Neutral Citation Number: [2024] EWHC 2484 (Ch)

Case No: BL-2021-000862

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

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 October 2024

Before :

MR JUSTICE RICHARDS

- -

Between:

SOUTH BANK HOTEL MANAGEMENT COMPANY LIMITED	**Claimant**
- and -	
(1) GALLIARD HOTELS LIMITED	**Defendants**
(2) STEPHEN STUART SOLOMON CONWAY	
~~**(3) CHRISTOPHER JOHN DUFFY**~~	
(4) LODGESHINE LIMITED	
(5) GALLIARD HOMES LIMITED	

AND IN THE HIGH COURT OF JUSTICE Case No: PT-2021-000367
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Between:

LODGESHINE LIMITED

Claimant

-and-

SOUTH BANK HOTEL MANAGEMENT COMPANY LIMITED

Defendant

- -
- -

Matthew Bradley KC and Saaman Pourghadiri (instructed by **PCB Byrne LLP**) for the **Claimant** (in case BL-2021-000862)
Nicholas Trompeter KC and Simon McLoughlin and Isabel Petrie (instructed by **DMH Stallard LLP**) for the **Defendants** (in case BL-2021-000862)

Hearing dates: 26 June 2024 – 15 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Richards

INTRODUCTION

1. This dispute centres on an annex building (the "**Annex**") to a hotel (the "**Hotel**"), now known as the Park Plaza County Hall Hotel, at a site (the "**Site**") in Addington Street, London SE1. In the claim with reference PT-2021-000367 (the "**Rent Claim**"), Lodgeshine Limited ("**Lodgeshine**") claims for arrears of rent it says South Bank Hotel Management Company Limited ("**SBHMC**") owes pursuant to an underlease (the "**Underlease**") of the Annex that was granted to SBHMC in 2008. In the claim with reference BL-2021-000862 (the "**Main Claim**"), SBHMC counters that the Underlease formed part of an objectionable and fraudulent "**Annex Lease Scheme**" perpetrated by various members of the Galliard group of companies (to whom I will refer as "**Galliard**" unless it is necessary to be specific as to a precise legal entity) and the managing director and chairman of the Galliard group ("**Mr Conway**").

2. The Site is located next to a listed building known as the "General Lying-In Hospital" ("**GLIH**"). Until its development by Galliard, the Site was a car park. A succession of planning permissions was obtained for the Site but common to all of them was a requirement to include a low-rise annex (just three storeys high) with an appearance similar to that of the GLIH.

3. Ultimately Galliard secured planning permission for the development of the Site into a 398-room Hotel plus Annex. In 2004, Galliard implemented an innovative structure for financing development of the Site and making a profit for itself that involved "selling" (or more accurately, granting leases of) individual rooms in the Hotel ("**Rooms**") to investors ("**Investors**"). I refer to the totality of the project for development of the Site, and the sale of Rooms to Investors, as the "**Project**".

4. The structure of that transaction was broadly as follows:

    i) Investors would pay cash to Galliard Hotels Limited ("**Galliard Hotels**") in return for Galliard agreeing to grant a lease of a Room once the Hotel was developed (a "**Room Contract**"). Sums that Galliard Hotels received pursuant to Room Contracts would help to finance the development of the Hotel. Galliard also took out commercial borrowings from Barclays Bank plc ("**Barclays**") for this purpose with those borrowings secured by charges over the Site.

    ii) Once the Hotel was completed, "**Room Leases**" would be granted to all Investors in completion of the agreements for lease in the Room Contracts. The Hotel opened for business in early 2008 and Room Leases were granted on various dates between January and July 2008.

    iii) SBHMC was to be the company that managed the Hotel. For five years after the Hotel opened, SBHMC was to be a wholly owned member of the Galliard group. Originally it was contemplated that an Investor, on taking the Room Lease, would simultaneously grant a sublease to SBHMC that would enable SBHMC to make each Room available to guests. However, that structure changed and, instead,

each Room Lease granted certain rights to SBHMC to use Rooms otherwise than by way of sublease.

iv) For the first five years after taking a Room Lease, an Investor was entitled to a fixed 6% return on the amount paid for the Room Lease (the "**Rental Guarantee**"). Different Investors' Rental Guarantees would accordingly expire at different times, depending on the precise date on which they received their Room Leases.

v) Until all of the Rental Guarantees had expired (subject to an overall long-stop date), the freehold to the Site was to be retained by Galliard Hotels. However, once the Rental Guarantees expired, Investors would take the full risk and reward in the Project by (i) each Investor becoming a shareholder in SBHMC by being issued with one share in SBHMC for every Room held, so that SBHMC ceased to be a member of the Galliard group and became controlled by Investors; and (ii) by SBHMC taking a transfer of the freehold.

vi) Promotion of this investment to Investors started in 2004. At that time, it was recognised that Investors had a legitimate interest in knowing that, when they signed their Room Contract, there was a binding contract in place for the future transfer of the freehold interest. To that end, on 24 February 2004, Galliard Hotels entered into a freehold sale contract (the "**FSC**") with SBHMC providing for the freehold in the Site to be transferred to SBHMC for a consideration of £1. At the time of the FSC, SBHMC was a member of the Galliard group and therefore the FSC was an entirely intra-group arrangement. However, as noted above, the FSC was entered into in contemplation of arrangements which would culminate in SBHMC leaving the Galliard group and being wholly owned by Investors.

5. Conveyancing and other work in setting up this structure was done by Howard Kennedy LLP ("**Howard Kennedy**"), a firm of solicitors. Howard Kennedy was acting for Galliard on this transaction with the main point of contact, at least in relation to matters touching on the present dispute, being Mr David Philips ("**Mr Philips**"). Howard Kennedy had a long-standing relationship with Mr Conway, having advised him on both his personal and business matters for some 50 years. Over that period, Mr Conway had dealt largely with Mr Philips's father, to whom I refer as "**Mr Martin Philips**" to distinguish him from his son. Mr Martin Philips also did some legal work in connection with the transaction.

6. As a result of this structure, an Investor signing a Room Contract could be assured that in due course, he or she would obtain (i) a Room Lease and (ii) a share in SBHMC which would own a freehold interest. However, the Investor obtained no warranties or indemnities relating to the assets of SBHMC, in which Investors were to become shareholders. Accordingly, they obtained no express assurance to the effect that there would be no other liabilities in SBHMC such as the liability to pay rent pursuant to the Underlease that is at issue in the Rent Claim.

7. It took somewhat longer than expected for Investors to be issued with their shares in SBHMC. By March 2014, most of those shares had been issued and Investors held the majority of those shares. Some shares, however, continued to be held by Galliard and companies connected with Mr Conway. It had not proved possible to sell all Rooms to

Investors and so some Galliard companies had taken up the rump of unsold Rooms, thereby becoming Investors with a right to become a shareholder in SBHMC.

8. At the heart of the dispute between the parties is a disagreement as to precisely the nature of the freehold interest SBHMC was entitled to acquire pursuant to the FSC. The Site was registered at HM Land Registry with a single title number. SBHMC's position is that the FSC was an agreement to transfer the entire freehold interest registered with that title. Galliard's position is that the intention was for the FSC to exclude the part of the Site on which the Annex would be built. That issue acquires particular significance because, following a request by the operator of the Hotel ("**Park Plaza**") in 2005, certain facilities, including conferencing facilities, are located in the Annex.

9. On 16 June 2008, soon after the Hotel opened for business, but before the FSC had completed in accordance with its terms, the Annex Lease Scheme was effected:

    i) Galliard Hotels (which remained the registered proprietor of the Site as the FSC had not completed) granted a 999-year lease of the Annex at a peppercorn rent to Lodgeshine (the "**Lease**").

    ii) Lodgeshine granted the Underlease, which was a 15-year rack-rented lease to SBHMC. For the first five years, no rent was payable pursuant to the Underlease. Thereafter, the annual rental would start at £117,382.50 as increased by the Retail Prices Index ("**RPI**").

10. On 9 April 2014, Galliard Hotels transferred the entire freehold interest in the Site to SBHMC (the "**Transfer**"). However, the result of the Annex Lease Scheme was that the freehold interest so conveyed was encumbered by the Lease and, indirectly, the rack-rented Underlease. Given its view of its rights pursuant to the FSC, SBHMC considers the Annex Lease Scheme to represent an unwarranted and fraudulent interference with its property rights. SBHMC brings eight claims against various defendants to vindicate the rights that it asserts:

    i) The "**Breach of Trust Claim**" is brought against Galliard Hotels. SBHMC asserts that, following the FSC, Galliard Hotels held the freehold in the Site on trust for SBHMC and that Galliard Hotels acted in breach of that trust by granting the Lease.

    ii) The "**FSC Contract Claim**" is brought against Galliard Hotels. It asserts that Galliard Hotels was in breach of the FSC by granting the Lease.

    iii) The "**Room Lease Claim**" is brought against Galliard Hotels. It argues that Galliard Hotels owed SBHMC contractual obligations pursuant to the Room Leases to afford SBHMC access to the Annex and that, by granting the Lease, Galliard Hotels was in breach of those obligations.

    iv) The "**Directors' Duties Claim**" is a claim brought against Mr Conway, who was the sole director of SBHMC (and Galliard Hotels and Lodgeshine) at the time of the Annex Lease Scheme. It asserts that Mr Conway breached fiduciary obligations owed to SBHMC as a director (i) in procuring that the companies involved entered into the Annex Lease Scheme, and not to reverse it and (ii) in failing to tell Investors about the scheme.

v) The "**Knowing Receipt Claim**" is brought against Lodgeshine. It asserts that Lodgeshine received SBHMC's assets consisting of an interest in the Annex and rent payable pursuant to the Underlease with knowledge that it was obtaining those interests as a result of Galliard Hotels' and/or Mr Conway's breach of trust.

vi) The "**Inducing Breach of Contract Claim**" is brought against Lodgeshine and Mr Conway. It asserts that both induced Galliard Hotels to breach its obligations under the FSC.

vii) The "**Unlawful Means Conspiracy Claim**" is brought against Galliard Hotels, Lodgeshine and Galliard Homes Limited ("**Galliard Homes**"). It asserts that these three participants were involved in an unlawful means conspiracy that was intended to injure SBHMC by depriving it of the economic benefit of the Annex.

viii) The "**Invalidity Claim**" asserts that the Lease and Underlease are, in the words of paragraph [453] of SBHMC's written closing submissions "ineffective as deeds, and ineffective to transfer legal title" because of defects in their execution.

11. The defendants dispute all of these claims with a recurring theme of their defences being that the FSC either did not, or was always intended not to, convey any interest in the Annex to SBHMC. Relatedly, Galliard Hotels makes the "**Rectification Claim**" seeking rectification of the FSC, to the extent necessary to give effect to the stated common intention that it should not operate as an agreement to transfer any interest in the Annex.

12. I will structure the remainder of this judgment as follows:

i) Part A deals with introductory matters.

ii) Part B contains findings of fact on events prior to the execution of the FSC in 2004.

iii) Part C contains findings of fact on events taking place between 2004 and 2008, when the Hotel opened for business.

iv) Part D contains findings of fact on the genesis of, and implementation of, the Annex Lease Scheme.

v) Part E contains conclusions on the proper construction of the FSC.

vi) Part F deals with the Rectification Claim.

vii) Part G deals with allegations that the Defendants deliberately concealed certain matters, for the purposes of s32(1)(b) of the Limitation Act 1980 (the "**Limitation Act**").

viii) Part H contains factual findings on events taking place after Mr Duggan, Mr Lakha KC and Mr Marley (Investors, and later directors in SBHMC) became aware of the Annex Lease Scheme.

ix) Part I contains conclusions on limitation matters.

x) Part J deals with the Room Lease Claim.

xi) Part K deals with the Invalidity Claim.

xii) Part L sets out my conclusions on the Main Claim.

xiii) Part M deals with the Rent Claim.

PART A – INTRODUCTORY MATTERS

Key persons

13. This judgment will examine the actions and beliefs of a number of persons. In the interests of readability, the Appendix to this judgment sets out a list of the individuals and entities who are referred to frequently.

Witness credibility and the documentary record

14. Much of the factual dispute in this case concerns what various individuals were subjectively thinking as long ago as 2004. This case, therefore, is an object lesson in the fallibility of human recollection that was so incisively explored in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] 3560 (Comm). Central to my evaluation of the facts will be the contemporaneous documentary record. That does not, however, mean that the oral evidence served no useful purpose, and I base my findings on all of the evidence (see *Kogan v Martin* [2019] EWCA Civ 1645, at [88], per Floyd LJ).

15. Many of Galliard's witnesses were clearly well aware of the importance to Galliard's case of particular subjective views being held in 2004 and later. Mr Conway, for example, in his evidence was at pains to stress what he said was the contemporaneous understanding and intention that the Annex should be retained within the Galliard group and should not pass to SBHMC pursuant to the FSC. Other Galliard witnesses (for example Mr Angus) sought to distance themselves from what they considered to be potentially "unhelpful" statements in contemporaneous documents and emails addressed to them by emphasising that they were not themselves key decision-makers in relation to the Project.

16. A number of SBHMC's witnesses also showed some tendency to tread carefully on aspects of the case that they perceived to be sensitive. For example, Mr Marley downplayed the extent to which he reviewed his Room Contract when signing it in 2004 even though the hard copy of that contract suggested that it had been reviewed quite carefully and that Mr Marley had sought to negotiate it before signing it.

17. Inevitably both sides criticised each other's witnesses. Sometimes these criticisms were not consistent. For example, a Galliard witness being asked questions relating to a particular email who volunteered some recollection that was not set out in a witness statement would frequently be accused of giving new evidence for the first time in the witness box. By contrast, witnesses such as Mr Philips who were reluctant to be drawn into a discussion of any matter that was not clearly stated on the face of a contemporaneous document were accused of a lack of candour or willingness to assist the court.

18. I do not see any utility in this case in making impressionistic and high-level observations about the "reliability" of all the witnesses who were cross-examined. I do not consider that any of those witnesses were actively lying to the court. Rather, in line with the tendency identified in *Gestmin*, a number of witnesses showed signs of having "refreshed" their own recollections by seeing how the arguments in this case have unfolded and developing an understanding of those factual propositions that suit their case and those that do not. In some cases, witnesses have genuinely come to believe particular things which are inaccurate when judged against the contemporaneous record. To give some relatively unimportant examples, Mr Angus was convinced when giving his oral evidence that the Annex was located on Leake Street, at some distance from the Hotel, when in fact it abutted the Hotel. Mr August was convinced when giving his oral evidence that, in order to accommodate the incorporation of the Annex into the Hotel, it was necessary to demolish a wall that had already been constructed in the basement. All parties agreed that this was not the case. Mr Angus and Mr August were not seeking to mislead the court. They had simply come to believe, over the long course of this dispute, something that was incorrect.

19. In a similar vein, I do not consider that those Galliard witnesses who were convinced of the existence of a clearly articulated understanding in 2004 to the effect that Galliard would retain the Annex were lying and seeking to mislead the court even though I have not accepted that evidence. Given the nature of the dispute and its focus on subjective beliefs and understandings held up to 20 years ago, it is inevitable that some witnesses' recollections can be shown to be wrong by reference to the contemporaneous documentary record. In that narrow sense, their recollections could be said to be "unreliable". However, that is simply the nature of the case before me, and I make no criticism of any of the witnesses' truthfulness even in circumstances where I have not accepted their evidence.

20. Since the contemporaneous documentary record is of such significance, I make some brief observations on the completeness of that record. A number of documents on both sides have been destroyed. Howard Kennedy's policy of destroying hardcopy documents was reflected in Mr Philips's evidence. There was nothing untoward in that document destruction.

21. I have considered carefully Galliard's destruction of documents in 2019. Those documents were destroyed at a time when Mr Duggan, Mr Lakha KC and Mr Marley were articulating the basis of what would ultimately become the present dispute in correspondence with Galliard. Mr Duffy was aware of this potential dispute, and he also accepted that he knew that once litigation is "in the offing" documents potentially relevant to that litigation should not be destroyed. I consider that Mr Duffy should have thought more carefully about the document destruction process given what he knew about the possibility of a dispute with SBHMC. However, I accept his evidence that he was genuinely uncertain at the time as to whether litigation was "in the offing" as distinct from a degree of sabre-rattling on SBHMC's part.

22. However, despite the destruction of hard copy documents on both sides, the court has been provided with a good set of electronic communications passing between Howard Kennedy and Galliard, and within Galliard, from 2004 onwards. Of course, there is the possibility of "gaps" in that record. However, few such gaps were evident. The legal teams on both sides were able to match up emails with the contemporaneous documents to which they referred. There were few, if any, examples drawn to my attention of a

situation where an electronic document referred to another document that could not be found. When added to Mr Philips's tendency to record advice given and instructions received in writing, to which I will refer later in this judgment, I consider that I have a good picture of contemporaneous communications relevant to this dispute.

Written closings

23. Put together, the parties' written closings ran to some 600 pages (including additional material such as written answers to questions that I had raised and schedules). The written closings between them referred to over 230 authorities. It has been helpful to have such a full statement of both parties' cases on both the law and facts as I have been writing up my reserved judgment. However, given the length of the written material, on 9 July 2024, in advance of oral closings, my clerk wrote to the parties on my behalf as follows:

> *I would, therefore, ask that the oral closings at least allude to all central aspects of the parties' respective cases to the extent that they are being pursued. I recognise that I will need to take much of, and indeed most of, the detail from the written closings, but I am keen to avoid a situation where (i) a central point is not alluded to in oral closings, (ii) I don't fully grasp the centrality of that point from the written material and (iii) the centrality of the point only emerges when a party complains that it is not addressed in the embargoed judgment.*

PART B – FACTUAL FINDINGS ON MATTERS UP TO 2004

Mr Conway, Galliard and the relationship with Howard Kennedy

24. It is common ground that many of the matters at issue in this dispute fall to be resolved by reference to the subjective beliefs and intentions of Mr Conway at various times. However, Mr Conway delegated much of the work in relation to the Project to others and the FSC that lies at the centre of this dispute was professionally drafted by Mr Philips, a solicitor at Howard Kennedy. It is, therefore, appropriate to start with an overview of Mr Conway's way of doing business and how that affected the actions of others, including Mr Philips.

25. Mr Conway is a co-founder of the Galliard group. He is 78 years old and remains the group's Executive Chairman. He is an accomplished businessman with a keen eye for identifying new opportunities. He was one of the first people in the UK to alight on the idea of selling individual hotel rooms to investors. His colleagues at Galliard describe him variously as a "natural salesman", an "entrepreneur and deal-doer" and the "ideas man". Those were entirely apt descriptions.

26. Mr Conway has little interest in the finer detail of the implementation of his innovative ideas. Nor does he relish a structured "corporate culture" (indeed he left Frogmore in 1991 so that he could have more freedom). He finds long documents tedious and quickly gets bored in discussions about the detail of projects. These personality attributes mean that he tends to identify individuals who have complementary skills, forms long-term business relations with them and gives them much latitude, trust and confidence.

27. That can be seen from the fact that a number of witnesses on behalf of Galliard have had a business relationship with Mr Conway for some considerable time. For example, Ms Akers has been Mr Conway's personal assistant since 1982. Mr Conway has worked with Mr Angus since the late 1960s. Mr Galman has worked at Galliard for some 30 years. Mr Porter was involved in Galliard's finance function from around 1990 until 2022 with Mr Conway standing by him when he was disqualified as a company director and expelled from the Institute of Chartered Accountants following the discovery of accounting irregularities at Queens Moat Houses plc. Mr Tucker-Brown has had business dealings with Mr Conway since 1991.

28. I have referred in paragraph 5 to Mr Conway's business relationship with Howard Kennedy which has lasted for over 50 years. Originally Mr Martin Philips was the main point of contact at Howard Kennedy and after he started to wind down his professional practice, he handed the relationship over to his son, Mr Philips. A number of witnesses commented on the degree of latitude that Howard Kennedy had in dealing with Galliard's affairs. Mr Conway himself said in cross-examination that his typical instructions to his lawyers would have been "protect my interests and report back to me". I also accept Mr David Conway's evidence that the relationship between Galliard and Howard Kennedy was not a "normal one" of the kind a company might have with its commercial solicitors. Rather, because of the trust and confidence that had been built up over 50 years, Galliard would assume that documents Howard Kennedy prepared were "good to go" (in Mr David Conway's words) unless told otherwise.

29. This process of rapid decision-making based on a high level of personal trust between colleagues and advisers meant that Galliard did not have the "corporate" culture that Mr Conway had found restricting at Frogmore. However, it did mean that details risked being overlooked. It also posed some risks for Howard Kennedy who would not infrequently receive instructions from Mr Conway in the form of short emails which did not always address the kind of detail that lawyers consider important. For example, when Mr Philips was seeking instructions on appropriate terms for the Underlease, Mr Conway sent him an email saying:

> *Pse draw in your opinion best terms. 15 yrs ok 22 50 psf index linked ok.*

30. That modus operandi at Galliard resulted in Mr Philips taking particular care to confirm instructions that he received orally. Anyone at Galliard who gave Mr Philips oral instructions in relation to the Project could generally expect to receive a letter, memorandum or email confirming instructions in reasonably short order following the conversation in question.

The planning background up to 2004

31. The Site forms part of the old County Hall Estate, previously owned by the London Residuary Body ("**LRB**"). In 1995, the Galliard group, as part of a joint venture (the "**JV**") with the Frogmore group, purchased a large part of the County Hall Estate from the LRB. The JV, and later Galliard alone, went on to develop the area into a mixture of residential, hotel and retail spaces.

32. When the JV acquired the Site, it was a car park. The Site stood adjacent to the GLIH which was a listed building owned by an NHS Trust that would prove to be reasonably

assertive in defending its interests associated with the GLIH, for example its right to light. Since the Site was considered unsuitable for residential development, partly because residential planning permission was thought to be unlikely, the JV obtained planning permission, in or around 2002, to construct an office block on the Site.

33. The architect acting on the proposal to develop the Site as an office block was "**Gensler**". In a document submitted to the relevant planning authority ("**Lambeth**") on 10 June 2002, Gensler explained that its designs included a three-storey component along Addington Street which would "achieve a complementary relationship between the General Lying-In Hospital and the proposed building". That three-storey building would ultimately become the Annex. Gensler's idea was that this building would be lower in height than the office block and would have some features that were redolent of the GLIH so as to smooth the visual transition from the GLIH to the office block. The relatively low height of the building also had the advantage of protecting the GLIH's right to light.

34. In 2003, Frogmore and Galliard agreed to terminate the JV insofar as it related to the Site with Galliard alone taking forward the development of the Site and acquiring ownership of it. Galliard Hotels acquired the Site from Frogmore in July 2003 for a purchase price of £5.1 million, largely financed by a loan from Barclays. Galliard's expertise was in residential developments. However, since the Site was unsuitable for a residential development, Galliard sought to develop it as an "aparthotel" which was closer to Galliard's core expertise. Mr Conway had the idea that investors could be invited to acquire individual rooms in the aparthotel. That was a novel concept in the UK at the time, but Mr Conway had seen it used successfully in Canada and Europe.

35. Galliard instructed different architects, BUJ Architects ("**BUJ**"), to prepare drawings for the aparthotel planning application. However, BUJ retained the concept of the Annex that had appeared in Gensler's drawings, and much of its design. It was thought that retaining some elements of the office block application, for which planning permission had already been granted, would increase the chances of the aparthotel application securing planning permission.

36. For that reason, the application for planning permission that was submitted in February 2003 (the "**300 Room Proposal**") included a Class B1/D1 element and was for:

> *redevelopment of the Addington Street site to provide 300 room Apart-Hotel (21,170.4 sq. m) with additional stand alone offices or consultation office, Class B1/D1 (431.1 sq. m)*

37. The 300 Room Proposal thus included a "bolt on" Annex pulled away at ground level from the proposed Hotel to allow a through access to the GLIH service yard. The first and second floors of the Annex would sit over that access way and be identical in height and similar in appearance to the adjacent GLIH. The Annex would have its own entrance from the street and would, in appearance, be a separate building from the main Hotel and, while the Annex and the Hotel abutted each other at the level of the first and second floor, there was no internal access between the two buildings at either such level. Even at the first and second floors where the Annex and Hotel abutted each other, the floor levels and ceiling levels were different, which came to cause some construction issues later on. The Annex was envisaged to have a separate postal address and would have sewerage connections separate from those of the Hotel. That said, the

basement of the Hotel would extend under the Annex with the result that, if a freehold interest in the Annex was ever disposed of separately from the Hotel, it would be, in the jargon of property lawyers, a "flying freehold".

38. Planning permission for the 300 Room Proposal was granted on 7 October 2003 (the "**300 Room Permission**"). One of the terms of the 300 Room Permission was that Galliard Hotels would enter into a Section 106 Agreement under which it was obliged to provide toilet facilities for local bus drivers in the Annex building.

39. The 300 Room Permission was just the beginning of the planning process as far as Galliard Hotels was concerned. Securing an early planning permission was an important part of Galliard's strategy in "de-risking" the development, but at the time the 300 Room Permission was granted, Galliard Hotels still did not have a final view on how the Site would be developed. Moreover, there remained the task of, as Mr Mills of BUJ put it, "trying to make as much money as possible from the usage of the site" while staying within the same "planning mass envelope" as that for which planning permission had been granted. Galliard did not, therefore, consider that its ambitions for the Site were necessarily constrained by the terms of any particular planning permission. Rather, it would seek to adapt the planning permission granted to fit with its ambitions with the result that, until the development was largely finalised, it was always contemplated that any particular planning permission granted might be the subject of future applications to amend.

40. Having secured the 300 Room Permission, on 11 November 2003 Galliard Hotels applied to vary it so as to permit the construction of 394 rooms in the Hotel. On 19 February 2004, Lambeth gave consent (the "**394 Room Permission**") on conditions, among others, that the Hotel be used only for Class C1 user and that the Annex be used only for Class B1 or D1 user and that any proposed use outside those classes would require additional planning consent.

41. In a manifestation of the approach to planning issues described in paragraph 39, the version of the scheme that was marketed to investors in 2004 (see paragraphs 47 to 53 below) was for something other than the proposal approved in the 394 Room Permission, most probably a scheme involving 396 Rooms. In paragraphs 115 and 117 below I describe later planning applications and permissions relating to 396 Rooms and 398 Rooms respectively

Early discussions touching on use of the Annex

42. As will be noted from the analysis of the 300 Room Permission and the 394 Room Permission above, the idea for the Annex did not come about because Galliard Hotels had a commercial wish for office accommodation adjacent to the Hotel. Rather, the concept of the Annex was as a "make weight" designed to secure the early planning permission that Galliard considered important as a means of de-risking the Project.

43. In the period leading up to 24 February 2004, when the FSC was executed, the focus of Galliard Hotels was very much on securing investors for Rooms in the Hotel. The reason for that was twofold: selling Rooms would provide Galliard Hotels with some capital necessary to develop the Site and bank finance could be more readily obtained at cheaper rates if the Project was regarded as largely "pre-sold".

44. In his oral evidence, Mr Angus said that he remembered preparing cashflows estimating likely revenue from the Annex as part of the process of securing funding from Barclays. There was no reference to these cashflows in his witness statement and copies of the cashflows were not put into evidence because, said Mr Angus, given the lapse of time since they were prepared in 2003, it had not been possible to locate them. I am not prepared to accept that such cashflows were prepared since I am not satisfied that Mr Angus could have a clear recollection of what was included in cashflows provided to Barclays some 20 years after the event. I am fortified in that conclusion by the fact that Mr Angus's recollection of other matters relating to the Site and its development was faulty. As I have noted in paragraph 18, for example, he mistakenly thought, for example, that the Annex was physically located on Leake Street.

45. There was some evidence of discussions between Mr August of Galliard and Professor Sir Richard Thompson KCVO, who was a consultant in the nearby St Thomas' Hospital Gastrointestinal Laboratory operated by the NHS Trust, about the possibility of using the Annex as consulting rooms. Those discussions started with an enquiry from Professor Thompson in March 2003 and continued until around February 2006 by which time it was clear that the Annex would be used as part of the Hotel. However, that correspondence was desultory. Professor Thompson would write an occasional letter and Mr August would tend to reply a week, or sometimes several weeks, later to the effect that completion of the Annex was still some way off. Mr August, moreover, was a project manager tasked with keeping the development of the Site on track. He had no responsibility for commercial lettings at Galliard and did not pass Professor Thompson's correspondence to colleagues with a view to "closing a deal" for a lease of the Annex once constructed. Neither Galliard nor Professor Thompson seemed to attach great significance to the proposal from the correspondence I was shown. While I am certainly not concluding that Mr August or Galliard was "stringing along" Professor Thompson, the desultory nature of the correspondence indicates that it suited Galliard to have an ongoing dialogue with the NHS Trust on matters other than the noise and inconvenience of upcoming construction works.

46. Moreover, Mr August accepted that he was not personally involved in the decision-making as to the ultimate ownership of buildings that were to be constructed on the Site. He was having his discussions with Professor Thompson at a time when SBHMC and Galliard Hotels were under common control. Accordingly, a proposal for the NHS Trust to use some space in the Annex was not inconsistent with SBHMC holding a freehold interest in the Annex. Nor was it inconsistent with Galliard Hotels retaining a freehold interest in the Annex.

The way the scheme was marketed

47. The proposal to sell individual rooms in the Hotel was, at the time, a novel one and Mr Conway's own brainchild. Mr Conway was by no means "hands-on" in his overseeing of the Project. However, he did take a keen interest in the way it was marketed as his formidable business acumen meant that his input in this area could make a real difference to its success. Therefore, while he certainly did not himself design the floor plans, photographs and models that formed part of the way the Project was marketed, he would have reviewed much of that material before publication.

48. Understandably, the focus of Galliard's marketing materials was on the benefits to Investors of acquiring Rooms. After all, it was from the sale of Rooms that Galliard expected to realise its commercial profit on the Project.

49. A recurring theme in the brochures describing the Hotel is the presence of the "Office Annex" on floor plans for the first and second floor, albeit without any suggestion that there was any internal access between the Hotel and that "Office Annex". The brochures that Mr Duggan and Mr Marley received were in evidence with both of them showing the presence of that Office Annex. That said, brochures such as these contained, in small print, wording explaining that specifications in the brochure could be altered without prior notice and that the information contained in the brochure would not form part of any contract with investors. A CAD (computer assisted design) drawing of the Hotel from the time shows the Annex as abutting the Hotel.

50. Contemporaneous marketing material did not mention the possibility that, as well as revenue from their Rooms, Investors might benefit from income generated by the commercial exploitation of the Annex in user classes B1 or D1. For example, an advertising flyer from June 2005 emphasised in bright colours matters such as the low price of the Rooms, the valuable Rental Guarantees and the ability to purchase an investment in the Hotel through a SIPP without mentioning the possibility of additional revenue from the Annex.

51. In June 2004, Horwath UK, a firm of tourism, hotel and leisure consultants, sent Mr Conway a market overview and indicative financial performance for the development. Their report stated that "an adjacent office Annex, which is not part of the serviced apartment operation, is also proposed between the hotel and The Lying-In Hospital".

