Case No: HQ14X04691

Neutral Citation Number: [2017] EWHC 614 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/03/2017

Before:

MR MARTIN RODGER QC
Sitting as a Judge of the High Court

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Between:

(1) JOHN MICHEAL
(2) PAULINE WENDY MICHEAL
(3) HAVERING RADIO CARS UK LIMITED — **Claimants**

- and –

(1) GARY ANTHONY PHILLIPS
(2) A1 GROUP (UK) LIMITED
(3) LYNN PHILLIPS — **Defendants**

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Stuart Hornett (instructed by Barker Gillette LLP) for the Claimants
The Defendants did not attend

Hearing dates: 1 and 2 March 2017

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Judgment

Mr Martin Rodger QC

Introduction

1. This judgment concerns claims by Mr and Mrs Micheal and their mini-cab company Havering Radio Cars UK Ltd ("HRC") arising out dealings between 2010 and 2014 for the acquisition of HRC by the first and second defendants, Mr Phillips and his company A1 Group UK Ltd. Those dealings proved abortive but for a period of almost three years from January 2011 to November 2014 HRC was managed by A1 Group and Mr Philips pending an intended sale. The claimants make a series of financial claims in respect of that period. They also make claims concerning the building at 142 South Street, Romford from which HRC is run. The freehold interest in the building was purchased in July 2012 by Mr Philips and his wife, Mrs Lynn Philips.

2. In their broadest outline the financial claims are based on the allegation that Mr Philips and A1 Group breached fiduciary and contractual duties which they owed to the claimants while they were engaged to manage HRC in anticipation of its acquisition, and that they diverted the business of HRC and combined it with the business of A1 Group causing loss to the claimants when the intended acquisition failed to progress to completion.

3. The claims relating to 142 South Street seek to establish that HRC has a tenancy of the ground floor of the premises which is a business tenancy within the scope of Part II of the Landlord and Tenant Act 1954 and that Mr and Mrs Phillips hold the freehold of the premises on a constructive trust for Mr Micheal.

4. During the hearing I gave an *ex tempore* judgment on the financial claims, the reasons for which I now record in substantially the same form. The claimants had become aware shortly before the trial that notice has been give by the second defendant, A1 Group, that a meeting of its creditors was to be convened on 3 March at which a resolution was to be proposed for a voluntary winding up. The claimants wished to participate in that meeting with the benefit of the judgment I was satisfied they were entitled to. I also now deal for the first time with the claims concerning 142 South Street.

Parties

5. On 3 February 2017 Green J made an order striking out the defence and counterclaim of Mr Phillips and A1 Group. The order was made for the reasons explained in a judgment given on 2 February 2017 following the hearing of an application to debar the first and second defendants for breach of an unless order, and a cross application for relief against sanctions. In summary, Green J was satisfied that Mr Phillips and A1 Group were in serious breach of a number of orders requiring that they preserve company records and computer equipment and give disclosure of documents. In particular he was satisfied that Mr Philips had deliberately destroyed computer hard drives on which relevant financial data was held and that this was part of a broader strategy of refusing to provide disclosure.

6. At a subsequent PTR held on 9 February 2017, Soole J. ruled that the effect of the striking out and debarring order was that Mr Phillips and A1 Group were prevented from participating to any extent at the trial on issues other than costs and could not challenge the claims or evidence of the claimants. As a result they did not attend and played no part in the trial.

7. Despite having been struck out the defence of the first and second defendants usefully serves to define the factual issues in dispute and those which the claimants are not required to prove. It includes a number of admissions concerning the manner in which the business of HRC was run by Mr Philips and A1 Group on which the claimants have relied in support of their case.

8. The third defendant, Mrs Phillips, is unaffected by the striking out of her husband's defence, and it had been expected that the trial of the property claims would proceed against her in the conventional way. However, on 22 February 2017 her solicitors, Geldards, wrote to the Court informing it that Mrs Philips had decided not to be represented at or to attend the trial. Their letter made a number of helpful concessions on behalf of all three defendants by admitting the contents of the witness statements of 17 witnesses who had played small parts in the events with which the action is concerned and whom the claimants would otherwise have called to give evidence.

The facts in outline

9. The fullest account of the relevant facts was contained in the third witness statement of Mr Micheal the contents of which (and earlier statements) he confirmed under oath and elaborated on in some small respects in oral evidence. He also answered a number of questions from me about his recollection of matters of particular relevance to the property issues. He gave his evidence in a straightforward manner and although his recollection of certain events was not especially clear, I have no hesitation in accepting the broad outline and much of the relevant detail of his account.

10. Mr Micheal explained that until the end of 2010, and for over 30 years before that, he had run a number of mini-cab businesses in the Romford and Havering areas. He had always traded under the names "A1" and "A1 Network". At different times he had traded through a variety of companies, one of which, Havering Radio Cars Limited, was incorporated on 16 May 1990 and was the entity through which he ran the business until September 2009. Following an investigation of the company's tax affairs (the outcome of which, I was informed by Mr Micheal, was that it was wholly exonerated) Mr Micheal incorporated HRC on 26 September 2009 to take over the business on the advice of insolvency practitioners.

11. Mr and Mrs Micheal are the sole and equal shareholders in HRC. Although not formally a director (again on professional advice) Mr Micheal ran the company from March 2010 (when it started trading) until management was passed to Mr Phillips and A1 Group in January 2011. Mr Micheal became a director of HRC in August 2014 after the dispute had arisen.

