Neutral Citation Number: [2020] EWHC 290 (Comm)

Case No: E90BS009

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS AT BRISTOL
CIRCUIT COMMERCIAL COURT

Bristol Civil & Family Justice Centre
2 Redcliff Street
Bristol
BS1 6GR

Date: 28/02/2020

Before :

HH JUDGE RUSSEN QC

(Sitting as a Judge of the High Court)

- -

Between :

FAIRFORD WATER SKI CLUB LIMITED	**Claimant**
- and -	
(1) CRAIG RONALD COHOON **(2) SCOTT RICHARD COHOON** **(3) JANE LOUISE COHOON** **(4) CRAIG COHOON WATERSPORTS (A FIRM)**	**Defendants**

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- -

SIWARD ATKINS (instructed by **Wilmot & Co**) for the **Claimant**
HUGH SIMS QC and KATIE GIBB (instructed by **Harrison Clark Rickerbys Limited**) for the **Defendants**

Hearing dates: 7th to 11th and 17th October and 29 November 2019

- -

Approved Judgment

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

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HH JUDGE RUSSEN QC

HH JUDGE RUSSEN QC:

1. This judgment comprises the following sections:

   (1) Introduction and Background: paras. 2 to 25

   (2) The Proceedings: paras. 26 to 46

   (3) Legal Principles: paras. 47 to 158

   (4) Witnesses: paras. 159 to 190

   (5) The Claims

      a) Management Fees and Charges: paras. 191 to 307

      b) Unexplained Payments (presumed to be for a defendant's benefit): paras. 308 to 330

      c) Specific Payments (alleged to be for a defendant's benefit): paras. 331 to 386

      d) Payments Not Collected or Not Accounted For: paras. 387 to 415

      e) Property-related Dealings: paras. 416 to 530

   (6) Conclusion: para. 531

(1) Introduction and Background

2. This is my judgment following the 7 day trial of a claim in which the claimant ("t**he Club**") seeks to hold each of the defendants accountable for monies and property which, to summarise, it alleges were misappropriated from it through the actions of the defendants. In response to that claim the fourth defendant ("**Watersports**") has counterclaimed for payment of a management fee which it says is due to it in respect of a period of time after January 2017 following the termination of an agreement for its management of the Club's premises (and which, although pleaded primarily as an ongoing period, was identified in closing submissions as being a period of one year as representing a reasonable period of notice of termination of the management agreement relied upon).

3. It will be apparent from what I say below that the length of the trial (itself longer than originally fixed) did not permit proper consideration of every one of the nigh-on 300 transactions that remained in issue between the parties. I should therefore state at the outset that despite the parties' voluminous closing submissions – the defendants' ran to 79 pages and was accompanied by 5 detailed appendices of spreadsheets and tables

comprising dozens more – I have come to the clear conclusion in preparing this judgment that many of them cannot be decided against the defendants as if each had been given proper consideration at trial.

4. The Club was incorporated in 1976 under the name of Cotswold Motor Boat Racing Club Limited. It adopted its present name in 1999. Its business is that of running a members' club centred upon water skiing activity on a lake and surrounding land near Fairford, Gloucestershire ("**the Site**"). The Club owns the Site (though the water in the lake belongs to Thames Water). It is the payment of a Club membership fee which entitles a club member to water-ski on the lake. If any member brought a guest skier then a guest fee was payable to the Club (though at Section 5(d) of this judgment I address an issue over the Club's entitlement).

5. The Club's turnover is based not only upon membership and guest fees but also extends to income generated from renting and selling (on long leases) the lodges and static caravans situated on or near the lakeside and which are generally occupied for leisure purposes rather than as all-year-round dwellings. When its business first started those who stayed at the Site did so in touring caravans. However, over time, the Club moved to leasing or selling static caravans and lodges, though there remains an area where touring caravans can be parked. The Site now accommodates 41 static caravan sites (sometimes referred to at trial as "statics") and 18 lodges (alternatively described as log cabins).

6. The lodges are constructed out of two wooden units which are then cladded. The main supplier of them was a company called Salop Leisure ("**Salop**"). The lodges are situated at the north end of the Site, near the Coln river and are known as the Coln River Lodges.

7. In addition to the statics and lodges, there is also the area at the site on which visitors in touring caravans can pay to stay during the 7 months of April to October.

8. In order to avoid confusion on the point, in circumstances where the witnesses have referred to the Club's "members" usually with a meaning different from that to be taken by a company lawyer, I will refer to the members of the Club, as a corporate entity, as "shareholders" and to members of the water ski club operated by it as "members". Not all shareholders are members and not all members are shareholders. Neither do all occupiers of lodges or statics take to the water on skis.

9. I will, without intending any discourtesy to the individuals concerned, refer to the first three defendants by their first names (as the parties did during the course of the trial): **Craig**, **Scott** and **Jane**. Craig is the father of Scott and the husband of Jane. Craig and Jane were married in 2017, though they had been living as man and wife for some years before.

10. In addition to being a proprietor of Watersports, Craig was a director of the Club between around 1977 and his resignation on 16 January 2017. He had been involved in water skiing at the Site from earlier in the 1970's when an unincorporated entity was responsible for permitting the use of the lake by members for power boat racing and, when not being used for that activity, water skiing. By the time the Club was incorporated Craig was giving water skiing lessons during summer evenings and

weekends. By the late 1980's, at a time when water skiing had taken over from power boat racing as the preferred activity, Craig was living in a touring caravan at the Site.

11. Scott was a director of the Club between November 2007 and 27 February 2017 when he too resigned. Scott was also its Company Secretary between those dates. Scott is a qualified water ski instructor.

12. Although not a point flagged in the Defence, Jane is now said by the defendants to have been an alternate director (to act, as required, in place of either Craig or Scott) and they say she took no active role and received no director's remuneration as other directors did (sometimes by way of a credit against their member's fee). Jane was appointed as a director on 15 February 2015 and like Craig resigned from office on 16 January 2017. The Club did not accept Jane's alternate director status, saying that there is no written record of her being appointed as such in accordance with the Club's Articles. The defendants responded by saying that Jane was not challenged on her position in cross-examination. I return to this issue below.

13. Jane is also a qualified water ski instructor with approximately 20 years' experience. Over the years she has helped out in the business of Watersports on an irregular basis when there was a shortage of staff, both by giving skiing lessons and, less frequently, helping out in its shop.

14. It is appropriate to note at this stage that Craig, Scott and Jane were not the only directors of the Club in the period prior to 2017. I mention below the previous directorships of Mr Colin Garner ("**Mr Garner**") and Mr Ian Hamilton ("**Mr Hamilton**"), each of whom gave evidence at the trial, as well as that of Mr Derek Thompson ("**Mr Thompson**", who died in 2007). Since early 2017, and following the Club's discovery of matters which have prompted it to make this claim, the Club has been under the directorship of Mrs Christine Owens ("**Ms Owens**", who is the wife of Mr Garner) and Mr Paul Godden ("**Mr Godden**").

15. Watersports is an unincorporated business which is independent from the Club. Craig established the business in the early 1980's. Although the Club had alleged that Watersports is a partnership between Craig, Jane and Scott, at the start of the trial it was recognised that only Craig and Scott were partners at the times material to these proceedings. After working in Watersports' business for a year towards the end of the 1980's, Scott returned from other employment to work full time in the business with Craig in around 1994.

16. The business of Watersports involved running a water ski school at the Site, providing lessons for skiers, and operating a shop for the sale of water ski equipment. The ski school was established before the shop.

17. Watersports occupied its premises and made use of the lake under a 10 year lease granted by the Club (by its former name) to Craig in 1995 and subsequently under a 15 year lease (effective from May 2007) which was formalised in June 2012.

18. For some time Watersports' shop was located in a portacabin on the Site but it was later moved to part of a building built as a shop (the subject of the 1995 lease) and shower block and then, later again from around 2007, from the building located in the Site known as the Old Rangoon Pub (the subject matter of the 2012 lease). Customers

of the shop would obviously include members of the Club. Guests of members would also take advantage of the skiing lessons on the lake provided by Watersports.

19. After Craig and Scott ceased to be directors of the Club, Watersports severed its connection with the Site. Its business is now confined to its shop which is now located nearby at Parry's Barn, London Road, Fairford.

20. At all times material to these proceedings before 2017 the Club's day-to-day administration was conducted from Watersports' shop premises. For the last 10 years of that period, Craig and Scott then ran the Club's affairs on a day-to-day basis from the old pub premises.

21. Although the business of Watersports was independent of the Club's, the fact that it ran its own business from the Site and that its two proprietors were also directors of the Club (and responsible for running the Club's office from Watersports' premises) meant that the two businesses were somewhat intertwined. So much is obvious from the nature of the dispute between the parties on one particular head of claim. On that claim, the Club seeks to recover from the defendants the cost of an advertisement placed in the British Watersports Federation Magazine (in December 2011) on the basis that it would have been for the benefit of Watersports, not the Club. The response of Craig and Scott (which I address further below) was that the advert probably promoted the sale of the Club's lodges.

22. It is the separate interests of Craig and Scott in both the Club and Watersports, and their duties as directors of the Club prior to 2017, which has led to the Club's claim against them.

23. The Club alleges that Craig, Scott and Jane have been guilty of numerous breaches of duties owed under the Companies Act 2006. Claims are also advanced against Watersports on the basis of (to summarise) its knowing assistance in some of the alleged breaches and/or its knowing receipt of some of the benefit allegedly derived from them.

24. I must address them in considerable detail below but the essential allegations are that, as directors of the Club, one or more of the individual defendants misappropriated money and other property from the Club, caused the Club to pay management charges and remuneration which had not been agreed by the Club, and failed to account to the Club for monies which either were collected or ought to have been collected from its members. The claim is not only about the consequential losses allegedly suffered by the Club but also a fiduciary's obligation to account to his principal for allegedly ill-gotten gains.

25. The counterclaim by Watersports springs from one aspect of the Club's second group of allegations. Watersports claims to be entitled to unpaid fees under a Management Agreement which it says (though the Club now disputes) it entered into with the Club in May 2007 ("**the Management Agreement**").

(2) The Proceedings

26. The Club commenced these proceedings on 30 October 2017 claiming damages totalling approximately £1.55m from Craig, Scott and Jane, in respect of their alleged

breaches of duty as directors during the period from 2006 to 2017, and against Watersports for assisting in or benefiting from those breaches.

27. The Schedule of Losses annexed to the Particulars of Claim not only provided a general description of the various heads of claim, by reference to subject matter, but identified 38 heads of claim. However, some of those (grouped under the description 'Payment made by Company not for its benefit') involved a challenge to hundreds of underlying transactions involving payments made by cheque, in cash or online. The 38 items came to be reproduced on "**the Scott Schedule**" mentioned below and the numerous payments covered by three of those items were recorded on a document which came to be described as "**the Spreadsheet**". At Appendix 2 to the defendants' written closing submissions the Spreadsheet was reproduced with further columns which included one summarising the defendants' evidence at trial.

28. The Defence and Counterclaim (for Watersports' unpaid management fee) was served on 22 March 2018. That statement of case was later amended so as to not admit the validity of the appointment of Ms Owens and Mr Godden as directors of the Club, or their authority to cause the Club to bring the Claim, and re-amended shortly before trial to retract an admission that Jane was a partner in Watersports.

29. The Claim and Counterclaim came on for trial in the week commencing 7 October 2019. At the trial the evidence and submissions were directed to the items in the Scott Schedule and some (but only some) of those on the Spreadsheet.

30. The Scott Schedule was a document prepared for the Pre-Trial Review on 5 September 2019 for the purposes of identifying the parties' respective positions on each head of claim. The Order made on that occasion provided for a revised version of the Scott Schedule to be served with each side "setting out its case on each head of claim itemised in it as it will be presented at trial" and for the sequential service of any documents and supplemental witness statements in support of that case. Any further documents or statements from the defendants were to be served by 1 October 2019.

31. By the start of the trial there were 24 heads of claim identified in the Scott Schedule as being still in dispute between the parties (the other items within it were identified as being the subject matter of agreement as a result of concessions made by each side). The remaining 24 items on Scott Schedule had a value of £1,075,952. One of them – Item 2 which was identified as "bank loan cash back" in the sum of £8,529 – ceased to be contentious in that Craig and Scott conceded that a cashback payment to the Club in respect of a loan from Barclays Bank was then paid out to Watersports. Although the Scott Schedule referred only to Craig being accountable, it seems that the concession ought to be reflected in an order that Craig, Scott and Watersports should account for it.

32. As I explain below when addressing particular items, there was further movement between the parties at trial on certain items on the Scott Schedule.

33. Items 11, 12 and 13 of the Scott Schedule covered the heads of claim referred to as "unexplained cheques", "cash" and "online payments" and each cross-referred to the Spreadsheet as the 'Unexplained Payment Schedule'. The Spreadsheet therefore comprised the numerous items of expenditure between July 2011 and December 2016

which were said to support those heads. Many such items were said by the Club to be unsupported by an invoice or the retained carbon copy of an invoice which was referred to as a "**pink slip**". For others there was a pink slip but the Club disputed that the relevant expenditure was properly for its account (Ms Owens had used the abbreviation 'NFC', meaning "not for Club").

34. The Spreadsheet, in its original form, was an exhibit to the first witness statement of the Club's director and witness Ms Owens. In that statement Ms Owens referred to those pink slips by which Watersports had charged the Club for certain items of expenditure which, at least at first sight, Watersports had incurred in favour of third parties. The pink slips had been provided by the Club's bookkeeper, Mr Russell Morris ("**Mr Morris**"), and were said by the defendants to be the carbon copies of (white paper) invoices raised by Watersports against the Club. Ms Owens said in her statement that the Spreadsheet reflected her attempt to reconcile the pink slips with third party supplier invoices and that it covered all payments made in cash or by cheque or online which were unexplained.

35. Mr Atkins, in the course of his opening submissions, withdrew the Club's claim in respect of seven items on the Spreadsheet with a value of approximately £16,000. And in his cross-examination of Craig he also made it clear that it was content not to pursue its challenge in respect of four further items on the Spreadsheet.

36. Included within the Spreadsheet is a column headed 'Quick Book System Notes'. This is a reference to the "**QuickBooks**" accounting software which Mr Morris used in his bookkeeping for the Club. Some of the entries in that column reflected the provision of pink slips to Mr Morris for him to make a brief note about the payment on the system. However, many other entries noted that there was "nothing on system", meaning that the QuickBooks records did not assist in explaining the payment.

37. I have already noted that the Scott Schedule and the Spreadsheet provided the focal point for the detailed evidence and argument in circumstances where the Particulars of Claim, Defence (which had been re-amended by the time of trial) and Reply (itself amended) really served to sketch out at a more general level the suggested bases of liability and the grounds for resisting it. However, the Particulars of Claim did (with further sub-categorisation) break down the heads of claim into the following categories: (1) management fees and charges; (2) unexplained payments presumed to be for the benefit of one or more of the defendants; (3) specific payments by the Club alleged to be for the benefit of a defendant; (4) payments not collected for the Club or collected but not paid to the Club; and (5) claims relating to properties at the Site. These are the categories I address in Section 5 of this judgment. The Spreadsheet (and Items 11 to 13 on the Scott Schedule) related to the second of these categories and included one (Item 1 on the Scott Schedule) which fell within the third category.

38. At an early point in the trial it became necessary for me to consider the scope of certain allegations made in support of one particular element of each of the second and fourth categories, as fleshed out the Scott Schedule at Items 15 and 22 respectively, because of an application by the Club to amend its Particulars of Claim.

39. Item 15 of the Scott Schedule related to a "management charge" of £50,000 which was said to have been paid to Craig in 2007/8 for managing the lodge project at the

Site and on which the Club's pleaded case was that the Club had not agreed to pay it and that it was an unauthorised payment. Item 22 of the Scott Schedule related to Plot 11 at the Site. The Club's pleaded case was that Craig had caused the Club to transfer Plot 11 to himself for no consideration and without authority to do so. The Club sought to recover the value of Plot 11 which was said to be £75,000 at the date of the Particulars of Claim.

40. Mr Atkins, in his skeleton argument and his opening submissions on behalf of the Club, drew attention to what the defendants had said in their Defence in response to these two particular elements of the Claim (though they had said it in the Defence as originally served in March 2018, before later amendments). In response to the claim for £50,000 (Item 11) they said not only that the claim was time-barred for proceedings commenced in October 2017 (it was also said the amount was more accurately described as a project fee for managing the lodge development in around 2004/5) but that, instead of making a cash payment, the Club had instead agreed to transfer Plot 3 at the Site to Craig. Responding to the claim in respect of Plot 11 (Item 22) the Defence also took a limitation defence and put the Club to proof of its suggested value. It did not admit that Plot 11 had been transferred to Craig for no consideration and without any authority to do so. An explanation was given as to how Craig (in the context of transferring his interest in Plot 3 to a Mr Nutt) had in 2011 paid £24,000 of his own monies to procure the release of a charge over Plot 3; and how Plot 11 was later formally transferred to Craig in 2015 in lieu of that sum being owed to him by the Club (because it was the bank's debtor and it benefited from his payment to clear off the bank's charge).

41. Mr Atkins' skeleton argument had raised the point that the transfers of Plot 3 and later Plot 11 would appear to have involved Craig acquiring a substantial non-cash asset from the Club which would have required the approval by a resolution of the Club's shareholders when there had been none. Depending on when the transfer of Plot 3 took place, and assuming the value of the relevant plot was more than 10% of the net asset value of the Club at the relevant time, this would have involved a failure to comply with section 190 of the Companies Act 2006 (or possibly section 320 of the Companies Act 1985 in the case of any transfer of Plot 3 at a time when the earlier statute remained in force) leading to accountability on the part of Craig. Mr Atkins recognised that the point had not been expressly pleaded but he said it was covered by the existing pleading that the transfer had been made without authority. By the conclusion of his opening submissions, and in circumstances where the defendants had indicated that they were not prepared to proceed on the basis that the Companies Act point was already covered by the Particulars of Claim, Mr Atkins indicated that he intended to apply to make what he described as "*updating amendments*". At the beginning of the second day of the trial Mr Atkins said he would make the application at the close of the Club's evidence. Mr Sims QC made it clear at that point that the defendants would oppose it.

42. The application to amend was made in the afternoon of the second day, after the Club's five witnesses had been called, by reference to a draft Amended Particulars of Claim which Mr Atkins had by then prepared. In fact, the proposed amendment in support of the claim to Plot 3 (an alternative to the Club's primary case for the recovery of £50,000 and one predicated upon the court accepting the defendants' version of events) did not seek to rely upon either section 320 or section 190. Instead,

reliance was placed upon Article 84(1) of the Club's Articles, and the absence of any suggestion that Craig had declared his interest in compliance with that article, and what was said to be a recognition by Craig, Scott and Jane in their witness statements that the transfer was a gift. The alternative claim was that Craig should therefore account to the Club for the value of that gift or pay equitable compensation for the loss resulting from it having been made.

43. The separate proposed amendment in relation to Plot 11 did take the point that there had been a failure to comply with section 190 of the 2006 Act (putting the defendants to proof that the necessary shareholders' resolution was passed) and asserted the Club's right to elect between avoiding the transaction or claiming monetary relief against the directors. In addition to the existing case that Plot 11 had been transferred for no consideration at all, the draft amendment included the allegation (posited upon the basis of the court accepting that Craig had given £24,000 of value in respect of the plot) that it had been transferred at a significant undervalue.

44. By a decision given on the morning of the third day of the trial, and separately transcribed, I gave my reasons for refusing the amendment for the recovery of the value of Plot 3 but allowing those advanced in respect of Plot 11. However, in relation to the permitted amendment, I made it as clear as Mr Atkins had done when making the application that there was no question of further evidence being adduced beyond that already given or previously contemplated by the parties. There had been no provision in this case for expert valuation evidence or accountancy evidence. The case on undervalue and non-compliance with section 190 would therefore stand or fall by reference to whatever findings the court felt able to make, by reference to the evidence of fact, in relation to the relevant date (for section 190 purposes) and the questions as to the value of the plot, any consideration given for it and of the net assets of the Club.

45. After my ruling on the amendments, the trial continued with the defendants' evidence.

46. Although the parties had hoped to finish their evidence by the end of the trial week, and certainly to do so on a further day the following week which had been set aside out of caution, it proved necessary to use the further day to complete the evidence and also to reserve the date of 29 November 2019 for closing submissions. It was not possible, even with that extra time, to address all of the items on the Spreadsheet and that raises a question as to how I should determine the claims under Items 11 to 13 on the Scott Schedule, in their entirety, by reference to those that were.

(3) Legal Principles

The Pleaded Duties

47. The Particulars of Claim advanced the Club's claim by reference to the following general duties owed to a company by its director under Part 10 (Chapter 2) of the Companies Act 2006 ("**the 2006 Act**"):

(1) under section 171, the duty to act in accordance with the Club's constitution and to exercise the powers given to him as a director only for the purposes for which they are conferred;

(2) under section 172, the duty to act in a way the director considers in good faith would be most likely to promote the success of the Club for the benefit of its members as a whole. This duty is to be exercised having regard to the matters non-exhaustively set out in sub-paragraphs (a) to (f) of section 172(1) but none of those was suggested by either party to have any particular impact upon the over-arching duty;

(3) under section 174, the duty to exercise reasonable care, skill and diligence. Again, the partly objective and partly subjective determination of the standard to be observed by the particular director, as required by section 174(2), was not suggested to have any particular resonance in this case; and

(4) under section 175, the duty to avoid any situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

48. Allowing for their point that Jane took no active part in the management of the Club during the 2 years of her directorship, the defendants accepted that these duties obviously applied. However, Mr Sims QC and Ms Gibb made the following submissions and observations about the pleaded duties:

(1) Section 171: the duty to act for proper purposes. They submitted that a director's liability is fault-based and a director should not be liable unless he knows that he is acting for an improper purpose or in breach of his fiduciary duty. They accepted, as Mr Atkins had pointed out, that this means either for purposes which the director knows are improper or where he has knowledge of *the facts* which make the purpose improper without necessarily being conscious that it is an improper one or involves a breach: see *Madoff Securities International Ltd v Raven* [2013] EWHC 3147 (Comm) at [195]-[200], per Popplewell J. The defendants' counsel said that, on a proper analysis few, if any, of the Club's heads of claim fell under this category of alleged breach.

(2) Section 172: the duty to act in good faith and in the Club's best interests. They said that the duty involved directors exercising their discretion bona fide in what they consider, not what a court may consider, to be in the interests of the company: *Re Smith and Fawcett Ltd*, [1942] Ch 304, 306, per Lord Greene MR. The test is a subjective one and the relevant question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind: see *Regentcrest Plc v Cohen* [2001] 2 BCLC 80 at 120, per Jonathan Parker J. Counsel said it follows that a director can act unreasonably and mistakenly, and will not be liable for a breach of his fiduciary duty to the company, so long as he was honest in his mistaken belief. They cited the decision of Mr Jonathan Crow, sitting as a deputy High Court judge, in *Extrasure Travel Insurance Ltd v Scattergood* [2003] 1 BCLC 598, at [89], who said that fiduciary duties are concerned with concepts of honesty and loyalty, not with competence. They further said that risk is an inherent part of any commercial activity and, as Popplewell J observed in *Madoff v Raven*, "*Corporate*

management often requires the exercise of judgment on which opinions may legitimately differ, and requires some give and take....". The submission was that, on an analysis of them, most of the heads of claim were pursued in relation to this duty and the onus of establishing that the director did not act in the best interests of the company was upon the Club: *The Bell Group Ltd v Westpac Banking Corporation* [2008] WASC 239 at [4596].

(3) Section 174: the duty to exercise skill, care and diligence. The defendants' counsel submitted that similar principles to those governing section 172 applied to the allegation of negligence, save that the standard of care is to be determined not only subjectively by reference to his particular knowledge, skill and experience but also on general, objective criteria: see *D'Jan of London Ltd, Copp v D'Jan* [1993] BCC 646, 648D-E, and, now, the language of section 174(2). They said that this duty was invoked by the Club in relation to the claims covered by Items 17 to 21 and 24 on the Scott Schedule.

(4) Section 175: the duty to avoid conflicts. Mr Sims QC and Ms Gibb said this encompassed two strands of the duty upon a fiduciary to account to his principal, frequently labelled the 'no conflict rule' and the 'no profit rule', each of which must be considered separately: see *Don King Productions Inc v. Warren* [2000] Ch 291 and *In Plus Group Ltd v. Pyke* [2002] 2 BCLC 201, 220. They said the emphasis of the Club's claim was under the latter but, in relation to the former, a fiduciary might act for more than one principal with the informed consent of each: see the observations of Millet LJ in *Bristol and West BS v. Mothew* [1998] Ch 1, at 18. Such consent may be express or implied: see *Kelly v. Cooper* [1993] AC 205. However, as they recognised, even if a fiduciary is properly acting for two principals with *potentially* conflicting interests, he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other (or, in other words, act so as to infringe the duty of good faith owed under section 172 to each). There is no breach of fiduciary duty in acting for both, for as long as the conflict between the interests of the principals is only a potential one and does not operate to undermine that fundamental duty of loyalty. As for the 'no profit rule', it applies even where the fiduciary has acted in good faith in making a profit through the use of his fiduciary position: see *Regal Hastings v. Gulliver* [1967] 2 AC 134, 144.

49. Mr Atkins took no particular issue with these propositions. In relation to the 'no profit rule' he observed (relying upon *Mortimore on Company Directors* (2017, 3rd ed)) that the application of the rule does not rest upon it being shown that the company was itself able to incur the initial expenditure necessary to make the resulting profit. That is obviously correct and section 175(2) of the 2006 Act says as much.

50. That provision reflects such authority as *Regal Hastings* where the directors were accountable for the profit on the shares in the subsidiary purchased by them alongside those acquired by the company, even though the company was not able to commit more than the £2,000 it had invested and the directors may even have been in breach of some other duty had they caused it to risk more. In that case the House of Lords applied the well-known rule in *Keech v Sandford* (1726) Sel. Cas. Ch. 61 which, in focusing upon whether the profit has been obtained by reason of or by use of the fiduciary position, established that it is irrelevant whether or not the principal could

have obtained the profit for himself. The question is therefore whether or not the director has exploited for his own gain an opportunity which came to him (or came to be known to him) through his position as a director and which can be said to be sufficiently closely connected to the company's affairs as to be considered an opportunity of the company.

51. As the decisions in *Re Smith & Fawcett*, *Regentcrest* and *Extrasure Travel* were not in the joint bundle of authorities (reliance was again placed upon *Mortimore on Company Directors* op. cit. for a commentary upon them) I raised with counsel during their submissions certain points that occurred to me in the light of my own summary of other decisions addressing these duties (save section 174) in *Stobart Group Limited v Tinkler* [2019] EWHC 258 (Comm) at [396]-[397], [401]-[402] and [428]. Having done so, and the dividing line between sections 175 and 177 of the 2006 Act also having emerged during the course of Mr Atkins' submissions, I would add the following observations:

(1) It is no answer to an alleged breach of the duty under section 171 for the directors responsible for the relevant decision to say they were acting in the best interests of the company: see *Regentcrest Plc* at [123]. Observance of the duty embodied in section 172 will not excuse what is otherwise a breach of section 171.

(2) Although the duty under section 172 is expressed in subjective terms and not so as to impose an objective standard of managerial competence (which is covered by the separate duty under section 174) that does not mean that the court will not be prepared to doubt the director's honesty and professed support for the company's best interests where substantial detriment has resulted from his act or omission: see *Regentcrest* at [120]. The fact that his actions have caused harm to the company, and may objectively be said to have been unreasonable, might support the conclusion that in fact his alleged belief that he was acting to promote the interests of the company was *not* one honestly held at the time.

(3) The legal burden of establishing a breach of that duty (under section 172) is upon the party asserting the breach and, allowing for any shift in the evidential burden, it is not for the director to vindicate his own position: see *Charles Forte Investments v Amanda* [1964] Ch 240, 260-1. However, where his decision is one that no reasonable director could have considered to be in the best interests of the company then reliance upon his own suggested contrary belief will not avoid a finding of breach: compare *Re Southern Counties Fresh Foods Ltd* [2008] EWHC 2810 (Ch), [53], per Warren J.

(4) The language of section 175 reflects the scope of the fiduciary duty applicable to a trustee which (subject to the fully informed consent of the beneficiaries) applies to potential as well as actual conflicts of interest including those in respect of deemed corporate opportunities on *Keech v Sandford* reasoning. The language of section 175(7) covers both the 'no profit' and the 'no conflict' rules. The duty under section 175 will not be infringed where the situation cannot reasonably be regarded as likely to give rise to a conflict of interest or if the matter has been authorised by the directors: see section 175(4).

(5) Section 177 of the 2006 Act separately addresses conflicts of interest arising under a transaction or arrangement made between a director and the company. [For

completeness, I note that section 182 (which is not one of the general duties imposed by Chapter 2 of Part 10 and which carries potential criminal consequences rather than civil ones) imposes an obligation to declare any such interest in an existing transaction or arrangement of the company unless the director concerned complied with section 177 before the company entered into it.]

(6) It is because the 'no conflict' rule extends to *potential* conflicts of interest under a transaction between the director and the company, even if the transaction may be beneficial to the company, that the company's articles will usually make provision for a director (who might otherwise be held accountable under section 177) to formally declare his interest to the board. In the present case the Club's Articles did so by incorporating clause 84(1) of Table A of the Companies Act 1948, which required disclosure in accordance with what was section 199 of that Act (the predecessor of section 317 of the Companies Act 1985 ("**the 1985 Act**") upon which the Club relied in support of its challenge to the Management Agreement with Watersports and to which I return below).

52. Counsel recognised that the authorities upon which they had relied supported these further observations. Mr Sims QC correctly observed that the second and third did not detract from the fundamentally subjective nature of the duty under section 172 and really served to highlight the point that it is an evidential question as to whether or not a director who has caused loss to the company, or who appears to have acted irrationally, can nevertheless defend his actions on the basis that he acted in accordance with it.

53. I return below to the issues between the parties over the impact of section 317 of the 1985 Act. It would be wrong to describe that earlier statutory provision as the predecessor of section 177 when it was concerned only with a potential criminal penalty for a director who did not disclose his interest in a proposed transaction with the company. Until the enactment of the general duties in sections 171 to 177 of the 2006 Act, the civil consequences for such non-disclosure were governed solely by the application of the established equitable principles expressly recognised by section 317(9) of the 1985 Act. Nevertheless, as I explain below, the provisions of section 317 are material to one of the Club's heads of claim and to Watersports' counterclaim. That is because the terms of the Club's Articles are such that, as I have mentioned, the issue of compliance or otherwise with the requirements of section 317 goes to the validity of the Management Agreement.

54. Section 178 of the 2006 Act addresses the civil consequences of a breach of any of the general duties relied upon in the Particulars of Claim. Save for the codified duty of care in section 174, which is not fiduciary in nature even if equitable in origin, they are each "*enforceable in the same way as any other fiduciary duty owed to a company by its directors*."

Alternate Directors

55. It is appropriate at this point to address the responsibility and duties of someone appointed as an alternate director.

56. On the Club's pleaded case, each of Craig, Scott and Jane are alleged to have been directors of the Club, owing the duties summarised above, and on that basis are said to be liable for wrongdoing during the periods of their respective directorships. Although the Re-Amended Defence withdrew the admission that Jane was a partner in Watersports, the admission that she was a director and owed those duties remained in that statement of case.

57. Nevertheless, in her witness statement of December 2018, Jane said that she had only been appointed as a director in February 2015 as a consequence of concern over Craig's health (though she said he was not particularly unwell at the time) and his concern that a further director might be needed to attend to matters, such as signing cheques. Jane also referred to the view of Mr Morris that it would be sensible to have three directors. At paragraph 14 of that statement she said:

> "*I did not know what was expected of me as a director. As far as I was aware, I was only a director in case Craig or Scott could not attend a meeting.*"

58. In his witness statement, Craig said his then wife-to-be was "*only ever intended to be an alternate director if Scott or I could not discharge our duties*." Jane's statement said she did "*absolutely nothing*" as a director, not attending board meetings, signing cheques or accessing the Club's online bank account. Craig said she had no active role. She was not paid a director's salary.

59. In anticipation of them confirming as much in the witness box, the defendants' skeleton argument made submissions on the basis that Jane was only an alternate director.

60. Article 13 of the Club's Articles permit any director to appoint an alternate director who in that capacity is entitled to be given notice of any board meeting and to attend and vote, but not to receive remuneration. The article also enables the appointing director to revoke the appointment and states that any such appointment or revocation should be made by that director in writing. I have already noted that the defendants cannot point to such a document though, consistent with the position that the appointment of the alternate terminates when the directorship of the appointor terminates, Jane did resign on the same day as Craig. The timing of her resignation was therefore consistent with her having been an alternate for Craig, though not for Scott who did not resign until the end of the following month.