52. Inevitably, SBHMC stresses contemporaneous material that refers to the Annex being "within" the operation, with Galliard stressing material that suggests it is "outside". However, in my judgment that polarised approach risks overlooking the following aspects of the contemporaneous marketing and similar material which are significant:

    i) First, there is no consistent position on the Annex. In my judgment, that is because the focus of Galliard's marketing efforts was on the Rooms with the result that Mr Conway did not consider whether title to the Annex would or would not pass to SBHMC. That is consistent with the nature of discussions between Galliard and Howard Kennedy, which I consider in paragraphs 57 to 79 below.

    ii) Second, Galliard's marketing efforts at the time were focused on promoting the low cost of an investment (particularly if acquired in a SIPP) as compared with the high, and guaranteed, revenue that could be expected. Although the assurance that Investors would have a share of the freehold was certainly mentioned in contemporaneous material, that was not Galliard's central focus. There is, therefore, a risk of applying undue hindsight in treating contemporaneous marketing and similar material, which was predominantly not concerned with ownership of the freehold interest, as shedding some light on questions of ownership. Once that is appreciated, it becomes less surprising that Horwath UK were proceeding on the basis that the Annex would not be part of the Hotel operation. Horwath UK had been asked to express an opinion on the likely

revenue from Rooms and accordingly were not concerned with the possibility of revenue from the Annex.

53. Those considerations also address Mr Conway's assertion in his evidence that, if the Annex truly was to be included in the freehold title conveyed to SBHMC, Galliard would have "shouted that from the rooftops". I do not accept that. The contemporaneous marketing material was largely not focused on questions of ownership, or the Annex, and instead promoted the financial benefits of acquiring a Room. "Shouting from the rooftops" about an ownership interest in the Annex would have made little sense given that focus.

Legal and structural issues as perceived in 2004

Information provided to prospective investors' solicitors

54. Of particular significance to Galliard's marketing of the Project were sales fairs, trailed by a campaign of radio and other advertisements, at which investors would be invited to exchange contracts for the purchase of a Room on provision of a relatively modest deposit of £1,000. For that to be feasible, Galliard put in place arrangements with a panel of various firms of solicitors who were provided with prior information on the Project, including draft contracts and other documentation. Representatives of those solicitors' firms would then attend the sales fair and be in a position to accept instructions from Investors with a view to exchanging contracts there and then.

55. This process of providing relevant information to solicitors in advance required Mr Philips to prepare a "pack" of documentation that included, among others, the following documents:

    i) an "Introduction" that explained the overall structure of the transaction in which an Investor was being invited to participate;

    ii) title and planning documentation;

    iii) replies to standard pre-contract enquiries;

    iv) a copy of the FSC as executed.

56. Mr Philips started work in earnest on the preparation of this pack of documents on 26 January 2004. He was working to a tight deadline as there was to be a sales fair in Hong Kong on 26 February 2004. A Mr Garry Lucas had been lined up to act as solicitor for interested investors at the Hong Kong sales event. Accordingly, much of the documentation, including an executed FSC needed to be available by then.

57. Mr Philips was keen to ensure that he had a note of Galliard's instructions as to the structure of the proposed transaction. He therefore set about preparing a "**Structure Note**" and shared it with various people at Galliard for comment. I agree with Galliard that the Structure Note was largely an "internal facing" document whose purpose was to confirm the structure that Howard Kennedy had been asked to implement. It was not necessarily intended to form the basis of discussions between Galliard and Investors' solicitors. The Structure Note's function is emphasised by the fact that, on 17 February 2004, with the Hong Kong sales event imminent, Mr Philips approached both Mr Conway and Mr Tucker-Brown with a request for approval of, among other documents,

the Structure Note. On 19 February 2004, Mr Philips wrote to Mr Tucker-Brown saying:

> *I believe that the structure note now sets out your instructions to me, but I would still be grateful if you could confirm that this is the case.*

58. The Structure Note was a significant document that sheds a clear light on what Galliard and its lawyers were thinking at the time. All the individuals at Galliard from whom Mr Philips sought comments on the Structure Note would have been aware of the purpose and function of that note summarised in paragraph 57 as Mr Philips mentioned in correspondence on the Structure Note that his ability to take steps or draft documents was dependent on him having a clear and agreed understanding of the structure.

59. Mr Philips sent Mr Lucas a copy of the draft Structure Note on 27 January 2004. In parallel he had discussions with a number of individuals at Galliard with a view to finalising Structure Note and the pack of documents more generally. For example, on 26 January 2004, he sent a letter to Mr David Conway with some standard questions including the following:

> *1. With regard to the development of the whole, please can you let me know exactly what is being carried out. That is*
>
> *- Please confirm how many buildings on the site and where each one is located*
>
> *- please confirm how many commercial units there are in each building and where they are located*
>
> *- Please confirm how many residential units there are in each building and where they are located*
>
> *- Please provide any other relevant information*

60. On 13 February 2004, Mr David Conway replied by faxing Mr Philips's letter back to him with some answers to the various questions in manuscript. He wrote "1" next to the first question, obviously confirming that there was a single building on the Site. Slightly above the request for "any other relevant information", he wrote the single word "Plans". It was faintly suggested in cross-examination that the word "Plans" can only have been intended to be an answer to the last request (for "any other relevant information"). However, I do not consider that to be correct. Mr David Conway provided no answer to the request for information on the number of commercial units and residential units. Therefore, in my judgment he was saying that Mr Philips would find answers to all the remaining questions asked by question 1 of his letter by consulting (unspecified) plans.

61. Mr David Conway's response to detailed questions using the single word "Plans" just two weeks before the pack of documents needed to be ready for the Hong Kong sales event was not helpful. I am quite unable to accept the suggestion that, in response to Mr David Conway's fax, Mr Philips should (i) have consulted plans submitted in connection with the planning application and (ii) having done so realised that steps needed to be taken to exclude the Annex from the transfer to be effected pursuant to the FSC. It was not for Mr Philips to divine for himself, two weeks before documents needed to be finalised, what property was ultimately to be conveyed pursuant to the

FSC. It was for Galliard to tell Mr Philips what they expected to convey and what, if anything, they wished to keep.

62. Mr Philips also sent a memo to his father, Mr Martin Philips on 26 January 2007 asking for copies of various title documents, planning permissions and Section 106 Agreements. A second memo sent to his father on the same day asked for comments on the draft Structure Note.

63. Between 26 January 2004 and 20 February 2004, Mr Philips had a succession of discussions with various Galliard personnel touching on the structure of the transaction. In accordance with his usual practice, Mr Philips sent everyone with whom he had a significant discussion a letter or memo recording that discussion and the points arising out of it. So, for example, Mr Philips expressed a strong concern to both Mr Angus and Mr Tucker-Brown about an aspect of the structure that might require the ultimate operator of the Hotel to cover losses arising if the income from any particular Room was less than the expenses attributed to that Room. When Mr Tucker-Brown confirmed that Galliard was prepared to take a commercial view on the point and address it with the ultimate hotel operator in due course, Mr Philips confirmed the instruction in writing.

64. In none of his extensive discussions regarding the structure and documentation was Mr Philips told that either (i) when development of the Site was complete, there would be both an Annex and a Hotel on that Site or (ii) that the then current planning permission for the development prohibited the Annex from being used as part of the Hotel. It follows that he was not given instructions by anyone as to whether title to the Annex should, or should not, pass to SBHMC on completion of the FSC; nor did he have the necessary information to work out that this was a question that needed to be answered. Mr Philips had shown himself to be a careful and meticulous lawyer. He was quite willing to address Galliard's commercial interests associated with the project in his dialogue with Mr Tucker-Brown referred to in paragraph 63. Had he been told that there would ultimately be an Annex on the Site, that could not be operated as part of the Hotel given the terms of Galliard's planning permission, he would have raised questions as to what should be done with that Annex and documented the instructions that he was given. As noted in paragraph 22, I have a good degree of confidence in the completeness of the record of electronic communications passing between Howard Kennedy and Galliard.

65. Moreover, the failure of anyone at Galliard to identify the Annex in their discussions with Mr Philips was not because they did not read the Structure Note. On 18 February 2004, Mr Tucker-Brown gave Mr Philips some comments on the Structure Note. Similarly, both Mr Tucker-Brown and Mr Angus had engaged with Mr Philips about the hotel operator being required to bear losses associated with individual rooms.

66. The Structure Note that emerged from this process was unmistakably a document intended to record, in lawyerly language, the structure of the transaction that Mr Philips had been asked to implement. It made extensive use of defined terms including, significantly that of the "Property" which was defined as meaning:

> *the development site at Addington Street, London*

67. Mr Philips formed the view that the Structure Note was substantially approved on or around 19 February 2004 since there were no further drafts of it after that date. The Structure Note did not mention the Annex at all. It did not envisage that SBHMC (referred to in the Structure Note as the "Management Company") would have any activities other than managing the Hotel.

68. Mr Philips was well aware that that "development site" was registered with a single title number. The Structure Note stated that, once all leases of Rooms had been granted to purchasers, the freehold of the "Property" would be transferred to the Management Company for a consideration of £1. There is frequently scope for debate about the meaning of even the most apparently simple document. However, it is fair to say that the clear impression given by the Structure Note was that the entirety of the single title to the Site would in due course be conveyed to SBHMC. If Mr Philips had thought otherwise, the Structure Note would have said as much.

69. Galliard submitted in closing that, because cross-examination of its witnesses occasionally failed to distinguish between the Structure Note and the introduction to the pack of documents provided to panel solicitors (which is discussed further in the section that follows), that cross-examination was unfair or misleading. While I agree that some questions in cross-examination occasionally conflated the two documents, the conclusions that I have set out above on the purpose and effect of the Structure Note are not vitiated by that conflation.

70. Nor am I able to accept Galliard's argument that the Structure Note dealt only with the "Hotel" aspect of the Site, thereby leaving unspoken the way in which the "Annex" aspect of the Site would be dealt with. Given the function of the Structure Note, of which Mr Conway, Mr David Conway and Mr Tucker-Brown were well aware, it would make no sense for Galliard to contribute to the development of a Structure Note dealing with part only of the transaction.

Discussions between Galliard and Howard Kennedy on the drafting of the FSC

71. The Structure Note (which was finalised on or around 19 February 2004) was adapted so as to form the "**Introduction**" to the pack of documents shared with panel solicitors. The version of the Introduction current as at 23 June 2004 (and so after the FSC was executed) began:

> *we [Howard Kennedy] act on behalf of Galliard Hotels Limited ("the Vendor") with regards to the sale of flats [sic] at the Addington Street Hotel site London SE1 ("the Property").*

72. The Defendants point out that this wording is slightly different from the wording in the Structure Note (which defined the "Property" by reference to the whole "development site at Addington Street" without any reference in that definition to the Hotel). I see no such significance. The purpose of the Structure Note was to record Mr Philips's understanding of the entire transaction which he was being asked to document. It is natural, therefore, that he should adopt a definition of "Property" that focuses on the whole development site. By contrast, the Introduction was intended to be read by solicitors acting for Investors. Those investors were interested in acquiring Rooms in the Hotel and it is therefore natural that the opening sentence of the Introduction should describe the transaction in which Investors were interested.

73. Paragraph 24 of the Introduction confirmed that, once all of the Rooms had been sold and the Rental Guarantees expired, Galliard Hotels would transfer the freehold of the "Property" to SBHMC.

74. As noted in paragraph 55 above, one of the documents to be included in the title pack provided to prospective investors' solicitors was an executed copy of the FSC. The reason for its inclusion was so that prospective investors would see that the promise to deliver the freehold to the Site (which was emphasised in the Structure Note) was backed up by a written contract that was enforceable under the Law of Property (Miscellaneous Provisions) Act 1989.

75. The FSC was prepared in a rush. On 5 February 2004, Mr Philips told Mr Lucas that he had prepared a first draft of that contract. On 24 February 2004, Mr Philips was still not sure which company would be acting as the "property management company" in his words and, until there was a clear view that contract could not be executed. The FSC was executed on 24 February 2004 just in time for Mr Philips and others to catch their flights to Hong Kong for the sales event.

76. The signature on behalf of SBHMC on the FSC reads "Howard Kennedy". Mr Philips sent Mr David Conway a letter on 25 February 2004 confirming that he had been instructed to exchange the FSC the previous day. I infer that, having received Mr David Conway's authority, Mr Philips wrote his firm's name in the signature block for SBHMC. I am unable to reach any conclusion as to who signed the FSC on behalf of Galliard Hotels and simply record the uncontroversial fact that the contract was duly executed on behalf of both parties. I have concluded, however, that Mr David Conway, checked with Mr Conway before giving Mr Philips instructions to exchange the FSC.

77. With the hindsight that comes from knowing that the FSC is at the heart of this dispute, it might be wondered why such an important document was prepared and executed in relatively short order. The answer is that, in February 2004, it was not perceived as an important document at all. Mr Conway had made the commercial decision that Galliard was not interested in collecting a ground rent from Investors. Moreover, the FSC was to be entered into between two companies that were under common control. From the correspondence circulating at the time the FSC was executed it is apparent that it was not thought to be particularly important. Nor was it suggested at the time that particular care was needed as to its terms because SBHMC would ultimately come to be controlled by Investors.

78. There was a good amount of cross-examination devoted to the question of who at Galliard "reviewed" the terms of the FSC before it was executed. I do not consider that it was subjected to any detailed review from Galliard personnel (including Mr Conway) for at least the following reasons:

    i) The FSC was not regarded as terribly important for the reasons set out in paragraph 77. Mr Conway would, therefore, have regarded the drafting and execution of the FSC as a matter almost entirely for Howard Kennedy.

    ii) Mr David Conway, with whom Mr Philips had been liaising on the terms of the FSC did not have the expertise to review it critically as he was, at that stage, a relatively junior employee of Galliard with responsibility for sales.

iii) Mr Philips did not consider that he needed anyone at Galliard to perform a detailed review of the FSC as he considered his instructions to be clear given that the Structure Note had been approved.

79. However, Mr Philips must have obtained instructions from Galliard personnel of at least some aspects of the detail of the FSC since that document contained bespoke provisions, considered in more detail below, for SBHMC to give Galliard Homes access to an "Office Unit". In none of those discussions was Mr Philips told of any need to retain an interest in any part of the Site.

The collective investment scheme issue

80. One of the legal issues that concerned Galliard and Howard Kennedy in 2004 was whether the Project would amount to a "collective investment scheme" ("**CIS**") for the purposes of the Financial Services and Markets Act 2000 ("**FSMA**"). If the Project did involve investors participating in a CIS, a number of regulatory consequences would follow, particularly with regard to the advertisement and promotion of the Project.

81. Section 235(1) of FSMA defines a CIS as:

> *any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements… to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property…*

82. Howard Kennedy was concerned that this definition was apparently satisfied because, at a high level of generality, Investors would be sharing in profits or income arising from the operation of the Hotel. They took the advice of counsel, Mr Robin Potts QC on the point.

83. Mr Potts QC's advice on the issue was premised on the proposition that there was no "pooling" of "profits or income" arising from the operation of the Hotel for the purposes of s235(3)(a) of FSMA. He considered that absence of pooling to be demonstrated by the fact that if a particular Room was empty, the Investor owning that Room would obtain no income and make no profit.

84. I have concluded that, if Howard Kennedy had been told prior to execution of the FSC, that SBHMC would, in due course, obtain the Annex separately from the Hotel, they would have considered that to raise additional CIS issues. Those issues would have arisen because they called into question the premise of Mr Potts QC's advice as they could result in an Investor obtaining income from the commercial exploitation of the Annex even in circumstances where that Investor's own Room was standing empty.

85. However, that does not mean that the issues would have been insuperable. On learning of a potential revenue stream that was potentially being "pooled", Howard Kennedy would have considered whether there truly was a risk of a CIS arising. I have concluded that, if this issue had been considered at the time, the overall conclusion would have been that rent from the Annex would be unlikely to cause the Project to become a CIS.

86. The reason is that this is, in effect, the situation that the Project actually came to face without any suggestion being made that it gave rise to a CIS. As was convincingly

demonstrated during the course of the cross-examination of Mr Tucker-Brown, two Rooms with identical occupancy rates could generate different amounts of revenue for their respective owners because of income generated by communal facilities such as conference rooms, restaurant and bar. That raises the inference that the basis for the allocation of such communal income is by reference to a factor other than pure occupancy rates of the Room concerned. Yet there has never been any suggestion that this feature of the arrangements gives rise to a CIS.

87. The Defendants counter this line of reasoning by arguing that what matters is not the actual position under the CIS legislation but rather how relevant personnel would have viewed it at the time. I agree with the premise of that argument, but I do not accept the conclusion that the Defendants consider to flow from it.

88. The people considering the CIS issue in 2004 were Mr Tucker-Brown and Howard Kennedy. Mr Conway was aware in 2004 of the existence of the CIS issue since, if Galliard was promoting an unregulated collective investment scheme, that could result in personal sanctions for him. However, he was not on top of the detail as to what was, or could, amount to a CIS. That was an archetypal example of the issue that he would leave to his lawyers to resolve. Therefore, the true question is how Howard Kennedy and Mr Tucker-Brown would have perceived the issue in 2004.

89. Mr Tucker-Brown's evidence set out in his witness statement was to the effect that SBHMC's claim in the present proceedings for a beneficial interest in the Annex runs contrary to the interests of Investors. He bases that assertion on a proposition that, if SBHMC successfully obtain the Annex and derive income from leasing it out (for example) there would be pooled income for the benefit of Investors with the result that the Hotel will become a CIS. He reasons that:

> *Income that SBHMC could generate from letting out the Annex is different to the income generated by (e.g.) the restaurant in the Hotel. The income that I, as an Investor, make from the restaurant in the Hotel is entirely dependent on how many people I have booking my room. If no one stays in my room, I make no money on the restaurant or other guest services.*

90. Mr Philips said that he had a similar understanding in 2004. However, the problem with Mr Tucker-Brown's analysis is twofold. First, he is wrong to say that the income Investors make from the restaurant in the Hotel is entirely dependent on how many people book that Investor's Room (see paragraph 86 above). Second, both he and Mr Philips were wrong to believe that, in 2004, there was a distinction between "Hotel income" and "other income" from a CIS perspective. In my judgment, both Mr Philips and Mr Tucker-Brown have mis-remembered the precise nature of the CIS issue as it confronted the Project in 2004 and have overlooked the fact that Galliard believed at the time that they had a satisfactory way of dealing with CIS issues arising from the receipt of income not directly connected with guests' occupation of Rooms.

91. The solution that Galliard believed they had was for non-Room income to be applied in discharging expenses in which Investors would otherwise be required to share. That was considered to give Investors the economic benefit of that income (in the form of reduced expenses) without an actual "pooling" of the income that would give rise to a CIS concern. Mr Georgiou referred to the solution as informing the marketing of the

investment to some of the later purchasers and Mr Philips alluded to the solution at point 10 of a memo that he wrote in 2006.

92. Accordingly, at the time of the FSC in 2004:

    i) Neither Mr Conway nor other relevant individuals at Galliard would, subjectively, have considered that there would be a CIS problem if SBHMC acquired an interest in the Annex and generated income from that Annex whether by letting it as separate office space or, following an amendment to planning permission, using it to house conference facilities for the Hotel.

    ii) A reasonable observer would not consider either that SBHMC's acquisition of an interest in the Annex would give rise to a CIS problem.

The "flying freehold" issue

93. SBHMC invites me to find that, if the FSC as executed in 2004 had provided for the Annex (when constructed) to continue to belong to Galliard Hotels, the resulting "flying freehold" would have created significant difficulties. I will not make any such finding.

94. I conclude from the evidence that both Galliard and Howard Kennedy would prefer to avoid either the creation of, or the acquisition of, "flying freeholds". That is because the "flying freehold" can be difficult to sell. Moreover, lenders can be concerned at advancing money on the security of a "flying freehold".

95. However, even if the Annex had been excluded from the sale to SBHMC, and thereby became a "flying freehold", I do not consider that the consequences would have been particularly severe in the circumstances. First, since the issue did not affect the Rooms that Investors were to acquire, but rather affected a different part of the Site altogether, it would not have affected Investors' ability to obtain loans secured on Rooms. Nor do I consider that the "flying freehold" issue would have had any material bearing on Galliard's own ability to raise finance. Galliard had raised the finance that it needed when it originally acquired the Site from Frogmore and, even if the Annex had been retained as a "flying freehold", it was such a small proportion of the Site as not to constitute much of a problem from Galliard's perspective.

PART C – FACTUAL FINDINGS 2004 TO 2008

The 2004 request to Mr Philips about retaining the freehold

96. By 1 June 2004, the FSC had been executed. The Hong Kong sales event had taken place, but other sales events were coming up in London. On that date, Mr Philips wrote an important letter to Mr Conway. That letter started by summarising a question that Mr Conway had raised on a telephone call on 28 May 2004 namely:

> *... whether or not it would be possible to retain the freehold to receive the benefit of any rental income in respect of the various commercial parts of the hotel.*

97. The problem that Mr Philips identified with the proposal was that:

> *... The sales literature was prepared on the basis that the freehold of the site would be transferred to the management company, and that the management company would be owned by the unit owners after a period of 5 years.*
>
> *This means that it would not be possible to retain ownership of the freehold.*

98. Mr Philips canvassed the possibility of granting a long lease of "certain of the commercial areas" to a Galliard group company which would then under let the relevant commercial units to service suppliers. He concluded that such a transaction simply could not work in relation to areas such as the gymnasium. He then wrote:

> *Even in respect of the areas that may potentially be treated in this manner (such as the hairdressers, restaurants and newsagents), I'm concerned that when we were issuing papers and when we were marketing the units in the first place no reference to this was made.*

99. Of course, there was another potential reason why Galliard could not "retain ownership of the freehold": by the FSC, Galliard Hotels was contractually obliged to transfer the freehold to SBHMC. That Mr Philips did not immediately alight on this potential objection further demonstrates the perceived relative unimportance of the FSC at the time. In Mr Philips's mind, the significant point was that Investors had been told that SBHMC would obtain the freehold of the site in five years' time. The significance of the FSC, as noted in paragraph 74, was simply in emphasising to Investors the enforceability of that promise.

100. SBHMC argues that this advice would have made it clear to Mr Conway in May 2004 that Galliard had no legal right to retain any ownership interest in the Annex. It reasons that (i) the "newsagent" to which Mr Philips was referring was intended to be located in the Annex and therefore (ii) Mr Conway must have known from Mr Philips's advice that Galliard could not retain any ownership interest in the Annex. I do not accept that.

101. Certainly, later in the course of development of the Project, there was a brief suggestion that a retail unit be located on the ground floor of the Annex (see paragraph 113 below). Mr August confirmed in his oral evidence that this was because a retail unit in the Annex might be able to attract custom from passers-by. However, I do not consider that in May 2004 there was any firm proposal for a newsagent to be located in the Annex once built.

102. In my judgment, there are two significant factors arising out of this advice. First, on being told that Galliard could not retain any part of the freehold interest in the Site, Mr Conway did not respond with surprise by saying that the Annex at least could surely be retained. That points away from him having a clear understanding throughout that the Annex was to remain with the Galliard group. Second, Mr Conway accepted the advice at least until 2008 when he revived suggestions connected with the Annex.

The introduction of Park Plaza

103. The Galliard group's expertise lay largely in residential property development. Operating the Hotel would require it either to acquire expertise in hotel management or to engage a third party to provide that service. In March 2005, Mr Conway had lunch

with Mr Boris Ivesha of the Park Plaza hotel group and following further discussions, Park Plaza agreed to become the Hotel's operator.

104. Park Plaza brought to bear extensive experience in hotel management. One of Park Plaza's insights was that communal facilities within a hotel are capable of having a beneficial effect on room revenue. For example, extensive conference facilities at a hotel might attract block bookings of rooms from people attending a conference in question. Accordingly, some time in May 2005, Mr Ivesha indicated to Mr Conway that, if Park Plaza was to operate the Hotel, it would wish to locate certain communal facilities in the Annex.

105. Initially, Park Plaza's focus was on using space in the Annex as additional luggage storage space, perhaps sharing that space with a hotel, also owned by Galliard, across the road which benefited from a connection through an underground tunnel. However, Park Plaza came to believe that the Hotel would also benefit from additional conference facilities on the upper floors of the Annex.

106. Mr Conway accepted in cross-examination that he approved Mr Ivesha's proposal in principle before a meeting between Mr Ivesha and BUJ that took place on 24 May 2005 to discuss how his suggestions would affect the design of the Hotel. In closing, Galliard suggested that Mr Conway may have been mistaken and his discussions with Mr Ivesha may have taken place later, perhaps in June 2005. However, I do not consider that the precise timing of the meeting between Mr Conway and Mr Ivesha matters greatly.

107. The minutes of the meeting between Mr Ivesha and BUJ of 24 May 2005 record as follows:

> *1.17 Suggested Amendments to increase space for back of house & provide payback for taking Annex Building*
>
> - *basement conference rooms removed from basement with the additional space given over to provide larger back of house facilities e.g. house door, clean linen store, dirty linen store, maintenance store and maintenance workshop;*
> - *Annex building to be linked into hotel and made into Conference Rooms;*
> - *Executive lounge to be created at rear of Annex building with use of terrace;*
> - *14th floor Executive Lounge to become an additional suite. If additional space can be squeezed from the plant room two suites might be created;*
> - *Suite added at 1st floor level between gridlines K and L in part of space currently designated to Administration Offices.*

108. The first, second and third bullet points in the above quotation referred to the location of facilities in the Annex. The nature and significance of the "payback" referred to in the fourth and fifth bullet points was disputed. SBHMC argues that the use of this term demonstrates that, in 2005, Galliard received something in return for making the Annex available to the Hotel with the result that the Annex Lease Scheme represented a

dishonest attempt to obtain payment again. By contrast, Galliard argues that the very fact that some "payback" for use of the Annex was envisaged in 2005 is consistent with its case that the Annex was always intended to be held back for Galliard's own use.

109. In my judgment, the focus on the word "payback" is misplaced. The word appeared in minutes of the relevant meeting prepared by Mr Mills, an architect at BUJ. Mr Mills was not adjudicating on the competing rights of SBHMC and Galliard to the Annex building. Rather, he was seeking to design a Hotel that would be profitable. Mr Ivesha's proposals involved additional construction costs. They also raised the possibility that someone (Mr Mills did not need to decide who) would not be able to use the Annex which was to be made available to the Hotel. It was natural for Mr Mills, as a commercial architect, to consider ways in which any additional cost could be recovered by using space freed up to create additional Rooms that would increase the Hotel's revenues.

110. I find that Mr Conway did not consider in 2005 that he was receiving "payback" that compromised any claims Galliard might otherwise have to ownership of the Annex. While Mr Conway would have been made aware of the additional construction cost to which Mr Ivesha's proposals gave rise and would have been aware of proposals to mitigate that cost by using space freed up to produce extra Rooms, I do not consider that at this stage Mr Conway was approaching the question as one involving "ownership" of the Annex. He was simply seeking to take on board Mr Ivesha's suggestions as to how the operation of the Hotel could be improved.

111. However, I have inferred that the discussions with Mr Ivesha in 2005 resulted in a change in the way that Mr Conway viewed the Annex. Until then, the Annex had been a drawing in an architect's plans, that had been taken from the Gensler proposal simply because it was thought to improve the prospects of obtaining planning permission for the Hotel. The discussions with Mr Ivesha showed Mr Conway that (i) the Annex now needed to be used as part of the Hotel; (ii) Galliard was being put to expense in consequence; and (iii) Investors would obtain some benefit from that expense. Although Mr Conway did not have an understanding of the detail of the transaction, this outcome jarred with his understanding of it since he did not think that the Annex formed part of the investment proposition made to Investors. While he had authorised Mr David Conway to instruct Howard Kennedy to exchange the FSC, his grasp of the detail of the transaction was insufficient to enable him to realise that the FSC ostensibly involved an agreement to transfer the entire title to the Site.

112. Galliard invites me to find that Mr Conway told Mr Ivesha during discussions with him that SBHMC would have to pay a market rent for the Annex. I will not do so. There is no record of such a discussion in the contemporaneous documentation. Therefore, the evidence in support for the proposition consists entirely of Mr Conway's recollection of a conversation with Mr Ivesha which took place nearly 20 years ago. The fact that Mr Ivesha has not himself been called as a witness also points against me making the findings for which Galliard argues.

113. Following the agreement to incorporate the Annex into the Project, Mr Mills prepared some preliminary drawings, circulated to Mr Ivesha and to Mr August, reflecting those changes. I have concluded from those drawings and Mr Mills' covering email of 13 June 2005 circulating them that the proposal involved conference facilities being

included on the first and second floors of the Annex. The proposal also involved "creating a small space for a convenience shop at ground floor in the Annex".

Further amendments to planning permissions

114. The proposal to use the Annex as part of the Hotel necessarily required a change of use application to be made to Lambeth since both the 300 Room Permission and the 394 Room Permission were conditional on the Annex being used in Class B1/D1 which was inconsistent with its use as part of the Hotel.

115. However, amendments to the planning permission did not proceed in a linear fashion. In February 2005, before the decision to incorporate the Annex into the Hotel was taken, Galliard had applied to vary the 394 Room Permission so as to secure planning permission for a scheme that involved the Hotel having 396 rooms (the "**396 Room Scheme**"). The 396 Room Scheme involved a considerable extension to the basement of the Hotel so that it would have a "similar size to the approved office scheme". The 396 Room Scheme envisaged that the Annex would continue to have use class B1/D1.

116. Galliard secured planning committee approval for the 396 Room Scheme. However, it never secured a full planning permission for that scheme.

117. Galliard, with the approval of Lambeth, effectively bypassed the 396 Room Scheme applying instead in September 2007 for retrospective planning permission for a hotel comprising 398 rooms (the "**398 Room Permission**"). The 398 Room Permission effectively incorporated aspects of the 396 Room Scheme including the extended basement of the Hotel but overlaid that scheme with the changes that Mr Ivesha had requested. Accordingly, the 398 Room Permission had the following features so far as material:

    i) the extended basement that forms part of the 396 Room Scheme;

    ii) 398 rooms, including the additional rooms that had been created as part of the "payback" described in paragraph 109;

    iii) a change of use from the Annex to Class C1 (Hotels and Hostels).

118. The change described in paragraph 117.iii) was incompatible with the Annex being used as a retail unit (Class A1). It appears as though Galliard decided on 9 May 2006 that it no longer intended the ground floor of the Annex to be used as a retail unit partly because they intended to locate storage space for the Hotel on the ground floor of the Annex.

119. The parties disagreed as to the extent to which incorporation of the Annex into the Hotel resulted in increased amenities (Galliard's position) or rather reduced amenities and an increase in the number of Rooms to Galliard's commercial benefit (SBHMC's position). Galliard had the better of that argument. Certainly in its final form, the Hotel had 398 Rooms rather than the 394 for which Galliard had planning permission when the Project was initially being marketed. Those extra four rooms gave Galliard a commercial benefit. However, the economics of the Hotel were significantly improved by accommodating Park Plaza's wish for greater conference facilities located in the Annex. Moreover, Mr Conway genuinely and reasonably thought that inclusion of the

Annex would improve the economics of the Hotel to Investors' benefit. Indeed, that was one of the reasons why incorporation of the Annex into the Hotel jarred with his high-level understanding of the transaction (see paragraph 111).