12. Mr Micheal has always traded from the ground floor of 142 South Street, Romford which was the centre of his business operations. The premises are close to Romford railway station and very well situated to attract business from bars and clubs in the centre of the town; they have always been by far the busiest location from which HRC and its predecessors operated. By 2010 the company also occupied satellite mini-cab offices in 3 other locations: at Hornchurch Station, Elm Park Station and Harold Hill.

13. The business model operated by Mr Micheal is a common form for mini-cab firms. The business operates with relatively modest overheads and derives income from payments it receives from its drivers rather than from passengers. All drivers are self-employed and

own or lease their own vehicles. The company passes on jobs to the drivers, using hand held devices linked to a central computerised despatching system. Each driver pays a weekly fee of between £100 to £130 and a smaller additional fee of 60 pence per fare. Most of the company's income is received in cash. The success of the business depends to a significant extent on the company attracting and retaining drivers, which requires it to generate calls from customers or walk-in business. As a result the value of the business is in its good will.

14. By 2009 Mr Micheal wished to retire. He was approached by Mr Phillips who offered to buy his business. Mr Philips already owned and operated a mini-cab business in the area through a partnership known as Elm Cars based in Dagenham. After a period of negotiation a sale price of £2m was agreed for the entire share capital in HRC. This sum was to be paid in instalments after Mr Philips had taken over the day to day running of HRC, and initially at least the source of payment was to be the income generated by the business itself. In anticipation of the purchase Mr Phillips incorporated A1 Group.

15. Heads of terms were agreed in March 2010. They made no reference to the South Street premises. The parties agreed to negotiate the details of the agreement with a view to completion taking place by 23 December 2010 and management of HRC by A1 group commencing on 3 January 2011. The transaction proceeded in accordance with that leisurely timetable and on the 23rd December 2010 HRC entered into two agreements, a Management Agreement and a Purchase Option Agreement.

The Management Agreement

16. Under the terms of the Management Agreement A1 Group (referred to as "the Management Company") was engaged to provide certain services to HRC ("the Company") from 3 January 2011 until the termination of the agreement on 31 May 2011, or on the sale of the share capital (or for breach). The relevant obligations were contained in clause 3.1 of the Agreement and in its first schedule. Clause 3.1 provides as follows:

> "During the Engagement the Management Company shall, and (where appropriate) shall procure that the Individual shall:
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> (a) provide the Services with all due care, skill and ability and use its or his best endeavours to promote the interests of the Company;
> (b) unless the Individual is prevented by ill health or accident, devote such time and effort as he, in his professional pinion deems necessary in each calendar month to the carrying out of the Services for their proper performance; and
> (c) promptly give to the Board (or any Shareholder of the Company) all such information and reports as it may reasonably require…"

17. Mr Phillips was not himself a party to the Management Agreement, but he was identified as the "Individual" who was to assume day-to-day control of HRC. Pursuant to Clause 3.5 he was to be appointed a director of HRC.

18. The services in Schedule 1 included day to day management of HRC co-ordination of drivers, managing office staff, booking cash payments, banking cash, paying all staff, contractors and suppliers, attending all board meetings, reporting to the Board, and arranging for the leases of each of the properties occupied by the Company (including South Street) to be "assigned or granted into the name of the Company".

19. Under the terms of the Management Agreement Mr and Mrs Micheal, were to be paid monthly salaries (£2,919, and £2,667 respectively) and monthly shareholder payments of £6,000 each. The shareholder payments were to be set off against the purchase price of the shares, but the salaries were not. Payment of the salaries was subsequently suspended and the aggregate amount of the shareholder payments fluctuated from time to time, sometimes falling to £10,000 and at other times increasing to £15,000.

20. By clause 4.1 of the management Agreement it was agreed that A1 Group would be entitled to receive a fee for its management services equal to the net profit of HRC each month after payment of all outgoings including wages and the shareholder payments. It appears that no such payment has ever been made because the business did not generate sufficient net profit.

The Purchase Option Agreement

21. The Purchase Option Agreement was the means by which the share sale was to be achieved, and was entered into between Mr and Mrs Micheal, and A1 Group, on 23 December 2010. A1 Group was granted an option to require Mr and Mrs Micheal to sell their shares during an Option Period expiring on 31 May 2011 at a price of £1.94m. If the share sale option was completed a second option was then provided for by which A1 Group was to have the right to purchase the freehold of 142 South Street (which at that stage did not belong to the claimants) for a purchase price of £260,000 with interest on deferred payments.

22. The Option Purchase Agreement was to lapse in the event of the termination of the Management Agreement for breach.

Mr Philips takes control

23. I am satisfied that Mr Phillips assumed sole responsibility for running HRC by January 2011. I accept Mr Micheal's evidence that after that date he had little or nothing to do with the business apart from in dealings with the company's bank, which refused to accept Mr Philip's mandate as he was never formally appointed a director.

24. A1 Group's acquisitions were not limited to HRC's business and the company acquired a number of other local mini-cab businesses in the wake of the Management Agreement. On 1 December 2010, Mr Phillips transferred his partnership business of Elm Cars into A1 Group for £1,102,035. BJ Mini Cabs was acquired in January 2012 and Romford Minicab Services Limited ("RMC") in March 2012. Mr Philips ran RMC from the South Street premises using the phone number and brand "70 70 70".

25. Despite the lack of formality in his role, and the omission of both parties to proceed with his appointment as a director, the claimants maintain, and I accept, that Mr Philips was in practice in control of the day to day operations of HRC. The claimant's case on the extent of Mr Philips' involvement is supported by the evidence of employees and drivers which was admitted on behalf of the defendants by Geldards in their letter of 22 February 2017. It is on that basis that the claimants allege Mr Philips acted as a *de facto* director and owed the company fiduciary and statutory duties.