61. Mr Atkins accepted in his opening submissions that, if the court made a finding that Jane was only appointed as Craig's alternate, the legal consequences were as suggested by the defendants. Their submissions were based upon a summary of the status of an alternate director in *Mortimore on Company Directors* (op. cit. at paras. 3.41 to 3.43). This was to the effect that an alternate director is personally liable for his own acts or omissions, is not deemed to be the agent for his appointor and is not to be imputed with knowledge of a matter known to the appointor. Likewise, questions over disqualification from voting on the ground of a conflict of interest (subject to the provisions of clause 84(1) of Table A) require the interests of the appointing director and of the alternate to be looked at separately on the basis that each is a director in his own right. This is all consistent with the alternate director having the same voting rights as the appointor, when he does act, but having no powers, rights or duties of office when the director for whom he is an alternate is himself acting.

Section 180 and the Club's Articles

62. On the basis that the above duties now imposed by statute are (by section 178 of the 2006 Act) expressed by reference to the fiduciary relationship between director and company which underpinned their equity-based predecessors, section 180 makes certain qualifications to what might otherwise flow from the rigorous application of these duties of loyalty owed by the director to *the company* (in the sense of its members). As they are potentially relevant to the present case, I note that section 180(1) is to the effect that (as each of sections 175 and 177 makes clear) it is *the board* which may "authorise" the director's conflicting interest so as to remove the risk of the transaction later being set aside on the basis that the members themselves had not given their informed consent to it. Further, section 180(4), which applies to each of the general duties including that in section 177, also provides that they (a) "*have effect subject to any rule of law enabling the company to give specific or general authority to do what would otherwise be a breach of duty*"; and (b) "*where the company's articles contain provisions for dealing with conflicts of interest, [they] are not infringed by anything done (or omitted) by the directors, or any of them, in accordance with those provisions*."

63. I have already mentioned that the Club's Articles adopted clause 84(1) of Table A. That provision required a director with a direct or indirect interest in a proposed contract or arrangement with the company to declare the nature of it to the board of directors in accordance with the statutory provision that was in force when the Articles were adopted (section 199 of the Companies Act 1948) which had been replaced by section 317 of the 1985 Act by the date of the (alleged) Management Agreement.

64. It follows from the language of section 180(4) that it is necessary to see whether or not the procedure laid down by clause 84(1) of Table A was complied with, in relation to any particular transaction, before it can be concluded that it involved an infringement of one or more of the duties in sections 171 to 177 (not just section 177). It is also necessary to check that the procedure was complied with in order to see whether it was a transaction upon which the director with the interest in the transaction could properly vote. Article 12 of the Club's Articles modified the stipulation in clause 84(2) which would otherwise have operated to provide that the director concerned would not count in the quorum for the meeting and should not vote on that subject matter. But that makes it all the more important that the procedure in clause 84(1) is observed if the director concerned is to meet the otherwise elementary point that, by having a conflicting interest and promoting it with his supporting vote, he has put himself in breach of one or more of his general duties.

65. The terms of section 180(4) also require consideration of the possibility that the transaction was sanctioned by some general or specific authority from the Club's members in accordance with the general law. In his closing submissions, Mr Sims QC relied upon section 180(4)(a) in support of the defendants' case that the Club's shareholders had, at the AGM on 27 March 2007, given their advance approval to the Management Agreement of May 2007 between the Club and Watersports. He also submitted that the agreement had been later ratified by the shareholders at the next

year's AGM on 18 March 2008 at which the Club's 2007 Accounts, referring to a site management fee, were approved.

66. Mr Sims referred to a passage in *Palmer's Company Law*, at para. 8.3401, addressing section 180 and citing *Hogg v Cramphorn* [1967] Ch, 254, 269, for the proposition that the equitable rules indicate the authorisation must be given by the company's members not its directors (unless they are one and the same) and that *"[t]he authorisation may be given either in advance or retrospectively, but is effective only if consent is properly and fully informed*." In *Hogg v Cramphorn*, Buckley J contemplated the members' authorisation being given by the majority of the shareholders rather than unanimously. That is unsurprising when the most obvious (arguably only reliable) manifestation of their informed consent is a shareholders' resolution by which the members - even those in any minority voting against the resolution who might to have been unfairly prejudiced by the board's action – are taken to speak with one voice. The need for their consent to be fully informed is of course consistent with the approach in equity, at least so far as it supports the proposition that the principal will be barred from rescinding a transaction entered into by the fiduciary in breach of his duty to the principal if he is taken to have affirmed it. In such a case, it is for the fiduciary to prove not only that the transaction is fair but that "*in the course of the negotiations he made full disclosure of all facts material to the transaction*.": per Millett LJ in *Mothew*, at 18D.

Section 317 of the 1985 Act

67. Although not pleaded in the Particulars of Claim, the Club also came to rely in submissions upon the provisions of section 317 of the 1985 Act in relation to Item 14 on the Scott Schedule: the monies paid under the Management Agreement upon which Watersports relies in receiving them. Section 317 was in force in place of section 199 of the 1948 Act at the time of the alleged Management Agreement.

68. Section 317 of the 1985 Act (as amended over time) was in force until October 2008 when it was replaced by the provisions of sections 177 of the 2006 Act (and by section 182 in relation to interests in existing contracts). Although this earlier statutory provision talked of the director's interest in a '*contract*' that term was defined as extending to '*any transaction or arrangement (whether or not constituting a contract)'*. Whilst it was in force, section 317 required a director with a direct or indirect interest in either an existing or proposed contract to declare '*the nature of it*' at a meeting of the directors of the company, on pain of a fine if he did not. In the case of a proposed contract, the declaration was to be made at the board meeting at which the contract was first taken into consideration.

69. I should make clear my view that the omission of any reference in the Particulars of Claim to the requirements of section 317 of the 1985 (with its potential criminal rather than civil consequences) is of no real significance. The Club alleges both that it never agreed to pay the management charge, which is said to have been paid to Craig over a 10 year period, and that the other directors were not authorised to pay it. Breaches of section 171 and 175 are accordingly alleged. In fact, like section 177, those sections did not come into force until October 2008 whereas the Management Agreement between the Club and Watersports is said to have been concluded in May 2007. The

Particulars of Claim, which did not countenance the making of a management agreement at any time, were not specific as to the commencement date of that 10 year period; though it is reasonably safe to infer that it should be counted back from the issue of proceedings in 2017. To the extent some of it pre-dated them coming into force, the emphasis should not be upon sections 171 and 175 but instead the equivalent fiduciary duties upon which those provisions are based.

70. Should the defendants establish that the Management Agreement was concluded at that earlier point in time, they would nevertheless still have to establish that the Club's entry into it was the result of due compliance with section 317 of the 1985 Act. That is because establishing due compliance with clause 84(1) of Table A (and with what was by then the relevant statutory provision in section 317) is relevant to meeting the allegation of breaches of duty: see section 180(4)(b) of the 2006 Act. In my judgment, that is the position whether the alleged breaches were of the duties as they are now expressed in the 2006 Act (in respect of the period after October 2008) or what were their earlier fiduciary-based equivalents. I say that on the basis that section 180(4)(b) of the 2006 Act now expresses the recognised principle that any relaxation of a director's fiduciary duty through a provision in the company's articles means that the provision must be strictly complied with if he is not to be held accountable for profiting at the expense of the company: see *Hely-Hutchison v Brayhead Ltd* [1968] 1 QB 549, 585-6 and 590, and *Guinness Plc v Saunders* [1990] 2 AC 663, 689-693.

71. Reliance is indeed placed in the Club's Amended Reply upon clause 84(1) of Table A, on the footing that the Management Agreement was in fact made. The Club is correct to focus upon this provision in its Articles as the trigger for an analysis of the requirements of section 317 of the 1985 Act and, if those requirements were not met, the potential application of the principles of law and equity expressly preserved by section 317(9).

72. Establishing whether or not section 317 was complied with is therefore relevant to considering the particular breaches of duty alleged by the Club in relation to the payment of management fees. The focus is upon the recovery of the monies paid in management fees rather than the remedy of avoiding an agreement which, in fact, has since terminated. As I have noted, the Club's pleaded case in relation to the management fees is advanced under sections 171 and 175 or (to the extent that they were paid before October 2008 their fiduciary equivalents) and the Particulars of Claim refer to them having been paid without authorisation and in breach of the 'no profit rule'.

73. Mr Atkins highlighted that the former section 317 contained no equivalent to the language of the current section 177 which relieves a director of the duty to declare his interest in a proposed transaction if and to the extent the other directors either are or ought reasonably to be already aware of it (the same language appears, alongside other exculpatory circumstances, in section 182 in relation to existing transactions). By reference to the decision of Lightman J in *Re Neptune (Vehicle Washing Ltd)* [1996] Ch 274 and the commentary in *Mortimore on Company Directors* (op. cit. at paras. 17.01 and 17.06) he submitted that section 317 took effect even where the relevant interest was apparent to the other directors, as *Re Neptune* established that section applied with full rigour even where there was only one director. I return

below to the question of whether section 317 of the 1985 allowed the exercise of a judicial discretion to refuse relief in that type of situation.

74. Mr Atkins referred to the passage in the judgment in *Re Neptune*, at 383, where the judge identified the aims which compliance with the section was designed to achieve: the revelation or reminder of the director's interest; a pause to consider its implications; and the creation of an event ("*a distinct happening*") which ought to be recorded in the minutes of the meeting so that they might be consulted if the transaction later comes under scrutiny. In the respect just noted, section 177 of the 2006 Act is less onerous for a director than its predecessor and operates to qualify those objectives where the other members of the board are to be taken to have known about the interest.

75. However, in one respect the new section arguably appears to be stricter. Whereas section 317 imposed a duty that the director should declare "*the nature of his interest*" (language also used in the previous section 199 of the 1948 Act, as tracked in regulation 84) section 177 refers to the obligation to declare "*the nature and extent*" of the interest. The point about the need for the director to declare *the extent* of his interest appears to be reinforced by section 177(3) which contemplates that if an initial declaration of interest becomes inaccurate or incomplete then a further declaration must be made.

76. I refer below to the defendants' argument that not only was section 317 complied with in relation to the entry by Watersports into the Management Agreement with the Club (in May 2007) through what was discussed at a Board Meeting on 4 January 2007 but, as noted above, that the shareholders had for the purposes of section 180(4) also given their prior approval to it at the AGM on 27 March 2007. During the defendants' closing submissions I pointed out that the minutes of both meetings revealed a certain fluidity in the nature of the proposal (those for the AGM recorded the conclusion that "*a net figure of £15,000 to £20,000 would be paid for the management of the site*") and I therefore asked Mr Sims whether it was his position that it was sufficient for compliance with both statutory provisions that the "nature", if not the precise extent of the director's conflicting interest had been disclosed. He confirmed that was his clients' position. In other words (mine not his) the provisions of section 317 of the 1985 Act were less exacting than those of the current section 177.

77. Having reflected upon this question, I am not persuaded that the defendants' distinction is a valid one. On the basis of what I say about it below, it follows that I consider that the draftsman of section 177 simply took the opportunity to clarify rather than change what, building upon the approach in equity to informed consent, is involved in any statutorily compliant disclosure of interest.

78. The first point to note is that Lightman J in *Re Neptune*, at 282H, proceeded on the basis that section 317 required:

> "a full and frank declaration by the director, not of "an" interest, but of the precise nature of the interest he holds, and, when his claim to the validity of a contract or arrangement depends upon it, he must show that he has in letter and spirit complied with the section and article to like effect: see Lord Cairns in *Liquidators of Imperial Mercantile Credit Association v Coleman* (1873) L.R. 6 H.L. 189, 205."

79. The second point is that, although section 317(9) made it clear that the section operated independently of any "rule of law" restricting a director from being interested in a contract with his company, the need for full disclosure of the interest is consistent with the position in equity: see paragraph 66 above. *Re Neptune* was decided before *Motthew* but I believe the reference in that later case to the need for a fiduciary, when dealing with his principal, to make "*full disclosure of all facts material to the transaction*" illustrates what Lightman J probably had in mind when referring to the spirit of the section. In the case of *Liquidators of Imperial Mercantile*, to which the judge did refer, I note that the company's articles in that case referred to the need for the director to declare "*his interest*" (as opposed to "*the nature of his interest*" under section 317) but, allowing for that distinction, Lord Cairns said "*a man declares his interest, not when he states that he has an interest, but when he states what his interest is*."

80. In my judgment, therefore, compliance with section 317 of the 1985 Act, required disclosure of the specific amount of the fee to be paid under the Management Agreement.

81. The parties were also in disagreement on the issue as to whether or not the court enjoys what Lightman J contemplated might be a "*residual discretion*" not to hold non-compliance with the section against the director where his non-disclosure might be described as "*technical*" in the sense of already being known to the rest of the board.

82. Mr Sims QC and Ms Gibb submitted that the consequence of non-compliance was the transaction was voidable, not void, and that the courts have criticised an overly technical approach to the section. The second limb of that submission goes beyond the court's ability to refuse to set aside an avowedly voidable transaction if one or more of the recognised bars to rescission (such as laches, affirmation or the impossibility of restitution) was made out. The defendants go further in saying that there can be cases where, in effect, the court should not take cognisance of the statutory non-compliance if it was of an unduly technical nature.

83. They relied upon the decision of Simon Brown J in *Runciman v Walter Runciman Plc* [1992] BCLC 1084,1096-7, where the judge proceeded on the assumption that a director had failed to comply with section 317 in not declaring a variation in the terms of his service contract which extended its term. *Runciman* was decided before *Re Neptune* but the defendants relied upon it and other authority in submitting that the approach of Lightman J did not support the application of a strict, universal rule. In *Runciman*, the judge described the assumed non-declaration as being "*as purely technical as it ever could be*" and posed the question as to what "*the balance of justice*" required in deciding whether or not to hold the contract to be unenforceable. He held it would be patently unjust to treat the extension of the contractual term as ineffective when the other directors clearly understood it had been agreed and where those who then took over the company (and procured the director's dismissal from employment) were also aware of it when they did so. However, I read the decision and the terms in which it was expressed at (at p. 1097d) as reflecting the conclusion that it was not just to hold that the extension of the director's term was unenforceable. As this involved consideration of matters arising *after* the assumed non-declaration, I read it as really endorsing nothing more than the proposition that the result of the non-

declaration was that the agreement was indeed voidable (not void) but nevertheless should not be set aside.

84. In *Runciman* the judge had referred to the comment of Dillon LJ in *Lee Panavision Ltd v Lee Lighting Ltd* [1992] BCLC 22, 33b, where he expressed doubt as to whether or not, in a case of an apparently technical breach of section 317 had the inevitable result that the court had no discretion to refuse to set aside the contract if the company applies with sufficient promptness to set it aside. Although obiter, that observation does appear to lend support for the second limb of the defendants' submission. Certainly on one reading it suggests that, quite separately from any bars to the rescission that might otherwise exist, there may be cases where the non-compliance with section 317 is sufficiently technical that there is not even the initial trigger of 'voidability'.

85. By his decision in *Re Neptune,* at p. 284G, Lightman J granted the director leave to defend the claim (in the face of the company's summary judgment application) and observed, in the light of *Runciman* and *Lee Panavision*, that it would be for the trial judge to decide whether "*the rule of equity gives the plaintiff an absolute right to recovery or whether today the rule is more flexible and the court has a residual discretion, at least if there is "a mere technical non-disclosure of an interest" shared by or known to all directors …*."

86. I should at this stage say that, were it not for Watersports' counterclaim in respect of the termination of the Management Agreement, I would regard this issue between the parties as being rather off the point. The dispute between them is about money and the very circumstances contemplated by Lightman J as potentially supporting the existence of a residual discretion now form the basis of an express exception to the duty under section 177 of the 2006 Act (see section 177(6)(b)) though I remind myself that the section came into force after the date of the Management Agreement. There also exists the court's well-known power to relieve a director of the consequences of a breach of duty in certain circumstances identified by section 1157 of the 2006 Act (or section 727 of the 1985 Act as it was at the time of the alleged agreement) and upon which the defendants rely in the present case. Allowing for the fact that the first was not in force at the time of the alleged Management Agreement, each of these statutory provisions militates against the existence of a judicial discretion to read-down section 317 of the 1985 Act.

87. Even having regard to the existence of Watersports' counterclaim I am not entirely convinced that any judicial 'discretion' to overlook the strict requirements of statutory disclosure (carrying criminal consequences for non-compliance) can be of much significance to the operation of the common law principles which section 317 of the 1985 Act preserved and did not itself seek to qualify.

88. The Club's primary position is that the Management Agreement was never concluded. But, in any event and any such agreement having now run its course, its claim is to the recovery of monies paid under it over a 10 year period. The Club is not seeking to set aside the Management Agreement whose existence it disputes (and even Watersports, on its counterclaim, recognises that the agreement has since terminated). As I have sought to explain, on the Club's case for the recovery of monies paid under the purported agreement, one only gets to section 317 via clause 84(1) of Table A and one only gets to that provision of the Articles because of the need to test whether, at

least in relation to management fees received after 2006 Act came into force, the relevant defendant has an escape route from liability under section 180(4)(b) of that Act. In relation to management fees received before October 2008 when that section came into force, one is considering the Articles and section 317 from the perspective of the equivalent common law escape route from liability under the fiduciary duty against self-dealing, as addressed by Lightman J in *Re Neptune* at p. 279D.

89. It is therefore section 180(4)(b) of the 2006 Act which is concerned with civil liability and which, through the Articles, seeks to modify the impact of the self-dealing rule and the potential accountability (now under section 177) of a director who contracts with the company without adequately disclosing his interest. This statutory provision post-dates the decision in *Runciman*, *Lee Panavision* and *Neptune*. Of those three cases, only *Neptune* concerned a claim that the director was accountable in respect of his self-dealing. The other two were claims to enforce a contract affected by section 317.

90. Looking at the language of section 180(4)(b), it must be obvious that a director wishing to escape liability for self-dealing has either complied with the provisions of the articles (and, therefore, section 317 as adopted by them) or he has not. There can be no scope for a defence of 'substantial compliance' with the articles, or whatever equivalent term might be suggested to be consistent with any finding of a 'merely technical' breach of section 317. That really would involve an impermissible re-writing of the Articles if not also of section 180(4). In relation to the claim for monies paid in the first year or so of the Management Agreement, when section 180 was not then in force, I say the same against the existence of a residual discretion that would result in a modification of clause 84(1) so far as relief from liability for breach of fiduciary duty is concerned.

91. That is the position in relation to the Club's claim to recover the management fees. However, Watersports has its counterclaim for monies due under the Management Agreement. This is a contractual claim against the Club to which section 180(4)(b) has no application. I observe at the outset that it would be an odd situation where a director was (by reason of his personal interest in the company's counterparty) accountable for monies received under a contract which was nevertheless found to be enforceable against the company. However, I proceed on the assumption that, in principle at least, Watersports (as that counterparty) might be able to resist the Club's claim that the Management Agreement upon which the counterclaim is based should be set aside. And to do so not only by relying upon any of the established bars to rescission but by reference to the residual discretion (not to treat the agreement as even voidable in the first place) which is suggested to exist.

92. The counterclaim advanced by Watersports therefore requires me to address the question of whether or not, as a matter of principle and as submitted by the defendants, there exists the kind of residual discretion hinted at by Dillon LJ in *Lee Panavision*.

93. The issue between the parties is *not* whether a contravention of section 317 and the consequential non-compliance with the Club's Articles results in the Management Agreement (if made) being void rather than voidable. Mr Atkins accepts that the agreement would be voidable, not void from the outset. That was the position adopted by the parties in *Runciman* and *Lee Panavision* and in the other two cases

cited to me in this context: *MacPherson v European Strategic Bureau Ltd* [1999] 2 BCLC 203 (Ferris J) and *Re Marini, Liquidator of Marini Ltd v Dickenson* [2004] BCC 172 (HHJ Seymour QC). Each of those two further cases concerned a claim by the company to recover sums paid under an agreement in respect of which it was alleged there had been non-compliance with section 317. Each was decided on the basis that the agreement had been fully performed (at least in a number of respects), that the company had not sought to rescind it and that it was too late for it to do so. However, in *Macpherson*, Ferris J made the obiter comment that, had it been necessary to do so, he would have followed *Runciman* in holding that the non-compliance would not have "*vitiated*" the agreement.

94. In paragraph 70 above, I have mentioned the cases of *Hely-Hutchison v Brayhead* and *Guinness v Saunders* in connection with the principle that appears now to underpin section 180(4(b) of the 2006 Act. Lightman J had fully in mind the principle recognised in those cases when he referred in *Neptune*, at p. 284G, to "*orthodox doctrine*" by which a rule of equity gives the company an absolute right, free of any residual judicial discretion existing within the rule itself, to recover benefits under a contract which constituted self-dealing (and which, now, cannot be met by a defence under section 180(4)(b)): see his judgment at 279D.

95. At the later trial in *Re Neptune*, the deputy High Court judge (Mr Alan Steinfeld QC) found that the director had acted in breach of his duty to act in the best interests of the company: see *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald (No. 2)* [1995] BCC 1000. Nevertheless, the judge went on (at p. 1023) to make the obiter comment that to treat the transaction as valid because of "*a mere technical non-declaration*" would negate altogether the requirement for such a declaration to be made at all when the decision of Lightman J was to the effect that the articles (and the statute) must be scrupulously complied with.

96. In *Lee Panavision*, at p. 33, having made his observation which hinted at a judicial discretion in the matter, Dillon LJ (at p. 33d) expressly declined counsel's invitation to express a view about the true doctrine to be discerned from the decisions of the Court of Appeal in *Hely-Hutchison* and the House of Lords in *Guinness-Saunders*, saying "*[T]hese matters can await a later case*". I think that was a reference to the question as to whether or not the equitable principles applicable to a contract made between a director and the company (as relaxed by the articles) were such that a failure to disclose in accordance with the articles meant that contract *was* voidable or only *might be* voidable.

97. I am not aware of any such later case in which it is part of the clear ratio that there can be cases where the non-compliance with section 317 is sufficiently 'technical', or immaterial, that the agreement should not even be regarded as voidable and, therefore, at least vulnerable to being set aside. Only Ferris J in *MacPherson* offered the view, without needing to decide the point, that he would have followed *Runciman* but Simon Brown J in that earlier case expressly disclaimed offering a definitive view upon section 317 (mindful as he was of the tentative way in which Dillon LJ had expressed himself in *Lee Panavision*) and he expressly recognised the strictness of the rule in equity.

98. This idea of a residual discretion which precludes the company from relying upon alleged non-compliance with section 317 can be traced back to one particular

interpretation of the comment by Dillon LJ. Yet I have mentioned his unwillingness to pronounce upon the effect of the judgments in *Hely-Hutchison v Brayhead Ltd* and *Guinness Plc v Saunders*. Dillon LJ did not think it necessary or appropriate to decide that point.

99. As I have already mentioned, section 317 is not directly concerned with civil consequences. Accordingly, there seems to me be neither a justification or need to ponder the implications of a technical or immaterial non-compliance with the strict requirements of the section, or to grapple with the difficulties of defining such a concept. Whether the section is applied with full rigour or, somehow, with a degree of latitude, it only operates to preserve rather than qualify the legal and equitable principles which govern the parties' respective rights and potential remedies under a transaction which involves the director in a conflict of interest. That is clear from the language of section 317(9).

100. However, in agreement with Mr Steinfeld QC in *Neptune (No. 2)*, I would have thought the unjustifiable result of reading the section as being subject to an exception for the merely technical would be the undermining of the articles which require strict adherence to the section if the director is not, applying those common law principles, to be held accountable for his conflict of interest. Of course, the 'merely technical' nature of any non-compliance may well feed into matters which may justify the court deciding not to set aside what, as a matter of principle, is a voidable transaction. That is a different point which does not rest upon a residuary judicial discretion not to apply the articles to the hilt. I think the facts of *Runciman* illustrate that, when the technical oversight passes unnoticed and without concern by the rest of the board, the equitable principles governing the remedy of rescission (of an indisputably voidable contract) are sufficiently flexible to cover many situations of an unmeritorious challenge to its enforceability.

101. Section 317(9) of the 1985 Act (as section 178(1) of the 2006 Act now does) required the court to apply equitable principles in addressing the consequences of any breach of the self-dealing rule. As Simon Brown J did in *Runciman* (at p. 1093b and as noted in paragraph 83 above), I proceed on the basis that the strictness of the rule in equity is such that any contract entered into by a fiduciary in breach of the self-dealing rule is voidable, whether or not there may be grounds for resisting its subsequent avoidance by the company. That is what Lightman J described as "*orthodox doctrine*" in *Re Neptune* and it is the strict and inflexible rule of equity which Mr Steineld QC came to apply in that case: see *Re Neptune (No. 2)*, at 1015. In addition to the director's potential accountability to the company, the consequence of a breach of the rule is that the transaction is voidable.

102. If am right about the director's ability to come within section 180(4)(b) being a black and white issue, the suggestion that (through the Club's Articles) section 317 may be applied with less rigour when it comes to Watersports' claim under the Management Agreement sounds unorthodox and unprincipled. Whether an agreement which falls within the potential scope of section 317 is or is not to be treated as voidable (subject to any of the established bars upon rescission) should not depend upon the identity of the party promoting it in any subsequent legal proceedings concerning its enforceability.

103. It follows, in my judgment, that there can be no scope for saying that something less than strict compliance with that relieving provision can justify the court treating the transaction as otherwise than voidable. There is no principled basis for concluding that there may be some cases where a company's articles (requiring observance of section 317 of the 1985 Act) have not been strictly complied with but the court nevertheless has a discretion not to treat the resulting transaction as voidable.

104. I would summarise my review of the principles governing the operation of that section when viewed from the perspective of compliance with clause 84(1) of Table A (and the relieving provisions of section 180(4) of the 2006 Act) as supporting the following propositions:

(1) compliant disclosure in accordance clause 84(1) (and section 180(4)(b)) requires the director to have disclosed the nature and extent of his interest under the proposed transaction under consideration. In other words, full disclosure so that the other directors can see and understand the nature of that interest. If the interest involves the company making a payment to him (or to another party in which he has an interest) then the amount of that payment needs to be disclosed;

(2) even if a director cannot escape liability under section 177 of the 2006 Act (or the equivalent fiduciary duty upon which the section is based) by establishing that he acted in accordance with clause 84(1), by making adequate disclosure to the board, he may still be able to do so by establishing that the company's shareholders gave their approval to the transaction in accordance with the principle now expressly recognised in section 180(4)(a); and

(3) if the director is not able to establish circumstances which bring him within the relieving provisions of section 180(4) the result is that the transaction is voidable and he is accountable to the company for any profit he has made. But those consequences are subject to the application of any other potential bar upon the remedy of rescission and the power to relieve the director from liability under what is now section 1157 of the 2006 Act. In relation to any setting aside of the Management Agreement, the defendants raise (in the context of section 1157) the point that the court may in certain circumstances make a fair allowance for remuneration of a fiduciary who has acted in breach of duty: see *Boardman v Phipps* [1967] 2 AC 46, at 104, 112. The consequences are also subject to any limitation defence that the director may be able to raise in response to his alleged accountability. Issues of limitation are addressed below.

Section 190 of the 2006 Act

105. The above discussion of section 317 of the 1985 Act (and section 177 of the 1986 Act) is relevant to those transactions where the director's conflicting interest can be addressed in a proper manner so as to avoid accountability for a breach of duty. The relaxation of the 'no conflict' duty, in the context of a transaction or arrangement with the company, is addressed primarily at the level of the board (though not exclusively in the light of section 180(4)(a)).

106. However, the particular arrangement between the director and the company may be sufficiently substantial as to require *formal* approval of it by *the company's members*. As appears from what I say below about section 180(3) and the language of the section itself, section 190 of the 2006 Act operates independently of section 177 (and, therefore, section 180(4)).

107. Section 190 of the 2006 Act requires the approval of a director's acquisition of a 'substantial non-cash asset' (as defined by section 191) by a resolution of the company's members. The Club's amendment of the Particulars of Claim at trial, already mentioned above, introduced reliance upon section 190 of the Companies Act 2006 Act in relation to Item 22: the transfer of Plot 11 which is alleged to have been a substantial property transaction caught by the section.

108. In paragraph 62 above I have mentioned the two limbs within section 180(4) of the Act which alleviate the full potential effect of most of the general duties being put on the same basis as their equity-based equivalents. Another such provision is found in section 180(2) which is to the effect that the duty to avoid a conflict of interest in section 175 need not be complied with if the situation of conflict (or potential conflict) arises under a substantial property transaction that has been approved by members in compliance with section 190. Conversely, section 180(3) is to the effect that where section 190 bites then compliance with each potentially applicable general duty – including that contained in section 177 requiring a director to declare his interest in a proposed transaction to the board – does not relieve the director of the need to obtain the approval of the members in accordance with section 190.

109. In other words, where an arrangement is caught by section 190 only the members may approve it by resolution. It is clear from the language of section 190(1) that any such approval by members must be obtained *before* the company may enter into it, unless its terms are such that its effectiveness is conditional upon such approval being obtained. Unless it is conditional upon that, the company "*may not enter into the arrangement*" if the shareholders have not approved it.

110. That said, if the section is contravened, section 196 of the Act recognises that the members may "*within a reasonable period*" affirm it by an appropriate resolution. Doing so would not completely cure the contravention (see the clear language of section 190(1)) but it would avoid what is otherwise the consequence of it under section 195.

111. Section 195 provides that the consequence is that the transaction is voidable at the instance of the company (unless restitution is no longer possible, the company has been indemnified for any resulting loss or the interests of a bona fide purchaser for value have intervened) and that those identified in subsection 190(4) are respectively liable to account to the company for any gain derived from it or to indemnify the company against any loss suffered as a result of entering into it.

112. Therefore, in relation to substantial property transactions, there is in section 196 an equivalent potential escape route from accountability to that which (through section 180(4)) exists where the nature of the transaction is such that the formalities need only have been addressed at board level in accordance with section 177.

Burden of Proof: "Unexplained Payments"

113. In relation to the unexplained payments set out in the Spreadsheet, the parties were at odds over the extent to which the fiduciary position occupied by Craig, Scott and Jane operated to qualify the burden upon the Club to prove accountability in respect of challenged payments. This was perhaps inevitable in circumstances where, as I observed during counsel's opening submissions, this aspect of the claim had the flavour of the taking of an account – though an account without any prior finding to establish liability or accountability in principle – but one where it seemed most unlikely that the length of trial would permit each and every one of the impeached transactions to be explored in testimony.

114. I have already explained that the Spreadsheet relates to Items 11, 12 and 13 of the Scott Schedule. That part of the Scott Schedule is supported by the allegation in paragraph 9(1)(c) of the Particulars of Claim which stated that the purpose of the listed payments was "*unclear at present but which are presumed (in the absence of any explanation from the Defendants) to have been for the benefit of one or more of the Defendants*". Each of sections 171, 172 and 175 of the 2006 Act were relied upon in support of an allegation that the Defendants were "*liable to restore the payments*" to the Club. The reliance upon the first two of those three, coupled with the fact that the pleading did not discriminate between the defendants by attempting to fix liability in respect of a particular payment by reference to a particular defendant's benefit, is a clear indication of the Club's position that the basis of the suggested liability was in fact wider than a receipt-based one. The language of paragraph 9(1)(c) is to be contrasted with that of paragraph 9(1)(a) which introduced a list of specific payments which were said to be "*clearly for the benefit of the Defendants*".

115. The defendants submitted that there was no proper basis for the court to presume that the questioned payments were not for the benefit of the Club, but instead for the benefit of one or more of themselves, if they or some of them had not been explained. Mr Atkins on behalf of the Club accepted that the court is not bound to find that a fiduciary has failed adequately to account simply because he or she has not produced supporting paperwork. However, the Club's position, in summary, was that as the Spreadsheet had only been produced shortly before trial and, Mr Atkins submitted, Craig and Scott had admitted that a significant number of payments had been for their respective benefit and had given unsatisfactory explanations for many of those which were considered at trial. The Club said the court should presume against them where there was no documentation in support of it; or no documentation beyond a pink slip.

116. Mr Sims QC and Ms Gibb relied upon the decision of Lesley Anderson QC, sitting as a deputy High Court judge, in *Re Idessa (UK) Ltd (in liq), Burke v Morrison* [2012] 1 BCLC 80 in submitting that the evidential burden only shifted to the director to show that the payment was a proper one, once the claimant had established a prima facie case that the director had received company money. They also relied upon the judge's observation that, whilst the absence of an explanation from the director may drive the court to conclude that it was not justified, the court may still be satisfied in the light of other evidence that the payment was a made in good faith and for proper company purposes.

