr Godwin did not even hint that Mr Gould was untrustworthy and indeed portrayed them as good friends or working colleagues. Mr Godwin's evidence is undermined by the contemporary documentation referred to above but I also find his evidence that Mr Gould did not mention his role as an employee and that he reported to Mr Popely as incredible. There was no reason for him not to do so. In the light of all the evidence addressed to date, I find that he has not disclosed the true involvement of Mr Ron Popely and has instead sought to use Mr Gould as the shield to hide it.

304. On 2 December 2016 Mr Ron Popely, C1 and another company obtained injunctive relief against Ms Phelan to protect confidentiality.

305. By letter dated 14 December 2016 WL's supervisor gave notice to its creditors that the CVA had failed and was terminated. It appeared from a Good Hotel Management Limited email sent 16 December 2016 and from its enclosures that some of the hotel rooms demised under Hever and Needham Room Leases had been repossessed, forty at each hotel. A draft letter to Investors stated that Hever was to become a Best Western Plus Hotel.

306. On 29 December 2016 1D's agents gave notices to WL that 1D had recovered possession of Hever's main reception block including the conference suite, the communal areas and gym in the Old Barn and the conference centre known as Anne Boleyn. The repossession relied upon 1D's rights under the WL:1D Hever Charge in circumstances of WL now being insolvent and without apparent hope of remaining a going concern. The WL:1D Hever Charge therefore had the practical effect of ensuring that the Hever Common Parts Lease remained under the control of Mr Ron Popely as beneficial owner of 1D.

### D5) Events Involving 2D, 3D and 4D

307. On 1 January 2017 SCCL entered into a rental management agreement with 1D for Needham. SCCL was described as *"the manager of the hotel and resort known as Needham ... [who] also operates a lodging rental management and reservation programme ... for the rental of guestroom units located within the Hotel ..."* and 1D is described as *"The owner [who] has acquired the guestroom unit number [blank] within the Hotel [and] desires to appoint [SCCL] as its exclusive rental management agent ..."*.

308. On 3 January Messrs Godwin, Hanafee, Dixon and Mercer met to discuss the current position and action points needed for Hever. On 6 January 2017 WL was placed into CVL. On 19 January 2017 Countrywide Hotels met with Mr Hanafee for SCCL, Mr Godwin for Good Hotel Management Limited and Mr Duthie for both SCCL and Good Hotel Management Limited. The minute made clear that Mr Hanafee would be the point of contact for financial reporting from Countrywide Hotels for Needham and by Mr Godwin would be the contact for Hever. *"They [Mr Hanafee and Mr Godwin] in turn would report back to [Mr] Gould and [Mr] Ron Popely, where previously it had been reported straight to [Mr] Gould and [Mr] Ron Popely"*. Mr Duthie would be concerned with ongoing maintenance/property challenges for both Hever and Needham. There is no doubt that Mr Ron Popely remained in overall control.

309. I am afraid that this too causes serious problems for Mr Godwin's reliability as a witness both with regard to his two witness statements and his evidence during cross-examination. It sustains the findings of fact I have made contrary to his evidence above. There is no reason or evidence to doubt the accuracy of the minute and he had no basis for doubting its accuracy as he sought to do during cross-examination. I find as a fact having taken into consideration the evidence as a whole including Mr Godwin's cross-examination that this document confirms the previous findings. Namely that Mr Godwin knew and failed to disclose within his evidence the true extent of the involvement of Mr Ron Popely with regard to Hever and Needham and that this involvement continued after the liquidation of WL and the repossession of the Hever Common Parts Lease's demise by 1D, his company. Nor, indeed, did he disclose the extent of his own dealings with Mr Ron Popely. That decision will be sustained by the further facts and matters dealt with below.

310. I should add, that I do not accept his evidence under cross-examination that he never reported to Mr Ron Popely. The fact that he was appointed to do so goes against that evidence and its veracity has to be judged in the context of his unfounded suggestion that the minute was inaccurate. It would be contrary to Mr Ron Popely's overriding control of the project. In addition it has to be judged in the context of his overall lack of reliability as a witness including the fact that he has wrongly stated that Mr Ron Popely had no real involvement with Hever or Needham.

311. The equivalent serious problems and conclusions apply to Mr Duthie. He attended the meeting, he would have heard the reporting discussion and he would have appreciated Mr Ron Popely's role. I do not accept his suggestion in cross-examination that the minute might not be accurate for the same reasons as applied to Mr Godwin. As with Mr Godwin, he was unable to provide any basis for this suggestion of inaccuracy. This applies even though he challenged the record that described him as attending for Good Hotel Management Company as well as SCCL. He said he would only have

represented SCCL. I add that I rely also upon the findings above that have already found Mr Duthie to be an unreliable witness.

312. On 10 February 2017 Mr Dickson, presumably for the proceedings in Gibraltar, signed a witness statement to refute the fact that Mr Ron Popely had been a shadow or de facto director of C1 to his knowledge and in particular whilst he was the sole director. Plainly the facts above show otherwise and this adversely affects his character assessment.

313. Hever Hotel Room 14 Limited (**"H14"**) was incorporated on 26 January 2017. The members until 22 February were Hever Property Company Limited and 1D and thereafter 1D alone. It appears that steps were being taken by C1 to change Hever to a time share property. On 9 March 2017 Good Hotel Management Limited entered into a management agreement with H14 for the purposes of a time share of hotel room 14. H14 held ownership of the Hever Room Lease for that room. There is a mirroring of events at Needham with regard to the rental management agreement between SCCL and 1D. It can be inferred that this were parts of the scheme and designs of Mr Ron Popely using Mr Gould to assist their implementation. There is no reason or evidence from which to imply otherwise.

314. This was presumably about the time, as Mr Godwin recollected in chief, of his meeting with Mr Dickson (acting on behalf of 1D, who now had possession of the Hever common parts) *"after a while of operating Hever Hotel"* and the *"worldwide fractional timeshare scheme"* being explained to him. His recollection was: *"As part of that process there was the opportunity to earn money to pay for the Hever Common Parts Lease so we did a deal based on [2D] taking the lease from [1D] in place of [WL], and then providing Steve and his guests with fully serviced rooms on a discounted, nightly rate (I think it was £37.50 a night per person something like that off the top of my head) and over time that would effectively buy the [Hever Common Parts Lease]"*. Mr Gould put 2D in place, as he had Good Hotels Management Limited, he explained. He added: *"... after some negotiation [he and Mr Dickson] agreed for the sale ... for £400,000 with a cash deposit of £20,000 ... then there were ongoing payments made, something shy of £40,000 in smaller incremental payments of about £5,000 when there was basically money around and then the bulk ... was made by the guest room nights ..."*.

315. The idea, therefore, was that 2D would provide the rooms (dinner, bed and breakfast) at the reduced rate because the balance when compared with the usual rate would be set off against its purchase of the Hever Common Parts Lease. It has been suggested within the evidence relied upon by the Defendants that the amount to be set off was instead, the £37.50 which had to be paid for the bed and food provided. However, that does not make sense. The amount which 2D (in fact Good Hotel Management Limited but that is a different point) was giving up and, therefore, would logically be the subject of any set off would be the difference between the usual rate paid by guests and the £37.50. This lack of sense also undermines the credibility of the evidence trying to explain payment of the purchase price, although for the avoidance of doubt findings will be made even if it that was the agreement.

316. Whichever sum was treated as the credit, the agreement assumed that 2D would be the one providing value by the reduction in price. However, Hever was being operated by Good Hotels Management Limited subject to a licence fee and upon terms that it

would keep the net profits. Good Hotels Management Limited would provide the rooms and also had to agree to receive the £37.50 as part of its turnover and it take the discounted rate "hit" without gaining any interest in the Hever Common Parts Lease.

317. The supposed answer to that appears to be provided slightly later in the witness statement when Mr Godwin explained that Good Hotel Management Limited provided 1D with the Hever facilities whilst incurring a licence fee owed to 2D. The consequence was, as stated by Mr Godwin, that Good Hotel Management Limited did not pay the licence fee. However, there were no documents (whether from 1D, 2D or Good Hotels Management Limited) shown to me identifying such a set off or of it being exercised on a day to day or any other basis.

318. I will address this evidence and the challenge to its truthfulness by the Claimants below when further, potentially material facts have been referred to and for convenience will define it as **"the £400,000 Payment Credibility Issue"**.

319. By email sent 24 March 2017 to Mr Price of Countrywide Hotels, Mr Godwin of Good Hotel Management Limited raised various matters and financial concerns regarding the operation of Hever copying in Mr Ron Popely and Mr Gould.

320. On 5 May 2017 4D was incorporated with Mr Duthie its appointed director and sole member. He remained its director until replaced by Mr Edward Townsend on 1 March 2020. Mr Duthie during cross-examination stated that it was his company and Mr Nield was its manager. 4D became the sole member of SCCL the same day, in place of Mr Duthie.

321. The agreement signed for the sale of the Hever Common Parts Lease to 2D for £400,000 within the trial bundle (**"the 1D:2D Hever Sale Agreement"**) is undated but it is agreed this sale occurred on 31 May 2017. Mr Godwin's evidence was that only £20,000 was paid in cash at the time. The "TR2" recorded that the £400,000 had been paid, although the evidence establishes that was untrue.

322. 2D was registered as proprietor on 28 June 2017. I found Mr Godwin to be diffident and uncertain when first questioned about how the Hever Common Parts Lease was valued at £400,000 or how he came to agree that figure for 2D. Eventually he referred to having calculated that it might be worth £1.5 million in 5-8 years' time. That was in circumstances, or so it appeared from his answers, of not knowing there was a peppercorn rent or, at least, not being able to remember if he thought about it at the time because it was not a major consideration. One would have thought, and this does not weigh well for the reliability of his evidence, that the rent would be considered a major consideration when valuing the purchase price of the Hever Common Parts Lease. Plainly, it would be relevant to net profit.

323. My underlying impression was that he really could not explain the £400,000 figure. Although I recognise this occurred during the inherent pressures of cross-examination, the (and I put it no higher than this when viewing this piece of evidence alone for my decision) suspicion is that this was simply an arrangement organised by Mr Popely within a scheme which avoided the need for payment of any substantial sums through the activation of the 1D:2D:Good Hotel Management Limited £37.50 a night licence fee deduction set off agreement. That suspicion has been proved justified in the light of the subsequent evidence below.

324. 2D relies upon the fact that it used conveyancing solicitors and, as Mr Godwin stated, nothing was drawn to their attention concerning any issues concerning the Hever Common Parts Lease or the Hever CPL Variation. That, however, would not be surprising because there is no suggestion they were informed of the true role of Mr Ron Popely. The position of 2D itself is that it was a purchaser for value, in good faith and without notice of any matter causing the Hever Common Parts Lease, whether in its original form or as varied, to be void. The fundamental issue that raises is whether the knowledge of Mr Ron Popely should be attributed to it, as the Claimants contend.

325. As to payment, Mr Godwin did not disclose that the £20,000 cash payment required had been borrowed from Sapling FT. That of course created a further connection with Mr Ron Popely, also potentially with the £2.010 million loan from C1 to Sapling FT which would mature on 10 January 2023 and/or the loan agreement between Sapling FT and C2 of 3 March 2013. That in itself did not prevent the possibility of payment by 2D to 1D of £20,000. However, Mr Godwin accepted in cross-examination that this *"loan"* was made without any formal documentation, without interest and most importantly without a term for repayment having been agreed. When cross-examined, Mr Godwin failed to provide any explanation for this informality with a company clearly connected with Mr Ron Popely, as identified within the facts and matters above. He failed to explain why the loan was made on "repay whenever, if ever terms". There was no documentary evidence from 2D to explain the position and this appears simply to be a transfer of money from Sapling FT to 1D via 2D dressed as a payment by 2D.

326. In my judgment bearing in mind the controlling factor and machinations of Mr Ron Popely, this clearly pointed to the conclusion that this money was provided without a term for repayment on the basis that the "purchase" was part of a scheme Mr Ron Popely had created for his own benefit using the companies concerned and Mr Godwin. That is supported by the fact that the loan has not been demanded. This points to the further conclusion (on the balance of probability based upon all the evidence involving Mr Ron Popely) that it would not be paid by 2D unless and until it suited Mr Ron Popely to move money around between the various entitles he controls.

327. Returning to the £400,000 Payment Credibility Issue, there was no reference to this in the 1D:2D Hever Sale Agreement. It is difficult to credit that there would have been no reference to this method of payment had it truly been the agreement between the parties.

328. Furthermore and also in contradiction with Mr Godwin's evidence, a deed dated 31 May 2017 (**"the 2D:1D Loan Note"**) between 1D and 2D recorded that a resolution had been passed on 31 May 2017 by 2D to issue an unsecured loan note for a loan by 1D to a value of £380,000 with a fixed rate of interest. The loan note's detailed provisions included default provisions which applied (amongst other circumstances) if 2D failed to pay any principal or interest accruing on 1 June and 1 December in each year within 10 business days of the payment date. There was an express no set off provision and no reference to a room and meal arrangement. The liability was secured by the 1D:2D Charge over the Hever Common Parts Lease. All Mr Godwin said in chief about the 2D:1D Loan Note was that he remembered it and a missing signature had to be added leading to it being redated in September 2017. He did not seek to address the inconsistencies.

329. Plainly, the 2D:1D Loan Note was an agreement that created a liability which is inconsistent with Mr Godwin's recollection of events that give rise to the £400,000 Credibility Issue. There was no reference to £380,000 being paid by set off and by small amounts of cash from time to time. There was no right to set off. At this stage of the facts the conclusion that can be drawn is that Mr Godwin's recollection concerning the £400,000 Credibility Issue is unreliable in the light of this contemporaneous document.

330. The "CH1" for the legal charge granted to 1D for registration against Hever's title at HM Land Registry signed by 2D is dated 15 June 2017. Mr Godwin explained in his evidence the circumstances in which there are two versions of this document with different dates. Nothing has turned on that or on the evidence of people meeting a petrol stations to sign the amended version of the deed. I will not consider that meeting further. 3D was incorporated on 23 June 2017 with Mr Godwin the appointed director and registered member.

331. HM Land Registry's title entry records that 4D purchased the Needham Lease on 24 July 2017 with the price of £250,000 stated to have been paid on 16 June 2017. 4D's ownership was registered on July 2017. Mr Duthie in cross-examination stated that the transfer was Mr Gould's idea and that the £250,000 was not actually paid. His evidence was that the price agreed between them represented the value they thought the completed building work had. This of course assumed the work had been paid for by SCCL, which it had not been although, as will appear next, that was supposedly addressed by a set off.