Ongoing marketing of Rooms following incorporation of the Annex

120. Before June 2005, 240 Rooms had been sold. It follows that, at the time the Annex was incorporated into the Hotel, over 150 Rooms, representing over 30% of total Rooms, were unsold. Galliard continued to sell Rooms at sales events and similar up until the summer of 2008.

121. The unchallenged evidence of two Investors (Ms Gopinathan and Mr Grenfell KC) satisfies me of the following points:

    i) At least some Investors who acquired their Rooms after the Hotel was substantially constructed (including Ms Gopinathan) were taken on a tour of the Hotel and shown communal facilities including the meeting rooms in the Annex. An Investor receiving such a tour was not told that SBHMC would have to pay a separate rent for the use of those facilities.

    ii) At least some Investors who acquired their Rooms after the Annex was incorporated within the Hotel (including Mr Grenfell KC) considered it important that SBHMC should eventually acquire the freehold interest in all facilities that formed part of the Hotel's operation. Mr Grenfell KC had been bruised by a personal experience of making an investment in a block of flats in which the management company did not own the freehold title to the full site (in that case a porter's flat was excluded) and was determined to learn from that experience.

    iii) Some Investors (including both Mr Grenfell KC and Ms Gopinathan) thought that the conference and other facilities at the Hotel were a "selling point" that was material to their decision to invest. I infer, therefore, that Galliard took some steps to highlight the availability of conference and other facilities in its marketing materials and "pitch" to potential Investors.

122. Those conclusions are borne out by the contents of valuation reports prepared for lenders considering advancing money to Investors on the security of their Rooms. A valuation report dated 8 November 2007 prepared for Barclays included the following paragraph:

> *13.11 we are informed by Andrew Taylor of Galliard Homes Ltd that the common parts, to include the fitness centre, conference facilities, restaurant and bar are assigned by the freeholder to Park Plaza in the Management Agreement. Any profits from these ventures will be used to reduce the overheads of the Management Company and contribute to the running cost reducing outgoings. This then increases the profitability of the rooms.*

123. Galliard is, of course, correct to say that this statement was made in a valuation report (prepared by a valuer) and not in marketing materials (prepared by Galliard). However, since Mr Taylor was making statements to this effect to valuers in November 2007, I infer that Galliard's sales force would be making similar statements to prospective Investors.

PART D – GENESIS AND IMPLEMENTATION OF THE ANNEX LEASE SCHEME

Genesis of the Annex Lease Scheme

124. The origins of the Annex Lease Scheme are to be found in a memo that Mr Conway sent to Mr Philips by fax on 2 April 2008 (the "**April 2008 Memo**"). It was stated to be copied to Mr Galman, Mr Angus, Mr Martin Philips, Mr Ivesha and Mr August. Since the April 2008 Memo has been the subject of much analysis and cross examination, I quote it in full:

> *When we sold the hotel rooms at Addington Street the side access building was always staying out of the equation and was a building worth several hundred thousand pounds for us either to occupy as office or let.*
>
> *Perhaps John August could advise me of the exact size of the annex building.*
>
> *It transpired that Park Plaza due to the success of the hotel required additional conferencing and meeting facilities and we utilise the adjoining building without any charge whatsoever to the people who had already purchased flats.*
>
> *The hotel now looks as if it will be trading in excess of the rental guarantee payment of the five year period and I wonder whether it is too late to contemplate actually rentalising the annex building back into the Park Plaza lease.*
>
> *Please advise.*

125. Whether Mr Conway was correct to say that the Annex was "always staying out of the equation" is, of course, a question that I must decide by reference to the totality of the evidence. It is, therefore, premature to express any factual conclusion on the first paragraph of the April 2008 Memo. However, I will address other criticisms that SBHMC makes to the effect that the memo represented a fundamentally dishonest attempt by Mr Conway to "spin" the facts to persuade his lawyer, Mr Philips, to issue advice to the effect that Galliard could indeed retain a rental stream on the Annex.

126. The first criticism is that Mr Conway deliberately downplayed the value of the Annex, presenting it as being just worth "several hundred thousand pounds" when, as Mr Conway accepted in cross-examination, its true value was between £1.2m and £1.5m. I do not accept that. When saying that the Annex was worth "several hundred thousand pounds", Mr Conway was emphasising that it had a genuine and real value. If he had wished to give a different impression, he might have said that the building was worth "a few" hundred thousand pounds. Moreover, in the next sentence, Mr Conway shows that he was not sure of the exact size of the Annex and so could not have been intending to convey any fixed impression of the Annex's actual value.

127. SBHMC is correct to observe that, as at 2 April 2008, the Hotel had been trading for just a couple of months. It was, therefore, too early to gauge the "success of the hotel". Nor was it correct to say that the demonstrable success of the Hotel had driven the decision to require additional conferencing and meeting facilities. However, I am quite

unable to accept SBHMC's argument that the third paragraph of the April 2008 Memo was a fundamentally dishonest reimagining of the true position. As analysis of Mr Conway's other written communications demonstrates, he did not weigh his words with the precision of a lawyer. The overall meaning of his third paragraph is both understandable and accurate. Park Plaza knew the hotel business and their advice in 2005 had been that additional conferencing and meeting facilities were necessary for the Hotel to be successful. In that sense, it was accurate to say that the "success of the hotel required additional conferencing and meeting facilities" as that had been Park Plaza's advice that Galliard had followed.

128. Nor do I accept that the penultimate paragraph of the memorandum is misleading. Certainly it might have been optimistic to conclude that, based on two months' trading figures, the Hotel could be expected to produce results in excess of the Rental Guarantee over the next five years. However, if the Hotel was doing well so soon after it had opened, Mr Conway could be forgiven for having an optimistic view since it might be thought that performance could only improve as the Hotel became more well-known.

129. SBHMC also argues that the April 2008 Memo glossed over the fact that the incorporation of the Annex into the Hotel took place during the middle of the sales programme rather than after all Rooms had been sold. However, that criticism overlooked the fact that the stated purpose of the April 2008 Memo was to obtain advice and indeed the memo had been copied to Mr Galman who had been leading on sales of Rooms.

130. Nor do I accept that, in asking whether it was "too late" to rentalise the Annex, Mr Conway was tacitly revealing that he knew Galliard Hotels was under a contractual obligation to transfer the freehold title to the Annex. Rather, the reason Mr Conway was worried it might be "too late" was because he realised that he had done nothing to follow up on the issue that had nagged him following his discussions with Mr Ivesha in 2005 (see paragraph 111).

131. I therefore reject SBHMC's arguments that the April 2008 Memo was a fundamentally dishonest exercise in "revisionism". Certainly, Mr Conway was aware that there were issues associated with his proposal to "rentalise" the Annex. However, that is why he sought advice on it. If Mr Conway had truly wished to appropriate an Annex to his own use knowing that he was not entitled to it, he could have done so much more straightforwardly by not asking for advice at all and bypassed Mr Philips's extensive knowledge of the Project by instructing a completely different firm to prepare the necessary documentation.

The consultation with Galliard's marketing function and whether it was "rigged"

132. Mr Philips responded to the April 2008 Memo in a letter dated 3 April 2008. As with his response to the earlier similar query in 2004 (see paragraph 97 above), Mr Philips's initial concern was not with the terms of the FSC but rather with the nature of the promise that had been made to Investors. In his letter, Mr Philips asked for a plan of the area in question, which was consistent with his lack of awareness of the Annex at the time he was drafting documentation in 2004. He also raised two issues.

133. He described the first issue (which I will term the "**Common Parts Issue**") in the following terms:

> *Were any of the purchasers informed that the area in question was to form part of the hotel, and that the hotel would have free use of it as part of the common parts? If they were, then there may be a problem. Nothing was contained in the legal documentation in this regard, and as such, it would simply be a case of whether or not any of the sales staff mentioned this.*

134. He described the second issue (which I will call the "**Integrality Issue**") as being whether the area in question would be needed in order for the Hotel to be used as a hotel. He gave the following example:

> *... a hotel would clearly need a reception desk, and as such, a reception desk would need to be included within the common parts, and would also probably require restaurant facilities, but would not (for example) need three separate restaurants, and as such in that case, at least two of the restaurants could be treated as separate to the hotel.*

135. Having identified these issues, he said that:

> *If it is the case that the conference facilities are not integral to the use of the hotel as a hotel, and that no one was told that they would be included as part of the common parts for the hotel, then I do not foresee any problem with entering into a tenancy agreement in favour of Park Plaza in relation to those conferencing facilities.*

136. SBHMC is critical of what it argued to be Mr Philips's apparently unquestioning acceptance of Mr Conway's assertion that the Annex was "always staying out of the equation". However, I regard that criticism as misplaced at least in relation to his initial advice. With the benefit of hindsight, it can be seen that Mr Philips's letter of 3 April 2008 overlooked an important point: namely the possibility that the FSC might preclude any dealing with the Annex in the way Mr Conway was suggesting. Having overlooked that point, Mr Philips was not approaching matters on the footing that he should advise on the possibility of a claim for rectification of the FSC. He did not, therefore, at this stage consider that he needed to probe the existence or otherwise of a particular common intention at the time the FSC was executed and there is nothing untoward in the fact that he did not do so.

137. Also with the benefit of hindsight, it can be seen that Mr Philips's formulation of the Common Parts Issue was not as precise as it could have been. The concern he was articulating could be understood as relating to either (i) ownership of the Annex (i.e. whether Investors had been told that title to the Annex would pass to SBHMC); (ii) income from facilities in the Annex (i.e. whether Investors had been told that SBHMC would be entitled to any revenue generated by those facilities undiminished by any requirement to pay rent for the use of the Annex); or (iii) whether Investors had been told about the existence of conference and other facilities located in the Annex specifically.

138. Mr Conway sent an email on 3 April 2008 to members of his sales team (Mr Georgiou, Mr Taylor and Mr Galman). He copied that email to Mr Philips. He asked for input from his sales team on the Common Parts Issue in the following terms:

> *David Galman and the sales team could they please report urgently as to whether any purchasers were under the impression that the annex building with the conferencing rooms would be included in the sales.*
>
> *It could only possibly be the very latest purchasers because we did not know about it ourselves till very late.*

139. SBHMC's case on Mr Conway's dishonesty involves the assertion that Mr Conway "rigged" this consultation process so that it produced a favourable response which could then be presented to Mr Philips to induce him to sign off on the Annex Lease Scheme. For reasons that follow, I reject that proposition.

140. I have concluded that there was some financial reason why Mr Conway perceived the "rentalising" of the Annex to be "urgent". On 8 May 2008 when Mr Conway thought that progress on the Annex Lease Scheme was not as rapid as he had hoped, he sent a terse chasing email to Mr Angus and Mr Philips saying simply "Rentalisation. Annexe pse. April 500k" which suggests that some monetary result hinged on the conclusion of the Annex Lease Scheme. That conclusion is also consistent with the fact that in 2008 a global financial crisis was looming.

141. Mr Conway's formulation of the question on which he wanted the sales team to report back could quite reasonably be read as asking about all three possible representations summarised in paragraph 137. Mr Conway's email prompted Mr Galman to chase his team in the following terms:

> *Final chance to comment on this please*
>
> *Do owners expect the income from this to go to management co?*
>
> *I know they expect bar and restaurant revenue but in terms of the annexe I don't think they even know it exists*
>
> *we never discussed [conf and banq] in terms of add St, as we sold as bed factory Most sale came before park plaza*
>
> *Yes we did for west bridge*
>
> *I've led the witness a bit But def not any documents in marketing or legals?*
>
> *Please all confirm?*

142. Mr Georgiou responded as follows:

> *David*
>
> *I replied to everyone last week confirming that there isn't any marketing literature about income from annexe paid to management company. It's also not in Gerards presentation.*

> *Towards the end of County Hall we may have mentioned verbally to a few purchasers about the conferencing facilities but nothing was ever confirmed in [writing]…*

143. SBHMC characterises these responses as being driven by Mr Conway's wish to "rig" the process. Accordingly, SBHMC argues that Mr Galman and Mr Georgiou were focusing not on providing unvarnished answers to Mr Philips's questions, but rather on whether there was an "audit trail" that could catch Galliard out in a lie when, as anticipated, Mr Philips was told that the Common Parts Issue was not a problem.

144. I am unable to accept that characterisation of what happened. The emails were simply not practised enough to be laying out the groundwork for a misleading response to Mr Philips. Mr Galman's comment that he had "led the witness a bit" is imbued with a significance that it did not possess at the time. Mr Galman was simply saying that, as well as seeking views from his colleagues in the marketing department, he was also setting out his views. Moreover, if Mr Conway truly had asked Mr Galman and his colleagues to look for "smoking gun" documents to pave the way for a misleading confirmation from Mr Philips, there might at least have been some consistency between the responses of Mr Galman and Mr Georgiou. Yet both responses referred variously to Investors' awareness or otherwise of the existence of the Annex and the treatment of income from conferencing facilities. Neither response said anything about what Investors had been told about the ownership of the Annex.

145. I conclude that the process of canvassing the views of Galliard's marketing function on the Common Parts Issue produced responses that were broad brush and imprecise not least because it was unclear precisely what question they were being asked. Moreover, since their response was being sought in a short time scale, there was nothing sinister about the fact that their response is focused on written material since that material could be expected to provide the quickest answers to Mr Conway's questions.

146. On 8 April 2008, Mr Conway gave Mr Philips a confirmation on the Common Parts Issue to the effect that:

> *I do believe David Galman has confirmed that the purchasers were never aware that this was going to be part of the building and it was only included that Boris's request at this extremely late stage.*

147. As I have explained, there were imperfections in the way that Galliard's marketing function was consulted on the questions that Mr Philips had raised. However, I conclude that Mr Conway genuinely raised those questions with his marketing team who made a genuine and good faith attempt to answer them. I do not consider that Mr Conway gave the confirmation knowing that it was untrue or that it had been procured as part of a rigged process.

148. On 14 April 2008 Mr August confirmed to Mr Philips that the "conference facilities are not integral to the hotel". That confirmation was given together with other confirmations as to the ultimate terms of the Lease and Underlease with Mr August accepting in cross-examination that he probably gave the confirmation on Mr Conway's instructions. SBHMC suggests that this confirmation could not have properly been given and Mr Conway knew it was suspect. I do not accept that. Mr Philips had explained the nature of his concern on the Integrality Issue. Mr Conway could quite reasonably form the view that the Hotel could be operated without conferencing

facilities in the Annex even though those were clearly desirable. I acknowledge that, by 29 May 2008, Mr Philips realised that the Annex was physically attached to the Hotel and so both provided structural support to the Hotel and relied on structural support from it. However, that does not alter my conclusion. In my judgment there is a real distinction between the Annex being "integrated with" the Hotel and being "integral to" it.

Settling the structure of the Annex Lease Scheme

149. By the time of Mr Conway's terse email of 8 May 2008 (see paragraph 140 above), Mr Philips had received confirmations on both the Common Parts Issue and the Integrality Issue. That left the question of how to achieve the desired result of "rentalising" the Annex. Mr Philips's initial suggestion was that SBHMC should grant a long lease to a Galliard group company with a sublease being granted back to SBHMC at a rack rent. On 9 May 2008 Mr Philips sent a memo to Mr Conway, Mr Angus and Mr August seeking instructions on matters such as the premium for the long lease (question 7 in that letter) and the rent payable under the sublease.

150. SBHMC places some emphasis on Mr Conway's response to question 7 relating to the premium for the long lease in an email of 12 May 2008 in which he wrote:

> *Point 7 an oversight we were always going to receive value for annexe u advise best method. [Mr Angus] to advise size of building before finally advising initial rent after five yrs retail price index annually ...*

151. SBHMC characterises this as a further instance of Mr Conway seeking to "paper" the file with spurious contemporaneous references to the "oversight" in relation to the Annex. I do not accept that. Read in context, Mr Conway was giving Mr Philips a good degree of latitude to advise on the "best method" for the Annex Lease Scheme. That "best method" was to take into account Mr Conway's assertion that there had been some sort of "oversight".

152. Mr Conway's email of 12 May 2008 did not express any views on how the Annex could best be retained within the Galliard group. On the contrary, Mr Conway asked Mr Philips to decide on the best method. Mr Philips appears to have misinterpreted the email as suggesting that the "rentalisation" of the Annex could be achieved by way of a single lease. That emerges from a postscript that Mr Philips added to a letter of 12 May 2008 (the "**PS Letter**") as follows:

> *PS since dictating the above I received in Stephen's e-mail dated 12 May 2008 timed at 8:32 AM. The problem is, if you simply granted a rack rent lease out of the freehold title, after the 5 year income agreements expire, the freehold would need to be transferred to the residents and at that stage the residents would therefore receive the benefit of the rent payable in relation to the annex building. The best way to therefore deal with the matter would be for a long lease to be granted at this stage to a Galliard group company. That Galliard group company can then hold the benefit of that long lease, and grant a rack rent lease to the management company. The management company would then pay the rent to the Galliard group*

> *company, and when the freehold was transferred, the residents would only be entitled to the peppercorn rent payable by the Galliard group company.*

153. In this postscript, Mr Philips was addressing a point that Mr Conway probably had not raised. However, it explains why he reiterated his request for details of the premium payable for the long lease and the identity of the Galliard group company to which it was to be granted. The postscript is also significant because it shows that by 12 May 2008, Mr Philips was beginning to realise the significance of the FSC.

154. I have concluded that, from at or around 12 May 2008, Mr Philips realised that the proposal to "rentalise" the Annex was more complicated than he had originally thought. The viability of the proposal did not depend only on what Investors had been told by Galliard's salesforce. Rather, it was also necessary to consider whether the proposal would be at odds with the terms of the FSC.

155. After the "PS letter" of 12 May 2008, there was a noticeable change in the emphasis of Mr Philips's advice. First, there was a "wobble" on 16 May 2008 in which he canvassed the idea that, rather than proceeding by way of a lease/ underlease transaction, it might be better to transfer out part of the freehold interest in the Site to a Galliard group company. He explained his thinking in the second paragraph of that letter as follows:

> *As discussed, my concern is that after the 5 year income agreements expire, the freehold of the Addington Street hotel needs to be transferred over to the management company, and although none of the unit purchase[r]s were told that the annex building forms part of the hotel, I would not want them to be able to claim that it does.*

156. The theme of guarding against potential claims by dissatisfied Investors also appeared in paragraph 2 of the same letter in which Mr Philips suggested that it would be a good idea for Park Plaza to write a letter formally requesting additional conferencing facilities with the transferee of the partial freehold interest, on receipt of that letter, granting a lease back of the Annex to SBHMC.

157. On 16 May 2008, Mr Porter queried why the Annex needed to be transferred out of Galliard Hotels Limited. In a letter dated the 19 May 2008, Mr Philips explained his reasoning as follows:

> *... I am concerned the purchasers of the individual units may try to classify the annexe as part of the hotel, and as such, the requirement to transfer the hotel would include a requirement to transfer the annex to the management company.*
>
> *If they ran such an argument and were successful, then you would lose the benefit of the rental stream.*
>
> *By separating out the annex at this stage, it is much less likely that purchasers of the units will pick this up in five years time.*

158. Mr Philips copied that explanation to Mr Conway who "replied all" by email on the same day "sounds sensible any conter" which must have been an invitation for anyone to express a contrary view. Significantly, Mr Conway was at this stage giving his

approval to a transaction involving a transfer out of part of the freehold. That was not the transaction ultimately implemented. By 30 May 2008 the idea of transferring out part of the freehold title was no longer current. Attention had focused back to a lease/leaseback structure and Mr Philips was seeking instructions on the terms of the leases. A letter of 30 May 2008 reveals some of Mr Philips's thinking on the terms of those leases. In general terms, Mr Philips said that:

> *the intention was to make [the head lease] as much as possible a lease of a piece of land [as opposed to a lease of the internal parts of a building), so that we could argue that the building itself was always supposed to be distinct from the hotel...*
>
> *I would be reluctant to include any specific right in favour of the annex building to utilise the internal common parts of the hotel, as clearly that would indicate that the annex building was tied into the hotel, and as such (unless you instruct me otherwise), I will not include such a right...*

159. Ultimately, the Annex Lease Scheme was implemented by means of a lease/leaseback structure on 16 June 2008. Both the Lease and the Underlease granted as part of that scheme were registered at HM Land Registry on 7 July 2008.

160. Later in this judgment I explain why, at the time of the Annex Lease Scheme, on a true construction of the FSC, SBHMC had a contractual right to a transfer of the entire freehold interest in the Site, including the Annex. Accordingly, the effect of the Lease was to deprive SBHMC of its economic interest in the Annex for no valuable consideration. By the Underlease, SBHMC retained the right to use the Annex, but it had to pay Lodgeshine a market rent in order to do so. The overall result was a transfer of value out of SBHMC and into Lodgeshine.

161. At the time of the Annex Lease Scheme, Galliard Homes held 100% of the shares in both SBHMC and Lodgeshine. Mr Conway owned 47.68% of the shares in Galliard Homes with the other shares being held by members of his family indirectly through a company incorporated in the Isle of Man. Therefore, if one "looks through" the various corporate entities, at the point of the Annex Lease Scheme, Mr Conway himself obtained no overall economic benefit as the increase in value of Lodgeshine's assets, in which Mr Conway had an indirect 47.68% interest, was matched by a reduction in the value of SBHMC's assets in which Mr Conway also had an indirect 47.68% interest. However, looked at over a broader timescale, Mr Conway did obtain an overall economic benefit. SBHMC would in due course be owned entirely by Investors with the result that Mr Conway would ultimately not bear the economic cost of the reduction of SBHMC's assets. However, he would retain an indirect 47.68% share in the corresponding increase to Lodgeshine's assets.

Mr Conway's perceptions on the Annex Lease Scheme

162. Mr Conway accepted in paragraph 70 of his third witness statement that at the time the Annex Lease Scheme was entered into, he realised that, without the grant of the Lease, the Annex would not be retained by the Galliard group but would ultimately have transferred over to SBHMC. It is, however, a matter of significant dispute why Mr Conway acted as he did. SBHMC's position is that he was motivated by a conscious

wish for Galliard to retain an interest in the Annex, knowing that it was not entitled to do so. Mr Conway's position, as set out in his third witness statement, is that any transfer of the Annex to SBHMC would involve a "mistake" and he was motivated by a wish to prevent that mistake from taking place.

163. SBHMC notes that Mr Conway made no assertion of a "mistake" in his first witness statement given in connection with Galliard's earlier application for summary judgment. It describes it as an "outrageous abuse" for Mr Conway to deploy evidence of a "mistake" now at trial, having not said anything about that matter when summary judgment was sought and having pleaded a positive case to the effect that he was not aware of the FSC until 2021.

164. I consider SBHMC's criticisms to be misplaced. Mr Conway was neither a lawyer nor aware of, or particularly interested in, the detail of the transaction involving SBHMC. I have concluded that following his discussions with Mr Philips, Mr Conway realised in general terms that the Annex Lease Scheme represented the method by which SBHMC would be prevented from acquiring the full economic interest in the Annex. I accept Mr Conway's evidence that he did not know of the FSC specifically at the time he approved the Annex Lease Scheme. Rather, he was aware in general terms that there was a contract that would otherwise operate to transfer the whole title to the Site including the Annex and the Annex Lease was intended to prevent that result. Mr Conway was simply not sufficiently on top of the detail to realise that this contract was the FSC that features so prominently in these proceedings.

165. Nor is Mr Conway's evidence that it would be a "mistake" if SBHMC acquired the Annex problematic. Mr Conway was not using that word in the way a lawyer would. It is consistent with his approach to matters of detail for Mr Conway to form the view that, to the extent SBHMC was to obtain the full economic interest in the Annex, that was both undesirable and at odds with his high-level appreciation of the transaction as it had been structured in 2004. That was what Mr Conway meant by a "mistake".

166. In my judgment, Mr Conway concluded that, if the Annex passed to SBHMC, something would have gone wrong at a general level. He had a general conception of the transaction as involving the sale of individual rooms in the Hotel and giving Investors a share in the freehold of the Hotel by virtue of their shared ownership of SBHMC. That general conception of the transaction did not involve the Annex at all. The "mistake" that Mr Conway described in his evidence was in substance the matter that had jarred with him in 2005 (see paragraph 111).

167. It was reasonable, in 2008, for Mr Conway to believe that there had been a "mistake" (in the sense he used the word) if the deal that his lawyers had documented in 2004 resulted in SBHMC obtaining ownership of the Annex. For that view to be reasonable, Mr Conway did not have to go back and perform a careful audit of everything that had been said in 2004 as if he were a lawyer considering a possible claim for rectification of the FSC. Mr Conway's view was reasonable because the deal that had been done in 2004 could be understood, at a high level of generality, as a transaction involving a hotel and a freehold interest in a hotel. In 2004, the Annex, when constructed could not lawfully be used as part of the Hotel and indeed was a separate building from the Hotel. In those circumstances, it was not unreasonable for Mr Conway to conclude that, even if the legal documents resulted in the Annex being treated as part of the deal, they ought not to have done.

168. I will not conclude that Mr Philips told Mr Conway in 2008 that there was a potential defect in the FSC specifically. Mr Conway's belief that I have described above did not depend on an awareness of a specific "mistake" in any specific contract. Nor will I conclude that Mr Philips told Mr Conway in 2008 that there might be a professional negligence claim against him or Howard Kennedy relating to the drafting of the FSC. Mr Philips said in cross-examination that he "may well" have told Mr Conway that he could take separate legal advice in respect of Howard Kennedy's actions. However, if Mr Philips had indeed done so, that would have been an important conversation that he would almost certainly have documented in writing given the general care that he took in this regard.

169. I also conclude that Mr Conway both genuinely and reasonably formed the view that Mr Philips had advised that the Annex Lease Scheme was an appropriate way to prevent a "mistaken" transfer of the Annex (again, in Mr Conway's sense of the word) to SBHMC from occurring which would not involve Galliard Hotels in a breach of trust or breach of contract. On 14 May 2008, Mr Philips had written to Mr Conway saying that there was "no problem with dealing with the matter as requested [i.e. by a lease/leaseback of the Annex] and all that I need to know from you is the name of the Galliard group company that will hold the long leasehold interest and whether or not a premium will be paid by that Galliard group company for that long leasehold interest". I have rejected the allegation that Mr Conway procured Mr Philips's sign off as part of a "rigged" process of consultation with his marketing team.

170. Subsequent to that, there was the brief "wobble" when Mr Philips had been considering whether a transfer of part of the freehold interest would be a better way of dealing with matters. In addition, Mr Philips came to realise that the FSC made the matter more complicated than he had initially thought. However, from Mr Conway's perspective there was nothing to call into question the reassuring advice that Mr Philips had given. Moreover, Mr Conway had a long-standing professional relationship with Howard Kennedy and reposed significant trust and confidence in them. Mr Conway concluded, reasonably, that if there was anything wrong with the Annex Lease Scheme, Mr Philips would have told him.

171. I do not therefore accept SBHMC's assertion that Mr Philips told Mr Conway that the Annex Lease Scheme would likely involve some kind of breach of the FSC, but Mr Conway decided to go ahead nonetheless. If Mr Philips had given advice to this effect, he would have documented it in accordance with his general practice.

172. Nor do I accept SBHMC's assertion that Mr Conway decided not to tell Investors about the Annex Lease Scheme in 2008 because he knew that it was wrong generally or involved a breach of trust or breach of contract. As I have explained, Mr Conway thought, following Mr Philips's advice, that the Annex Lease Scheme was permissible. He chose not to make a general announcement of it because he thought that some Investors might make what he regarded to be mischief even though the scheme was proper. That was a hard-nosed commercial decision and a different company director might well have preferred greater transparency. However, it was not a sign that Mr Conway knew that he had something to hide.

173. While formally disavowing any assertion that Mr Philips was party to an improper or dishonest implementation of the Annex Lease Scheme, SBHMC made a number of criticisms of his actions. SBHMC argues, for example, that Mr Philips was complicit in

giving a misleading impression of the Annex Lease Scheme in contemporaneous documentation by drafting documents so as to bolster the "argument" referred to in paragraph 158. In a similar vein, SBHMC criticises his advice summarised in paragraph 156 that Park Plaza write an apparently self-serving letter to SBHMC. I will deal with those criticisms because I accept that, Mr Philips's actions are capable of shedding some light on Mr Conway's state of mind.

174. I do not accept that the criticisms of Mr Philips are suggestive that either he or Mr Conway knew that the Annex Lease Scheme was impermissible. With hindsight, Mr Philips could have realised earlier that the permissibility or otherwise of the Annex Lease Scheme depended on the terms of the FSC and not just what Investors had been told. Mr Philips alighted on that issue relatively late in the process at or around the time of the PS letter. However, Mr Philips had been assured by Mr Conway that the intention had always been for the FSC to exclude the part of the Site on which the Annex was to be built. Moreover, at the time of the Annex Lease Scheme, SBHMC was still a member of the Galliard group. Mr Philips could usefully have enquired more deeply into the basis for Mr Conway's assurance as to the existence of the common intention. He could, perhaps have foreseen the difficulties that might arise if, after SBHMC left the group, Investors examined that asserted common intention and found it wanting. However, no allegation of fraud is made against Mr Philips and I will not find that he knew or suspected that Mr Conway's confirmation was doubtful. I conclude that Mr Philips was entitled to take at face value the assurance that Mr Conway had given him not least since Mr Conway was, at the time, the sole director of both SBHMC and Galliard Hotels. Understood in that light, Mr Philips's suggestions as to how the Annex Lease Scheme should be documented were not intended to give a picture of the transaction that he knew to be wrong, but rather to ensure that the documentation was consistent with what Mr Conway had told him and so did not contradict it.

175. From the above, I have reached the following factual conclusions as to Mr Conway's knowledge of, or belief in, the existence of a conflict of interest between SBHMC and Lodgeshine and between SBHMC and Mr Conway himself:

    i) Mr Conway accepted in cross-examination that he realised that he needed to take care to avoid a conflict of interest between SBHMC and his own personal interests, or between SBHMC and other companies, such as Lodgeshine, of which he was a director.

    ii) Mr Conway was an astute businessman. He would have realised that, if one took as a starting point the proposition that SBHMC was entitled to own a freehold interest in the Annex, the Annex Lease Scheme would have the economic consequences set out in paragraphs 160 and 161 above.

    iii) However, Mr Conway considered that was not the correct starting point. His view was that to the extent SBHMC had a contractual entitlement to the Annex, that was a "mistake" in the sense I have explained. Viewed from that perspective, he did not consider that there was any benefit to Lodgeshine (or himself), or any disbenefit to SBHMC, in implementing the Annex Lease Scheme. That was because he considered that the Annex Lease Scheme simply put SBHMC and the rest of the Galliard group in the position they should have been in from the beginning.

iv) It was reasonable for Mr Conway to approach matters as set out in paragraph 175.iii) since, having instructed Howard Kennedy in connection with the Annex Lease Scheme, they could be expected to tell him if there was something wrong with that scheme.

v) Mr Conway was fortified in his conclusion that there was no disbenefit to SBHMC (by reference to what he considered to be the correct starting position) by his perception that Mr Ivesha's suggestions to increase conferencing facilities would increase SBHMC's revenue from Rooms. I do not agree with SBHMC that there was no evidence for that belief. Rather, I conclude that the evidence consisted of Mr Ivesha's own recommendation and Mr Conway's willingness to incur additional expenditure to give effect to it. Mr Ivesha knew the hotel business well and so Mr Conway's belief in this regard was reasonable.