117. *Re Idessa* concerned a claim by a claim by the company's liquidator which included payments for the benefit of directors, the making of which was said to have

constituted misfeasance. It was one of the authorities considered by Newey J, as he then was, in *GHLM Trading v Maroo* [2012] EWHC 61 (Ch) which also concerned a challenge to transactions that were for the benefit of the directors (in the form of credit entries on their directors' loan account with the company). Having considered other authorities, each of which concerned receipts of company property by the defendant director or (in the case *of Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347; [2012] Ch. 453) gains obtained through the breaches of the fiduciary duty not to make a secret or unauthorised profit at the company's expense, the judge said, at [149]:

> *"In the circumstances, I agree with Mr Miles [*Mr Robert Miles QC sitting as a deputy High Court Judge in Gillman & Soame v Young [2007] EWHC 1245 (Ch), at [82]*] that, once it is shown that a company director has received company money, it is for him to show that the payment was proper. In a similar way, it seems to me that, where debit entries have been correctly been made to a director's loan account, it must be incumbent on the director to justify credit entries on the account. That conclusion makes the more sense when it is remembered that the director: (a) will have been (one of those) responsible for the management of the company's business, and (b) will have had a responsibility for ensuring that proper accountings records were kept (see eg ss 386-389 of the Companies Act 2006)."*

118. Newey J had earlier cited a passage in the judgment of Lord Neuberger MR in *Sinclair v Versailles*, at [34], which referred to directors being in a closely analogous position to that of trustees (because of their stewardship of the company's property subject to fiduciary constraints) and concluded that "*it is incumbent on a director to explain what has become of company property in his hands*." I read that as meaning that a director should be ready to provide an explanation as to what has become of property that was under his control as a director even if he did not then come to receive it personally. I believe that reading is consistent with what was said in the approved passage from *Gillman & Soame v Young* and with the responsibility of a fiduciary to be ready to account to his principal for dealings with the principal's property. It is also consistent with the statutory purpose behind the requirement for accounting records to be kept (for 3 years in the case of a private company). Section 386(3(a) of the 2006 Act stipulates that a company's accounting records should contain a running record of its receipts and expenditure and the matters to which they relate. Such transactions will ordinarily be with third parties rather than with its directors.

119. I have referred in paragraph 114 above to the nature of the Club's case in respect of the payments on the Spreadsheet. The allegation is that the defendants are "*liable to restore the payments to the company*". I read that as a claim to the "restorative" remedy of equitable compensation - (the phrase "equitable compensation" does appear elsewhere in the Particulars of Claim, though not in paragraph 9(1)(c) and not in the prayer which sweeps up the amounts in that sub-paragraph into claims for liquidated sums) - which is the personal remedy available against a fiduciary who is shown to have been responsible for the unauthorised payment away of his principal's assets: see *Mothew*, at 18A, and *Sinclair v Versailles*, at [45]. I note that the (non-fiduciary) duty of care under section 174 of the 2006 Act is not relied upon by the Club in paragraph 9(1)(c) of the Particulars of Claim. Although the remedy of

equitable compensation will often be receipt-based (and section 177 is one of the three sections relied upon by the Club in connection with the Spreadsheet) it may also be ordered, for the purpose of restoring value to the principal, where a director has breached his duty by making an unauthorised payment from which he has not personally benefited but from which the company has derived no value. By not distinguishing between individual directors, and relying upon sections other than section 177, it seems that the Club has advanced the latter basis of claim; though in his closing submissions Mr Atkins focussed only upon Craig and Scott (albeit treating them as equally liable which could be consistent with a receipt by Watersports) but not Jane.

120. In my judgment, the authorities of *Re Idessa* and *GHLM Trading* assist only so far on the point as to whether and, if so, to what extent I should adopt the 'presumption' advanced in paragraph 9(1)(c) of the Particulars of Claim. In those earlier cases the court was addressing the shifting evidential burden of proof (and the significance of directors' responsibility for the company's obligation to keep accounting records of dealings with its property in that context) on heads of claim that had been addressed by the fiduciary in evidence at trial.

121. In this case, however, the competing submissions made to me were advanced in circumstances where, allowing for the springboard of an established fiduciary relationship, the parties had not *fully* adopted (and here I adopt the language in *Sinclair v Versailles* at [45]) "*the traditional way in which a non-proprietary claim is assessed in equity [*namely*] through the medium of an equitable account, which leads to equitable compensation*." In addressing sub-paragraph 9(1)(c), the Defence stated that the basis of the suggested presumption was not understood, particularly when the purpose of each payment was said to be "*unclear*". The trial was too short for the purposes of working through every item on the Spreadsheet for the purpose of achieving such clarity and the court then deciding, in relation to each one, whether or not equitable compensation should be ordered.

122. Although the Club relied upon the evidence of Ms Owens to say that it has shifted the evidential burden onto the defendants, and suggested that this was adequate to support a case (if I now use the language of an equitable account) for "falsifying" items that were not addressed in testimony at trial, Mr Atkins's closing submissions recognised that the approach at trial meant *"[T[here is some difficulty with this part of the claim because there was not time to go through each of the payments on the Spreadsheet at trial*." Even though I read *GLHM Trading* as endorsing a wider principle upon a fiduciary's duty to account for his dealings with the principal's property, even if he perhaps was not himself the recipient of it, and that appears to be the basis on which the Club's claim has been pleaded, I am not persuaded that it would be right to make any presumption against the defendants in relation to items on the Spreadsheet upon which they were not cross-examined at trial.

123. To do so would not only be unfair to the defendants, in my judgment, but also involve too much post-trial demand upon the court's resources. I can and probably should assume that the Club and its lawyers undertook some cost-benefit analysis of comparing the total value of Items 11 (£106,055), 12 (£11,293) and 13 (£98,105) on the Scott Schedule with the likely number of additional trial days, and attendant legal costs, required to cover each item on the Spreadsheet if the Club was to attempt to

make good its claim to those maximum values. My rough assessment is that doing so would have doubled the length of what proved to be a 7 day trial.

124. But, whether or not a conscious decision was taken by the Club in the face of what would have been obvious in terms of the lengthening of the trial, a claimant cannot reasonably expect the court to subsequently take on the burden of addressing those items which the shorter trial could not accommodate by making its own assessment of evidence on discrete sub-heads of claim which the parties chose not to explore at all or as fully as they might have.

125. The point is illustrated by considering item 47 on the Spreadsheet. This was for the sum of £7,680 paid on 28 December 2012. Craig and Scott said it was a payment in respect of building services provided by Graham Hill at Plots 15, 16 and 17. There was a document in the trial bundle which purported to be an undated invoice from G. Hill Building Services at an address in Pontypridd in the total sum of £7,680, marked in manuscript as 'paid'. The Club had in fact obtained a statement from Mr Hill (of that address) which said that he had not produced the invoice, and did not know who had, and that he had not been paid under it. However, it was the subject of a hearsay notice which did not rely upon Mr Hill being unavailable to give evidence at trial but instead stated that his evidence was not likely to be "substantive" to the determination of the issues between the parties. The Club's decision not to call Mr Hill to give evidence at trial meant that the defendants were denied the opportunity to put to him their case (according to Scott) that the owner of one of the plots, Brian Lee, was from the same town as Mr Hill and that together they worked on tidying up the area around Coln River Lodges. Scott said that Mr Hill was paid cash in response to his invoice. In my view, the court should not in these circumstances of incomplete evidence be left to speculate about what might have come out of more comprehensive treatment of this item.

126. I have already explained that the Spreadsheet began life as an exhibit to Ms Owens' witness statement. So far as the Club's pleaded case on the 3 groups of unexplained payments was concerned, the Defence had taken the point that this aspect of the claim was "*embarrassing for want of particularity*" and that the defendants "*reserve[d] the right to respond further to this claim upon it being properly pleaded*." It never was the subject matter of a particularised pleading and the Club's complaint that the Spreadsheet containing the defendants' comments was received only shortly before trial must be viewed in that light. Although the Order made at the PTR on 5 September 2019 made provision for the parties to address the terms of the Scott Schedule, it said nothing about the Spreadsheet (as it became).

127. It seems to me that the Club, by exhibiting to Ms Owens' witness statement an earlier version of the Spreadsheet, has proceeded almost as if the court has already reached a decision that an account be taken and directed that the defendants should justify their position upon each item upon it if is not to be falsified and made the subject of an order for equitable compensation. That is not the case and the principle in *GHLM Trading* does not support a presumption that, if a payment is challenged (even with the apparent justification), the director is presumptively *liable* to make equitable compensation in respect of it. In fact, the prayer contemplated that an account or inquiry might be ordered after trial (as an alternative, I think, to the claims for the liquidated sums) though, in the event, the Club has not pressed for the taking of account in respect of any items not aired at trial.

128. By confirming in her testimony the truth of that witness statement Ms Owens has established the Club's position that the payments were "unexplained" by reference to the documentation since made available to it. Without more, that does not in my judgment trigger a presumption (as pleaded) that the payment was for the benefit of one or more of the defendants. Whether or not, evidentially, there was something more in relation to particular payments on the Spreadsheet is a matter I address below in connection with Items 11, 12 and 13 on the Scott Schedule.

129. The suggestion that the Club has given the court enough of a template to work through the other items on the Spreadsheet (see paragraph 115 above) is not only unreasonable in its expectations of the court but, more importantly, potentially unfair in its consequences for the defendants. There is, however, one exception to this conclusion that the court cannot fairly adopt a 'similar fact' type of approach in establishing liability on the part of the defendants and it relates to the practice of Craig and Scott adding a mark-up for the benefit of Watersports in respect of what they said was the partnership's services in procuring supplies of goods and services for the benefit of the Club. On that aspect, I do consider that Craig and Scott were given an adequate opportunity to explain their position, as fiduciaries, by reference to those pink slips (showing a mark-up) on which they were cross-examined.

130. However, in relation to the vast majority of the 273 items on the Spreadsheet about which they were not asked questions, it is important to recognise that the decisions in *Re Idessa* and *GHLM Trading* are both to the effect that it is open to the director to escape falsification of a particular payment even though there is inadequate documentation to support it. Indeed, it is the absence of such documentation that it likely to have led to the payment being impugned by the company in the first place. And I would observe that the reasoning of Newey J in *GHLM Trading* suggests that the court should be more open to persuasion by the director where the absence of documentation does not signify a breach by the company (at the hands of that director) of the duty to keep accounting records under section 386 of the 2006 Act. By the time of the change in the Club's directorship in January 2017, the 3 year period for which accounting records should have been retained had expired in respect of many of the items on the Spreadsheet.

131. Yet the Club's position in relation to those items on the Spreadsheet which were not addressed at trial amounts to an invitation to presume that neither Craig nor Scott could have had a satisfactory explanation for them which might have overcome what the Club said was a lack of documentation to support them. It also assumes that there could be no relevant circumstances which might operate to relieve them from any liability for the purposes of the discretion under section 1157 of the 2006 Act addressed below. In my judgment, with the exception of those which involve the Watersports' mark up on the cost of a third party supply of goods or services, that would involve an insufficiently principled approach to determining a claim for equitable compensation.

132. That would have been my conclusion in the light of the way the parties have chosen to approach the Spreadsheet. However, the point in *GHLM Trading* (to the effect that the director might be given more of the benefit of any doubt occasioned by the excusable absence of accounting records) goes further in the present case. That is because there may well have been further relevant accounting records that were not before the court. To quote from the defendants' closing submissions:

> "*107. Counsel for [the Club] cross examined [Scott] on Thursday 17 October about how the [defendants] had been able to explain some of the spreadsheet payments when the narrative was not provided in the pink slip [T/6/43/1]. It was noted by Counsel for [the defendants] that certain invoices which supported the detailed breakdown had been disclosed and were available, but for some reason neither side had chosen to include them in the trial bundle (though hard copies were available at Court to show the same). Further, [Scott] clarified that some comments were from his recollection e.g. 'ITT Flight' was for sewage treatment on site; or QB entries jogged his memory*."

133. That statement is also to be read alongside what Mr Morris said about providing information to the new board in early 2017. Ms Owens confirmed that she had obtained the pink slips from Mr Morris. When asked about the apparent fact that there was not even a pink slip to support some QuickBook entries, Mr Morris said that the folders he had passed to Ms Owens and Mr Godden contained "*all the documentation relating to what information had been entered on Quickbooks*" and "[*W]here that pink slip has gone, I do not know. I would maintain it was in the folders when the files were dispatched*." I found Ms Owens to be a generally more reliable witness than Mr Morris but I do not feel able to conclude that his evidence that he provided more pink slips than those to which the Club has since pointed was untrue.

134. The disclosure of those documents which remained, as referred to by the defendants' counsel, would have been in accordance with the order for standard disclosure made in June 2018. It would be wrong for me to assume that there could be nothing in them of potential assistance to the defendants, so far as unexplored items in the Spreadsheet are concerned, simply because they were not before the court.

135. In these circumstances, the fairer and principled approach for me to adopt is instead to follow what was said in *GHLM Trading* (see paragraph 117 above). I have sought to explain (see paragraph 119) my understanding that the Club's claim is (now) directed at Craig and Scott (only) for their part in causing improper payments to have been made, whether or not either of them personally benefited from the particular payment in question. As I have said, although *GHLM Trading* (and the cases considered by Newey J) concerned payments or credits which had benefited the fiduciary, I proceed on the basis that the accountability rests upon the fiduciary having held the purse strings for his principal for the purposes of making only proper payments for value. However, allowing for that, I can only properly adopt this approach in relation to transactions that were explored in the evidence at trial and upon which either Craig or Scott was given an adequate opportunity to explain himself (or, one might say, to give his account of them).

Limitation

136. I have already mentioned above the point that certain payments on the Spreadsheet might be regarded as rather stale when viewed from the perspective of the Club's duty to retain accounting records in respect of the underlying transaction.

137. The defendants submitted that any claim made in respect of payments by the Club prior to 30 October 2011, the date six years prior to the commencement of the proceedings, is in any event statute barred.

138. The Club said three things in response. The first was that the greater part of the its heads of claim fell within a 6 year limitation period which, in general, applies either directly or by analogy to claims against a fiduciary for breach of fiduciary duty: see sections 21(3) and 23 of the Limitation 1980 Act ("**the 1980 Act**"). In his opening submissions Mr Atkins said this was "*really 98 per cent of the claim*." The second was that he relied upon the provisions of section 21(1) of the 1980 in relation to any breach of duty by the defendants which resulted in monies being converted to their own use. And the third was that, in relation to any breach of duty which resulted from neglect in collecting membership or guest fees, he said there had been deliberate concealment by the defendants of a deliberate breach of duty by them (or some of them) which was sufficient to trigger the application of section 32 of the 1980 Act.

139. In his oral opening submissions Mr Atkins said this last point went only to two years' worth of fees, and turned on findings of fact, with the result that not too much time needed to be devoted to it. In his closing submissions Mr Atkins maintained his reliance upon section 32 in relation to the two years' worth of uncollected guest fees which fell outside the 6 year period.

140. Section 21 of the 1980 Act provides that:

> *"(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."*

And section 21(3) states:

> *"Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by another provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.*
>
> *For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession."*

141. The defendants accepted that a director falls to considered as a class of fiduciary potentially within the scope of section 21. However, Mr Sims QC and Ms Gibb

submitted that the Club had not pleaded, or pleaded adequately, an allegation that any of their clients had been fraudulent. As they rightly observed, the emphasis of the Club's argument was under section 21(1)(b).

142. In *JJ Harrison (Properties) Ltd v Harrison* [2002] 1 BCLC 162, [25]-[29], Chadwick LJ explained that section 21(1)(b) of the 1980 Act applies to a director who receives company property as a result of a breach of the fiduciary duty he owes to the company. That is because he is to be treated as within the "class 1" category of constructive trustee identified by Millett LJ in *Paragon Finance Plc v DB Thakerar* [1999] 1 All ER 400, 408-9. In other words, the fiduciary obligations of the director (as a quasi-trustee of the company's property) pre-date the impugned transaction so that the director's interest in the property, as recipient of it, can be said to be impressed with the company's beneficial interest under the "trust".

143. By contrast, a director's breach of a non-fiduciary duty (see sections 174 and 178(2) of the 2006 Act) or of a fiduciary duty which leads to him being treated as a constructive trustee within *Paragon v Thakerar* "class 2" will be subject to the 6 year limitation period (unless the breach of fiduciary duty was fraudulent so as to come within section 21(1)(a) of the 1980 Act). Therefore, if the constructive trusteeship of the director is only of a remedial nature and arises not by reason of his pre-existing stewardship of company property but, instead, only out of the circumstances in which it was transferred to him, then section 21(1)(b) of the 1980 Act will not apply. A "constructive trust" claim against a director in respect of something other than the company's pre-existing interest in the property or money received by him - e.g. that he should account for a profit or a commission because his fiduciary position gave him the opportunity to receive it and he should therefore be treated as if he has acquired it (or the opportunity to obtain it) on behalf of the company – is a formulation of equitable relief which falls outside the subsection. The grant of that proprietary remedy at the end of the claim does not involve any recognition by the court, for limitation purposes, of a cause of action arising out of a beneficial interest of the company in the subject matter "property" *before* the director had himself acquired it.

144. On this basis, the defendants contended that the 6 year limitation period prescribed by section 21(3) applied in particular to claims against Craig in respect of profits made by him through his acquisition and disposal of one lodge (Item 16 on the Scott Schedule) and a number of static caravans (Item 19) at the Site though, in closing submissions, it emerged that perhaps only one static caravan transaction may have pre-dated 30 October 2011. Other items on the Scott Schedule which straddled that date were partially caught by the usual 6 year limitation period (even if some of them might be analysed as involving a breach of trust for the purposes of section 21(3)).

145. As for section 32 of the 1980 Act, invoked by the Club in relation to the claim in respect of the first two of eight years of guest fees claimed under Item 17 of the Scott Schedule, Mr Atkins relied upon the postponement of time where "*any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant*": section 32(1)(b). I have previously observed that the 'statement of claim test' applied by the authorities to the language of section 32(1)(b) will fall to be considered by reference to what the claimant does subsequently plead (after the expiry of the usual limitation period) as a necessary and proper element of the claim: see *Davy v Heather Moor & Edgecombe Ltd* [2018] EWHC 353 (QB), [53]. Section 32(2)

provides that "*deliberate commission of a breach of duty in circumstances where it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty*."

146. In the context of any breach of duty by one or more of the directors, the unlikelihood of its discovery for some time ought, therefore, to depend in part upon the actual prospects of the breach being unearthed by any fellow directors who are not implicated in the breach or, in the case of any breach which might be shown to have had discernible consequences for particular items within the company's accounting figures, the potential for its discovery by members looking at the company's published accounts. For the two years of guest fees in question – 2010 and most of 2011 – only Mr Hamilton was a director of the Club alongside Craig and Scott. The Club's abbreviated accounts for those years did not contain sufficient detail to enable the reader to identify any suggested shortfall in its receipt of guest fees. Although Mr Morris referred in his evidence to copies of the Club's full accounts being circulated at AGMs, he also confirmed that the last AGM took place in 2008.

147. In such a case, the court must also consider the implications of a director being under a duty to disclose his own wrongdoing to the company. I recognise that there is such a duty within the duty of loyalty now covered by section 172 of the 2006 Act (compare *Stobart v Tinkler* at [392]-[393]) but the duty to speak up can only be invoked against a director who knows he has committed a wrong and, on that basis, can be said to have suppressed or "concealed" the fact of it.

148. In his skeleton argument Mr Atkins cited the decision of Morgan J in *IT Human Resources Plc v David Land* [2014] EWHC 3812, [134]-[135], where the judge said:

> "*The distinction for the purposes of section 32(2) is between intentional wrongdoing on the one hand and negligence or inadvertent wrongdoing on the other: Cave v Robinson Jarvis & Rolf [2003] 1 AC 384 at [17] and [25] per Lord Millett and at [58] and [60] per Lord Scott.*"

149. In his written closing submissions Mr Atkins highlighted that the essence of the defence was that Craig and Scott had not collected guest fees because they considered Watersports was entitled under the terms of its lease to charge members of the public for the use of the lake. He said that, on that basis, there had been *"a deliberate (albeit unconscious) breach of duty on their part"* which was covered by section 32(2) and that time had not begun to run against the Club until the new board was appointed in January 2017. The reference to the breach having been an "*unconscious*" one indicates that it falls outside the scope of section 32(2).

Section 1157 of the 2006 Act

150. The final barrier placed by the defendants in the way of the Club recovering under any head of claim which is not time-barred and which has been made out was one constructed by reference to section 1157 of the 2006 Act.

151. Mr Sims QC and Ms Gibb relied upon the court's broad discretion to relieve a company director of liability for negligence, breach of duty or breach of trust. This well-established discretion is now embodied in section 1157 of the 2006 Act which I have touched on above in the context of the argument as to whether or not the court enjoys a particular discretion in the context of the duty against self-dealing and also the unexplored items on the Spreadsheet. To grant relief from liability, whether in whole or in part, the court must be satisfied that the defendant acted honestly and reasonably and that having regard to all the circumstances, he ought fairly to be excused.

152. The defendants relied upon a number of authorities beginning with *Re Duomatic Ltd* [1969] 2 Ch 365, 374H and ending with *Northampton Regional Livestock Centre Co Ltd v Cowling* [2014] EWHC 30 (QB), at [159]-[170].

153. The well-known *Duomatic* principle is to the effect that where all the shareholders of the company give their informed approval to a transaction which ought formally to have been approved in a general meeting then their approval, whether given before or after the transaction, is to be treated as effective and as binding upon the company as a formal members' resolution would have been. In this case, the defendants rely upon the principle in relation to what they say was the shareholders' approval of the Management Agreement between the Club and Watersports. Perhaps unsurprisingly, in many cases where the *Duomatic* principle is invoked by the defendant reliance is also placed upon the discretion now found in section 1157, as happened in the *Duomatic* case itself. In relation to two payments which could not be said to have been approved by the shareholders, the court exercised its discretion in that case to relieve a director from liability to repay one payment (on condition that he paid the liquidator's costs of the application) but not the other. The director's honesty was not in doubt but the different treatment of the two payments highlights that it needs to be established that, in causing either to be made, the director acted both honestly *and reasonably*.

154. Another authority relied upon by the defendants was *Re D'Jan* (which I have mentioned above in the summary of section 174 of the 2006 Act) a decision of Hoffmann LJ sitting as an additional judge of the Chancery Division. In that case the respondent director relied, unsuccessfully, upon a proposition akin to the *Duomatic* principle (and operating to preclude a claim by the company in respect of negligent acts which could be said to have been authorised by all of its then shareholders) but the judge did exercise his discretion to grant, under what was then section 727 of the 1985 Act, a measure of relief from liability. By so doing he made it clear that the director can be found to have acted "reasonably" for the purposes of exercising the discretion even though the liability arises in respect of his failure to exercise reasonable care under what is now section 174 of the 2006 Act. In *Re D'Jan*, Hoffmann LJ exercised his discretion having regard to the fact that the company was solvent at the time of the negligent act and that only the defendant (as a 99% shareholder) and his wife (holding the remaining 1% of shares) then stood to suffer the consequences of it.

155. *Northampton Livestock* also concerned the exercise of the discretion in the context of a director's liability for negligence but the defendants relied upon it for the recognition by Green J, at [160], that section 1157 can be invoked in response to a claim for an account. Of course, the fact that a company formulates its claim against

a director in terms of a seeking an account, as opposed to a liquidated sum, does not really assist in identifying the underlying cause of action for the purpose of testing the true scope of the section. However, section 1157 (in this respect echoing section 61 of the Trustee Act 1925) expressly contemplates the grant of relief in respect of "*breach of trust*" and, at first sight, that language is wide enough to cover a proprietary claim against a director whether it is under class 1 or class 2 constructive trusteeship on *Paragon Finance* categorisation. In the course of preparing this judgment I have become aware of a recent decision of the Court of Appeal which confirms as much: see *Dickinson v NAL Realisations (Staffordshire) Limited* [2019] EWCA Civ 2146, at [44], per Newey LJ (with whom Baker LJ agreed) and [65], per Dingemans LJ. That said, one can readily see that the nature of the proprietary claim against the director, the basis of which will have been established before section 1157 can be invoked, may well confine the director in terms of what he can sensibly argue to have been honest and reasonable conduct on his part. The outcome in *Dickinson* illustrates the point.

156. The defendants also rely upon the proposition that even a fiduciary who has put himself in an unauthorised position of conflict with his principal may be permitted a fair allowance for his efforts on behalf of the principal. In referring to the situation of "a *Boardman v Phipps* type breach" the defendants have in mind the type of situation where an opportunity comes to the fiduciary by reason of his fiduciary position and is exploited by him in circumstances which render him accountable for the profits derived from the transaction. If, in addition to acting honestly, the fiduciary can establish that the profits for which he is accountable are attributable to his own work and skill then the court may permit him a fair allowance for his efforts against his accountability. The case of *Kingsley IT Consulting Ltd v McIntosh* [2006] EWHC 1288 (Ch), relied upon by the defendants, involved a fair allowance (fixed by reference to what the parties had previously discussed to be reasonable drawings) being extended to a former director who had benefited from a corporate opportunity in the form of a contract to provide project management services.

157. The defendants seek to apply this reasoning to say that, even if as a matter of principle the Management Agreement is to be treated as set aside, the value of the services actually provided over the years by Watersports on behalf of the Club should be regarded as wiping out any accountability for the sums received under it.

158. In the light of that rather lengthy discussion of the legal principles prompted by the parties' rival submissions, I now turn to the evidence given at trial.

Witnesses

159. The Club called the following witnesses: Ms Owens, Mr Godden, Mr Garner, Mr Mike Coxhead, and Mr Andy Dyson.

160. In addition, the Club relied upon witness statements from David Nutt, Simon Moore, Donna Fisher, Phil Bosley (though unsigned and undated), Moosh (or Michelle) Bolton, Pete Joyce, Jamie Hall, Colette Belgrove, Tim Waddington, Terry Rickards, Graham Hill, Aaron Field, Jo Thompson, Peter Benton, Patricia Hobrough, Andy Mitchell and Diane Summers. They are members of the Club (in the case of Ms

Bolton, a former member) and Mr Rickards is also a shareholder. With the exception of the first three of those listed, the witness statement was the subject of a hearsay notice which said the maker was not being called as his or her evidence was "*not likely to be substantive to the determination of the issues between the parties*."

161. The defendants said that this unorthodox form of hearsay notice meant that the statements should be given no or no significant weight. I agree and I have already explained how, in my judgment, it would be wrong to rely upon the hearsay of Mr Hill against what the defendants say about item 47 on the Spreadsheet.

162. The nature of the case is such that there are limits to the extent to which the witnesses called by the Club were able to comment upon the disputed payments and transactions identified by the Scott Schedule and the Spreadsheet. As I have remarked more than once already, the proceedings had the flavour of the taking of an account and the Club was to a large measure in the position of the impeaching party addressing items which, it said, had not be explained or vouched for by defendants. That said, in support of the Club's objections to particular items and what it said was the discharge of any initial evidential burden upon it, Ms Owens and Mr Godden did make certain positive allegations to support the Club's claim to financial recovery. I have already mentioned that Ms Owens' first witness statement introduced the original version of the Spreadsheet. Mr Godden's witness statement addressed the case for recovering under the third broad category of loss (payments not collected for the Club) and, specifically, members' guest fees and other fees that either were not collected or which were collected but not accounted for to the Club.

163. At this stage, I give my general observations upon each of the Club's witnesses without descending into the detail of their evidence on any particular disputed item.

164. Ms Owens introduced the Spreadsheet (in its original form) as evidence in the case. She became a director of the Club on 16 January 2017 and has since continued in that office. She has been a shareholder since around 1988 but ceased to be a water-skiing member around 10 years ago. At the time she became a shareholder she had just acquired a static at the Site but, with Mr Garner, she replaced this with a lodge in around 2007 to 2008. Ms Owens gave evidence which was clear and generally consistent with her witness statements expressing the Club's grounds for questioning the defendants' position. In support of some of those grounds Ms Owens relied in part upon evidence which was hearsay, for example a statement of Mr Jeremy Bristoe of Cheshire Mouldings that his company had been paid for timber which had been supplied to Lodge 11 owned by Craig and Jane. Cross-examination of Ms Owens did reveal some inconsistencies in her evidence, such as her initial denial that she had received a circular from the Club in May 2013 which referred to the proposal to create a swimming area in which members' children could swim. However, her evidence was resonant on the point that there was a want of documentary evidence to support a significant number of payments that her predecessor directors – Craig and Scott – had caused the Club to make.

165. In addition to pointing out that certain repayments to the Club had been made after questions about expenditure had been raised with Scott and Craig in early 2017, the general theme of Ms Owens' evidence was the lack of an adequate explanation from them of the basis on which they caused the Club to make those payments which were still in dispute. For example, she said that it was not enough to point to a pink slip

(being the carbon copy of a paper invoice from Watersports to the Club) without also producing the underlying invoice from the third party supplier; and pointed out that other pink slips seemed to add a sum (plus VAT) to an attached underlying invoice which itself called for further explanation.

166. Mr Godden, like Ms Owens, became a director of the Club on 16 January 2017. He has been a shareholder since around 1992 and owns a lodge at the Site. As I have mentioned, Mr Godden's evidence addressed what might be described as missing membership fees. Whereas Ms Owens' evidence was really a critique based upon the paucity of evidence or explanation furnished by the defendants, Mr Godden's involved him advancing a more positive case upon an income shortfall for the Club derived from a comparison of previous years with that of 2017 when he and Ms Owens took over. Perhaps partly for that reason, I found him to be rather more reticent than she was in giving evidence and that his own explanations were vulnerable to some valid criticism.

167. Mr Garner is the husband of Ms Owens. He was a director of the Club between January 2000 and October 2008. He said he resigned from office after Craig and Scott indicated that they would otherwise take steps to remove him. The circumstances were that he and his wife had fallen out with Craig over the proposed rental of £1,000 p.a. for their lodge, when they understood it was to be at a peppercorn rent, and where Scott had suggested that it was Mr Garner's particular responsibility to sort out a number of issues being raised by lodge owners.

168. Mr Garner had no recollection of any agreement that Craig would have the option of taking one of the plots on the Site in lieu of a log cabin development fee. However, he accepted that (separately from an ongoing discussion over Watersports' management fee) Craig had made passing reference to "*the lodge deal*" in an email to Mr Garner and Mr Thompson of 23 December 2006.

169. Mr Garner also accepted that, with Mr Thompson, he was part of the informal sub-committee formed to address the level of rent paid by Watersports and the management fee to be charged to the Club, which he said was very much led by Mr Hamilton. Mr Garner said he had not been party to any final decision to approve a net annual payment to Watersports which (as he put in testimony) was always going to be 'subject to contract' so that "*the club knew where it stood in terms of the overall net position*". However, in his testimony Mr Garner did accept that a management fee of £35,000 to £40,000, against which such rental would be offset, had been discussed against the background of the management of the Site having become more complex over recent years; and (although he was not present at the meeting) that it appeared to have been "*concluded*" at Club's AGM on 27 March 2007 that a net fee of £15,000 to £20,000 would be paid with effect from 2007.

170. Mr Garner's evidence was generally vague. This is perhaps inevitable when he had ceased to be a director of the Club over a decade ago. However, in my assessment, his vagueness reflected in large part the point that the proposals for documenting the arrangements for both a log cabin development fee and Watersports' site management fee (as mentioned in the documents put to Mr Garner in cross-examination) were never seen through.

171. Mike Coxhead has been the Club's Site Manager since around 2001 or 2002. In his witness statement Mr Coxhead said that Craig had asked him in May 2017 (and therefore a few months after Craig resigned from his directorship of the Club) to get rid of two builders' bags of rubbish upon relinquishing his keys to the Watersports shop. In that statement he said that the bags were open, and that one had been left outside and the other inside the shop, and that he could see they contained some company paperwork. Mr Coxhead said he handed "*these documents*" to Ms Owens and Mr Godden. However, his testimony was less clear. He said in the witness box that both bags were left outside the shop, that their contents were getting wet, and that he had not provided them (or any of their contents) to the new directors. When reminded of his witness statement, he apologised and said that he had indeed handed them to Ms Owens and Mr Godden.

172. It was not originally envisaged by the Club that Andy Dyson (as opposed to Mr Nutt who was not called) would be called to give evidence; a hearsay notice had been served in respect of his witness statement. Mr Dyson is both a shareholder and a member of the Club. He gave some evidence, which was hearsay, about a member being asked by Craig to confirm that the old shop premises at the Site had not been used by Craig as a personal storeroom. In testimony, Mr Dyson said it could have been Mr Nutt who had told him this. Mr Dyson said that it had been used as such until Craig and Watersports left the site and that those premises were not generally for use by members, though his children and other children sometimes obtained the key from the Cohoons to play there (together with the Cohoon's children).