332. A novation agreement dated 19 June 2017 **w**as made between SCCL, Mysave Limited and 4D (**"the SCCL/MySave/4D Novation Agreement"**). Mr Duthie accepted during cross-examination that he had signed it for both SCCL and 4D, as he would have had to, but explained that it was prepared by Mr Gould, who signed for Mysave Limited. Mr Duthie said he would have read and signed it at the office but bearing in mind his dyslexia and the errors to be referred to below, it is improbable that he read it (at least not) with any great care. Indeed this document was plainly another example of Mr Gould arranging matters to suit the intentions of Mr Ron Popely as the ultimate owner of Needham and controller of this project.

333. The SCCL/MySave/4D Novation Agreement provided:

a) According to the recitals: That SCCL owed £250,000 to 4D for the assignment of the Needham Lease under an attached agreement made 16 June 2017.

b) In addition the recitals recorded that MySave Limited was owed at least £250,000 by SCCL for work and improvements carried out at Needham.

c) To ensure that the owner of the Needham Lease had the liability to pay for those works, as the recitals explained, by clause 2 MySave Limited was substituted for SCCL to pay the £250,000 owed to 4D by 31 December 2020.

d) Under clause 3, 4D released SCCL.

334. The attachment is not included in the trial bundle. The SCCL/MySave/4D Novation Agreement is peculiar because one would expect 4D to have owed the liability to

SCCL not the other way round as expressly provided. In addition, although it stated that £250,000 was already owed for the transfer of the Needham lease on 16 June 2017, the transfer as recorded at HM Land Registry was made 24 July 2017. Mr Duthie could provide no explanation for these peculiarities but that is not surprising when the transaction was plainly organised by Mr Gould.

335. Whilst there has been no evidential explanation for those anomalies, in part it may simply be attributable to confusion of the draftsperson involving a misuse of the defined terms of creditor and debtor. However, even if so, that would not explain the different date in the SCCL/MySave/4D Novation Agreement for the transfer of the Needham Lease from the date recorded at HM Land Registry.

336. The outcome according to Mr Duthie was that SCCL having owed a debt to MySave Limited now transferred the Needham Lease for a consideration which would be paid to MySave Limited by 4D to extinguish SCCL's debt for the building works. He accepted that no money changed hands and there was no suggestion from Mr Duthie that 4D either could or did make payment to MySave Limited or, indeed to 3D.

337. The reality was that this was all a contrivance. The invoices from MySave Limited had been addressed to *"Oak Partners Ltd"*. It is apparent from C2's bank statements that it had been paying large sums to building companies, MySave Limited and Heltfield in particular. SCCL did not have a bank account. The reality insofar as MySave Limited was still owed money for its works was that C2 owed and would pay that liability. Presumably Mr Ron Popely would have claimed that this gave rise to a £250,000 debt between C2 and SCCL which would produce the position that 4D would pay C2 for the £250,000 purported consideration for the Needham Lease. However, that is not what the SCCL/MySave/4D Novation Agreement provided, that is not claimed in the evidence, and it did not happen. 4D has paid nothing and neither did 3D when it was granted the Needham Lease. Most importantly all this has occurred because C2, SCCL, MySave Limited and 4D were always Mr Ron Popely's companies and at all time subject to his active control and to his machinations.

338. The "**SCCL:4D Needham Management Agreement**" dated 24 July 2017 provided that 4D would be responsible for refurbishment and maintenance of Needham. SCCL would be the manager of Needham under the terms of an agreement of even date. Under clause 4, SCCL undertook all the obligations of 4D under the Needham Lease. Under clause 5, SCCL would pay 4D (in summary) £10,000 a year plus VAT and 10% of the Annual pre-tax profit. Mr Duthie signed the agreement for both parties but no doubt just following Mr Gould's request. The results was that SCCL having run Needham as owner would now run it as manager with the new owner, 4D, being held out to belong to the sole appointed director and registered member of SCCL, Mr Duthie. When asked whether any money was paid under the SCCL:4D Needham Management Agreement, Mr Duthie did not believe so. He said there was a debt. This simply adds to the contrivance.

339. Mr Duthie was asked to explain why the Needham Lease was transferred from 3D to 4D. His answer was that it was *"Just to separate the two"*. The problem with that answer was that 4D had not had any previous involvement and, therefore, separation was not required. Mr Duthie could not explain that but accepted that in reality this was just a switch of assets and liabilities from one company to another on the advice of Mr Gould for reasons he could not now remember. Bearing in mind that on the face

of Companies House's records he was the sole shareholder and director of both companies, that answer was not credible unless in reality he was, as I find, a nominee. Based on the evidence as a whole, it is to be concluded that it was part of Mr Ron Popely's contrivance administered by Mr Gould. There was no evidence from which to conclude that Mr Ron Popely had ceased to be in hands on control.

340. Returning to Hever, on or about 30 June 2017 Countrywide Hotels Management Limited terminated its management agreement with C1 and Good Hotel Management Limited.

341. 2D executed a "TP1" dated 10 August 2017 for the transfer by 2D to 3D of the Anne Boleyn Lease for £120,000. The property description for registration on 18 December 2017 was stated to be land on the north west of Hever. It was accepted by Mr Godwin that the £120,000 was not paid to 2D.

342. 3D had been formed on 23 June 2017. Mr Godwin was the registered sole member and the sole appointed director and that continues to be the case. His evidence in chief was that the transaction had occurred to create a separate health and spa section which could be licensed to an operating company which would pay 3D fees. He explained that to *"this day, the Spa is operated by another unconnected company"*. He did not within his evidence in chief address where the £120,000 came from or indeed whether it was paid. He did not explain why 2D could not have granted the licence.

343. However, Mr Godwin did explain that the *"structure had become a little bit messy"* with the result that CRS in Croydon, the accountants, proposed transferring the remainder of the Hever Common Parts Lease to 3D for £200,000. This occurred on 16 October 2017. Despite being the sole director and sole registered member of 2D and 3D and despite agreeing to this on the basis that 3D would pay £200,000 to 2D, he said: *I didn't really understand it too much myself but that's what I did"*.

344. Mr Godwin accepted during cross-examination that these arrangements were between *"me and me"*, that the £200,000 was produced as *"just a nice round number"*, and that no payment was or has been made.

345. I am afraid that this vagueness sustains the evidence that he was doing no more than acting under the overall control and direction of others, plainly from all the evidence Mr Ron Popely. These were further examples of his machinations resulting in no payments in fact being made. I agree with the submissions of Mr Collins K.C. and Mr Calland that what this has achieved is that the *"exploitation of Hever is … in the hands of the Popely family"* with Mr Ron Popely the commander.

346. Not only was Mr Godwin's evidence unsatisfactory, and not only was Mr Godwin unable to assist further during cross-examination but the evidence of the accountants is of relevance. Mr Upton's evidence, which I accept, was that UNL Chartered Accountants in Croydon were used by Mr Gould in his role as internal management accountant for (amongst others) WL, C1, C2, 2D, 3D, 4D, SCCL, Heltfield and MySave Limited. That is to say, an informal (subject to the periods when 1D was the parent of C1, C2 and WL respectively) group of companies.

347. Mr Nimesh Patel's evidence was that Mr Ron Popely was an entrepreneur, that his dealings concerning WL, SCCL and 4D were with Mr Gould until his death, and that

the companies for which UNL Chartered Accountants were retained were in reality a group. In other words evidence which was entirely consistent with the conclusion on the balance of probability that the true controller was at all material times Mr Ron Popely using Mr Gould until his death in 2020.

348. In that regard it is to be assumed that the reference by Mr Godwin to *"CRS in Croydon"* was meant to refer to *"UNL"* but even if not, there is no reason to anticipate that the arrangements would have been any different. Especially when Mr Godwin did not understand what was happening or at least not the reasons why.

349. On 10 August 2017 3D entered into a room management agreement with 1D for the Hever Room Leases of which it had taken possession pursuant to 1D's intention to invite guests to promote fractional ownership of the rooms.

350. A report of Auriga Associates dated 7 December 2017 valued the Needham Room Leases for SCCL subject to the Countrywide Hotels management agreement. Based on budget appraisals and a projected 5% cost of money, the investment value per room was £272,500.

351. In reaching this stage of the scenario, the judgment has not referred to a number of documents within the trial bundle dated on or around this period which addressed operational hotel issues. However, it is right to note that they were not addressed or copied to Mr Ron Popely and he did not appear from their content to have any involvement with Hever or Needham. That might support 2D's case but for two important matters. The first is that Mr Godwin's and Mr Duthie's evidence had not been that there was now a change between Mr Ron Popely's previous active involvement and control and the position during this period. They drew no such dividing line. Their evidence was that nothing changed because he had not previously been so involved. That was factually untrue. The second matter is that the lack of documentation expressly referring to Mr Ron Popely within the bundle for this period will change. Subsequent contemporaneous evidence will establish the continuation of his role as the ultimate controller of both Hever and Needham as set out below.

352. There was a document entitled *"Agenda Meeting with RP commencing 29.01.18"* which included items for: (i) Needham concerning *"Timescales and Budgets are Required"* (ranging from gas connection and new boilers to financials for December, forecast and cash position, and staff pensions); (ii) Hever (including financials, 3 months to December 2017, cash flow, new company); *"Oak"* (court costs and money repayment request); (iii) 1D (payment to room owners, meeting/room costs and a forecast); and (iv) *"Personal"* ("*Future plan*").

353. Mr Duthie drew a blank when asked about it. However, on its face it gave away the game. Not only did it evidence Mr Ron Popely attendance at a meeting to discuss the management of Hever and Needham, 1D and "Oak" but it did so in the context of also addressing his personal position concerning his future plan.

354. Email correspondence during February 2018 also established Mr Ron Popely's continuing involvement and interest in Needham: Mr Jon Nield, Needham's General Manager, on 26 February 2018 sent to Mr Kevin Hanafee within an email entitled *"Owners Review Pack – January 2018"* attachments relevant to the financial circumstances of Needham. They ranged from current aged debtors to liquor

stocktake reports and included monthly profit and loss reports as well as future event trackers and a current property report. The email asked when the *"normal monthly meeting"* should be held to discuss the documents. The email was copied to not only Countrywide Hotels, Mr Gould and Mr Duthie but also to Mr Ron Popely.

355. In response Mr Kevin Hanafee, replied to all on 27 February 2018 and asked for further information. The 28 February 2018 email response was sent by Mr Jon Nield to Mr Kevin Hanafee and copied to not only Countrywide Hotels, Mr Gould and Mr Duthie but also to Mr Ron Popely. Its contents support the conclusion that the documents were for a regular meeting to be held to discuss the current and future financial position of Needham including year to date figures and forecasts. This would be one of regular reviews. There was no error in it having been sent to Mr Ron Popely because the email specifically referred to: *"a discussion with [Mr] Ron [Popely] this afternoon, the £13,750 accrual we have for Gas this will be released with immediate effect"*. Mr Ron Popely was plainly still closely involved and concerned with the performance of Needham, past present and future.

356. Subsequent email correspondence during March 2018 also established Mr Ron Popely's continuing involvement and interest in Hever. He received weekly reports. The ones in the trial bundle, for the weeks ending 16 – 25 March, refer to *"Copy of ron report"* and there was an email from the Hever Hotel Manager sent on 26 February 2018 to Mr Godwin and Mr Hanafee entitled *"Report for Ron"* with the main text reading: *"Please find attached the weekly report for Ron"*. When Mr Hanafee emailed Mr Ron Popely on 27 February 2018 to confirm the agreement that the weekly Hever reports would come to him first for checking, Mr Ron Popely's response was that he would receive them as they were produced and Mr Hanafee could comment upon any inaccuracies should there be any. Any suggestion of a loss of control is plainly at odds with those documents.

357. As another illustration of his continuing, hands on, Hever involvement, when issues arose over the assignment of the Hever domain name to Mr Hanafee, Mr Ron Popely was involved. For example, an email sent 19 February 2018 from Mr Hanafee to Ben Hioco, who then owned the domain name, referred to Mr Ron Popely asking why C1 should have to pay for something that should have belonged to Hever. As another example, on 28 February 2018 he sent an email to Mr Hanafee, copying in Mr Godwin, complaining he had *"had enough of going over the same matters time and time again"*, this time concerning his instruction to buy the domain names.

358. Mr Ron Popely's receipt of Hever's weekly reports and his involvement in such matters as domain names arose in the circumstance of C1, still the freehold owner and having demised most of the hotel rooms on 999 year leases, now being interested in time shares. This was evidenced by the formation of H14, of which 1D, still Mr Ron Popely's company, became a member in succession to Hever Property Company Limited.

359. There are other examples of the Needham weekly reports having been sent as enclosures to emails from Mr Nield to Mr Ron Popely, Mr Gould and Mr Duthie of 13, 19 and 26 March 2018. Mr Ron Popely's response to the first evidenced his detailed involvement when he asked what the £1450 was for. Mr Duthie was included in that response evidencing his knowledge of Mr Ron Popely's continued involvement. He was also included in Mr Ron Popely's 13 March 2018 reply to the

consequential response from Mr Nield that even further demonstrated Mr Ron Popely's detailed involvement in Needham's finances. By the 19 March he was requiring costs to be looked at and sales pushed forward expressing the need to do better. By 26 March he was expressing his view that the reaction to his instructions had made matters *"much better"*. On 27 March 2018 Mr Nield sent Mr Popely, Mr Duthie and Mr Gould (copying in others) the Needham *"Owners Review Information for February 2018"*. None of this was mentioned by Mr Godwin.

360. None of this had been disclosed by Mr Duthie in his evidence either, whether in general or in specific terms. His version of events to the effect that Mr Ron Popely had no involvement with Needham and, therefore, 4D was his companies is unsustainable. His response in cross-examination that he would not have looked at the emails in particular because of his dyslexia cannot escape the conclusion that Mr Ron Popely was taking an active role in the management of Needham. If Mr Duthie was truly the owner of 4D and running Needham, as opposed, for example, to being concerned with on-site building, he would have appreciated this. In such a circumstance, it is extremely difficult to believe that he would not have known that weekly reports, which he accepted he knew of, went to Mr Ron Popely. He already knew of the reporting obligations and he would have appreciated that Mr Ron Popely was an active force who used Mr Gould to assist him.