Ratification

176. At all material times, Galliard Homes was the sole shareholder of SBHMC. As a defence to the Directors' Duties Claim, Mr Conway argues that Galliard Homes ratified any such breach, in accordance with the principle set out in *Re Duomatic Ltd* [1969] 2 Ch 365. As evidence in support, Mr Conway said in paragraph 73 of his Third Witness Statement:

> *In reality, I 'was' (in the sense that I controlled) the Board of Galliard Homes … None of George, Paul or Ranjan [Mr Conway's co-directors of Galliard Homes] were involved in the strategic decision-making for Galliard's business and were content to proceed in accordance with my recommendations in that regard. Having taken advice from Howard Kennedy (privilege in which is not waived) as to how to ensure that Galliard retained its ownership of the Annex, I caused Galliard Hotels, Lodgeshine and SBHMC to enter into the Lease and Underlease. Because I was content for those leases to be granted so, in reality, was the Board of Galliard Homes.*

177. Given my direction summarised in paragraph 23, I proceed on the basis that a *Duomatic* argument is not being pursued as nothing was said about it in Galliard's oral closings. I was not, therefore, taken to any authorities in oral closing addressing whether the silence of Mr Conway's co-directors is capable of amounting to a ratification given under the *Duomatic* principle. I will not, therefore, make any determination of that question of law. Rather, I simply record my factual finding that there was no such outward manifestation beyond the silence that Mr Conway describes (as I was not taken to any evidence of such an outward manifestation). To the extent that it is necessary to consider whether Mr Conway was acting in good faith as a precondition to any ratification of his actions, I have made factual findings in paragraphs 162 to 175 as to his state of mind.

PART E – CONSTRUCTION

Principles applicable to the construction issue

General principles

178. The parties did not disagree on the general principles that I should apply when construing the FSC. They did, however, disagree on the correct approach to "corrective" construction which I discuss in the section that follows. I can therefore set out the applicable general principles briefly.

179. I draw gratefully on paragraphs [18] and [19] of the judgment of Carr LJ in *ABC Electrification Ltd v Network Rail Infrastructure Limited* [2020] EWCA Civ 1645 ("*ABC*"). I will not burden an already lengthy judgment with a direct quote of these paragraphs. However, I have borne the entirety of them in mind.

180. Without in any way diluting the point that all of the principles summarised in paragraphs [18] and [19] of *ABC* are relevant, the following points emerge given the particular nature of the dispute on construction that arises in this case:

    i) Both the words used in the FSC and the factual background to that contract are relevant when determining the objective intention of the parties. Indications of meaning derived from both sources are then subjected to the "iterative process" referred to at [19] of *ABC*. In performing that iterative process, it does not matter whether one starts with a consideration of the factual background and the implications of rival constructions or whether one starts with a close examination of the relevant language of the contract so long as the court balances the indications given by each (see [11] of Lord Hodge's judgment in *Wood v Capita Insurance Services Ltd* [2017] AC 1173).

    ii) Evidence of the subjective intention of the contracting parties is not admissible as an aid to the construction of the contract. That is because the court's task is to identify the intention of the parties by reference to what a reasonable person, having all of the background knowledge which would have been available to the parties, would have understood the parties to mean by the language of the FSC (see [19] of *ABC*). Nevertheless, the genesis and overall "aim" (understood objectively) of the overall transaction of which the FSC formed part is factual background that is relevant to the construction of the FSC. Since the FSC was part of a wider "structure" that involved the sale of Rooms to Investors I am also prepared to accept that the terms, or likely terms of other contracts in that structure as they were (objectively) understood on 24 February 2004 are also relevant matters of factual background. It follows, therefore, that I can have regard to the terms of the standard form Room Contract as it existed on 24 February 2004 even though Investors did not enter into Room Contracts until, at the earliest, the Hong Kong sales event that took place a few days later.

    iii) I accept Galliard's submission, based on paragraph [32] of Phillips LJ's judgment in *Virgin Aviation TM Ltd v Alaska Airlines Inc* [2024] EWCA Civ 622 that there is a strong presumption that commercial parties do not intend to provide "something for nothing". That is an aspect of the considerations of "commercial common sense" referred to at [18] and [19] of *ABC*.

iv) That said, it is a question of fact whether, if SBHMC was to obtain an interest in the entire Site (including the part on which the Annex was to be built), that would result in it obtaining "something for nothing". Moreover, considerations of "commercial common sense" are aids to interpretation of the FSC. If the words of the FSC have a "natural meaning", a court should be very slow to reject that meaning simply because it appears to be an imprudent term for one of the parties to have agreed (see [18(v)] of *ABC*).

"Corrective" construction

181. Galliard also relies on the principle that a court may, as part of its unitary approach to contractual interpretation, "correct mistakes by interpretation". The leading case on the concept of "corrective construction" is *Chartbrook v Persimmon Homes Ltd* [2009] 1 AC 1101 ("*Chartbrook*"). In *Britvic Plc v Britvic Pensions Ltd* [2021] EWCA Civ 867, Nugee LJ described this as a "separate interpretive tool from those involved in choosing between rival interpretations". I do not believe that, in saying this, Nugee LJ was deciding that "corrective construction" involved the application of completely different principles from those that I have considered in the preceding section of this judgment. Lord Hoffman said at [23] of *Chartbrook* that the process of "correction of mistakes by construction" is not a separate branch of the law or a summary version of an action for rectification.

182. Rather Nugee LJ was noting that in a normal case a dispute about construction might involve words that are perfectly capable, on their natural interpretation, of having meaning A or meaning B with the dispute being which of those natural meanings properly reflects the intention of the parties determined objectively. By contrast, "corrective construction" involves a situation where the words of the contract have a single "natural meaning", but a reasonable person would have understood the parties to have intended a different meaning for example "12 January" instead of "13 January" in the example that Lord Hoffmann gave at [21] of *Chartbrook.*

183. As explained at [22] to [25] of *Chartbrook*, two requirements must be satisfied in order for a "corrective construction" to be possible:

    i) there must be a clear mistake on the face of the instrument; and

    ii) it must be clear what correction ought to be made in order to cure the mistake.

184. I agree with Galliard that the "clear mistake" can be established by reference to material that falls outside the four corners of the contract in question. I therefore accept that in principle it is open to Galliard to seek to establish the "clear mistake" by demonstrating that it would be "nonsensical or absurd" for the FSC to entitle SBHMC to the freehold of the entire Site.

185. That said, I agree with SBHMC that a "clear mistake" cannot be established simply by showing that it would be "commercially unattractive and even unreasonable" for the FSC to entitle SBHMC to obtain the freehold of the entire Site (see the judgment of Briggs LJ in *Sugarman v CJS Investments LLP* [2014] EWCA Civ 1239).

186. Although the parties expressed themselves to be apart on the correct principles of corrective construction, I consider that their dispute related to factual, rather than legal,

matters. For its part, Galliard argues that it was (objectively) clear in 2004 that the part of the Site on which the Annex was to be built should be excluded from the sale effected by the FSC. On that factual premise, it argues that it would indeed be "nonsensical or absurd" for the FSC to operate as an agreement to transfer the entire Site. SBHMC does not accept the factual premise, arguing that there was no clear objective understanding in 2004 that part only of the Site would be transferred pursuant to the FSC. On that factual premise, SBHMC disputes that the principle of "corrective construction" is engaged since there is no "clear mistake" of the necessary kind and rather simply either a regret, or a reimagining of the commercial transaction, on Galliard's part.

Relevant provisions of the FSC

187. The FSC was professionally drafted by Mr Philips and his colleagues at Howard Kennedy. It was executed on 24 February 2004, at which time there was neither a Hotel nor an Annex built on the Site. Rather, at that time, the Site was car park.

188. The FSC started with several recitals including Recital (a):

> *[Galliard Hotels] are the registered proprietors of the freehold interest in the Addington Street Car Park London SE1 registered with freehold title number TGL221719 (the "Property")*

189. That definition is significant because, by Clause 6, Galliard Hotels agreed to sell the "Property" for the sum of £1. If the matter had rested there, it would be entirely clear that the agreement was to transfer the freehold in the entire Site including the part of the Site on which it was intended that the Annex would be built.

190. Various provisions of the FSC referred to the future use of the "Property" and the business that was to be conducted there. For example:

    i) Recital (b) referred to the fact that Galliard Hotels were developing "the Property" into a hotel consisting of apartment units. Recitals (c) and (d) referred to the then contemplated structure under which Investors (defined in the FSC as "Purchasers") would obtain the Room Leases and grant subleases to SBHMC "for [SBHMC] to operate a hotel business in the Property" which was defined in the FSC as the "Business".

    ii) By Clause 1, as from grant of the first Room Lease (which, as noted, was to be several years before completion of the FSC itself) Galliard Hotels granted SBHMC rights of access over various parts of the "Property" for Galliard's use in carrying out the "Business".

    iii) By Clause 3 Galliard agreed to provide SBHMC "reasonable office space to enable [SBHMC] to run the Business ("**the Office Unit**") with that obligation also running from the date of grant of the first Room Lease, as distinct from the date of completion of the FSC.

    iv) By Clause 4, SBHMC was obliged to carry on the "Business" in a good and efficient manner in accordance with industry standards and so as to maximise the profits being generated by the letting of the Hotel Apartment Units.

191. Clause 5 contained extensive provisions dealing with SBHMC's occupation of the "Office Unit". That occupation was expressed to be pursuant to the terms of a tenancy at will and included the following provisions:

    i) By Clause 5(b), SBHMC agreed to pay all rates and taxes of an annual or other periodically recurring nature in respect of the "Office Unit".

    ii) By Clause 5(k), SBHMC was responsible for "all and any damage occasioned to the Office Unit or the Property adjoining neighbouring premises howsoever caused as a result of the entry onto and use of the Office Unit".

    iii) By Clause 5 (p), SBHMC allowed Galliard Hotels and persons it authorised to enter the Office Unit "for any and all purposes reasonably connected to Galliard's interest in the Property".

192. As I have noted, Clause 6 dealt with the conditions applicable to the sale of the Property:

    i) By Clause 6 (b), the sale of the "Property" was to be subject to the standard conditions of sale (third edition). Those were conditions of sale applicable to residential property as distinct from commercial property.

    ii) By Clause 6(c)(i) to (iii), the "Property" was to be transferred subject to among other matters, the 300 Bed Permission, and the associated Section 106 Agreements.

    iii) By Clause 6(c)(v), the "Property" was to be transferred subject to "all matters contained or referred to in the title to the Property". By Clause 6(h):

    > *Title shall consist of official copy register entries and filed plan for the freehold title to the Property and title having been deduced prior to the date hereof the Management Company shall purchase subject to the matters therein contained (other than entries securing the payment of monies due from Galliard) the Management Company shall not be entitled to raise any requisition or objection thereto.*

193. Galliard argues that Clause 6(c)(v) should be read as providing that SBHMC was to take the freehold title subject to any encumbrances that might happen to exist at the time of completion. That, obviously, is a matter of some significance because if that is the true effect of the FSC, SBHMC could not complain of a breach of contract on being required to take the freehold subject to the Lease and Underlease. However, I prefer SBHMC's submission that, given the references in Clause 6(h) to title consisting of matters in existence at the date of the FSC, Clause 6(c)(v) and Clause 6(h) when read together obliged SBHMC to take the freehold subject only to encumbrances existing at the date of exchange of the FSC and not by reference to any and all encumbrances subsisting at completion.

194. Clauses 6(e) and 6(f) contained provisions designed to ensure that, on completion, SBHMC stepped into the shoes of Galliard Hotels in relation to service charges and other matters arising under the Room Leases. So, for example, SBHMC had to pay Galliard Hotels an amount equal to arrears of service charge owed by Investors under

Room Leases, the assumption being that SBHMC would then look to Investors for reimbursement of those arrears.

Factual background relevant to construction

195. Central to Galliard's arguments on construction is the proposition that, when the FSC was executed, it would have been clear to any reasonable observer acquainted with the relevant facts that both Galliard Hotels and SBHMC must have intended that part of the Site on which the Annex was to be built to be excluded from the sale of the freehold title. For reasons that follow, I do not accept that argument.

196. A reasonable observer in February 2004 would note that there were no buildings on the Site at the relevant time. There was a proposal to construct a Hotel and Annex on the Site and planning permission had been obtained for that proposal. The Annex was not, however, being proposed because either SBHMC or Galliard had a particular interest in an office building being located next to the Hotel. Rather, the Annex had been proposed as a means to the end of securing planning permission for a hotel (see paragraphs 39 and 42 above). In 2004, a reasonable observer would have seen the proposed Annex as a "make weight" to which neither Galliard nor SBHMC attached particular significance. That would have suggested to the reasonable observer that the Annex was neither obviously in, nor obviously out, of the scope of the transactions effected by the FSC.

197. On closer inspection, the reasonable observer would see commercial factors pointing in different directions. Some commercial factors pointed in favour of the proposition that SBHMC was not intended to acquire an interest in the Annex once it had been built:

    i) Galliard was engaged in some discussions with Professor Thompson about a possible letting of the Annex. However, as noted in paragraphs 45 and 46 above, those discussions were relatively weak indicators of Galliard's intentions as to ownership of the freehold title to the Annex.

    ii) Certainly, contemporaneous marketing materials said little if anything about ownership of the Annex which is consistent with an intention that title to the Annex should not pass. However, I have explained in paragraphs 52 and 53 why this inference was relatively weak as well.

198. That said, there was a perfectly good commercial reason for including the Annex in the transfer. The FSC showed that the Hotel needed an "Office Unit" to assist with the management of the Hotel operations. While the court has had evidence of the subjective views of Mr Philips and Mr Conway on what they thought Clause 5 of the FSC was addressing, little if any of the evidence focused on the extent of the need for office space to support the Hotel. Mr Conway's Second Witness Statement stated that "back of house" facilities were extensive enough to require space at basement, ground mezzanine and first floor levels within the Hotel. A reasonable observer could well conclude that, even if SBHMC did not wish to rent out the Annex to others as office space, it could use the Annex itself in connection with management of the Hotel thereby freeing up space within the Hotel itself.

199. A reasonable observer would note that as at the date of execution of the FSC, the Annex could not lawfully be used as a hotel given the terms of the 300 Room

Permission and the 394 Room Permission. That was certainly a pointer against the Annex being included in the sale of the freehold title. However, I consider that it was a relatively slender indication for the following reasons:

i) A reasonable observer would note Galliard's approach to planning permission summarised in paragraph 39. In 2004, the Site was in an early stage of development and the final planning permission would only be needed after the development finished and the Hotel opened for business which, in the event, was some four years later. In 2004 there was a realistic possibility that ultimately the Annex could be used as part of the Hotel. Indeed, that is precisely what transpired.

ii) Even if the Annex could not be used for the purposes of the Hotel's core operations, it could still be used as office accommodation connected with the Hotel without breaching the terms of any planning permission. Galliard argued in closing submissions that, in order to use the Office Unit "to enable [SBHMC] to run the Business", the Office Unit would need a Class C1 planning permission. I do not, however, accept that. In my judgment, provided the Annex was being used as "office" accommodation for administrative staff, it would not matter what kind of business those staff were helping to administer.

200. Galliard argue that the CIS issue was a pointer against an intention that SBHMC should acquire an ownership interest in the Annex. I do not accept that argument for two reasons. First, even if SBHMC acquired a freehold interest in the Annex and generated income from exploiting it for use in Class B1 or D1, a reasonable observer would conclude that there still would be no CIS (see paragraph 92 above). Second, SBHMC would not necessarily earn income from the Annex even if it did acquire it since it was plausible that it might use the Annex in connection with the administration of the Hotel.

201. I consider that a reasonable observer would consider the "flying freehold issue" to be a neutral indicator for reasons set out in paragraph 95.

202. Finally, I consider the significance of the point that the FSC was part of a suite of contracts dealing with the Hotel. I note, for example, that the template Room Contract that was in existence at the time of the FSC described the FSC as being an agreement for the sale of the freehold of the "Block" with the Block in turn being defined as:

> *The Hotel Apartment Block situate at and known as the Addington Street Apart Hotel London SE1 and registered with freehold title absolute with [title number TGL221719]*

203. I acknowledge, of course, that the definition of the "Block" used in the Room Contract is consistent with Galliard's proposed interpretation of the FSC. It is redolent of the "Hotel" aspect of the Site and less redolent of the "Annex" aspect. However, I consider that the way the FSC was summarised in a Room Contract provides a relatively slender guide to the operative effect of the FSC which the parties, viewed objectively, intended.

Conclusion on construction of the FSC

204. I start with the language of the FSC. That provides a strong linguistic pointer to the effect that the entire freehold title would be transferred without any retention of part of that title representing the land on which the Annex was to be built. That strong

linguistic pointer comes from the fact that the "Property" was defined by reference to a single title number with the FSC taking effect as an agreement to transfer the "Property" as so defined.

205. The strength of that linguistic pointer is emphasised by the fact that it was professionally drafted. If part of the single freehold title was to be retained, it would have been a straightforward matter to do so expressly and the absence of any express provision is telling.

206. There are few linguistic pointers against that interpretation on the face of the FSC. Galliard points to the recitals to the FSC. However, those simply record an intention to develop the Property into a hotel without saying anything about any retention of part of the "Property" from the freehold title that is to be transferred. In a similar vein, I acknowledge that by Clause 1 of the FSC, Galliard granted SBHMC rights of access to the "Property" that are ready for use in carrying out the "Business" (being that of the Hotel). However, granting rights of access necessary for a particular purpose is not inconsistent with the entire freehold of the Property being transferred.

207. Galliard notes references in the FSC to requirements for SBHMC to "run the [Hotel] Business" and, in Clause 4, to maximising profit generated "by the letting of the Hotel Apartment Units". It contrasts these references to "Hotel" matters with an absence of references to income from the Annex. However, I regard that contrast as being of limited significance and not inconsistent with an intention, apparently clearly stated in the FSC, to transfer the entire freehold title. Put another way, the FSC did not need to specify how the Annex was to be used in order for the Annex, when built, to fall within the scope of the transfer of the freehold title.

208. Galliard points out that the provisions dealing with SBHMC's accession to Galliard Hotels' service charge position in Clauses 6(e) and 6(f) of the FSC do not deal with service charge arising under a putative lease of the Annex. That is true, but it is not inconsistent with the FSC transferring title to the Annex once built. It was quite possible in 2004 that the Annex might ultimately be used as part of the Hotel despite the terms of the planning permission then in place. In any event, while the very structure of the Project made it inevitable that Room Leases would be granted so that there would be service charge obligations arising that needed to be dealt with by the FSC, it was not similarly pre-ordained that there would be any lease of the Annex. As I have explained, it was realistically possible that the Annex might ultimately be used in connection with the Hotel's administration.

209. Galliard's reliance on linguistic indicators in the FSC do not overcome the point that Carr LJ made at [18(ii)] of *ABC* that "the clearer the natural meaning [of a contractual provision], the more difficult it is to justify departing from it". Linguistic pointers alone, therefore, are insufficient to displace the apparently clear meaning of the FSC. Rather, in my judgment, only indicators from the factual background would be capable of displacing that meaning.

210. I have considered the strength of the indicators from the factual background in paragraphs 195 to 203. My conclusion is that these matters do not displace the ordinary meaning of the FSC either.

211. Applying orthodox principles of contractual interpretation, the FSC set out an obligation to transfer the freehold of the entire Site and did not operate to retain that part of the Site on which the Annex was expected to be built.

212. Considerations of "corrective construction" do not lead to a different conclusion. Given my conclusion in paragraph 195, there was no clear mistake on the face of the FSC with the result that a necessary precondition to the exercise of a "corrective" construction was not present. Galliard argues that the construction of the FSC that SBHMC advances would result in SBHMC obtaining "something for nothing" because it would obtain an interest in the Annex that, viewed objectively, it was never intended to obtain. I do not accept that because it would have been far from clear to a reasonable observer that the Annex was indeed intended not to be included in the transfer.

PART F – RECTIFICATION

Applicable legal principles

213. I did not understand the parties to disagree that the following requirements must be met before the court will grant the equitable remedy of rectification (see *FSHC v GLAS Trust Corp Ltd* [2020] Ch 365 ("***FSHC***"):

    i) The parties to the contract shared a continuing common intention as to their agreement which existed at the time the document was executed (*FSHC* at [46]);

    ii) By mistake the document did not represent the parties' true agreement;

    iii) The "true agreement" or "continuing common intention" which forms the basis of a rectification claim is concerned with the parties' subjective state of mind. The rationale for this is the equitable doctrine that a party will not be allowed to enforce the terms of a written contract, objectively ascertained, when to do so is against conscience because it is inconsistent with what both parties in fact intended (and mutually understood each other to intend) those terms to be when the document was executed (see [146] of *FSHC*);

    iv) Since the focus is on a subjective common intention where contracts involving companies are involved it is necessary to identify a particular individual whose subjective intentions are to be examined. Fortunately, in this case, no difficulty arises as to the identity of that individual. Mr Conway was the "controlling mind" of both Galliard Hotels and SBHMC and so it is common ground that it is his, and only his, subjective intentions that should be examined.

214. Nor did I understand the parties to disagree that, even if the requirements of paragraph 213 are satisfied, rectification remains an equitable remedy to be given at the discretion of the court. It follows that, even if those requirements are satisfied, the court should apply established equitable principles in deciding whether to grant the remedy.

215. Paragraphs [73] to [74] of *FSHC* refer to another requirement namely that the common intention must be expressed in an "outward expression of accord". Galliard accepts that that is a requirement that must be satisfied in order for a commercial contract to be rectified. However, it argues that, in relation to a contract such as the FSC, which was not subject to any "negotiation" in any commercially real sense and which was entered

into between two companies with the same single guiding mind (namely Mr Conway) different principles apply.

216. Galliard argues that those different principles can be seen in paragraphs [26] to [37] of the judgment of Sir Geoffrey Vos MR in *Ralph v Ralph* [2021] EWCA Civ 1106. That was a case concerning a claim for rectification of a Form TR1, by removing a manuscript cross from box 11 that said that "the transferees are to hold the property on trust for themselves as tenants in common in equal shares". Neither of the transferees had signed the Form TR1 in question, and *Ralph v Ralph* was, accordingly, not a case involving rectification of a commercial contract.

217. At [26] to [37] of his judgment, Sir Geoffrey Vos MR canvassed the question of whether the principles identified in *FSHC*, which were formulated with commercial contracts in mind, applied to the case before him. He explained some points that might justify a different approach. For example, at [27] he noted that a commercial contract will typically have been the subject of some negotiation. Accordingly, in such a case an "outward manifestation of accord" could be derived from what the parties said during those negotiations. By contrast, in *Ralph v Ralph* itself, the transaction in question was an arrangement between family members such that "it would not be uncommon for the family members concerned not to discuss openly how the beneficial interest was to be held". Sir Geoffrey Vos MR therefore raise the possibility that the applicable principles governing the rectification claim in the case before him might involve some variant on the principles that apply to rectification of settlements and declarations of trust set out in cases such as *In Re Butlin's Settlement Trusts* [1976] Ch 251 which are "unilateral", rather than negotiated transactions.

218. I do not accept Galliard's argument that *Ralph v Ralph* obviates the need for an "outward manifestation of accord" in the case before me for the following reasons:

    i) First, Sir Geoffrey Vos MR took care not to decide the point noting at [31] that the point had not been fully argued and so no submissions had been made as to what adjustments to the *FSHC* approach might be made to reflect the differences from a commercial contract which he had outlined. Therefore, despite having canvassed the possibility of a different approach, Sir Geoffrey Vos MR expressly applied "traditional" *FSHC* principles when deciding whether to rectify the Form TR1.

    ii) Sir Geoffrey Vos MR's judgment simply explained differences between the Form TR1 that was in issue in the proceedings before him and a classic commercial contract that could be presumed to have been the subject of some negotiation. He did not seek to divide commercial contracts into the "negotiated" category and the "unnegotiated" category, with a different approach from that set out in *FSHC* to apply to claims for rectification of the latter category. Nor did he explain how to decide whether contracts fall into either category or the different approach that might be applied if a commercial contract is categorised as "unnegotiated".

219. I will, therefore, proceed on the basis that in order for the Rectification Claim to succeed, Galliard must show the necessary "outward expression of accord". That requirement means that it is not sufficient to establish that each party, privately and independently, had the same intention as the other with regards to a particular provision of their contract. Thus, there can be no common intention sufficient to justify a claim

for rectification if the relevant intentions remain "locked separately in the breast of each party" (see [73] of *FSHC*).

220. Therefore, there must be some communication of common intention for the necessary "outward expression of accord" to be present. However, that communication need not involve a declaration of the agreement or intention in express terms. The shared understanding may be tacit (see [80] to [82] of *FSHC*). A tacit shared understanding of this nature may include (i) something that is so obvious as to go without saying or (ii) an understanding reached without being spelt out in so many words (see [84] of *FSHC*).

Application to the facts

221. The continuing common intention on which Galliard relies is set out in, for example, paragraph 53 of its Re-Re-Re-Amended Defence and Counterclaim ("**RRADC**"), namely that the freehold of the Annex was to be retained as an asset within the Galliard group of companies.

222. I have concluded that Mr Conway, as the guiding mind of both SBHMC and Galliard Hotels, did not expressly articulate any such common intention before the FSC was executed. I reach that conclusion for the following reasons:

    i) No contemporaneous document has been produced that demonstrates clearly an articulation of such an express common intention.

    ii) I acknowledge the possibility that Mr Conway expressed the common intention orally to Howard Kennedy, or other members of the Galliard team. However, my findings as to the process by which the Structure Note was prepared leads me to reject that possibility. The whole point of that Structure Note was to enable Mr Philips to have an accurate record of Galliard's instructions on, among other matters, the drafting of the FSC. If Mr Conway had articulated, either to Mr Phillips or to the wider Galliard team, that the Annex was to be retained that would have been reflected in the Structure Note.

    iii) Mr Conway's evidence set out in paragraphs 50 to 56 of his Third Witness Statement to the effect that he did not concern himself greatly with the structure of the transaction, preferring to leave that to Howard Kennedy, is inconsistent with him articulating an intention to retain the Annex.

    iv) I acknowledge that a number of witnesses have given evidence to the effect that the common intention was present before the FSC was executed. I am certainly not suggesting that those witnesses were deliberately lying in giving this evidence. However, that evidence is inconsistent with contemporaneous documentation. I therefore consider that evidence to be a rationalisation, after the event, of what those witnesses now consider "should" have happened rather than confirming the presence of a common intention at the time that it would happen.

223. Nor am I prepared to accept that the common intention was tacit or so obvious that it did not need to be said in the sense summarised in paragraph 220 above. A strong pointer against the existence of such a tacit common intention is the Structure Note and the process by which it was prepared. If it was so obvious to Mr Conway, as not to require saying, that the Annex was to be retained within the Galliard group it would

have similarly been obvious to others within the Galliard group, such as Mr Tucker-Brown, Mr David Conway, Mr Angus and others who Mr Conway had tasked with implementing the Project. If the point had been obvious to those individuals, at least one of them would have passed it on to Mr Philips in the course of discussions on the Structure Note. Even though Mr Philips and Galliard were operating under significant time pressure in the run-up to the Hong Kong launch, "obvious" points on the structure would still have been picked up as part of the process of preparing the Structure Note.

224. That said, I have considered the various indicators of a tacit common understanding on which Galliard relies. Overall, I consider those to be in most cases equivocal and in some cases counterbalanced by indications to the effect that a freehold interest in the Annex was intended to pass to SBHMC. I have already considered some of these other indications in my conclusions on construction of the FSC set out above. I acknowledge that, when dealing with issues of contractual construction, I was looking at matters objectively from the perspective of a reasonable observer. However, the very same matters that rendered those indicators equivocal to a reasonable observer demonstrate that they did not evidence a common intention that was not spelt out in so many words, or that was so obvious as not to need saying. I can therefore deal with these other indications largely by cross reference to my earlier conclusions:

    i) The inferences to be drawn from the scope of the planning permission for the Project are equivocal. The planning situation could be expected to evolve and, even if the Annex could never have been used as part of the Hotel, it could still have been used for administrative purposes (see paragraph 199).

    ii) The possibility of using the Annex as accommodation for administrative functions associated with the Hotel meant that the Annex did not necessarily need to generate additional revenue. Even if it had generated additional revenue, the CIS issue would not have been perceived as a "show-stopper" (see paragraph 92).

    iii) The contemporaneous marketing material was equivocal (see paragraphs 47 to 53).

    iv) The "flying freehold" issue does not provide much of a pointer in either direction (see paragraph 95).

    v) The contemporaneous discussions with Professor Thompson about the possibility of a lease of the Annex were desultory and fall far short of demonstrating that it was obvious that Galliard would retain ownership of the Annex (see paragraphs 45 and 46).

225. My conclusion is that the necessary "outward expression of accord" was not present and the Rectification Claim fails for that reason. In those circumstances, I do not need to consider the "defences" to the Rectification Claim on which SBHMC relies, namely: (i) laches, (ii) that rectification would interfere unduly with the rights of bona fide third-party purchasers of the value and (iii) that Galliard Hotels has not "come to equity with clean hands". I will, however, make factual findings on those defences in case I am wrong in deciding the Rectification Claim as I have.

226. As to laches:

i) I have concluded that Mr Philips, and so Galliard Hotels, became aware that, in its "un-rectified" form, the FSC was likely to result in Galliard Hotels not retaining the Annex in or around May 2008 (see paragraph 154 above).

ii) I have concluded (see paragraph 240) that, on deciding to implement the Annex Lease Scheme, Mr Conway on behalf of Galliard Hotels took the conscious decision not to notify Investors generally in 2008.

iii) SBHMC also placed some reliance on Galliard's destruction of documents in connection with its arguments on laches. I have made findings on circumstances surrounding such document destruction in paragraphs 20 to 22.

227. As to the asserted interference with the rights of bona fide purchasers for value:

i) SBHMC was a bona fide purchaser for value of the freehold interest in the Site (including the Annex).

ii) I have made factual findings in paragraph 121 above as to matters relating to ownership of the Annex that influenced the investment decisions of some Investors.

228. I have, throughout this judgment, made factual findings on Mr Conway's state of mind in connection with the Annex Lease Scheme and have, in particular, rejected the allegation that he behaved dishonestly in implementing it. I consider those factual findings are sufficient to determine any question relating to "clean hands".