173. The evidence for the defendants at trial was given by Mr Hamilton, Jane, Mr Morris, Craig and Scott. In addition, the Club indicated that it was content not to challenge the witness statement of Mr Dylan Roberts which could be taken as read.

174. Mr Roberts is the Joint Managing Director of Salop. His statement explained how Salop supplied both statics and lodges to the Site and how, in order to secure preferred supplier status, Salop would not only offer the purchaser a discount on the manufacturer's RRP but also pay a commission to the Club. He gave the example of the static sold to Mr Thompson where he secured a discount of £8,042 and the Club was paid a commission of £4,680. He also referred to Craig agreeing on behalf of the Club to absorb base preparation and connection costs in order to facilitate sales during harder economic times. Mr Morris also addressed Craig's purchase of Meyer Lodge (Item 16 on the Scott Schedule).

175. My general assessment of the defendants' witnesses who gave evidence is as follows.

176. Mr Hamilton gave evidence by video link from Bali. Mr Hamilton is a graduate in economics with a background in business. He worked in the investment banking sector for 10 years and has sat on the boards of about 30 companies (incorporated in the UK, USA and Australia) in both executive and non-executive capacities. He was a director of the Club between March 1999 and January 2015, when he resigned, with a short period out of office between 22 July 2008 and 30 October 2008 following an earlier resignation that year. He had been a member of the Club since around the early 1990's and Craig had asked him to become a director when others had stood down from the board. His resignation which took effect for 3 months in 2008 reflected the Club's inability to pay his £3,000 p.a. salary due to financial difficulties.

177. Mr Hamilton was generally clear and confident when giving evidence, allowing for the passage of time since the transactions in question, and of more assistance to the court than that of the later witnesses who gave evidence upon the same matters as he had addressed. That said, he was more uncertain on certain aspects when addressing, by reference to the contemporaneous documents, the issue of the level of Watersports' management fee for 2006 and 2007 as indicated by the Club's accounts for 2006 and 2007.

178. The principal matters addressed by Mr Hamilton in the witness box were the transfer of a plot (Plot 3) to Craig in lieu of a fee for his efforts in relation to the lodge development, in around 2004 to 2005, and the fixing of a (net) management fee for Watersports in 2007. In relation to the management fee, Mr Hamilton did his best to address the potential significance of what was recorded in the contemporaneous documents and to provide his recollection of them. In that respect, his evidence contrasted somewhat with that of Craig and Scott and also of Mr Morris. There was, however, an element of present-day assumption or analysis on his part as to what some of those documents showed. I return below to Mr Hamilton's evidence in relation to those two matters.

179. Jane's testimony was brief. She was not cross-examined upon any of the items in the Scott Schedule. Mr Atkins did direct her attention to an entry in Craig's bank statements which contained an entry for 29 July 2013 referring to a payment to Jane of £7,500 with the reference "Static Sale" but she had no recollection of that payment. In relation to Jane's status within the Club it was suggested to her that a salary was being credited to the balance of a director's loan account but she said she was not aware of that. Jane was not otherwise challenged on her position that she was only an alternate director and never took any decisions in that capacity. Although the formality of her presumed appointment as an alternate director is a matter of doubt, I am persuaded by the evidence that Jane was not responsible for any act or omission required to trigger the personal liability of the kind mentioned in paragraph 61 above.

180. In order to accommodate a readjusted trial timetable, Mr Morris' testimony was interposed during the cross-examination of Craig on the afternoon of the second day of the trial. Craig was absent from court during that evidence.

181. Mr Morris is a chartered certified accountant, with over 30 years' qualification and some 20 years' experience working within industry as an accountant and as a finance director or financial officer. He owns a static caravan at the site, is a shareholder of the Club and was a member of it from 1999 to 2007. At the request of Craig, in around 2004, Mr Morris began to assist Mr Thompson (who was the Company Secretary but had become unwell and who later died in the autumn of 2007) in maintaining the Club's books. It was at that stage that Mr Morris began to use the QuickBooks software in place of Mr Thompson's paper records. Initially, the financial information was submitted to the Club's accountants, Griffith Clark, but from 2008 onwards Mr Morris was both the bookkeeper and responsible for preparing the Club's financial accounts.

182. Mr Morris' evidence addressed a number of points and, for the purposes of the principal heads of claim, the most important were his use of QuickBooks to record sales and purchase information provided to him by Craig and Scott on a quarterly basis, to raise invoices for Club membership and static home fees (lodge fees were

dealt with separately) and to conduct periodic bank account reconciliations. The QuickBooks software was used in this way down to December 2016. Mr Morris said that the sales and purchase information provided by Craig or Scott and noted in the system was assumed by him to be accurate and to relate to the Club. He explained how he had to pay for the QuickBooks data to be extracted from a corrupted hard disc on his computer before he delivered the information to the Club's solicitors in 2018.

183. In addition, Mr Morris addressed the level of the management fee payable by the Club to Watersports. He said that, in 2007, he was given to understand that Watersports would be entitled to a net payment of £15,000 in respect of management fees after taking account of the rental of £20,000 that Watersports was to pay the Club for rental of the shop and lake. Importantly, Mr Morris expressed his understanding that the net entitlement was agreed in 2007 but was also to be backdated for the year 2006.

184. The testimony of both Craig and Scott is to be viewed not only in the light of their respective witness statements but also in the light of the 'Defendants' Comments' contained in the Spreadsheet. They had both contributed to those comments and they were each asked questions about some of them.

185. I have already touched upon Craig's general inability to grapple with the detail and potential implications of what had been recorded in the Club's accounts and minutes of meetings so far as Watersports' management fee was concerned. For example, in relation to what was stated on the point in the Club's 2007 accounts, he deferred to the explanation given by Mr Morris (which he had not been present to hear but of which he was apprised by Mr Atkins in cross-examination) even though Mr Morris could be expected to act and did at the time act upon what he had been told by the directors. Craig's evidence upon many of the other impugned transactions (involving specific payments by the Club to Watersports) was also vague and in a number of instances he said that the questions about a particular item would be better directed to Scott. Even making due allowance for the lapse of time since some of the payments were made (and for the fact that some were clearly less significant than others) I found the generally uninformative nature of his evidence to be surprising bearing in mind his fiduciary position and the need for scrutiny when the transactions in question were for his own or Watersports' benefit. I refer below to the unsatisfactory nature of Craig's evidence about Plot 11 and the management charge. It was clear from Craig's evidence that, in relation to those payments recorded on the Spreadsheet where the pink slips indicated that Watersports had charged the Club a mark-up on what Watersports had paid to the third party supplier, either he and/or Scott had decided upon the appropriate level of charge.

186. Another general observation to be made about Craig's evidence is that more than once during his testimony he referred to the Club being affected by the recession from around 2007 onwards. This chimed with what Mr Hamilton said about the reason for his own resignation as a director during 2008. He did so in the context of answers aimed at justifying decisions not to charge commissions from incoming licensees (on a transfer of an existing licence) in the interests of keeping the Site occupied. At the end of his testimony he confirmed to me that the recession had hit the Club and Watersports' shop business but not so much its business built on water ski lessons. The point is of some significance when the increased management fee which the defendants say the Club agreed to pay Watersports, in respect of the management of the Site, is said to have been agreed upon in the first half of 2007 and reflected in the

Club's accounts for the year ended 31 December 2007. If the Club was beginning to suffer a downturn in fortunes at around that time then that was a further reason for rigorous observance by Craig of his duties as a director (Scott did not become one until November 2007) when the fee was payable to his and Scott's separate business.

187. Craig's evidence left me with the impression that, during the period of his directorship, he was either largely ignorant of the legal duties attached to his stewardship of company money and property or that he did not pause too long, if at all, to reflect upon the potential consequences of them.

188. Scott, in his evidence, endeavoured to engage more fully than his father with certain items on the Spreadsheet challenged by the Club and put to him in cross-examination. However, many of his answers involved him talking in terms of what a payment would likely to have been for, as opposed to what he actually recalled the subject matter of it to have been, and that was an indication of uncertainty or speculation on his part. His evidence was consistent with Craig's on the question of Watersports passing on a mark-up to the Club. And, as with Craig, I found his evidence about Plot 11 to be unclear and unconvincing. Scott was unable to cast much light on the level of the management charge, correctly observing that it was agreed upon before he became a director. Again, I return to these matters below.

189. As with Craig, Scott's evidence was unimpressive in persuading me that he had been mindful of his duties as a director when causing the Club to commit to transactions where he faced a conflict of interests.

190. I now turn to my findings on the 24 disputed items in the Scott Schedule as grouped into the five main categories of claim. I address Watersports' counterclaim when dealing with the first category.

(5) The Claims

(a) Management Fees and Charges

191. The Club's claim to recovery of management charges is reflected in items 14 and 15 of the Scott Schedule.

192. Item 14 represents a claim to recover £350,000 from the defendants on the basis that Watersports improperly received a payment of £35,000 p.a. over a period of 10 years. For reasons which are apparent from the discussion below of the Club's accounts, this claim does not involve the Club giving any credit for the probability that (as indicated by the evidence) the rental payable by Watersports to the Club was offset against the actual payments made by the Club to Watersports by way of management charge. Whether or not that happened, the Club's position is that Watersports was not entitled to any part of the management charge and that includes the part set off against any rent liability of Watersports.

193. Item 15 reflects a claim to recover a one-off fee said to have been paid to Craig in respect of his management of the lodge development. I have already explained how I refused permission to amend at trial so that the Club might, in the alternative, seek to recover the value of Plot 3 as an alternative to the claim for repayment of £50,000 covered by item 15.

The Annual Management Charge

194. In order to arrive at a conclusion on Item 14 of the Scott Schedule it is first necessary to consider contemporaneous documents including the Club's published accounts at around the time the management charge was said to have been agreed. Doing so reveals a confusing picture.

195. The Defence identifies the minutes of a directors' meeting on 10 May 2007 ("**the May Minutes**") as the document which reflects and evidences the Management Agreement between the Club and Watersports by which the defendants say it was agreed Watersports would charge an annual management fee of £35,000. In fact, the May Minutes referred to "CC" (arguably a reference to Craig personally rather than Watersports) charging a management fee in that sum and also to the Club charging "the ski school" £20,000 rental. The relevant part of the May Minutes read as follows:

> "*Following earlier board discussions, and the proceedings of the recent AGM, CC has invoiced the club for a £10,000 management fee for 2006. For 2007 the club will charge the ski school £20,000 rental for the water usage and the old pub buildings, and CC will charge a management fee of £35,000. New contracts in respect of each of these arrangements are being prepared by the company's solicitor*."

196. Although the May Minutes contained that final statement, no formal management agreement was ever prepared. In his evidence, Craig could not recall whether he told Mr Hamilton that a solicitor was drawing up a contract but he said he would not have said it if it had not been true. Mr Hamilton, who prepared the minutes, said in his evidence that the information must have come from Craig.

197. The only written management agreement that came to be concluded, much later in 2013, was a different one between the Club and Coln River Lodges Limited ("**CRL**"), a company set up by lodge owners, including Ms Owens, who were dissatisfied with the standard of services provided to them in return for their service charges. CRL was set up in 2011 as an independent management company to provide services to the lodge area and began to do so from that year onwards. The later formal agreement with CRL related to the management of the lodge area of the Site in return for a fee of 10% of the service charges paid by lodge owners (and therefore worth about £2,000 to £3,000 p.a.). As for an agreement over the rent payable by Watersports (an earlier 10 year lease in favour of Craig having expired in May 2005) a 15 year term from 10 May 2007 was only formalised much later, by a Lease dated 14 June 2012. That Lease provided for a rent of £20,000 with provision for rent reviews in 2010, 2013, 2016 and 2019.

198. The meeting on 10 May 2007 took place before Scott became a director. At that time Mr Garner and Mr Thompson were also directors but only Craig and Mr Hamilton were recorded in the May Minutes as having been present. Mr Garner could not explain why he had not been present and it was clear from his evidence that this

concerned him: "*I mean, there's two people agreeing all this. I wasn't there …*". Mr Hamilton said it was normal practice to give the directors notice of board meetings so Mr Garner and Mr Thompson would have been aware the meeting was to be held. He said he would have drafted the minutes within a couple of days of the meeting and could not explain why (as some other board minutes within the trial bundle did) they did not record any apologies for non-attendance by absent directors.

199. At an earlier board meeting the previous year, held on 29 April 2006 and at which all four directors were present, it had been agreed that Mr Garner and Mr Hamilton would form a sub-committee for the purpose of considering the basis on which the Club facilities were leased and the provision and cost of management and supervision of the Club and its activities. At a board meeting held on 4 January 2007 (at which Craig, Mr Hamilton and Mr Garner were present but Mr Thompson was not) reference was made to the board's wish to discuss "*proposals tabled by [Craig] and presented to the sub committee set up at the previous meeting*." That reference to "proposals" appears to have been a reference to an email which Craig had sent on 23 December 2006 in which he had suggested that the rent paid by Watersports should be increased from (just under) £14,000 to £20,000 and that the management fee should be increased from £5,000 to £26,000. He also mentioned payment "*in arrears to cover 2006*".

200. The minutes from these earlier board meetings evidence the "*the earlier board discussions*" referred to in the May Minutes.

201. In his skeleton argument Mr Atkins had referred to the need to explore at trial the stark conflict of evidence between the two members of the proposed sub-committee. Mr Hamilton had said in his witness statement that a management fee was agreed: "*this proposal was put to the Board and approved verbally*" and "*the directors voted unanimously in support of [Watersports] being paid for managing the site*". Mr Garner, on the other hand, had said he never partook in any sub-committee and it followed that no such decision was made. However, each moved from his position when giving evidence. Mr Garner accepted that he had participated in discussions with Mr Hamilton. Although Mr Garner was not at the later meeting in May 2007, which fixed upon the management fee of £35,000 p.a., he accepted in his evidence that "*a management fee of £35,000 to £40,000 was discussed*".

202. Mr Hamilton gave answers which were to the effect that the board's approval was the result of informal discussion between board members between the board meeting on 4 January 2007 and the Club's AGM on 27 March 2007. This was the result of "*an interaction between [Mr Garner] and I, at the very least*" during that period and continuing up to 4 May 2007.

203. Mr Hamilton was asked about the reference in the May Minutes to an invoice for £10,000 as the management fee for 2006. He said "*what I think has happened is that [Craig] had made a case that the prevailing rate of £5,000 a year was not sufficient for the work that had been done, and that he requested that figure be raised for that year …. The board felt that was a reasonable request and agreed to a figure for that year*." However, it was unclear from Mr Hamilton's evidence whether the May Minutes were accurate in referring to an invoice for £10,000 as having been submitted. Craig had mentioned the idea of a payment of "*arrears*" for 2006 in his email of 23 December 2006. However, in his testimony, Craig could not explain why

the May Minutes referred to him having invoiced the Club for £10,000 as a management fee for 2006 (he did say that the reference to "CC" in this context meant Watersports). He said: "*there must have been some discussion, but I don't know. I cannot remember*." No clear recognition of an enhanced management fee for 2006 (above £5,000 p.a.) appeared in the Club's accounts discussed below.

204. Although Mr Garner was not present at the meeting on 10 May 2007, he (though not Mr Thompson) had been present at the board meeting on 4 January 2007 at which the provision of site management services and rental was discussed in the context of a proposal for a new agreement between the Club and Watersports that would address those matters.

205. The minutes for the earlier board meeting in January state that "*due regard was taken of the potential conflict of interest, that arises due to CC's position*." Reference was made to the previous setting up of the sub-committee of Mr Garner and Mr Hamilton and to Craig having presented proposals to it. They do not record what those proposals were but, as noted above, I conclude they must have been those raised by Craig in his email of 23 December 2006. Having noted the conflict of interest, they record:

> *"[Mr Hamilton] and [Mr Garner] agreed that the arrangements between the ski school should represent fair market and arm's length terms. It was also agreed that the affairs of the club had become substantially more complex in recent years, and that the current level of management fee was no longer realistic*."

206. The minutes also record an agreement that Craig would obtain two external opinions as to the rental value of the property leased to Watersports. They further recited agreement amongst those present (Craig, Mr Hamilton and Mr Garner) that those matters – the rental of buildings, the rental of the water and the provision of site management services - would be brought together in a single agreement.

207. Mr Garner gave his evidence about discussion of a management fee of £35,000 to £40,000 by reference to the minutes of the Club's AGM on 27 March 2007. The AGM therefore took place between the two board meetings in 2007. The minutes of the shareholders' meeting record that it was reported that management of the site would warrant an annual charge of £70,000 but the first conclusion of the meeting was that the rent should be £20,000 and the second that:

> *"it was concluded that a net figure of £15,000 to £20,000 would be paid for the management of the site. These will be effective from 2007*."

208. Although that minute reads as if the issue had been concluded, at least at shareholder level, its terms reveal that the amount of the management fee, against which the £20,000 would be offset, was something of a variable (to the tune of £5,000).

209. The minutes of the AGM also refer to "*independent specialists*" having been appointed to assess the rent the Club should charge Watersports and the management fee Watersports should charge in return. Craig said in his evidence that this was a reference to Mr Hamilton and Mr Garner (as the sub-committee). Mr Hamilton said

that once he and Mr Garner had begun to look into the matter it became clear that it would be difficult to find a comparable for Watersports' situation (a point that had been flagged back in the meeting on 29 April 2006, at least so far as the appropriate rent was concerned) but that he had spoken to some estate agents who had experience of the leisure industry in order to get an indication of likely charges. Mr Hamilton said they had looked at the amount of time (including the anti-social hours sometimes required) that was likely to be devoted by Watersports to managing the Site. It would seem that it was on this basis that shareholders were told that management of the Site could cost in the region of £70,000.

210. There is no indication in the documents and none of the witnesses suggested that Craig did obtain for the benefit of the March 2007 AGM the independent valuations which it had been agreed on 4 January 2007 he would obtain in order to assist a decision on the appropriate rental to be paid by Watersports. In response to questions from me, Craig said that he could not recall any discussion over setting the rent at £20,000 and Mr Hamilton said that he was not involved in costing that figure and did not remember querying it.

211. I now turn to the Club's published accounts and what they said about the management charge. One might expect the accounts to simply reflect any agreement reached by the shareholders or directors of the Club but that is not the position. And the evidence of Mr Morris raised one particular doubt over the accuracy of the Club's accounts for 2006.

212. The last accounts prepared for the Club by its accountants Griffiths Clark were the unaudited abbreviated accounts for the year ended 31 December 2007. For earlier years, including 2006, the firm had prepared audited accounts but a decision was taken that the Club's operations did not justify them being audited and its Articles were accordingly amended to dispense with that requirement. In 2007 Mr Clark of Griffiths Clark, who had been the Club's point of contact, retired. In these circumstances, the May Minutes noted that Mr Morris had become responsible for the Club's accounting requirements. For the year ended 31 December 2008 onwards Mr Morris therefore took over responsibility for preparing the Club's accounts.

213. I have quoted above from the minutes of the March 2007 AGM which stated that the payment to Watersports of a net sum of £15,000 to £20,000 would be effective from 2007 (the Club's accounting year matched the calendar year). Likewise, the May Minutes referred to the management charge *for 2007* being £35,000 (and the rent £20,000) and to Craig having invoiced the Club for a £10,000 management fee for 2006.

214. The 2006 accounts contain a note ('Transactions with Directors') which is consistent with the fee of £35,000 only being payable for the year 2007 onwards, though not with the idea of Craig raising an invoice of £10,000 for 2006. Having referred to Craig paying rents of £6,000 (for the use of the lake and associated facilities of the ski school) and £7,992 for buildings, the note stated:

> "*A site management fee of £5,000 (2005 £5000) and a log cabin development fee of £Nil (2005 £20,000) was payable to C Cohoon for the year ….*"

215. I will return below to the question of the cabin development fee but, for present purposes, note that this statement was included in accounts approved by shareholders at the AGM on 27 March 2007; the same meeting at which the new management fee arrangement for 2007 was raised. Those 2006 accounts were approved by the board the next day and then signed by Craig on its behalf. Further, at the Club's 2008 AGM (held on 18 March 2008) the 2007 accounts were approved by the shareholders and the equivalent note in those also referred to the site management fee for 2006 being £5,000. The 2007 accounts were approved by the directors in April 2008 and signed by Scott.

216. I have just touched upon what the note in the 2007 accounts said about the amount of the site management fee for 2006 being £5,000. The relevant part of the note in relation to transactions with directors in the later accounting year said:

> "*Included in turnover is an amount of £20,000 (2006 £13,992) received from Cohoon Water Ski School for rental of the buildings and use of the lake and associated facilities.*
>
> *A site management fee of £50,000 (2006 £5,000) was payable to Cohoon Water Ski for the year. £20,000 was outstanding at the year end and this is included within Trade Creditors .....*"

217. The 2007 accounts were the last set of abbreviated accounts prepared by Griffiths Clark but which (as I have said and unlike earlier accounts) were not audited by them. The above note appeared accurately to reflect the May Minutes in relation to the rent but not in relation to the site management fee.

218. At first sight, the note would support a net payment to Watersports of £30,000, rather than £15,000, for 2007.

219. Mr Morris said that the explanation for the reference to a fee of £50,000 was that it represented the £35,000 payable for 2007 plus £15,000 outstanding from 2006 on the basis (as he understood it) that the higher fee was to be backdated to 2006. As for the £20,000 said to be "outstanding", Mr Morris said that this indicated that not all of the £50,000 had been paid by the year end.

220. Mr Morris' evidence was that the arrangement for Watersports to receive a net payment of £15,000 (£35,000 management fee less £20,000 rental) was "*put into place in 2007 and back dated to 2006*". Mr Hamilton was not able to shed any light upon the reference in the 2007 accounts to a £50,000 management fee though he did give some answers by reference to the May Minutes (which were expressed with an element of conjecture and one of which I have quoted above) about Craig making out a case for Watersports receiving more than £5,000 for 2006, even though Craig's evidence did not really support him.

221. Mr Morris' position was not supported by the evidence of Craig or Mr Hamilton. Both of them told me that the £35,000 management fee was effective from 2007. They were the only persons present at the meeting evidenced by the May Minutes. Craig had been absent from court during Mr Morris's testimony (which, as I have

mentioned, was interposed during Craig's cross-examination) and was unable to comment upon the suggestion that a further £15,000 of the £50,00 figure mentioned in the 2007 accounts in fact related to the previous year. Craig said he had no idea about that.

222. Whether or not part of the stated fee for 2007 was unpaid at the financial year end, Mr Morris' explanation of the £50,000 is also completely at odds with the terms of the 2006 and 2007 accounts (as approved by the shareholders and directors, and the later set being signed off almost a year after the May Minutes). Mr Morris said the arrangement was "*agreed by the board and ratified by the accountants*" but the accounts prepared by Griffith Clarke for those years raise an immediate doubt about their understanding. Each set of those approved accounts was quite clear as to what site management fee was "*payable for the year*"; and the 2007 accounts expressly noted again (in parenthesis) that the fee payable for 2006 was £5,000, not £35,000. The May Minutes and those for the earlier AGM could not have been clearer in stating that the £35,000 fee was "*for 2007*" and, in circumstances where the May Minutes noted the start of his involvement in the Club's formal accounting (as opposed to bookkeeping) arrangements, it is difficult to see how Mr Morris could have properly derived a different understanding.

223. The May Minutes also recorded that the new rent of £20,000 p.a. was also to be effective from 2007. Mr Morris said in his evidence that, for the purposes of backdating the arrangement to 2006, it was not necessary to re-visit the appropriate level of rent for 2006 as only the carrying back of the £15,000 differential needed to be addressed. But, as that differential was predicated upon the rent being £20,000, it must follow that if Mr Morris is right then both sets of accounts would have been inaccurate in stating that Watersports was paying rent of £13,992 in 2006.

224. The striking point about Mr Morris' suggestion that Watersports' net entitlement to £15,000 dated back to 2006 is that there seems to be no documentary support for it save possibly the reference in the May Minutes to Craig having already "*invoiced the club for a £10,000 management fee for 2006*". If the previous site management fee of £5,000 had already been paid to Watersports then an invoice for a further £10,000 would make up the £15,000. However, if the Club had paid the extra £10,000 in response to such an invoice then that further indicates that Mr Morris' analysis of the note in the 2007 accounts (as approved the next year at an AGM on 18 March 2008 and subsequently at a board meeting on 16 April 2008) cannot be supported. Mr Morris' analysis not only involves the note being wrong in confirming that the site management fee for 2006 was £5,000 but, so far as I understand it, also assumes both that Watersports was entitled to a net £15,000 in respect of 2006 and that none of it had in fact been paid (so that it was appropriate to have that £15,000 reflected within the note). Even if an accepted invoice for an extra £10,000 had been raised for 2006 and none of the total £15,000 for that year had been paid, it does not follow that the management fee *for 2007* became £50,000.

225. For completeness, I note that later accounts prepared for the Club by Mr Morris did not contain an equivalent note to that in the 2006 and 2007 accounts until those that were prepared for 2011. The 2011 accounts (approved by the board in September 2012) were consistent with the May Minutes in stating:

> "*During the 12 months ending 31 December 2011, Fairford Waterski Club Limited received £20,000 in rental income, paid £35,000 management fees and purchased goods and services to the value of £12,051 from Craig Cohoon Waterski & Pro shop, a partnership operated by Craig Cohoon and Scott Cohoon*."

226. The discussion above relates to the level of the management fee payable to Watersports. I have already noted that, even though the parties have proceeded on the basis that Watersports actually received a net annual payment of £15,000 after taking account a rent of £20,000 p.a. payable for the use of its premises and the lake, the Club challenges the entirety of the £35,000 annual management fee claimed by Watersports. Perhaps for that reason the parties did not focus upon the level of rental with which Watersports had been debited, and whether or not the suggested agreement upon a rental figure of £20,000 was to be scrutinised to the same degree as the £35,000 figure against which it was offset.

227. The first year's rent under the 1995 lease had been fixed at £6,000 and was thereafter subject to an annual increase (not to exceed 8% above the previous year) fixed by reference to the RPI. The Club's 2006 accounts (confirmed again by the note in the 2007 accounts) show that by that year a total rent of £13,992 was payable by Watersports to the Club. The minutes of a board meeting on 21 December 2004 (which noted that the 1995 lease was to expire the following March and that Mr Hamilton would discuss a new lease with solicitors on behalf of the Club) indicate that Watersports also paid rates of around £4,000.

228. I have already referred to the minutes of the board meeting on 4 January 2007 recording that Craig would obtain two external valuations of the market value of the property rented to Watersports. That was in the light of the minutes for the earlier board meeting on 29 April 2006 having noted that "*obtaining any meaningful external valuation was difficult due to the unusual nature of the facilities involved*" and that "*the most important factor was the net position with regard to payments to and from the parties*". The board was satisfied that the then current position (in 2006) "*represents fair value for both parties*".

229. I have already noted that the evidence of Craig and Mr Hamilton showed that the £20,000 rental figure (an increase from the £13,992 payable in 2006) was perhaps not given too much scrutiny.

230. I have had to address the contemporaneous documents and the Club's accounts at some length because of their significance to the issue as to whether or not the Management Agreement was concluded and, if so, whether clause 84(1) of Table A and the requirements of section 317 of the 1985 Act were complied with so as to provide a defence to the Club's claim to recover the management fees paid under it. I have explained in paragraph 104 above what was required in terms of such compliance.

231. As to the first question, the Club points to the fact that the May Minutes stated (inaccurately) that *"[N]ew contracts in respect of each of these arrangements are being prepared by the company's solicitor*" when the new lease was not drawn up until 5 years later and no relevant written management agreement was ever prepared.

Mr Atkins relied upon the evidence of both Mr Hamilton and Mr Garner which confirmed their understanding that the arrangements would be documented.

232. In my judgment, the fact that the arrangements were not reduced to writing does not mean that no relevant agreement was ever made. This is especially so when I am asked to decide this head of the Club's claim by reference to a statutory provision which expressly defined a "contract" in terms of a transaction or arrangement which might fall short of a binding agreement: see section 317(5) of the 1985 Act. Although the Club's claim to recover the management fee is advanced on the basis that the Club never agreed to Craig receiving it, the cause of action is founded upon breaches of duty owed by the directors rather than being a claim in restitution (against Watersports only) for monies paid under an anticipated contract which did not materialise. And, although the current directorship of the Club is dissatisfied with the level and standard of service said to have been provided by Watersports during the term of the Management Agreement, the reality is that those previously on the board understood that (after May 2007 just as before) Watersports did act as Site manager up until January 2017.

233. The real issue is, therefore, whether or not the contract (in the section 317 sense) was entered into following due compliance with the Club's Articles in relation to the disclosure of Craig's personal interest (through Watersports) in the Management Agreement. Of course, if that issue is resolved against the defendants, there remain questions over possible shareholder ratification and, subject to that, the extent of accountability of any one or more of the defendants in respect of the management fees received under it.

234. On the issue over the adequacy of the disclosure of Craig's interest, the confusing note within the 2007 Accounts does nothing to assist in clearly identifying the extent of Craig's interest which ought to have been declared by him as a director. However, I must bear in mind that, whether or not he made compliant disclosure of his interest at or, perhaps, before the meeting on 4 May 2007 is an issue that is susceptible to determination independently of the accuracy or otherwise of any subsequent note about the transaction in the Club's financial statements.

235. In my judgment, the evidence shows that clause 84(1) of Table A was not complied with before the Club entered into the Management Agreement. It is on this aspect that the absence of a formal contract (in draft) between the Club and Watersports has greater significance. The absence of one immediately raises a degree of uncertainty over the nature and extent of Craig's separate interest. It is much easier for a director to say that his interest in the transaction was adequately declared if he can show that the written terms exhaustively addressing it were before the board, in draft, before completion. The confusion sown by the evidence of Mr Morris about the level of management fee illustrates the risks of not doing so. However, the problem for the defendants in this case is that there is no evidence at all to support the conclusion that Craig otherwise declared to a meeting of his fellow directors the true nature and extent of his proposed interest.

236. The May Minutes do not record this having been done at the meeting of Craig and Mr Hamilton on 10 May 2007. Instead, the minutes suggest that the new arrangement for a rent of £20,000 and a management fee of £35,000 were the product of *earlier* board discussions. That was the tenor of Mr Hamilton's evidence, at least so far as his

interaction with Mr Garner outside formal meetings was concerned. However, the minutes of the last relevant board meeting on 4 January 2007 show, as Mr Atkins submitted, that the board discussion on that occasion was a general one about a possible revised (and formal) management arrangement; not one which involved any focus upon the terms of any proposed contract (and the interest of Craig under it). The point is made clear by the board deciding at that meeting that Craig should seek two external valuations of the property let to Watersports. Establishing what rent Watersports should pay was key to establishing the amount of the contemplated differential to be received by the partnership.

237. In addition to referring to earlier board discussions, the May Minutes also referred to the proceedings of the March AGM. The "*conclusion*" that the net payment to Watersports should be "£*15,000 to £20,000*" was one which the minutes of the AGM on 27 March 2007 record has having been decided upon by those present at that meeting. On that occasion, Craig and Mr Thompson were present with Mr Morris and Mr Mark Clarke either also present or in attendance. Apologies for the absences of Mr Garner, Mr Hamilton and three others were recorded. That conclusion appears to have been on the basis that a management fee could be as much as £70,000 p.a but there was no decision as to what the management fee for Watersports actually should be. It should be noted as recently as 23 December 2006 (by his email of that date) Craig had proposed (alongside a revised rent of £20,000 p.a.) a management fee of £26,000 p.a.. Those present at the AGM were told (it seems inaccurately) that independent specialists had been appointed to assess the level of rent as well as the amount of the management fee. Mr Hamilton (who was not at the AGM) did give evidence that he had spoken to a firm of estate agents operating in the leisure sector with a view to establishing comparables for the proposed management fee, but it is clear that the informal sub-committee did not cause the rental value to be assessed.

238. It is therefore obvious that there was no information available to the board (or the sub-committee) which would have assisted either the board or the shareholders in deciding whether the extent of Craig's proposed conflicting interest – in the form of the net payment to be made to Watersports – was a justified one. After all, an independent opinion that the rent should be significantly more than the £20,000 subsequently decided upon would probably have shaken any assumption that a net payment of £15,000 to Watersports was justified. I recognise that the absence of convincing evidence to support a net annual payment in a particular amount does not necessarily undermine the case for saying that a director's conflicting interest (in the intended payment of that amount) was adequately declared. But, as with the absence of any draft of the proposed management agreement identifying the services to be provided in return for the gross management fee, this uncertainty over the basis of any set-off against the management fee goes to the general point about a lack of information to support the case for establishing compliance with clause 84(1).