26. From January 2011 Mr Micheal substantially withdrew from management of the business and spent most of his time in Spain. When he was in Romford he would drop in to the office and kept contact with staff and drivers, but other than in smoothing relations with the bank his involvement in management was minimal.

27. It had been intended that the share sale would be completed by the end of May 2011 but it is clear from the evidence of Mr Micheal and from the witness statement of Mr Philips that Mr Philips methods, and his willingness to sever ties with drivers was a source of dispute between them. Mr Philips appears to have regarded Mr Micheal's contacts with drivers as interference, while Mr Micheal resented how some of his former staff were being treated. Money also became a source of tension, with Mr Philips failing to make some of the shareholder payments on time.

28. In anticipation of the expiry of the Management Agreement there was an exchange of correspondence between solicitors in May 2011. On 26 May Mr Micheal's solicitors Lodders, wrote an equivocal letter which, on the one hand, appeared to terminate the Management Agreement for failure to pay the shareholder payments, but on the other hand proposing that that the agreements should not terminate and discussions over a new arrangement for their completion should begin if Mr Phillips could demonstrate a credible business plan. On 31 May, Sackvilles, Mr Philips' solicitors, denied that there were any breaches, asserted that payments had been made when funds were available and maintained that the agreements remained on foot. In the same letter they acknowledged that Mr Phillips had dismissed drivers in his capacity as a director of HRC.

29. It is not necessary to form a concluded view as to whether the Management Agreement terminated by effluxion of time on 31 May 2011, or was continued by agreement or replaced by a new arrangement. In practice the parties continued to conduct themselves on the assumption that the agreements were still on foot. Mr and Mrs Micheal's salaries and shareholder payments continued to be paid more or less regularly and Mr Philips remained in control of day to day operations. Both parties appear to have considered that they remained in a state of negotiation but there is very little evidence of any concerted effort to revise their existing arrangements which simply continued. It is clear that the business was under some financial pressure and in the early part of 2012 it was agreed that Mr and Mrs Micheal's salaries should no longer be paid; there may also have been an agreement that the salaries would be rolled up and added to the eventual purchase price of the business but the evidence on this is unclear.

Termination of the relationship

30. Matters came to a head over money in June 2014 when Mr Phillips stopped making the shareholder payments; thereafter, with the exception of a single payment of £1,000, he made no further payments of any kind into HRC's bank account.

31. At a meeting on 21 July 2014 Mr Philips said that he wanted to renegotiate the price of share purchase because the salaries and shareholder payments were too expensive. Mr Micheal refused. Mr Philips responded by barring Mr Micheal from access to the company's premises and instructing staff not to allow him to come in to the South Street office or park in the staff parking bays. Shortly after the meeting Mr Philips installed security gates at 142 South Street. In response, Mr Micheal made contact with staff in an attempt to discover how the business was being run. He became aware that the business was now effectively run together with RMC under the "triple 70" brand and that the

phone numbers and internet domain names through which HRC had communicated with its customers had been diverted to an umbrella A1 brand run as a single operation by Mr Philips.

32. On 29 August 2014, the claimants' new solicitors (Barker Gillette) wrote a long letter before action, in which they purported to accept various breaches of the continuing Management Agreement as repudiatory. They demanded that HRC's property be returned to it, together with all accounting records and other documents, telephone numbers, the website and the premises at South Street. No substantive answer was ever received to this letter. The action commenced with Particulars of Claim issued on the 15th October 2014.

33. The claimants applied for injunctive relief to restore them to the premises and to control of HRC. On 10 November 2014 Flaux J. ordered Mr Phillips and A1 Group to provide information about HRC's telephone numbers and to transfer those numbers, email addresses and domain names back to the company, to deliver up its VAT, tax and other accounting records and not to interfere with its business.

34. Pursuant to the orders of the Court the claimants were able to resume control of HRC. Mr Philips' immediate response to the order requiring him to refrain from interfering with or obstructing HRC's occupation of 142 South Street was to contest the spelling of HRC's name in the order (despite having been present at the hearing on 14 November 2014 at which it was made) and to delay giving possession of the premises until the order was formally amended.

The financial claims

35. The essence of the financial claims is that Mr Phillips and A1 Group diverted and merged HRC's business with that of A1 Group and RMC and in so doing acted (in Phillips' case) in breach of his fiduciary and statutory duties and (in A1 Group's case) in breach of the terms of the Management Agreement.

The status of Mr Phillips

36. The first issue concerns the status of Mr Phillips and A1 Group in relation to HRC between 3 January 2011 and 14 November 2014. The claimants submit that Mr Phillips was a *de facto* director and key to HRC's governance structure; they say that the role he assumed subjected him to fiduciary duties as well as the statutory duties imposed by ss.170-177 Companies Act 2006. The claimants contend that Mr Philips' status did not change after 31 May 2011 when the Management Agreement was due to terminate and that he remained a *de facto* director until the court ordered him to hand back control of 142 South Street on 14 November 2014.

37. In their Defence the first and second defendants denied that Mr Philips was a director of HRC but asserted instead that he was an agent of the company in the period after 31 May 2011.

38. For the purpose of the statutory duties imposed on a director by the Companies Act 2006, a director includes any person occupying the position of director by whatever name they are called (s.250, Companies Act 2006). The test of whether a person is a *de facto* director has been considered in the Supreme Court in *Revenue & Custom v Holland* [2010] 1 WLR

2793 [2001] 1 WLR 2793 and most recently in the Court of Appeal in *Smithton Ltd v Naggar* [2015] 1 WLR 189.