361. I do not accept Mr Duthie's recollection during cross-examination that Mr Gould never mentioned Mr Ron Popely to him and told Mr Duthie he never discussed matters with Mr Ron Popely. It is plain Mr Gould must have had frequent discussions and there is nothing in the evidence to suggest that Mr Gould would have lied to Mr Duthie. His evidence to the contrary is incredible unless he was not truly concerned in day to day management. As to that the theme of Mr Duthie's answers was that he was hands on site managing the works and that, on the balance of probability, was his role.

362. It is also to be borne in mind that there was a close relationship. Mr Ron Popely was a long time business associate and friend of Mr Duthie. Looking at the evidence as a whole, I am satisfied on the balance of probability that Mr Duthie was a nominee director outside the context of that on-site building work supervision and a nominee member. Mr Gould controlled the management of 4D upon the instructions of Mr Ron Popely as had occurred whilst SCCL held the Needham Lease. The subsequent evidence sustains that finding.

363. Another example of Mr Ron Popely's continued involvement in respect of Needham and Hever, was an email sent by him to Mr Hanafee on 24 April 2018. He attached the Needham weekly report and criticised Mr Hanafee for having misled him into thinking he would do his best to keep Hever and Needham on track when, in fact, he did *"little or nothing [and only] wanted money"*

364. Similarly, Mr Ron Popely contacted the Hever Hotel Manager by email sent on 16 May 2018, copying in Mr Godwin and Mr Hanafee concerning Hever's progress; meaning of course (sic) the progress of 3D and its business. There are other examples including an email from Mr Ron Popely to Mr Hanafee in which he asked when the Hever monthly management meeting would be held after he had just received Mr Hanafee's draft of the agenda for the proposed meeting.

365. Mr Godwin was asked to explain Mr Ron Popely's continuing involvement in the light of this contemporaneous documentation. I considered his response elusive and unsatisfactory. His attempt to suggest that it was unknown to him and/or that it all resulted from a working relationship Mr Ron Popely had with the manager, Lee, was implausible. That is particularly so when this "working relationship" had not been disclosed in his evidence in chief and he had in any event expressly stated that Mr Ron Popely had nothing to do with Hever except for the occasional telephone calls concerning matters such as blocked drains. Plainly the contemporaneous evidence established otherwise.

366. I also reject his evidence that the matters identified in the emails were carried on by Mr Ron Popely and Mr Hanafee behind his back whilst he was managing the hotel. If 2D and 3D were truly his companies, there would be no reason for that to occur and no reason has been proffered.

367. On 30 April 2018 MySave invoiced *"Stevenage Conference Centre"* for works to a suite at Needham totalling £252,000. Yet this was after the transfer of the Needham Lease to 4D on 16 June 2017 and 4D's assumption of the liabilities. Mr Duthie could only suggest this was an error. It was, as will be seen, an error that continued preventing any suggestion that this was a one off administrative error when deciding to invoice a company other than *"Oak Partners Ltd"*.

368. In that invoice there was a break down identifying four types of work. A second invoice of the same date for the same suite, identifying two types of work, was for £60,000. MySave Limited's next invoice to *"Stevenage Conference Centre"* for works at Needham with five types of work referred to was dated 30 November 2018 for £240,000. There followed two invoices dated 28 February 2019, one for two described items of work at Needham and the other for three different types of work, both for £180,000. An invoice dated 31 May 2019 was for one item of work at Needham for £45,000 and another of the same date for five items was for £240,000. An invoice dated 2 August 2019 for seven items was for £300,000. One for 10 July 2020 for landscaping was for £30,000. In principle, all these should have been addressed to 4D but it is clear from the whole Needham scenario (mirroring the Hever scenario) that in practice they were all part of the contrivances of Mr Ron Popely presumably through the administrative services of Mr Gould, whether they were for genuine work at genuine cost or not.

369. A licence dated 1 May 2018 between Weald Properties Limited, as licensor and to be signed by Mr Hanafee, and Hever Resort Hotel Limited, as licensee and to be signed by Mr Godwin, applied to the common parts of Hever. For a fee of £35,000 it permitted Hever Resort Hotel Limited to occupy the property for permitted use in common with Weald Properties Limited until 30 September 2026 or when terminated in accordance with clause 4, which also provided the licence should last until 30 September 2027 subject to termination provisions. Nothing was made of this at the trial.

370. On 19 December 2018 Mr Hanafee forwarded to Mr Ron Popely an email from an owner of a Hever or Needham Room Lease complaining that he had not received rent due for a year. Mr Ron Popely in response the same day asked for further information concerning the last payment made and its calculation.

371. In an email sent 3 January 2019 responding to Mr Ron Popely, Mr Dickson assured Mr Ron Popely that Mr Pope had not asked whether he had been a shadow director of C1 and that, if he had, he would have confirmed that he had been acting under his instructions when dealing with Ms Phelan's claims. He confirmed he was not accustomed to taking instructions from Mr Ron Popely and was aware of the consultancy agreement. Plainly from all the facts established, this was untrue.

372. On 1 February 2019 Mr Godwin resigned as a director of Good Hotel Management Limited. That left Mr Tom McCarthy as the sole director having been appointed on 30 September 2018. Mr Godwin's evidence was that he had been introduced to Mr McCarthy by Mr Gould. Mr Godwin did not really remember the details concerning his resignation. He thought it had something to do with reorganisation once Countrywide Hotels Management Limited had left.

373. Mr Jim Goodwin had been the first registered member and appointed director of this company following its formation on 13 July 2016. Mr Godwin was appointed a director on 13 July 2016. On 15 May 2017 2D became the registered member. At that stage he was 2D's sole registered member and director and from 23 June 2017 3D's appointed director and registered member. 2D was replaced as sole registered member by Mr McCarthy on 30 September 2018. Good Hotel Management Limited was placed into creditors' voluntary liquidation on 21 May 2019.

374. So, in principle Mr Godwin should have known precisely how and why Mr McCarthy had become the registered member and an appointed director of Good Hotel Management Limited on 30 September 2018 not only because he was a director but also because he, on the face of entries at Companies House, was the sole registered member and director of 2D, who at the time was Good Hotel Management Limited's sole appointed member. One would have expected him to explain how Mr McCarthy came to Hever having purchased the company and discussing with him, his co-director, how Good Hotel Management Limited would be run together with his aims for his new company. Bearing in mind those roles, Mr Godwin would also reasonably be expected to remember why Mr McCarthy no longer wanted him to be a director in February 2019, assuming Good Hotel Management Limited was indeed owned by Mr McCarthy. Instead he could only recollect Mr Gould's involvement in the resignation. In reality, of course, this is further evidence of Mr Ron Popely, with Mr Gould acting on his instructions, arranging the companies connected to his Hever project to suit his scheme. I reject Mr Godwin's evidence that he made his own decisions.

375. A report of Auriga Associates dated 27 September 2019 valued the freehold of Hever subject to the Hever Common Parts Lease with an initial annual rent of £50,000 for Mr Dickson (c/o Hever Hotel & Country Club). They opined a market value of £840,000 assuming a passing rent of £142,382.21 with an assumed, viable tenant compared with £175,000 for a peppercorn rent on the basis of a sale of the freeholder to the Investors (described as "*an unlikely and unattractive scenario"*). Their surprising opinion that this justified the reduction of the rent to a peppercorn on 31 May 2013 was not argued on behalf of the 1D, 2D or 3D.

376. There was a *"settlement agreement"* made on 30 January 2020 between 2D, 3D and 1D (**"the 2D, 3D:1D Settlement Agreement"**). It recited that the consideration for the original transfer from 1D to 2D had been paid in full: £20,000 as an initial deposit; £47,700 payments on account made on behalf of 2D and Hever Spa; £326,710 as

credits for payments 2D was entitled under the rental agreement of 10 August 2017 between the three parties for the use of 8830 room nights at £37.00 a night between 10 August 2017 and 10 January 2020; and a final balance of £5,590.

377. The 2D, 3D:1D Settlement Agreement only stated that payment had been made and did not suggest any reason for a "settlement". There was no reference to any set off of Good Hotel Management Limited's licence fee or to the fact that Good Hotel Management Limited had paid the £47,700 and the balance of £5,590, as stated by Mr Godwin during his cross-examination but not within his witness statement. Furthermore, the credit was for the discounted rate for the rooms not for the market rate that would have been paid without the agreed discount which the oral recollection of Mr Godwin concerning his conversation with Mr Dickson (as a matter of logic) identified as the set off.

378. Mr Godwin in chief stated that he remembered the document and that he *"created [it] from scratch"*. He also said that he calculated the £47,700 from the accounts and it probably took him about a week to get the amounts and draft the agreement. No documents were produced. What he also did not do was explain the reasons for the settlement or refer to the Good Hotel Management's Licence fee or address the 2D:1D Loan Note.

379. Mr Godwin provided no evidence to substantiate the fact that 8830 room nights had been provided by Good Hotel Management Limited at £37.00 a night between 10 August 2017 and 10 January 2020. The fact that only 1 room was sold with fractional ownership obviously in itself raised doubt over that figure and disclosure of the hotel registers cross-referenced to the set offs would have been expected.

380. It is to be concluded as a finding of fact when addressing the £400,000 Credibility Issue that 1D, 2D and 3D have failed on the balance of probability to establish that 2D paid the £400,000 as it asserted for the following accumulated of reasons:

a) The oral recollection of a set off for the provision of discounted stays by those 1D wanted to sell fraction room shares did not take into account that Good Management Limited ran the hotel and received the net profits. This fact had to be translated later in Mr Godwin's witness statement into a set off by 2D of Good Hotel Management Limited's licence fee.

b) In contrast the later 2D, 3D and 1D Settlement Agreement made no reference to the licence fee or to Good Hotel Management Limited but purported to settle an unidentified dispute on the basis that £326,710 of the £400,000 was attributed to 8830 room nights at £37.00 per night.

c) In addition, that attribution applied the discounted rate but the point of the oral recollection, if true, was that 2D would gain the benefit of a discounted rate. That is to say the set off should have reflected the difference between the value of the normal rate and the discounted rate. The credit to 2D should have been substantially more, presumably.

d) In any event, the existence of a set off agreement (whether oral or as provided for in the 2D, 3D and 1D Settlement Agreement) was inconsistent with the 2D:1D Loan Note. It made no reference to any such set off (whether the

£37.00 or a higher figure) but expected repayment of a term loan by the date specified without set off.

e) The "TR2" incorrectly recorded that the £400,000 had been paid.

f) There was no documentary evidence to support the fact of the 8830 discounted nights and only one room was sold for fractional ownership.

g) There was no evidence of or commercial reason identified for Good Hotel Management Limited having supposedly paid the £47,700 and the balance of £5,590.

h) Mr Godwin was an unreliable witness and in respect specifically of the £400,000 failed to disclose the "pay as and when if ever" terms of the £20,000 Sapling FT loan.

i) There was no valuation evidence or other evidence to satisfactorily explain the £400,000 valuation.

j) Mr Ron Popely's controlling, hands on involvement and Mr Gould's role as an employee was not even disclosed. This has all the hallmarks of a contrivance created by Mr Ron Popely for the companies he controlled and used by Mr Ron Popely to achieve results without payment in fact being made.

381. Mr Gould died on 22 September 2020.

382. Mr Dickson resigned as a director of 1D on 18 February 2021 and was replaced by Mr Gorman. He gave his disqualification undertaking on 7 April 2022 to take effect from 29 April 2022.

383. Emails between Mr Nimesh Patel of UNL Accountants and Mr Ron Popely on 13 April 2022 showed Mr Ron Popely having been sent the latest draft of 4D's financial statements for 2021. His continuing hands on involvement was demonstrated by the fact that he asked the identity of the creditors owed the sum of £708,215. Mr Ron Popely observed that he knew part was owed to SCCL and probably to MySave. Invoices from Mr Duthie to 4D were also sent to him. This was in direct contrast to the oral evidence that Mr Ron Popely played no role and had no interest in 4D.

384. Mr Patel also informed the Court during his cross-examination by Mr Collings K.C. that Mr Duthie, as a result of Mr Gould's death, had asked him to communicate with Mr Popely and to give information to Mr Popely. Accordingly he had had discussions with Mr Ron Popely asking and him answering questions about 4D's accounts. This too sustained the conclusion that Mr Duthie's evidence must be rejected for its failure to disclose and its attempt to hide Mr Ron Popely's true role and involvement not only with 4D but with Needham and Hever generally.

385. UNL Accountants have also provided *"to whom it may concern"* letters identifying liabilities incurred for the following works: (i) WL between incorporation and December 2015 incurred for Hever £1,292,273. (ii) Hever Hotel Resorts Limited between 22 June 2016 (date of incorporation) and 1 April 2020 incurred £225,000. (iii) SCCL between 25 February 2015 and February 2020 incurred £941,907. (iv) 4D,

£250,000 for lease acquisition, £200,000 for lease improvements, £321,651 for Mr Duthie and £160,000 for MySave Limited labour.

386. There was no suggestion from UNL that they had audited these figures and they must be read in the above-mentioned context of Mr Ron Popely giving instructions and the machinations/contrivances which feature within his business/management practices combined with the evidence from Mr Upton and Mr Patel that WL, C1, C2, 2D, 3D, 4D, SCCL, Heltfield and MySave Limited were treated as a group and that their accounts would need *"tidying up"* at the year ends. They must also be read subject to the information provided in the bank statements identified within the evidence of Mr Ingram.

387. This leads to the *"Schedule of Construction Invoices & Credit Notes"* created to address the evidence of the quantity surveyors who were not called because it was agreed that the real issue was who paid not how much was or should have been or be paid. It identified invoices to C1 and C2 totalling £1,924,767 and £2,745,000. It also identified invoices to Stevenage Conference Centre from MySave Limited from 30 April 2018 to 10 July 2020 totalling £747,000 and from 30 November 2018 to 2 August 2019 totalling £780,000.

388. However, there was no evidence of any of those invoices having been paid by SCCL or 4D. The findings of fact above clearly establish that payments were made and would only have been made by C1 or C2.

389. Mr Duthie, however, relied upon his assertion that SCCL paid £1,456,429 for works, plant/machinery and fixtures and fittings which he said appeared from its accounts between 2016-2020. He did not accept Mr Ingram's evidence that he could find no evidence of SCCL having paid for Needham works.