PART G – DELIBERATE CONCEALMENT

The law on "deliberate concealment"

229. Section 32(1)(b) of the Limitation Act provides that if any fact relevant to SBHMC's right of action has been deliberately concealed by a defendant then the period of limitation is not to begin to run until SBHMC has discovered the concealment or could, with reasonable diligence, have discovered it. Section 32 contains provisions that expand the concept of a "defendant" to a defendant's agent and other persons. Section 32(2) also contains provisions dealing with a deliberate commission of a breach of duty in circumstances in which that breach is unlikely to be discovered for some time, but it is not suggested that this provision is of any relevance in the circumstances of this case.

230. The concept of "deliberate concealment" is at the heart of s32(1)(b). I did not understand the parties to disagree on the propositions of law that I set out in this section.

231. In order for s32(1)(b) to apply, the following must be established (see *Canada Square v Potter* [2023] 3 WLR 963 ("***Canada Square***")):

i) a fact relevant to the claimant's right of action;

ii) the concealment of that fact from the claimant by the defendant either by a positive act of concealment or by a withholding of the relevant information; and

iii) an intention on the part of the defendant to conceal the fact or facts in question.

232. As to the requirements set out in paragraph 231.i), the fact in question must be one that is required in order to plead a statement of case or, put another way, a fact without which the cause of action would be incomplete. A fact which merely improves prospects of success of a claim is not a "fact relevant to the claim" in the requisite sense (see [49] of the judgment of Sir Terence Etherton C in *Arcadia Group Brands Ltd v Visa Inc* [2015] Bus LR 1362).

233. As to the requirement set out in paragraph 231.ii):

    i) There is no need to show that the defendant knew or suspected that a fact concealed is in fact relevant to a claim potentially to be brought by the claimant (see [105] of *Canada Square*).

    ii) There is no need to show that the defendant had a legal or other obligation to disclose the information (see [104] of *Canada Square*).

    iii) If a claimant was aware of a relevant fact at some point in the period beginning with accrual of the cause of action and ending with the alleged act of concealment, the claimant cannot take the benefit of s32(1)(b) of the Limitation Act (see [44] of *Ezekiel v Lehrer* [2022] EWCA Civ 16). The rationale for this is that a defendant cannot "conceal" a relevant fact of which the claimant is already aware.

234. As to the requirement set out in paragraph 231.iii):

    i) In order to be "deliberate", concealment must be an intended result of the defendant's acts or omissions. Recklessness is not enough. The defendant must have considered whether to inform the claimant of the relevant fact and decided not to (see [108] of *Canada Square*).

    ii) A concealment of a relevant fact can be deliberate without being dishonest (see [99] of *Canada Square*).

Deliberate concealment of the Annex Lease Scheme

The allegations as advanced in closing

235. "Deliberate concealment" for the purposes of s32(1)(b) of the Limitation Act has to involve some act or omission whereby a defendant conceals a relevant fact from a claimant. SBHMC's pleadings were not as clear as they could have been on the topic of who perpetrated relevant acts of concealment and who the relevant facts were concealed from. For example, what Mr Trompeter KC referred to as the "red text" in paragraph 17.2,3A of SBHMC's Re-Re-Amended Reply (the "**Reply**") referred to acts of Galliard Homes as procured by Mr Conway as its controlling mind in (i) resisting Investors' entry onto the board of SBHMC, (ii) failing to volunteer management accounts to Mr Marley after his appointment as director and (iii) resisting Investor-directors' assumption of control over the board of SBHMC in 2017. Those acts were pleaded to be motivated by a wish to minimise Investors' control over, or insight into, SBHMC's business. Accordingly, it was pleaded that Galliard Homes' conduct was prompted in significant part by the desire "to conceal the Annex Lease Scheme from Investors" (emphasis added).

236. The difficulty with this articulation is that the complaints about the Annex Lease Scheme are not predominantly directed at Galliard Homes except to the extent that it is a defendant to the Unlawful Means Conspiracy Claim. Paragraph 17.2.3A does not, therefore, explain precisely how all defendants are said to have concealed relevant facts. Moreover, the "concealment" pleaded is from Investors yet the claimant in this action is SBHMC.

237. Perhaps conscious of these issues, in his oral closing submissions, Mr Bradley KC focused on paragraph 34 of the Reply which contained the assertion that:

> *despite regular communications with the Investors (who were to control SBHMC), the Defendants did not inform them of the Annex Lease Scheme. This was a deliberate decision to conceal the said scheme from SBHMC (once under new control).*

238. That formulation leaves somewhat unclear the precise occasions on which each Defendant thought about telling SBHMC about the Annex Lease Scheme but deliberately decided not to do so. In his oral reply, Mr Bradley KC did not disagree with Mr Trompeter KC's understanding that the allegations based on the "red text" in paragraph 17.2.3A of the Reply were no longer pursued. Rather, in his oral submissions Mr Bradley KC formulated the "deliberate concealment" on which he relied as follows:

    i) the Lease and Underlease were themselves designed to obfuscate by presenting the "argument" to which Mr Philips referred (see paragraph 158 above).

    ii) Mr Conway, the controlling mind of all relevant defendants took a conscious decision not to tell Investors about the Annex Lease Scheme at the time it was implemented.

    iii) That conscious decision was not taken once and for all when the Annex Lease Scheme was implemented. Rather, it was renewed and continued at the time Investors were represented, through Mr Marley, on SBHMC's board. As a consequence, the intention to conceal the Annex Lease Scheme from Investors became an intention to conceal it from SBHMC itself.

    iv) This was demonstrated by two episodes: (i) the "sham" board meetings at which Mr Marley was ostensibly being invited to approve accounts that had already been approved and (ii) the efforts that [Mr Porter] deployed in ensuring that there was no prior period adjustment in SBHMC's statutory accounts (see paragraph 259 to 262 below).

239. In paragraph 34 of its Reply, SBHMC also pleaded that the reason why Mr Conway gave instructions that the Annex Lease Scheme should be entered into in 2008 was deliberately to conceal from SBHMC (once it was under the control of Investors) the separation out of the Annex from SBHMC. The argument summarised in paragraph 238.i) appears to be directed at a similar target. However, if it is, it amounts to an assertion that a purpose of the Annex Lease Scheme was deliberately to conceal the Annex Lease Scheme itself which I do not accept. Rather, the question is whether, whatever the purpose of the Annex Lease Scheme, any Defendant took steps deliberately to conceal that scheme from SBHMC. I do not consider that the argument

set out in paragraph 238.i) has any significant bearing on that question. I focus, therefore, on the allegations set out in paragraphs 238.ii) to 238.iv).

Factual findings relevant to allegations of deliberate concealment of the Annex Lease Scheme

The decision not to inform Investors at the time the Annex Lease Scheme was implemented

240. In his cross-examination, Mr Conway accepted that he "concealed" the Annex Lease Scheme. That was a significant acceptance and it is important to be clear what it comprised. Viewed in the context of the cross-examination as a whole, I have concluded that Mr Conway accepted that he "concealed" the Annex Lease Scheme from Investors by deciding not positively to announce to them generally that the scheme had been implemented. That decision was taken because, even though Mr Conway, having received Howard Kennedy's legal advice, regarded the scheme as proper and effective, he was concerned that, if told, some Investors might object. At the time he took that decision, Mr Conway realised that Investors would become shareholders of SBHMC in five years' time because that was an integral feature of an investment in the Project (see paragraph 4.v) above).

241. Accordingly, the "concealment" to which Mr Conway admitted consisted of a decision not to inform Investors of the Annex Lease Scheme at the time it was implemented. In my judgment, this was not a "once and for all" decision that the Annex Lease Scheme would not be disclosed to anyone who happened to be an Investor. It was more limited, namely that there would be no general announcement to Investors generally in or around 2008 that the Annex Lease Scheme had been implemented.

242. Even though that decision involved Mr Conway considering whether to disclose the Annex Lease Scheme to Investors, and deciding not to, that decision does not, on its own, engage s32(1)(b) of the Limitation Act. In 2008, none of the Investors were shareholders or directors of SBHMC. They would only become shareholders over five years later on expiry of the Rental Guarantees. No decision had been taken in 2008 that Investors would, or would not, become directors of SBHMC in the future and still less had any Investors been identified as candidates to become directors on expiry of the Rental Guarantees. Therefore, on its own, Mr Conway's decision in 2008 involved no concealment of the Annex Lease Scheme from SBHMC, the claimant in this action.

243. Other than not positively informing Investors, no steps were taken in 2008 to hide the Annex Lease Scheme. As noted in paragraph 159, the Lease and the Underlease were registered at HM Land Registry.

Did Galliard Homes "resist" the appointment of investor directors to the board of SBHMC between 2012 and 2015?

244. The Room Contracts provided for Investors to be issued their shares after all of the Rental Guarantees had expired, subject to a long-stop date of 1 January 2014. Once Investors held a majority of the ordinary shares in SBHMC, they would together have been able to pass shareholder resolutions appointing directors to the board of SBHMC.

245. One allegation of "deliberate concealment" in the "red text" in paragraph 17.2.3A of the Reply is to the effect that Galliard Homes resisted the appointment of Investors as

directors of SBHMC between 2012 and 2014. As I have explained, I did not understand that allegation to be pursued in closing, but it is instructive to explain why I do not accept it. Mr Porter of Galliard Homes did, in December 2012 send a letter to Investors seeking volunteers to serve as directors of SBHMC. However, Mr Philips advised that there would be certain risks in having Investors on SBHMC's board at a time when Galliard retained some liability under the Rental Guarantees. Conceptually, Investors could affect the Hotel's operation and so increase Galliard's risk under those guarantees.

246. Galliard, therefore, concluded that it was preferable to adhere to the letter of the agreement with Investors and issue shares in SBHMC, and transfer the freehold to the Site, only after the Rental Guarantees expired. The change of tack did not arise in circumstances where Mr Conway or any defendant had considered that the appointment of such directors would result in the disclosure of the Annex Lease. Galliard explained its decision in a letter of 7 February 2013 in which it announced that it had decided instead to appoint C1 Capital to protect Investors' interests by overseeing decisions regarding the operation of the Hotel. In my judgment, that letter set out a true reflection of Galliard's reasons for not appointing Investors as directors at that time. It would have made no sense for Galliard even to suggest the appointment of Investors as directors if its true motivation at the time was to conceal the Annex Lease Scheme from SBHMC.

247. SBHMC also pleaded that Galliard Homes and Mr Conway "avoid[ed] passing a formal resolution at an Annual General Meeting ("AGM") on 23 May 2014 for the appointment of an Investor-director to the board of directors of SBHMC". I reject that allegation. The meeting on 23 May 2014 was not an AGM of SBHMC at which directors could be appointed.

248. That said, between 2012 and 2015, Galliard continued with its previous policy of not positively advertising the existence of the Annex Lease Scheme to Investors. For example, on 16 January 2013, Mr Porter was sent an email by Mr Branch asking whether Investors were aware that SBHMC would shortly start paying rent pursuant to the Underlease. Mr Porter replied "Not their concern – just forms part of the hotel's operating costs". That statement was literally true at the time since Investors' returns under the Rental Guarantee would be the same whatever the Hotel's actual operating costs. The email makes it clear that Galliard was continuing with its decision not to make a general announcement of the Annex Lease Scheme to Investors. However, I do not accept that it demonstrates an intention, whether on the part of Mr Porter or any defendant, to conceal the Annex Lease Scheme from SBHMC itself. It was simply a manifestation of the same decision as is described in paragraph 242.

Alleged concealment from Mr Marley: 2015 to 2017

249. Investors were issued shares in SBHMC in March 2014, somewhat later than the long-stop date provided for in their Room Contracts. Therefore, from March 2014, Investors controlled SBHMC's ordinary share capital and could, if they had mobilised themselves, appointed their own nominees to SBHMC's board. By March 2015, they had not mobilised themselves in that way, but Mr Conway had decided that it was time for him to step down as the sole director of SBHMC.

250. Mr Duffy and Mr Tucker-Brown were appointed as directors of SBHMC on 27 March 2015. Mr Duffy had been aware of the Annex Lease Scheme from around 2013 because, from that point the rent-free period on the Underlease had expired with the result that Lodgeshine was entitled to receive rent and Galliard's commercial rent portfolio was within Mr Duffy's area of responsibility.

251. In the run-up to the AGM of SBHMC on 27 April 2015, it became clear that there remained some appetite for an Investor to be appointed as director. Mr Marley ensured that the agenda for the AGM included a proposal to appoint an Investor director. Two candidates presented themselves and Mr Marley was elected at the AGM itself and therefore became one of three directors of SBHMC together with Mr Duffy and Mr Tucker-Brown. Mr Marley gave a short speech thanking shareholders for voting for him and promised to be the "eyes and ears" of Investors on the Board.

252. On his appointment, Mr Marley was not aware of the Annex Lease Scheme. SBHMC alleges:

    i) Mr Marley was kept out of the kind of discussions to which a director would normally be party in order to prevent him from discovering the existence of the Annex Lease Scheme.

    ii) That behaviour manifested itself most strikingly in what SBHMC characterises as "sham" directors' meetings in 2016 and 2017 during which Mr Marley was invited to participate in an approval of SBHMC's annual accounts even though, to the knowledge of both Mr Duffy and Mr Tucker-Brown, those accounts had already been approved and submitted to Companies House.

253. In my judgment, the first strand of the allegation summarised in paragraph 252.i) involves an application of the kind of unfortunate hindsight that is not infrequently applied when business or other relationships sour. Following the souring of relations between Investors and Galliard, SBHMC has focused afresh on events at the time with a view, whether consciously or otherwise, to discovering hints in those events of what it now considers to be Mr Conway and Galliard's acts of deliberate concealment. The problem with this approach is that it involves events that might be entirely explicable by reference to circumstances as they existed at the time becoming refracted through a prism of suspicion and mistrust.

254. First, Mr Marley has significantly overstated the extent to which he was not involved in SBHMC's business. He said, in paragraph 35 of his Third Witness Statement that, following his appointment as director, "the only information regarding the Hotel that I recall receiving from Galliard was that relating to my room, as a regular investor, such as the turnover and profit it was generating". That was an exaggeration. Mr Marley was, for example, involved in discussions when it was rumoured that some staff at the Hotel might go on strike in a dispute about pay and conditions. He was involved in discussions in July 2015 concerning the approval of items of capital expenditure that were outside the then approved budget.

255. Second, in focusing entirely on deliberate concealment of the Annex Lease Scheme as explaining why Mr Marley was not as fully involved in discussions of SBHMC's business as he evidently wished, SBHMC ignore altogether more benign reasons why this might be the case. Specifically:

i) Until 2014, SBHMC was a 100% subsidiary of Galliard Homes and was, therefore, plugged into a number of automated processes that applied to such subsidiaries. It took some time for Galliard's internal processes to catch up with the fact that SBHMC was no longer a subsidiary.

ii) Mr Marley's co-directors were Mr Duffy and Mr Tucker-Brown who, unlike Mr Marley, had some connection with Galliard's existing infrastructure (even though Mr Tucker-Brown was not an employee of Galliard). The structure of Galliard's organisation was more set up to accommodating communications with members of its existing infrastructure than it was set up to facilitate communications with someone outside the organisation such as Mr Marley. Therefore, while Mr Marley and others now regard it as "suspicious" that, on 18 January 2016, Mr Porter emailed Mr Duffy (without copying Mr Marley) with a request that he look at the rent review on the Underlease, I do not consider that there was anything untoward about it. Rather, it was an instance of one Galliard employee asking another for input.

iii) Mr Marley's allegations of being "kept in the dark" also pay insufficient attention to the fact that he did not have a skill set that translated naturally to being a director of SBHMC. Mr Marley is clearly a highly skilled engineer. However, his knowledge of financial and accounting matters is limited. Early in his cross-examination, it became clear that Mr Marley did not appreciate what "management accounts" are or that there is a difference between "management accounts" (i.e. periodic financial information that is provided to management of a company) and a company's audited statutory accounts that have to be filed at Companies House.

256. It is true that, in both early 2016 and early 2017, Mr Marley was invited to participate in a board meeting one of whose stated purposes was to approve SBHMC's final accounts for the accounting periods ended on 31 March 2015 and 31 March 2016 respectively. In fact, prior to those board meetings, the accounts had been approved: those for 2015 apparently by Mr Duffy alone and those for 2016 apparently by both Mr Duffy and Mr Tucker-Brown. Mr Marley was not consulted before either set of accounts was filed at Companies House.

257. Therefore, in both 2016 and 2017, Mr Marley travelled a long way from his home in Cheltenham to a board meeting in London. Mr Marley was not aware at the time of the 2016 board meeting that the accounts for SBHMC's accounting period ended 31 March 2015 had already been approved. However, either during or following the 2017 board meeting, Mr Dijkstra told Mr Marley that the accounts in question (for the year ended 31 March 2016) had been approved prior to that meeting.

258. Mr Marley was, quite understandably, angry when he was told this. He was entitled to conclude that he had been treated with disrespect. Moreover, Mr Porter should have done better, as SBHMC's company secretary, than allowing a statement to appear in both sets of accounts to the effect that they had been approved by order of the board in circumstances where Mr Marley had not been invited to approve them. However, the assertion that there was more to these incidents than carelessness and disrespect is wide of the mark. I conclude, for the following reasons that what SBHMC refers to as the "sham board meetings" were simply the result of poor administration and the mistaken application of processes that were appropriate when SBHMC was a member of the

Galliard group but which had ceased to be appropriate after it became controlled by Investors (see paragraph 255.i) above).

i) First, no attempt was made in 2017 to disguise the fact that the accounts that Mr Marley was being invited to "approve" had already been sent to Companies House. The accounts that he was sent bore a Companies House stamp and barcode confirming that they had been filed on 20 December 2016.

ii) Second, when in January 2017 Mr Marley requested some financial information relating to the Hotel, Mr Dijkstra sent him the Hotel's management accounts. Indeed, Mr Dijkstra even went to the trouble of extracting the financial information in question from another Excel spreadsheet. The material that Mr Dijkstra sent to Mr Marley showed that SBHMC was paying £9,782 a month as rent on the Underlease (described in the management accounts as the "Hotel Property Lease"). If the Defendants were orchestrating an ongoing programme of deliberate concealment of the Annex Lease Scheme, they would have ensured that Mr Dijkstra was instructed not to reveal such information. However, although he received the Excel spreadsheet in question, I have concluded that Mr Marley did not appreciate the significance of this figure at the time and so did not conclude that SBHMC was paying rent pursuant to the Underlease to Lodgeshine. Mr Marley's conception of "management accounts" was imperfect and I have concluded that he limited his review of the Excel spreadsheet to an attempt to reconcile "headline" figures that it contained with entries in SBHMC's full-year accounts for the period.

iii) Third, it was not just Mr Marley who was on the receiving end of this treatment. The accounts for the year ended 31 March 2015 were approved without either Mr Marley or Mr Tucker-Brown being consulted.

259. Finally in this regard, I deal with SBHMC's assertion that Galliard and Mr Conway sought to prevent a visible record of the Annex Lease Scheme from appearing in Galliard's 2015 accounts by requiring SBHMC's auditors (BDO) to refrain from including a "prior period adjustment" in respect of rent on the Underlease in those accounts.

260. The point arose from the fact that for the first 5 years of the Underlease, no rent was payable. A case could nevertheless be made that, applying accounting principles, the entirety of the rent due under the Underlease needed to be spread over its 15-year term. Accordingly, even though no cash rent was payable in the first five years, a it was possible that nevertheless an accounting expense needed to be recognised. BDO picked up on this point in 2015 and suggested that SBHMC's accounts for that period should include a "prior period adjustment" recognising the fact that the accounts for the previous year had been prepared on an incorrect basis.

261. Mr Porter disputed the need for a prior period adjustment and ultimately his view prevailed. BDO were ultimately prepared to sign off on the 2015 accounts without any prior period adjustment.

262. SBHMC argues that Mr Porter's debate with BDO was motivated by a wish to conceal the Annex Lease Scheme since, if the prior period adjustment in question had been made, Investors would see a clear reference to the scheme on the face of SBHMC's

statutory accounts. If the other evidence of concealment of the Annex Lease Scheme from SBHMC had been stronger, I might perhaps have accepted that interpretation. However, in the event, I have concluded that I will not draw this conclusion from Mr Porter's discussions with BDO. I conclude that they represented the kind of debate that not infrequently takes place between a company and its auditors as to the proper presentation of accounts. Moreover, BDO are a large and reputable accounting firm. I am not prepared to conclude that they succumbed to pressure exerted by Mr Porter to conceal the Annex Lease Scheme. Indeed, the fact that they were prepared to sign off on accounts without the prior period adjustment demonstrates to me that Mr Porter was correct in his analysis that no such adjustment was required.

Conclusion on deliberate concealment of the Annex Lease Scheme

263. I have concluded that neither Mr Conway nor any of the other defendants "deliberately concealed" the Annex Lease Scheme so as to engage s32(1)(b) of the Limitation Act. The initial decision not to make an announcement to Investors as a whole did not, on its own, amount to "concealment" from SBHMC. The subsequent acts on which SBHMC relies did not involve "deliberate" concealment since they did not involve Mr Conway or any other defendant considering whether to disclose the Annex Lease Scheme to SBHMC, but deciding not to.

Deliberate concealment of the FSC – the allegations as advanced in closing

264. SBHMC has pleaded that the Defendants deliberately concealed (i) the FSC and the existence or likely existence of an executed version of that contract and (ii) drafts of the FSC. The basis of these allegations is to be found in correspondence between the parties in 2020 and 2021. Very broadly it is said that Galliard's own enquiries with Mr Philips had revealed the likely existence of a FSC (as demonstrated by Mr Philips' discovery of a draft). The "deliberate concealment" in question is said to be established by a letter dated 22 February 2021 (the "**February 2021 Letter**") in which DMH Stallard said, on the instructions of Mr Conway and the Defendants, that no FSC had ever been executed and that, accordingly, any claim by SBHMC for breach of contract was fundamentally flawed because there was no written contract that complied with the provisions of the LP(MP)A.

265. As I understood it, SBHMC's allegations of "deliberate concealment" focused on the actions of Mr Conway, Mr Huberman and Mr Hirschfield because in his reply submissions, Mr Bradley KC referred me to passages of those witnesses' cross-examination to meet the assertion that the case had not properly been put.

266. In closing, Galliard objected to aspects of that argument:

    i) Galliard argues that, since Mr Huberman and Mr Hirschfield are not themselves defendants to the claim their actions are incapable of amounting to deliberate concealment by a defendant for the purposes of s32(1)(b).

    ii) Galliard submits that aspects of its case on deliberate concealment were not properly put to Mr Conway, Mr Huberman or Mr Hirschfield.

iii) Galliard also argues that an allegation that a draft FSC was deliberately concealed is legally irrelevant given the proposition of law that I have summarised in paragraph 232.

267. I do not accept the broad objection set out in paragraph 266.i). The pleaded allegation is of deliberate concealment by "the Defendants". Moreover, the Reply specifically refers to correspondence involving Mr Huberman, Mr Hirschfield and Mr Duffy who could realistically be asserted to be acting on behalf of Galliard Hotels or Galliard Homes (both Defendants) when searching for the FSC. DMH Stallard wrote the February 2021 Letter having taken instructions from a team that included Mr Conway, Mr Huberman, Mr Hirschfield and Mr Duffy. Therefore, it is conceptually possible that if the February 2021 Letter effected any "concealment" that this was done on the instructions of Mr Huberman, Mr Hirschfield, or Mr Duffy acting on behalf of a Defendant. It would not be right to rule out of bounds any reliance on the actions of Mr Huberman, Mr Hirschfield and Mr Duffy even though they are not themselves defendants to the claim.

268. I will deal with the objection summarised in paragraph 266.ii) in the sections below in which I express my conclusions.

269. I accept Galliard's argument summarised in paragraph 266.iii). SBHMC's contrary argument was that the "relevance" or otherwise of a draft FSC must be assessed at the time of the acts said to constitute deliberate concealment. At the time of the February 2021 Letter, SBHMC and its lawyers had not been able to discover an executed FSC. Accordingly, SBHMC submits that any Particulars of Claim that it drafted in 2020 or 2021 could necessarily plead only an inference that a FSC existed with the existence of a draft document being necessary to the pleading of a claim based on such an inference. SBHMC points out that paragraph 7.3 of Practice Direction 16 requires a claimant pleading a claim based on a breach of contract to append the contract in question to the Particulars of Claim. If pleading a claim based on the inferred existence of a FSC in 2020 or 2021, SBHMC would only be able to comply with that obligation if Galliard had provided drafts.

270. However, what SBHMC is describing in these submissions is simply evidence. Obviously SBHMC would have better prospects of establishing an inference that a written FSC existed if it could show that some drafts of that contract were prepared. Put another way, if no drafts had been prepared and no executed FSC had been found despite enquiries, the prospects of successfully establishing that such a FSC was nevertheless executed would be poorer. However, paragraph 48 of Sir Terence Etherton C's judgment in *Arcadia v Visa*, states expressly that "facts which merely improve prospects of success are not facts relevant to the claimant's right of action". The relevant fact for the purposes of SBHMC's claims is that there actually was a written FSC that complied with s2 of the LP(MP)A. Deliberate concealment of drafts of a FSC are incapable of amounting to concealment of that relevant fact since it is quite possible for drafts of the FSC to have been prepared without that contract ever being executed in written form.

271. SBHMC counters that, if Galliard did deliberately conceal drafts of the FSC in 2020 or 2021, that would have prevented SBHMC from doing the best it could in the circumstances. Accordingly, SBHMC argues that it would be wrong in principle for Galliard to benefit from the limitation period continuing to run. I am unable to accept that submission. Certainly the Limitation Act does not, in the words of Lord Reed and

Lord Hodge at [228] of *Test Claimants in the Franked Investment Income Group Litigation v HMRC* [2022] AC 1, "pursue an unqualified goal of barring stale claims". However, it does provide that up to a point of demarcation, an inability to plead a claim because of a lack of awareness of crucial facts is the claimant's problem. The point of demarcation prescribed by s32(1)(b) is where a defendant has deliberately concealed an essential fact from the claimant. In my judgment, the point of demarcation would not be reached in the circumstances of this case by a deliberate concealment of drafts of the FSC.

272. If SBHMC's allegations of deliberate concealment had been different, concealment of drafts of the FSC might have been a relevant fact. For example, if SBHMC was asserting that, at the time of the February 2021 Letter, Mr Conway had, on his desk, the signed FSC but told DMH Stallard to deny the existence of that contract, or even of drafts of it, a pleading that drafts had been concealed could be seen as particulars of the means by which the FSC itself was concealed. However, a freestanding allegation of concealment of drafts of the FSC, is not in my judgment a relevant fact. Nevertheless, in case I am wrong in that conclusion, I will make factual findings as to the extent of any "deliberate concealment" of a draft FSC.

Deliberate concealment of the FSC – findings

Initial searches for the FSC between June 2020 and September 2020

273. On 29 April 2020, Shakespeare Martineau sent Mr Conway a letter before action in relation to the Annex Lease Scheme. Paragraph 85 of that letter requested that Galliard provide a copy of the FSC. It contained no request for drafts. That prompted Galliard to start a process of seeking to gather together relevant documents. On 30 June 2020, Mr Huberman asked Mr Millar for a copy of "all documents relating to the transfer of the freehold from Galliard Hotels to SBHMC, including the purchase contract". Given that this request was for documents prepared some 16 years previously, something of a paperchase ensued. Mr Philips was contacted, but he thought that Mr Duffy had copies of the relevant documents. Mr Duffy sent an email saying that, having checked his files, he could not find any. Within Galliard, a view formed that Howard Kennedy had relevant documents in their archives which they might not have forwarded on to Galliard in 2004. That view was reinforced by a perception on the part of Mr Huberman and others that transfers of real estate are frequently preceded by contracts and so the likelihood was that a FSC existed somewhere.

274. Mr Millar went back to Mr Philips in an email on 6 July 2020. Just 14 minutes after receiving Mr Miller's email, Mr Philips replied:

> *Thanks Ivan. I cannot recall a separate contract per se but rather just a transfer.*

275. Mr Philips had clearly not undertaken an extensive search for the FSC in the short time before he responded to Mr Millar's email. Moreover, his email response was a statement of his recollection rather than a definitive statement to the effect that a FSC had never been executed. However, email can be an imperfect method of communication. Here the flurry of emails represented something of an ongoing commentary on an unsuccessful search for documents which was unlikely to further the communication of nuanced ideas. Mr Millar took Mr Philips to be confirming more

than he had, writing to Mr Huberman that Mr Philips "has said that there was no contract for the freehold transfer, only the transfer".

276. Mr Millar was closer to the mark in an email, also sent on 6 July 2020 in which he said that:

> *We do not know whether any [FSC] was ever exchanged as nobody appears to be able to locate a copy.*

277. However, the idea that a FSC might never have been executed had taken root. In an email of 22 July 2020, Mr Millar observed that "David Philips commented that there was no [FSC] – the matter just went straight to transfer".

278. That understanding was reflected in an email of 9 September 2020 sent by DMH Stallard to Shakespeare Martineau in which DMH wrote "as regards disclosure of the freehold sale contract to which you refer, does not exist. We understand that the matter proceeded to completion without a sale contract".

279. SBHMC invites me to reject as "implausible" the evidence of Mr Huberman and Mr Hirschfield to the effect that they understood Mr Philips to be saying that no FSC had ever been executed. I do not find that evidence implausible and I accept it. After all, much of the discussion with Mr Philips on attempts to locate the FSC was being undertaken by Mr Millar whose emails showed that he had not fully grasped what Mr Philips was actually saying. More generally, I find it entirely plausible that a discussion over email on a hunt for documents could result in addressees of those emails not fully understanding what Mr Philips was saying. That not infrequently happens with email communication.

Further searches in January 2021

280. Questions relating to the existence of the FSC arose afresh in January 2021 in part because Galliard had consulted leading counsel who had asked whether Howard Kennedy had a copy of the signed, or even draft, FSC. DMH Stallard forwarded a copy of counsel's request to Mr Duffy on 25 January 2021. Mr Duffy's response that, he had "asked Howard Kennedy to double check but we have never found a copy" reflected the belief held within Galliard to which I have referred in paragraphs 277 and 278.

281. Since the impression within Galliard at the time was that no FSC had ever been executed, Mr Duffy did not think to ask Mr Philips about the existence of an executed FSC in the light of counsel's request. Given Galliard's belief at the time, there would have been no point to such a request since they understood Mr Philips already to have confirmed that no FSC had ever been executed. Therefore, when Mr Duffy wrote to Mr Philips on 25 January 2021 he started his email by writing:

> *we desperately need to find a copy of the **draft** Freehold sale contract that may have been or should have been attached the contract for sale. We have a copy of the transfer but we cannot find the contract [emphasis added]*

282. Mr Philips replied on 25 January 2021 to the effect that, since a COVID lockdown was then in place he would not be able to go into his office to look through boxes of old files. He said that it was unlikely in any event that Howard Kennedy would retain the

hard copy files going back to 2004. He therefore performed, or asked colleagues to perform, an electronic search and, having done so, sent an email to, among others, Mr Huberman, Mr Hirschfield and Mr Duffy on 26 January 2021 saying:

> *I have located a draft word format version of the document headed "freehold agreement" and attach the same herewith, albeit I think this was the first draft and therefore I cannot guarantee the actual version entered into was the same (as it may have been updated/amended before the first launch based on client instructions).*

283. Mr Philips was, therefore, mistaken when he said in his Second Witness Statements that in January 2021, he was only looking for an executed FSC. When asked for a reason for that mistake Mr Phillips said that he had performed his searches before Galliard had waived privilege on any of their legal advice. That prompted Mr Bradley KC to suggest that Mr Philips was telling lies in his witness statement assuming that he would not be found out because the underlying instructions to him were privileged. I do not accept that. I conclude that what Mr Phillips was trying to say in his, admittedly somewhat unclear, answer was that because, when he gave his Second Witness Statement, privilege had not been waived, he had not been as careful as he should have been in checking that witness statement against privileged instructions given to him. I accept that account and, while Mr Philips should have taken more care when preparing his witness statement, conclude that he was not lying to the court.

