Henry and another v Finch and another; Re Finch (UK) plc (in liquidation)

[2015] EWHC 2430 (Ch)

Chancery Division

Judge Hodge QC, sitting as a High Court judge

13 August 2015

Miss Katherine Hallett (instructed by Bermans, Manchester) for the Applicants

Mr Simon Hill (instructed on a direct public access basis) for the Respondents

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

JUDGE HODGE QC:

1. This is the trial of an application by the joint liquidators of the company, Finch (UK) Plc, against its two directors, Mr and Mrs Finch, who are husband and wife and who were also the owners of the company's entire issued share capital. The application was issued in Manchester on 17.7.12 and effectively seeks (1) declarations that the respondents or either of them were guilty of misfeasance and breach of trust in relation to the issue, allotment and/or redemption of 875,000 redeemable shares in the company of £1 each, (2) a declaration that the crediting to the director's loan account of £875,000 in January 2008 constituted a preference in favour of the respondents or either of them, (3) a declaration that the respondents or either of them were guilty of misfeasance and breach of trust in retaining properties which beneficially belonged to the company, and (4) further and consequential relief. During the course of the trial, it became clear that the preference claim also extended to the return of the properties to the company. In essence, the company, whose principal activity (so far as this litigation is concerned) was property development, had taken over the property development trade of Mr Finch's former sole trading business, S R Finch & Co, from March 2002. The company entered into Creditors' Voluntary Liquidation on 11.7.08. One of the principal issues raised in this litigation is the extent to which the company had acquired the beneficial title to properties in the names of the respondents, or either of them, which had formed part of the trading stock of S R Finch & Co, or which were later acquired

in the individual names of the respondents, or either of them, rather than in the name of the company. Although this has only recently been disclosed by Mr Finch, on 14.7.2011 he created a trust deed for the benefit of his creditors under the Protected Trust Deeds (Scotland) Regulations 2008, conveying his property to an insolvency practitioner with KPMG's Glasgow office, Mr Blair Carnegie Nimmo. I understand that the liquidators accept that any money judgment against Mr Finch will be subject to the terms of this Scottish protected trust.

2. The exchange of evidence in the case was originally concluded in December 2012, with a first witness statement from Mr Henry in support of the application, a lengthy (105 page) witness statement in answer from Mr Finch, and a witness statement from Mr Henry in reply. Until the Friday before the trial, there had been no witness statement from Mrs Finch. The application has been listed for a substantive hearing in Manchester (over 4 court days) on no less than 3 occasions, in May 2013, February 2014 and July 2014. Each listing has had to be vacated due to the fact that Mrs Finch was diagnosed with cancer in January 2013, and her condition is likely to prove terminal. Her husband is caring for her at their home at St Leonards on Sea, on the South-Coast, and it would be impossible for him to leave her for a trial of any length in Manchester. Eventually, and for the reasons I gave in an extemporary judgment I delivered in Manchester on 19.6.15, I listed the case for a substantive trial at the Rolls Building in London over 4 days, starting on Monday 3.8.15. In order to cause the minimum inconvenience as possible to the Chancery Listing staff at The Rolls Building (who should receive full credit for their assistance in accommodating this trial), I listed it at the start of the Long Vacation, hence the relatively short lead-in time to the re-listed trial. As a result of the move to London, Miss Katherine Hallett (of counsel) was retained on behalf of the liquidators in place of the Manchester counsel formerly engaged on their behalf. Shortly before the trial the respondents (who had previously been acting as litigants in person, albeit with occasional, and long-distance, assistance from a McKenzie Friend based in the North-West) retained the services of Mr Simon Hill (of counsel) on a direct access basis. Major developments occurred during the week or so before the trial. On 24th July Mr Finch produced a further 59 pages long witness statement. There was no attempt to relate its contents to Mr Finch's earlier 2012 witness statement. Accompanying Mr Finch's further witness statement were some 200 pages of further documents (numbered pp 700 and following), to which Mr Finch added during the course of the week preceding the trial. This led to the production of additional docs from the liquidators (added to the bundle of documents numbered 2 which had accompanied Mr Henry's 1st witness statement). On the afternoon of the Friday before the trial Mr Finch produced almost 550 pages of ledger entries, which I have found impossible to follow without considerable assistance from Mr Finch. (In examination in chief, Mr Henry described them as "in many ways, just a lot of figures"). Later that same afternoon, there was produced, for the first time, a witness statement from Mrs Finch, although this is mercifully short. In it she indicates her unreserved support for her husband and his position and her concurrence with his two witness statements, which she says she has read. She confirms that they held many directors' meetings, normally at home. Whenever there was a business subject for the company that required a board meeting, her husband would explain the subject to his wife and seek her opinion. They would discuss, and he would listen to his wife's views. Mrs Finch and her husband always acted in good faith, and she took comfort in seeing how diligent her husband was, always seeking the advice of solicitors and accountants for the company's important business. Mrs Finch cannot understand how the liquidators have made so many false claims. Her husband has shown her

where all the moneys had been received by the company. Mrs Finch apologises most sincerely for any faults in their actions as directors, and says that there was never any intention to do this and that they had always worked hard to promote the company.

3. Although I intend no criticism of the parties or their legal representatives, the manner in which the documents have been presented to the court has made the task of the court (and, I suspect of the parties and their legal representatives) considerably more difficult. This is because the documents are not arranged chronologically, or even thematically (such as property by property), but in the manner in which they were exhibited to the several witness statements of Mr Henry and Mr Finch. Indeed, I must pay particular tribute to the industry and attention of Miss Hallett and Mr Hill, who were seldom lost for a page reference on the many occasions upon which one was requested by a somewhat perplexed judge.

4. On the morning of the first day of the trial, and after hearing submissions from both counsel, I allowed an application by the respondents, which had been opposed by the liquidators, for relief from sanctions so as to permit the respondents to rely upon their further witness evidence and documents. My reasons are to be found in the extemporary judgment I delivered that morning. In summary, I found that there had been a serious and significant default on the part of the respondents for which there was no good reason; but that, in all the circumstances of the case, the interests of justice demanded that I should accede to the respondents' application for relief.

5. The liquidators' evidence consisted of the two witness statements of Mr Henry, supplemented by brief oral evidence. Mr Henry gave evidence in chief explaining the additional documentation the liquidators had produced in response to the respondents' further evidence and documents. He was cross-examined for less than 10 minutes. After the conclusion of Mr Finch's evidence, Mr Henry was re-called to address the issue of the solvency of the company in January 2008, and he was cross-examined by Mr Hill. His further evidence lasted for about 40 minutes. There was no challenge to Mr Henry's probity or his good faith. Inevitably, as a professional liquidator, he had no direct, personal knowledge of the matters falling to be considered in this litigation.

6. The respondents' only live evidence came from Mr Finch. The respondents also rely upon short witness statements from Mrs Finch and from Mr David Elliott, a former company secretary and creditor of the company. I have already summarised Mrs Finch's evidence. Mr Elliott's witness statement (which was admitted as a hearsay statement, without cross-examination, and despite non-compliance with the required formalities) is directed to rebutting the liquidators' case that the respondents were responsible for an alleged over-payment to Mr Elliott of some £15,761. Having confirmed his two substantive witness statements, Mr Finch was in the witness box for some 12 hours, spread over 3 days, starting (after an early luncheon adjournment) at about 1.40 pm on Monday 3rd August and concluding shortly before 3.00 pm on Wednesday 5 August. In his closing submissions, Mr Hill said that throughout his evidence Mr Finch had done his best to illuminate and to assist the court, and to answer each question thoroughly and patiently and to the best of his ability. He had displayed an almost complete mastery of the documents and of the company's ledger and accounts. I accept that description of Mr Finch and his evidence. Mr Hill also submitted that although Mr Finch had perhaps engaged only lately with these proceedings in the necessary depth, he had presented a clear picture of a complex and convoluted state of affairs.