39. There is no single definitive test and the question is one of fact and degree (see *Smithton* at [33] to [45]). The Court looks to what the person did, to see whether they were "part of corporate governance system" and assumed the status and function of a director, rather than to their job title. It is relevant to consider whether the company itself held the person out as director and whether third parties considered them to be a director.

40. I am satisfied that Mr Phillips was a *de facto* director. The evidence admitted on his behalf establishes that from January 2011 he held himself out to the staff of the business as their new employer and to the world at large (including his own solicitors and HRC's accountant, Leslie Rosner) as the new owner of the business. He dismissed the security and cleaning contractors, Mr Sloan and Mr Rowe. He signed cheques for up to £10,000 and had control of the cash receipts of the business, which he was responsible for banking. He assumed authority to dismiss staff whom he considered were below standard or unwilling to fit in with his methods and to hire new staff. He terminated the company's relationship with a number of its drivers and introduced a new shift system. He replaced the former manual book keeping system with a new computer software system which was used for both A1 Group and HRC. He rebranded the business using the RMC "triple 70" brand and made changes to HRC's office. He moved the main centre of operations away from South Street to the Brooke Trading Estate in 2012. He closed the Harold Hill office in 2013. Many of these steps were within the scope of the authority conferred by the Management Agreement which put Mr Philips in day to day control of the business, but others (including the merging of the systems and practices of HRC with those of his own companies, the facts of which are not in dispute) went beyond what was permissible in his role as manager of HRC and indicate clearly an assumption on his part of full authority over and control of the business. All of these acts were undertaken at a time when no other person was exercising any degree of control over the affairs of HRC.

41. It is also relevant that in the first half of 2011 these steps were taken against the background of a commitment in the Management Agreement that Mr Philips would be appointed a director and have authority to bind the company up to certain financial and other limits (clause 3.5). The basis of his engagement with HRC was therefore that he would be a director. In the event Mr Phillips exceeded the limitations contemplated by the Management Agreement, and in practice other than the operation of the bank account there was nothing that Mr Phillips did not control.

42. It is not disputed in Mr Phillips' witness statement that he and A1 Group embarked on a business strategy of acquiring and merging the operations of the various local mini-cab businesses they had acquired. Part of this strategy of amalgamation involved setting up a central exchange for telephone calls and bookings and operating the various companies as a single business. That objective was admitted in the Amended Defence where it was contended that Mr Micheal agreed to the changes or that they were for the benefit of HRC because they brought costs savings.

43. There is no documentary support for the pleaded suggestion that Mr Micheal agreed to the changes and he denies that he did. I am satisfied, having heard Mr Micheal's evidence, that he did not agree to the fundamental changes that Mr Phillips introduced, although it is likely that he contemplated they would occur once the share sale had been completed. Until the completion of the sale, and while he was dependent on the success of HRC to

pay the salaries and provide the funds for the share purchase, it was not in his or the company's interests for the business to lose its identity. Mr Micheal's dissatisfaction with the direction of Mr Philips' management contributed to the disagreement in May 2011 and in an email dated 4 May 2011 he specifically stated that the changes Mr Phillips had made up to that date were against his advice.

44. I am also satisfied on the basis of the evidence of Mr Simon Poluck, a Chartered Accountant who gave expert evidence in support of the claim, that Mr Phillips' strategy of merger was achieved without any proper accounting records being maintained to show how, if at all, work was distributed between the previously separate businesses. Nor was any system put in place to allocate irrevocably mixed income received from the drivers. For operational purposes the separate legal identities of the companies were simply ignored and the businesses were run together.

45. This merger occurred at a time when Mr Phillips was not the owner of HRC and had not paid for HRC's shares. He owed duties to HRC to promote its success (s.172, CA 2006) and to avoid conflicts of interest (s.175). Similar duties were imposed on A1 Group by the Management Agreement. It was obliged to procure that Mr Philips use his best endeavours to promote the interests of HRC. A1 Group and Mr Philips were permitted to be involved in other businesses provided that the company gave priority to the provision of services to HRC over any other business activity (clause 5). I accept therefore that neither A1 Group nor Mr Philips had the right to deal with the business and assets of HRC in a way that was detrimental to it and its shareholders.

The specific acts complained of

46. The specific allegations of breach of duty pursued at trial and my conclusions on them are as follows.

47. First, that Mr Philips and A1 Group transferred HRC drivers to the merged A1 Group. I accept that when Mr Phillips took over HRC, it had 105 drivers but that when it was returned to Mr Micheal's control in November 2014, it had no drivers at all. Mr Phillips transferred them to his other businesses or (in a few cases) their engagements were terminated. The evidence establishes that 105 drivers had HRC call signs in April 2011. There is no documentary evidence to show any separate call signs for HRC drivers in November 2014 and all the drivers had become part of a pool working for the merged business of A1 Group. When Mr Micheal resumed control in November 2014 it was therefore necessary for him to encourage drivers back to working for HRC.

48. Secondly that Mr Philips and RMC set up a central telephone exchange in March 2012 at Brooke Trading Estate (A1 Group's headquarters) to handle all of the calls for HRC, A1 Group and RMC, and that he diverted or discontinued HRC's telephone numbers or merged them with A1 Group. Whichever telephone number a caller used (whether an HRC number, an RMC number or one of the other businesses merged into A1) the receptionist replied "car service" and no distinction was made to the customer or for accounting purposes concerning the company which had attracted the booking or should be credited with the driver's fee. The establishment of a central exchange, the merger of the telephone lines and the uniform greeting from the operator are all admitted in the Defence.