390. The financial statements are abbreviated and unaudited. They recorded increases in the tangible assets from time to time from additions, reclassification/transfers, disposals and depreciation so that as at 29 February 2020 there were valued at £992,235, an increase from £659,381 the year before. The notes recorded, insofar as leasehold property was concerned, the value of cost as at 1 March 2019 was £491,907 and the financial year's additions were £450,000 with depreciation of £49,191 deducted.

391. Those accounts need to be viewed from the basis that SCCL no longer owned the Needham Lease, and had not done so since 16 June 2017. That from 24 July 2017 its business in regard to Needham was to be responsible for refurbishment and maintenance in return for paying 4D an annual fee and percentage of its pre-tax profit. The figures in the accounts have not been explained by Mr Duthie or by anyone else in that context or at all. Furthermore, nor has the 4D or Mr Duthie presented evidence of any bank account showing any payment by SCCL. Mr Duthie's reliance upon the unaudited abbreviated accounts does not assist him to overcome the finding made on the balance of probability that payments were made and would only be made by C1 or C2.

392. On 21 April 2022 Mr Ron Popely gave his disqualification undertaking and was disqualified for a second time for 9 years from 12 May 2022. Mr Darren Popely's undertaking was dated 26 April 2022 and his disqualification for 9 years began on 18

May 2022. Their report quantified WL's leasehold improvements by reference to invoices approved by Mr Gould as director and main contact at just over £1.3 million.

### D6) The Current Position - Hever

393. Mr Godwin's evidence referred with regard to Hever to the problems of Covid and to the work he had carried out *"tirelessly"* for no financial reward since 31 May 2017 including *"unblocking drains, repairing roofs, repairing gutters, cutting up fallen trees and many other works to keep the hotel open"*. Hever is not being used as a hotel. 1D is no longer in possession and its charge has been redeemed having been paid the £400,000 sale price for the Hever Common Parts Lease. The Hever Common Parts Lease has not been used to secure any other borrowing or liabilities. Dairy Cottage is separate and Mr Godwin did not know who is occupying or is the owner of it.

394. He informed the Court that the current position concerning occupation of Hever is that there are two licensees in occupation, South East Country Lets and Hever Health and Performance. 3D as owner of the Hever Common Parts Lease is their licensor and the licences are for fixed periods subject to the usual termination provisions. Hever Health and Performance operated the spa within the area subject to the Anne Boleyn Lease which is also owned by 3D.

395. Mr Godwin explained that South East Country Lets runs the business of letting out the hotel rooms on medium term lets. It is owned by Dawn Humphries, a former bookkeeper at Hever. Mr Godwin did not disclose in his witness statement that Dawn Humphries is related to Mr Ron Popely and that Mr Gorman (his nephew) is her son. During cross-examination Mr Godwin said he was aware that she is Mr Neil Gorman's mother and that she is distantly related to Mr Ron Popely. He also explained that she had been involved in arrangements made with and payments made to several of the Hever Investors.

### D7) The Current Position - Needham

396. Mr Duthie was replaced by Mr Edward Townsend as director of SCCL on 1 March 2020. His evidence was that this occurred because he was going abroad to work. He remained 4D's director but also gave evidence that SCCL has *"fallen out of the picture"* and that Mr Lee Crawford was now managing Needham. His evidence was that about 18 months ago he negotiated and drew up a licence agreement with Needham Hotel & Spa for a fee of £4,500 a month.

397. Mr Duthie was also aware that an agreement was being negotiated with the Home Office to use Needham to house asylum seekers. He said he believed: *"[4D] is still there, yes they are trying to have an agreement with the Home Office at present [to house asylum seekers] … They are working towards it …"*.

398. During the course of that cross-examination Mr Collings K.C. put to him that as the director and the person in sole control of 4D he must know what the current position

is. Mr Duthie confirmed *"they have not started yet ... They're entering into an agreement with the Home Office ... with asylum seekers"*. He explained that up until now Needham was operating as a hotel but with limited success. As a result it is now proposed to contract with the Home Office so that the whole of Needham would be used to accommodate asylum seekers. This would benefit the Needham Room Lease owner Investors because 4D would be profitable as a result of receiving the payments from the Home Office.

399. One would have assumed from this that the agreement would be with 4D but Mr Duthie informed the Court that it will be with Needham Spa and Hotel (**"Needham SpH"**) who have a lease from 4D. When asked what he could tell the Court about this new lessee, his response was that *"They've just got a lease"*. When further cross-examined by Mr Collings K.C., Mr Duthie disclosed that Mr Neil Gorman owned Needham SpH. That is not something Mr Neil Gorman disclosed during his evidence.

400. Mr Duthie thought this lease had been granted some 18 months ago but then went on to describe the lease to operate the hotel as a management agreement. As managers, he explained, Needham SpH would enter into the agreement with the Home Office and it would be Needham SpH not 4D who would receive the money from the Home Office if the agreement is made in them future. However, he added, 4D would be paid a rent and he thought that was because Needham SpH had a lease as well as a management agreement. Subsequently he accepted that was probably incorrect and added when pressed by Mr Collings K.C. for a figure that he thought Needham SpH paid, that it would pay 4D £4,500 a month, *"roughly"*. He did not know the value of the Home Office contract *"because it's not started yet"* but thought the idea was to start with a few people first but Mr Gorman had not talked to him about it. This was not something Mr Neil Gorman disclosed within his evidence.

401. This confused understanding on the part of Mr Duthie of what occurred only some 18 months ago and continued up to the trial must be viewed in the context of him holding himself out to be the owner of 4D and its director. Indeed in answer to questions he said that he now had no-one to help him and that he was responsible for negotiating the terms of the agreement with Needham SpH and for producing the paperwork (subject to the assistance of his secretary). If that was true, it would be wholly inconsistent with his vagueness and lack of knowledge expressed in the witness box. It was plain during his cross-examination that he did not know or understand what had occurred and the concept that he remained anything more than a nominee for Mr Ron Popely was unsustainable. It is also to be noted that no documents make reference to these events.

402. Of further concern resulting from that testimony is the fact that evidence emerged the day after he left the witness box that far from still being negotiated, there was an existing contract with the Home Office. Whether that was with Needham SpH resulting in a fee to 4D or with 4D direct remains hidden in the fog created by the failure of Mr Gorman, Mr Godwin and by his non-attendance Mr Ron Popely to disclose what has been going on. Mr Collings K.C. made clear he would not object to Mr Duthie being recalled to explain this divergence with his evidence but that offer was declined. There was no explanation before me for why Mr Duthie and Mr Godwin failed to disclose the existence of the binding agreement. However, the reality is there is no further need for grounds to support a conclusion that they were each unreliable witnesses.

## E) The Hever Common Parts Lease Decisions

### E1) Introduction and the Void/Voidable Answer

403. There is a dispute within the submissions as to whether this case should be addressed from the beginning forwards or from the end backwards. The underlying point for Mr Darton K.C.'s support for the latter being that for his clients the issue is whether they are bound by what has gone before, whatever that may have been. He is plainly right about that but that is an issue which will only arise if the transactions of the Hever Common Parts Lease and the Hever CPL Variation can be challenged by the Claimants. It will only be then that the Defendants will need to address their claimed position as purchasers for value acting in good faith and without notice of any wrongdoing. I will proceed on a beginning forward basis.

404. As previously explained, C1's case starts with the proposition that the grant of the Hever Common Parts Lease was a void transaction because it was granted without authority. The basis for that assertion being that the power to grant the Hever Common Parts Lease, which plainly existed, was not exercised in good faith to promote the success of C1 for the benefit of its members having regard to the matters listed within ***section 172 CA***. Instead the intention was to prevent the Hever Lenders from obtaining security of any value through the Hever Lenders Charge and that purpose would benefit Mr Ron Popely's other company, WL, at the expense of C1. That was an improper purpose. The Hever Common Parts Lease was not granted for a commercial or any other proper purpose and the grant was made as a fraud on the power and consequentially without authority.

405. That led to an intricate debate between Mr Collings K.C. and Mr Darton K.C. as to whether the grant would be void or voidable even if the facts relied upon by 1 C were proved on the balance of probability. I will need to address the detailed submissions of Mr Darton K.C. in further detail below. However, the underlying answer is straight forward and can be identified first. It was a debate that arose from the potential confusion that might appear to exist when describing a transaction that has taken place as "void" even though title has passed, for example because of the application of the provisions of ***the Land Registration Act 2002***, and in particular ***section 58***.

406. The term "void" speaks for itself and its use is obvious when, for example, the transaction did not occur because signatures were forged and those who "signed" had no authority. The transaction simply did not occur because of want of authority. However, there are circumstances where legal title nevertheless passes. For example because the money misappropriated arrives in another's bank account or because the transferee of a forged real property transfer is registered as the proprietor of the legal estate at HM Land Registry with the result under ***the Land Registration Act 2002*** that the legal estate is vested in them even though it would not otherwise be because it was a void transfer. In that circumstance, as long established by case law, the recipient from the void transaction must hold the title received on a bare trust for the original owner.

407. The straight forward answer to the debate, therefore, is that Mr Collings K.C. was correct when he submitted that if it is sufficiently proved that there was no authority

to grant the Hever Common Parts Lease, then although title passed because of registration at Her Majesty's Land Registry (applying ***sections 29, 52(1) and 58(1) of the Land Registration Act 2002***), WL held the registered title on trust for C1. That trust was and would not appear on the register. It would not trouble anyone else purchasing or obtaining a charge over the Hever Common Parts Lease as a result provided they were purchasers for value, acting in good faith and without notice of the existence of C1's interest as a beneficiary of the trust. However, if they were not, they too would be bound by the trust even if title passed to them pursuant ***the Land Registration Act 2002***. The same would apply for anyone else subsequently purchasing the Hever Common Parts Lease from them.

408. As a result, it is necessary to decide whether WL held title on trust for C1 and, if so, whether 1D, 2D and ultimately 3D were purchasers for value, acting in good faith and without notice of the existence of C1's interest as a beneficiary of the trust. However, I will first address Mr Darton K.C.'s contrary submissions within the void/voidable debate.

### E2) The Void/Voidable Dispute in Detail

409. Mr Darton K.C. challenged the whole concept of void and voidable submitting that the proposition that some breaches of directors'' duties under ***the CA*** render transactions void whilst others do not *"has no logical basis and would produce arbitrary results"*. He referred to the decision of ***Knightsbridge Property Development Corporation (UK) Ltd v South Chelsea Properties Ltd [2017] EWHC 2730 (Ch)*** (**"*Knightsbridge Property*"**) at [74], where Newey LJ held that breach of ***section 177 CA*** rendered a transaction voidable rather than void.

410. Mr Collings K.C. submitted that the grant of the Hever Common Parts Lease was void (subject to the issues of apparent or ostensible authority which 2D, 3D and 4D raise) because the facts establish a fraud on the power. This does not require dishonesty as understood at common law. He submitted that it applies if Mr Ron Popely (and those who acted on his instructions) when granting the Hever Common Parts Lease or the Hever CPL Variation did not act in good faith and sincerity with the aim of achieving the real purpose and object of the power they were exercising. In other words, he submitted that the power to demise was exercised for a purpose and intent which fell outside its real purpose and intent.

411. In support of his submission he relied upon the following principle to be found in ***Hopkins v TL Dallas Group Ltd*** [2004] EWHC 1379 (Ch), [2005] 1 BCLC 543 at [88] per Lightman J:

> "*The grant of actual authority should be implied as being subject to a condition that it is to be exercised honestly and on behalf of the principal … . It follows that, if an act is carried out by an agent which is not in the interests of his principal … then the act will not be within the scope of the express or implied grant of actual authority. As a result there cannot be actual authority.*"

412. The following three examples considered in well-established and binding case law answer the dispute

a) Ignoring at this stage the land registration system and, therefore, the potential effects of statutory intervention, when someone executes a transfer of the title to a house by forging a signature, the purported transfer has never taken place. It is void (see ***Argyle Building Society v Hammond*** (1985) 49 P&CR 148, CA).

b) When trustees purport to exercise a discretionary power by transferring money from one trust to another but did not have the power to do so or did so by exercising the power for an improper purpose, the money or its traceable proceeds will be in the hands of the transferee. In that sense title has passed but the money will still belong in equity to the first trust. That is because the purported exercise of the power did not take place and the transaction was void. It is in contrast to a case where the trustees act within their powers but in breach of duty. In that circumstance the power was exercised, the transaction took place with authority but may be voidable (see ***Foskett v McKeown*** [2001] 1 AC 102 and ***Pitt and another v Holt and Another*** [2013] UKSC 26, [2013] 2 AC 108).

c) If a managing director of an incorporated bank causes the bank to lend money for various ventures in which he held a personal interest and that was in breach of fiduciary duty so that the lending occurred outside the scope of his power and, therefore, without authority, it cannot bind the bank apart from questions of ostensible or apparent authority. Absent those questions, the transaction is void. The money or its traceable proceeds are held by the recipient on trust for the bank. (see ***Heinl and Others v Jyske Bank (Gibraltar) Ltd*** [1999] Lloyd's Law Reports 511, CA).

413. The answer to Mr Darton K.C.'s submission, therefore, is that it is contrary to binding authority including the cases referred to as examples above. It also fails to recognise the logical basis for the distinction between transactions which do not take place in the sense that there is no authority and transactions which do where there is authority even if those with authority act within breach of duty. The case of ***Knightsbridge Property*** (above) does not assist that submission because Lord Justice Newey decided that the transaction before him fell within the acting with authority but in breach of duty category not within the acting without authority category. He applied the distinction Mr Darton K.C. submitted had no logical basis and was arbitrary.

414. It can also be added that Lord Justice Newey, when sitting at first instance, decided that the case of ***GHLM Trading Limited v Maroo and others*** [2012] EWHC 61, [2012] 2 BCLC 369 at [171] was a case within the long line of void transaction authorities where directors had acted in their own interests rather than those of the company, its members or (where appropriate) its creditors as a class. As a result they had acted without authority and the transaction was void. In doing so he referred to the decisions of ***Heinl and Others v Jyske Bank (Gibraltar) Ltd*** (above) and ***Hopkins v TL Dallas Group Ltd*** (above). He expressed the legal position from the viewpoint of third parties as follows: *The better view appears to be that, where a director has caused his company to enter into a contract in pursuit of his own interests, and not in the interests of the company, its members or (where appropriate) its creditors as a*

*class, and the other contracting parties had notice of that fact, the contract is void rather than voidable"*.