I accept that Mr Finch has genuinely sought to do that, although I would not always describe the picture he has presented as "clear". Mr Finch can, in my judgment, be criticised for employing an accounting system of such byzantine complexity and opacity that it has been almost impossible for the liquidators, and for the court, to drill down through the accounts and to understand them without considerable assistance from Mr Finch. Because they are based on the company's ledger entries, Mr Finch's diagrams seeking to show the flow, and the destination, of funds attract the same criticism. But I am satisfied, from my observations of Mr Finch during 12 hours in the witness box, and also whilst sitting in court and engaging with the proceedings, that, with one major qualification, he is an honest witness who, albeit only belatedly, has engaged fully with the court process, and has sought to assist the court to the best of his ability, and in a straightforward manner. That is not to say, however, that I necessarily agree with Mr Finch's legal characterisation, or his legal analysis, of his convoluted dealings with the company. Although I will set out my express findings, and their consequences, later in this judgment, I make it clear now that I accept Mr Finch's evidence as to the creation of his family trusts, as to his factual dealings with the various properties, and as to the creation of the 875,000 redeemable shares in the company. I am satisfied that any contradictions, or inconsistencies, in Mr Finch's evidence, or any gaps in his recollection, as to these matters were the result of genuine difficulties of recollection or analysis on Mr Finch's part. But I cannot accept as credible, and I do not accept, Mr Finch's account of his reasons for the redemption of the redeemable shares, or as to the state of the company's financial affairs at that time. Only to this limited extent do I reject Mr Finch's evidence.

7. The evidence in the case concluded at about 4.00 pm on the third day of the trial (Wednesday 5 August). Mr Hill then proceeded to address me in closing for a little over 5 ½ hours, beginning at about 4.00 pm on day 3 and concluding at about 3.45 on day 4. Miss Hallett then addressed me in reply for a little over 4 ½ hours, concluding at just before 3.00 pm on Day 5 of the trial. I then heard briefly from Mr Hill in rejoinder, and from Miss Hallett in rebuttal. The trial concluded at about 3.20 pm on Friday 7 August. Despite sitting at 10.00 am on each day of the trial apart from the first day, the hearing had exceeded its time estimate by almost one full day. I reserved judgment until 10.30 am on Thursday 13th August. Because of the volume of the trial documentation, I have had to work on the judgment in London, thereby effectively extending my stay at the Rolls Building for a full court week.

8. I make it clear that I have considered in detail the documents and the evidence presented to me. Inevitably in a case as complex and convoluted as the present, there will be particular documents, authorities, and points (both factual and legal) to which I have been referred that I do not consider to be relevant to my determination in this case. The mere fact that I do not mention a particular matter does not mean that I have overlooked it, or that it has not been considered in the course of my deliberations. To mention every single point would make this judgment, in a difficult and complex case, unmanageable.

9. I begin with the trust documents. They are four in number. The first in point of time is the Discretionary Finch Family Trust dated 28 May 2001 (at pp 786-790). The settlors were the respondents. The trustees were Mr Finch, his father, and Mrs Finch's father. The beneficiaries were Mrs Finch and the respondents' 6 children. The settlement was expressed to be irrevocable but (by clause 8 (i)) the trustees had full power to transfer the whole or any part of the trust fund to another trust. There was a trust for sale with power to postpone sale. The settlors and any spouse of the settlors were excluded from any benefit unless a named

beneficiary. The settled property comprised the business assets of Mr Finch's sole trader business, SR Finch & Co, together with various properties identified at p 790, many of which (including 51, 52 and 53 Marina, St Leonards on Sea, which were later sold to the company) feature in this litigation. The settlement was executed by the respondents as settlors. Only one of the trustees, Mrs Finch's father, executed the document; and then only as a witness to the settlors' execution.

10. The second document in point of time is the Discretionary Finch Family Trust dated 11 July 2001 at pp 791-5. This is a mirror image of the first, save that the trustees were Mr Finch, his father, and his mother, and there was three additional trust assets: a property in Spain (not material to this litigation), a leasehold penthouse at 16 Marina Park, St Leonards on Sea (which was later surrendered and replaced with leases of 16 and 17 Marina Park, which had by then been developed out of the former penthouse), and a ketch named Blue Silk. By this time, Mrs Finch's father had sadly passed away. The document was executed by the respondents as the settlors, and their signature was witnessed by Mr Finch's mother, one of the trustees. Mr Finch told me that he had drafted both of these trust documents; and that he considered that the second had been validly created pursuant to the power of re-settlement conferred by clause 8(i) of the first document. The difficulty with this is that one of the two surviving trustees of the first trust, Mr Finch's father, did not execute the second trust. Happily, it is not necessary for me to determine the validity of the second trust for the purposes of this litigation; nor would it be appropriate for me to do so in the absence of any of the beneficiaries other than Mrs Finch.

11. Both the first and the second trust documents first surfaced as part of the respondents' recent further documentation. The liquidators invite me to find that they are recent fabrications, or alternatively sham documents. There was no dispute between counsel as to the legal concept of a "sham". I was referred to Diplock LJ's celebrated observations in *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786 at 802 C-F and to observations of Munby J in *A v A* [2007] EWHC 99 (Fam), [2007] 2 FLR 467 at [49] – [53]. Mr Finch says that these are genuine documents, created at the dates they purport to be made. I accept Mr Finch's evidence and I reject the liquidators' case. On this point I believe that Mr Finch is telling the truth. If the documents are recent creations, I cannot see why Mr Finch would have complicated matters by producing two different documents, dated only 2 months apart, which are difficult to reconcile with each other. If they are sham documents, I cannot understand why they were not produced to the liquidators, and to the court, earlier in this litigation. Nor is there is any evidence that any of the several trustees were ever parties to any alleged sham.

12. The third and fourth trust documents are both dated 30 January 2006. One is called "Discretionary Finch Family Trust" and is at pp 440-8. The settlors are the respondents. The beneficiaries are both the respondents and their children, and also any corporation all of the equity shares of which are owned beneficially by any one or more of the individual beneficiaries (described as a "corporate beneficiary"), which would include Finch (UK) Plc. The trust is governed by the law of Costa Rica; and the trustees are two Costa Rican lawyers. The document was executed by the respondents as settlors (their signatures being witnessed by Stephen Smart, whom Mr Finch told me he had considered bringing forward as a witness) and by the two Costa Rican trustees. The trust property comprised many of the previously settled properties, together with two more recent additions, 43 Filsham Road and the

leasehold at 1 The Colonnade, Marina, St Leonards on Sea. Mr Finch told me that this document had been obtained by the liquidators from the Land Registry in about July 2009. He described it as the "current" trust. It was not executed by either of Mr Finch's parents, who (with him) remained the trustees of the July 2001 Trust in 2006 (although they have since both passed away). I am satisfied that this document was executed at or about the time that it purports to be, and that it was intended to have legal effect. I do not accept that it is a sham. Happily, it is neither necessary, nor appropriate, for me to determine the validity and effect of this 2006 Discretionary Finch Family Trust given (1) that it was executed by only one of the two surviving trustees of the May 2001 Trust, and by only one of the three original and surviving trustees of the July 2001 Trust and (2) that one of the named beneficiaries was Mr Finch, who had been expressly excluded from any benefit under the two earlier trusts.