49. The discontinuance of some telephone lines became apparent as early as August 2013, and was a point of dispute in the intermittent discussions over the continuance of the Management Agreement. In September 2014 a former employee called the main HRC number to book a mini-cab and received a text confirmation of the booking from "A1 Group Minicab" informing her that it was now operating a new phone system and inviting her to use an alternative A1 Group number in future. Restoration of the numbers was not achieved until mid-January 2015, which created difficulties for HRC in seeking to re-establish trade independently from A1 Group.

50. Thirdly that Mr Philips and RMC promoted only the triple 70 phone number and insisted that drivers gave out cards using this number, rather than HRC's numbers. This appears to have occurred gradually but in 2014 an instruction was given to all drivers that from then on they were only to use the triple 70 cards and not the former HRC cards. The South Street premises were rebranded with a "70 70 70" sign in 2014.

51. Fourthly it is said that the HRC/A1 website, domain name and email addresses which belonged to HRC were appropriated to A1 Group. Mr Micheal had purchased the domain name "a1network.co.uk" in 1999. On 9 November 2011, Mr Phillips moved the registration of the domain name over to A1 Group and diverted traffic to its website; he also appropriated a1network email addresses. The Amended Defence admits that the web address and the associated email address were all linked into the central A1 group "hub". The transfer back of control of the website was not achieved until February 2015.

52. Finally it is said that Mr Phillips disposed of or destroyed all or part of HRC's despatching and telephone systems and failed to return them when control of the business was handed back in November 2014. A new despatching system including 107 radios and driver's data head units had been purchased by Mr Micheal in 2008 which HRC took over in March 2010. The Amended Defence admits that the system was disposed of and that 90 of the radios were sold for £25 each.

53. As a result of the disposal of its despatch system and radios it was impossible for HRC to function independently and it became entirely reliant on central exchange created by Mr Phillips. When HRC was handed back to Mr Micheal none of the radios and very few data heads were returned and the business could not operate until replacement equipment had been purchased.

54. These steps taken by Mr Philips and A1 Group are largely admitted; to the extent they are not admitted I find they are established by the evidence. I am satisfied that the result was that bookings and business were diverted away from HRC to A1 Group and RMC. I accept the evidence of Mr Poluck that no sufficient (or any) accounting controls were put in place to enable the business and income of one company to be distinguished from that of another. The Defence contains an allegation that these were "fairly allocated" between the component companies of the combined enterprise but there is no evidence that that was so and Mr Poluck could find not records which would have enabled any principled or measured apportionment of income to be undertaken. There was no attempt to identify which bookings and associated income should be allocated to which drivers or, more importantly, to which company. Mr Poluck's view, which I accept, was that the pool of income appeared to have been allocated unequally or disproportionally between the companies and that there was a "substantial downturn" in the recorded turnover of HRC soon after the acquisition of RMC, which coincided with the policy of merger. The pattern of receipts averaged over rolling twelve month periods shows that the turnover of the A1

Group as a whole (including HRC) was rising between 2012 and 2014, while during the same period the recorded turnover of HRC was falling.

55. I am therefore satisfied that the manner in which HRC was operated after January 2011, and in particular after March 2012 amounted to a breach of fiduciary, statutory and contractual duties owed by Mr Phillips and A1 Group to HRC.

Quantification of loss

56. Damages are claimed on the basis that they should restore HRC to the position it would have been in but for Mr Phillips' and A1 Group's breaches. The primary head of loss is loss of revenue to HRC as a result of the diversion of business away from it. A specific claim is made for the cost of replacement of the despatch and phone systems which were never returned. Other losses relating to the South Street premises will be addressed later.

57. Mr Poluck analysed the loss of revenue suffered by HRC by reference to three periods. The first (which Mr Poluck referred to as "the relevant period") was from 3 January 2011 to 14 November 2014 when Mr Phillips was in control. The second was from 15 November 2014 to March 2016, a period for which there is financial information on the performance of HRC while Mr Micheal sought to re-establish its business. The third is from March 2016 until March 2021, by which time Mr Poluck estimates the business should have been restored to the position it would have been in (assuming a steady rate of recovery) had the breaches not occurred.

58. Mr Poluck was presented with a difficult task owing to the destruction of computer records by Mr Philips, but he was reasonably confident that the material he had was sufficient to allow a broad assessment of the financial performance of the businesses and an estimation of losses. Having read his report and heard his oral explanation I accept his methodology and am satisfied that he has made sensible assumptions and applied suitable qualifications. In resolving uncertainty it is appropriate to give some weight to the fact that a large part of the difficulty in quantification arises from the deliberate act of Mr Philips in destroying accounting records.

59. For the first, or "relevant", period Mr Poluck took the turnover for the financial year March 2011 to March 2012 as establishing a base level of performance of HRC before the merger of businesses began in earnest with the purchase of RMC in March 2012. He observed a marked reduction in turnover from the third quarter of 2012 and therefore assumed that up until that time the breaches had not adversely affected the income of HRC to a material extent.

60. In making his assessment Mr Poluck took account of the possible effects of general market trends (in particular the potential impact of internet operators like Uber, which neither he nor Mr Micheal considered significant at this time in Romford) and any costs savings that HRC may have benefitted from.