284. SBHMC argues that in his email of 26 January 2021, Mr Philips was making it clear that an executed FSC did exist (hence his reference to the "actual version entered into"). I do not accept that. The only way that Mr Philips could confirm that the FSC had been executed was by finding a signed version and he had not done so by 26 January 2021. Therefore, the email of that date reveals the extent to which Mr Philips and Galliard were proceeding at cross-purposes. Mr Philips recognised the possibility that the FSC had indeed been executed. However, Galliard had discounted that possibility because of their incorrect belief that Mr Philips had himself ruled it out in correspondence in June and July 2020. I do not regard it as "incredible" (to use SBHMC's word) that Mr Huberman, Mr Hirschfield and Mr Duffy overlooked the hint in Mr Philips's email that an executed FSC might exist. People not infrequently interpret written communications by reference to what they already think and believe and all three individuals believed at the time that there was no executed FSC.

285. The February 2021 Letter did not refer to the draft FSC that Mr Philips had found.

Deliberate concealment of FSC – Conclusions

Executed FSC and "existence of" FSC

286. I do not accept Galliard's arguments that this aspect of SBHMC's case was not properly put to Mr Huberman, Mr Hirschfield, Mr Duffy or Mr Conway. An allegation of "deliberate concealment" is not an allegation of fraud. In my judgment all four of these witnesses would have been aware from the questions that they were asked that it was alleged that they knew at the time of the February 2021 Letter that an executed version of the FSC existed but that they had nevertheless permitted or instructed Galliard's solicitors to say otherwise in correspondence. However, while the allegation

was properly put, I do not consider that SBHMC has made out the allegation of deliberate concealment of the executed FSC.

287. I find that the February 2021 Letter was prepared following the input of a team that included Mr Conway, Mr Huberman, Mr Hirschfield and Mr Duffy. At the time of the February 2021 Letter, none of that team was actually aware of the existence of an executed FSC. Mr Huberman, Mr Hirschfield and Mr Duffy had all been involved in correspondence with Mr Philips on efforts to find the executed FSC. As I have explained, that correspondence caused them wrongly, but genuinely, to conclude that Mr Philips had confirmed that a FSC was never executed. Mr Conway with his marked lack of interest in the detail of the transaction could have had no greater awareness of the existence of an executed FSC than Mr Huberman, Mr Hirschfield and Mr Duffy. Mr Philips had told him in 2008 that the Annex Lease Scheme was the means by which a transfer of the Annex to SBHMC would be prevented (see paragraph 164). He would have assumed that Mr Philips was correct as otherwise there would be no point to the Annex Lease Scheme. However, he did not know that the document in question was the freehold sale contract that Shakespeare Martineau were requesting and whose existence DMH Stallard were denying.

288. I have concluded that all four witnesses would, in 2020 and 2021, have thought that, in the ordinary run, there would have been some sort of document which gave contractual effect to Galliard's obligation to transfer the freehold interest in the Site and so would have been surprised when searches had not unearthed an executed document to this effect. SBHMC's allegations of "deliberate concealment" in relation to the executed FSC rely on an incorrect assertion that a belief by Galliard personnel such as Mr Huberman, Mr Hirschfield, Mr Duffy and Mr Conway that an executed FSC should exist meant that they knew it did exist. However, given the discussions with Mr Philips in the hunt for the document, all of these individuals had come to the view by the date of the February 2021 Letter, that an executed FSC did not exist.

289. Mr Philips's discovery of a draft FSC in January 2021 did not alter that belief. Drafts can be prepared of documents that are never executed.

290. There is a further point. At the time of the February 2021 Letter, it appeared possible that SBHMC and/or Investors were about to bring legal proceedings relating to transactions that had taken place in 2004. All of Mr Conway, Mr Huberman, Mr Duffy and Mr Hirschfield had access to the legal advice that DMH Stallard was providing to Galliard. It would make no sense for any of these individuals to engage in any "concealment" of the FSC when that would simply risk restarting a period of limitation pursuant to the Limitation Act.

291. None of Mr Conway, Mr Huberman, Mr Duffy or Mr Hirschfield deliberately concealed an executed FSC. That was because, at the time of the alleged acts of deliberate concealment, they were unaware that such a document existed. Being unaware of the existence of an executed FSC they were incapable of considering whether or not to disclose it and so the requirement of "deliberate concealment" referred to in paragraph 234.i) is not satisfied in relation to the FSC.

292. That conclusion also deals with SBHMC's allegation based on deliberate concealment of the "existence of" the FSC.

Deliberate concealment of draft FSC

293. I consider that Galliard is correct to say that the case on deliberate concealment of a draft FSC was not put to Mr Conway or Mr Hirschfield expressly. That emerges from the transcript references that Mr Bradley KC gave in support of his assertion that the allegation had been squarely put:

    i) The transcript reference for Mr Conway's cross-examination dealt with the executed FSC, but not drafts.

    ii) The transcript references for Mr Hirschfield did refer to the draft FSC that Mr Philips had found and did put the proposition that it was "someone's deliberate choice" not to disclose that draft contract to SBHMC. However, there was no express exploration of whether Mr Hirschfield had considered whether the draft contract should be provided to SBHMC, but had concluded that it should not be so as to keep SBHMC in the dark as to the existence of the draft.

294. The allegation was, however, put to Mr Huberman. A good part of that cross-examination was concerned with whether discovery of the draft FSC caused Mr Huberman to realise that there must be an executed version somewhere. That was in substance cross-examination as to deliberate concealment of the executed FSC. However, it was put to Mr Huberman that he deliberately chose not to reveal the draft. I will, therefore, make my findings in this section by reference to the allegations as put to Mr Huberman.

295. It is true that in the letter February 2021 Letter, DMH Stallard did not refer to the draft FSC that Mr Philips had found. By that time, all of Mr Duffy, Mr Huberman, Mr Hirschfield and Mr Conway were aware that the draft document had been discovered.

296. With the benefit of hindsight, it would have been better if that document had been provided voluntarily to SBHMC. However, I will not conclude that Mr Huberman considered providing SBHMC with a draft FSC, but decided not to because he did not want SBHMC to be aware of that draft. I therefore conclude that there was no deliberate concealment of a draft FSC in the February 2021 Letter. I reach that conclusion for the following reasons:

    i) Shakespeare Martineau's original request for disclosure was of the executed FSC in letters that they wrote on 29 April 2020. Since they had not asked for drafts preceding the final version, Mr Huberman was not party to any deliberate concealment in declining to instruct DMH Stallard to provide drafts. Nor was Mr Huberman being unnecessarily pedantic in following this course. He genuinely thought that no FSC had been executed and I conclude that, in those circumstances, he would not have considered providing drafts (which had not been requested) instead.

    ii) The point made in paragraph 290 is equally applicable to the allegation of deliberate concealment of the draft FSC.

    iii) SBHMC invites me to conclude that, because leading counsel had shown an interest in drafts of the FSC (see paragraph 280) Mr Huberman must have realised that they would be of interest to SBHMC with the result that Mr

> Huberman made a conscious decision not to disclose those drafts. I do not accept that. Even though counsel had asked for drafts, Shakespeare Martineau had not. I accept Mr Huberman's evidence that he believed counsel would have his own reasons for requesting the documents he did which might differ from Shakespeare Martineau's reasons for requesting different documents. I accept Mr Huberman's evidence that he did not consider that the draft FSC should be disclosed as part of the process of preparing the February 2021 Letter.

297. A further allegation of deliberate concealment of a draft FSC is based on Mr Huberman's response to an email that Mr Duggan sent him on 12 March 2021. Mr Duggan sent that email the day after he had found a copy of an executed FSC package of documents in his loft. In that email Mr Duggan asked Mr Huberman about the extent of enquiries that Galliard had made of Howard Kennedy regarding the existence of the FSC stating that it was:

> *incumbent upon Galliard to make… enquiries and to disclose any documents, including correspondence or drafts of [the FSC] that may be of relevance.*

298. Mr Duggan did not disclose in that email that he had himself already found a copy of the contract. He deliberately did not mark his email "Without Prejudice" in the hope that Mr Huberman would say something that could be interpreted as untrue about the existence of that contract which could then be drawn to the attention of the court.

299. I regard Mr Duggan's email as an attempt to trick Mr Huberman. Having laid what it thought was a trap, SBHMC was predisposed to conclude that, when Mr Huberman did not provide a draft FSC in response, that this was evidence of "deliberate concealment". I do not agree. Mr Huberman simply replied to the effect that DMH Stallard's letter set out Galliard's position. DMH Stallard were Galliard's lawyers and Mr Huberman considered that they were leading on all correspondence about the possible claim, including requests for disclosure of documents. He did not, therefore, consider embarking on a separate disclosure exercise of his own. Since Mr Huberman had not considered instructing DMH Stallard to provide a draft of the FSC when they wrote the 22 February 2021 Letter, I infer that he was of the same mind at the time he replied to Mr Duggan's email some three weeks later. I reject the allegation that Mr Huberman was engaged in deliberate concealment of the draft FSC in his response to Mr Duggan.

Conclusion

300. I reject the allegation of deliberate concealment of the FSC for the reason that no defendant engaged in the requisite behaviour, with the requisite mental state, for deliberate concealment to be present.

301. Galliard also argues that there is a conclusion of pure law that disposes of the allegation namely that (i) Mr Philips knew of both the FSC and drafts thereof from the moment they were prepared; (ii) his knowledge should be attributed to SBHMC as SBHMC's conveyancing solicitor; and (iii) there can therefore be no deliberate concealment of the FSC from SBHMC applying the principles set out in paragraph 233.iii). Given my conclusion on factual matters, I do not need to determine this question of law and I will not do so. I simply observe that the factual premise as to the state of Mr Phillips's

knowledge is correct. He was, indeed, SBHMC's conveyancing solicitor as demonstrated by the fact that he had the authority to sign the FSC on SBHMC's behalf.

PART H – DISCOVERY OF THE ANNEX LEASE SCHEME

When various persons discovered the Annex Lease Scheme

302. SBHMC has failed to demonstrate that there was any deliberate concealment of the Annex Lease Scheme. I make the findings of fact in this section in case, contrary to that finding, it is necessary to consider Galliard's case that, in any event, SBHMC is to be attributed with knowledge of the Annex Lease Scheme before any act of deliberate concealment so as to engage the principle set out in paragraph 233.iii).

303. In my judgment, the following individuals with some relationship with SBHMC were aware of the Annex Lease Scheme at the following points in time.

    i) Mr Conway and Mr Philips were aware of it from the moment the scheme was implemented in 2008. Mr Conway was the sole director of SBHMC at that time. Mr Philips as has been noted was a solicitor instructed to do the conveyancing with authority to act on SBHMC's behalf (see paragraph 301).

    ii) Mr Dijkstra was aware of it shortly after C1 Capital were appointed in 2013.

    iii) Mr Duffy was aware of it at the time he was appointed as a director of SBHMC in 2015.

    iv) Mr Marley and Mr Lakha KC became aware of it for the first time in December 2017 when they learned about it in their capacities as directors of SBHMC at a meeting with BDO.

304. I have already explained C1 Capital's role in paragraph 246. C1 Capital were appointed in 2013 pursuant to a Service Agreement with a two-year fixed term. That agreement was never formally renewed, but I conclude that SBHMC and C1 Capital agreed, by conduct, a renewal of that agreement on substantially similar terms. Mr Dijkstra accepted, and I find, that C1 Capital's role was to manage and monitor all aspects of the Hotel's operations on behalf of SBHMC effectively so that the board of SBHMC did not have to. Part of that role involved, in Mr Dijkstra's words "interrogating the monthly performance" of the Hotel on behalf of SBHMC.

305. By paragraph 2 of Schedule 1 to the Service Agreement, C1 Capital was obliged to provide quarterly reports on the performance of the Hotel. Rent started to become due pursuant to the Underlease in 2013 and, accordingly, from that date C1 Capital was under a contractual obligation to inform SBHMC of the obligation to pay rent.

306. Clause 2.3 of the Service Agreement provided that C1 Capital would not, when carrying out its obligations thereunder, be acting as agent for SBHMC. Galliard's position was that C1 Capital was nevertheless SBHMC's agent, whereas SBHMC argued that the Service Agreement provision to the contrary should be respected. I will not burden an already lengthy judgment with an analysis of that question since it is not necessary for my decision.

When various individuals discovered the existence of the FSC

307. I make the findings in this section in case I am wrong on my conclusion that there was no deliberate concealment of the FSC. They are relevant to the principle summarised in paragraph 233.iii) and Galliard's argument that SBHMC should be attributed with knowledge of the FSC before the acts that were alleged to constitute deliberate concealment of the FSC.

Knowledge of Mr Duggan, Mr Marley and Mr Lakha KC in 2004

308. Mr Duggan, Mr Lakha KC and Mr Marley all instructed solicitors to act for them in connection with their acquisition of Rooms. All of those solicitors would, in 2004, have received a pack of documentation of the kind referred to in paragraph 55 that contained a copy of an executed FSC. That follows because the pack of documentation was prepared specifically for provision to Investors' solicitors and there is no reason why it would not have been given to these three particular Investors' solicitors.

309. It was suggested to all three witnesses in cross-examination that they would themselves actually have been aware in 2004 or 2005, when they entered into their Room Contracts, that the FSC had been executed. I have concluded that none of these three Investors would themselves have been aware of this fact at this time (as distinct from being attributed with the knowledge of their solicitors) for the following reasons:

    i) The pack of documentation had been sent to their solicitors and I am not satisfied that the Investors themselves would have reviewed that suite of documentation at around the time they signed their Room Contracts.

    ii) Investors were certainly told in marketing and similar material at the time that SBHMC would take a transfer of the freehold of the Site in due course. All three Investors regarded that as an attractive and important feature of the investment. However, it does not follow from this that the three Investors realised that the FSC had actually been signed when they were signing their Room Contracts. I do not find it incredible, or implausible, as Galliard argued, for even lawyers such as Mr Duggan and Mr Lakha KC to rely on assurances in such documentation. They were entitled to conclude that a reputable firm such as Galliard would not be lying in its marketing literature. If the promises set out in the marketing literature were not appropriately backed up by contractual assurance, the Investors had instructed solicitors who could take the point and require contractual assurance as necessary.

    iii) Much emphasis was placed on Clause 19(a) of each Investor's Room Contract. Mr Duggan, Mr Marley and Mr Lakha KC were careful investors and I accept that they would have read this clause before signing the contract. By Clause 19(a), each Investor "acknowledged that [Galliard Hotels] has entered into the Freehold Sale Contract". However, I accept each of the three Investors' evidence that, while they gave this acknowledgement they did not independently verify that it was accurate. The only way that they could verify it would be by, themselves, rather than through their solicitors, requesting sight of the signed FSC. I find that none of Mr Duggan, Mr Marley and Mr Lakha KC took this step. Rather, they simply signed their Room Contract not considering the acknowledgement was important or in need of their own personal verification. I do not consider that to

be an implausible or unlikely course of conduct even for lawyers such as Mr Duggan and Mr Lakha KC.

Knowledge of Mr Duggan, Mr Marley and Mr Lakha KC between 2017 and 2020

310. Mr Duggan, Mr Marley and Mr Lakha KC discovered the Annex Lease Scheme when they were told about it in December 2017. That prompted them all to focus on the documents they had to hand. They realised from this review that there was supposed to be a contract for the transfer of the freehold interest in the Site from Galliard Hotels to SBHMC. However, although they saw references to that contract, they could not find the contract itself. On 16 December 2017 Mr Duggan emailed Mr Lakha KC and Mr Marley saying that he had reviewed his Room Contract and the legal report he received from the panel solicitors and that "the relevant sections are clause 19 of the Sale Contract and clause 1.28 of the Legal Report".

311. All three Investors were pressed in cross-examination with the proposition that they had thereby discovered the existence of the FSC. I do not accept that. Rather, I accept the distinction that Mr Lakha KC drew in his oral evidence. He had discovered at this point that an FSC should exist but he had not discovered that it actually existed. The fact that Shakespeare Martineau wrote in paragraph 3.2 of a letter of 29 April 2020 that Galliard "was required to transfer the freehold of the Hotel to SBHMC" does not alter this conclusion. Shakespeare Martineau's understanding of Galliard's "requirement" was expressly drawn from Clause 19(a) of the Room Contract. Shakespeare Martineau were simply making references to a document that they knew should exist but which they could not find. That is why, in paragraph 85 of the same letter, they requested a copy of the FSC.

312. Overall, I conclude from the evidence that Mr Duggan, Mr Marley and Mr Lakha KC did not become themselves aware that the FSC had been executed, or of its terms, until Mr Duggan found a copy in the pack of documents in his attic on 11 March 2021.

The decision to continue paying rent pursuant to the Underlease

313. The factual findings in this section are relevant to various defences that Galliard advances in relation to claims based on a breach of trust to the effect that SBHMC "affirmed" the Underlease by continuing to pay rent on it.

314. SBHMC continued to pay rent pursuant to the Underlease until 16 January 2019. It follows that SBHMC was paying rent pursuant to the Underlease after the point at which Mr Dijkstra found out about the Annex Lease Scheme in June 2013 (see paragraph 303.ii)) and after the point in time at which Mr Marley was provided with a spreadsheet showing that SBHMC was paying the rent pursuant to the Underlease (see paragraph 258.ii) and after the discovery by Mr Duggan, Mr Marley and Mr Lakha KC of the Annex Lease Scheme at the meeting with BDO in December 2017 (see paragraph 303.iv)).

315. In the autumn of 2018, SBHMC took legal advice from (unnamed) counsel on matters connected with the Lease and Underlease. SBHMC accepted that it waived privilege in relation to aspects of that advice dealing with its understanding as to whether it had a right to rescind the Lease or Underlease up to and including 31 August 2019 because it placed in evidence an email from Mr Duggan dated 15 July 2019 referencing that

aspect of the advice received. In consequence, on the first day of the trial, I made an order requiring SBHMC to disclose the instructions from and/or legal advice provided to SBHMC from 1 September 2018 to 17 January 2019 in connection with the validity of the Lease and Underlease and whether SBHMC was obliged to pay rent pursuant to the Underlease. I also ordered SBHMC to provide communications recording that advice dating up to 31 August 2019.

316. SBHMC's response was to disclose a document described as instructions to counsel, which were completely redacted, and a document described as a note of counsel's advice, also completely redacted. SBHMC's position was that in the autumn of 2008 it was not taking advice on the validity of the Lease or Underlease, or on SBHMC's obligation or otherwise to pay rent pursuant to the Underlease. Accordingly, its position was that there was in substance nothing to be disclosed pursuant to the terms of my order.

317. Galliard argues that, before SBHMC ceased to pay rent pursuant to the Underlease it must have known (i) the facts necessary to plead a case to the effect that the Lease and/or Underlease were void or voidable and (ii) that it had a legal right to seek a declaration that the Lease and Underlease were void or voidable. Accordingly, applying the test set out by the Court of Appeal *Peyman v Lanjani* [1985] Ch 457, it argues that SBHMC's continued payment of rent pursuant to the Underlease amounted to an affirmation of any breach of trust. It reserves the right to argue in a higher court that *Peyman v Lanjani* imposes too high a bar in requiring knowledge of legal rights but realistically accepts that I should not decide this point as I am bound by the Court of Appeal's judgment.

318. Galliard bases that argument on contemporaneous documentation addressing the nature of the legal advice that SBHMC had obtained. For example, Mr Lakha KC said in paragraph [39] of his Second Witness Statement that, at a meeting in February 2019, he and others representing SBHMC told Mr Duffy and Mr Conway that they had "taken legal advice and provided lawyers with documents that showed there was never supposed to be a lease, and that South Bank were meant to take ownership of the freehold of the entire Hotel". In a similar vein, Galliard refers to Mr Duggan's email of 15 July 2019 in which he wrote, in connection with a letter from Galliard requiring payment of rent pursuant to the Underlease:

> *Although we can ignore this for a while, we will be legally obliged to pay the rent increases and Galliard could, in the worst case, "evict" the hotel from the meeting rooms if we do not pay. If you recall, our potential legal action against them does not argue that the lease is invalid, [text redacted] so the rent still has to be paid.*

319. I do not accept Galliard's interpretation of these emails. When they were written, SBHMC had still not located the FSC. While it considered that there should have been an FSC, they still did not know that a written FSC had been executed that complied with the requirements of the LP(MP)A. The allegation that the Lease or Underlease were void or voidable depended crucially on Galliard Hotels having entered into a written contract to convey the entire freehold interest in the Site that satisfied the LP(MP)A. Without that contract a claim that the Lease or Underlease were voidable could not get off the ground.

320. I accept Mr Duggan's evidence that, in his email of 15 July 2019, he was expressing his own conclusions on the advice that counsel had provided in the light of the questions that counsel had been asked. I infer that in 2018, counsel was asked to advise on some sort of claim in misrepresentation. Whether that claim was to be brought by Investors or by SBHMC itself, the essence of it was that Galliard Hotels had represented that an unencumbered freehold interest in the Site would be provided to SBHMC and had breached that representation by providing SBHMC with an encumbered title. That did not carry with it an assertion that the Lease or Underlease were void or voidable. Therefore, when Mr Duggan said that SBHMC was "legally obliged to pay the rent increases", he was not setting out counsel's advice on a potential claim that the Underlease was void. Rather, he was saying that because counsel had been asked to advise only on a possible misrepresentation claim, there was no secure legal basis on which SBHMC could argue that the Underlease was of no effect. Galliard asserted that Mr Duggan's explanation of what he meant by his email was "incredible", but I do not agree. It is entirely consistent with the fact that he had not yet found the executed FSC.

PART I – LIMITATION ISSUES

The limitation periods applicable to the various claims

321. SBHMC did not, in its closing submissions, dispute Galliard's analysis of the primary limitation periods applicable to most of SBHMC's claims. I therefore set out Galliard's analysis in tabular form with only brief commentary necessary to explain it. The table does not deal with the Room Lease Claim in relation to which there was a dispute as to the expiry of the primary limitation period which is addressed below. Nor does the table deal with the Invalidity Claim because the parties eventually came to agree that, given the remedy SBHMC seeks for that claim (an altering the register pursuant to paragraph 2(1)(a) of Schedule 4 to the Land Registry Act 2002) there is no applicable primary limitation period.

Claim	**Section of Limitation Act fixing primary limitation period**	**Primary limitation period expiry**	**Sections relied upon by SBHMC to extend primary limitation period**
Breach of Trust	S21(3)	16 June 2014	S32(1)(a) S32(1)(b) S21(1)(a) S21(1)(b)
FSC Contract	S5	16 June 2014/ 9 April 2020	S32(1)(a) S32(1)(b)
Directors' Duties	S21(3)/s36	16 June 2014/9 April 2020/27 March 2021	S32(1)(a) S32(1)(b) S21(1)(a) S21(1)(b)
Knowing Receipt	S21(3)	16 June 2014	S32(1)(a) S32(1)(b)

Inducing Breach of Contract	S2	16 June 2014/ 9 April 2020	S32(1)(a) S32(1)(b)
Unlawful Means Conspiracy	S2	16 June 2014/9 April 2020	S32(1)(a) S32(1)(b)

322. SBHMC entered into "**Standstill Agreements**" with Mr Conway, Galliard Homes and Lodgeshine on 18 June 2020. It entered into no Standstill Agreement with Galliard Hotels. The Standstill Agreements operated to "pause" the limitation period applicable to claims against Mr Conway, Galliard Homes and Lodgeshine until 23 April 2021. The Main Claim was issued on 25 May 2021.

323. The reason for both 16 June 2014 and 9 April 2020 being listed as possible dates for the expiry of the primary limitation period in connection with the FSC Contract Claim, the Directors' Duties Claim, the Inducing Breach of Contract Claim and the Conspiracy Claim is that loss and/or breach relevant to those claims could be viewed as taking place either at the time of the Annex Lease Scheme (on 16 June 2008) or when SBHMC took the Transfer of a freehold interest that was encumbered by the Lease (on 9 April 2014). The two candidate dates are, accordingly, six years after these two events. However, nothing turns on which of these two candidates is the correct one since both fall before both the date of the Standstill Agreements and the date on which the Main Claim was issued.

324. Those two dates are also relevant to the Directors' Duties Claim insofar as it is asserted that Mr Conway was in breach of those duties by either permitting, or procuring, the Annex Lease Scheme to be implemented. Accordingly, that aspect of the Directors Duties Claim is also brought after expiry of the primary limitation period.

325. A further date, of 27 March 2021, appears as a candidate for the expiry of the primary limitation period for the Directors' Duties Claim. That is because, in paragraph 540.2 of its written closing submissions, SBHMC alleged that Mr Conway was in breach of his duties owed to SBHMC between the date of the Annex Lease Scheme and his retirement as a director on 27 March 2015. That breach was said to consist of Mr Conway failing to disclose "his own wrongdoing" in that period. Although the Main Claim was issued after 27 March 2021, SBHMC's written closings argue that the Standstill Agreement prevents this aspect of the claim from being out of time.

Section 32 of the Limitation Act

Statutory provisions

326. Section 32 of the Limitation Act provides, so far as material as follows:

> ***32 Postponement of limitation period in case of fraud, concealment or mistake.***
>
> *(1)Subject to subsections(3) (4A) and (4B) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—*
>
> *(a) the action is based upon the fraud of the defendant; or*

> *(b)any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or*
>
> *(c) the action is for relief from the consequences of a mistake;*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.*
>
> *References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.*
>
> *(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.*

Section 32(1)(a)

327. Galliard's position in closing was that s32(1)(a) could apply only to proceedings "in which fraud has to be proved for the plaintiff to succeed" in the words of Somervell LJ in *Beaman v A.R.T.S. Ltd* [1949] 1 KB 550, at 567. Galliard relied on the summary of Mr Simon Rainey KC (sitting as a Deputy Judge of the High Court) in *Manek v 360 One WAM Ltd* [2023] EWHC 710 (Comm), at [90], in which he referred to s32(1)(a) as dealing with "claims where fraud is a juridical part of the claim."

328. The formulation of Mr Simon Rainey KC was not disputed in *Manek v 360 One WAM Ltd* (see paragraph [91] of the judgment). Initially in its closing submissions, SBHMC did not accept Galliard's position as summarised in paragraph 327. However, in oral submissions, Mr Bradley KC did not dispute the analysis that Galliard put forward based on *Beaman v A.R.T.S. Ltd*. SBHMC does not say that fraud is a "juridical element" of any of the claims that it advances (although it does allege that various Defendants have engaged in fraudulent behaviour). I conclude that s32(1)(a) does not extend the limitation period applicable to any of SBHMC's claims.

Section 32(1)(b)

329. I have already explained in Part G why the "deliberate concealment" relied upon is not present. Accordingly, s32(1)(b) does not operate to extend the limitation period applicable to any of SBHMC's claims.

Section 21(1) of the Limitation Act

330. Section 21(1) of the Limitation Act provides, so far as material, as follows:

> ***21 Time limit for actions in respect of trust property.***
>
> *(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—*
>
> *(a)in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or*

> *(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.*

331. It was common ground that, for s21(1)(a) to apply, SBHMC must show that a breach of trust has occurred and that it was fraudulent in the sense of involving an absence of honesty or good faith (see [64] of the judgment of Patten LJ in *First Subsea Ltd v Balltec Ltd* [2018] Ch 25). Galliard does not contradict SBHMC's argument based on the judgment of Millett J in *Armitage v Nurse* [1998] Ch 241 that the relevant question is whether the trustee pursued a particular course of action either knowing that it was contrary to the interests of beneficiaries or being recklessly indifferent as to whether it was contrary to their interests or not.

Fraud – s21(1)(a)

332. SBHMC asserts that both Galliard Hotels (in relation to the Breach of Trust Claim) and Mr Conway (in relation to the Directors' Duties Claim) committed the breaches of trust dishonestly. The dishonesty is said to arise from Mr Conway's actions, with his dishonesty being attributed to Galliard Hotels, on the basis that he was, as material times, the sole director of Galliard Hotels. In essence, the dishonesty alleged consisted of Mr Conway appropriating the economic interest in the Annex to Lodgeshine by means of the Annex Lease Scheme, despite knowing that SBHMC was entitled to obtain the freehold interest in the Annex pursuant to the FSC. SBHMC also relies on the fact that Mr Conway did not notify Investors of the Annex Lease Scheme as an indicator of fraud.

333. In order to determine those allegations of dishonesty, I apply the approach of Lord Hughes set out at [74] of his judgment in *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391:

> *When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people.*

334. I have made findings as to Mr Conway's state of mind at the time of the Annex Lease Scheme in paragraphs 162 to 174. I have also, in paragraph 147, rejected the allegation that Mr Conway engineered a rigged process of consultation with the Galliard marketing team to procure Mr Philips to sign off on the Annex Lease Scheme. I consider those findings to be inconsistent with Mr Conway, or Galliard Hotels' dishonesty. Section 21(1)(a) does not apply.

Section 21(1)(b)

335. SBHMC relies on s21(1)(b) of the Limitation Act to extend the limitation period applicable to the Breach of Trust Claim and the Directors' Duties Claim. In order for s21(1)(b) to apply, the following ingredients must be present:

    i) There must be a "trustee".

    ii) There must be "trust property" or the "proceeds of trust property". That "trust property" or "proceeds" thereof must either be in the possession of the trustee or must have been previously received by the trustee and converted to his use. Accordingly, there are four possible permutations of these requirements: (i) trust property in the possession of the trustee; (ii) trust property previously received by the trustee and converted to his use; (iii) proceeds that are in the possession of trustee; and (iv) proceeds which have previously been received by the trustee and have been converted to his use.

    iii) The action in question must be, in the requisite sense, for the "recovery" of the trust property or proceeds thereof.