13. The final trust document is at pp 433-9 and it describes itself as a "Declaration and Confirmation of Limited and Specific Bare Trust" made by "the bare trustee" being Finch (UK) Plc. It was apparently produced to Mr Henry on 11 July 2008, the day the company entered into CVL. The trust assets are all the English properties identified in the 2006 Discretionary Finch Family Trust. The document was executed by the respondents as settlors, by Mr Finch on behalf of "the Beneficiary, the Finch Family Trust", and by Mr Finch on behalf of Finch (UK) Plc as "the Trustee". Mr Finch told me that he was responsible for the drafting of this document. I find it difficult to understand what meaning this document is seeking to convey. The specific purpose of the bare trust is said to be that the trust assets are to be improved, maintained and sold for the benefit of the Finch Family Trust within a period of 5 years. There are references to the company holding the legal title to the assets on trust; but this is a nonsense because the legal title was in fact vested in the respondents, or one of them. There are references to £875,000, or a sum never less than this sum, being a sum that reflects "the Current Agreed Liability" (a term not defined) being paid by the company, and also to the company having agreed to issue 875,000 redeemable shares to Mr Finch "as Settlor in the singular but acting for and on behalf of the settlors Mr and Mrs S R Finch in the plural", even though the redeemable shares had already been issued by this time. I am satisfied that this document also was executed at or about the time that it purports to be, and that it was intended to have legal effect; but I find it difficult to assign any discernible legal effect to this document in circumstances where the legal title to the relevant properties was, and was to continue to be, held by the respondents or one of them. In the course of his evidence, Mr Finch emphasised that it was intended as a "confirmation" of the existing "commercial arrangement", and I accept that this was the case. In my judgment, this document merely evidenced the existing relationship between the company and any relevant trust, whatever that may have been, and cannot be treated as varying whatever legal relationship had previously existed.

14. I turn then to consider the dealings between the company and the respondents in their capacity as investment advisors and managers to the Finch Family Trusts. Certain of the trust properties (as identified in the completion statement at p 849, and also 51, 52 and 53 Marina, St Leonards on Sea) were sold and conveyed to the company by the respondents. The company also purchased other land from unrelated third parties. An example is the land on the north side of 43 Filsham Road, St Leonards on Sea, which the company developed as Plots 1-4 Filsham Hurst. Later, certain of the properties belonging to the company were sold and conveyed to one or other of the respondents, who would raise money on them by taking

out buy-to-let mortgages. I accept Mr Finch's evidence, which is in large part supported by the ledger entries, that the respondents have fully accounted to the company for all of the moneys they received in relation to these transactions. But, in addition, other trust assets were subject to what Mr Finch termed the "commercial arrangement". Some of these were properties which had originally formed assets of Mr Finch's sole tradership, S R Finch & Co, and they entered the commercial arrangement on 31.1.03, as evidenced by the documents at pp 186.1-4 and 2000. Others were acquired later, such as 43 Filsham Road, which was purchased by Mr Finch in November 2003 and entered the commercial arrangement on 31.1.05: see pp 324.7 and 2300. In re-examination, Mr Finch explained how this worked by reference to 55 Filsham Road, St Leonards on Sea (also known as The Turret House), the respondents' present family home, which had entered the commercial arrangement on 31.1.2004. A value for this property was set at £400,000. Since it was subject to a mortgage (in favour of the Woolwich) of £275,000, Mr Finch's director's loan account (or DLA) was credited with the balance of £125,000: see pp 334.3 and 2154. Mr Finch explained that they needed to reflect that liability in the company's books, and that the only place for it was in the DLA. It was said to reflect the property coming in to the "keepership" of the company. The £125,000 was said to be a reference to how much should come back to the family trust. During the company's keepership, it would pay any council tax for the property which was not borne by any tenant, and the company would bear the mortgage payments, but retain the rents for the property. When any property reverted to the trust, Mr Finch said that as part of the final accounting exercise, he would ensure that the company had been subjected to any expenses. The benefits to the company were said to be that its profile, brand or image were enhanced by its apparent ownership of the properties, and that it had the benefit of charging for any works undertaken to the properties. At the end of his evidence, I asked Mr Finch why it had been necessary to set a value on the properties if they were not being introduced into the company. Mr Finch explained that this was the security aspect: to show a value for each property. The respondents had felt safer knowing that the company had acknowledged that the amount was owed. It had never been the intention to treat each property as an asset of the company. It was merely to represent the company's "work in progress". When I asked why the trust had been concerned about the security aspect, Mr Finch replied that it was to reflect the parties' best estimate of what each property was worth. In response to questions about communications betweens Mr Finch and the trustees, he said that there had just been meetings, with nothing in writing. He had explained the commercial arrangement to the trustees, and they had supported his decisions. When the trustees from Costa Rica had taken over, there had been much more involvement on the part of the trustees. Mr Finch confirmed that the trustees had been content for him to introduce the properties to the company in terms of the commercial arrangement: they understood that Mr Finch was the investment manager.

15. During the company's "keepership" of the properties, their assigned value was treated as an asset of the company, and any mortgages thereon were treated as part of its liabilities. The report of the directors and financial statements for the y.e. 31.1.2006 were approved by the Board of Directors (who were Mr and Mrs Finch) on 11.10.06 and were signed on its behalf by Mr Finch. Note 18 (headed "Related Party Disclosures") at p 274 includes the statement that "The directors Mr and Mrs Finch hold properties amounting to £2,556,816 in trust for the company and these are included in stock and work in progress as at the year end. Mortgages held by the directors on these properties totalling £1,504,599 are included in bank loans as at the year end." The properties in question are identified in an unsigned and undated letter from

the respondents to the company's accountants, Ashdown Hurrey LLP, at p 321. A similar note appears in the following year's accounts at p 408 (although the figures are reduced). Mrs Finch had resigned as a director on 26.1.07 and these accounts were signed by Mr Finch, as the company's sole director, on 11.1.08 (which was a Friday). On the same day Mr Finch also signed a letter to the company's accountants which (at p 412) confirmed that the penthouse flat at Marina Park, 43 Filsham Road, 55 Filsham Road and The Colonnade were all held in the names of the directors, but in trust for the company. The accountant's relevant working papers are at pp 439.8-11. (Mr Henry told me that the manuscript notes appear on the originals, apart from the gamma entries on p 439.11 which were in his hand.) There were no corresponding entries in earlier years' accounts for the company (at pp 184, 533, 364 and 240). Because the company entered into CVL on 11.7.08, audited accounts for the y.e. 31.1.08 were never produced. Brief management accounts for the y.e. 31.1.2008 appear at p 541.2; and the estimated statement of affairs as at 11.7.08 appears at p 475.