61. There was no evidence that HRC was not paying a fair share of the overheads of the combined businesses in the years when it was under Mr Philips' control. Overheads were relatively stable in a business of this nature, and Mr Poluck therefore assumed that, as the overheads were assumed to have been met, changes in turnover were a reasonable proxy for changes in profit. The 2011-12 base level of turnover was £524,813 p.a. which Mr Poluck compared with performance in subsequent years. In the period from 26 March

2012 to 14 November 2014 the comparison demonstrated a loss of turnover of £387,520. Mr Poluck also offered an alternative calculation assuming a base turnover reduced by 10%, but he did not regard that approach as justified and I see no reason to make that conservative assumption in the defendants favour in respect of a period when uncertainty has been created by Mr Philips own actions.

62. I was initially troubled by a point acknowledged by Mr Hornett in opening, namely that under the terms of the Management Agreement, A1 Group was entitled to a fee equal to the net profits from HRC after all expenditure, salary and share payments had been made. It therefore seemed to me that there may have been no loss during the relevant period as A1 Group was entitled to all the profits that might otherwise have been made.

63. Mr Hornett pointed out that this point had not been relied on by Mr Phillips or A1 Group in their defence, and that it was apparent that no fee had ever been paid by HRC to A1 Group. It did not follow that there would necessarily have been a sufficient profit to enable the fee to be paid even if the breaches had not been committed. When Mr Poluck was asked to consider this point he produced a short report in which he explained that, assuming corporation tax first had to be paid on the profits of the business before the shareholder payments were made out of the balance, the net profit of the business on which he based his assessment of loss would not have been sufficient both to make the payments which were due to the claimants under the Management Agreement and to leave a surplus over to be paid in fees to A1 Group. I was satisfied by Mr Poluck's explanation that this would indeed have been the case.

64. I therefore accept that the loss to HRC in the period to November 2014 was £387,520.

65. As for the second period from November 2014 to March 2016 Mr Poluck looked at the performance of HRC and identified a loss of £328,672 comparing the base turnover with the results actually achieved while Mr Micheal sought to establish the business on an independent basis. I accept that that is the appropriate figure to award for the second period.

66. For the period from March 2016 for which accounting information was not yet available, continuing until the business is able to resume its former level of operation, Mr Poluck assumed the same base figure and applied a notional rate of growth of 10% per annum. Mr Micheal considers this to be too optimistic an assumption, but Mr Poluck was nevertheless comfortable with it based on the experience of the period of recovery for which accounts are available. He also considered a much more rapid recovery with growth of 20% or 30% but he did not regard those as realistic hypotheses and I agree. Mr Micheal gave evidence of the steps he has taken to restore the business and Mr Poluck considered, and again I agree, that until the base level of turnover is achieved the on-going losses are attributable to the defendants' breaches and diversion of business. For the period of five years until March 2021 adopting the assumed growth rate of 10% the aggregate loss is £508,930.

67. Mr Poluck qualified this estimate in two respects. First he acknowledged that assuming the base turnover could be achieved in future without addition expenditure may be unrealistic. The new despatching system was highly efficient and there was capacity for staff to handle a greater level of business, but as turnover grew he thought it would be likely that additional overheads would be incurred. The assumed profitability implicit in his figures exceeded that of any of the mini-cab businesses he had considered. He

therefore suggested that a deduction of up to 10% might be appropriate to take account of this factor.

68. Secondly, in response to a question from me, Mr Poluck acknowledged that it might be appropriate to apply a general contingency to future income to reflect uncertainties. The business of operating mini-cab firms was undergoing change (the Uber model which cuts out the independent mini-cab firm being an example) and while this had not yet made much impression in Romford it might do. Moreover, Mr Micheal had already retired from the business once and it might be unrealistic to assume that it would continue to operate under his guidance for the whole of the period covered by Mr Poluck's assessment. That introduced an element of uncertainty which was very difficult to quantify.

69. I am satisfied that it is necessary to moderate Mr Poluck's calculations to reflect both of these factors and to avoid over compensating the claimants. It is not possible to be precise in the discount which is required but I consider there is a real risk that the projected profits will not be achieved for reasons unconnected with the defendants' breaches and I propose to reduce the estimate of future loss to £400,000 to reflect a combined deduction for additional overheads and other contingencies.

70. In order to achieve the projected turnover it will be necessary for HRC to increase spending on advertising. Mr Micheal said that he was spending £15,000 a year more than he had formerly done and Mr Poluck therefore included an additional sum of £90,000 in his calculation of loss for the period from November 2014 to March 2021. I accept that additional expenditure is necessary in response to the breaches of the defendants and that it should be added to the damages sum. Against these losses it is necessary to offset a net sum of £69,237 paid into HRC by A1 Group.

71. As for the cost of the new despatching system required to replace the system abandoned by Mr Philips, and other expenditure, I do not consider that it is appropriate to award the full amount claimed. The original despatch equipment was at least four years old when it was replaced, and would have been eight years old in November 2014. In order to achieve the turnover projected by Mr Poluck an efficient modern system would be required in any event. I therefore intend to limit this element of the claim to the expenditure on 105 licences and PDAs for drivers to bring the complement up to 2011 levels at £600 each (£63,000). I also award £10,721 for the replacement phone system, but I disallow the refurbishment of the two offices which would have been required periodically in any event.

72. I therefore gave judgment on the financial claims as follows:

Loss January 2011 to 14 November 2014	£387,520
14 November 2014 to 25 March 2016	£328,672
25 March 2016 to 25 March 2021	£400,000
Licences and PDS for 105 drivers @£600 each	£ 63,000
New telephone system	£ 10,721
Additional advertising costs	£ 90,000
Less net payment	[£ 69,237]

Total	£1,210,676
Interest on past losses at 2.5%	£ 48,448

The property claims

73. The property claims against Mr and Mrs Phillips concern HRC's business premises at 142 South Street. HRC first seeks a declaration that it has a tenancy within Part II of the Landlord and Tenant Act 1954 extending to the whole of the ground floor of the premises. An additional claim is then made against Mr Philips and A1 Group for damages or for an account of sums received from the letting of part of the ground floor to a Mr Barker after the transfer of HRC's main centre of operations to the Brooke Trading Estate in 2012. More ambitiously Mr Micheal claims that Mr and Mrs Phillips hold the freehold interest in the building, which they acquired in July 2012, on a *Pallant v Morgan* constructive trust for him.