239. In the light of what was said at the board meeting on 4 January 2007 and at the AGM on 27 March 2007, the decision taken by Craig and Mr Hamilton on 10 May 2007 appears to have been rather precipitate, even allowing for the fact that they contemplated formal contracts being drawn up by the Club's solicitor. Whether or not that is so, and even if it may not have been wise to take it in the absence of any external opinion upon the amount to be debited to Watersports in the form of rent, there is nothing in the evidence (nor any reference in the May Minutes) which lends

support to the conclusion that the nature and extent of Craig's interest was clarified beforehand for the benefit of the board and those members of it who, on the defendants' case, appear to have been unable to attend the May meeting.

240. Accordingly, and on my analysis (in paragraph 104 above) of what was required for compliance with clause 84(1), the Management Agreement was voidable for non-disclosure of Craig's interest.

241. On that basis, the defendants argued that the Club's shareholders nevertheless authorised or ratified the Management Agreement. They relied upon the minutes of the AGM on 27 March 2007 which of course took place some six weeks before the meeting on 10 May at which the agreement is said to have been concluded. Those minutes reveal a discussion over the range of the likely management fee, albeit with the "conclusion" upon the net payment to Watersports (expressed as a variable which covered the lower differential subsequently decided upon). I note that the AGM minutes do not record, on that point, a formal resolution of the kind passed in relation to the approval of the 2006 accounts, the appointment of the auditors and the re-appointment of Craig and Mr Thompson as directors. For the reasons already indicated, in my judgment the recorded discussion was too vague and, at least in relation to the absence of independent opinion over rental, too misinformed to trigger application of the principle in *Hogg v Cramphorn*: see paragraph 66 above.

242. The defendants also rely upon what is recorded as having taken place at the 2008 AGM held on 18 March 2008. It appears that, in addition to Craig, Scott, Mr Garner, Mr Morris and Mark Clarke, at least two other shareholders of the Club were present at the meeting. At that meeting both the minutes of the 2007 AGM and the Club's 2007 accounts were approved. For the reasons also already indicated above in relation to the confusing picture created by the note in the 2007 Accounts, the approval of those accounts cannot in my judgment be read as evidencing shareholder ratification of an annual management fee of £35,000 p.a. commencing in 2007. The note in the accounts does not refer to such a fee and, inevitably, even the defendants' written closing submissions have had to offer rival potential explanations for how it could be read.

243. As I have already noted, the next set of accounts to mention the payment of a management fee of £35,000 (alongside rent of £20,000) in the current accounting year were those for 2011. In my judgment, they provide insufficient evidence to establish shareholder ratification (at that significantly later point in time). This is especially so when there was no formal shareholder approval of those accounts. As to that, it appeared from Mr Morris' evidence that the 2008 AGM was the last meeting formally convened for the Club's shareholders and which actually took place. Poor attendance at earlier annual meetings had led to the decision being taken that a meeting would only take place if one was requested.

244. The Club's position in these proceedings is that shareholders generally were not even aware of the management fee until the current board avoided the alleged agreement as soon as they took office at the start of 2017. Whether or not that is the case, the defence of informed shareholder authorisation or ratification has not been made out. It must be remembered that at no time during the relevant 10 year period was a formal management agreement prepared (as originally envisaged) containing terms to enlighten the shareholders as to what Watersports was doing in return for its £35,000.

245. In these circumstances, the question arises as to what if any relief in favour of the Club should follow. The Club's pleaded case is that Craig "*took a management fee for 10 years whilst a director of the [Club]*". On that basis, the Club alleges that he acted in breach of the no profit rule (referring to section 175 of the 2006 Act about the commencement of which I have made my observations at paragraph 69 above) and that "*all the Directors*" (meaning Craig, Scott and Jane) were in breach of section 171 of the 2006 in causing or permitting the unauthorised fees to be paid. The relevant paragraph in the Amended Particulars of Claim does not mention Watersports, or any distinct basis for recovering it from the partnership, but the value of the claim under the Management Agreement is clearly included in the total sum of £634,910 claimed against Watersports. In the face of a Defence saying that Watersports received the fees under the Management Agreement, the Club's Reply said nothing further on this head of claim.

246. In my judgment, the Club has established accountability on the part of Craig subject to any limitation defence and the grant of any relief under section 1157 of the 2006 Act. The basis of his liability is the fiduciary duty (to which he was subject in 2007) to avoid a conflict of interest. To conclude otherwise would involve me ignoring the clearly defined escape routes from liability, as now identified by section 180(4) of the 2006 Act, when neither of them is available to him.

247. However, the Amended Particulars of Claim allege liability on the part of all four defendants in respect of this head of claim, though I note that the Club's position in the Scott Schedule is that Craig and Scott are answerable.

248. I am not persuaded that there are grounds for liability on the part of either Scott (in his own right) or Jane. Scott was appointed as a director after the entry into the Management Agreement, in November 2007. Those who were directors of the Club alongside Craig at the time it was entered into – Mr Hamilton and Mr Garner (as Mr Thompson died that year) – have not been sought to be made accountable in respect of it and, because there was no challenge to the Management Agreement before 2017, would not have alerted Scott to any questions over its validity. Scott appears to be less accountable in respect of the Management Agreement than Mr Hamilton, Mr Garner or Mr Thompson (or his estate). The same applies to Jane with much greater force, as she was (she says) only appointed as an alternate director and I have recognised that she took no steps as a director which were relevant to these proceedings. Indeed, in his closing submissions Mr Atkins did not suggest Jane should be held accountable for the management fees.

249. Even had I considered there to be any proper basis for holding Scott or Jane accountable in respect of payments of management fees during the period of their respective directorships I would nevertheless have exercised my discretion under section 1157 of the 2006 Act to exonerate him or her from that liability. Whereas Craig was subject to the strictness of the fiduciary duty to avoid a conflict of interest when the Club and Watersports entered into the Management Agreement, and must therefore be taken then to have assumed the risk of any finding of liability through his breach of it, neither Scott or Jane were alive to those consequences until after they had ceased to be directors. There is no evidence that Jane played any part in the payment of the management fees. Any involvement on the part of Scott would have been in ignorance of the challenge to the Management Agreement which the Club has since made. In those circumstances he can, in my judgment, be heard to say that he acted

reasonably and honestly in not questioning the validity of an agreement which pre-dated his appointment.

250. There remains the question as to whether Scott is nevertheless exposed to liability for Craig's breach of duty through his (Scott's) equal interest in Watersports. He was a partner in Watersports at the time the Management Agreement was concluded and Watersports received the benefit of the annual payment of £35,000 (in the form of a set-off against rent and receipt of the balance).

251. I am not persuaded that, to the extent a case against the partnership is still advanced, Watersports should be held accountable in respect of the management fees. This is first and foremost because the Club's pleaded case does not adequately explain the suggested basis of liability on this head of claim. The relevant paragraph of the Amended Particulars of Claim dealing with the claim to £350,000 refers only to Craig making 'restitution' of the management fees. The position of Watersports is addressed in an earlier paragraph which refers, generally, to the partnership's dishonest assistance in the directors' beaches of duty and/or its unconscionable receipt of payments. Although no claim in restitution was pleaded against Watersports I have in any event found that the Management Agreement was made. The extent to which Scott was involved, if at all, alongside Craig in negotiating the Management Agreement on behalf of Watersports was not explored at the trial. Neither was Scott asked whether he had understood his father to have made effective disclosure of his conflicting interest to the Club's board. As with Scott's position as a director, I do not see any sound basis for concluding that Watersports should be taken to have known that what Craig had done (or failed to do) as a director of the Club involved a breach of fiduciary duty or that the resulting payments to it, when the Management Agreement remained unchallenged by the Club, were unconscionably received or retained.

252. Had it been necessary to do so, I would have found that any claim against Watersports in respect of the period prior to 30 October 2011 was in any event statute barred. If made out, an allegation of 'knowing assistance' or 'knowing receipt' would have resulted in Watersports being a "class 2" constructive trustee on *Paragon v Thakerar* categorisation.

253. The result is that only Craig is potentially liable in respect of the payment of the annual management fee. However, that conclusion requires the court not only to focus upon the appropriate measure of his accountability but also to consider whether he has a limitation defence to part of the claim or should be wholly or partially excused from liability under it.

254. Dealing first with the primary measure of Craig's accountability, this issue is complicated by the fact that it was not a case of what I might describe as a straight breach of the self-dealing rule where the conflicting interest of the director arises under a contract made between the company and himself: compare *Re Neptune*. In this case, the Club contracted with Watersports and Craig's personal interest was his indirect one as a partner in Watersports. Even though the Club's pleaded case was formulated on the basis that there had been a straight breach of the self-dealing rule ("*The First Defendant took a management fee for 10 years whilst a director of the Claimant*") the indirect nature of his interest was sufficient to trigger the application of the rule, as both parties have recognised. The fact that Craig (in his own name) did

not contract with the Club or directly receive the management fee *might* be significant on the issue of limitation. However, those facts do not mean that the duty now reflected in sections 175 and 177 of the 2006 Act could not extend to protecting the Club from Craig advancing his interests as a partner in Watersports at the Club's expense.

255. I have set out my understanding of what Lightman J referred to in *Re Neptune* as "orthodox doctrine" in paragraph 94 above. If equity will not permit a contract to stand if it has been entered into in breach of the duty to avoid a conflict of interest then it ought to follow that the director who committed the breach should be accountable for the monies paid by the company under that contract even if he did not directly or personally receive all of them. Otherwise, as my findings of non-liability on the part of Scott and Watersports on this head of claim serve to show, the Club's avoidance of the Management Agreement would not carry with it at least the potential for full restitution of those monies. Yet its right to avoid it, applying the strict rule of equity, arises because Craig put himself in a position of a conflict of interest which has not been addressed in accordance with the Articles or waived by the Club's shareholders. The application of that rule does not require the principal to establish that the fiduciary has actually benefited unfairly, to an identified extent, at the expense of the principal. The fact that the court, as in *Boardman v Phipps*, sometimes recognises that the resulting transaction may actually have benefited the principal so as to justify an allowance for the fiduciary's efforts on the setting aside of the transaction (at least in a case falling within the 'no profit' limb of the duty) illustrates this point.

256. Nevertheless, making the point does require me to focus upon how it impacts upon the starting point for Craig's accountability under the Management Agreement.

257. Both sides approached this question by reference to the full £35,000 per annum payable to Watersports under the Management Agreement. The Club seeks recovery of the full 10 years of fees on the basis that the directors (and, it seems, Watersports) were to be treated as class 1 constructive trustees for limitation purposes. I have already observed that the Club's case is that no such management agreement was concluded so, on that basis, there was no need to be concerned by the fact that the Club appeared to have benefited by making reduced payments of management fee after a set-off for rent. There was no true contractual entitlement to set off so, the Club says, it should have received all of the rent and paid none of the fee.

258. The defendants, on the other hand, say that there should be no recovery in respect of the specified annual fee (ignoring any deduction for rent) even if a breach of duty was established and the Management Agreement could not be said to have been subsequently ratified or affirmed. That is because, even in respect of that part of the claim which did not relate what they say are time-barred payments before October 2011, the court should act upon the reasoning in *Boardman v Phipps* or exercise its discretion under section 1157 of the 2006 Act by reference to the matters addressed below.

259. However, even though a different starting point for any exercise of such discretion was not urged upon me by the defendants, it seems to me that it is wrong to ignore the fact that, because of the deduction for rent due, the Club paid Watersports £15,000 p.a. not £35,000 p.a.. I say that because it is clear on the facts that an uplift in

management fee was only discussed in the context of an uplift in rent. And it is no part of the Club's case that the agreement upon a rent of £20,000 p.a. – as that later came to be recorded in the executed Lease dated 14 June 2012 – was somehow vulnerable to being set aside as the product of wrongful self-dealing by Craig. Nor that the level of rent decided upon was financially disadvantageous to the Club even if the parties did not benefit from the anticipated expert valuation opinion before deciding upon it (I have already mentioned that the directors at the time appear not to have given it too much further thought).

260. Contrary to the Club's case, I have found that the Management Agreement was made even though it was a voidable transaction leading to issues of accountability. In these circumstances, I do not consider the Club to be correct in advancing a case of accountability which ignores the fact that it has benefited from Watersports' agreement to pay a rent of £20,000. That agreement went hand-in-hand with the parties' entry into the Management Agreement, as the documents beginning with Craig's email of 23 December 2006 and ending with the May Minutes clearly demonstrate. The minutes of the AGM on 27 March 2007 talked about "*a net figure of £15,000 to £20,000*". On an even more fundamental level of reality, Watersports was able to assume the obligations of Site manager *because* it was in occupation as tenant on part of it.

261. The court is now being asked to hold Craig accountable for monies paid by the Club under the Management Agreement which is no longer in force but which is to be treated as having been voidable once made in 2007. In my judgment, the concept of *restitutio in integrum* provides the firmest point of reference for measuring the potential extent of that accountability (just as it would have if the claim had been one to set aside an ongoing Management Agreement). In applying that concept, I do not consider that Watersports' reciprocal obligation to pay rent of £20,000 can or should be ignored. In this context, the obligation upon Watersports to pay the previous rent of pay £13,992 p.a. was an aspect of the parties' pre-2007 contractual position under which the Club agreed to see its tenant separately provide Site management services. It was the case that the Club was net creditor (to the tune of £9,000) under the previous arrangement but if it wishes to undo the financial effects of the new one then, in my judgment, the Club must recognise that the unquestioned benefit of a higher rental to be paid by Watersports was part of that arrangement.

262. Accordingly, in my judgment the correct starting point for measuring Craig's accountability under this head of claim is £15,000 per annum.

263. Even if I had formed a different view on this point as a matter of principle, on the basis that the challenge to the Management Agreement (but not the Lease) required the court to consider the position of Watersports only as manager and not as tenant/manager, I would nevertheless have concluded that it would have been a proper exercise of my discretion under section 1157 of the 2006 Act to have reduced the level of Craig's exposure to £15,000 per annum. Even making allowance for the fact that Craig had himself proposed in December 2006 a more modest shift to Watersports becoming net creditor of the Club, to the tune of £6,000 rather than £15,000, the fact is that none of his fellow directors and no shareholder questioned the basic assumption as to Watersports' entitlement being a 'net' one at any time during the 10 year period. On this aspect of the case, I conclude that Craig acted honestly and reasonably in believing that Watersports had properly satisfied its rental

obligation before receiving the balance. It would in my judgment have been fair to excuse him as a director from any liability which was premised upon the Club not having to give credit for the rent received.

264. That raises the question as to whether there are any other factors operating to reduce Craig's exposure for his breach of duty. Mr Sims QC and Ms Gibb relied both on this aspect of the claim and more generally upon what they described in their closing submissions as 'the countervailing benefits' enjoyed by the Club as a result of having Craig, Scott and Watersports on site. They referred to such matters as Scott having taken over as Company Secretary after Mr Thompson's death in 2007 without drawing the sum of £60 per week that his predecessor had taken; the provision by Watersports of electricity needed for the operation of the Club's electric gates and security cameras; the accommodation of the Club's office requirements within Watersports' office; and the reference in the minutes of the 2007 AGM which indicated that outside management might have cost as much as £70,000. The defendants argued that, even if the management agreement were to be set aside, Watersports should be treated as being entitled to at least the gross sum of £35,000 p.a. on *Boardman v Phipps* reasoning.

265. Mr Atkins responded by saying it was not permissible to rely upon a basket of suggested benefits when they did not feature in any counterclaim and the Club had not had an adequate opportunity to address them in detail. By way of example, he referred to doubt over the defendants' point that the value of electricity provided to the Club outweighed the costs of electricity consumed whilst Craig and Jane were in occupation of their lodge on a non-metered electricity supply that was paid for by the Club (though this forms a separate head of claim under Item 9 on the Scott Schedule). He also pointed out that the £60 that Mr Thompson had drawn was more than likely his director's fee paid on a weekly basis.

266. However, specifically in relation to the management fee, the Club contended that the evidence supported the view that that Watersports had singularly failed to provide site management services of any real value. The Club pointed to the fact that, as a result, in 2011 the owners of the lodges were forced to set up CRL to take over those services provided to them. Indeed, the Club relied upon the matters summarised below in saying that they were further indications that the Management Agreement with Watersports was not a genuine one but instead simply a means of extracting money from the Club.

267. On the issue of Site management, Mr Atkins cross-examined Craig upon the terms of a letter written to the Club in September 2008 by eight lodge owners (which Craig thought was probably all of them at that time). The letter made complaints about the general appearance of the Site, shortcomings in maintenance, facilities and infrastructure, and a lack of progress with landscaping works. The letter asked for an explanation as to how their service charges had been spent and were proposed to be spent and the proposed marketing of unsold plots. Craig said he did not recall receiving the letter but he did concede that not enough was being spent but that it was a difficult time because of the recession and the Club was under pressure to repay its bank borrowing. The tenor of his evidence was that the lodges were not generating sufficient maintenance fees to fund the cost of works such as putting gravel on drives. He said the Club had been happy to see the management of the lodge area later taken over by CRL.

268. Ms Owens said that after CRL took over the provision of services for lodge owners it managed to do so at half the rate of service charge (£1,200 per lodge instead of £2,400) that had previously been charged. Although there has been an increase since 2007 in the number of lodge owners paying the charge (there are now 17 lodge owners) she said that the approximate annual running cost of CRL is £8,200. She also said that in 2017 the new board had to spend around £100,000 just to make the Site safe and compliant with Health & Safety regulations. Reliance was placed upon a detailed Electrical Installation Condition Report of May 2017 from Brimstone Electrical Systems which made the general point that the Site had originally been wired to accommodate perhaps a dozen caravans on a temporary basis and had not been upgraded to reflect the growth in static caravans and lodges.

269. In submitting that the Site had become positively dangerous during the period of Watersports' alleged management, Mr Atkins also pointed to the terms of a short Report prepared by Sureteam, health and safety consultants, in January 2018 which referred to a number of hazards identified on a visit in February 2017. Some of them led to the swimming pool area (which the defendants say was created for the benefit of the Club and which is the subject of Item 6 on the Scott Schedule) being condemned. Craig responded to this criticism in his evidence by saying that the Council had inspected the site in around 2008 to 2010 and, apart from being told to take down some fencing around the marina, the Club had passed the inspection.

270. The problem, as I see it, with the parties gnawing away at the above bones of contention lies in the fact that the Club's claim in relation to Item 14 of the Scott Schedule is not a breach of contract claim. There have been no allegations of breach of particular express or (more likely) implied terms of management service or of any more general shortcomings in performance by Watersports during any of the relevant 10 years. The result is a very unstable platform for making any clear findings that Watersports did fall short in its provision of services.

271. Having reflected upon the rival points, I do not feel able to conclude that it would be appropriate to exercise my discretion to relieve Craig of liability to repay the Club the net annual management fee of £15,000. If I had been persuaded to do so then I would have regarded the statutory discretion under section 1157 of the 2006 as the appropriate basis. Although the defendants relied upon it being a *Boardman v Phipps* type situation, I regard the court's ability to make a liberal allowance for the skill and effort of the accounting fiduciary as relevant to the 'no profit' limb rather than the 'no conflict' limb of the duty to avoid a conflict of interests. It is because there will be no "deal" between the fiduciary and his principal, regulating the former's exploitation of an opportunity in breach of the 'no profit' rule, that the court has power to allow him some remuneration at the expense of the principal where his efforts have proved to be beneficial. However, in a case of a conflict which arises out of the fiduciary's self-dealing with his principal, the fiduciary will have negotiated terms with the principal and the question then is whether or not there are circumstances justifying the exercise of a discretion (under section 1157 or its equivalent) to relieve him of the full financial consequences of the principal having those terms set aside.

272. I have also considered whether it would be appropriate to limit Craig's exposure under Item 14 by taking account of the fact that Watersports was already receiving £5,000 p.a. before the Management Agreement of May 2007; and that (as expressly recognised at the 2007 AGM) the existing situation already involved Craig in a

conflict of interest. However, the fact that the Management Agreement was said to reflect the point that the management of the Site and the Club's affairs had become substantially more complex (so that Watersports would become net creditor of the Club) has led me to conclude that the notional setting aside of the Management Agreement should be viewed in isolation from the previous arrangements.

273. There remains the question of limitation. Is the Club's claim against Craig in respect of net management fees paid before 30 October 2011 statute barred?

274. In contrast to some of its claims in respect of property dealings (category 5 below) where the Amended Particulars of Claim assert that Craig must return property *in specie*, or account for its value, the claim in respect of Item 14 is not presented otherwise than as a personal claim. There is no suggestion that it is a proprietary claim and no mention in the Amended Particulars of Claim of the defendants being accountable as constructive trustees. Although the pleading does not use the expression (though it was one proposed in the disallowed amendment in relation to Plot 3) its language and prayer for relief read like a claim to equitable compensation. However, in response to the defendants pleading a limitation defence, the Club's Reply asserts that "*insofar as the claim is to recover property belonging to the Claimant but received by the Directors in breach of their director's duties and thereafter converted to their use, the claim falls within s 21(3) of the Limitation Act. Which applies to claims against directors by analogy: see* JJ Harrison (Properties) Ltd v Harrison [2002] 1 BCLC." Of course, if one stops with section 21(3) of the Limitation Act, the result is that a 6 year limitation period would apply to the claim (as opposed to no limitation period at all for cases within section 21(1)).

275. I have already mentioned that the Amended Particulars of Claim assert that it was Craig, not Watersports, who took the management fee. Even if that had been the case, it would not have answered the point as to whether or not, instead of applying the 6 year period provided for by section 21(3) of the 1980 Act, there were grounds for invoking either limb of section 21(1). On the facts of this case there is no basis for concluding that Craig was party to a fraudulent breach of trust perpetrated by the Club's entry into the Management Agreement. Nor does section 21(1)(b) apply. Even if Craig and Watersports could be treated as one and the same and the Club had asserted a proprietary claim in respect of the fees received, it is in my judgment clear that his now established liability to account could not support the analysis of a class 1 constructive trusteeship. That is obvious from the fact that any such constructive trusteeship would only arise from the Club successfully impugning the Management Agreement and not through the Club seeking to follow its original monies into the hands of Craig as if they had not been paid on a contractual basis (or, indeed, as if Watersports had not long since spent them). In fact, the Club's formula for equitable relief on this head of claim is not even a class 2 constructive trusteeship but a personal claim for equitable compensation.

276. Craig's fiduciary status as a director is such as to trigger the application of section 21 to this breach of fiduciary duty by him but the result is that the 6 year limitation period applies. Although it probably did not intend to stop there, the Club's Reply is correct to say that section 21(3) of the 1980 Act applies to this head of claim. Craig is not liable to pay equitable compensation in respect of management fees prior to 30 October 2011.

277. The Reply went on to say that all claims were in any event covered by section 32 of the 1980 Act. But, as I have mentioned, Mr Atkins only sought to invoke this in relation to two years' worth of guest fees and the concept of deliberate concealment plainly can have no application to the Club's entry into the Management Agreement in 2007 and its payments (after deduction of rent) over the following 10 years.

278. Accordingly, my decision on this head of claim is that Craig is liable to make equitable compensation in respect of annual sum of £15,000 paid to Watersports in the period after 30 October 2011. For the avoidance of any doubt, this decision takes account of any continuing reliance by the Club upon the alleged cash payment forming the basis of Item 15 of the Scott Schedule.

Watersports' Counterclaim

279. This the most appropriate place in the judgment to address the counterclaim made by Watersports arising out of the termination of the Management Agreement in January 2017. I mentioned at the outset of this judgment that Mr Sims QC made it clear that his client was confining its claim to the loss of one year's management fee. That was said to be a reasonable period of notice, for termination of the unwritten agreement, and as I understood it, this was on the basis that there should be no offset for rent because Watersports has since left the Site.

280. I need not dwell further upon the quantification of the counterclaim because it follows from what I have said about the non-compliance with the Club's Articles, and the Club's ability to treat the Management Agreement as voidable, that no claim can be made by Watersports in respect of its allegedly wrongful termination.

281. I therefore dismiss the counterclaim.

The Lodge Development Fee

282. I have already explained how I refused the Club's application at trial to amend its case on Item 15 so as to make an alternative claim which it said arose in the light of the defendants' response on the issue. It follows that the Club's claim on that item remains one for the recovery of £50,000 said to have been paid to Craig in 2007/2008 as a one-off fee for initiating and managing the development of the Coln River Lodges area of the Site.

283. In their skeleton argument and opening submissions Mr Sims QC and Ms Gibb said there was no evidence that such a money sum had ever been paid. Their point was that Craig's entitlement to be rewarded for his efforts in promoting the sale of lodges at the Site was satisfied in kind (through the intended transfer of Plot 3) and at an earlier point in time.

284. The Club's witnesses did not seek to identify the alleged payment which formed the basis of this head of claim. As the Club has otherwise been unable to prove that a separate fee of £50,000 was paid to Craig (on its otherwise unparticularised case,

sometime during the years 2007/8) and I refused the amendment application for a switch of focus to Plot 3, this head of claim falls to be dismissed.

285. Indeed, by end of the trial the Club's position had become (through Mr Atkins' closing submissions):

> "*This is a claim for £50,000, being a one off payment made by the Club to Craig in 2007. The Club accepts that this falls to be dealt with as part of the annual management fee (see item 14 above).*"

286. I do not accept that an alleged but unproven one-off payment to Craig has an impact upon my decision in relation to his accountability in respect of annual management fees paid to Watersports but, in any event, I have made it clear above that my decision on Item 14 of the Scott Schedule reflects this suggestion.

287. Nevertheless, although it is therefore unnecessary to dwell upon it for the purpose of any exercise of the discretion under section 1157 of the 2006 Act, I need to set out the defendants' position because of the linkage between Plot 3 and the claim in respect of Plot 11 (Item 22 on the Scott Schedule) addressed below.

288. Craig's position is that the project of developing the Coln River Lodges area, for which he took personal responsibility, was outside the scope of the general management of the Site by Watersports. The terms of his email of 23 December 2006 certainly indicate that to have been his earlier position, when he said that his proposals for Watersports' management fee did "*not affect the lodge deal*."

289. As with the issue over the annual management fee, there is little in the way of a documentary trail concerning that suggested entitlement. Just as any agreements for general management of the Site were never documented, neither was one for Craig's supervision of the development and sale of plots and cabins in the lodge area. The only agreement later concluded in respect of the lodges was the one in 2013 between the Club and CRL; and that agreement was not one in respect of the development and sale of the lodges (or log cabins) but instead for the management of the communal areas and the collection and expenditure of the service charge payable by the lodge owners in return for an annual percentage fee.

290. The minutes of a board meeting on 21 December 2004 (at which all four directors are recorded as having been present) do provide some contemporaneous support for Craig's case that he earned the right to a plot for his work on promoting the Coln River Lodges. Under the heading "Directors Remuneration" they recorded that:

> *"……. A project management fee for CC was discussed, with the possibility of this being in the form of an option on a Cabin site to be explored."*

291. According to the minutes of the later board meeting on 4 January 2007 the directors addressed the management of the lodge development separately from the general management fee in that:

> "*It was further resolved that the previously agreed arrangements between the company and CC relating to the supervision of the development and sale of the Log Cabin's [sic], should be documented at the same time*."

292. For the board meeting three months later, in May 2007, the May Minutes recorded that 6 sites on the log cabin development had been sold: five on the basis of a licence and one by grant of a long leasehold.

293. As already noted, the Club's 2007 AGM took place between those two board meetings, on 27 March 2007, and it was at the shareholders' meeting that the Club's 2006 accounts were approved. As appears from the quote above from the relevant note in those accounts (see paragraph 214 above) they referred to a "*log cabin development fee*" of nil for 2006 compared with one of £20,000 payable to Craig for 2005. The 2005 accounts themselves were not in the trial bundle.

294. When Mr Atkins asked Craig about the reference to a £20,000 fee being paid for 2005 he was not able to explain it. Craig did say that Plot 3, which features in this aspect of the claim to the extent I have already noted, had a value of £20,000 to the Club's bank for whom the plot was part of its security. As for Mr Hamilton, when he was taken to the 2006 accounts he said that he thought the figure of £20,000 related to what the accountants suggested to be the notional value of Craig's work. Mr Hamilton said both that he had not been involved in costing the £20,000 figure (for 2005) and that he did not recall querying it. Mr Garner's evidence in relation to these contemporaneous documents was vague and of no real assistance to me. He certainly did not challenge the assumption of some kind of entitlement in the form of a log cabin evelopment fee (which is perhaps unsurprising given that he was a recipient of the December 2006 email and, as a director of the Club, was privy to the accounts) and said he did not "*specifically remember*" the proposal that Craig would take a plot in lieu of a fee.

295. The board meeting on 4 January 2007 appears to have assumed that an arrangement between the Club and Craig, in respect of his development of the lodge area, had been "*previously agreed*" and needed to be documented. However, allowing for anything that may have been said about the arrangement in the 2005 accounts, there was no document in the trial bundle from the period between that meeting and the earlier one on 21 December 2004 (with the idea of Craig taking a plot to be explored) which evidenced any such agreement.

296. Craig's position was that the Club had recognised the time and effort he had put into the lodge development and agreed to reimburse him for that. Both in his first witness statement and testimony he used language which indicated that he raised the question of a fee only after the lodge development had been completed. In his first statement Craig said he had been motivated to take responsibility for the development by a desire to improve the Club's facilities rather than any pre-agreed payment for his services. However, in his second witness statement he referred to the board deciding in 2004 or 2005 to "*take advantage of the proposal that I had brought to them*" and that it was on the basis that "*I would take full responsibility for the project*" that a "*fixed price fee*" of £50,000 was agreed.

297. Craig's first witness statement put the completion of the lodge development at around March 2005 when there were four show lodges on the Site, supplied by Salop on a sale or return basis. He said the plots were ready for purchase in or around the 2006 season. However, his second witness statement referred to responsibilities continuing after that event, such as meeting with potential purchasers and setting up the management company (CRL) for the benefit of residents.

298. Nevertheless, on the basis that this further statement also referred to him fulfilling his responsibilities "*over a three year period*" (and as those responsibilities began with the selection of a planning consultant and the making of a planning application in October 2002) it seems quite likely that any agreement by the Club to pay him a fee, reached after the board meeting on 21 December 2004, would have been one made *after* Craig had provided most if not all of his services. In fact, as will be seen from the discussion below of the transfer of Plot 3, it appears that any final decision by the Club in relation to this fee was one probably made in 2006 or 2007 when Plot 3 became vacant and, Craig says, the decision was made to transfer that plot to him in lieu of a money payment. In fact, his email of December 2006 can be read as indicating that "*the lodge deal*" had not been resolved by then.

299. Craig expanded upon his witness statement in cross-examination by explaining that he had asked for the sum of £50,000 and that this was agreed by Mr Garner and Mr Thompson. He said that his effort in promoting the lodge area had been considerable and had included site preparation (involving the removal of numerous trees on the north shore of the lake, subsequent levelling of the area and constructing a spit in the lake so as to create separate zones) as well as submitting the planning application which took over a year before permission for up to 20 log cabins was granted. Craig did not recall a particular board meeting being held to discuss the sum of £50,000, saying "*Colin would have met with Ian and they would have made a decision*."

300. I have already mentioned that earlier Mr Garner's evidence was neutral on this issue and certainly not at odds with Craig's position. In his evidence, Mr Hamilton said he was not involved in costing the figure of £20,000 (mentioned in the 2006 accounts as the fee for the previous year) which he thought was a notional value introduced by the Club's accountants. He said that it was in light of the substantial effort Craig had put into the development and the financial benefit to the Club that the directors agreed that Craig should be rewarded for his efforts. This was agreed shortly after the initial steps to bring the project to fruition had commenced, perhaps 6 months into it. Mr Hamilton said this was agreed at board level, and he believed Mr Garner was present, but could not say that shareholders had been told or that it had been raised at an AGM.

301. Mr Garner said that, as the Club lacked the cash resources to pay Craig, it was agreed that he would be assigned one of the plots in lieu of payment but he could not recall which particular plot or whether it was assigned a given value. Mr Hamilton thought that the statement in the 2006 accounts in relation to the fee for 2006 *("£Nil*") reflected the fact that Craig had received Plot 3 in lieu of a cash payment.

302. Craig's witness statement explained how, in 2007, Salop needed one of their show homes (a Tingene 2 bedroom cabin) for use at another location. They removed it from Plot 3, leaving that plot vacant.

303. Craig had no need of a vacant plot at the Site. At that time he and Jane were living in a lodge, known as the Old Lake View Lodge, situated in the garden of the Old Rangoon Pub (and the plot which they had purchased from Mr and Mrs Thompson who had been the landlords of the pub when it was operational from the late eighties until around 2000). However, the Club did not have cash to pay his lodge development fee and Craig says that the Club agreed that he could have Plot 3 as payment in kind.