16. In a letter to the liquidators (at p 439.3) dated 6.11.2008 the company's accountants stated that in respect of the company's financial statements the director, Mr Finch, had provided them with details of properties registered at the Land Registry in his name and those registered jointly with his wife that he had confirmed were held in trust by them for the company. Mr Finch was said to have signed and submitted a letter of representation to that effect; and the accountants enclosed a copy of the 11.1.08 letter. The financial statements were said to have always dealt with the properties in that way in line with the facts presented to the accountants, and Mr Finch had approved the financial statements. The letter concluded: "We have no knowledge of a Finch Family trust nor any beneficial interest conveyed thereon [sic]." When presented with this letter in cross-examination, Mr Finch said that the accountants had always been conscious of the family trust. But he then added that he had said that "we held this in trust for the company". He said that he had needed to show that they (i.e. the respondents) were being responsible. By way of clarification, I asked Mr Finch whether he had told the accountants that he held the properties in trust for the company, and he confirmed that he had. He later added that all the properties held in trust by the company were part of the commercial arrangement.

17. At the heart of much of this case is the correct legal characterisation of the "commercial arrangement" created by Mr Finch wearing (as he put it) his two hats, on behalf both of the company (of which he was the principal, and the only truly active, director) and also the family trusts (of which he was a settlor and the investment manager). Mr Finch was adamant that the beneficial interest in the properties which were the subject of the commercial arrangement had never passed to the company. But it would seem to me that the correct characterisation of the nature of the commercial arrangement is a question of law. Addressing the distinction between tenancies and licences in his leading speech in *Street v Mountford* [1985] AC 809 at 819 E-G, Lord Templeman observed:

"… the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."

18. In my judgment, the legal concept that best fits the dealings between the parties (as evidenced by the ledger entries, the company's accounts, and the letters of representation from the directors to the company's accountants, when viewed in conjunction with Mr Finch's evidence) is that of a sale by the trust, acting by Mr Finch as its investment manager, to the company, acting by Mr Finch as its lead director, of the beneficial interest in each of the properties which were the subject of the commercial arrangement, coupled with a call option in favour of the trust, again acting by Mr Finch, entitling it to call for a re-transfer of the beneficial interest in the properties in return for the payment to the company of their assigned value. In my judgment, any breach by Mr Finch of his duties as a director of the company, and any non-compliance with any technical requirement of the Companies Acts, in this regard was cured by the application of the principle in *Re Duomatic* [1969] 2 Ch 365 since I am satisfied on the evidence, and I find, that the commercial arrangement was expressly endorsed and approved by both respondents as the only two shareholders of the company at a time when the company was neither solvent nor on the verge of insolvency. At a later point in this judgement, I will need to consider whether the company ever validly exited from the commercial arrangement. But before doing so, I need first to consider the issue and the allotment of the 875,000 redeemable shares in the company.

19. The report of the directors and financial statements for the company for the year ended 21.1.2003 were approved by the board and signed by Mr Finch on 20.2.2004. They were apparently filed at Companies House on 25.3.2004. They record (under note 15, headed "Called up share capital) that 875,000 Redeemable C shares of £1 each were allotted to Mr Finch and fully paid for cash at par during the year: see pp 521 and 533. Payment was made by debiting £875,000 to Mr Finch's DLA on 31.1.2003, which was then in credit to the extent of £902,962.30, reflecting the introduction of properties to the company as part of the commercial arrangement: see pp 186.1-4 and p 2000. Until shortly before the trial, the liquidators had not seen any written resolution for the creation of the redeemable shares. This was produced as part of the respondents' late disclosure. A written resolution for the creation of 1 million redeemable C shares (and providing for them to be redeemable upon the giving of not less than one month's previous notice in writing) signed by both of the respondents and purportedly dated 25.1.2003 appears at pp 741-3. This was enclosed with a letter to Mr Finch from Ashdown Hurrey dated 16.2.2004, which also enclosed a Form 88 (2) allotting the redeemable shares to Mr Finch, at pp 739-40. From a later letter from the accountants to Mr Finch dated 8.4.2004 (at p 744), it would appear that some further paperwork was required to satisfy the requirements of Companies House, which was apparently only filed on 6.8.04: see p 505. Nevertheless, I am satisfied on the evidence, and I find, that any breach by the respondents of their duties as directors of the company, and any non-compliance with any technical requirements of the Companies Acts (including any need under s 103 of the *Companies Act 1985* for an independent valuation of the non-cash consideration for the redeemable shares effectively supplied by the values assigned to the beneficial interest in the properties passing to the company as part of the commercial arrangement) was cured by the application of the principle in *Re Duomatic* since both respondents, as the only two shareholders of the company, expressly endorsed and approved the issue and allotment of the redeemable shares to Mr Finch at a time when the company was neither solvent nor on the verge of insolvency. The liquidators' claims for declarations that the respondents were guilty of misfeasance and breach of trust in procuring the company to issue and/or allot the 875,000 redeemable shares therefore fail.

20. In the company's financial statements for the y.e. 31.1.2006 the 875,000 redeemable shares were shown as part of the company's share capital: see p 265 and note 16 at p 274. This accounting treatment changed in the following year's accounts (signed by Mr Finch on 11.1.2008). In accordance with FRS 25, the redeemable shares were re-classified as debt, and appeared under the heading "creditors: amounts falling due after more than 1 year": see pp 399, 406 and 408. Note 14 (at p 406) included the statement: "Although the Redeemable C shares are redeemable at par upon the holders or the company providing one month notice they have been classified as due between two and five years because the company and the holders of the shares have agreed that no redemption will be made until at least two years after the balance sheet date." That two year period would not expire until 31.1.2009. That statement was supported by the letter of representation signed by Mr Finch and also dated (in manuscript) 11.1.2008 (which was a Friday) which (under the heading "Going Concern") stated: "We confirm that the Redeemable C shares held by the director S R Finch will not be redeemed within at least two years of the balance sheet date. We further confirm that they will only be redeemed as cash flow allows and not to the detriment of the company's going concern status": see p 411.

21. By the next working day (Monday 14.1.2008), however, there would appear to have been a dramatic change of mind on the part of Mr Finch for the company secretary (Liane Jean Whitney) signed the minutes of an EGM of all of the members of the company (the two respondents) held between 9.00 am and 9.30 am on that day which unanimously resolved by special resolution that the C class redeemable shares should be redeemable on demand (rather than upon the giving of one month's previous notice in writing): see p 538. Mr Finch wrote to the company "to immediately demand the sum of £875,000 for the redemption of the C class shares". The letter continued: "This has the effect of triggering the cancellation of the Special Purpose Bare Trust and the return of any property that you have left and managing in the Trust Portfolio to my wife and I. You may set off against the £875,000 the values of the properties and corresponding mortgages with the resulting balance paid to my Directors Loan account": see p 539. At p 540 are the minutes, signed by Mr Finch as chairman, of an EGM of all of the members of the company (the two respondents) held between 2.00 am and 2.30 am on Thursday 31.1.08 which unanimously resolved by special resolution that the company's C class shares should be redeemed in full that day further to a demand from the shareholder, Mr Finch. The minutes recorded (1) that the shareholder, Mr Finch, representing the Finch Family trust would receive a credit for the shares to his DLA in the sum of £875,000; (2) that the shares being demanded resulted in the properties held in trust by the company for the Finch Family Trust having to be returned and the trust cancelled; and (3) that the trust properties should be returned and debited to Mr Finch's DLA and also that the mortgages associated with each property were also credited to Mr Finch's DLA. An annotated printout showing the effect on Mr Finch's DLA is at p 542 (with Mr Finch's version at p 821). The ledger entries themselves are at p 2527. According to the printout, before the £875,000 was applied to Mr Finch's DLA, it was in debit to the extent of £229,953.05. At p 870, Mr Finch produced a calculation in support of his assertion that, in fact, his DLA was in credit to the extent of £69,185.18 even before any part of the £875,000 was credited to his account. As a result of questions from the Bench during the course of his re-examination which led to the court adjourning late for lunch on Day 3, Mr Finch very fairly accepted that the asserted £85,000 credit on p 870 could not properly be treated as a credit to his DLA as at 31.1.2008. It therefore falls out of the picture. But Mr Finch also