415. To the extent that Mr Darton K.C. also relied upon the decision of Roskill J. in ***Hely-Hutchinson v Brayhead*** (above) as a decision reaching a different conclusion, I must disagree. The key for Mr Justice Roskill's decision was that the *de facto* director concerned had ostensible or apparent authority. Whilst there had been a breach of the Articles and of ***s.199 of the Companies Act 1948***, both of which (in summary) prohibited a director from contracting or being interested in a contract with the company without disclosure, the issue was whether the other contracting party had known that to be the case. If not, the contract was enforceable but if so, the contract was void. In other words, the decision turned on whether a third party was someone who acted in good faith, for value and without notice.

416. The case was complicated on its facts because the other contracting party was also a director of the company with whom he personally contracted. The issue was whether if he contracted in a personal capacity and the company was represented by another director he could nevertheless rely upon ostensible or apparent authority despite being a director of the company with whom he contracted. If not, it was an unenforceable contract. The Judge found it to be enforceable not because it was voidable rather than void but because the law did not go as far as to say that it was sufficient that the person contracting personally was a director of the company contracting with them for that person to have constructive knowledge of the fact that the other director acting for the company acted without authority.

417. I also do not consider that the Privy Council's decision in ***Howard Smith Ltd v Ampol Petroleum Ltd*** [1974] A.C. 821 assists Mr Darton K.C.'s submissions and the Defendants' refutation of the void:voidable distinction. It too sustains the void/voidable distinction. Lord Wilberforce emphasised that when deciding whether a power was validly exercised, the first step is to identify with a fair view the nature of the power and to define any limits for its exercise. The next step is to examine the purpose for which the power was exercised before concluding whether that purpose was proper (see [835G] and also his reference at [835B] to the following passage from the judgment of Viscount Finlay in ***Hindle v. John Cotton Ltd.*** (1919) 56 Sc.L.R. 625, 630- 631 - *"Where the question is one of abuse, of powers, the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the. state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reason"*.

418. Lord Wilberforce then explained: *"In doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and [the Court] will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls"*. He referred to the following passage from the judgment of Dixon J. in ***Mills v. Mills***, 60 C.L.R. 150, 185-186: *"The application of the general equitable principle to the acts of directors managing the affairs of a company cannot be as nice as it is in the case of a trustee exercising a special power of appointment"*.

419. Lord Wilberforce then identified good faith and relevant purposes as the key issues when addressing the bases for the directors' exercise of their powers. The directors could not rely upon good faith on its own. He explained that the trial judge had found that their decision had not involved any of the considerations of management which ought to have been addressed by directors when acting within the proper sphere of their decision making powers. Therefore the power to issue and allot shares was improperly exercised. It followed that the allotment should be set aside. That was because the transaction was void. The void:voidable line was drawn.

420. I, therefore, turn to the issue of which side of the line this case falls on its facts. First, whether the decision to grant the Hever Common Parts Lease was made without authority or not.

### E3) Factual Overview Addressing the Hever Common Parts Lease Defence

421. The findings of fact establish that the decision to grant the Hever Common Parts Lease was made by Mr Ron Popely. He was not an officer or employee of C1. However, the facts also establish that he assumed the responsibility to act as a director even though never appointed one. In addition or alternatively, that the appointed director during the period 28 July 2010 and 11 July 2013, Mr Darren Popely, was accustomed to act upon the directions or instructions of his father. Mr Ron Popely was a shadow director as defined by ***section 251 CA***. There was no evidence of any decision by Mr Darren Popely to grant the Hever Common Parts Lease except to the extent that he executed it on behalf of C1. The facts were that this resulted from the decision of Mr Ron Popely (see in particular paragraphs 193-202 above), and I am satisfied that the execution was one of many examples of him acting upon the directions or instructions of his father.

422. Therefore, the facts relevant to the grant of the Hever Common Parts Lease and the execution of the Hever CPL Variation establish that Mr Ron Popely's knowledge and actions are to be attributed to C1. He assumed the role of a director (even whilst disqualified) and the others, such as Mr Darren Popely and Mr Gould, acted on his instructions to implement his plans and requirements for his Hever project.

423. The findings of fact concerning the role of Mr Ron Popely undermine the Defence insofar as it asserts that his role was limited to that of a consultant who was not involved in the management of C1. Equally, the assertion that those who made the management decisions were Mr Paul Gould from 5 July 2010 until 28 July 2010 and from then until 11 July 2013 Mr Darren Popely not Mr Ron Popely. Similarly the Defence is undermined to the extent that it failed to admit and disclose that WL was in truth one of the group (formal or informal as explained above) of companies used by Mr Ron Popely to operate his scheme at Hever.

424. The Defence is further undermined to the extent that it hid the steps taken by Mr Ron Popely to prevent C1 executing the Hever Lenders Charge or enabling it to be registered at HM Land Registry. It is also undermined as a result of its failure to disclose that the Hever Common Parts Lease was granted by C1 pursuant to Mr Ron Popely's plan to give WL rights which through prior registration would have priority over the Hever Lenders Charge as and when/if it was registered at HM Land Registry.

The pleaded denial that the purpose of the demise was to prevent the Hever Lenders acquiring the Hever Lenders Charge over the unencumbered freehold title is not sustained on the facts.

425. In addition, the pleaded Defence that the Hever Common Parts Lease was granted to WL because Chateauform required substantial and expensive restorations for Hever's conference facilities to be carried out by WL is untrue. That is a finding made not only because of the contemporaneous documentation evidencing the true intentions of Mr Ron Popely and, therefore, C1. It is also sustained by the lack of evidence to support that assertion and most importantly by the contemporaneous evidence that C1 paid for the works from the money it raised by the sale of the Hever Room Leases. That evidence is itself supported by the calculations derived from bank statements showing C1 paid the builders and WL did not.

426. Turning to the true factual position established by the evidence. It started with the fact that C1 owned the Hever freehold. Its principal asset was valuable because of: (i) the nature and location of the building; (ii) the fact that money could be made from the sale of the Hever Room Leases; and (iii) the obligations of WL under the Hever WL Management Agreement to pay both an Annual fee of £20,000 and 5% of the turnover with an anticipated turnover of £2.5 million (subject to the financial support for rental payments and the exclusion of the fee until 1 January 2014).

427. As at 23 May 2013 when the Hever Common Parts Lease was executed, C1 was not repaying the liabilities it owed to the Hever Lenders. In addition, Mr Ron Popely was refusing to allow C1 to comply with its contractual obligations with the Lenders concerning the grant and registration of the Hever Lenders Charge to secure the existing and future liabilities of their lending. The 999 year demise would mean and meant that C1 could not fulfil its contractual obligation to provide an unencumbered freehold title as security for the Hever Lenders Charge.

428. It also meant for C1 that any sale of the freehold of Hever would be subject to the 999 year Hever Common Parts Lease. From that time a purchaser of the freehold would not have possession of the demised parts, would not be able to operate Hever as a hotel (or indeed for any other business requiring possession of the common parts) without licence or through the lessee and would have potential difficulties concerning the frreholder's lessor obligations under the Hever Room Leases. The experts agreed that this gave rise to a significant fall in value even assuming rent would be paid.

429. Added to this scenario was the fact that WL was never to be required to pay any rent. The minute of 31 May 2013 revealed that the Hever CPL Variation reflected an agreement reached at latest 8 days after the grant of the Hever Common Parts Lease. The absence of Mr Ron Popely meant it could not be tested whether this was agreed on that day or whether he had always intended that to be the position. However, in either case the decision to grant the Hever Common Parts Lease was made without any due consideration of WL's ability to pay. The minute recorded it could not pay and the conclusion reached was that the rent should be a peppercorn.

### E4) Decision – Grant of the Hever Common Parts Lease

430. There is potential for considering the application of ***Part 23 of the CA*** to this disposition but that is not a matter raised before me. Instead the transaction is to be viewed in accordance with the substance of the claim, namely as a distribution of an interest in C1's main asset to another company (whether connected or not but in fact connected) for an improper purpose and without authority.

431. There is obviously no dispute that the director(s) of C1 had the power to grant a lease of the common parts of Hever. The purpose of that power was extremely wide since there are many circumstances in which such a power might be exercised. The overall purpose would be to promote, in good faith, the success of C1 for the benefit of C1 and, as a result for the benefit of the members as a whole having regard to the interests of those identified within ***s.172 CA***. For the reasons set out below, I accept the submission of Mr Collings K.C. that the subjective reasoning of Mr Ron Popely for the exercise of the power on this occasion did not fall within that purpose. He did not reach his decision by considering or applying, in good faith, the way that would be most likely (or indeed likely) to promote that success. As a result he did not exercise the power and neither did Mr Darren Popely when executing the Hever Common Parts Lease for the purpose for which it had been conferred in breach of ***section 171 CA***.

432. Mr Ron Popely's reasoning was to cause C1 to take a step which would prevent it from fulfilling its contractual obligation to grant security to C1's Lenders at a time when C1 had borrowed money and was not repaying them the loans as contractually required. That step, which he decided to take, would transfer an asset from C1 to WL, a company which he also controlled and was ultimately owned by himself. That decision was not in the interests of C1 (its members or creditors) and was in his own interests by reason of the advantage WL gained by having an interest in Hever equivalent to a freehold interest instead of the existing ten year licence to occupy. It was not a decision in good faith, it was a decision based on self-interest, and it was not one which fulfilled the disclosure requirements of the ***CA***. It was a decision the purpose of which (whether applying a sole, dominant or primary test) was an improper exercise of power. That improper purpose caused the purported exercise of the power.

433. In addition, it was a decision made without considering the interests of C1, whether adequately or at all. As Mr Collings K.C. submitted, there was no evidence that any consideration was given to whether the grant would promote the success of C1 and, it follows no conclusion that it would. In addition, there was no evidence to even suggest regard was had to the desirability of C1 maintaining a reputation for high standards of business conduct or that they possibly could have been when reaching their decision.

434. Further, there was no evidence of any consideration having been given to whether WL could or would pay the rent provided until the meeting held on 31 May 2013. That minute recorded that WL could not afford the rent and the conclusion was that the rent should be reduced to a peppercorn. Mr Ron Popely would have known that when reaching his decision that WL should grant the Hever Common Parts Lease to his other company, bearing in mind he was the person who controlled his project. Ability

of WL to pay C1 was plainly a matter which should have been considered before the grant of the Hever Common Parts Lease. So too should have been the financial and practical consequences of the grant of a 999 year lease of the common parts for the value and use of the freehold. Whilst that would give rise to a variety of matters which the director could and should have addressed, there is no evidence that any such matter was addressed.

435. In addition, objectively it is plain the grant was not in the interests of C1. C1 already had an agreement with WL for the management of Hever as a hotel using the common parts (including payment of an annual fee of £20,000 and 5% of turnover with an anticipated £2.5 million turnover subject to the rental support provision). It did not need to grant a 999 year lease for that purpose. There was no suggestion of the grant being on negotiated terms which meant that the superseding 999 year lease would be of greater benefit to C1. Indeed, the fact that WL was not in a financial position to pay the rent and would only be able to pay a peppercorn speaks for itself objectively. Furthermore, this occurred at a time when C1 was not paying the Lenders and the grant would mean C1 could not fulfil its obligations to them by the grant of the security to which they were contractually entitled.

436. The grant also meant for C1 that any sale of the freehold of Hever would be subject to the 999 year Hever Common Parts Lease. The findings of fact above and the opinions of the experts concerning diminution of value (both mentioned in paragraph 428 above) all support the decision that this grant was an exercise outside the purpose of the power to demise; a fraud on the power as Mr Collings K.C. submitted..

437. The defence was advanced that in any event C1 gained by receiving the covenants of WL. It was the case that WL assumed liabilities for rates, taxes and outgoings and for the repair, insurance, decoration, maintenance, rebuilding and reinstatement of the Hever common parts. However, the facts establish that the covenant to pay the rent was illusory. Mr Collings K.C. also made the relevant point that WL was already subject to the obligations of the Hever WL Management Agreement. In any event there was no evidence that this was a consideration for the exercise of the power. It is also to be noted for completeness that if evidence for such a defence had been advanced, it would have been necessary to address the fact that WL's funding and, therefore, fulfilment of the covenants would be attributable to C1's monies whether derived from its borrowing from the Lenders and/or the proceeds of the sales of the Hever Room Leases. In other words, attributable to the circularity of funding involving, for example, the 1D:WL £2 Million Loan Agreement within the context of the WL:1D Hever Charge and the C1:1D Hever Room Mortgage Agreement. Nevertheless the reality was that the sole purpose of this decision was to avoid the Hever Lenders Charge being registered against the unencumbered title of Hever.

438. In my judgment the grant of the Hever Common Parts Lease was not a valid exercise but was an abuse and fell outside the purpose of the power conferred upon the director(s) to deal with C1's real property assets by disposition including by demise. Mr Ron Popely and, as a result, Mr Darren Popely reached the decision to grant the Hever Common Parts Lease on a basis that was not a proper exercise of power in circumstances of self-interest (through WL). They did so without consideration of the facts matters and circumstances which were proper considerations of management. The decision was not made in good faith to promote the success of C1 and there was no genuine or acceptable commercial purpose. The decision would not have been

reached but for the improper purpose. As a result the decision and the demise fell on the side of the line where the transaction is void subject to the passing of title by reason of registration by WL under ***the Land Registration Act 2002***. WL, therefore, held that title on trust for C1.

439. The argument for the Defendants that there was ratification of the breach is unsustainable. There was no decision whether by the director(s) and/or the registered member and/or the ultimate owner which addressed the void transaction, considered the merits and failings and determined that C1 should grant the Hever Common Parts Lease. The suggestion that the sale of the freehold of Dairy Cottage achieved this is flawed even if it is to be assumed that the title of Dairy Cottage was affected by the Hever Common Parts Lease. Plainly the Hever CPL Variation was not ratification either.

440. I note for completeness that even if there had been a ratification decision whether after due and proper consideration or at all, it would have had to and been unable to face the following formidable problems identified within the skeleton argument of Mr Collings K.C. and Mr Calland:

a) *"The principle does not apply where the act involves the exercise of powers for an improper purpose (i.e. in breach of s.171(b) of the Companies Act 2006): see* ***Madoff Securities International Ltd v Raven*** *[2013] EWHC 3147 (Comm) at [269] per Popplewell J;*

b) *Neither can it apply to an act which is not honest, bona fide and in the best interests of the company****: Madoff Securities International Ltd v Raven*** *[2011] EWHC 3102 (Comm) at [123] per Flaux J;* ***Tonstate Group Ltd v Wojakowski*** *[2019] EWHC 3363 (Ch), at [14]-[16] per Zacaroli J;*

c) *The principle cannot apply where the transaction jeopardises the company's solvency or causes a loss to creditors:* ***Ciban Management Corp v Citco (BVI) Ltd*** *[2021] AC 122, at [40] per Lord Burrows JSC, and see* ***BTI 2014 LLC v Sequana SA*** *[2022] 3 WLR 709, at [91] per Lord Reed PSC, and at [288] per Lady Arden JSC; and*

d) *It is for the party who seeks to invoke the principle to prove its application, including where relevant that the company was solvent at the material time:* ***Lexi Holdings Plc v Luqman*** *[2007] EWHC 2652 (Ch), at [193] per Briggs J."*.