HRC's status as tenant

74. Mr Micheal has operated his mini-cab businesses from the ground floor of the South Street premises since at least 31 August 1994, when another of his companies, Auchinlek Ltd took a 15 year lease of ground floor. The lease was granted by the owner of the freehold in the entire building, Reculver Ltd, a company owned by a Mr Marks.

75. Auchinlek was dissolved without formal assignment of the lease in 1999 and the term of the lease expired on 5 May 2009. On dissolution, the lease would have vested *bona vacantia* in the Crown, which would have been entitled to disclaiming it. There is no evidence of disclaimer or of any other involvement on the part of the Crown.

76. After the dissolution of Auchinlek Mr Micheal continued to run his businesses from the premises using the original Havering Radio Cars Limited, which ceased trading in March 2010 and was itself dissolved on 12 November 2011. From March 2010, HRC traded from the premises, paying rent to Reculver until the freehold of the building was acquired by Mr and Mrs Phillips in March 2012.

77. I am satisfied on the evidence that HRC had exclusive possession and sole occupation of the entirety of the ground floor from March 2010 until after March 2012. South Street was one of the properties identified in Schedule 3 of the Management Agreement as being occupied by the HRC, and in their defence the defendants assert that they asked for a formal lease to be obtained before the Management Agreement was executed, but this was never done.

78. Throughout the period of its occupation up to March 2012 HRC paid rent quarterly to Reculver. I was shown invoices from Reculver for the rent due on the March, June and September quarter days in 2010 each of which was addressed to "A1 Cars" (Mr Micheal's trading name). Other correspondence from Mr Marks shows that he referred to Mr Micheal's business as A1 Cars, and that the rent was being received. Mr Micheal explained that Mr Marks was relaxed about precisely which company paid the rent, so long as it was the company that Mr Micheal was operating at the time.

79. Rent and other sums due in respect of insurance continued to be paid after Mr Phillips assumed responsibility for management. Rent was paid by cheques from HRC to Reculver signed by Mr Phillips in July, September and December 2011 and March 2012 and is recorded in the company's account ledger. In his defence Mr Philips admits the payments but suggests they were made by mistake from HRC's cheque book rather than from A1 Group's. I do not accept that suggestion. After Mr and Mrs Phillips acquired the freehold (exchanging contracts on 24 March and completing the purchase on 27 July 2012) the HRC account ledger shows accruals of rent from HRC to Mr and Mrs Phillips for 142 South Street.

80. By the payment and acceptance of rent HRC became the tenant of Reculver under an implied quarterly tenancy of the whole of the ground floor of the premises. In the defence of the first and second defendants and in the separate defence of the third defendant it is alleged that they acquired the freehold title to South Street in good faith, after inquiry, and without notice of any interest of HRC. It is said, or implied, that they therefore acquired the freehold free of HRC's tenancy. Once again I do not accept that analysis. While it is true that HRC had no formal lease or any other instrument granting a tenancy, Mr Philips was clearly aware of the fact of its occupation and payment of rent since he himself was writing the cheques to Reculver. The tenancy was an overriding interest for the purpose of section 29, Land Registration Act 2002, and the facts concerning the creation of the tenancy were well known to Mr Phillips. There is nothing to suggest that inquiry was made of HRC on behalf of Mrs Phillips as to its status, or that there was any failure by HRC to disclose to her that it was in occupation and paying rent. Whether the relevant facts were also known to Mrs Phillips is therefore immaterial as the tenancy bound her in the absence of inquiry.

81. On 7 December 2012 Mr Philips (acting in his own name) purported to grant a tenancy of property described as 142 South Street to Mr Steven Barker at an annual rent of £7,000. The tenancy agreement was in writing, signed by both parties, and was for a term of one year expiring on 7 December 2013. The property comprised in the tenancy was not the whole building, nor the whole of the ground floor, but part only of the ground floor which had been occupied by HRC but from which it withdrew. Mr Barker ran a sports shop business in premises adjoining 142 South Street and it appears that he took over part of the premises formerly occupied by HRC to provide additional space for that business.

82. Mrs Phillips was not a party to the tenancy granted by her husband to Mr Barker and in her defence it is pleaded on her behalf that she had no contemporaneous knowledge of it. I take that to mean that she had no knowledge of the tenancy while it remained in existence and became aware of that her husband had granted a tenancy to Mr Barker only when she read it in the claimants' statement of case.

83. On 17 October 2013 Mr Barker and Mr Phillips entered into a formal deed of surrender of the tenancy agreement. Despite the surrender Mr Barker remained in occupation until very recently. I was not told whether he had made any further payments to Mr Phillips after the surrender, but no payments have been requested of him by HRC since Mr Micheal resumed control of the remainder of the ground floor in November 2014. Mr Barker was not joined as a party to these proceedings but on 6 March 2017 he cleared all of his remaining stock and belongings from that portion of the ground floor of the premises which he had continued to occupy and handed over the keys to Mr Shala, an employee of HRC. The following day, 7 March, Mr Micheal resumed possession of the whole of the ground floor on behalf of HRC, cleared out a few items left behind by Mr

Barker, and displayed a large banner in the window advertising HRC and its phone numbers.