claimed credit for an additional £49,000 represented by (1) an outstanding balance of £30,000 said to be due to him (on behalf of the trust) on his grant of a lease to the company of the basement flat at 42a Wellington Square, Hastings on 30.6.04 and (2) a further £19,000 because the value of the ketch, Blue Silk, had never been credited to Mr Finch's DLA even though it had formed part of the commercial arrangement. If all of these credits were to be allowed in full, this would have resulted in Mr Finch's DLA being in credit to the extent (on my calculations) of £33,185.18. In closing, Miss Hallett expressed her concerns about Mr Finch's reliance on p 870 and the additional two credits because these claims had been advanced at a very late stage which had left the liquidators with insufficient time to review the ledger entries and to consider whether they were justified. She is particularly concerned about the claimed credit of £117,814.82 said to be due to the DLA on the re-mortgage of 55 Filsham Road because, as Mr Finch himself accepted, this had pre-dated 31.1.2007 and so should have been picked up by the company's accountants when they had adjusted the DLA in the course of auditing the accounts for that year.

22. If it were necessary for me to do so, I would have accepted Mr Finch's evidence about the propriety of these adjustments, and would have found that his DLA was in credit to the extent of £33,185.18 immediately before the process began of adjusting his DLA to account for the redemption of the 875,000 redeemable shares. But I am not sure that this issue has any practical effect upon the outcome of these proceedings. Mr Hill accepts that set-off is not available to Mr Finch in these misfeasance proceedings against any debt that may have been due to him from the company. Once Mr Finch had given notice to the company immediately demanding £875,000 for the redemption of all of his C shares, in my judgment he became a creditor of the company for the purposes of s 239 IA 1986. By making the adjustments to his DLA on 31.1.2008 against this monetary liability on the part of the company under which Mr Finch sought to achieve the return of the properties which were the subject of the commercial arrangement, I find that the company was doing something which had the effect of putting Mr Finch into a position which, in the event of the company going into insolvent liquidation, would be better than the position he would have been in if that had not been done: the properties would form part of his assets rather than those of the company. The requirements of s 239 (4) are therefore satisfied. Since the company went into CVL on 11.7.08, less than six months later, any preference was given at a "relevant time". Two questions remain: (1) In crediting the value of the properties against his DLA, was Mr Finch influenced by a desire to put himself into a better position if the company went into insolvent liquidation? Since, as a director of the company, Mr Finch was a person connected with the company, by s 239 (6) such a desire is presumed unless the contrary is shown. (2) As at 31.1.2008, was the company unable to pay its debts as they fell due? On this issue, the burden is on the liquidators: see s 240 (2).

23. I have already indicated that I cannot accept as credible, and I do not accept, Mr Finch's account of his reasons for the redemption of the redeemable shares, or as to the state of the company's financial affairs at that time. I must now explain why. Mr Finch's explanation for the redemption of the 875,000 shares was that he needed to eliminate the debit balance on his DLA before the end of the company's financial year in order to avoid the Revenue imposing charges to tax and penalties on both the company and himself personally. He also explained that, because of the change in accounting practice, reflected in the different treatment of the preference shares in the company's accounts for the years ended 31.1. 07 and 08, there was

no longer any purpose in maintaining the £875,000 as share capital rather than long-term debt because it was identified as long-term debt in the company's accounts in any event. He added that with the end of the commercial arrangement, the liability for the mortgages would revert from the company to the trust. The first difficulty with Mr Finch's explanation is that if the purpose of redeeming the shares was to eliminate the debit position on Mr Finch's DLA, then, according to the stated position on the DLA, Mr Finch only needed to redeem some 230,000 shares; and, if his account of the adjustments needed to his DLA is correct (as I am inclined to think that it is), then there was no debit position, and therefore no problem which needed to be remedied. The second difficulty is the timing: on Friday 11 January Mr Finch had signed the letter of representation to the company's accountants, and also the company accounts themselves, committing himself not to redeem the shares before 31.1.2009. By first thing on Monday 14.1.08 (if the company minutes at p 538 constitute an accurate record of the time of the EGM) Mr Finch had already decided to renege on his commitment and to call for the immediate redemption of all 875,000 of his shares. (The account at paragraphs 103 and following of Mr Finch's 2nd witness statement cannot be accurate in terms of the chronology.) Mr Finch was questioned about these difficulties both in cross-examination and by me at the end of his evidence. I do not find his answers, or his explanation, at all satisfactory. Mr Finch told me that there had been discussions about the tax charge with the company accountants, although there was nothing in writing. Mr Finch accepted that he had been responsible for signing the letter of representation which had been prepared by the company's accountants, and that he had consciously applied his mind to the representation about the redeemable shares because he had appreciated that one of the 2 years had already passed. But he had realised that it was a mistake when he had started to take on board the implications of the DLA, and he had been driven by the need to ensure that it was in credit, rather than looking for actual repayment of the DLA. Mr Finch told me that he had told the accountants that he was going to redeem the shares. He also told me that he had not been conscious at that time of the adjustments he now says should have been made to his DLA, that he had had limited time, and that he had been fearful of the result if the DLA had not been put in credit by the company's year end on 31.1.2008.

24. I fear that I cannot accept any of this evidence. None of it can explain the dramatic shift in Mr Finch's position over the weekend between 11 and 14 January 2008. I am satisfied that by this time Mr Finch appreciated that the company was at serious risk of insolvency and he was determined to extricate from the company the properties which were the subject of the commercial arrangement, and which he had carefully built up with his wife over the previous ten or more years, in order to preserve them for the benefit of his family. I find that Mr Finch has sought to mislead the court to achieve that end. I cannot accept that the company's accountants were complicit in Mr Finch's retraction of the assurances he had given to them as recently as 11.1.08. Miss Hallett also relies upon an email Mr Finch sent to Robert McIlvar (of Bank of Scotland) on 31.3.08 (at p 541), when he was applying for continued financial support for the company, in which he stated that it was not his intention to withdraw the £875,000 shown in the 2007 accounts as a liability to him "for the foreseeable future", without mentioning that much of this liability had already been reflected by adjustments to his DLA consequent upon the unwinding of the commercial arrangement. When questioned by Miss Hallett about this email, Mr Finch accepted that he had not explained that he had redeemed his shares; but he maintained that he was being "totally transparent" with the bank, saying that he was not proposing to withdraw his money from the company. At the very least,

Mr Finch was being economical with the truth by not mentioning the effect upon the commercial arrangement; but I arrive at my conclusion as to Mr Finch's motivation independently of the contents of this email. I find as a fact that both the share redemption, and the application of its notional proceeds to secure the return to the respondents of the properties which were the subject of the commercial arrangement, were influenced by a desire on Mr Finch's part to improve his position in the event of the company going into insolvent liquidation. Alternatively, Mr Finch has not succeeded in rebutting the presumption that he was so influenced.