441. It was also submitted for C1 that the grant of the Hever Common Parts Lease was void for want of its execution by C2 following the transfer of Dairy Cottage. It is a submission which does not appear to take into sufficient consideration the fact that the transfer did not include any part of the subsequent demise to WL. However, there is no need to address that case further in view of the decisions already made.

### E5) Decision – Execution of the Hever CPL Variation

442. The decision that the Hever Common Parts Lease was held on trust means there is no need to consider the Hever CPL Variation claim. The deed purported to amend a void transaction and its future depended upon the outcome for the Hever Common Parts Lease. However, even had that not been the case the decision to amend the rent payable to a peppercorn was entirely unjustifiable within the context of the purpose of the director's power to deal with C1's assets.

443. The matters above relevant to the decision in respect of the Hever Common Parts Lease would continue to apply for the purposes of the power to execute the Hever CPL Variation. Its execution was to give effect to the decision made at the 31 May 2013 meeting. ) That is to say, the removal of WL and its successors in title being under a binding obligation to have to pay the rent of £50,000 a year for five years, £100,000 for the next five, and annual increases of 12.5% for the remainder of the term. The result of the decision was that for no consideration (other than execution by deed) C1 gave up its entitlement to rent, sustained a resulting loss in value to its freehold asset and did so for the benefit of Mr Ron Popely's company, WL. There was no commercial purpose, the Lenders were still not being paid according to C1's obligations and this was an improper exercise of power falling outside its purpose.

444. The submission that there was value or cause for the decision because as at 31 May 2013 (and presumably thereafter) WL could not pay the rent and its abandonment would increase the prospects of success of [Mr Ron Popely's] project to C1's benefit and the benefit of the Investors is unsustainable. The submission that the monies spent by WL on renovation and refurbishment was comparable with the resulting loss in value to the freehold makes no sense for a lease already executed with a binding rent covenant but in any event is based upon the false factual premise that the works were or would be paid for by WL. The submission that there was cause for the variation because WL's covenants would remain in place is equally unsustainable. The defence of ratification fails for the equivalent reasons as it failed for the Hever Common Parts Lease.

445. The defence that the result would in any event be a voidable transaction that has not been avoided is plainly wrong. This too was not a valid exercise but was an abuse of the power conferred upon the director to deal with C1's real property assets by disposition including by demise. It too was a decision based upon self-interest. There was also no evidence of any consideration of the facts matters and circumstances which were proper considerations of management. The decision was not made in good faith to promote the success of C1 and the grant was not a purpose for which the director's powers had been allocated. The decision would not have been reached but for the improper purpose. The transaction was void

446. The alternative claim concerning the Hever CPL Variation is that it was a transaction caught by ***section 423 IA*** if the Hever Common Parts Lease was a valid transaction. This does not arise in the light of the decisions above which in fact prevent such a claim because the Hever Common Parts Lease was held on trust for C1 absolutely and, therefore, assets were not put beyond the reach of (in summary) creditors.

447. Had it been relevant (i.e. absent the trust), plainly there was no value provided by WL for the Hever CPL Variation and it was a transaction at an undervalue as defined by ***section 423(1)(c) IA***. On the basis, as the Defence asserted, that the Hever CPL Variation stemmed from the meeting on 31 May 2013 it is to be concluded on the

balance of probability that its purpose was to put assets beyond the reach of a person who is making, or may at some time make a claim against C1 or otherwise to prejudice the interests of such a person in relation to a claim which he is making or may make. That is because the purpose some 8 days earlier of the Hever Common Parts Lease was precisely that. A grant to thwart the Hever Lenders is found as a fact. In this instance the asset placed beyond the reach of the Lenders (and any other C1 creditor) was the covenant requiring the rent to be paid to C1 leaving a freehold subject to a 999 year demise without the payment of rent.

448. The defence that this was a transaction for good consideration because WL continued to operate Hever, finance the renovation and equip the common parts, reducing the risk that Investors would ask to buy-back their leases, and maintaining the continuation of the covenants by WL under the Hever Common Parts Lease is simply unsustainable. Assuming the Hever Common Parts Lease was not void, C1 had all its rights and WL had all its obligations before the Hever CPL Variation but would no longer have a binding lease requiring the payment of rent afterwards for the 999 year term after its execution. If the problem was that WL was financially unsound, and had the Hever Common Parts Lease been valid, C1 should have been considering forfeiture and finding a suitable replacement for WL. It was a void transaction.

## E6) The Position of the Defendants Generally – Hever and Needham

449. Mr Darton K.C. submitted that the Claimants' case for both Hever and Needham *"is centred on the mistaken notion that, should the directors of the First and Second Claimant be found to have breached their duties in executing the Leases and Deed of Variation then they must have acted in excess of their authority and the chain of subsequent transactions can be ignored because the breaches of duty 'blighted' the Original Transactions. The approach ignores the fact that, in each case, the impugned transactions were executed by deed (see section 46 of the CA 2006 and Bowstead at [8-034]) and that the sole directors acted with the authority of the company, even if the company concerned intended, on the Claimants' case, to prejudice its lenders"*. In support of that submission Mr Darton K.C. relied upon the decision of Millett J., as he then was, in ***Macmillan Inc. v Bishopsgate Trust (No3)*** [1995] 1 WLR 978 at 983-985

450. The first part of that submission has already been addressed when explaining the void/voidable distinction. Indeed, unsurprisingly, the decision of Millett J. in ***Macmillan Inc. v Bishopsgate Trust (No3)*** (above) applied that law. Macmillan transferred shares to B.I.T. and this resulted in the cancellation of the share certificates and their replacement by new certificates in B.I.T.'s name. Mr Maxwell then used those shares as security for lending for the benefit of his private companies. As the Judge found, he did so for the benefit of his own interests and contrary to the interests of Macmillan. The issue that followed was whether the lender banks could rely upon that security even though the transfer was for an improper purpose with the result that B.I.T., as the judge decided, held the shares as nominee for MacMillan. In other words, the starting point for the issue was that the transaction was void and the beneficial interest held on trust so that title would not pass to the lenders unless, as third parties, they were purchasers for value in good faith and without notice.

451. That further issue is the one addressed within the second part of Mr Darton K.C.'s submission. The Judge (deciding Delaware law was the same as our law for this purpose) proceeded to resolve it on the basis that the actual or apparent authority of an agent would still bind the principal even if the agent was acting fraudulently and in furtherance of their own interests. The Judge was satisfied the banks could rely upon the apparent authority of the board who authorised the transfer of the shares because the banks acted bona fide, for value and without notice when taking the shares as security for their lending. This is the issue for the dealings by the Defendants with the Hever Common Parts Lease as originally granted and as varied and with the Needham Lease. They received their interests pursuant to the title of the party making the disposition, in accordance with the ***Land Registration Act 2002***. The next issue is whether they received their title but held it on bare trust for C1.

### E7) Decision – 1D and The WL:1D Hever Charge

452. The Hever Common Parts Lease became the subject of the WL:1D Hever Charge on 26 June 2015 pursuant to the terms of the 1D:WL £2 Million Loan made on 5 June 2011. As a proprietor of a registered charge, 1D had all the powers conferred on a legal mortgagee by law (subject to any contrary provision on the register). Bearing in mind that the money to be lent was expressly to be the balance of the unpaid purchase price for the relevant Hever Room Leases owed to C1, the only conclusion to be reached must be that the WL:1D Hever Charge in practice provided, and was intended ultimately to provide, security for C1. That is because any money recovered by 1D from WL would be held for and have to be accounted to C1. The WL:1D Hever Charge was held on trust for C1 by 1D, its agent, accordingly.

453. That conclusion is not altered by the fact that the WL:1D Hever Charge expressly provided that WL collected the money rather than 1D. This did not alter the fact that the security had to be granted to ensure repayment by WL to 1D of monies to be held for and repaid to C1. The only potential catch was that the WL:1D Hever Charge referred to the secured loans as being also attributable to the payments collected from the Needham Investors. This created the potential for a mixing of funds. However, that would be a matter to be resolved, if it needs to be, between C1 and C2 and makes no practical difference for this judgment.

454. If that conclusion is to be ignored, however, because that case was not pleaded, it matters not for the outcome. The starting point for that conclusion is that the findings of fact have established Mr Ron Popely's control of the Hever project including his assumption of the responsibilities of a director for C1 role and/or his role as its shadow director. Further, it is not in dispute, and it is clear in any event, that he was at all material times the ultimate owner of 1D and its appointed director from 14 October 2010 to 2 May 2015. That is sufficient particularisation for the decision that his knowledge should be attributed to 1D, as well as C1.

455. It can be noted for the purposes of that decision that the findings of fact specifically establish on the balance of probability that Mr Ron Popely was responsible for: (i) the original idea that future purchasers of the Hever Room Leases would be able to borrow up to half of the purchase price for a Hever Room Lease (as evidenced by the 16 December 2010 email from Ms Phelan to Ms Oliver); (ii) the resulting 1D:WL £2

Million Loan Agreement made 30 September 2011 (at a time when 1D was C1's and WL's registered shareholder) which concerned the collection of the unpaid balances of the purchase price owed to C1 should an Investor enter into a purported mortgage with 1D; (iii) the 1D:C1 Hever Room Mortgage Lease, which he executed as 1D's director; and (iv) the resulting WL:1D Hever Charge executed pursuant to the terms of the 1D:WL £2 Million Loan Agreement.

456. As to the WL:1D Hever Charge, it was granted at the time (26 June 2015) Mr Duthie was an appointed director and registered as its member (2 May 2015). However, it is a finding of fact that he was a nominee and Mr Ron Popely remained in charge of the Hever project including the actions of 1D. He continued to be 1D's ultimate beneficial owner. Any suggestion that Mr Duthie's appointment and registration created a clean break for 1D from Mr Ron Popely and ended attribution of knowledge would be contrary to the findings of fact.

457. As a result, when WL granted the WL:1D Hever Charge, 1D through Mr Ron Popely was fully aware that the Hever Common Parts Lease had been granted in all the circumstances identified above that resulted in the transaction being void. 1D was not a purchaser for value acting in good faith and without notice of the resulting trust for C1. The WL:1D Hever Charge and the statutory rights received by WL upon its registration were held on trust for C1.

458. 1D gave notice to WL that it had taken possession on 29 December 2016. It did so pursuant to its powers under the WL:1D Hever Charge as provided for pursuant to the ***Land Registration Act 2002*** as trustee for C1. 1D transferred the Hever Common Parts Lease to 2D on 31 May 2017 in the same capacity. The next issue, therefore, concerns the knowledge of 2D: Was 2D, as a successor in title to 1D, a purchaser for value acting in good faith and without notice of the trust?

459. It is at this stage relevant to note that although "good faith" remains a test, the key issue is that of notice because a person who lacks notice of the wrongdoing will normally be acting in good faith. The additional requirement of a purchase for value does not mean the consideration has to be shown to be adequate but it does require more than nominal consideration. There must be no (in summary) actual, constructive or imputed knowledge giving notice of C1's interest at the time consideration was given for the Hever Common Parts Lease.

**E8) Decision – 2D and The Hever Common Parts Lease**

460. C1s case is that 2D through Mr. Ron Popely had full knowledge of the circumstances in which the Hever Common Parts Lease was held on trust for C1. 2D's contrary position is that it acted at all material through its director and member, Mr Godwin. As a result it had no knowledge of the void transaction or it's circumstances and had no knowledge that the title transferred to it was held by 1D on trust for C1. No contrary information or advice had been received from the conveyancing solicitors. 2D was entitled to rely upon WL's registration at HM Land Registry of WL and upon the registered WL:1D Hever Charge enabling good title to be transferred without being affected by any underlying trust. That entitlement arose in circumstances not

only of good faith and an absence of notice but also as a purchaser for value having paid £400,000.

461. Whilst the burden proof lay upon C1 to establish the trust, it was for 2D to establish that it was a purchaser for value who received title pursuant to the Land Registration Act 2002 whilst acting in good faith and without notice of that trust. It might have been argued that payment was proved and the evidential burden of proof moved to C1 because the entry on HM Land Registry's register recorded that 2D had paid £400,000 for the transfer. However, that argument was unavailable. 2Ds case is that only £20,000 was paid at the time and by implication 2D accepted that this record of payment was incorrect. In addition, plainly 2D needed to rely upon more than £20,000 to be a purchaser of value. That sum would not be adequate value.

462. However, whether there might have been a shift of the burden or not, the evidence has positively established on the balance of probability that adequate value was not provided by 2D. The cumulation of evidence and facts producing that result as detailed within section "D" above (in particular at paragraphs 309-311, 314-318, 321-328 and 376-380) can be summarised as follows:

a) The circumstances in which the £20,000 was "borrowed" by 2D without any real obligation to repay.

b) The findings of fact upon the £400,000 Credibility Issue concerning the purported discounted room rate set off agreement.

c) The fact that 2D had not itself paid the balance and there was no evidence of justification for Good Hotel Management Limited doing so.

d) It has not been established on the balance of probability that any part of the £400,000 has in fact paid by 2D.

e) The overall finding of a contrivance.

f) The underlying absence of credibility for the evidence of Mr Godwin and the bad character findings for Mr Ron Popely.