336. These should not be regarded as a concatenation of unrelated requirements. Section 21(1)(b) has a clear purpose which Kekewich J explained as follows in relation to its statutory predecessor in *Re Timmis, Nixon Smith* [1902] 1 Ch 176 at 186 (a description that was endorsed by the Supreme Court in *Burnden v Fielding* [2018] AC 857):

> *The intention of the statute was to give a trustee the benefit of the lapse of time when, although he had done something legally or technically wrong, he had done nothing morally wrong or dishonest, but it was not intended to protect him where, if he pleaded the statute, he would come off with something he ought not to have, i.e. money of the trust received by him and converted to his own use.*

337. I did not understand the principles that I have summarised in paragraph 335 to be controversial and the four permutations that I have set out in paragraph 335.ii) represent a precis of Mr Trompeter KC's oral submissions that were not contradicted in Mr Bradley's reply. I note, in passing that s21(1)(b) does not expressly spell out whether the final words "in the possession of the trustee or previously received by the trustee and converted to his use" relate only to the "trust property" referred to just prior or also to any "proceeds". If the words relate only to the "trust property", s21(1)(b) could be read as imposing no requirement that proceeds be either "in the possession of" or "previously received by" the trustee provided that the "trust property" is or has been. However, as I have said, neither party argued for that interpretation. Moreover, the interpretation would go against the grain of the legislation which is squarely concerned with property that has, in some real world sense, passed through the hands of a trustee (or is to be deemed to have passed through the hands of the trustee as in *Re Howlett Deceased* [1949] Ch 767). That is borne out both by the natural reading of s21(1)(b), which sets out the four permutations that I have summarised, and also by the fact that s21(1)(b) is concerned with actions to "recover" property "from the trustee" by contrast to s21(1)(a) which is capable of applying to actions against any person. In addition, reading the closing words as relating only to the "trust property" and not proceeds could have some unexpected consequences. A claim against a trustee who sells trust

property entirely regularly, but wrongly appropriates the proceeds would, on that interpretation not be subject to s21(1)(b) since the "trust property" would no longer be in the possession of the trustee and, although previously received, would not have been "converted" since the sale of that property was entirely regular.

338. Taking the requirements that I have summarised in paragraph 335 in turn:

i) The definition of "trust" and "trustee" have, by s38(1) of the Limitation Act, the same meaning as in the Trustee Act 1925. For the purposes of the Breach of Trust Claim, it is clear that Galliard Hotels is a "trustee" since, following the execution of the FSC, it held the freehold title to the Site on some form of trust for SBHMC. For the purposes of the Directors' Duties Claim, Mr Conway was, so long as he was a director of SBHMC, a fiduciary steward of SBHMC's property and so treated as a "trustee" for the purposes of s21(1)(b) (see [19] of *Burnden v Fielding*).

ii) It is fair to say that SBHMC did not articulate clearly in its pleadings which of the four permutations described in paragraph 335.ii) are relied upon and what precisely is the "trust property" or the "proceeds of trust property" for the purposes of the statutory provisions. I do not agree with SBHMC that this shortcoming was dealt with by paragraph 14.5 of its Re-Re-Amended Particulars of Claim ("**RAPOC**"). That said, SBHMC did articulate its position in oral closings (later followed up by way of a copy of Mr Bradley KC's speaking note) in response to a question I asked during the hearing and both parties' closing submissions addressed s21(1)(b). I was not sure whether SBHMC's position as set out in its answers to my questions was entirely the same as the position articulated in its written closing submissions and I will explain later the approach that I have taken to any such actual or potential inconsistency.

iii) The question of "recovery" relates to the remedy that is sought in relation to the trust property or proceeds thereof. An action can be for "recovery" in the requisite sense even if it does not seek a proprietary remedy in relation to the assets concerned. For example, a claim for equitable compensation for loss associated with being deprived of trust property or proceeds is capable of being a claim for "recovery" (see [13] of *Burnden v Fielding*). In *Hotel Portfolio II v Ruhan* [2022] EWHC 383 at [305] to [308] Foxton J, after a detailed review of authorities in this area concluded that, where a trustee obtains "disloyal profits" generated from the wrongful receipt of trust property, an action for an account of those profits is capable of falling within s21(1)(b). He contrasted this with an action of an account of profits received from other sources, such as a bribe, which not being generated from trust property would fall outside s21(1)(b).

Application to the Breach of Trust Claim against Galliard Hotels

339. SBHMC's position as set out in its oral closings and speaking note is that, for the purposes of the Breach of Trust Claim, the relevant property is the Lease. In its written closing submissions, it had described the relevant property as being the Annex which was "received" by Galliard Hotels. It is undesirable for the court or Galliard to have to speculate as to whether there is any difference between these two articulations of the position, particularly in circumstances where the precise position that SBHMC is taking has not been pleaded. I will, therefore, take SBHMC's position to be as set out in its

oral closings and speaking note which were in express response to questions that I had raised because I was unclear on that position.

340. Galliard Hotels has never had possession of the Lease. The Lease was never trust property held by Galliard Hotels. The Lease was a new interest, carved out of the freehold title, granted to Lodgeshine which has retained it at all times since its grant. Accordingly, I reject any suggestion that the Lease is trust property in the possession of Galliard Hotels or trust property previously received by Galliard Hotels. That deals with permutations (i) and (ii) summarised in paragraph 335.ii) above.

341. Accordingly, the Lease can be the relevant property only if it is the "proceeds" of trust property namely the freehold interest in the Site. SBHMC's argument based on the Lease as the relevant "property" must be that:

    i) The Lease represents the "proceeds" of "trust property" (namely the freehold interest in the Site).

    ii) That "trust property" (the freehold interest in the Site) was "previously received" by Galliard Hotels.

    iii) Galliard Hotels converted the freehold interest to its use by granting the Lease in defiance of SBHMC's rights of ownership.

    iv) SBHMC's claim is to "recover" the proceeds of that freehold interest (namely the Lease).

342. However, that analysis does not establish the presence of permutations (iii) or (iv) that are set out in paragraph 335.ii). The "proceeds" (the Lease) are not in the possession of Galliard Hotels (permutation (iii)) and have not previously been received by Galliard Hotels (permutation (iv)).

343. There is, therefore, a flaw in the argument summarised in paragraph 341. That flaw consists of relying on Galliard Hotels' previous receipt of the "trust property" (the freehold) when the claim is based not on the "trust property" itself but on alleged "proceeds" that Galliard Hotels does not possess, and has never received. SBHMC's approach effectively relies on the flawed alternative interpretation of s21(1)(b) summarised in paragraph 337 that it never actually advanced. Having identified the relevant asset as the Lease, SBHMC can rely on s21(b) only if the Lease is in the possession of Galliard Hotels or has previously been in the possession of Galliard Hotels. It is not sufficient to point to some other asset (the freehold interest) that has been owned by Galliard Hotels.

344. I did not consider that analysis to be contrary to the purpose of s21(1)(b) as explained in paragraph 336. As that quote recognises, ignoring complexities, not relevant here, about assets a trustee is deemed to have received as in *Re Howlett Deceased*, s21(1)(b) is concerned with assets that a trustee possesses or has previously held. If a trustee deals wrongly with trust assets, s21(1)(b) is capable of applying. If a trustee realises trust assets, receives the proceeds of them, and deals wrongly with those proceeds s21(1)(b) is capable of applying as well. However, I do not consider that s21(1)(b) applies to the Breach of Trust Claim in circumstances where Galliard Hotels has never received or possessed the Lease that forms the foundation of SBHMC's argument.

Application to the Directors' Duties Claim against Mr Conway

345. SBHMC's position, as set out in Mr Bradley KC's speaking note, appeared to be that the relevant property for the purposes of s21(1)(b) in relation to the claim against Mr Conway was the Lease. That was consistent with what Mr Bradley KC said in his oral submissions. That analysis fails for the reasons I have set out in the section above. The Directors' Duties Claim is brought against Mr Conway in his capacity as a former director of SBHMC. However, in that capacity he is not to be treated as having ever possessed or received the Lease which has, at all times, been held by Lodgeshine.

346. SBHMC seeks to escape from this conclusion by arguing that Mr Conway controls Lodgeshine and accordingly, the Lease should be treated as being in his "possession" albeit through a corporate "wrapper" consisting of Lodgeshine. Reliance was placed on *Burnden v Fielding* in this regard. I do not accept that analysis. First, the factual premise of it was not made out: Mr Conway controlled, indirectly, 47.68% of the shares in Lodgeshine at the time of the Annex Lease Scheme and I was referred to no evidence suggesting that Mr Conway was able to control any of the other 52.32%.

347. Second, *Burnden v Fielding* does not stand as authority for the proposition that, in all circumstances, the "corporate veil" can be pierced so that a director is treated as "receiving" or "possessing" any property held by companies under the control of that director. Paragraph [16] of the judgment of Lord Briggs in *Burnden v Fielding* set out a clear disavowal of the proposition that the case was being decided by reference to principles of "anti-avoidance" or the piercing of the corporate veil. The true ratio of *Burnden v Fielding* is that (i) the directors were treated as holding property of companies of which they were directors and (ii) when they acted to transfer company property to other companies that they controlled they converted assets to their own use because they dealt with those assets in a way that denied the company's ownership. On that analysis, it was not necessary to decide whether after the transfer had been affected the assets were in the "possession" of the directors by virtue of being owned by companies they controlled.

348. However, Mr Bradley KC's speaking note referenced a slightly different argument to the effect that:

    i) SBHMC's equitable interest in the freehold (acquired on execution of the FSC) was treated as held by Mr Conway in his capacity as director of SBHMC and was therefore "trust property" that was previously held by Mr Conway (permutation (ii) in paragraph 335.ii)).

    ii) Mr Conway converted that trust property to his use by granting a Lease to Lodgeshine from which Mr Conway would derive an economic benefit given his shareholding interest in Lodgeshine.

349. That struck me as a stronger way of putting the argument. In his oral submissions on behalf of Galliard, Mr Trompeter KC answered it by saying that there can have been no "conversion" of the equitable interest in the freehold to Mr Conway's use in circumstances where SBHMC has, since 2014, held that very freehold interest. I see the force of that argument. SBHMC's complaint is not that it no longer has a freehold interest in the Site but rather that, since that interest is encumbered by the Lease, its interest is less valuable than it would otherwise have been. Moreover, even recognising

the extended concept of a claim for "recovery" of trust property set out in paragraph 338.iii) above, I see a real difficulty with the argument that SBHMC is seeking to "recover" an interest in the freehold when it has held the freehold interest legally and beneficially since 2014.

350. In his reply on behalf of SBHMC, Mr Bradley KC did not contradict Mr Trompeter KC's analysis. He did not, for example, explain how the freehold interest could have been "converted" by virtue of being rendered less valuable. Indeed, beyond the general submission that dealing with an asset in a way inconsistent with the rights of an owner amounted to "conversion to own use", SBHMC made few submissions on the breadth of the concept. Some reliance was placed on *Re Clark* (1920) 150 L.T. 94. However, little of the short report of that case dealt with limitation issues. The conclusion that "… the defendant having retained part of the trust-estate, the Statute of Limitations and Judicial Trustees Act 1896 (59& 60 Vict c35), s3 were not applicable to his case" does not obviously translate into a finding on the scope of s21(1)(b) of the Limitation Act. Overall, I do not consider that SBHMC has succeeded in displacing the analysis advanced by Galliard which I have summarised in paragraph 349.

351. It would have been better if SBHMC had pleaded, well in advance of the trial, a rigorous explanation of how s21(1)(b) applied to both the Breach of Trust Claim and the Directors' Duties Claim. In the event, I have considered the arguments as I understood them to be advanced in closing and conclude that s21(1)(b) does not apply.

Conclusion on limitation issues

352. The following claims all relied on a limitation period being extended under either s32(1)(a) or s32(1)(b) of the Limitation Act. Since I have concluded that neither of those sections applies, those claims are all dismissed on limitation grounds:

    i) the FSC Contract Claim;

    ii) the Knowing Receipt Claim (SBHMC having accepted in its closing submissions that it does not rely on s21(1)(a) or (b) of the Limitation Act as extending the limitation period applicable to this claim);

    iii) the Inducing Breach of Contract Claim; and

    iv) the Unlawful Means Conspiracy Claim.

353. My conclusion on s21(1)(a) and s21(1)(b) of the Limitation Act also means that the Breach of Trust Claim fails.

354. The Directors' Duties Claim, to the extent based on the entry into of the Annex Lease Scheme, also fails on limitation grounds given my conclusions on s21(1)(a) and s21(1)(b) of the Limitation Act. The Directors' Duties Claim, so far is based on an allegation that Mr Conway "failed to disclose his own wrongdoing" is considered in paragraph 442.

PART J – THE ROOM LEASE CLAIM

Relevant provisions of the Room Leases

355. The Room Lease Claim is a contractual claim for breach of Room Leases, as distinct from the Room Contracts which functioned as agreements for lease. The parties' Agreed Chronology records that Room Leases were entered into between January 2008 and July 2008. That was after the development of the Hotel reached practical completion (on 19 December 2007). Accordingly, all Room Leases were executed in circumstances where both the Hotel and the Annex had been constructed. (This was not the case with the Room Contracts: a large number of Investors entered into their Room Contracts before the Site had been developed and so at a point at which there were no buildings on the Site).

356. Neither party suggested that there was any difference between the terms of various Investors' Room Leases that was material for the purposes of the Room Lease Claim. Accordingly, in the discussion that follows, I will deal with the relevant clauses as they appeared in Mr Marley's Room Lease which was dated 30 January 2008.

357. The parties to a Room Lease were Galliard Hotels (which was defined as the "Landlord"), the relevant Investor (defined as the "Tenant") and SBHMC (defined as the "Company").

358. Clause 9 of each Room Lease provided as follows:

> *[Galliard Hotels] hereby grants to [SBHMC] the right to utilise the Common Parts in conjunction with its appointment by the Tenant in clause 8 hereof for the purpose for which they are properly intended*

359. It is common ground that Clause 9 did not permit or authorise a charge to be imposed for SBHMC's "right to utilise the Common Parts".

360. The "appointment … in clause 8" was a reference to provisions of the Room Lease under which each Investor appointed SBHMC as its agent to act on its behalf and in its name to locate guests to occupy that Investor's room. Clause 8 permitted SBHMC to appoint a Hotel Operator (in practice Park Plaza) to carry out SBHMC's obligations consequent on its appointment as an Investor's agent. Clause 8 also introduced other provisions contained in a schedule to the Room Lease dealing with payments due in connection with that Investor's Room.

361. The Common Parts were defined in the Room Lease as meaning:

> *(i) the roadways pavements and passageways forming part of the Estate*
>
> *(ii) the communal entrances hallways staircases lifts (if any) landings and passageways forming part of the Building*
>
> *(iii) the communal gardens forming part of the Estate (if any)*
>
> *(iv) the communal facilities within the Building and the Estate*

> *(v) all other parts of the Building and the Estate as are for the time being not comprised or intended in due course to be comprised in any lease granted or to be granted by [Galliard Hotels]*
>
> *Provided that [Galliard Hotels] shall be entitled to vary and alter the Common Parts from time to time by notice in writing to the Tenant and [SBHMC] by the addition of any adjoining or neighbouring areas or by the removal of any part or parts thereof provided further that such variations and alterations do not materially and adversely affect the beneficial use and occupation of the Demised Premises*

362. It was not suggested that there was any "notice in writing" that fell within the scope of the proviso either adding, or removing, the Annex from the definition of "Common Parts".

363. The definition of "Common Parts" references other definitions of which the significant ones are "Building" and "Estate".

364. "Building" was defined as meaning:

> *The hotel apartment block to be known as The Addington Street Apart Hotel London SE1 registered with the title number TGL221719*

365. "Estate" was defined as meaning:

> *the Building is situated and all amenity areas forming part thereof*

366. That is a verbatim quote of the definition of "Estate". Obviously some words are missing from that definition, but neither party suggested what those missing words might be.

367. I also mention some aspects of the Room Lease that do not refer directly to the Common Parts but are relevant to the interpretation of that term that Galliard advances.

368. Paragraph 3 of the Sixth Schedule of the Room Lease included a covenant by SBHMC to use reasonable endeavours to "locate a Hotel Operator to carry out and perform the Business" in accordance with the provisions set out in the Seventh Schedule (including paragraph 6(a) to the effect that the Building was to be run as a "high-class hotel"). If SBHMC could not locate such a Hotel Operator, SBHMC was obliged to use all reasonable endeavours to carry out and perform the Business itself (and would be treated as the "Hotel Operator" for the purposes of the Room Lease).

369. The "Business" was defined as follows:

> *a hotel business (to be carried out in the Building in accordance with the Seventh Schedule hereto) run for the benefit of the [Investors].*

Whether the "Common Parts" included the Annex

370. Galliard argues that the definition of "Common Parts" does not include the Annex for the following reasons:

i) The relevant part of the definition of "Common Parts" is limb (v) which excludes parts of the Building or Estate which are, or are intended in due course to be, comprised in any lease granted by Galliard Hotels.

ii) The Room Lease should be understood and construed in the light of the Room Contract to which it gave effect. The Room Contract contemplated that there would be a single hotel "Block" that was the subject of the "Business" of the Hotel. That was emphasised by the provisions of the Room Lease to which I have referred in paragraphs 368 and 369 above.

iii) As Galliard put it in its skeleton argument: "a self-contained building which cannot lawfully be used for the business of a hotel is of no use to the "Business"". Accordingly, at the point in time when the Room Lease was entered into, the parties can fairly be said to have understood that the Annex was something which "was intended in due course to be comprised in any lease… to be granted by [Galliard Hotels]". A complicating factor with that argument is that some Investors, unlike Mr Marley, would have been granted Room Leases after the Annex Lease Scheme was implemented. At that time, the Annex would actually be comprised in a lease granted by Galliard Hotels (namely the Lease itself). However, neither side suggested that Room Leases granted after the date of the Annex Lease Scheme had a different effect from those granted before and accordingly, I need not address this possible complication.

371. Applying the principles of contractual construction that I have identified in paragraphs 178 to 186 above, I reject Galliard's arguments and conclude that the "Common Parts" did include the Annex for the following reasons.

372. First, I agree with SBHMC that nothing in the Room Lease provided for, or contemplated, the Annex being comprised in any lease granted by Galliard Hotels. Accordingly, even if limb (v) of the definition of "Common Parts" was the operative one, Galliard's analysis would fail.

373. In any event, limb (v) is not the operative provision. In my judgment limb (v) operates as a "sweep up" provision that covers "all other parts of the Building" that have not been included within the definition by virtue of limbs (i) to (iv) provided that those other parts were not intended, at the time the Room Lease was granted, to be included in a lease of property granted by Galliard Hotels. The reason for that proviso was to prevent individual Rooms (which were unquestionably intended to be included in leases granted by Galliard Hotels) from being inadvertently included within the "sweep-up" definition in limb (v). It would make no sense for individual Rooms (which were to be occupied periodically exclusively by paying guests) to be regarded as Common Parts.

374. The premise of Galliard's analysis is flawed. In my judgment, the Annex (which, at the time of the Room Leases would objectively have been understood to include conferencing facilities) falls squarely within the scope of limb (iv) on the basis of being "communal facilities within the Building and the Estate".

375. While I accept that, in principle, the Room Contract can be relied on as an aid to the interpretation of the Room Lease (and SBHMC did not argue otherwise), in the circumstances of this case the Room Contract is of less assistance than Galliard suggests. The Room Contract was entered into at a time before any building had been

constructed. It was also entered into before there was any suggestion that hotel facilities would be located in the Annex. Moreover, the parties' Agreed Chronology records that the application to Lambeth for retrospective amendment to the 394 Room Permission (which included the application to change the use of the Annex to Class C1) was made on 11 September 2007. That was after the Room Contracts, but before the grant of the Room Leases. Factual circumstances, therefore, had changed significantly removing much of the force of Galliard's argument to the effect that the Annex was a self-contained building that could not lawfully be used for the purposes of the Hotel business.

Whether SBHMC is entitled to make a contractual claim for breach of Clause 9

376. Galliard characterises Clause 9 of the Room Lease as simply conferring a "right" on SBHMC to use the Common Parts in a particular way and for a particular purpose. It inclined to the view that the "right" granted was in the nature of an easement, although it acknowledges that the Second Schedule to the Room Lease sets out the easements that are granted in connection with the Room Lease without including the rights specified in Clause 9. However, it does not attach any particular significance to the nature of the "right" granted instead making the argument that it does not come with any associated obligation on Galliard Hotels. It draws an analogy with a grantor of a right of way, whether in the form of an easement or a contractual license, who assumes no obligation to ensure that the right of way remains clear and unobstructed.

377. I consider that analogy to be misplaced and at odds with an ordinary interpretation of Clause 9. A grantor of a right of way who allows a path to become overgrown may well not be doing anything inconsistent with the grant (depending on the precise wording of the grant in question). However, SBHMC's complaint in this case is different. It argues that Galliard Hotels' very act of granting the Lease impeded SBHMC's ability to exercise the rights it had been afforded pursuant to Clause 9 since it was no longer in Galliard Hotels' gift to allow it to use the Annex. If that complaint is made out, I do not see any secure basis why SBHMC should be precluded from making a contractual claim for breach of Clause 9.

Limitation

378. Each Room Lease was granted by deed. Accordingly, by s8 of the Limitation Act, it is common ground that the primary limitation period expires 12 years after the date on which the cause of action accrued. SBHMC's pleaded case in paragraph 15E of its RAPOC is that Galliard Hotels "first breached clause 9 of the Room Lease by granting the Lease with the effect that Galliard Hotels could not give SBHMC the use of the Annex". However, SBHMC characterises Clause 9 as a "continuing contractual obligation" which was breached on a "continuing basis". Therefore, SBHMC argues that its cause of action did not accrue once and for all when the Lease was granted but rather continues to accrue on each day on which the Lease is in place.

379. Galliard's position is that even if the grant of the Lease did breach Clause 9 of the Room Lease, any breach was complete when that Lease was granted on 16 June 2008. No Standstill Agreement was entered into with Galliard Hotels and accordingly, the limitation period expired on 16 June 2020, before SBHMC issued its claim form in the Main Claim on 25 May 2021.

380. For SBHMC's position to be correct, both (i) Clause 9 must be a "continuing contractual obligation" and (ii) Galliard Hotels must have breached it on a continuing basis. I will therefore take the two requirements separately.

381. In *Bell v Peter Browne* [1990] 2 QB 495 Nicholls LJ explained the concept of a "continuing obligation" by way of the following contrast between:

> *the normal case where a contract provides for something to be done, and the defaulting party fails to fulfil his contractual obligation in that regard at the time when performance is due. In such a case there is a single breach of contract… and the exceptional cases where, on the true construction of the contract, the defaulting party's obligation is a continuing contractual obligation … which arises anew for performance day after day, so that on each successive day there is a fresh breach {AB2/49/7}*

382. Galliard Hotels' obligation in this case was to grant a right to utilise the Common Parts. I do not accept Galliard's argument that this falls within Nicholls LJ's formulation of the "normal case". Galliard Hotels could not, for example, establish that it had complied with Clause 9 if it granted a tenancy-at-will of the Annex if two months later it changed the locks to the Annex and refused SBHMC access. In my judgment, SBHMC is correct to characterise Clause 9 of the Room Lease as an obligation that has a similar continuing nature to a landlord's covenant for quiet enjoyment of demised premises.

383. However, even though I am prepared to accept that Clause 9 imposed a continuing obligation, I do not accept SBHMC's point that the alleged breach was a continuing one. Right at the heart of the Room Lease Claim is the proposition that Galliard Hotels' grant of the Lease was a breach of Clause 9 because it meant that Galliard Hotels could no longer give the use of the Annex that it had promised. However, if that assertion is correct, Galliard Hotels did nothing further to aggravate the situation after granting the Lease. Nor, after the Lease was granted was the situation more acute. On SBHMC's formulation, two years after the Lease was granted, and without any additional action on its part, Galliard Hotels was just as incapable of giving SBHMC the use of the Annex as it was on the day the Lease was granted. I regard that as inconsistent with an assertion of a "continuing breach" of Clause 9.

384. The analogy with a tenant's repairing covenant that Nicholls LJ considered at 501D to E of the report of *Bell v Peter Browne* is instructive. A repairing covenant will typically involve a "continuing obligation". There is no single obligation that can be performed by a set time for performance in order to satisfy a repairing covenant. If a tenant who has agreed to a repairing covenant allows a property to fall into disrepair it can quite sensibly be said that each day that passes (i) involves a new breach consisting of the tenant's failure to take the action required and (ii) which breach makes the problem more acute. As I have explained, neither statement is true of the breach of Clause 9 said to consist of Galliard Hotels' grant of the Lease.

385. It is true that, having granted the Lease, Galliard Hotels could have remedied any breach of Clause 9 that it involved by, for example procuring a surrender of the Lease and Underlease with it. However, the fact that a breach might be capable of remedy

does not of itself make that breach a "continuing breach" as Nicholls LJ explained at 500G to 501C of *Bell v Peter Browne*.

386. Accordingly, the Room Lease Claim fails on limitation grounds and does not fall to be determined. I note that Galliard has not relied to any significant extent on an argument that grant of the Lease was not a breach. However, it does argue that, if grant of the Lease was a breach it did not cause SBHMC any loss since the Lease itself did not result in SBHMC losing any "right to utilise" the Annex for no payment. That loss, if there was one, arose pursuant to the Underlease to which SBHMC consented by executing it. That argument was mentioned briefly in both parties' written closing submissions. I do not need to decide the point given my conclusion on limitation above. However, I consider the argument to be instructive and to support my conclusion in paragraph 383. The grant of the Lease was not of itself injurious to SBHMC's interests: conceptually even after granting the Lease, Galliard Hotels could have requested Lodgeshine not to complain of SBHMC's continuing use of the Annex or to grant SBHMC a licence. The real substance of SBHMC's complaint is that, following grant of the Underlease, it had to pay to use the Annex. That injury, if it was one, was crystallised once and for all when the Underlease was granted since the obligation to pay was constituted by the Underlease.

PART K – THE INVALIDITY CLAIM

Factual findings relevant to the Invalidity Claim

387. Both the Lease and the Underlease contained signature blocks stating that both documents were to take effect as deeds.

388. The signatories to the Lease were Galliard Hotels and Lodgeshine, both limited companies. Accordingly, both signature blocks stated that the two companies signed the Lease as a deed "acting by two directors or a director and a secretary".

389. Next to the signature block of both Galliard Hotels and Lodgeshine on the Lease are two signatures. One reads clearly "S Conway". The other is illegible, but it is common ground that it is the signature of Mr Angus who was, at the relevant times the company secretary of SBHMC, Galliard Hotels and Lodgeshine.

390. The signatories to the Underlease were Lodgeshine and SBHMC. Their signature blocks also stated that they were executing the Underlease as a deed "acting by two directors or a director and a secretary". The signatures on the Underlease were the same as the signatures on the Lease and so it is common ground that Mr Angus signed the Underlease at a time when he was a company secretary of both Lodgeshine and SBHMC.

391. Mr Conway did not himself sign either of the Lease or the Underlease. Instead he asked Ms Akers to sign his name for him by writing the "S Conway" signature on both documents. Ms Akers duly did so. This was not an isolated occurrence. Mr Conway frequently asked Ms Akers to sign documents by writing his name on them because Mr Conway felt that he did not have time to do so. Ms Akers's unchallenged evidence is that she has signed hundreds of documents in this way.

392. Ms Akers's unchallenged evidence was that Mr Conway would ask her to "sign specific documents as him whenever he wanted me to do so". I infer from this that Ms Akers followed that general practice and did not sign the Lease or Underlease on her own initiative, but rather sought and obtained Mr Conway's specific instructions to do so, probably following an oral discussion between them.

393. I therefore conclude that Ms Akers signed both the Lease and the Underlease genuinely believing she had Mr Conway's authority to do so following the oral instructions that Mr Conway gave her referred in paragraph 392 above. However, Mr Conway had given Ms Akers no power of attorney whether executed as a deed or otherwise that authorised her to sign the Lease or the Underlease on his behalf. Nor had either Galliard Hotels nor Lodgeshine executed any power of attorney (whether as a deed or otherwise) that gave Ms Akers authority to execute documents on their behalf.

394. It is more likely than not that Ms Akers did not sign the Lease and Underlease in Mr Conway's presence as she worked at a desk that was located outside Mr Conway's office.

395. At the time he asked Ms Akers to sign the Lease and Underlease, Mr Conway realised because of his extensive background in property transactions, that both documents would be sent to HM Land Registry for registration. Mr Conway accepted in cross-examination that he realised that anyone at HM Land Registry who saw those documents would think that "S Conway" had signed the document himself rather than asking someone to write that signature for him.

396. However, Mr Conway did not know precisely what steps needed to be taken validly to execute documents as deeds at the relevant time. That conclusion follows from (i) Mr Conway's lack of knowledge of legal matters, (ii) his oral evidence to the effect that he had not been given advice by Howard Kennedy as to how precisely he needed to go about executing the documents they sent to him and (iii) his general aversion to getting to the bottom of points of detail associated with his many property transactions. He did not, therefore, realise that by asking Ms Akers to sign documents in his name he, or companies of which he was a director, might not validly be executing those documents. At no point while he was a director of Galliard Hotels or Lodgeshine has either company sought to disavow their respective obligations under the Lease and Underlease in reliance on the proposition that either document had been invalidly executed. I infer that Mr Conway genuinely thought the Lease and Underlease were validly executed.

Estoppel – denying a landlord's title

397. SBHMC's pleaded case is that as a result of what it asserts to be defects in their execution, neither of the Lease and Underlease were validly executed as deeds. Accordingly, both the Lease and Underlease were ineffective to dispose of any legal estate and were therefore registered at HM Land Registry by mistake. SBHMC seeks the following remedies as a result:

    i) an order for alteration of the register pursuant to paragraph 2(1)(a) of Schedule 4 to the Land Registration Act 2002 to remove the reference to the Lease from title TGL221719 (the freehold title) and to close title TGL310871 (relating to the Lease) and title TGL310894 (relating to the Underlease); and

ii) restitution of all monies paid pursuant to the Underlease on the basis that those monies were paid by reason of a mistake.

398. In paragraph [565] of its written closing submissions, Galliard took what it described as a "preliminary point" to the effect that it is not open to SBHMC to make these arguments as against Lodgeshine. It referred to paragraph 1.037 of the current edition of *Woodfall on Landlord & Tenant* arguing that SBHMC's arguments breached one of the "first principles of the law estoppel as applied to the relations between landlord and tenant, that a tenant is estopped from disputing the title of his landlord". Beyond the reference to *Woodfall* and *Monroe v Lord Kerry* (1710) 1 Bro 67, it was not explained precisely which arguments SBHMC seeks to advance breach that "first principle".

399. It seems to me that SBHMC's argument that I have summarised in paragraph 397 involves the following propositions:

i) *Because neither the Lease nor the Underlease were validly granted by deed, they cannot be legal estates that bind SBHMC's freehold interest*. That is a statement about matters affecting SBHMC's freehold interest and does not, in my judgment, engage the estoppel referred to in *Woodfall*.

ii) *Lodgeshine cannot have granted any legal estate in land to SBHMC by virtue of the Underlease because, since Galliard Hotels did not validly execute the Lease as a deed, Lodgeshine had no legal estate of its own out of which it could grant the Underlease*. That statement appears to engage the estoppel set out in *Woodfall*, but it involves no different proposition of law from that set out in paragraph 399.i) since it relies on the point that the Lease was not granted by way of a duly executed deed.

iii) *SBHMC is not bound by promises to pay rent apparently contained in the Underlease because SBHMC did not validly execute the Underlease as a deed*. That argument does not obviously involve any challenge to Lodgeshine's title and so does not fall within the scope of the estoppel on which Galliard relies. The argument might engage a different estoppel since it involves SBHMC denying the validity of a document that it has at least ostensibly executed and which it has ostensibly performed by paying rent to Lodgeshine. However, that is not the estoppel on which Galliard relies.