25. The company ceased trading on 17.6.08 and went into CVL on 11.7.08 with an estimated deficiency as regards creditors of almost £1.113m. The largest creditor, Bank of Scotland, was owed over £837,000. Pages 473-4 demonstrate that as at 31.1.08 the company owed Bank of Scotland over £761K and National Westminster Bank over £31K. The company's principal assets were in the form of illiquid property, with (according to Mr Finch's calculation) Plot 4 Filsham Hurst requiring a further £50,000 to be spent on it to complete the development. During the course of Mr Finch's cross-examination, both he and Mr Henry produced calculations seeking to show that, as at 31.1.08, the company (according to Mr Finch) was solvent and (according to Mr Henry) was insolvent. Both were questioned about their calculations. One difficulty with Mr Finch's analysis is that it requires £50,000 to be spent on 4 Filsham Hurst which the company did not have without continuing bank support, nor had contracts being exchanged for its sale. Mr Henry's calculation, by contrast, has the support of logic underlying it.

26. Mr Finch relies on the 2007 accounts (which show retained profits of £240,502 and a surplus of total assets over current liabilities of over £2.45m) and management accounts for the y.e. 31.1.08 at p 541.2 (which show further profits for the year of £58,322.99 and a balance sheet in surplus). In evidence, Mr Finch maintained that the company was not insolvent as at 31.1.08 and that it enjoyed good relations with its bank. The insolvency came about later, because of the bank's failure to continue its support for the company and the company's consequent inability to complete its development projects. In addition to Mr Henry's insolvency calculation, the liquidators rely upon the company history at p 472 which was provided to creditors for the purposes of the meeting on 11.7.08 at which the company was placed into CVL. Mr Finch accepted in cross-examination that he had provided this information to the liquidators. It was said that problems had first begun to materialise during 2007. Property took longer to sell and prices had to be lowered. During 2007 while the company's sales slowed down finance charges mounted. The director attempted to seek alternative sources of revenue but this did not materialise. The weight of the bank finance and interest charges eroded the profits made by the company and with the lack of sales the company started to make losses. The director attempted to obtain further support from Bank of Scotland. The company was unable to secure new funding. Whilst the Bank did offer new facilities, the terms were such that the director felt unable to accept them because interest and charges were too great and further guarantees were going to be needed. A further problem was that the terms did not actually provide sufficient extra working capital to allow properties to be further developed to allow their sale. The director took the advice of an insolvency practitioner and, after discussion, took the decision that the company should cease to trade and be placed into CVL.

27. On the evidence, I am satisfied that the liquidator has discharged the burden of showing that the company was insolvent on 31.1.08. It was entirely dependent upon the continuing support of Bank of Scotland, and, as events were shortly to prove, this could no longer be assured. It was this realisation that (as I have found) motivated Mr Finch to renege on his commitment not to redeem his shares for a further year, and to seek the return of the properties which were the subject of the commercial arrangement. One of the individual properties which form part of the present claim is 42A Wellington Square, Hastings. I find the dealings with this property instructive in the present context. Mr Finch had granted a lease of this basement flat to the company on 30.6.04 for £48K. It is Mr Finch's evidence (which I accept) that the company had never accounted to him for this sum. On 20.7.08 the company sold this lease to Mrs Finch for £120K. At the same time, she mortgaged this flat to Godiva Mortgages Ltd for £102K: see the completion statement at pp 296 and 301.1. That left a balance of £18K outstanding to the company. It is Mr Finch's evidence (which I accept) that this was off-set against the £48K, leaving a balance due to Mr Finch of £30k from the original purchase. Miss Hallett had challenged Mr Finch's account in cross-examination, pointing out that that if the balance of £18K had been off-set against the outstanding £48K, there was no reason why the whole £48K should not have been off-set against the £120K purchase price. Mr Finch had no satisfactory answer to this point. I find that that is because the reality (which Mr Finch was not prepared to articulate) is that by July 2007 the company was so desperate for money that it needed to receive in cash (or by way of credit) the whole of the net balance of the mortgage proceeds of £102K being raised by Mrs Finch. The completion statement shows that £7,200 of the mortgage proceeds were paid to M Cornelius. Mr Finch's evidence is that this was a repayment of £7,200 to his sister, Melinda Cornelius, who had lent the company money to enable it to purchase materials for works to 42A. A disproportionate amount of time was taken up with an analysis of the paperwork which was said to evidence this liability on the part of the company at pp 617-8 (which Mr Hill acknowledged could have been better). I accept that this documentation is capable of evidencing payments to the company by Melinda Cornelius in a sum sufficient to explain the payment of £7,200 to her, and that she had only presented an invoice to the company for this amount when she was told that the company had sufficient funds to repay her. I accept the evidence of Mr Finch that this payment reflected the proper discharge of a company liability. But what both aspects of this transaction demonstrate is the parlous financial state of the company as early as July 2007. I am satisfied on the evidence that the liquidators have discharged the burden of showing that the company was insolvent on 31.1.08. It could not meet its debts as they fell due without outside support, which could no longer be assured. The company's cessation of trading in June 2008, and its move into CVL a month later, were not the product of some new, and extraneous, event but the inevitable culmination of a process which had begun earlier, and had been perceived by Mr Finch as likely to occur in January 2008. All of the necessary elements of a preference within the meaning of s 239 IA 1986 have been made out. The liquidators are entitled to a declaration in the terms of paragraph 3 of the Application Notice. Although I have not yet been addressed on remedies, my preliminary view is that the appropriate consequential remedy to restore the position to what it would have been if the company had not given that preference (within s 239 (2)) would be an order cancelling the redemption of the 875,000 shares and declaring that the company retains the beneficial interest in the various properties which were the subject of the commercial arrangement, and which were debited to the DLA on 31.1.08.

28. In any event, the redemption of all 875,000 of the shares, and the consequent debiting of properties to the DLA, cannot stand for another reason. By CA 1985, s 160 (read in conjunction with ss 181 (a) and 263) redeemable shares may only be redeemed out of profits available for distribution by the company. According to the last audited and filed accounts, the company's net profits available for distribution were only £240,502. Although I was taken to no authority on the point, in my judgment the respondents cannot rely upon the further sum of £58,322.99 described as "net profit after tax" in the management accounts for the y.e. 31.1.2008 at p 541.2 since these accounts were never audited or approved by the company and, in the light of the estimated trading loss for the period 1.2.07 to 17.6.08 recorded at p 477 of £871,613, there must be some doubt as to the validity of the £58K odd figure. Therefore permitting the redemption of more than 240,502 shares was unlawful and constituted a breach of the respondents' duties as directors. This was not something which was capable of being validated by the unanimous agreement of the respondents (as shareholders) in accordance with the *Duomatic* principle; and, in any event, that principle has no application once a company is insolvent or in financial difficulties such that its creditors are at risk, as I have found to be the position as at 31.1.08: compare *Re Idessa (UK) Ltd* [2011] EWHC 804 (Ch), [2012] BCC 315 at [54] per Miss Lesley Anderson QC and *Goldtrail Travel Ltd v Aydin* [2014] EWHC 1587 (Ch) at [114]-[118] per Rose J. Although I have not yet been addressed on remedies, my preliminary view is that the appropriate consequential relief would have been an order cancelling the redemption of 634,498 of the shares and declaring that the company retains the beneficial interest in various properties which were the subject of the commercial arrangement, and which were debited to the DLA on 31.1.08, up to the assigned value of £634,498; but in view of my conclusion on relief under s 239, such an order would seem to me to be unnecessary.