463. The findings of fact also establish on the balance of probability that the knowledge of Mr Ron Popely was to be attributed to 2D with the result that it did not act in good faith and had notice of the C1 trust. That decision is derived from a cumulation of (amongst other findings) the following summarised evidence and findings of fact that are set out in detail within section (D) above:

a) The umbrella finding that Hever was Mr Ron Popely's project. He was the ultimate owner and controller with hands on management involvement and the appointed directors and registered members were his nominees. The companies he used for the Hever project, including 2D, were in effect a group as explained by the accountants in evidence. The evidence plainly establishes it was his group of companies used for his project by Mr Ron Popely. Indeed, C1 was the wholly owned subsidiary of 1D as at 31 May 2017 and 1D was Mr Ron Popely's company with the registered member and director at that time being his nominee.

b) 2D was formed by Mr Gould, who as an employee acted on Mr Ron Popely's instructions. Mr Duthie until 1 May 2017 and Mr Godwin thereafter were Mr Ron Popely's nominees as the registered member and appointed director (noting Mr Godwin's appointment as a director and shareholder of Good Hotel Management Limited from 13 July 2016 even occurred without him being informed and consenting providing similarly fact evidence of control by Mr Ron Popely using Mr Gould).

c) The 19 January 2017 minute identified Mr Ron Popely as the person standing at the top of the tree and the person to whom Mr Godwin would report concerning the financial position of Hever, as well as Mr Gould.

d) The document entitled *"Agenda Meeting with RP commencing 29.01.18"* expressly linked Hever and Needham (which provided notable similar fact evidential support), as well as "Oak" and 1D to Mr Ron Popely's *"Personal* (*Future plan*)".

e) The non-disclosure and attempt to hide the true roles of Mr Gould and Mr Ron Popely in Mr Godwin's evidence in chief undermined his credibility both generally and when specifically asserting that 2D had no relevant knowledge or notice.

f) The £400,000 Price Credibility Issue finding of fact not only undermined the defence of the payment of value but also led to the conclusion that this purported payment was a contrivance of Mr Ron Popely.

g) There was also the following post transfer evidence sustaining such a conclusion with regard to the vagueness of Mr Godwin's evidence concerning the management of 2D that emphasised his role of nominee. For example, his lack of knowledge concerning the reasons for the creation of 3D and his lack of an explanation for the £200,000 which was unpaid.

h) The contents of the document entitled *"Agenda Meeting with RP commencing 29.01.18"* and the many other 2018 documents evidencing Mr Ron Popely's ongoing, hands on control and Mr Godwin's lack of explanation or of acceptable explanation for that evidence.

i) Mr Godwin's lack of recollection for his resignation from and the transfer of the shares of Good Hotel Management Limited all evidenced that he was not in control of such events.

j) The overall feature of Mr Godwin's unreliability as a witness and the bad character of Mr Ron Popely.

464. The consequence of attribution is plain. At the time of the agreement to transfer the Hever Common Parts Lease to 2D, which resulted in the transfer being registered at HM Land Registry on 28 June 2017, 2D through Mr Ron Popely (and Mr Gould) had knowledge and notice of the circumstances in which: (i) C1 had granted the Hever Common Parts Lease to WL and executed the Hever CPL Variation; and (ii) the grant of the WL:1D Hever Charge. In all the circumstances 2D was not a bona fide

purchaser for value without notice. 2D therefore obtained its title upon registration but also held that title outside the confines of the register on a bare trust for C1.

465. The fact that the 1D:2D Charge was discharged on the register as a result of purported repayment of £380,000 (as the balance of the £400,000) on 8 March 2020 makes no difference to the decision in the light of the findings of fact. The Hever Common Parts Lease was held on trust by 2D for C1 at all times during its ownership.

466. Those findings mean it is unnecessary to consider for the purposes of the claim against 2D, the alternative case concerning the Hever CPL Variation, namely that it was a transaction caught by ***section 423 IA*** if the Hever Common Parts Lease was a valid transaction. Its relevance for the 2D would have arisen when considering the relief that might be awarded under ***section 423 IA*** including the relief identified within ***section 425 IA***. The findings of fact would have meant that 2D would not have been able to rely upon the statutory limits to that relief that are expressed within ***section 425(2) IA***. However, nothing further needs to say with regard to this and the position of D3 falls to be considered.

### E9) 3D and the Hever Common Parts Lease

467. The next step is to consider the impact of those decisions upon the grant of the Anne Boleyn Lease and the transfer of the Hever Common Parts Lease to 3D. On 10 August 2017 2D transferred the Anne Boleyn Lease to 3D purportedly for £120,000 and subject to the continuing application of the 1D:2D Charge with the intention of creating an independent spa business. There is no dispute that the £120,000 was not paid. A change of plan led to 2D transferring the Hever Common Parts Lease (excluding the demise for Dairy Cottage, which remains and is registered in the name of D2 and, therefore, subject to the above-mentioned trust) to 3D by a transfer dated 16 October 2017, purportedly for £200,000, *"a nice round number"*, but again unpaid.

468. There is no dispute that 3D was formed in the image of 2D and that 2D's knowledge would equally be 3D's. Its formation and use was simply to transfer the assets of 2D to a company with the same appointed director and registered member.

469. Although this was accepted by 2D and 3D, that acceptance was only in terms of Mr Godwin being the owner and shareholder of 3D, as he was of 2D at the time of 3D's incorporation and continuing. However, the findings of fact concerning Mr Ron Popely's role and attribution of his knowledge with regard to 2D obviously flowed through to 3D. They establish that his knowledge was and should be attributed to 3D in addition to 1D and 2D (see from paragraph 342 onwards). For example:

a) The findings of fact concerning Mr Ron Popely's role after 23 June 2017 derived from the wide variety of contemporaneous documentation previously identified, in particular during 2018, specifically address his involvement with, control of and actions concerning 3D as well as 2D.

b) The findings of fact concerning Mr Ron Popely's role after 23 June 2017 specifically address 3D as well as 2D. The findings concerning Mr Godwin's

lack of understanding for the formation and use of 3D or why the payment of £200,000 was chosen for the Hever Common Parts Lease transfer price, other than as a *"nice round number"* evidenced his true position as a nominee.

c) The evidence, including from the accountants, that 3D was part of the informal group of companies used for the Hever project support the conclusion that 3D, as with 2D, was a vehicle used and controlled by Mr Ron Popely.

d) The fact that the £120,000 and the £200,000 were not paid by 3D is consistent with the general machinations of Mr Popely which implemented schemes for his companies without real payment.

e) The overall absence of credibility for the evidence of Mr Godwin to the effect that Mr Ron Popely was not involved with Hever other than when contacted by telephone when problems such as drainage requiring access to his past experience with Hever arose. The lack of plausibility for Mr Godwin's evidence concerning the numerous 2018 documents that evidenced Mr Ron Popely's role.

f) The sustaining post transfer evidence of the numerous documents during 2018 which established that Mr Ron Popely remained in control of and actively involved in the Hever project, his personal project.

g) The sustaining post transfer evidence of the findings concerning Mr Godwin's lack of understanding and knowledge in regard to Mr McCarthy and Good Hotel Management Limited.

h) The sustaining post transfer evidence of the involvement of 3D in the 2D, 3D:1D Settlement Agreement and all that flowed within the findings of fact from that document which Mr Godwin created.

i) The sustaining post transfer evidence of the continuing connection between 3D, South East Country Lets and Mr Ron Popely.

470. It follows that the decisions concerning 2D equally apply to 3D. 3D held and continues to hold the Hever Common Parts Lease (as transferred to it) on trust for C1. It was not a purchaser for value, never having paid the £120,000 or the £200,000. It through Mr Ron Popely had the knowledge of the circumstances in which and facts causing the Hever Common Parts Lease, including as varied by the Hever CPL Lease, to be void subject to the statutory consequences of registration at HM Land Registry. It follows that 3D received its title pursuant to the ***Land Registration Act 2002*** but held and continues to hold that title on trust for C1. Had it been relevant, that knowledge would have meant that it too would not have been able to rely upon ***section 425(2) IA***. I will address the issue of relief that flows from this decision after considering the claim concerning Needham.

## F) The Needham Lease Decision

### F1) Introduction

471. The claim starts with the proposition that the Needham Lease was void because the power to grant it was not exercised for a proper purpose. The fact that the rent was a peppercorn (if demanded) meant it was a depletion of C2's assets and a consequential enlargement of SCCL's assets. The second ground to justify that conclusion is that it was designed to prevent the Investors enforcing recovery of their original purchase funds by the exercise of the buy-back option after 4 or 5 years (as appropriate).

472. The starting point is the expert evidence and the inevitable conclusion from expert opinion and from common sense that the grant was a transaction at a significant undervalue. In practical terms the grant meant that C2 would no longer be able to dispose of its freehold title without taking into consideration that the common parts and relevant facilities were under the control and within the exclusive possession of the lessee. It also meant that any obligations to the Investors and their rights to an income from the room, as well as the value of their long leases, would be affected insofar as the areas demised were relevant. Plainly they were to the running of Needham as a hotel/conference centre business and to the resulting income for the Investors. There was no evidence to identify the advantages of the covenants within a 999 year lease over a management agreement with a short licence term.

473. As with Hever, the facts established that Needham was Mr Ron Popely's project and that he was the ultimate owner of the relevant companies including C2 and SCCL. This was not "just" the grant of a 999 year demise for an undervalue, it was a demise to a company in which Mr Ron Popely held a personal interest.

474. With regard to C2, he had signed the purchase Heads of Terms for C2 to buy Needham on 3 December 2012, given the irrevocable instruction for the purchase on 5 February 2013 and instructed the exchange of contracts on 13 February 2013. It was his company, Sapling FT, that had lent C2 a £1.34 million, two year loan. According to their invoices, his building companies, Heltfield and MySave Limited had carried out works at Needham. Just as had occurred for Hever, there was a 1D:C2 Needham Room Mortgage Agreement. The findings of fact clearly establish his hands on control of the project from beginning to end.

475. As with Hever, his project was for Needham to be purchased by C2 for use as a hotel/conference centre, for its rooms to be sold at a premium on long leases and for the business to be run by a management company(ies). It was not or should not have been within the purview of such a project for C2 to place a third party in the position of owning a 999 year lease over the common parts and other demised facilities and to create the same difficulties for Needham and its Investors as the demise of the Hever Common Parts Lease created for C1 and its.

476. The facts established, nevertheless, that Mr Ron Popely caused SCCL to be formed for that purpose:

    a) Despite representations to Investors to the contrary, Needham would not be opened until completion of the substantial, required building works. For the purposes of management and supervision of the works he first used his company, WL, as the management company under the terms of the 1 February 2013, ten year agreement.

b) During this period he also had direct communications with Chateauform, who would operate the conference business, and there was no doubt from the evidence that they understood Mr Ron Popely to be the person in control.

c) The findings of fact are that SCCL was formed (using the administrative assistance of Mr Gould) on his instructions and Mr Duthie was at all material times his nominee whilst appointed director (25 February 2015 until 1 March 2020) and registered member from (25 February 2015 until 5 May 2017).

d) The solicitors retained to deal with the grant of the Needham Lease to SCCL reported to Mr Ron Popely (as evidenced by Sheppersons' letter 5 March 2015). The SCCL Needham Agreement will have arisen from his instructions given to Mr Gould for implementation. There was no evidence (other than Mr Duthie's statement) to support the proposition that the grant of a 999 year lease to SCCL was required to achieve the express purpose of the SCCL Needham Agreement. Namely, to ensure completion of the works and then to maintain and manage Needham. C2 paid for the works. Plainly it was not and Mr Duthie's evidence is rejected for that reason and taking into consideration his lack of reliability as a witness. A management agreement with licence would have sufficed.

e) The Needham Lease was granted in the circumstance of the finding of fact that SCCL was ultimately owned and controlled by Mr Ron Popely.

f) There was no explanation within the evidence for the Needham Lease having a peppercorn rent. Mr Duthie could not explain it and his evidence was that he signed the Needham Lease trusting Mr Gould. Mr Ron Popely gave instructions to Mr Gould and would no doubt have been asked to explain the absence of rent had he attended to give evidence. His absence meant there was no evidence of the decision making process which resulted in The Needham Lease to justify a peppercorn rent.

g) There was no evidence of any decision making concerning whether C2 should enter into a management agreement alone with SCCL without a 999 year lease. However, plainly based upon the findings summarise above, this was Mr Ron Popely's decision in the context of the grant of a 999 year lease to a company he ultimately owned and which would benefit from a peppercorn rent.

### F2) Decision – The Grant of the Needham Lease to SCCL

477. In the absence of evidence from Mr Ron Popely, the subjective basis for the decision can and must be inferred from the facts summarised above. It is to be concluded from those facts that Mr Ron Popely decided to insert a limited company operated by a nominee director to protect and/or to benefit his interests by depleting C2's assets to the benefit of his other company, SCCL. Mr Duthie provided no independent decision making process and, indeed, simply acted on instructions when executing the Needham Lease.

478. The fact that the director(s) of SCCL had the power to grant the Needham Lease is not in dispute. The same conclusions with regard to the width of the power in respect of Hever equally apply and need not be repeated. The grant of the Needham Lease was not an exercise of the power to demise in accordance with the purpose of the power, namely, to promote C2's success. It was a decision that was not in the interests of C2 (its members or creditors) but in the interests of Mr Ron Popely's other company, SCCL.

479. As with the Hever Common Parts Lease, those facts give rise to a potential ***Part 23 CA*** issue but that is not pursued and in any event they undoubtedly mean that this decision to grant WL a 999 year lease at a peppercorn rent was an improper exercise of power. It was not a decision made in good faith but one based on self-interest. It was a decision in breach of ***sections 171 and 172 CA*** as claimed by C2 and submitted by Mr Collings K.C.. The improper purpose caused the purported exercise of the power. It was as Mr Collings K.C. submitted, an obvious fraud on the power.

480. It follows without needing to repeat all that was stated concerning the equivalent position for C1 and Hever, that SCCL obtained title as a result of a void transaction only because of the provisions of the ***Land Registration Act 2002***. However, it held that title on trust for C2.

481. The defence relies upon the contention that the grant meant SCCL would finance the completion of the renovation of Needham. There was, however, no covenant to do so. Mr Duthie's evidence was that MySave Limited would pay for the works but recover their costs from SCCL. However, that was not a term of the grant and in any event it is not what occurred. There is no evidence of any payment by SCCL to MySave Limited, whereas C2's bank statements revealed payments totalling £253,167 to it and £3,517,000 to Heltfield (the cause for such a large sum being unexplained but it will have in part presumably related to building works). Furthermore, it is apparent from the findings of fact that Mr Ron Popely relied upon the income of C1 and C2 for the Hever and Needham works and any money that might have been paid by SCCL (none having been identified) would on the balance of probability have resulted from the circulation of their funds derived principally (at least) from the Investors.