304. Craig's evidence did not identify any specific or approximate date, or event or meeting, as a reference point for the agreement to transfer Plot 3. In his first witness statement he said that "*as the premiums for leaseholds were circa £50,000, the arrangement suited me*" (this being a reference to a long leasehold interest of 125 years). His statement went on to say "*there was not much point in recording the transaction at that time*" – this would have been around 2007 after Salop had removed their show home – as "*[e]veryone on the Board knew it was mine and treated it accordingly*".

305. In their witness statements, Jane and Scott referred to their understanding that Craig had been "*gifted*" Plot 3, though Jane's statement did say this was "*for all the work he had done to set up Coln River Lodges*". However, neither of them appears to have been involved at the time in any decision to pay a lodge development fee or to transfer Plot 3 in lieu. At the material time the directors were Craig, Mr Thompson, Mr Hamilton and Mr Garner, each of whom is recorded as having been present at the meeting on 21 December 2004 at which the idea of Craig being rewarded was identified as a matter for further consideration. Jane confirmed that her recollection was based upon Craig coming home and telling her that the transfer of Plot 3 had been agreed.

306. This evidence of the witnesses and that which emerges from the documents is therefore vague and unclear as to when and by whom and on what assessment of value, if any, Plot 3 subsequently came to be used to satisfy Craig's suggested entitlement. The path to an agreement after that meeting in December 2004 is sketchy.

307. Nevertheless, although it is not material to a decision on Item 15 of the Scott Schedule, the evidence supports the conclusion (to the extent it may be material to Item 22) that Craig was treated as being entitled to Plot 3 – its beneficial owner – by the time it came to be transferred to Mr Nutt in 9 December 2011. Ms Owens was not on the board before January 2017 but in the witness box she said "*we knew Craig had Plot 3*".

(b) Unexplained payments (presumed to be for the benefit of a defendant)

308. The payments which the Club has alleged are unexplained by the defendants, and presumed to be for the benefit of one or more of them, comprise Items 11, 12 and 13 on the Scott Schedule.

309. I have already explained that those items find reflection in the Spreadsheet and how a yet further version of the Spreadsheet was attached as Appendix 2 to the defendants' written closing submissions.

310. Mr Atkins' opening and closing submissions upon Items 11 to 13 were relatively brief and the Club's position rested with the suggested template for the court to work through the greater part of all 273 items on the Spreadsheet which remained in dispute. The defendants have approached them in much greater detail (through their Appendix 2 with its cross-references to the evidence given upon the 37 payments addressed at trial and submissions on all 273).

311. At the general level, the parties made the following competing submissions.

312. The Club's position was that little reliance could be placed upon the inclusion of a payment in the Quickbooks system, particularly when there was nothing but a pink slip to support it. Mr Atkins referred to and asked Craig and Scott questions about a number of payments with the reference "CL Trade Creditors" (denoting a current liability of the Club) in the QuickBooks notation on the Spreadsheet but which, as Craig or Scott conceded, related to a payment which should be reimbursed to the Club. Therefore, the inclusion of an item within the Quickbooks records could not, despite the involvement of Mr Morris in recording it, be taken as a reliable guide that the payment had in fact been for the benefit of the Club.

313. Against that, the defendants said that the Club had been guilty of pejorative references to the pink slips as if (when not accompanied, in the trial bundle at least, by other documentation to support the particular item of expenditure) they should be treated as bogus pieces of paper rather than duplicates of invoices raised by Watersports to the Club and others. They say the invoices were raised and passed to Mr Morris and entered onto the Club's books and records, including on QuickBooks. Mr Morris said if Craig and Scott did not submit the paperwork to him then he could not make the entry in Quickbooks. Therefore, Ms Owens had been wrong to assume the worst, indiscriminately marking items as 'NFC' ("*not for Club*") when in many cases supporting documents, which had been disclosed, or an explanation from Craig or Scott indicated the opposite.

314. Mr Morris also gave evidence that he had never raised concerns about the use of the Watersports invoices (or pink slips) and treated them as supplier invoices; that he carried out reconciliations of receipts and petty cash disbursements on a periodic basis coinciding with the submission of quarterly VAT returns; that statements from suppliers were not kept once payment was made; that, in his view, the Club kept very detailed accounting records; and that it was rare that any large adjustments were made over the 10 years in which he was the Club's bookkeeper and accountant.

315. In relation to statements from suppliers, Mr Morris explained that a particular payment by the Club might comprise more than one supplier invoice. He referred to Hills Waste having invoiced on a weekly basis but being paid monthly (the challenge on certain payments to Hills Waste was one of those conceded by the Club in opening). Multiple invoices might be reconciled to one payment but the system would not reveal this to a subsequent observer.

316. Mr Morris' evidence therefore supported the conclusion that payments by the Club were cross-checked by him against paperwork. However, he made it clear that the column on the Spreadsheet marked 'Quick Book System Notes' were not his notes but instead (as Craig explained in his evidence) were compiled by Baldwins Accountants, who were asked to analyse the Spreadsheet items alongside QuickBooks in the context of these proceedings.

317. Craig and Scott said that there would be occasions when an invoice would cover items supplied both to the Club and Watersports. In such instances, the invoice would remain with Watersports who would raise an invoice (represented by a pink slip) to the Club and the underlying supplier invoice would not have been provided to Mr Morris.

318. They also recognised that there were instances where Watersports would charge the Club a margin for what was said to be the cost to Watersports of labour, time or other expenses incurred in obtaining goods or services for the Club. This charge was said to be justified on the basis that it fell outside the (unwritten) range of Watersports' management duties; for example, collecting sand bags from Brize Norton. They frankly admitted that the amount of margin was left to whoever completed the pink slip. Craig said he applied his common sense as to how much should be added, but would "*roughly knock on 20 per cent, which is a standard sort of rate for a handling charge*." Scott said he has spoken to Mr Morris about the likely value of the Watersports' margin, over a 10 year period, which "*Russell seemed to think was less than £1,000 a year if we had achieved a 30 per cent increase in the recharge."*

319. It is the recognition by Craig and Scott that they must have considered it appropriate to pass to Mr Morris, for inclusion in the Club's books and accounts, items that were not properly for the Club and their practice in imposing ad hoc uplifts for Watersports on expenditure which was for the Club which causes me to have real concerns about this aspect of their case. Were it not for the fact that many of them were accompanied by a supporting invoice (without the mark up) and the evidence indicating that they were all passed to Mr Morris for his consideration (even if some should not have been) there might even have been doubt over the authenticity of a significant number of the pink slips. Many of them were completed in such general terms (eg. "Van Fuel - £110" or "12 months tax on van - £225" or "site hours" for one Dan Beebee) as to prompt concern that they could have been created as part of a paper trail to support the making of certain payments at the Club's expense. However, the evidence does not justify that conclusion and I remind myself of the point made by Mr Morris about undertaking periodic checks and reconciliations.

320. Ultimately, the evidence summarised above and the parties' competing contentions as to the proper approach to Items 11, 12 and 13 reinforce my conclusion (see paragraph 135 above) that, with the exception of those pink slips which show the addition of a Watersports' mark-up on the value of third party goods or services said to have been provided to the Club, I should only address in this judgment those items which were adequately explored at trial. I feel this judgment is already disproportionately long when compared with the duration of the trial, though perhaps less obviously so when compared with all the points raised for my determination by the parties' respective written submissions (referring in detail to the Scott Schedule, the Spreadsheet and the evidence upon each). I have already explained why, as a matter of principle, this

judgment should not become any longer in dealing with items that were not properly aired at trial.

321. Nevertheless, the evidence does in my judgment establish that Craig and Scott failed to observe their duties as directors in two significant respects.

322. Firstly, they failed to ensure that the Club's monies were used only for expenditure properly for the Club's account and benefit. Their acceptance that the Club paid for certain items when it should not have done so demonstrates this point.

323. Secondly, it obviously did not occur to them, when exposing the Club to the Watersports' mark-up, that this involved them submitting to the competing interests of Watersports which it was their duty to avoid.

324. There was no agreement with the Club by which these added charges could have been justified. The continued absence of any written management agreement (of the type envisaged in 2007) meant that there did not exist clear terms by reference to which Craig or Scott might at least have attempted to make a case for saying that the nature of the services provided by Watersports in return for these ad hoc charges was beyond the scope of the £35,000 p.a. fee.

325. It is surprising that the practice of adding a mark-up was not picked up by Mr Morris, not least because the charging by Watersports of VAT on the gross uplifted sum appears to have resulted in the Club paying most of the VAT element twice (the first being the VAT on the supplier's invoice). However, it was the duty of Craig and Scott as directors not to submit to this added charge which served their own personal interests.

326. I found the explanations that they gave at trial for adding the mark up to be wholly unconvincing even though more credible testimony would probably not have relieved them of their obligations as fiduciaries. For example, Mr Atkins asked Scott about item 201 on the Spreadsheet, which related to a pink slip covering invoices for the supply of weed killer and two tractor tyres (and incidental fittings) together with a mark-up. Initially, the defendants had conceded that the sum of £103.72 ought to be repaid but that figure was not readily identifiable from either the pink slip or either supporting invoice and Scott said that they may have been mistaken to do so. In relation to the tractor tyres, the pink slip identified the sum of £561.49 to which VAT (including on the supply of the weed killer for which VAT had already been charged by the supplier) was then added. The underlying invoice from the ATS centre in Cirencester was for the VAT inclusive sum of £461.49. That invoice charged not only for the two tyres but also, it appears, for the wheel alignment and valves and valve caps on both. It advised (albeit in a standard statement on the invoice) about the need to re-check the tightening of the wheel nuts after a certain distance. When I asked Scott about the value suggested to have been added to this by Watersports, to justify the uplift, he said: "*But the tractor would not have gone to Cirencester, we would have gone to Cirencester to collect the tyres and then somebody fitted them on site*." I then asked him whether he could recall somebody at Watersports doing this and he then said: "*No, I don't recall*". The evidence, such as it is, indicates to me that the tyres and valves were fitted by the specialists at the tyre depot.

327. Having reflected upon the items in the Spreadsheet (and the rival points upon them as most recently identified in the defendants' Appendix 2) my conclusion is that the Club has made out its case in relation to Items 11, 12 and 13 of the Scott Schedule to the extent that any payment post-dates 30 October 2011 and is either one which (a) Craig or Scott either concedes or has in the past conceded should be repaid in a certain sum (in which case the value of that concession is to be held against them even if they have subsequently sought to withdraw it) and/or (b) reflects the value of a mark-up added by Watersports (with or without VAT) on what I presume to have been third party supplies to the Club. In my judgment, this level of recovery is justified by reference to the fiduciary accountability of Craig and Scott. That could be under any of sections 171 to 175 of the 2006 Act.

328. Despite my more general concerns about their position on these three items in the Scott Schedule (as tempered by the knowledge that the trial bundles probably did not contain all of the relevant documentation) there is no firm evidential basis for holding them accountable for other payments.

329. The parties should be able to reach agreement upon the total sum identified by the two categories of payment by working through the Spreadsheet, failing which disagreement over any particular payment can be put to me for my determination.

330. The total sum is one for which Craig, Scott and Watersports should each be held accountable. There is in my judgment no scope for relief under section 1157 of the 2006 Act.

(c) Specific payments by the Club alleged to be for the benefit of a defendant

331. The Scott Schedule contains a number of items by which the Club seeks to recover expenditure by it which it says was for the benefit of one or more of the defendants. I have just dealt separately with the Club's challenge to the Watersports putting its mark-up on the amount of third party invoices for services or supplies to the Club in the previous section of this judgment.

Advertisements

332. Item 1 of the Scott Schedule is a claim to £621 in respect of the cost of two magazine advertisements placed in 2011 and 2013 and paid for by the Club. The defendants had accepted that the cost of the first (of £141) should have been borne by Watersports but they dispute liability in relation to the other (invoiced by Ten Alps Media at a cost of £480). However, in his testimony, Scott said that he considered the £141 had been wrongly conceded – he believed the cost had been correctly attributed to the Club – and the version of the Spreadsheet attached to their written closing submissions sought to have the concession removed.

333. The disputed invoice shows that the advertisement was a double page spread appearing in Issue 1 of the magazine "Waterski and Wakeboard" in December 2011. The invoice dated 7 December 2011 was made out to "Craig Cohoon Waterski

School", as the "client", but a manuscript amendment was then made to it as if the addressee of the invoice should be "Fairford W.S.C" (i.e. the Club). It specified a payment date of 21 December 2011.

334. When asked about this invoice Craig said that it was an opportunity to draw interest in the Club from those attending the London Boat Show in January. He said that he had booked the advert and that Watersports would have made a couple of such magazine bookings that year but, as a double-page spread, this one was "*for the Club as well*". He did not recognise the handwriting of the amendment and did not know why the amendment had been made. Craig was uncertain as to whether it had advertised the Club's lodges but thought it probably would have on the basis that the lodges provided an ideal location for waterskiing.

335. Scott said it would not have been an advertisement of the Watersports' shop, as it no longer advertised its products at that stage, though he accepted that there may have been a mention of the ski school. However, the advert was not properly to be regarded as a shared one, between the Club and Watersports, as Watersports would not have advertised in the winter. He said there would have been a background photograph of part of the Site but was not able to recall whether the advert would have featured a picture of a lodge.

336. In her evidence Ms Owens said that the defendants had indicated to her that they would provide a copy of the two adverts but they had not been provided. This was disputed by Craig and Scott, who said they did not have a copy of the adverts.

337. The defendants submitted that, even if there was passing mention of Watersports in the advert, this should be regarded as *de minimis* so far as any doubt about attributing the cost to the Club was concerned.

338. I disagree. In my judgment, the evidence of Craig and Scott was not persuasive in displacing the conclusion that the terms of the invoice (before the manuscript alteration in the name of its addressee) correctly identified the client who benefited from the advert and the party who should have paid it: Watersports. Nor do I think the evidence of Scott was clear enough to justify the court re-visiting the concession made in relation to the separate sum of £141. Indeed, the vacillation on the point reinforces my conclusion, on this Item 1, that Craig and Scott, as directors, were not sufficiently careful to ensure that the Club only made payments in respect of costs properly attributable to it.

339. Accordingly, Craig and Scott are accountable in respect of Item 1. Again, any of sections 171 to 175 of the 2006 Act support their accountability. There is no limitation point to be taken in the light of the date of the invoice.

Cheshire Mouldings

340. When the Claim was issued the Club sought to recover the sum of £14,599 as the amount of invoices raised by Cheshire Mouldings and paid for by the Club between April and July 2015. The invoices were said to be for the supply of decking at the

lodge belonging to Craig and Jane on Plot 11. This claim forms Item 3 on the Scott Schedule.

341. The Defence said that the defendants had already addressed this claim, as it was a matter covered by a series of repayments to Club made in March 2017 and totalling £67,305. However, as appears from the summary of their case in the Scott Schedule, the combination of one of the Cheshire Mouldings' Invoices being overlooked and a miscalculation of the balance on Craig's director's loan account (when that calculation was material to the repayment) meant that they accepted that a further £8,591 was due in respect of this item.

342. By the start of the trial the Club was content to accept the accuracy of that balancing figure, subject to one point. The point was whether the defendants were correct, when calculating that figure, to say that shareholders of the Club were entitled to a discount not just in relation to the Club's membership fees but also in the ground rent payable in respect of any lodge or static caravan. They said that the calculation reflected the fact that the March repayments had failed to take account that Craig and Jane had paid the Club ground rent of £2,837 for the years 2015-17 when the number of shares in the Club held by them meant that they should not have.

343. In his witness statement Craig said that he and Jane were entitled to such an annual discount of £68 for every 100 shares held in the Club. He said that his holding of 4,192 shares and Jane's shareholding of 2,030 shares were such as to generate a total discount of £4,230 p.a., which was more than enough to wipe out their liability for ground rent. Accordingly, they should not have paid it.

344. Therefore, for the purposes of reaching a decision on Item 3 of the Scott Schedule, the only question I need to decide is whether or not holding a shareholding in the Club entitles the shareholder to a credit against ground rent as well as membership fees.

345. The first point to note is the obvious one that, despite holding those shares and despite Craig being a director of the Club during the period 2015 to 2017, Craig and Jane paid their ground rent as if no shareholder's discount applied. Scott, who also held a substantial shareholding, also paid his arrears of ground rent liability when asked to do so by the new board in 2017 when on the defendants' case he could have refused to do so.

346. Craig said in his testimony that the discount attached to a shareholding could be set off against either membership fees or ground rent payable to the Club. However, Mr Morris said his understanding, derived from Craig and Scott, was that the discount could be set against club membership fees or pitch fees owed by an owner of a static but not against the liability for ground rent in respect of the lodges.

347. The true position, in my judgment, is reflected in Mr Morris' understanding as corroborated by the ground rent payments that Craig, Jane and Scott were in fact content to make. The sum of £2,837 does not fall to be deducted from the sum of £8,591. Although Jane had been appointed to the board by the time of the Cheshire Mouldings payments, there is no indication that she was involved in the decision that the Club should make them. In any event, the Club (per the Scott Schedule) seeks to hold only Craig accountable in respect of them. Accordingly, I find Craig is liable to account for the £8,591.

Black Boat Repairs

348. Item 4 on the Scott Schedule is a claim for the cost of £403 in respect of repairs to a boat owned by Watersports which was paid by the Club in September 2016.

349. Craig had suggested in his first witness statement that the sum had been debited to his director's loan account. However, the defendants' justification for the Club bearing the cost came to rest with the point that the Club had been making use of the boat (for lake maintenance over 2 or 3 years) and Watersports had not charged the Club for such use. The defence to repayment was therefore that charging the Club for the repairs was justifiable or, alternatively, that its use of the boat meant that it had suffered no loss.

350. The background explanation given by Scott in the witness box was that the outboard motor on the Club's own boat had been stolen and, although its loss had been covered by an insurance claim, no replacement motor was purchased because there was a concern that the replacement might also be stolen. As Mr Atkins submitted, this explanation had not been given before and did not really explain why a replacement outboard could not have been stored securely when not in use (as Scott appeared to accept) but, in any event, Watersports had not formally raised a contra-charge in respect of the use of its boat. There was no pink slip and Scott accepted there had been no charge for use. However, he said the boat was damaged when the Club was using it.

351. This item provides a good illustration of the potentially acute conflict of interests faced by Craig and Scott as directors in the light of their stake in the Watersports business. In my judgment, their decision as directors to let the Club bear the cost of repair was not consistent with their duties when the reason for doing so was an after-the-event one which involved them deciding that the Club should pay for a decision not to apply the insurance proceeds as the insurer would have intended (or, to put it another way, to treat the loss as if it was uninsured).

352. The Scott Schedule refers to Craig being held accountable for this item but, as a matter of analysis, each of Craig, Scott and Watersports (where those two partners were aware of the wrongful receipt) ought to be accountable for the £403. Each of sections 171 to 175 of the 2006 Act supports this conclusion.

Re-Stain Lodge

353. Item 5 on the Scott Schedule is a claim for £900 which was said to be the cost of re-staining Craig's lodge. The Particulars of Claim gave no specifics in terms of when the Club had made this payment or to which lodge it related. The undated payment slip to which reference was made was in fact a pink slip which stated "*Re-stain Hyslop Lodge inc Paint - £900*". Scott said it was his handwriting but he could not remember when he had completed it. The Club did not adduce any evidence to link this apparent expenditure to a lodge in fact owned by Craig and, by the date of her

second witness statement, Ms Owens was focussing more upon the absence of a supporting invoice to justify it.

354. The defendants' case is that the re-staining was indeed that of a lodge occupied by Mr Hyslop under licence. Scott said this was the lodge on Plot 4 and that the terms of the licence agreement put the periodic obligation to re-stain upon the Club. Ms Owens did not dispute the existence of that obligation under the terms of a licence (as opposed to long lease) of a lodge. Scott thought that the expenditure would have been some time ago as Mr Hyslop had subsequently bought a long lease and then sold to Mr Dyson in around 2014. He also said that, to the best of his memory, the re-staining was done by a friend of his trading as AP Decorating and that, despite what the pink slip said, it was likely the £900 was labour only as he recalled buying the paint at £60 per tin.

355. Even allowing for the fact that any underlying invoice from AP Decorating, or any other tradesman or supplier, may well have may have been submitted longer ago than the start of the 3 year period over which accounting records for the Club ought to have been kept (to accompany the pink slip raised by Watersports) I found the defendants' evidence on this aspect to be highly unsatisfactory. As a director of the Club Craig should not have been accepting an invoice (prepared by him on behalf of Watersports) which was undated and, if the Club had a re-staining obligation, then the Club should have been invoiced direct for the labour and materials.

356. Nevertheless, although this process of alleged expenditure and re-charge by Watersports invites challenge, in my judgment the Club has not made out its case that Craig caused the Club to pay £900 for the re-staining of his own lodge.

Swimming Pool and Boat Lift

357. Item 6 on the Scott Schedule is the sum of £18,291 which the Club seeks to recover from Craig, Scott and Watersports on the basis that they caused the Club to pay it as the cost of the work of installing a swimming pool (or, more accurately, a cordoned-off area of the lake with a jetty perimeter) and a boat lift which were in fact for the benefit of Watersports.

358. Ms Owens' evidence was to the effect that she had been informed by a number of Club members that they had not used the area and would not let their children play in it. She referred to the swimming area having been condemned as a result of the health and safety inspection in 2017 (because its position exposed it to the danger of boats performing high-speed turns opposite) and to the fact that broken glass had remained in the water as a result of a storm in 2015. She referred to the perimeter and jetty being dismantled and to the fact that (the material having been used to construct a Club jetty elsewhere) the Club had offered the defendants £4000 in materials against this head of claim.

359. Those matters would not, in my judgment, be enough to establish that the swimming pool and boat lift were not installed for the benefit or partial benefit of Club members. I have already mentioned how Ms Owens eventually accepted that she had received a Club circular in May 2013 referring to a proposal to create a swimming area for the children of members. However, the Club points to the terms of the invoice submitted

by RA Marine Ltd in the sum of £18,291. This took the form of a letter from Richard Horn of that company with explanatory notes providing some detail of the work carried out in 2013. It was addressed to Craig, on behalf of "Craig Cohoon Watersports Limited" and had the typed date of 3 August 2013. That was consistent with the accompanying notes about the detail of the work undertaken that year. Manuscript annotations on the letter/invoice show "QB" (for Quickbooks) and a crossing out of the typed date in favour of "30/6/14". Craig thought, without being sure, that it was Mr Morris' writing. It also contained a credit for £210 in respect of "RA Marine purchases" which can only have been in respect of purchases made from the Watersports shop. The invoiced sum also reflected a 10% discount.

360. The summary of the work attached by Mr Horn comprised 10 items. Craig and Scott each addressed these in their evidence. The first item (which referred to the removal and modification and re-fitting of jetties "to Craig's lifts" in the sum of £800.10) was conceded by Craig to be for the account of Watersports. He also accepted that the last item - the supply and fit of a boat lift for Peter Joyce at £3,625 - would have been for the account of Watersports on the basis that (as supported by a witness summary from Mr Joyce who said he had paid Craig £4,000 in cash for the lift) Craig had received and retained the sale proceeds. However, Craig denied being accountable for that item on the basis that Watersports had left a boat lift of at least equal value for the benefit of the Club when Watersports left the Site. Craig initially assumed, without knowing, that the £210 credit reflected the fact that RA Marine had "*bought something from us*" but then retracted that statement.

361. Scott recognised that credit would have been in respect of purchases on a Watersports account. Looking at the 10 items, Scott said:

> "*I made a note of what I – just bear with me a second. My personal view on [document D1/53]: is item number 1, I was not sure. Item number 2, I was not sure. Item number 3 was Fairford Waterski Club's. So was item number 4, 5, and 6. 7 could possibly have been a Cohoon Watersports, along with item number 8. There does not appear to be a number 9, for some reason. Number 10 was Fairford Waterski Club. And number 11, I was not sure*."

362. This testimony reveals just how rough and ready, and inconclusive on the question of proper attribution, the exercise was of posting items for the account of the Club in the Quickbooks system. Craig's position that it was a mistake that the Club had been charged for the Joyce boat lift but there was now a contra charge to be raised against it was one of a number of examples of the defendants seeking to lessen the impact of clear directors' duties by reference to some general "merits" point. In fact, that Club's position was that it had no idea what Craig was talking about when he referred to Watersports having left behind a lift of equivalent value. For completeness, I should note that the argument at trial did not extend to consideration (including by reference to Watersports' lease) of whether or not Watersports chose to leave any such item or whether it had become annexed to the Site as a fixture.

363. As directors, Craig and Scott ought to have been more scrupulous at the time in ensuring that the Club did not pay for items that were not properly for its account. My judgment, in the light of the evidence on this item, is that Craig. Scott and Watersports should account for the following items: number 1 (£800.10); 2 (£1991.66); 7 (£28.50); 8 (£37.50); and 11 (£3,625). That makes £6,454.26 to which

the 10% discount should be applied and VAT added: £6,161. As I understand the position, the Club has already given credit elsewhere for the £4000 of re-usable materials but that will be a matter of record between the parties. This finding is supported by each of the duties in sections 171 to 175 of the 2006 Act.

One Month's Salary

364. Item 7 on the Scott Schedule is a claim for one month's salary. The sum of £3,427 was paid to Craig on 3 January 2017 under a standing order on the Club's bank account. The Club said it should be repaid in circumstances where Craig resigned his directorship that month.

365. However, the defendants had responded by saying that not only was Craig still a director at the time the payment went out of the Club's account but the payment was part of the Management Fee (Item 14 on the Scott Schedule) which I have addressed above. The defendants said the Counterclaim under the Management Agreement supported Craig's retention of the sum. By the time of trial, the Club agreed that the sum had been drawn as an instalment of the £35,000 management fee and that this item should therefore be considered as part of Item 14.

366. On that basis, and in the light of my findings upon Item 14 and the counterclaim, Craig should repay this sum. However, that conclusion is subject to clarification as to how that January 2017 instalment was calculated. It does not appear to be an amount which reconciles with a periodic payment of a net £15,000 or a gross £35,000 per annum (with or without VAT). What I intend is that, to the extent that the whole of the payment of £3,427 represented only a presumed net entitlement of £15,000 p.a. it should be repaid. If, however, it can be shown that the sum was paid towards an intended gross receipt of £35,000 p.a. then I make the assumption, for the purposes of this head of claim, that part of it (four-sevenths) found its way back to the Club in the form of rent before the Club took steps to avoid the Management Agreement; so that Craig should only have to account for £1,958 of it.

Telephone Bills

367. Item 8 on the Scott Schedule is the sum of £2,553.97 identified by the Club as being the cost of a telephone used by Watersports but paid for by the Club between 2011 and 2017.

368. However, when the defendants pointed out that Watersports had its own telephone line, for which it paid, the argument shifted to this being the cost of a broadband facility which Craig and Scott said was for use by the members of the Club and was provided for over 10 years.

369. The relevant invoices from BT were addressed to the Club at Watersports' address. It can be seen from some of them that they were submitted under an account for the provision of a telephone number and broadband. Craig said the relevant telephone number was one for the Club and related to a telephone located in Watersports shop.

It was not for the use of Club members but instead for people to contact the Club. Craig said he had phoned the number the day before he gave evidence at trial and it was still live. He said that the phone was not used to make calls (he said the bills supported this) but was for incoming calls and to support the broadband facility.

370. Ms Owens said she had asked members of the Club about this. They told her that they did not know that a telephone or broadband facility was available for their use. She said there was no reason why the Club would provide this facility for the members anyway; it was not covered by their membership fee and those with statics and lodges had their own facilities.

371. In his oral evidence Scott accepted that lodge owners would be too far away to use the facility but he said that the owners of statics used to drive round to the car park behind the shop to do so. He also referred to a covered area near the shop where the children of members would sit and use the wi-fi. The wi-fi code was available within the shop. Scott accepted that he allowed Watersports' own customers to use it.

372. Although those customers (and therefore Watersports indirectly) benefited from the use of the broadband facility, the evidence does not in my judgment support the conclusion that Craig and Scott breached their duties to the Club in causing it to pay the cost of it.

373. This conclusion is reinforced by the inclusion of expenditure upon *'Coms – Telephones*' in the management account information that was provided to Mr Morris for the purposes of his bookkeeping and preparation of accounts on behalf of the Club. As the defendants pointed out in their closing submissions, detailed accounting information was provided to Mr Morris in the period 2008 to 2016. This was contained on a memory stick which Mr Morris had provided to the parties' solicitors and paper versions of the electronic spreadsheets were added to the trial bundle. I was told that neither side had interrogated the figures. Whether or not amounts in the BT invoices are clearly reconcilable with the relevant entries in the spreadsheets, it would be wrong for me to assume that those amounts were not reflected in the information passed to the Club's accountant.

374. None of the defendants are accountable in respect of this item.

Electricity and Water Charges

375. Item 9 on the Scott Schedule is the sum of £4,900 in respect of the cost of electricity and water supplied to Craig and Jane's lodge but paid for by the Club between 2011 and 2017. As usage of these supplies was not metered until 2017, the Club has based its claim upon an estimated cost of £700 per year. That estimate is based upon the average cost for these utilities in a lodge of similar size.

376. The lodge in question is now known as Lake View Lodge and let out through Airbnb (though in her evidence Jane complained that Ms Owens had chosen, out of all other potential storage areas on the Site, to place a static caravan in a position which obscured its view of the lake).

377. Craig and Jane had accepted that the Club paid for water and electricity for their Lodge and originally offered £574.86 based upon what they say was their own relatively limited occupation of the lodge in that period and its letting out though Airbnb for 151 days. In her testimony, Jane explained that, when their house was being renovated in 2013, they had spent 2 or 3 continuous weeks in the lodge and that she, Craig and two children would also spend the summer holidays there. Otherwise, on their visit to the lake they would generally go back to their house for the night.

378. However, by his second witness statement, Craig said that there should be no accountability under this head of claim because Scott had been prepared to act as Company Secretary in place of Mr Thompson, without payment, and Watersports had paid for certain electricity consumed by the Club. Accordingly, he said, the Club had suffered no loss.

379. I have already mentioned how the defendants sought to include such matters within the countervailing benefits raised in response to the Club's challenge to the management fee. In my judgment, there is no proper connection between them and Item 9.

380. Adopting a broad brush assessment to this head of claim which has been formulated by reference to comparable usage/cost, I have decided the appropriate measure of accountability is £1,500. Craig should be held accountable for that sum under section 175 of the 2006 Act. I see no basis for holding Jane accountable. She was only on the board for the last 2 years of the period in question, and only then with the lack of active participation on her part already explained above. The decision implicitly if not expressly made to extend free electricity and water to the lodge from 2011 onwards was one in which Craig (if no other then director of the Club) was involved. The only other director who might potentially be held accountable for it in these proceedings is Scott but the Club does not (by the Scott Schedule) seek to hold him liable for this item. Accordingly, the liability is Craig's alone.

Wakeboard Jumps

381. Item 10 on the Scott Schedule is a claim for £12,004, representing the cost of wakeboard jumps installed at the lake paid for by the Club but which it says were for the benefit of Watersports.

382. Craig and Scott said that they installed the wakeboard jumps for use by the members of the Club and to attract new members (as wakeboarding was increasing in popularity). Ms Owens recognised that some Club members were wakeboarders but she pointed out that Craig had not purchased any jumps for those who were water skiers. She made the point that the jumps had quickly been removed at the request of members when the new board was appointed in 2017.

383. Initially, Craig and Scott had said that their ski school would have no use for these jumps, as it would be dangerous to let novices onto them. However, Craig did concede that some advanced students of Watersports might have used the jumps and Scott said that Watersports had one professional wakeboarder who used them. However, they made the point that Watersports did not have a wakeboarding boat (as

opposed to a "crossover" boat) and their case is that any benefit for their business was purely incidental.

384. Craig and Scott also said that Club had sold the jumps for £3,000 but failed to give credit for that sum. This was disputed by the Club, which said that it had given that credit when formulating the claim and this point was not pressed by the defendants in closing submissions.

385. On this item I prefer the evidence of the Club to that of the defendants. As Mr Atkins pointed out, it is supported by the inclusion within the trial bundle of an undated advertisement, by which Watersports advertised these "Spine Kicker" and "Roof Top" jumps on which experienced wakeboarders might test their skills, and by an invoice dated 2 May 2014 for the supply of the two jumps from Germany, which was addressed to Watersports.

386. In my judgment, Craig, Scott and Watersports are liable in respect of this item. The finding is supported by each of the duties in sections 171 to 175 of the 2006 Act.