29. In the light of my findings as to Mr Finch's motivation, and his failure to seek any legal advice on his duties as director, there can be no question of the grant of any relief to him under CA 1985 s 727 or CA 2006 s 1157 (whichever is applicable in the present case): Mr Finch has not acted honestly or reasonably, nor ought he fairly to be excused. Nor should such relief be granted to Mrs Finch, who completely abrogated the discharge of her duties as director, leaving everything to her husband. As Briggs J observed in *Lexi Holdings Plc v Luqman* [2007] EWHC 2652 (Ch) at [224]: "Complete inactivity as a director is by definition unreasonable".

30. I turn now to consider the liquidators' claims to specific properties. The liquidators lay claim to the two unidentified properties referred to in Note 16 of the company's financial statements for the period 1.4.01 to 21.1.02 at p 184: "The company purchased two properties for a total value of £400,000 from S R Finch & Co and these are included in purchases". I accept Mr Finch's evidence that this note refers to 51 and 52 Marina, St Leonards on Sea. Together with 53 Marina, these properties were later developed as The Colonnade. Mr Finch's evidence is supported by the sale agreements at pp 706 and 708. Although there is a discrepancy as to the dates, since only the second agreement was entered into during the period covered by the accounts, completion on the first was scheduled to take place during that period. The sale prices (£200,000 each) tally with the note in the accounts. The liquidators' claim that the note refers to the freehold of Finch Mansions, 22-23 Upper Maze Hill is pure speculation, and is inconsistent with the value (£88,500) attributed to that property in the company's ledger entries. That property formed one of the properties in the

commercial arrangement. Also part of the commercial arrangement was the freehold of 42 Wellington Square, Hastings. This had been introduced into the company as part of the commercial arrangement at a notional gross value of £450,000 on 31.1.03. It was developed by the company as part of the commercial arrangement with overdraft funding from Bank of Scotland: see the bank's letter dated 17.3.03. I accept Mr Finch's evidence that the reference in this letter to a development at Seacroft, Worthing is to the development which became Promenade House, 79 Marine Parade, Worthing. This is supported by Mr Finch's recently disclosed letter to Nat West of 29.1.02 at pp 885-6.

31. There are two aspects to the liquidators' claims in relation to the company's development on land it had purchased at Filsham Hurst, on land to the north of 43 Filsham Road, St Leonards on Sea (which had been purchased by Mr Finch at about the same time). First, it is said that company sold Plot 2 to both respondents in May 2006, and later sold Plot 3 to Mr Finch in February 2007, in breach of the provisions of ss 317 (relating to disclosure of directors' interests) and 320 (relating to substantial transactions involving directors) of CA 1985; that not all of the respective purchase prices were paid to the company; and that the company paid the respondents' legal fees and stamp duty. I am entirely satisfied from the evidence of Mr Finch, supported by the documents, that these two properties were purchased by the respondents as bare trustees for the company in order to enable the company to raise finance from buy-to-let mortgages taken out by the respondents on the properties. The respondents duly accounted to the company for all moneys received when they later sold these properties to unrelated third parties. Any technical breaches of the CA 1985 were cured by the unanimous agreement to these transactions by the respondents, as the company's two shareholders, in accordance with the *Duomatic* principle, at times when the company was still solvent; and, in any event, these were clear cases for the grant of relief under ss 727 and 1157 since the respondents were at all time acting honestly and reasonably in the best interests of the company, and it suffered no loss from these transactions. When the point that this was a clear case for relief was put to Miss Hallett, her response was that the court might very well think so. Although, in closing, Miss Hallett made it clear that she had no instructions to withdraw this aspect of the liquidators' claim, in the light of the evidence she clearly, and rightly, did not advance it with any great enthusiasm.

32. The second aspect is that on completion of the sale of Plot 1 on 23.2.07, the company accounted for £20,490.17 to David Elliott, the company's former company secretary: see p 216. It had previously accounted to him for £20,217.14 on the completion of the sale of Plot 3 on 1.2.2007: see p 280. Yet, according to the letter of representation to the company's accountants later signed by Mr Finch on 11.1.08, only £24,946 had been lent to the company by Mr Elliott. There is therefore said to have been an overpayment by the company to Mr Elliott of some £15,761. Mr Finch's evidence is that Mr Elliott only received what was due to him; and that the representation that only £24,946 was due to Mr Elliott as at the year ended 31.1.07 was a mistake, probably attributable to the fact that it had been assumed that the first payment of £20,217.14 had been made before, rather than immediately after, the 31.1.07 year end. The further discrepancy between £24,946 and the £20,490.17 was probably attributable to an error in calculating the amount of interest due to Mr Elliott. Mr Finch's evidence is supported by the hearsay evidence of Mr Elliott, and his calculations, at pp 835-8. I accept Mr Finch's evidence and case on this point, which are supported by the terms of the earlier of

the two completion statements at p 280, which states: “David Elliott – sum due (half) £20,217.14”. I reject this aspect of the liquidators’ claim.

33. I am satisfied on the evidence of Mr Finch and from the documents that the grant of the lease of the 2nd floor flat at 15 WishWard/54 The Mint to Mr Finch on 30.6.05 was a money-raising exercise for the benefit of the company in the same way as the later sales of Plots 2 and 3 Filsham Hurst, and that Mr Finch has fully accounted to the company for all moneys due to it on the onward sale: see p 2357. In closing, Miss Hallett had to acknowledge that that appeared to be the case. For the same reasons as I have given in relation to Plots 2 and 3 Filsham Hurst, in my judgment the liquidators’ claim in relation to this property fails.

34. I have already dealt with 42A Wellington Square. This was acquired by Mrs Finch for £120K. I have found that the £18k balance due to the company after it had received the net proceeds of the £102,000 mortgage taken out by Mrs Finch was offset against the £48K which was still outstanding from the company to Mr Finch for the original grant of the lease to the company. I have found that the £7,200 paid to Melinda Cornelius discharged a liability properly due to her from the company. The claim in relation to this property fails.

35. Promenade House, 79 Marine Parade, Worthing was one of the properties introduced into the commercial arrangement on 31.1.03. Since it was registered in the name of Mr Finch, it was he who charged it to Bank of Scotland on 27.4.05 pursuant to the offer letter addressed to Mr Finch of 1.4.05 (at p 712) which I find superseded an earlier offer letter to the company of 7.3.05 (at p 304). The property was developed into flats. Mr Finch’s evidence, which I accept, was that these were all sold and the moneys were passed to the company in full. The freehold was then sold to the tenants’ management company in January 2008 for a nominal sum. I find that the liquidators’ have no claim in relation to the freehold estate. Mr Finch had granted leases of Flats 6-9 to his wife in November 2005 whereupon the flats entered the commercial arrangement. Mrs Finch sold them on to unrelated third parties between August and November 2006. I accept Mr Finch’s evidence, supported by the ledger entries, that his wife fully accounted to the company for the sale proceeds. The claim in relation to these flats fails.

36. The liquidators’ complaint in relation to River Haven House (also known as 42 Bulverhythe Road) is that £25,000 representing sale proceeds of this property was paid into the bank account of SR Finch & Co at Nat West Bank on 27.2.08: see pp 315 and 2531. Mr Finch’s case is that this bank account was monitored by the company and it received the benefit of any money going into it, as evidenced by ledger entries at p 2111. Admittedly, this account is not listed as a company bank account in the CVL documentation at pp 473-4. However, at para 53 of his 1st witness statement Mr Henry advances a claim to moneys paid out of this account as part of the foreign payments claim. The liquidators have not explained to my satisfaction how moneys coming out of this account should fall to be treated as company moneys, but not moneys entering the same account. This claim therefore fails.