400. In those circumstances I consider it right to engage with the detail of SBHMC's arguments on due execution since those arguments have the potential to resonate not just in relation to questions of Lodgeshine's title as landlord, but beyond.

Statutory formality requirements

401. For the Lease and the Underlease to take effect as conveyances of legal title, they must be made as a deed (see s52 of the Law of Property Act 1925 ("**LPA 1925**")).

402. Section 1 of the LP(MP)A sets out the requirements that must be satisfied for an instrument to take effect as a deed. Section 1(2)(a) provides that the instrument in question must make it clear on its face that it is intended to be a deed. No difficulty arises with that requirement given the signature blocks of the Lease and Underlease that

I have described in paragraph 387 above. Section 1(2) (b) of the LP(MP)A sets out a further requirement namely that an instrument shall not be a deed unless:

> *(b) it is validly executed as a deed by –*
>
> > *(i) [the person making it] or a person authorised to execute it in the name or on behalf of that person,…*

403. At the time the Lease and the Underlease were executed, s36AA of the Companies Act 1985 was in force. That provided that:

> ***36AA – Execution of deeds: England and Wales***
>
> *(1) A document is validly executed by a company as a deed for the purposes of s1(2)(b) of [the LP(MP)A], if and only if –*
>
> > *(a) it is duly executed by the company, and*
> >
> > *(b) it is delivered as a deed.*
>
> *(2) A document shall be presumed to be delivered for the purposes of subsection (1)(b) upon its being executed, unless a contrary intention is proved.*

404. The effect of this provision is that, where a company's execution of a deed is in issue, the general requirements of s1(2)(b) are replaced with a different regime that includes a focus on whether the company has "duly executed" the document in question.

405. The question of whether a document has been "duly executed" by a company is dealt with in s44 of the Companies Act 2006 ("**CA 2006**") which provides, so far as material:

> ***44 Execution of documents***
>
> *(1) Under the law of England and Wales or Northern Ireland a document is executed by a company –*
>
> > *(a) by the affixing of its common seal, or*
> >
> > *(b) by signature in accordance with the following provisions.*
>
> *(2) A document is validly executed by a company if it is signed on behalf of the company –*
>
> > *(a) by two authorised signatories, or*
> >
> > *(b) by a director of the company in the presence of a witness who attests the signature.*
>
> *(3) The following are "authorised signatories" for the purposes of subsection (2) –*
>
> > *(a) every director of the company, and*
> >
> > *(b) in the case of a private company with a secretary or a public company, the secretary (or any joint secretary) of the company.*

...

(5) in favour of a purchaser a document is deemed to have been duly executed by a company if it purports to be signed in accordance with subsection (2). A "purchaser" means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property.

406. Section 47 of CA 2006 permits a company to appoint an attorney to execute instruments as deeds in the following terms:

47 Execution of deeds or other documents by attorney

(1) Under the law of England and Wales or Northern Ireland a company may, by instrument executed as a deed, empower a person, either generally or in respect of specified matters, as its attorney to execute deeds or other documents on its behalf.

(2) a deed or other documents are executed, whether in the United Kingdom or elsewhere, has effect as it executed by the company.

Whether the Lease and Underlease were signed by Mr Conway acting through his amanuensis, Ms Akers

407. Galliard relies on two old authorities: *Ball v Dunsterville* (1791) 4 Term 313 and *R v The Inhabitants of Longnor* (1833) 4 B & Ad 647 in support of an argument that both the Lease and the Underlease should be treated as signed by Mr Conway for the purposes of s44 of CA 2006, albeit acting through his amanuensis Ms Akers.

408. However, these authorities deal with the common law position in the 18th and 19th centuries. At that time, as explained by Danckwerts J in *Stromdale & Ball Limited v Burden* [1952] Ch 223 at 230, it was not necessary for any signature to be affixed to a deed in order for it to be valid. Instead, the placing of seal on the instrument was the essence of due execution. It was only with the enactment of s73 of LPA 1925 (since repealed) that signature of a deed became essential. I do not, therefore, consider that the authorities on which Galliard relies have any bearing on a question of interpretation and application of s44 of CA 2006 which invites a consideration of whether the Lease and Underlease were executed (i) on behalf of the relevant companies and (ii) by an authorised signatory of those companies.

409. On any straightforward reading of ss44(1) to 44(3) of CA 2006, the Lease and Underlease were not executed by Galliard and Lodgeshine. Ms Akers was not herself a director or secretary of either company accordingly, neither document was signed "by two authorised signatories".

410. Galliard emphasises the instructions that Mr Conway gave Ms Akers to write his name on both documents. However, those were administrative instructions of the kind that business people give to their personal assistants. The fact that Mr Conway gave those instructions did not render Ms Akers an "authorised signatory" for the purposes of s44 of CA 2006 since Ms Akers was neither a director nor the secretary of Galliard Hotels or Lodgeshine. Nor do I see a secure basis for a conclusion that, even taking into

account those administrative instructions, Ms Akers was signing either the Lease or Underlease "on behalf of" Galliard Hotels or Lodgeshine.

411. Next, Galliard argues that Ms Akers's act in writing Mr Conway's name on the Lease and Underlease is no different in substance from the situation in *Neocleous v Rees* [2019] EWHC 2462 (Ch) (in which an automated email footer was held to constitute signature by a party for the purposes of s2 of the LP(MP)A). However, I consider that to be a flawed analogy. *Neocleous v Rees* was concerned with the question of what it meant for a document to be "signed" at all and the related question of what constitutes a "signature". It was not concerned with the question whether a "signature" affixed by Person A could result in a document being treated as signed by Person B.

412. The *ratio* of *Neocleous v Rees* is that the question whether a document is "signed" for the purposes of LP(MP)A is to be determined by whether an ordinary person would understand it to have been signed without requiring an exposition from lawyers. Another way of approaching that question is to ask whether something that an ordinary person would regard as a "signature" has been applied to a document with an "authenticating intent". The court's conclusion on the facts was that an ordinary person today would regard as a "signature" the "electronic "signature" that is added to an email when a user enables the Microsoft Outlook "Signature" function. In addition, the court concluded that the requisite "authenticating intent" was present in circumstances where the sender of the email would have been aware that an automatic signature was being applied to the email.

413. However, the issue arising in this case is different. There is no doubt that the Lease and Underlease both bear a "signature" that reads "S Conway". The question is whether, in circumstances where that signature was applied by Ms Akers, the document is nevertheless to have been taken to have been "signed by" Mr Conway acting on behalf of Galliard Hotels or Lodgeshine respectively.

414. In my judgment, therefore, *Neocleous v Rees* does not compel any conclusion different from that arising on the ordinary and natural reading of s44. The Lease and Underlease were not "signed by" Mr Conway acting on behalf of the companies concerned.

Section 44(5) of CA 2006

415. Section 44(5) is quoted in paragraph 405 above. It is in the nature of a "deeming provision" which operates in favour of a "purchaser". Thus, if s44(5) applies, Lodgeshine, in its capacity as potential "purchaser" from Galliard Hotels, could potentially rely on the proposition that Galliard Hotels has duly executed the Lease. Similarly, SBHMC, in its capacity as a "purchaser" from Lodgeshine, could rely on the proposition that Lodgeshine has duly executed the Underlease.

416. Section 44(5) applies to "purchasers" who are acquiring interests in property. Thus, s44(5) would not appear to entitle Galliard Hotels to the benefit of any deeming provision to the effect that Lodgeshine duly executed the Lease, as Galliard Hotels is not a "purchaser" from Lodgeshine. Similarly, Lodgeshine is not a "purchaser" from SBHMC and so s44(5) does not engage a deeming provision that operates in Lodgeshine's favour to the effect that the Underlease was duly executed.

417. There is a short initial question of statutory construction. On a highly literal interpretation of s44(5) it might be said that the primary definition of a "purchaser" is a "purchaser in good faith and for valuable consideration", being the first part of the statutory definition. Pursuant to the second part of the statutory definition, "a lessee, mortgagee or other person who for valuable consideration acquires an interest in property" is also treated as a "purchaser". If that "two-part" analysis were adopted then a "lessee, mortgagee etc" could be regarded as a "purchaser" whether or not acting "in good faith" since the "good faith" requirement applies only to the first part of the definition.

418. I consider, however, that "two-part" interpretation to be unduly literal. There is no obvious reason why Parliament would have intended a lessee, mortgagee or similar to be entitled to the benefit of the provision even if acting without good faith but a more general category of purchaser to be subject to a requirement of "good faith".

419. Debate in the parties' closing submission centred on the applicability or otherwise of s44(5) to the Lease. SBHMC accepts that (i) Lodgeshine was, by the Lease acquiring an interest in property for valuable consideration consisting of the covenants that Lodgeshine gave under the Lease and (ii) that the Lease "purported" to be granted by Galliard Hotels because it bore a signature that appeared to be that of Mr Conway. However, SBHMC argues that Lodgeshine does not satisfy the requirement of "good faith" because:

    i) In context, the "good faith" requirement is concerned with whether Lodgeshine was on notice that there was only "purported" execution of the Lease by Galliard Hotels.

    ii) Mr Conway himself knew full well that he had never signed the Lease on behalf of Galliard Hotels. His knowledge should be attributed to Lodgeshine and prevented Lodgeshine from satisfying the "good faith" requirement.

    iii) A further reason why Lodgeshine failed the good faith requirement was because Mr Conway was involved in acts of forgery in connection with the grant of the Lease and Underlease. The forgery relied on was said to have been perpetrated by Mr Conway. Recognising that Ms Akers had not been cross-examined, SBHMC does not invite me to conclude that she committed any forgery.

420. In its written closing submissions, SBHMC suggested that the same facts that rendered Lodgeshine liable for the Knowing Receipt Claim also involved the absence of good faith. However, that argument was not mentioned in oral submissions and so, given my direction referred to in paragraph 23 I took it not to be pursued. Moreover, it was inconsistent with SBHMC's analysis of the "good faith" requirement summarised in paragraph 419.i) which Galliard emphasised in oral closing submissions.

421. I consider that my factual findings in paragraph 396 dispose of arguments based on an absence of good faith. Mr Conway genuinely believed that both the Lease and the Underlease had been validly executed. That was demonstrated by the fact that he regarded Galliard Hotels, Lodgeshine and SBHMC as bound by those documents and, in his capacity as director of those companies procured that they acted accordingly.

422. In arguing against this analysis, SBHMC submitted that ignorance of the law is not generally recognised as a defence either in the criminal law or in the civil law arena. I was referred to the judgment of Arnold LJ at [141] of *Racing Partnership Ltd v Done Brothers Limited* [2020] EWCA Civ 1300. However, there was a judgment on the ingredients necessary to establish liability under the tort of conspiracy to injure by unlawful means. I see why their Lordships in that case held that liability could be established without proof that the tortfeasors knew that the means in question were unlawful. However, I consider that judgment leaves room for the conclusion that Lodgeshine was acting in "good faith" even though it, through Mr Conway, had an incorrect understanding of the relevant law. SBHMC's approach would mean that, even though Mr Conway did not know he had done anything wrong in asking Ms Akers to sign documents on his behalf, and even though he genuinely believed that both the Lease and Underlease had been validly executed, he could still be said to have acted in "bad faith". I do not consider that Parliament could have intended that outcome when enacting s44(5).

423. I was shown the statutory definition of two offences set out in s1 and s3 of the Forgery Act 1981 (the "**Forgery Act**"). Section 1 is the primary offence of "forgery" that involves a person "making" a "false instrument" with the necessary *mens rea*. Ms Akers was the person who signed the Lease and the Underlease with Mr Conway's name. That certainly appears capable of amounting to the "making" of a "false instrument" as those concepts are defined in s9 of the Forgery Act. However, as I have explained, I will not make any finding that Ms Akers was guilty of forgery in circumstances where she has not been cross-examined.

424. SBHMC instead relies on Mr Conway's actions. It says that he either (i) procured or encouraged Ms Akers to make a false instrument and thereby became an accessory to forgery perpetrated by Ms Akers or (ii) committed an offence under s3 of the Forgery Act. In oral submissions it was suggested that these were two sides of the same coin and since I am not prepared to make any finding that Ms Akers committed a forgery offence, I will approach the matter by reference to s3.

425. Section 3 of the Forgery Act makes it an offence for any person to:

> *… Use an instrument which is, and which he knows or believes to be, false, with the intention of inducing somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.*

426. SBHMC relies on my finding that Mr Conway (i) knew that the Lease and Underlease were "false" within the meaning of s9(1) of the Forgery Act because he knew that he had not actually signed them, (ii) intended for the Land Registry to accept the documents as genuine and so (iii) register those interests to the prejudice of SBHMC.

427. SBHMC make a similar point on the interpretation of s3 of the Forgery Act as they do in connection with s44(5) of CA 2006, arguing that the *mens rea* necessary for an offence under s3 is present by virtue only of Mr Conway knowing that he had not himself signed the Lease and Underlease. Galliard disagrees arguing that Mr Conway needed to know that the Lease and Underlease had not been validly executed in order to be guilty of that offence.

428. In my judgment, Galliard's submission is to be preferred. Mr Conway believed that the documents had been validly executed. That belief is inconsistent with the presence of an intention to "induce" the Land Registry to accept those documents as genuine. In Mr Conway's view, no "inducing" was necessary since he believed the documents were validly executed. In a similar vein, Mr Conway did not have an intention to "induce" the Land Registry to register the Lease and Underlease to the prejudice of SBHMC. Although Mr Conway was mistaken in his belief that the documents were validly executed, a corollary of that belief was that he could not have thought that there was any prejudice to those documents forming the basis of a registration at HM Land Registry. Although the case was concerned with different elements of the offence of forgery, I note that in [115] and [116] of *Demco Investment and Commercial SA v InterAmerican Life Assurance (International) Ltd*, Christopher Clarke J, as he then was, reached a similar conclusion on the facts of the case before him.

429. I therefore conclude that Mr Conway's knowledge that he had not himself signed the Lease and the Underlease does not prevent either Lodgeshine or SBHMC from being "purchasers" in "good faith" for the purposes of s44(5) of CA 2006.

430. In its written closing submissions, SBHMC made a separate point to the effect that s44(5) is expressed to apply "in favour" of a "purchaser". It argued that due execution of the Underlease did SBHMC no "favour" at all since SBHMC would prefer to be released from the obligations contained in the Underlease. However, nothing was said on this point in oral closings and given the direction I gave summarised in paragraph 23, I proceed on the basis that this point is not strenuously being pursued. In any event, in my judgment s44(5) is capable of applying "in favour of" SBHMC. Clearly, there has been a change in the management of SBHMC since the date of the Underlease with the present management wanting the Underlease to be set aside. However, at the time of the Underlease, SBHMC was under different management which positively sought registration of the Underlease as a legal interest in land in reliance on the proposition that it had been validly executed as a deed.

431. I conclude that s44(5) of the Companies Act operates (i) to treat the Lease as duly executed in favour of Lodgeshine and (ii) to treat the Underlease as duly executed in favour of SBHMC.

Equitable Lease

432. Galliard's case on s44(5) has, accordingly, succeeded. In those circumstances I do not need to consider its alternative argument to the effect that, had those arguments failed, the Lease and Underlease would take effect in equity following the rule in *Walsh v Lonsdale* (1882) 21 Ch D 9.

433. SBHMC has argued that, since Galliard has not come to equity with clean hands, neither the Lease nor Underlease should take effect in equity. I reject SBHMC's argument based on an assertion that Mr Conway has been involved in forgery for reasons set out above. SBHMC also relies on assertion that the Lease and Underlease were granted in breach of Mr Conway's duties as a director and in breach of the FSC and the trust that it created. I have not determined the substance of those matters since the Directors' Duties Claim and the FSC Contract Claim have failed on limitation grounds. However, I have made factual findings that would enable any question of breach of directors' duties, or breach of the FSC, to be determined.

PART L- DISPOSITION OF THE MAIN CLAIM

Breach of Trust Claim and the FSC Contract Claim

434. These claims fail on limitation grounds: see paragraphs 352 and 353 above. I have nevertheless made findings as to the proper construction of the FSC and the Rectification Claim.

435. In case I am wrong in my conclusion on limitation, I have made factual findings on defences that Galliard raised to these claims. Accordingly, I have made findings in paragraphs 162 to 175 as to Mr Conway's state of mind when procuring SBHMC to enter into the Annex Lease Scheme which are relevant to Galliard's arguments to the effect that SBHMC acquiesced in, or consented to, any breach of trust or breach of contract. I have also made findings dealing with the defence of affirmation in paragraphs 313 to 320.

436. It is quite clear from SBHMC's case and witness evidence that Investors consider that there is something seriously wrong with the proposition that the limitation clock was ticking between 2008 and 2017, when Mr Lakha KC, Mr Marley and Mr Duggan were not actively aware of the Annex Lease Scheme. I acknowledge the depth of the grievance that Investors feel to the effect that rights under the FSC, to which they attached significance, have been diluted. If they had known in 2004 what they know now, Investors might well have required contractual comfort from Galliard to address the risk that, in the lengthy period between Investors making their investment and becoming shareholders in SBHMC, SBHMC might undertake transactions that Investors considered undesirable. However, in the absence of such contractual provisions on which Investors can sue, this is a claim brought by SBHMC with, in my judgment, the Limitation Act consequences set out above.

Directors' Duties Claim

437. It is common ground that the statutory duties that Mr Conway owed to SBHMC, insofar as relevant to the Directors' Duties Claim, are set out in ss171 to 174 of CA2006. Sections 175 to 177 did not come into force until October 2008 and all sides agree that they are not relevant.

438. SBHMC's case as advanced in closing focused on Mr Conway's decision to enter into the Annex Lease Scheme in 2008. In essence, that was said to be a breach of the duties in ss171 to 174 because Mr Conway knew full well that SBHMC was entitled to become the owner of a freehold interest in the Annex and that the Annex Lease Scheme operated to deprive it of the benefit of that entitlement. That case fails on limitation grounds (see paragraph 354 above).

439. I will not burden an already lengthy judgment with an analysis of the law on ss171 to 174 of CA 2006 since, given my conclusions on limitation, that would be unnecessary. I have, however, made factual determinations throughout this judgment on Mr Conway's state of mind when implementing the Annex Lease Scheme and on the steps that he took to satisfy himself as to its propriety. I trust that those factual findings will enable the matter to be determined if I am wrong in my conclusion on limitation.

440. SBHMC also argued that Mr Conway was in breach of the equitable self-dealing rule which pre-dated the enactment of ss175 to 177 and that Mr Conway's mental state was irrelevant to that breach since the rule against self-dealing imposes strict liability. Galliard objected that this case was not pleaded. SBHMC did not, in its written or oral submissions, point to any paragraphs of the RAPOC in which the claim was pleaded. My own review of the RAPOC finds only a general assertion in paragraph 33.2.1 to the effect that:

> *Mr Conway acted whilst hopelessly conflicted and/or interested and failed even to declare the same. In each case, Mr Conway also preferred his own interests as an ultimate beneficial owner of Lodgeshine and Galliard Hotels.*

441. I would have welcomed some submissions at trial from SBHMC as to whether this was sufficient to amount to a pleading of a breach of the self-dealing rule. I received none, although following circulation of my embargoed judgment, SBHMC did submit that its case on self-dealing was pleaded in paragraph 33.2.1 of the RAPOC and, in any event, the substance of the allegations was made abundantly clear in SBHMC's written closing submissions and put to Mr Conway so that any deficiency in the pleadings was overtaken by events. However, in my judgment, the time for making those submissions was at trial given that SBHMC was on notice that Galliard was submitting that there was no pleaded case on "self-dealing" that it had to meet. I have, therefore, proceeded on the basis that there was no pleading of breach of the self-dealing rule although this has no effect on my decision since the Directors' Duties Claim has failed on limitation grounds. I have nevertheless made findings as to the economic effect of the Annex Lease Scheme and Mr Conway's perception of the nature of any conflict of interest in paragraphs 160, 161 and 175 above with a view to addressing the allegation pleaded in paragraph 33.2.1 of the RAPOC. I address other matters arising from SBHMC's submissions that followed the embargoed judgment in the "Postscript" at the end of this judgment.

442. In paragraph 325, I refer to another claim that was alluded to in SBHMC's written closing submissions to the effect that there was a separate breach of duty consisting of Mr Conway's "failure to disclose his own wrongdoing" before ceasing to be a director in March 2015. SBHMC has not addressed Galliard's complaint that a separate allegation of breach of duty based on a failure to disclose was unpleaded. I note the reference in paragraph 33.2.1 of the RAPOC to Mr Conway's failure to declare a conflict of interest. However, read in context, that is expressed as a factor that made his decision to enter into the Annex Lease Scheme objectionable. While, in its oral closings, SBHMC did focus on an absence of disclosure as part of its case on "deliberate concealment", it was not suggested that the absence of disclosure also amounted to a separate breach of Mr Conway's duties as director. In consequence, I am not satisfied that the separate breach alleged was properly pleaded and the matter was not alluded to in oral closings (as requested by my direction summarised in paragraph 23). I conclude that this allegation does not fall for determination.

Economic torts and knowing receipt claims

443. These claims fail on limitation grounds. In those circumstances, I have made factual findings going to the ingredients of the tort including Mr Conway's knowledge or

otherwise of the FSC at various times and his state of mind when entering into the Annex Lease Scheme.

PART M – THE RENT CLAIM

Rectification of the provisions of the Underlease dealing with rent

444. Ultimately, there was no real dispute between the parties that the provisions dealing with RPI -related increases to rent payable pursuant to the Underlease had misfired. Accordingly, I can deal with this issue briefly.

445. The Underlease was granted on 16 June 2008. No rent was payable for the first five years of the term. The parties are agreed that, in the first year in which rent was payable, the annual rent was the figure of £117,382.50 stipulated in the definition of "Initial Rent" in the Underlease as increased by the relevant RPI increase between 16 June 2008 and 16 June 2013. RPI figures are not actually available as at the 16th day of the month. However, both parties are content with an approximation that uses RPI figures at the end of May. Applying that approach, RPI in May 2008 was 215.1. RPI in May 2013 was 250. Accordingly, the parties are agreed that the rent payable in the first year after 16 June 2013 was £117,382.50 x 250/215.1 which amounts to £136,427,82.

446. Anyone acquainted with the practice of increasing prices charged by reference to RPI increases would immediately assume that the rent due in the second year, from 16 June 2014, would start with the figure of £136,427.82 as uplifted by reference to increases in RPI between May 2013 and May 2014 (using the approximations that the parties are content to apply). RPI in May 2013 was 250. RPI in May 2014 was 255.9. Therefore, it is natural to assume that the rent payable from 16 June 2014 would be £136,427.82 x 255.9/250 which amounts to £139,647.52.

447. There is, however, a possible interpretation of the Underlease to the effect that the rent payable from 16 June 2014 factors in the increase in RPI since May 2008 rather than only the increase since May 2013. That would involve a significant double count of the RPI increase with no objectively good reason.

448. In his oral evidence Mr Conway accepted that the Underlease had been intended to contain a simple mechanism for RPI increases (along the lines summarised in paragraph 446). He accepted that to the extent that the result was as set out in paragraph 447, that was a mistake.

449. In the light of that acceptance, Galliard does not oppose SBHMC's claim for rectification of the Underlease so as to achieve the outcome summarised in paragraph 446 although, recognising that rectification is a remedy in the discretion of the court, leaves it to the court to decide whether to grant the remedy.

450. I will rectify the provision in the way that SBHMC requests. I conclude that all the requirements necessary for rectification are present. In the light of Mr Conway's acceptance, I conclude that it was so obvious as not to need saying that the mechanism for increasing rent in line with RPI would operate as summarised in paragraph 446.

Lodgeshine's claim for unpaid rent

451. SBHMC did not in its closing submissions say anything about Lodgeshine's claim for unpaid rent. I took it to accept that its sole defence to this claim consisted of its assertion in the Main Claim that it was entitled to a declaration that the Lease and Underlease were void or voidable either because of defects in their execution or because of the fact that they were granted in breach of the FSC, the trusts imposed by the FSC and Mr Conway's directors' duties. Since that claim for relief has failed with my determination of the Main Claim I conclude that Lodgeshine's claim for unpaid rent succeeds although, of course, the unpaid rent that SBHMC owes must be calculated by reference to the provisions for RPI increases as rectified.

452. There remains a dispute between SBHMC and Lodgeshine as to Lodgeshine's entitlement to interest on rent unpaid. I hope the parties will be able to reach agreement on that issue but, if they cannot, it can be dealt with at the consequentials hearing.

POSTSCRIPT

453. This judgment is already long. Dealing with all the issues canvassed in the parties' lengthy closing submissions, many of which do not arise given my conclusion on limitation matters, would have made the judgment disproportionately long and involved a disproportionate allocation of judicial resource to a trial listed for 15 days. I have instead sought to ensure that, if I am wrong in the way I have disposed of the various claims, I have at least made factual findings necessary to enable the totality of the dispute to be resolved.

454. No party suggested that I should follow a different process and determine each and every issue discussed in their closing submissions. Nor did any party suggest, except as set out below, that there were any respects in which the factual findings I have made are inadequate to deal with the other areas of dispute raised in closing submissions or that there were areas in which further findings were needed.

455. That said, in submissions made following receipt of the embargoed judgment, SBHMC asked that I expand it so as to reach a conclusion on (i) whether Galliard Hotels was in breach of trust and (ii) whether Mr Conway had breached the "self-dealing" rule. Galliard's position was that no such findings were necessary since my existing factual findings were sufficient to address both issues should they need to be determined following a successful appeal against my other conclusions.

456. I do not consider it necessary or proportionate to decide whether Galliard Hotels was in breach of trust. That would necessitate a lengthy addition to this judgment to deal with the parties' competing arguments as to whether "informed consent" is needed before a beneficiary can consent, concur or acquiesce to a breach of trust and, if so, whether SBHMC had done so in the light of my findings as to the state of mind of relevant individuals. I am reinforced in my conclusion by the fact that SBHMC did not suggest that my factual findings were insufficient to enable this issue to be determined beyond querying whether, in what is now paragraph 164, I determined whether Mr Conway knew that, but for the Annex Lease Scheme, SBHMC had a contractual right to acquire a freehold interest in the Annex. I considered SBHMC's observation in this regard to be fair and I have, accordingly, amended paragraph 164 to reflect Mr Conway's acceptance in cross-examination that he did know that there was a contract.

457. Nor do I consider it right, or necessary, to make findings on whether Mr Conway breached the prohibition on "self-dealing". Because its position was that this was not pleaded in the RAPOC, Galliard said little in its closing arguments about the substance of that prohibition. Since SBHMC did not contradict Galliard's position on the pleadings, I would risk unfairness in reaching a conclusion on the substance of the prohibition without the benefit of Galliard's submissions on that issue. I did not understand SBHMC to say that the factual findings I have made on the allegation that is pleaded at 33.2.1 of the RAPOC (see paragraphs 160, 161 and 175) are insufficient. Rather, I understood it to argue that I should "join the dots" and explain why those findings lead inexorably to a breach of the self-dealing rule and I have explained why I will not do so.

APPENDIX – LIST OF PERSONS REFERRED TO IN THIS JUDGMENT

The following is a list of the persons who are referred to frequently in the judgment. Names in bold indicate witnesses and an * by a witness's name indicates that the witness was cross-examined. I have not included individuals (even if witnesses) or entities who are not referred to frequently in the judgment. However, I have borne in mind all aspects of the witness evidence to which I was referred even if the witness's name does not appear in the table below.

Ms Akers	Employee of Galliard Home since 1991. Personal assistant to Mr Conway since 1982
Mr Angus*	Worked in Galliard's finance function in various roles. Former Company Secretary of SBHMC
Mr August*	Project Manager at Galliard from 1994 until 2018
BDO	Galliard's auditors. Also audited SBHMC's accounts until early 2018
BUJ	Architects engaged by Galliard in connection with the Project
C1 Capital	The company appointed in 2013 to oversee Park Plaza's management of the Hotel on behalf of SBHMC
Mr Conway*	Founder and director of the Galliard group and acknowledged controlling mind of all the corporate defendants
Mr David Conway*	Son of Mr Conway. Had a sales role at Galliard at the relevant times
Mr Dijkstra*	Employee of C1 Capital since May 2013 and director since 1 April 2015
DMH Stallard	Galliard's solicitors in these proceedings
Mr Duffy*	Employee of Galliard and director of SBHMC from 27 March 2015 until 20 July 2017
Mr Duggan*	Investor and solicitor (now non-practising). Director of SBHMC since 20 November 2017
Galliard Hotels	Original registered proprietor of the Site and seller of the freehold interest pursuant to the FSC. Grantor of the Lease
Mr Galman*	A senior member of Galliard Hotels' sales team
Gensler	Architects engaged by Frogmore in connection with the predecessor to the Project that would have involved the Site being developed for use as offices
Mr Georgiou	A member of Galliard Hotels' sales team reporting to Mr Galman
Ms Gopinathan	An Investor
Mr Grenfell KC	Barrister and Investor. As well as investing himself, he introduced friends and colleagues to Galliard

Mr Hirschfield*	In-house legal counsel for Galliard Homes
Howard Kennedy	Mr Conway's and Galliard's solicitors. Acted in connection with the Project
Mr Huberman*	Chartered accountant and director of Galliard Homes
Mr Ivesha	CEO of Park Plaza
Mr Lakha KC*	Barrister, Investor and director of SBHMC since 20 November 2017
Lambeth	The relevant planning authority
Lodgeshine	Member of the Galliard group. Galliard Hotels' tenant pursuant to the Lease and SBHMC's landlord pursuant to the Underlease
Mr Marley*	Electrical engineer, Investor and director of SBHMC since 27 April 2015
Mr Millar	In-house counsel to Galliard, on secondment from Howard Kennedy
Mr Mills*	Architect at BUJ who prepared drawings and other material for the Project
Park Plaza	The company engaged to operate the Hotel pursuant to a contract with SBHMC
Mr Philips*	Solicitor at Howard Kennedy LLP. The primary point of contact for Galliard in relation to conveyancing matters associated with the Project
Mr Martin Philips	Former solicitor at Howard Kennedy LLP and previously custodian of the institutional relationship with Mr Conway and Galliard. Gradually reducing the scale of his practice and transitioning the relationship to Mr Phillips at the time of the Project
Mr Porter*	Retired chartered accountant. Involved in Galliard's finance function. Former Finance Director of Galliard and former Company Secretary of SBHMC
Shakespeare Martineau	Former solicitors for SBHMC in connection with these proceedings
Mr Tucker-Brown*	Investor and previous joint venture partner with Galliard since 1991. Not actually an employee of Galliard but can be regarded as a representative of Galliard in connection with the Project. Director of SBHMC from 27 March 2015 until 20 July 2017