(d) Payments not collected for the Club or collected but not paid to the Club

387. Item 17 on the Scott Schedule is a claim for £9,600, being the estimated sum of guest fees which Craig and Scott should have collected but did not collect for guests of members using the lake over a period of eight years beginning in 2010. Item 18 relates to membership fees payable in the three years 2014 to 2016 which the Club says were either not collected or collected by them but not remitted to the Club. The Club now says the value of Item 18 is £121,792 (when unrecovered ground rent and electricity charges are added to the missing membership fees) but the defendants point out that the pleaded value of this item is £67,200 (a figure advanced in Mr Godden's first witness statement) and the Club has not sought permission to amend.

Guest Fees

388. The Club has based the value of Item 17 upon an estimate that fees payable by members in respect of guests would have been payable since 2010 at the rate of £1,200 per year.

389. The first point I should make is that I consider all bar the last two months of the first 2 years of the period covered by this claim to be statute-barred. Although the defendants' revised position (as explained below) and Craig's testimony opened up the possibility that guest fees may have been collected and then passed to Watersports (so as to raise the possibility of class 1 constructive trusteeship) the pleaded case is to the effect that members were not charged for their guests when they should have been. In my judgment, the evidence does not support the conclusion that there has been deliberate concealment by either Craig or Scott of any breach of duty by them resulting from their failure to collect for the Club's benefit fees from members' guests. As a separate point, I would add that the evidence of Mr Hamilton (their co-director during the relevant period) did not address his awareness or otherwise of any

dip in the amount of guest fees during those two years, when (applying the 'statement of claim' test applicable to section 32(1)(b) of the 1980 Act) one would expect that to be a point pleaded by the Club. Accordingly, section 32 of the 1980 Act does not apply and there can be no recovery in respect of the period prior to 30 October 2011.

390. As to whether or not there should be accountability in respect of the balance of the period, in his first witness statement Craig accepted that he had failed to collect guest fees. However, he said that the correct estimate for this item was £3,000 and so offered that sum instead. In testimony, Scott said that the Club was wrong to use the year 2017 as a comparator as, by that stage, Watersports had ceased to operate as a ski school and it was likely that guest fees would have increased. Scott's evidence was that the guest fees in 2016 were £470. The defendants also suggested that some guest fees had been collected for the Club over the relevant period for which the Club had not given credit. Although it was not addressed in evidence (the relevant spreadsheet was inserted in the trial bundle after the evidence had been closed and the trial adjourned for a day of closing submissions) I note that a spreadsheet of accounting information provided by Mr Morris indicated that guest fees of £375 *may* have been credited to the Club in 2016.

391. In his second witness statement Craig retracted the offer made in his first one, saying that under the term of the partnership's Lease from the Club such fees were payable to Watersports. The defendants relied upon clause 2.2.1 of the Lease which provided: "*the right to use the Lake and the sole right to charge members of the public for water-skiing on the Lake (subject only to the Landlord's right to charge its members)*".

392. The Club submitted that there was nothing in the point as Watersports' right to charge members of the public for their use of the lake had nothing to do with Craig's duty as a director to collect guest fees from members for their guests. Mr Atkins remarked that Craig's willingness to take such a point spoke volumes about his appreciation of his duties as a director of the Club. The reservation of the Club's "*right to charge its members*" plainly extended to the right to charge them for any use of the lake by their guests and the Club rules made it clear that guest fees are payable by a member bringing the guest. The maximum number of guests for a boat owning member was 10 per season and if guest fees were not paid (at Watersports' office) a member risked suspension. The Club's right to charge guest fees sat side by side with Watersports' right to charge its own customers under its lease of the lake which was a right it would not otherwise have.

393. In my judgment, the Club's interpretation of the Lease is clearly the correct one.

394. The defendants' fall-back position was that, if they were accountable at all, it should be at the rate of £470 p.a. indicated by Scott's evidence. On the available evidence, my decision on this head of claim is that Craig, Scott and Watersports are accountable for 6 years of guest fees at the rate of £500 p.a. which coincides with Craig's initial position. This takes account of any point that might be read into Mr Morris' spreadsheet (for 2016) mentioned above. Section 175 of the 2006 Act supports this finding.

395. There is no scope for relief under section 1157 of the 2006 Act when Craig's evidence was that he relied upon what I consider to have been his unreasonable interpretation of the Lease in deciding for himself that the fees should be paid to Watersports.

Membership Fees

396. I have already mentioned that the Club's pleaded case in support of Item 18 is that £67,200 of membership fees had either not been collected by Craig and Scott or collected but not remitted to the Club.

397. When cross-examined about that figure by Mr Sims QC, Mr Godden appeared to accept that his first witness statement did not clearly explain the basis of that calculation. It seemed to involve an assumption that fees for 7 members - at an average of £1600 p.a. – were missing over a 6 year period. However, he said that the correct figure for a shortfall was the sum of £121,792 identified by his second witness statement. That sum was made up of what were described as "*the total missing fees*" for the years 2014, 2015 and 2016 when compared with the fees (of £144,935) collected by the new board for 2017. The figures comprised not just membership fees but also electricity charges and ground rents. It is the alleged shortfall in receipts for the three years in respect of those three charges which the Club now seeks to recover under Item 18.

398. Mr Godden said that the membership numbers did not significantly change over those four years and that a logbook which Mr Coxhead kept for recording electricity meter readings indicated that the Site was more or less full during that period. Mr Coxhead's lists indicated that the 41 occupants shown for 2017 was no more than one or two more than the number in each of the preceding 3 years.

399. In the witness box Mr Godden explained the prompt for his approach to a comparison with the 2017 receipts as follows:

> "*The reason why we have done this is we went back to all the data right from the beginning, so when we took over the club the data was scarce to say the least. When we asked Scott for the date that we can calculate all the fees on, he said he walked round the site and just made notes, then came up with his database which was in his head*."

400. Mr Godden's supporting spreadsheets were said to take account of all the payments which Craig and Scott had remitted to the Club (and which could not be ascribed to other matters) which still resulted in a substantial shortfall in each of the years 2014, 2015 and 2016.

401. The defendants contended that the Club's approach was flawed in a number of respects. First, they said that Mr Godden's evidence amounted to accountancy opinion evidence advanced by someone who is not an accountant and not independent. Mr Atkins disputed this, saying that Mr Godden's evidence was based upon a factual analysis, which reflected fairly constant membership numbers and the level of receipts in 2017, rather than any opinion. Secondly, the defendants pointed to the significant increase in the amount of the claim compared with the initial figure of £67,200.

Thirdly, they said that Mr Godden had not adopted the more instructive approach of preparing a schedule which identified particular members who were said to have paid monies to either Craig or Scott which could then be shown not have been passed on to the Club.

402. Mr Godden accepted in his cross-examination that it might be the case in some instances that some membership fees were not received in the first place, as opposed to have been collected and not remitted to the Club. This led the defendants to submit that any outstanding fees or rents due from a member who had not paid what was due should be sought by the Club from that member rather than from themselves.

403. In relation to those members who had paid their fees, Mr Godden said that a membership fee could have been paid in a number of ways. The fee could have been paid into one of three bank accounts (the Club's, Scott's or Watersports') or in cash or by card machine. He also said that some outgoing members who could not afford to pay their membership would leave their static to the Club so that it might then be sold to cover the fee.

404. One of the hearsay statements sought to be relied upon by the Club, made by Mr Jamie Hall who purchased a static in 2016, referred to payment in cash to Scott of a "winter fee" of £920 (above the seasonal rent of £1650). Another statement by Mr Tim Waddington referred to making membership and rental cash payments in instalments by agreement with Scott. Mr Aaron Field's hearsay statement referred to payments made in cash and by card machine. Mr Andy Mitchell referred in his statement to having paid subscriptions to Scott's bank account and by card machine; and said that he was only given the Club's bank account details at the end of 2016. Another such statement, made by Ms Colette Belgrove, referred to a statement by Scott that he and Craig were the owners of the static purchased by her in May 2016 and owners of the Site.

405. I must bear in mind that it was the Club's decision not to call the makers of those statements to give evidence and that the inability of the defendants to cross-examine them must be factored into the weight to be attached to them.

406. Craig and Scott accepted that some members paid their fees and other charges by card on the Watersports' card machine (they said the Club did not have its own one on grounds of expense) but they were all remitted to the Club. Although it is in my view telling that Watersports was in the position of having to make such a significant payment to the Club in respect of fees collected using that machine, the defendants relied in the Scott Schedule upon the later transfer to the Club of £20,287 in respect of more recent fees collected that way. Mr Morris identified this as one of a number of transactions requiring action following the change of board even though he said in his witness statement that "*many of them would have been sorted in the normal course of events/year end reconciliation*".

407. In his testimony, Craig deferred to Scott for a response to Mr Godden's revised analysis. Scott said there would have been fluctuations in membership. He referred to a drop in membership income between 2012 and 2013 (due to members not renewing their membership) and identified 5 people who were shown in a list of members for 2013 or 2014 who had since left. Mr Morris had said that when a member did not renew his membership the value of the invoice was changed to zero

in the QuickBooks records. However, Scott had to recognise that he had no recollection of a spike in membership at the end of 2016 which might account for the 2017 receipts being significantly higher, though he did suggest that year's figures might reflect VAT not previously shown and also the payment of £20,287. The print out of the schedules which Mr Morris said he had provided to the parties' solicitors on a USB stick, which were added to the trial bundle at the very end of trial and about which witnesses were not asked any questions, did not extend to 2017 but showed the income from "ski membership" was £37,833 for 2014, £36,916 for 2015 and £41,916 for 2016.

408. Scott also referred to the discount against membership fees (though not ground rent – see above) enjoyed by shareholders. When looking at comparisons of membership income between different years, Scott said that some members would pay for two years' worth of membership (i.e. for the following year as well) by one payment. Both Craig and Scott said that they would, in the interests of encouraging full occupancy of the Site, sometimes give an incoming owner of a static a period of free membership, though Craig said this would not be for more than a few months of the current unexpired membership year.

409. Mr Godden said that, when he went through a list of members with him, Mr Morris had said "*There's names here that I don't even recognise*". Scott disputed Mr Godden's evidence that the details of 13 members were missing from QuickBooks records. Mr Morris, by his second witness statement, accepted that Mr Waddington's name did not appear in the QuickBooks records and that payments in respect of his membership (for "*several years*") were included in the payment to the Club of £20,287. However, Mr Morris was not cross-examined on the statement attributed to him by Mr Godden.

410. Those last pieces of evidence, coupled with the need to pay over the £20,208 after the 2016 year end, cause me to have real concerns about the manner in which Craig and Scott may have dealt with certain payments by members. As with the second broad category of claims (the allegedly unexplained payments) there are grounds for suspecting, that with Mr Hamilton's resignation from office in 2015, they may well since have been too free-and-easy in their treatment of monies due to the Club in a way that could have involved them breaching their duties as directors.

411. However, as with most of the payments covered by Items 11, 12 and 13, I feel unable to make a finding of liability on the available evidence. Mr Godden's approach to Item 18 involves some forensic accountancy analysis. The defendants have challenged his methodology as unreliable, and Craig said it was impossible to understand what he was trying to show by his spreadsheets. Mr Morris said that he would review membership and static fees with Scott once or twice a year and that he would check the cash balance indicated by the QuickBooks entries against the bank statements.

412. Although the recognised omission of Mr Waddington's details (like the inclusion of certain items of expenditure that were properly for Watersports' account) indicates that the QuickBooks records were not wholly reliable, Mr Morris was able to say that, having recovered the data from his computer, he had provided the QuickBooks records (to December 2016) to the Club's solicitors in the middle of 2018 and "*I have not received any queries/questions relating to the information provided*."

413. The provision of this information was a point to which Mr Morris reverted in testimony. He referred (in the context of the figures showing the £35,000 annual management fee) to the absolute certainty on his part that he had provided "*a number of subfolders which went by year*". Mr Atkins said that he had not seen them and neither had his instructing solicitor. However, as I have already noted in addressing the burden of proof on the allegedly unexplained payments, it seems that Mr Morris was correct to say they had been provided in 2018.

414. A cursory comparison between the spreadsheet handed to me after the close of evidence (which Mr Sims QC did in order to highlight the inclusion of the annual management fee for the years 2009 onwards) shows that it includes annual figures for 'Deferred Income (Rent)', 'Ski Membership'; 'Mobile Homes', 'Share Discount', and 'Log Cabins Fees'. Some of these items (and possibly others) appears to approximate to those included by Mr Godden in his schedules suggesting a shortfall in income. However, these figures were not interrogated at trial in a way which would (I think) have been required to test their accuracy before then examining in greater detail Mr Morris's evidence about their reconciliation with the bank balance.

415. Watersports has accounted for the £20,287 in respect of the membership card payments. I do not consider there to be a reliable evidential basis for concluding that some further specified sum is due under Item 18.

(e) Property Related Dealings

416. The Scott Schedule identifies a number of heads of claim which the Club says relate to dealings (mainly by Craig) either with or relating to property on the Site in breach of a relevant duty and to the financial detriment of the Club.

417. The claims are listed as Items 16 (the sale of Meyer Lodge), 19 (sales of mobile homes), 20 (lodge commission), 22 (the acquisition of Plot 11) and 24 (the rental value of the office and shower block). In addition, Items 21 and 23 are property-related claims as they respectively concern the costs of Club insurance and of the water and electricity used in the shower block.

418. It is sensible to begin with the claim in respect of Plot 11 because Craig says it is connected to the issue of the lodge development fee already addressed in a previous section of this judgment.

Plot 11

419. Item 22 on the Scott Schedule is linked with Item 15 which I have addressed above. The Club seeks to recover from Craig and Jane either the property on the Site known as Plot 11 or alternatively its value which is said to be £75,000 (as at the date of the Particulars of Claim).

420. The parties were agreed that the relevant date for the transfer of Plot 11 was January 2014 when Craig says the agreement for its transfer was made even though it was only in June 2016 that a long lease of the plot was formally granted to him and Jane.

421. The Club's original position was and its primary position remains that Plot 11 was transferred by the Club to Craig for no consideration and without any authority to do so on the part of those involved. However, it is on the basis that, to the extent there was any "transaction" properly so described, the Club amended its Particulars of Claim to plead reliance upon section 190. It says the transfer of Plot 11 was a 'substantial property transaction' puts the defendants to proof of any approval by its shareholders. In the absence of such proof, the Club assumed itself to be under an obligation to elect between avoiding the transfer and seeking monetary relief. The Scott Schedule asserts that Craig and Scott are answerable for this head of claim.

422. Consistent with what I have said in paragraph 108 to 112 above about the interplay between section 175 and section 190 - see section 180(2) - the Club also advanced an alternative challenge to the transfer of Plot 11 on the basis that it involved Craig breaching his duties under section 171, 172 and 175 (Jane was not a director at the relevant time). In that context the Club alleged that the supposed transaction was at a significant undervalue and that Craig had appreciated as much.

423. Although the entry into a transaction or arrangement was therefore to be presumed for the purposes of the undervalue allegation, the Club did not also seek to rely upon section 177. This was because, as Mr Atkins explained in his closing submissions, it was obvious that the other directors at the time were aware of Craig's interest: see section 177(6)(b). As I have already observed, that must have involved their awareness or presumed awareness of both the nature *and extent* of Craig's interest (including, therefore, the suggested element of "overvalue" by which he is said to have benefited).

424. However, whether or not the other directors had the necessary awareness, a claim under section 177 was not advanced by the Club in relation to Plot 11. In those circumstances, I do not consider it is open to the Club to rely instead upon section 175 (so far as alleged conflict of interest is concerned) when it is clear that section does not apply to a conflict or interest arising in relation to a transaction with the Club: see section 175(3).

425. Therefore, the Club's claim in respect of Plot 11 is either under section 190 or under sections 171 and 172.

426. In my summary of the proceedings above I have already touched upon the defendants' position that the value of Plot 3, as an asset to which Craig became entitled in lieu of a money payment of his lodge development fee, effectively fed through to his acquisition of Plot 11.

427. In addressing Item 15 on the Scott Schedule I have also referred to the vagueness of the evidence of the other three surviving directors who were privy to the agreement that Craig should have Plot 3 in lieu of a lodge development fee. Nevertheless, I have found that he was beneficially entitled to Plot 3 before he and Jane acquired Plot 11.

428. An obstacle in the way of a formal transfer of Plot 3 to Craig would have emerged from the plot's inclusion within the security held by Barclays Bank who had lent the Club significant sums to carry out the lodge development. I say that because of what Craig said in his evidence about his own decision to "transfer" Plot 3 some 5 years later. His evidence referred to the notional value of either £20,000 (according to his first witness statement) or £24,000 (according to his second) which the bank had put upon each plot for the purposes of its security.

429. When asked in cross-examination about the value of the transfer to him (beneficially) of Plot 3, Craig said his view was "*If I sell it, I sell it, if I don't, I don't*". In fact, no opportunity for him to realise any value for Plot 3 arose until 2011 when Craig says he was approached by David Nutt. Mr Nutt was a member of the Club who was interested in acquiring a lodge but Craig said that Mr Nutt lacked the resources to buy a plot and fund the cost of a lodge to go on it. It was in these circumstances that Craig says he agreed to transfer Plot 3 to Mr Nutt "*in exchange for £24,000 and a static*". The Defence states that Mr Nutt provided consideration of £49,000 made up of the payments of £24,000 (by cheque) and £10,000 (in cash) and the static caravan worth £15,000.

430. However, Plot 3 had not been formally transferred by the Club to Craig and it was also necessary to obtain the consent of the bank who had the benefit of fixed and floating charges over the Club's assets. Craig explained that, rather than incur the legal expense of first transferring Plot 3 to him, the transaction proceeded as one between the Club and Mr Nutt. Given the Club's legal ownership of Plot 3 and the charging of that plot in favour of the bank, that point about the parties to the transaction is easy to grasp.

431. However, matters did not proceed in the way one might have expected in such circumstances, with the Club negotiating with Mr Nutt to receive directly from him the consideration for Plot 3 (whether in cash and/or in kind) so that the bank's interests might be protected before the Club then accounted to Craig as beneficial owner in respect of the surplus. Instead, Craig says he received the consideration from Mr Nutt before then accounting to the Club's solicitors, Sanders Brickwood, for the £24,000 element of it so that they could remit it to the Club (the Club's bank statements showed a credit from the solicitors of £24,000 – "RE 3 Coln" – on 9 December 2011). By these means he says the Club obtained the consent of Barclays Bank to the formal transfer of Plot 3 to Mr Nutt. Craig kept the £10,000 cash and the static. His position is that the £24,000 paid up front by Mr Nutt (in the sense of prior to any bank sanctioned transfer) was his own money which was then used to facilitate the Club's disposal of a plot that was in fact owned by him.

432. Craig has suggested that the disposal of Plot 3 to Mr Nutt was linked to his acquisition of Plot 11; and that the Club, which continued to lack free cash to pay a lodge development fee, was nevertheless able to transfer the second plot to him in place of the first. This is despite Craig accepting that, for a full year after Mr Nutt acquired Plot 3, Plot 11 was used in 2012 as a base for the proposed sale of a lodge belonging to Mr Chris Lomas (mentioned below) before thought was later given to Craig buying that lodge and acquiring Plot 11. Further, the paperwork in relation to the transaction involving Plot 11 was not completed until June 2016. I return below to the different ways in which Craig expressed the point about the two plots being linked, including him saying that he had effectively paid £74,000 for both plots (i.e. the £50,000 earned

by way of a lodge development fee before the transfer of Plot 3 and the £24,000 paid prior to the transfer of Plot 11).

433. In 2012, Plot 11 was owned legally and beneficially by the Club, though it too formed part of the bank's security. Until shortly after the transfer of Plot 3 to Mr Nutt in late 2011, Plot 11 appears to have been (or become) a vacant plot. However, Craig explained in his evidence how it was that a lodge belonging to his friend Chris Lomas (and previously sited on Mr Lomas' Plot 5) had come to be moved onto Plot 11 in around 2012. Mr Lomas had wanted to upgrade his lodge at Plot 5 and Craig had suggested that he move his old one onto Plot 11. The idea was that Plot 11 and the lodge on it could then be marketed for sale together, with Mr Lomas taking the proceeds of any sale of his former lodge and the Club benefiting from the disposal of the plot.

434. However, Craig said that, despite them being marketed for about a year, the plot and lodge remained unsold. He said that Mr Lomas then invited him to buy his lodge. Craig said that he made an offer for the lodge, which Mr Lomas accepted, but made it clear that he did not then have the money to pay him. He said that, as a friend, Mr Lomas gave him time to pay.

435. That arrangement dealt with Craig's purchase of the lodge from Mr Lomas. But he also came to acquire Plot 11 on which the lodge stood. Craig referred in his evidence to how it would have cost £7,000 to £8,000 to move the lodge from Plot 11. He said that he took up occupation of the lodge in January 2014 and that is when the transfer of Plot 11 to him was agreed. However, Craig accepts that his ownership of Plot 11 was not formalised until later.

436. The trial bundle contained a number documents bearing upon that transfer of ownership. They included the counterparts of a Lease dated 27 June 2016 by which the Club (acting by Craig and Scott as signatories) granted to Craig and Jane a 125 year term of Plot 11 commencing 1 January 2005. Although Jane's witness statement referred to her and Craig marrying in 2017, the 2016 Lease names them as if they were already married. A letter written to Scott by the Club's solicitors on 8 March 2016 (which mistakenly, though perhaps reasonably in the circumstances, assumed that Jane was Scott's mother) indicates that the proposal for the lease was quite far advanced and that Craig and Jane had instructed separate solicitors. The Official Copy of the title to Plot 11 at HM Land Registry was not in evidence but a photographed image of an extract of that title in the trial bundle shows that the Lease had been registered by May 2017.

437. Manuscript amendments to each counterpart of the Lease show that a proposed rent commencement date of 1 January 2014 was changed to 1 January 2016. The premium was identified as *"£17,833.33 plus VAT of £3,566.67 Total £21,400*".

438. That sum - £21,400 – was identified in a document on Watersports' stationery which was headed "Personal Account" and dated 24 September 2015. The typed words of the document went on to read as follows:

> "*Management Invoice*
>
> *Work carried out for the sale of lodges based on the North shore*

Of the lake 105

Total cost £21,400

Craig Cohoon"

439. As Craig appeared to accept, when I pointed it out during his testimony, he was not personally registered for VAT so far as the (apparently) VAT inclusive sum of £21,400 was concerned.

440. The document also featured some manuscript writing which included "*Contra against free plot for managing development*" and which set off a "*sale*" (at £21,400) against an equivalent sum brought forward, to produce a balance of nil.

441. Craig and Scott were each cross-examined upon this document. They both appeared to be confused by its terms. At one point Craig said it had nothing to do with Plot 11 before being reminded that his witness statement said that the invoice had been raised at the suggestion of Mr Morris so that it could be satisfied by the transfer of Plot 11. Neither Craig nor Scott was able to explain why it did not identify the sum of £24,000 when the evidence of each was that it was the sum of £24,000 that Craig had (through his funding of the release of Plot 3 from the bank's security) contributed to the purchase of Plot 11. Craig said that the Lease should have identified a premium of £24,000. Scott said his understanding was that Craig paid £24,000 for Plot 11. I note that their answers were both at odds with the summary of their case in the Scott Schedule (at Item 22) which talked about the amount agreed to be payable having reduced from £24,000 to "£21,000 (inc VAT)" (*sic*).

442. Scott accepted that he dealt with the transaction on behalf of the Club. In his witness statement he identified the sum of £17,833.33 plus VAT as being the difference between the value of Plot 3 and the value of Plot 11 in circumstances where Craig had elected to swap one plot for the other. Referring to the solicitors' letter of 4 April 2016, Scott confirmed in that statement his understanding that the premium in that sum had already been paid to the Club. Although his evidence in the witness box was that the figure should have been £24,000, he was unable to explain how his understanding had changed.

443. When questioned about Scott's original understanding, Craig said he did not know why Scott had referred to the £21,400 being the difference between the value of the two plots.

444. They both said that the document was not an invoice that the Club was expected to pay. Craig described it as being "*a paper trail*". Scott said that the manuscript notes had been made by Mr Morris which is consistent with one of them being 'QB' (for QuickBooks). He said he had not typed it and presumed that Craig had. Craig could not recall who had typed it.

445. This uncertainty in the minds of the two directors who came to sign the Lease of Plot 11 on behalf of the Club must be viewed alongside the terms of the letter sent by its

solicitors to Scott on 8 March 2016 which I have mentioned above. That letter concluded with the following paragraph:

> "*I imagine that the company has already passed a resolution in connection with the proposed grant of this lease, and that, for the company's part, there are no other formalities outstanding. Please let me know, however, if you have any queries about this. If your parents require any such advice in their capacity as directors, then naturally they will need to seek this from their own solicitors."*

446. A subsequent letter from those solicitors to Scott, dated 4 April 2016, set out their understanding that the lease premium of £17,833.33 plus VAT had already been paid to the Club and sought confirmation of that point. It also sought instructions on the rent commencement date, so that might then be agreed with the solicitors acting for Craig and Jane. I believe it is reasonable to draw the inference that the solicitors would have subsequently agreed upon the typed date of 1 January 2014 before that was postponed by two years by manuscript amendment made before or upon execution of the Lease.

447. For completeness, I should at this stage note that no evidence was adduced in relation to the attitude of Barclays Bank to the terms on which Plot 11 was transferred to Craig and Jane. I presume that the plot still fell within the scope of the bank's security in 2014 and that if it still held its charge at the date of the Lease (I understand the security was cleared in 2016) the bank took at face value what was stated to be the premium of £21,400. Craig's evidence was that each plot had been given a notional value of £20,000, for security purposes, and the Club was free to negotiate any premium above that figure.

448. The absence of a board resolution or board minute evidencing the Club's approval of the transaction involving Plot 11 is a point of real significance in circumstances where even the evidence of Craig and Scott diverged on the question of the consideration provided by Craig. Any meeting of directors should have been minuted and, if authenticated by the chairman of it, would have been evidence of the matters recorded in it: see sections 248 and 249 of the 2006 Act. Craig said in cross-examination he would have discussed with Mr Hamilton, as well as with Scott, the proposed transfer of Plot 11 to himself. He referred to a meeting with Mr Hamilton in London. This would have to have been some time before January 2015 (when Mr Hamilton resigned his directorship) to be of any potential significance. But I do not regard it being so when Craig's evidence about the meeting was so vague and did not involve him saying that Mr Hamilton had applied his mind to the transaction and understood and approved the consideration for the transfer.

449. Indeed, the thrust of Craig's evidence was that – this being a disposal of a plot of the kind covered by the management service – he did not really need Mr Hamilton's approval. Mr Hamilton's evidence did not address the later transfer of Plot 11 as opposed to the earlier decision to assign a plot to Craig in lieu of payment of a lodge development fee.

450. In his second witness statement Craig explained his position by saying he had effectively paid £74,000 for both Plots 3 and 11: the £50,000 for which he had taken Plot 3 in lieu and the £24,000 he had paid from his own monies to enable the transfer of Plot 3 to Mr Nutt to go through. That was a different analysis from that contained

in his first witness statement when, as corrected by his evidence-in-chief, he said (of that payment of £24,000 to the Club):

> "*As a result of the transaction, I had now lost the right to Plot 3, had a received a cheque for £24,000 but paid the same amount, via solicitors, into the Club's account, so was essentially back in the same position I was before the Club agreed to assign Plot 3 to me in respect of my project management services. In order to redress the imbalance another plot (Plot 11) was assigned to me. However, again as there was no urgency on my part to put a lodge on the plot, it was not until later that I decided to take Plot 11*."

451. Of course, these different analyses do not take account of the other elements of value provided by Mr Nutt on the purchase of Plot 3 and retained by Craig: the £10,000 cash and the static caravan (said by the Defence to have been worth £15,000).

452. More fundamentally, and in the light of that personal financial benefit on the disposal of Plot 3 some 4 years prior to the grant of the Lease of Plot 11, Craig's account raises the question as to whether he is right to talk in terms of one plot being assigned to him in place of the other. On the assumption that the £24,000 duly credited to the Club's account by its solicitors in December 2011 came from Craig, and recognising that Lease of Plot 11 fails to identify that sum as the premium, the real question is whether or not Craig is right to suggest that his entitlement to Plot 3 was of any significance or had any real connection to that lease.

453. It seems as clear to me as these muddled accounts permit that the idea that an entitlement to Plot 11 somehow replaced the former entitlement to Plot 3 is one that was encouraged by the terms of the "invoice" dated 24 September 2015. In creating the paper trail of a "management invoice" to justify the transfer of Plot 11, the defendants have encouraged the idea that Plot 3 (as previously acquired by Mr Nutt) was somehow linked to Plot 11 (as only later acquired by Craig and Jane). That is highly doubtful.

454. The doubt over the correctness of Craig's analyses is reinforced by the summary of the defendants' own case at Item 22 of the Scott Schedule which said this (with my emphasis):

> "*Plot 3 was sold to Mr Nutt for £49,000 by way of a cheque for £24,000, cash of £10,000 and a caravan worth £15,000. However, the release payable into the Claimant to satisfy the bank came from the First Defendant's own funds, therefore <u>although the management fee was discharged, the First Defendant was £24,000 out of pocket and</u> <u>this amount was effectively a loan to Claimant</u> ……."*

455. The way the defendants' position is expressed there is at odds with the idea of carrying forward the whole or some part of the value of a £50,000 lodge development fee, said to have been earned by Craig's efforts before 2005 or thereabouts, to the formal acquisition of Plot 11 some 11 years later. So too are the terms of the September 2015 "invoice" (referring to £21,400 not £50,000). Also, if Plot 11 really was to be regarded as a substitute for Plot 3 then Craig should have accounted to the Club for the further £25,000 worth of consideration (cash and static) received from

Mr Nutt, but he did not. He cannot claim to be entitled (in lieu of a £50,000 management fee) to both the value of Plot 3, as realised through those proceeds, *and* the value of Plot 11. Indeed, it is highly questionable that the figure of £50,000 (as a fee) was of any continuing relevance once it had been decided that Craig should acquire Plot 3. Although Mr Hamilton was tentative on the point, I have already referred to his evidence about the accounting treatment of the fee in the Club's 2006 accounts in addressing Item 15.

456. Of course, the court is in the position of having to scrutinise the true basis of the transfer of Plot 11 *because* the Club (acting by its directors which included Craig and Scott) failed to engage with a formal resolution upon the matter of the kind suggested to Scott by the Club's solicitors. Mr Hamilton resigned in January 2015, before the Club's solicitors wrote their letter dated 8 March 2016, and there was all the more need for Craig and Scott to be scrupulous in observing their duties to the Club and to observe the formalities highlighted by the Club's solicitors.

457. In my judgment the evidence in relation to the consideration given by Craig for Plot 11 supports nothing more than the conclusion that he is to be treated as having advanced the sum of £24,000 to the Club in December 2011 in order to procure the transfer of Plot 3 to Mr Nutt and that by September 2015 it had been decided that Plot 11 would be given a value of £21,400 (the premium later identified in the Lease) for the purpose of the transfer to Craig and Jane. I am prepared to accept that the Club did not repay Craig his advance of £24,000, when the evidence indicates that it lacked the cash to do so, but that only supports the conclusion that Craig and Jane gave good consideration for the stated premium of £21,400.

458. I do not accept Craig and Jane are entitled to re-write the Lease (or the paper-trail invoice) so as to claim they paid £24,000 for Plot 11. They are probably estopped from doing so by the terms of the Lease (albeit not under seal) but, in any event, the contemporaneous documentation indicates that, if Craig had not been repaid the £2,600 balance of his advance then he must look elsewhere than their ownership of Plot 11 for a credit for that sum. With that caveat, the true analysis of the acquisition of Plot 11 emerges from answers Craig gave in cross-examination:

> "*Well, all I can say is that I took plot 3 and then I bought, with the money that was owed to me from the company, not the 50 – the 50,000, the 24,000, purchased plot 11. In actual fact, it was only for 21,400 but it should have been 24,000*."
>
> and
>
> "*So basically, I bought plot 11 for 24,000*"

459. Where does all this leave the Club's claim in relation to Plot 11 advanced under sections 171, 172 and 190 of the 2006 Act?

460. The answer, in my judgment, rests fundamentally upon whether or not the Club can show that the long lease of Plot 11 was worth more than the £21,400 taken to have been paid for it (and, if so, how much more). As I have said, even though that

premium was only clearly identified later, the parties agreed that this issue of valuation was to be addressed as at January 2014 when Craig says the transfer of Plot 11 was agreed.

461. That valuation date is consistent with the fact that, when the Lease of Plot 11 came to be signed in June 2016, a manuscript alternation was made to record the rent commencement date as being 1 January 2014. There was some evidence that that Craig and Jane did not pay in fact pay the rent of £831.60 p.a. before the change of the board but the fact that the new directorship required the arrears to be paid and (as I understand they, or some of them, were) demonstrates that, as a matter of analysis, no point falls to be made about the value of the plot including any "free rent" for the period before the Lease was signed.