482. The defence also relies (although this may be limited to the second part of the claim) upon the existence of the other covenants of SCCL under the Needham Lease. However, that does not address the glaring fact relevant to the first part of the claim that the transaction involved a diminution in C2's assets and consequential gains for SCCL. The further defence that the grant would protect the Investors had no evidence to substantiate it. Nor was there evidence that it was a consideration in the decision making process and there was no evidence to justify a decision made on that basis whether subjectively or (in the absence of its consideration) objectively.

483. In those circumstances it is unnecessary to address the alternative basis for the claim concerning the Investors. What should be said, however, is that the demise would have adversely affected the interests of the Investors for the same reasons the grant of the Hever Common Parts Lease did. In addition it occurred at a time when the buy-back rights had become an issue. Notice of intention to serve a notice for a buy-back was received on or about 14 January 2015 and required payment on 20 January 2016. There was also a completion date of 21 June 2015 for another buy-back at a price of £180,000. That would no doubt have been in the mind of Mr Ron Popely. As a result,

Mr Collings K.C. submitted that the purpose of the grant would have been to ensure no effective remedy could be obtained against C2 once it owned a freehold subject to the registered Needham Lease.

484. That would have tied in with C2's alternative claim under ***s.423 IA***. However, that too does not need to be addressed. Indeed it does not arise because SCCL's title achieved on registration was held on trust for C2. However, the claim would otherwise have succeeded for the following reasons:

a) Plainly for the purposes of ***s.423 IA***, the transaction at an undervalue requirement would otherwise have been established.

b) As to the requirement of purpose, what would have been clear absent the trust would have been that an asset was transferred at an undervalue at a time when Investors were making claims under their buy-back rights. It also occurred at a time when Mr Ron Popely was reacting to the fact that the opening of Needham, and, therefore, any receipt of income was significantly delayed by the failure to complete the building works required. There was plainly financial pressure giving rise to the cause for the prohibited purpose.

c) The otherwise unexplained demise would have achieved (but for the trust) the result of placing the asset (the 999 year term) beyond the reach of persons (specifically the Investors) who were making or may make at some time a claim against C2.

485. However, the existence of the trust thwarted that purpose and ***s.423 IA*** does not apply. The Needham Lease was still held on trust for C2 at the time it was transferred to 4D. The next issue, therefore, is whether 4D was a purchaser for value in good faith and without notice.

### F3) 4D and the Needham Lease

486. 4D was another company formed by Mr Gould. Whilst that is not in itself proof that this was another of Mr Ron Popely's companies, it would be consistent with what had gone before with regard to Needham and Hever. So too the finding of contrivance concerning the 19 June 2017 SCCL/MySave/4D Novation Agreement with regard to the purported £250,000 payment. First in the light of the common practice of Mr Ron Popely's companies formed after C1 and C2 not in fact paying anything and second bearing in mind all the anomalies that have been identified with regard to that document.

487. In reality all that occurred was that the assets of SCCL went to 4D, Mr Duthie became the registered member of 4D (5 May 2017), it became the registered member of SCCL (5 May 2017) and SCCL's management continued through the SCCL:4D Needham Management Agreement (24 July 2017). This has all the hallmarks of Mr Ron Popely's machinations and Mr Duthie could provide no (adequate) explanation for the transaction. It has been found as fact that Mr Ron Popely remained in control of SCCL. The same finding has been made for 4D.

488. The evidence to sustain that conclusion included:

a) The above-mentioned facts concerning its formation and the circumstances of it being used for the purposes of Mr Ron Popely's project.

b) The fact that Mr Duthie was a nominee and that the transfer of the Needham Lease was simply a switch of assets and liabilities from one company to another at the request of Mr Gould, who took his instructions from Mr Ron Popely.

c) The evidence, including from the accountants, that 4D, as with 3D, was part of the informal group of companies used for the Hever project.

d) The above-mentioned findings of contrivance and anomalies concerning the 19 June 2017 SCCL/MySave/4D Novation Agreement and the fact that the Needham Lease was transferred to 4D without it making any payment.

e) The sustaining post transaction evidence of the communications in 2018 and later that established Mr Ron Popely continued to control and to take an active role in the Needham project, his personal project.

f) Mr Duthie's inability to explain that fact or to have given evidence in chief concerning the role such correspondence evidenced and his lack of credibility concerning his evidence that Mr Ron Popely was not actively involved with 4D and that 4D was his company. In addition, his underlying lack of credibility as a witness and the bad character evidence for Mr Ron Popely (subject as always to a bad character direction).

g) The fact that the MySave Limited works were still invoiced to *"Stevenage Conference Centre"* and the absence of evidence that 4D paid for the works insofar as they applied to the demise or at all.

h) The concerning non-disclosure, and indeed contrary confusing evidence, by Mr Duthie of the current existence of an agreement for the use of Needham Hotel for asylum seekers and the absence of any clear understanding of what had occurred notwithstanding Mr Duthie's (rejected) evidence that 4D is his company and has nothing to do with Mr Ron Popely.

489. The true position was that Mr Ron Popely at all material times continued to control Needham. That SCCL and 4D were his companies and Mr Duthie his nominee. That Mr Duthie was an unreliable witness and his evidence to the contrary has to be rejected. It is right in fact and in law, as Mr Collings submitted, to attribute Mr Ron Popely's knowledge to them both. That knowledge meant SCCL and later 4D had notice that the decision to grant the Needham Lease at a peppercorn rent had not been a valid exercise but an abuse of the power conferred upon directors to deal with C2's real property by disposition including by demise. It was a fraud on the power that caused the demise.

490. It follows that the decisions in respect of SCCL concerning attribution, good faith and notice equally apply to 4D. In addition 4D was not a purchaser for value, no payment having ever been made. Whilst title was transferred to 4D in accordance with ***the***

***Land Registration Act 2002***, that title was and remains held on trust for C2. The defence that SCCL and/or 4D were purchasers for value acting in good faith and without notice is unsustainable.

## G) Remedies

491. The claim form seeks declarations that the Hever Common Parts Lease or the Hever CPL Variation and/or the Needham Lease were void. It seeks an order setting aside the Hever CPL Variation and/or the Needham Lease if not void. The Amended Particulars of Claim extend the relief to seek a direction to the Chief Land Registrar under ***paragraph 2(1)(a) of Schedule 4 to the Land Registration Act 2002*** to alter the register by cancelling the Hever Common Parts Lease and/or the Needham Lease. No objection has been taken to this not being a prayer of the Claim Form and obviously such amendment would be a formality.

492. Whilst the latter remedy took up considerable time in argument, on the basis of current submissions I do not see why it is necessary when C1 and C2 can ask for the Hever Common Parts Lease and the Needham Lease to be vested in them absolutely in any event. That will mean in practice that the leasehold interest will merge back into the freehold. All that is required, therefore, is an order to give effect to that vesting and merger. I anticipate that HM Land Registry will have an established approach for dealing with mergers of leasehold and freehold title and that counsel should be able to agree an appropriate form of order.

493. It seems to me that once the position is viewed from that angle, all the difficulties identified and addressed in submissions fall away. There is no need for any alteration under ***Schedule 4*** because of a mistake (noting this would not be rectification on the ground of bringing the register up to date by rectification but a new entry). That is because the registered titles were always held on trust for C1 and C2 respectively. Whilst that does not cure the original point, namely that but for the "magic" of ***the Land Registration Act 2002*** the Hever Common Parts Lease and the Needham Lease were both void, in practice the point will be resolved by the new entry. I raised this with the parties within the draft judgment offering them the opportunity to suggest otherwise and they have not done so.

494. However because C1 and C2 are entitled in any event to rectification if they can satisfy the statutory hurdles, I should address the rectification submissions: ***Section 65 of the Land Registration Act 2002*** gives effect to ***Schedule 4***, which provides the power to alter the register in the following circumstances (so far as material):

*"Introductory*

*1. In this Schedule, references to rectification, in relation to alteration of the register, are to alteration which—*

*(a) involves the correction of a mistake, and*

*(b) prejudicially affects the title of a registered proprietor.*

*Alteration pursuant to a court order*

*2 (1) The court may make an order for alteration of the register for the purpose of—*

*(a) correcting a mistake,*

*(b) bringing the register up to date, or*

*(c) giving effect to any estate, right or interest excepted from the effect of registration.*

*(2) An order under this paragraph has effect when served on the registrar to impose a duty on him to give effect to it.*

*3 (1) This paragraph applies to the power under paragraph 2, so far as relating to rectification.*

*(2) If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 without the proprietor's consent in relation to land in his possession unless—*

*(a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or*

*(b) it would for any other reason be unjust for the alteration not to be made.*

*(3) If in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so ….*

*Rectification and derivative interests*

*8. The powers under this Schedule to alter the register, so far as relating to rectification, extend to changing for the future the priority of any interest affecting the registered estate or charge concerned. …"*

495. The application of those provisions to the facts of these claims must apply the decisions of the Court of Appeal in ***MacLeod v Gold Harp Properties Ltd*** (above) and in ***NRAM v Evans*** (above). They are not only binding upon me in themselves but result from detailed review of the authorities, Law Commission Papers and text books to explain their outcome.

496. There cannot be any doubt that the original registrations of the Hever Common Parts Lease and the Needham Lease were both mistakes. The registrar would not have entered them had the truth that they were void dispositions been known (applying the definition approved in ***NRAM v Evans*** (above)). Nor can there be doubt that the registrar would not have registered the subsequent creation of the WL:1D Hever Charge or the transfers to 2D, 3D and 4D respectively had the true facts been known. Namely that the underlying Hever Common Parts Lease and the Needham Lease were void and the relevant defendant was not a purchaser for value acting in good faith and without notice (applying ***MacLeod v Gold Harp Properties Ltd*** (above)). Those facts and matters establish jurisdiction to alter the register subject to considering the exception restriction provisions of ***Schedule*** 4, ***paragraph*** 3***(2)*** and the exceptional circumstances provision of ***Schedule*** 4, ***paragraph*** 3***(3)***.

497. In reaching that conclusion I have noted in particular the following reasoning and decisions within the judgment of Lord Justice Underhill in ***MacLeod v Gold Harp Properties Ltd*** (above):

a) The description of the decision of the Court of Appeal in ***Argyle Building Society v Hammond*** (above) as *"unequivocal, and their endorsement – on the assumed facts [of forgery] – in* ***Norwich and Peterborough Building Society v***

***Steed*** *... explicit"* and his conclusion that this decision survived and is to be applied to ***the Land Registration Act 2002***. The decision being that whenever a registered disposition was in fact void, the court has the jurisdiction to decide whether to rectify the register through the application of the statutory power which jurisdiction is exercisable against those claiming through the registered proprietor in reliance upon subsequent registered entries.

b) His express approval of the reasoning of Mr Mark, deputy adjudicator, in ***Knights Construction (March) Ltd v Roberto Mac Ltd*** [2011] 2 EGLR 123 (particularly at paragraphs [80.1] and [80.2]).

c) His acceptance that in law for the purposes of ***Schedule 4*** a "mistake" will occur if, for example, an entry is made despite the fact that the actual transaction was void, for example because of a forgery. In contrast, a mistake will not occur if the error was voidable but not avoided when the disposition is registered.

d) His observation that if rectification is made to correct the "mistake", although it will take effect when the order was made, it will be effective in practice as a retrospective order because the rectification will date back to the date of entry of the mistake that has now been rectified but from the date of rectification. This is not limited to cases of fraud. It applies to all cases of rectification of a mistake.

e) That observation being supported by his construction of ***paragraph 8 of Schedule 4***. That it is concerned with changes to priority and confirms that rectification can include changing the priorities of interests registered after the mistaken entry but before the date of the order which is when rectification will take effect (**"the Relevant Period"**). It enables the party who benefits from the order for rectification from the moment the order is made to rely upon the priority of the entry rectified but not to rely upon it for any period during the Relevant Period.

f) His overall conclusion that "***Schedule 4*** *explicitly recognises that rectification has the potential to prejudice the interests of third parties who have relied in good faith on the register"*. That is because **Schedule 4** confers power to correct not only the mistake but "*the consequences of such mistakes"*.

498. This, of course, is a case where 1D, 2D, 3D, SCCL and 4D were not purchasers for value acting in good faith without notice of the fact that the Hever Common Parts Lease and the Needham Lease (as appropriate) was void. However, applying the decision in ***MacLeod v Gold Harp Properties Ltd*** (above) it is unnecessary to draw that distinction for the purpose of establishing jurisdiction. That is because their entries were the consequences of the original mistake even had they acted in good faith. They too may be expunged.

499. However because 1D, 2D, 3D, SCCL and 4D were not purchasers for value acting in good faith without notice, another way of looking at it on the facts of this case (applying the definition of *"mistake"* in ***NRAM v Evans*** (above) and the approach of ***MacLeod v Gold Harp Properties Ltd*** (above)) is that the subsequent entries themselves would never have been made had the registrar been told the true facts.

They applied for registration whilst knowing and without disclosing that the Hever Common Parts Lease or the Needham Lease (as appropriate) was void and their entry on the register was a mistake with the result that they should and will be removed from the register. That also establishes jurisdiction to alter the register by the expunging of those entries.

500. Turning next, therefore, to the exception provision of ***Schedule*** 4, ***paragraph 3***: This prohibits rectification where the registered proprietor is in possession absent the proprietor's consent unless the mistake was caused or contributed to by their fraud or lack of proper care or for any other reason it would be unjust not to rectify. The burden for proving the exception restriction does not apply lies on C1 and C2.

501. Assuming possession, although that is an issue, in this case 2D (having remained as proprietor of the part of the Hever Common Parts Lease demise relating to Dairy Cottage) and 3D for Hever and 4D for Needham as trustees for C1 and C2 respectively owe a fiduciary duty to consent. They can be replaced if they refuse that consent. The conclusion must be that the exception restriction will not apply. Furthermore, the exclusion of the exception in an unjust case would plainly apply if they refused their consent in these circumstances.

502. It would also and in any event be unjust for the alteration not to be made bearing in mind they and their predecessors were not purchasers for value acting in good faith without notice of the Hever Common Parts Lease and the Needham Lease (as appropriate) being void. It is unnecessary, therefore, to decide the issue of possession raised by Mr Calland.

503. The law as set out above when applied to the facts of this case means the well-argued and complete submissions of Mr Darton K.C. cannot survive. ***Schedule*** 4, ***paragraph 3(3)*** requires an order for rectification when the power exists unless there are exceptional circumstances. Plainly this is not such a case and rectification by cancellation of the entries should be ordered.

504. I will hear from counsel upon the terms of the order resulting from this decision subject to receiving an agreed form of order.

Order Accordingly