37. 43 Filsham Road, a family home, was purchased by Mr Finch on 28.11.03. It entered the commercial arrangement on 31.1.05: see p 2300. It remained there (as evidenced by the 2007 and 2008 letters of representation at pp 321 and 412) until it “exited” the commercial arrangement consequent upon the purported share redemption on 31.1.08: see p 890. The company therefore retains the beneficial interest in this property to the extent that the share redemption is cancelled. Similar considerations apply to 55 Filsham Road (also known as

Turret House), the respondents' present family home (which featured in both letters of representation), and to the freehold of Finch Mansions, 21-23 Upper Maze Hill (which featured only in the 2007 letter).

38. In relation to Marina Park, St Leonards on Sea, I make the following findings: The freehold to Marina Park was acquired by the company in 1999. It developed the property and originally granted a single lease of the top floor penthouse (known as 16 Marina Park) to the respondents. The penthouse was later converted into two flats (16 and 17), the original lease was surrendered, and separate leases of 16 and 17 were granted to the respondents. They sold the lease of 16 to an unrelated third party and (as I find) duly and fully accounted for the sale proceeds to the company. Flat 17 remained subject to the commercial arrangement (as evidenced by the 2007 and 2008 letters of representation at pp 321 and 412) until it "exited" the commercial arrangement consequent upon the purported share redemption on 31.1.08 at a value of £240K (less the existing Birmingham Midshires mortgage): see p 869. The company therefore retained the beneficial interest in this property to the extent that the share redemption is cancelled. However, No 17 was sold by the respondents to an unrelated third party (and the mortgage was redeemed) on 23.5.08 for £230,000, less than the assigned exit value. I therefore cannot see that the company would have suffered any loss if this transaction were to be unwound.

39. The fourth (and final) property to have featured in the 2008 letter of representation (as it had in the 2007 letter) was Flat 1, The Colonnade, St Leonards on Sea. This flat had been created out of part of 51-53 Marina, and the company had granted a lease of the flat to Mr Finch on 28.1.05 for £119,000: see p 2212. Initially this lease had been created to enable Mr Finch to raise money for the company by taking out a buy-to-let mortgage. It was then treated as forming part of the commercial arrangement. However, Mr Finch sold the lease on 20.12.07, before the commercial arrangement terminated, for £129,000. I am satisfied that Mr Finch fully accounted to the company for the sale proceeds: see pp 833 and 2517. I am entirely satisfied that any technical breaches of the CA 1985 (such as ss 317 and 320) on the grant of the lease to Mr Finch were cured by the unanimous agreement to that grant by the respondents, as the company's only two shareholders, in accordance with the *Duomatic* principle at a time when the company was still solvent; and, in any event, this would have been a clear case for the grant of relief under ss 727 and 1157 since Mr Finch was at all time acting honestly and reasonably in the best interests of the company and (as Miss Hallett acknowledged in closing) the company suffered no loss from these transactions. The claim in relation to this property therefore fails.

40. The ketch (Blue Silk) had been used by the company for marketing purposes and it had formed part of the commercial arrangement (as evidenced by the 2007 letter of representation, although it was not mentioned in the 2008 letter). The evidence (based on an admission by Mr Finch: see Mr Henry's 1st witness statement at paragraph 17) was that it had been sold on or around 21.2.08 for £19K. This was the same as the exit value assigned to the ketch on 31.1.08. I therefore question whether the company has suffered any loss in relation to the ketch which would justify the unwinding of this transaction, particularly since Mr Finch's evidence (which I accept) was that it was never debited to his DLA upon entering the commercial arrangement.

41. The liquidators assert a claim to the freehold of Chelsea Mews, 37-39 North Street and 22-25 Alfred Street, St Leonards on Sea. This property had been purchased by Mr Finch as long ago as December 1995. It is not specifically identified as one of the properties that entered the commercial arrangement on 31.1.2003, and (from the schedule of leases at p 390) it would appear that all but 2 Chelsea Mews had been developed and sold off by this date. Mr Finch denied that it formed part of the description of "Various Property" entering the commercial arrangement at p 186.1. Chelsea Mews was not mentioned in either the 2007 or the 2008 letters of representation. It is not mentioned at p 2527 as exiting the commercial arrangement on 31.1.08. However, it is listed as one of the trust assets in the 2006 Limited Specific Bare Trust at p 439. I find that Mr Finch was genuinely mistaken in his evidence that Chelsea Mews was not one of the various properties introduced into the commercial arrangement on 31.1.03. There is no reason why it should not have been treated in the same way as the other family-owned development properties; and the 2006 Limited Specific Bare Trust confirms it. I find that the liquidators have made out their case that this property formed part of the commercial arrangement, and was therefore beneficially the property of the company. The company therefore retains the beneficial interest in this property to the extent that the share redemption is cancelled. Mr Finch told me that it was being transferred from the trust at the moment for £1K.

42. The liquidators assert a claim to land at Westfield, East Sussex. This land entered the commercial arrangement on 31.1.04 at a value of £50k: see p 322.1. It is mentioned as one of the assets of the Limited Specific Bare Trust at p 439, where it is described as freehold land at New Cut, Westfield, East Sussex TN35 4RN. It is mentioned in the 2007 (but not the 2008) letter of representation. It exited the commercial arrangement on 31.1.08: see pp 821 and 2527. In cross-examination Mr Finch told me that it was, and is still, a greenfield site which he had acquired in the hope of obtaining planning permission for development. They had tried but failed to do so. In re-examination I was told that the land had been sold on by the Trust. Since the land formed part of the commercial arrangement, the company retains the beneficial interest in this property to the extent that the share redemption is cancelled. In this event, there would be a liability to account to the company for the net sale proceeds.

43. I believe that that addresses all of the liquidators' claims to specific properties.

44. Finally I turn to the liquidators' claim for various payments by the company to foreign bank accounts. This is addressed at paragraph s 52-56 of Mr Henry's 1st witness statement. Mr Finch was subjected to a probing cross-examination on these foreign payments and he gave detailed explanations for all of them to what I am satisfied was the best of his recollection and his ability. In closing, Mr Hill acknowledged that this was the one area where Mr Finch had not always been able to provide detailed answers to all of the questions put to him. In her reply, Miss Hallett submitted that Mr Finch had contradicted himself at times in his evidence on the foreign payments. I listened closely to Mr Finch's evidence on the foreign payments. Although I have not accepted his evidence on his motivation for the share redemption, I do accept his evidence about, and his explanations for, all of the foreign payments. I am satisfied that any contradictions, inconsistencies, or gaps in his evidence were the result of genuine difficulties of recollection and analysis after the passage of more than seven years. I am satisfied that the liquidators have not made out a case of misfeasance or breach of duty in relation to any of the foreign payments. The claim in relation to them therefore fails.

45. The result is that the liquidators' claims fail and are dismissed save in relation to the cancellation of the share redemption and the consequent effect upon the properties which had remained in the commercial arrangement as at 31.1.2008. I anticipate that there may need to be a further hearing to work out the effect of my decision and to formulate the terms of an order to give effect to this if it cannot be agreed between the parties. If so, that hearing should be listed in London on 13 October 2015.