462. Mr Atkins put his client's case first and foremost by reference to section 190. It was not argued that Plot 11 was worth more than £100,000 in January 2014 but it was contended that it was worth both more than £5,000 and 10% of the Club's asset value.

463. By section 191(3) of the 2006 Act, a company's "asset value" is (so far as material) the value of the company's net assets determined by reference to its most recent statutory accounts. Section 191(4) provides a company's "most recent" statutory accounts are those in relation to which the time for sending them out to members is most recent. As at January 2014, the most recent accounts were the 2012 accounts because the Club would not yet have filed or had to file the 2013 accounts (see sections 423, 424(2), 442 and 443 of the 2006 Act).

464. The balance sheet in the 2012 accounts showed the net asset value of the Club to be £522,077. For section 190 to have been engaged, the value a long lease of Plot 11 must therefore have exceeded £52,207.77 in January 2014.

465. Mr Atkins recognised that there was no expert evidence nor any contemporaneous documentary evidence about the value of Plot 11 (other than the premium stated in the Lease) but he submitted that there was other evidence to indicate that its then value was in excess of £52,207. He relied upon *Mortimore on Company Directors* (op. cit. at para. 18.45) in saying that the court does not need to establish what the exact value of Plot 11 was at that time, so long as it is satisfied that the value exceeds the threshold.

466. Mr Atkins pointed to the following:

(1) Craig's evidence that plots were generally selling for at least £50,000 in 2014 and 2015. He did talk also about much lower sale prices (£35,000 for Plot 18 and £30,638 for Plot 10) but those were sales in 2008 when, as he explained, the Club was struggling to sell plots in the midst of the recession. Consistent with that evidence was an email sent by him to the Club's solicitors in December 2015 reported that Plot 16 had been sold for £75,000, Plot 15 for £50,000 (to Mr Godden) and Plot 13 for £60,000. Although Craig's email referred to the sale of "lodges", it is clear from his witness statement that he was reporting the prices at which *the plots* had been or were being sold. His witness statement referred to Mr Godden paying £50,000 for his plot.

(2) The fact that the plan attached to the lease of Plot 11 showed it to be a superior plot on the Site, on the north side of the Lake, and not so overlooked or cramped as some corner plots, with a longer frontage and more spacious perimeter than all its neighbours apart from Plot 14. Plots 16, 15 and 13 mentioned above were said by Mr Atkins to be clearly inferior to Plot 11. Therefore, he submitted, one would expect the value of Plot 11 to have been substantially in excess of that figure;

(3) Ms Owens' evidence was that Plot 16 was sold in 2016 for £70,000 (£5,000 less than Craig had reported in the December 2015 email as being the sale price on which a £10,000 deposit had been taken) and that Plot 9 was sold for £84,000 in 2018. The Site plan indicated that Plot 16 is inferior to Plot 11 as it is significantly smaller (Ms Owens said that its decking area is just 20% of Plot 11's); it is sited on an angle with an awkward triangular perimeter; it is overlooked from the front by both its neighbours (Plots 15 and 17); and it has no boat jetty and no space to put one. The Club said that Plot 9 is closer to Plot 11 in amenity, but it is smaller and has no boat jetty although there is space to put one. Mr Atkins said that, even allowing for the distance from the valuation date of January 2014, the later sales suggest a value for Plot 11 substantially in excess of the requisite £52,207. He said no rise in market values could account for prices so much higher than that on clearly inferior plots just two and four years later; and

(4) Craig's own sale of the lodge on Plot 3 to Mr Nutt for £50,000 in December 2011, the plot element of which was submitted to have been around £35,000. Plot 3 is a corner plot shared with Plot 2 and the Club said that at couple of years later Plot 11 was likely to be more valuable by a significant margin. I note that Craig's own witness statement had referred to his earlier acceptance of the value of Plot 3 being £50,000 for the purposes of satisfying his lodge development fee.

467. On the basis that the 10% threshold valuation threshold was met, the Club said the transfer of Plot 11 had not been approved by the shareholders in accordance with section 190(1) of the 2006 Act. As there had been no affirmation of the transaction by resolution in accordance with section 196 and Craig and Jane still have the plot, the Club asserted its entitlement to elect between (i) avoiding the transaction and obtaining the return of the plot in accordance with section 195(2) and (ii) seeking an order that Craig and Jane account for any gain made on the plot or indemnify the Club for the loss of the plot under section 195(3). The Club contends that Scott is also liable to indemnify the Club for that loss as the director who authorised the transaction for the Club: see section 195(4)(d).

468. The defendants challenged the application of section 190. Mr Sims QC and Ms Gibb submitted that the relevant accounts were not the 2012 accounts but the 2013 accounts (in fact the Club's asset value recorded in those accounts was £513,119 leading to a slightly lower threshold valuation figure of £51,311).

469. As to the value of Plot 11 in January 2014, the defendants made the following points in saying that the 10% of value threshold had not been met:

(1) The Club was not even selling the plot with the lodge in situ. Craig purchased the lodge which had been placed on the plot separately from Mr Lomas. However, I am not sure this is a persuasive point because most of the Club's suggested comparable values (save that of Plot 3 when transferred to Mr Nutt in 2011) related to the sale price of the plot and not also the lodge upon it;

(2) The sale of Plot 16 for £70,000 (or, perhaps, 75,000) reflected its sale at a premium as, with Plot 17, it was one of the last two plots left for purchase and as Craig said in evidence "*so as a property developer, when you build 10 properties, the last two are where you make all your money because it's all paid for and you can sit there and wait and get a premium price, which is what we probably did.*";

(3) Ms Owens' lodge at Plot 18 sits on the biggest plot and she paid only £35,000 for them in 2008. Mr and Mrs Yarrow also paid £30,638 for theirs on Plot 10 in 2008. However, I note that in referring to these sales prices at the time of the global recession Craig said "*T]he main explanation for these low prices was that again the company was vastly overdrawn and we were in a dire state and I didn't have any choice but to take those prices. I didn't want to but that was – I had to do that to survive*". I also note that, in August 2008 and therefore during the global crash, Mr Lee was given a 2 year option to acquire a long lease of his licensed plot for a premium of £50,000 (by an addendum to his Licence Agreement which was considered in the context of Item 20 on the Scott Schedule).

(4) Plot 3 was the best plot for a slalom skier (as Mr Nutt was) because of its location on the lake;

(5) In 2016, Plot 12 sold for £40,000 (although the lease stated a premium of £24,000) and Mr Godden paid £50,000 for Plot 15 in 2017. These prices did not support the Club's contention that Plot 11 was worth more than £50,000 in 2014; and

(6) Plots sold at different times for varying amounts and Craig agreed a cut in price if necessary. Craig's evidence was that the price of £24,000 (as he suggested it to be) for Plot 11 was a fair price for a plot that had not previously sold with Mr Lomas' lodge on it. However, I note that part of Craig's explanation for it being a fair price was that he "*had been owed the money for a number of years, so I thought it was perfectly fair to do the transaction.*" This was a reference to Craig's alternative position that his lodge development fee had not been satisfied by the agreement that he could have Plot 3 (reflected in his later receipt of the proceeds from the sale to Mr Nutt). I have rejected that suggestion.

470. The defendants therefore submitted the case under section 190 had not been made out and that, even if it had been, they would be able to rely upon section 195 of the 2006 Act as restitution was no longer possible in the light of the modifications and improvements Craig and Jane had since made to the plot. This would include the decking provided by Cheshire Mouldings which a combination of concession and my finding above (on Item 3 on the Scott Schedule) shows to have been for Craig's account.

471. The defendants' further fall-back argument was to say that the discretion under section 1157 of the 2006 Act should be exercised in their favour. This should be the case if the court found that Craig or Scott had acted in breach of duty in causing Plot 11 to be transferred at an undervalue even though section 190 was found not to apply. One particular point relied upon was the benefit to the Club of having a developed plot with an occupied lodge upon it so far as that assisted with sales of later plots.

472. In my judgment the issue of the plot's value for the purposes of section 190 of the 2006 Act is a finely balanced one. Although the point leads only to a relatively fine adjustment, I accept the submission of the Club (which tilts the balance slightly against it) that the relevant accounts for determining the issue are the 2012 accounts.

473. That it is finely balanced is shown by the witness statement of Mr Hamilton who referred to his recollection of a flexible approach being taken by the Club and Salop in securing the sale of lodge plots and who said:

> "*At the outset, the cost of a lodge was, from memory, between £40,000 to £60,000 and to purchase a long lease for the land to put a lodge on was £50,000 to £80,000*."

474. However, in the light of the evidence including that of Mr Hamilton, I find that the value of Plot 11 in January 2014 was not less than the threshold figure of £52,208. Therefore, section 190 of the 2006 Act was breached.

475. Even if section 190 had not been triggered, I would have found that Craig and Scott each breached the duty under section 172 in relation to the transfer of Plot 11 for £21,400 when the plot was worth significantly more than that. That they subjected the Club's best interests to Craig's own is demonstrated by Craig's attempt to support the transaction on the basis that he had "*effectively paid £74,000 for two plots [i.e Plots 3 and 11] an average of £37,000 per plot*". But the true position (as Craig knew from his receipt and retention of £25,000 of value from Mr Nutt's purchase of Plot 3 and as he recognised by his answers quoted in paragraph 458 above) was that, at best, he had only paid £24,000 for it. His attempt to justify an additional element of consideration for the plot, in the event unsuccessful, involves an implicit recognition that Plot 11 was worth more than that sum.

476. However, in my judgment, the appropriate relief on Item 22 is that provided for by section 195 of the 2006 Act. I agree with Mr Sims QC and Ms Gibb that the evidence shows that restitution of the plot is no longer possible given the improvements that have been made in the intervening years to the lodge acquired from Mr Lomas. The Club's fall-back relief was for financial relief against Craig and Jane (under section 195(3)) in respect of their gain under the transaction and against Scott (under section 195(4)) in respect of the Club's loss under it.

477. Although Craig and Jane were not married in 2014 (or even by the date of the 2016 Lease taken in their names as if married) it is clear that Jane is to be treated as 'connected' to Craig for the purposes of section 195(4). That is because they were then living together as partners in an enduring family relationship: see sections 252(2)(a) and 253(2)(b) of the 2006 Act.

478. Section 195(7) enables a connected person to escape liability by showing that, at the time the arrangement was entered into, he or she did not know the relevant circumstances constituting the contravention of section 190. Jane's evidence did not address this issue. Her statement simply referred to her and Craig having "*acquired plot 11 from Chris Lomas*" (which, as she recognised in cross-examination, meant that the lodge had been acquired from him and the plot from the Club) and she did not otherwise address the transaction in her testimony. Jane has therefore not established that she comes within the protection of the subsection.

479. Accordingly, and taking the relevant value of Plot 11 as being no lower than the requisite £52,208 as at January 2014, I find that each of Craig, Jane and Scott are jointly and severally liable to the Club in the sum of £30,808.

Meyer Lodge

480. Item 16 on the Scott Schedule is a claim for £44,500 in respect of a profit made by Craig on the purchase of a lodge from Salop in December 2012 and its subsequent resale to Mr Chris Meyer.

481. Craig accepted that the Lodge was offered to the Club but says the Club could not buy it at that time, so he bought it instead. The unchallenged evidence of Dylan Roberts (of Salop) was that the invoice for the VAT inclusive sum of £24,500 was "*by default addressed to the Club, but my clear recollection is that it was Craig who bought it personally*." Mr Roberts said this was a greatly reduced price and, referring to the fact that the lodge had been supplied on a sale or return basis and had not sold having been placed on the Site in 2007, said that the cost "*to us*" of recovering the lodge would be between £5,000 and £6,000.

482. In his evidence, Craig had said that avoiding that removal cost was an expense that his purchase had saved the Club, on the basis that it would have borne the removal cost, but his answers in cross-examination were less sure on that issue and I conclude that is not a good point. However, he said that the Club lacked the monies to buy the lodge (saying it could have done so over the preceding 5 years had it wished to) and, by his second statement, that he spent £19,000 doing up this lodge.

483. The Club contended that the opportunity to buy the lodge came to him as a director of the Club and he held the benefit of it for the Club under the no-profit rule. Mr Atkins submitted that, under that rule, it was irrelevant whether or the Club could have bought the lodge or not, though in fact it could have funded the purchase for itself.

484. In addition to suggesting that membership fees had been diverted from the Club (a point which I have found has not been established under Item 18) and that Craig had drawn £5,000 of the Club's monies in July 2012 to buy a boat for himself, Ms Owens made some other points to show that the Club could have bought the lodge. She referred to some monies being due to it from Mr Brian Lee on the sale of a lodge, the Club having a bank balance of £110,000 odd by the end of January 2013, and its ability to draw down a bank loan for £200,000 approved in August 2012. However, Craig's position was that the Club did not have the money required to buy and then renovate the lodge and he disputed a number of points put to him by Mr Atkins. He

said the £5,000 for payment for the boat represented a legitimate drawdown against his director's loan account, that Mr Lee had instructed that his purchase monies should be retained and that the £200,000 was for the Coln River Lodge development project and was soon used up.

485. Craig also said that by renovating the lodge and selling it to Mr Meyer he enabled the Club to obtain a lease premium and ground rent.

486. In my judgment, Craig's points do not meet the force of the Club's claim under section 175 of the 2006 Act. I have already noted that the duty to avoid a conflict of interest applies whether or not the Club could have taken advantage of the opportunity to renovate and sell Meyer Lodge: section 175(2). There is no evidence that the transaction was authorised by the directors (then including Mr Hamilton whose evidence did not address this transaction) and the only real issue is whether or not the situation could not reasonably be regarded as giving rise to a conflict of interest between Craig and the Club. On that point, Mr Sims QC and Ms Gibb argued that Craig was not on Site purely in his capacity as a director but also as agent of Watersports. They also said that the Claimant was not in the business of buying lodges.

487. I do not accept those submissions. The opportunity came to Craig because he was a director of the Club to whom Salop had supplied the lodge (on a sale or return basis) for positioning on the Site. The Club was in the business of selling lodges (as this one came to be sold to Mr Meyer) and the opportunity to renovate before sale was one sufficiently connected with that business as to be treated as one belonging to the Club. That was especially so in circumstances where the understanding of Craig (if not of Mr Roberts) about the cost to the Club of having the lodge taken away might have supported a decision by the Club to instead pay for some renovation work on it.

488. Craig said in evidence " *…it had a massive amount of renovation to do. It was down and out. So who was going to do that on behalf of the Club? I wasn't going to do it. I did it privately, but I wasn't prepared to do even more than I was already doing for the Club.*" That evidence is entirely consistent with Craig benefiting from an opportunity which came to him as a director. In my judgment, he is accountable under section 175 of the 2006 Act for the personal profit made through it.

489. The fact that the Club benefited from the premium and ground rent subsequently paid by Mr Meyer (as it would have done if it had also sold the lodge to him) is no answer to Craig's accountability in respect of his personal profit on the lodge. However, although the Club criticises the absence of detail or documentation to substantiate the expenditure made which Craig said he incurred in putting the lodge into a saleable state, I do accept Craig's evidence that a significant amount of work to the lodge was required before it was sold to Mr Meyer. Craig should receive appropriate credit for this on *Boardman v Phipps* reasoning. In addition to the £19,000 he says he spent on renovation, Craig also seeks an allowance for the two months' labour involved in those renovations. This was suggested in the defendants' closing submissions to be worth an additional £10,000.

490. I am just persuaded by Craig's figure of £19,000 but unpersuaded that it should not be treated as also covering the labour element of the lodge renovation.

491. In my judgment, Craig is accountable under Item 16 for the sum of £25,500. I do not consider Craig to have acted reasonably in relation to this transaction so there is no scope for the exercise of any further discretion under section 1157 of the 2006 Act.

Mobile Home and Plot Sales

492. Item 19 on the Scott Schedule is a claim for £92,000, representing the proceeds of the sale of certain statics sold by Craig which either belonged to the Club or which came to him as a director of the Club. The Scott Schedule seeks to hold Craig, Scott and Jane answerable for that sum.

493. In his first witness statement Craig had accepted that he sold the statics for the total gross sum of £92,000. He said his profit would have been more like £15,000. He made the point that the Club could not have afforded to buy them at the time and his buying them benefited the Club because, having then renovated them at his own cost, he sold them to new residents. His actions thereby generated commissions and pitch fees for the Club. In his statement, Craig said he had paid the Club £10,000 in commission on his onward sales. He did so after his resignation from the board when Mr Morris identified that commission on sales at 10% or a minimum £1,000 (though the licence terms quoted in paragraph 508 below suggest something else) had not been paid and he took the view that he had made 10 such sales over the years.

494. At trial, Craig produced a schedule showing what statics he sold and the profit he made as a result. This identified 12 transactions (two of them involving successive sales of the same static) and a profit of £12,500. By the end of the trial the Club had abandoned its claim under two of the transactions (Hutchison and Peacey) and agreed that on a third (Bolton) the relevant profit figure was £2,000 as stated by Craig. Otherwise, the schedule was disputed.

495. As with Item 16, the Club argued that the key point was that Craig's opportunity to acquire the statics came to him as a director of the Club and his own evidence made that clear. Accordingly, Craig should account for the profit shown by the evidence to have been made by him. The defendants resisted a finding of any liability on this Item 19 on the basis that the evidence of Craig and Scott, in support of the comments of Craig in the schedule, should be preferred over the explanations given by some of the individuals involved from whom the Club had obtained witness statements (though unsigned in the case of Mr Bosley so as to be really nothing more than a witness summary for an intended witness) but sought to rely upon only as hearsay evidence. The defendants also said that the sales by Craig benefited the Club by helping the Site to tick over, in terms of occupancy, and avoid empty spaces during more challenging economic times.

496. I should say that the timing of most of these transactions is unclear so far as the potential implications of any limitation defence are concerned.

497. I have considered the rival submissions about particular transactions in the light of the evidence about them. In doing so, I have taken account of the Club's various pieces of hearsay evidence only to the extent that I consider Craig or Scott did not challenge the essence of what was being said.

498. In my judgment, the application of the 'no profit' rule to the transactions addressed by Craig and Scott in their evidence justify Craig being held accountable under section 175 of the 2006 Act for the following:

(1) £2,000 in respect of the Bolton transaction;

(2) £2,000 in respect of the Blackmore transaction;

(3) £3,000 in respect of the Barter transaction;

(4) £2,000 in respect of the Bryan transaction;

(5) £5,000 in respect of the Bellgrove transaction;

(6) £1,500 in respect of the Hoborough transaction; and

(7) £1,500 in respect of the Telling transaction.

499. In my judgment, those findings are justified by evidence which indicates that Craig made a profit (after allowing for the cost of improvements) on statics belonging to the Club by arrangement with the outgoing owner or which, in the case of the Telling transaction, was a profit representing a corporate opportunity caught by the rule.

500. I am not persuaded that Craig is accountable in respect of the Mitchell transaction. I accept his and Scott's evidence that Mr Moore (who the Club chose not to call to give his contemplated evidence on this transaction) sold his static to Mr Mitchell and that an invoice suggesting that he had sold it first to the Club was to ensure that the Club did not miss out on its commission on a sale, as they said had happened in other instances.

501. Nor am I persuaded that Craig should be held accountable for any sum in respect of the Bosley transaction. Craig said in his schedule that Mr Bosley paid the Club for his static, though in his testimony he was less clear about the transaction. Craig said he could not recall it and also seized upon the reference in Mr Bosley's witness summary suggesting that the static's was Craig's to sell. Despite this unsatisfactory evidence, my conclusion is that the Club must accept the consequence of not calling Mr Bosley as a witness to make good its case (which, despite relating to events in 2008, might well have come within section 21(1)(b) of the 1980 Act).

502. As for the Summers transaction, I accept Craig's evidence that this related to a later sale of a static from which Mr Hamilton had walked away having left it (in a very poor state) to Craig personally.

Lodge Commission

503. Item 20 on the Scott Schedule is a claim for £60,000, being the aggregate of commissions that were not collected or collected but not remitted to the Club. The commissions were payable by outgoing licensors (of statics) or incoming licensees (of lodges) whenever there was a change of occupant for a plot held under a licence as opposed to a long lease.

504. As with other items, the Club's pleaded claim to the £60,000 was expressed in very general terms. Although Mr Atkins' closing submissions said it was the aggregate of commissions not collected between 2011 and 2017, the Amended Particulars of Claim identified the sum by reference to a 15% commission payable on £400,000 worth of sales "*when the First and Second Defendants were directors*".

505. Craig agrees that commissions on specific transactions were not recovered but this was for a number of reasons, as follows:

(1) In the case of Mr Overton, he took out a lease on termination of his licence and so the commission was not payable. Craig said he decided not to charge Mr Overton commission because he knew he would buy the plot within two years. Scott said that when Mr Overton acquired the licence he had already intimated he was interested in converting to a long lease (he referred to the purchase then being delayed due to family reasons). Therefore, it was decided not to charge him commission but to encourage the purchase of the lease in the interests of continuing the Club's income stream through ground rent.

(2) In the case of Mr Johnston, Craig had decided not to charge him a commission as incoming licensee of a plot as the outgoing licensee was in financial trouble and he wanted to facilitate the purchase. Mr Johnston then transferred his plot to Mr Yarrow without telling the Club and so the chance to charge Mr Yarrow any commission was lost.

(3) In the case of Mr Yarrow, he sold his plot to Mr Ormiston quickly after he had bought it and so again the chance to charge commission was lost.

(4) In the case of Mr Ormiston, he is still a licensee on the Site. In fact, the Club says it has now recovered commission from Mr Ormiston's successor (which I assume means a family member rather than a third party purchaser who would have separately liable) so that this part of the claim is not pursued.

(5) In the case of Scott, he sold his lodge to someone who then took a lease and so no commission was payable.

(6) In the case of Mr Nutt, he took over his plot from Craig and, since no licence was involved, no commission was payable. The Club has since accepted this to be a good reason.

506. The defendants' counsel also submitted that any outstanding sums properly recoverable should be obtained from the appropriate licensee, if still on Site. The Club's recovery in respect of the Ormiston commission illustrates their point. If any such claim was now time-barred (or would have been in October 2017) then, likewise, it cannot now be pursued against them. As with Item 19, the dates of the transactions relied upon by the Club under the present item are unclear. I have already referred to

the language of the Club's Particulars of Claim which suggests that this head of claim may date back to 2007. Of the three sections of the 2006 Act relied upon by the Club it would seem that section 174 (the non-fiduciary duty of care) is the most relevant. In any event, there is no basis for concluding that anything other than a 6 year limitation period would apply.

507. Craig also said that there was no obligation to charge a commission. He said that the terms of the licence contained a power to charge a commission of *up to 15%* and that this gave a discretion not to charge in certain instances where not to do so was considered to facilitate a transaction in the overall best interests of the Club in the interests of securing the ongoing payment of rent on a plot that the outgoing owner no longer wanted. Craig said he and Scott should not be criticised and held accountable for the exercise of that discretion as they had acted in good faith and in the best interests of the Club.

508. The parties referred to a copy of the Licence (accompanied by a 2 year option to take a long lease at a premium of £50,000) granted by the Club to Brian Lee in August 2008. In fact, the provision in relation to the payment of a commission by the transferee on any sale of a static (described as a "lodge") was not as discretionary as Craig suggested. Clause 4 read:

> *"(d) Before we issue the new Licence Agreement to your buyer we will charge him a commission of not exceeding 15% of the Fair Market Value of the lodge (plus Value Added Tax or any similar tax if appropriate) unless your buyer is a Family Member. In case of a Family Member the buyer from the Family Member shall pay us commission not exceeding 15% of the price actually paid on resale (plus VAT if appropriate) to a non Family Member.*
>
> *(e) Apart from the commission payable by the buyer we will not make any other charges ....."*

509. In an answer which suggests that any resulting claim against him may indeed be time-barred in part, Craig said:

> "*financial times were very pressing ..... in the 2008, '09, '10 era and we felt we were getting, you know, we could have ended up with an empty plot, which obviously we certainly didn't want, therefore, at the time when finances were tight, we were fortunate to find somebody to move in, carry on and keep paying rent.*"

510. Although I am not persuaded by the argument that Craig's actions were expressly authorised by the Club's own contractual terms, in my judgment neither he nor Scott should not be held accountable in respect of Item 20. The Club has not established that they failed in their duties under section 172 or 174 (or any other section) of the 2006 Act. Section 172 expressly contemplates that a director should have regard to the longer-term consequences of his decision and the need to foster business for the company. I have already referred to the subjective test governing a director's decision

as to where the best interests of the company lie. Section 174 imposes a standard of reasonable diligence which in part is fixed by reference to the director's own experience.

511. Craig and Scott cannot in my judgment be criticised for any conscious decision made by either of them to waive a commission in the interest of ensuring that the plot continued to be occupied and a rental paid. The Club's riposte that they should have vetoed the transaction unless the commission was paid, so that the otherwise outgoing licensor remained committed to paying the rent, ignores the business reality of the situation. The evidence (including the Club's hearsay evidence) on Item 19 indicates that there were plenty of instances where an occupier could not afford to pay the ongoing rent and relinquished a static or lodge in lieu of payment. I do not accept the Club's submission that it had no financial interest in facilitating the transfer of a plot and I accept Craig's evidence that he was motivated by that interest.

512. In any event, I would have exercised my discretion under section 1157 of the 2006 Act to relieve Craig and Scott from any liability resulting from any such decision.

513. The justification for them not causing the Club to pursue Mr Yarrow for a commission which neither of them had consciously waived is less clear but (even if his ownership post-dated October 2011 so that the claim is not time-barred) I am not persuaded that a breach of duty has been established. I have no reason to doubt Craig's evidence that Mr Yarrow's period of ownership was short and the likelihood of the Club securing payment from him and, if so, at what cost was not explored in the evidence.

Club Insurance

514. Item 21 on the Scott Schedule is a claim for £62,586.20 which is said to be the amount of insurance premiums allegedly overcharged to the Club under a policy which also insured the interests of Watersports. The relevant insurance policy was in their joint names and the cost of premiums was apportioned between them. The Club says that it bore an excessive share of this cost and the sum claimed is the amount of the excess.

515. The first point to note about this head of claim is that the Club has not pleaded it that way. The paragraph in the Amended Particulars of Claim to which the Scott Schedule refers is one that instead refers to insurance payments (in the sum of £78,000) which "*ought to have been collected for the Claimant but were not.*"

516. Further, although Mr Atkins' closing submissions said that the sum of £62,586 related to the period 2011 to 2017, the summary of the Club's case in the Scott Schedule indicates that it is based on an allegedly excessive cost (measured at £6,258.62 p.a.) over a 10 year period. I also note that Scott's evidence was that the single policy in joint names was taken out in 2007 (though Craig said that step was taken in 2010). It is because a claim in respect of the first four years of that 10 year period would otherwise be statute-barred that the same comments make reference to section 32 of the 1980 Act.

517. The defendants have conceded (in their comments on the Scott Schedule) that the sum of £16,756 should be repaid to the Club but this is by reference to a quote obtained by Craig in February 2017 for insuring only the Club's interests and by comparing the amount of premiums which Watersports had re-charged to the Club over a 5 year period. I therefore see no basis for an argument that there has been deliberate concealment of breaches of duty by Craig or Scott going back 4 years beyond October 2011.

518. The Club's position on this item (in terms of the argument if not precise justification of the full £62,586 claimed) came to be the responsive one in Ms Owens' second witness statement where she said that the quote obtained by Craig was too high and, when compared with levels of cover under the previous policy, would have involved the Club being over-insured to the tune of £179,038. It was clear from her testimony that she had suggested as much to the insurance broker asked to quote for the Club after 2017 and that the Club had not gone ahead with one quote where the gap between the levels of cover (past and proposed) was smaller and the premium was higher. The defendants pointed out that the Club had not disclosed the terms and cost of insurance cover obtained by it for 2017 and 2018.

519. This nature of this evidence took the Club some distance away from its pleaded case. Be that as it may, my conclusion is that it cannot be used to make a finding that either Scott or Craig breached any of the pleaded duties (whether before or after October 2011) in a way that leads them to being accountable for more than the £16,756 they are prepared to concede.

Electricity and Water for Shower Block

520. Item 23 on the Scott Schedule is a claim for £10,000, being the estimated cost of water and electricity to a shower and toilet block used by Watersports but paid for by the Club between 2011 and 2017. The defendants are said to be liable for that cost as a result of breaches by Craig and Scott of sections 171 and 172 of the 2006 Act in causing the Club to pay for those utilities.

521. Craig and Scott said that the shower block was for members of the Club and so the costs were properly payable by the Club. The Club disputed this, saying that the block is located at the far end of the Site and away from the lodges but next to the ski school (when it was operating). Ms Owens said that the members of the Club did not use the showers or even know that the showers were available for use by them. In cross-examination she accepted that the showers and toilets were closer to the position of many statics but still questioned why any members would wish to leave their own home to use them. That said, she did accept that there was one skiing member who had owned neither a lodge nor a static. She did not address the potential use of the showers and toilets by those who came on to the Site in touring caravans.

522. Craig conceded that the customers of Watersports used the showers, as one would expect, but he said that such use was to be free of charge to Watersports so long as it held its lease of the lake. He referred to an agreement he says he made with the Club when he built the shop/office and shower block in the 1990's. This was at a time when the Club had yet to obtain planning permission for putting statics on the Site

and before the lodge development. There were therefore no shower or toilet facilities for members of the Club visiting in touring caravans.

523. Craig said his agreement with the then board of the Club was that if he built the shower block and made it available for use by members then Watersports could use it free of charge. In cross-examination, he could not recall which persons he had made the agreement with as it was going back more than 20 years. He said that the building works cost about £100,000 and that, whereas the Club later repurchased the shop/office from Watersports for £50,000 in accordance with the terms of the 1995 lease when that lease expired, it already owned the shower block. Craig said that his funding of the building costs meant that Watersports could continue to use the block free of any charge.

524. The Club responded to this by saying that the alleged agreement did not form part of the 1995 lease between the Club and Watersports which addressed the construction of the shop and "changing room block" and made provision for the shop to become part of the demised property and for the block to be handed over to the Club (with no mention of its use by Watersports). Nor was it mentioned in the later 2012 lease by which the parties formalised Watersports' occupation of the former pub and its use of the lake. Ms Owens said that one would have expected to have seen such an arrangement documented.

525. The evidence indicates to me that the Club should have been paying electricity and water charges for the shower block. The 1995 lease provided that the building became the Club's property. As with Item 21, the focus of the parties appears to have shifted away from the pleaded claim, in that the real issue between the parties may be over the ability of Watersports to let its clients use the shower block without contributing to those costs.

526. Whether or not Watersports should have made such a contribution, I am not persuaded that any of the defendants should be held accountable for it not having done so by reference to alleged breaches of duty. It seems to me that Ms Owens' evidence about the shower block not being a Club facility really ignores what the Club bargained for in the 1995 lease (by stipulating that, once built, it should be handed over to the Club) and quite possibly ignores the reasons why it would then have wished to do so for the benefit of largely non-resident members.

527. I make no finding of liability in respect of Item 23.

Rental for Shower Block and Office

528. Item 24 on the Scott Schedule bears some relation to Item 23 in that it is a claim for £25,000 which is said to represent a fair occupation rent for Watersports' use of the shower block and shop building after 2012 (when the partnership took its lease of the new premises in the former pub). Craig and Scott said that Watersports ceased to occup this building in 2012, which has since become the Club's office, and that there is therefore nothing due on this head of claim. They accepted they occasionally stored some items there. The Club said the defendants' account was incorrect though, in giving evidence, Mr Dyson accepted that the building was sometimes used by the

children of members (his own, Mr Nutt's and Craig's). The Club relied upon the hearsay evidence of Mr Nutt (who it had previously intended to call instead of Mr Dyson) which was to the effect that Craig had asked him to write a letter confirming that Craig had never used the building otherwise "*it would cost him £25,000 in rent*".

529. Mr Sims QC and Ms Gibb said that the value of this claim seemed to be based on a lease granted to a contractor in 2019 and was not a fair assessment of limited use for storage items.

530. I am not persuaded that what is essentially a claim for mesne profits for the use (as a storage facility) of a building for which the Club appears to have had no immediate alternative use justifies a claim against its directors. As with Item 23, I make no finding of liability against the defendants.

(6) Conclusion

531. I therefore make the findings of liability on the part of the respective defendants set out in paragraphs 278, 327, 339, 347, 352, 363, 366, 380, 386, 394, 479, 491, 498 and 519 above. The amounts identified in those paragraphs take no account of any interest that may be payable on the relevant sum and the question of interest, alongside costs and other consequential matters, will be the subject of a further hearing in the absence of agreement between the parties.