84. Mr Hornett invited me to grant a declaration that HRC is the tenant of the whole of the ground floor of 142 South Street and that its tenancy is a business tenancy entitled to the benefit of Part II, Landlord and Tenant Act 1954. I am prepared to grant a declaration to that effect, notwithstanding the intervening period of Mr Barker's occupation. HRC clearly had such a tenancy of the whole of the ground floor up to the time Mr Barker's interest was created on 7 December 2012 and that tenancy continued at least to the extent of the property occupied by HRC. Whether the whole of the ground floor had remained subject to HRC's tenancy might have been a subject of debate between the HRC and Mr Barker, but it is apparent from his actions in 2013 in surrendering the tenancy granted to him by Mr Philips before its contractual expiry, and on 6 March 2017 when he finally vacated the premises and handed over the keys to HRC, that Mr Barker does not assert any entitlement to occupy the ground floor against HRC.

85. If Mr Barker had remained in occupation of 142 South Street I would not have been prepared to make any determination concerning the effect on HRC's interest of the grant of the tenancy to him by Mr Philips, one of HRC's two joint landlords, nor of the effect of the surrender by Mr Barker of his tenancy on 17 October 2013 nor of his continued occupation thereafter. As Mr Barker has vacated the premises, however, I can see no reason not to grant the declaration requested by Mr Hornett. There is no suggestion in the pleadings filed on behalf of Mr and Mrs Philips that Mr Philips acted on behalf of HRC when he granted the tenancy of part of the ground floor to Mr Barker in 2012. There is nothing to suggest that HRC willingly relinquished possession of the premises to Mr Barker, or intended to give up any of its own rights while he was in occupation. In the absence of a positive assertion to that effect, with evidence in support, there is nothing to support the inference that HRC surrendered its interest in part of the ground floor premises by operation of law.

86. I should add that after a draft of this decision was circulated to the parties (in a form prepared before I was aware that Mr Barker had vacated the premises), HRC was excluded from the area of the ground floor of 142 South Street previously occupied by Mr Barker. The locks were changed, and it is reasonably to be inferred that that was done by persons acting on the instructions of Mr Philips. Earlier this week, on 21 March, an injunction was granted by Mr Justice Fraser on the application of HRC requiring Mr Philips to permit HRC to resume possession of the ground floor premises and restraining him (and anyone acting on his behalf) from interfering with HRC's occupation of the premises. I am satisfied that HRC, rather than Mr Philips, is entitled to occupy the premises from which it was excluded.

87. I will therefore make a declaration that HRC has a quarterly periodic tenancy of the whole of the ground floor of 142 South Street.

88. I was also asked to make an order that Mr Philips account to HRC for income received from Mr Barker from 7 December 2012, or pay damages for any omission to collect rent from him. The period for which any such claim could be sustained is from 7 December 2012 until 14 November 2014 during which period the annual rental value of the premises occupied by Mr Barker was £7,000. As HRC had a tenancy of the premises which Mr Barker occupied it was Mr Philips duty to collect that sum on behalf of HRC, which I am satisfied is entitled to recover £13,416.

Rights in relation to the freehold of 142 South Street

89. Mr and Mrs Phillips completed their purchase of the freehold of 142 South Street from Reculver on 27 July 2012. The purchase price was £325,000 and a deposit of £15,000 was paid. It is Mr Micheal's case that he and Mr Phillips had an oral agreement that in the event that the sale of the shares in HRC did not proceed to completion, Mr Phillips would allow Mr Micheal to buy the property at a price which he, Mr Micheal, had previously negotiated with Mr Marks (who owned Reculver). That price had been £300,000.

90. An oral agreement for the purchase of land is of no effect as a result of section 2, Law of Property (Miscellaneous Provisions) Act 1989. It is said on behalf of Mr Micheal that the circumstances in which Mr and Mrs Phillips acquired 142 South Street gave rise to a constructive trust in his favour to which effect should be given by compelling them to transfer their interest to him for £300,000.

91. The property in dispute includes the ground floor retail premises and two residential flats on the upper floors; since 2012 the flats have been refurbished by Mr and Mrs Phillips at their own expense. There is no current valuation of the whole building but in December 2014 it was valued on Mr Micheal's instructions at £415,000 by Hilbery & Chaplin of Romford.

92. Mr Micheal claims to have the benefit of the form of common intention constructive trust referred to as a *Pallant v Morgan* equity (named after *Pallant v Morgan* [1953] Ch 43). Such an equity arises out of a joint venture for the acquisition of property, as Lord Scott made clear when he provided the following explanation in *Cobbe v Yeomans Row Management Ltd* [2008] 1 WLR 1752, at paragraph 30:

> "If two or more persons agree to embark on a joint venture which involves the acquisition of an identified piece of land and a subsequent exploitation of, or dealing with, the land for the purposes of the joint venture, and one of the joint venturers, with the agreement of the others who believe him to be acting for their joint purposes, makes the acquisition in his own name but subsequently seeks to retain the land for his own benefit, the court will regard him as holding the land on trust for the joint venturers."

93. A fuller consideration of the requirements of the constructive trust arising out of such an arrangement was given by Chadwick LJ in *Banner Homes v Luff* [2000] Ch 372 at 397-399:

> "(1) A Pallant v Morgan equity may arise where the arrangement or understanding on which it is based precedes the acquisition of the relevant property by one of those parties to that arrangement. It is the pre-acquisition arrangement which colours the subsequent acquisition by the defendant and leads to his being treated as a trustee if he seeks to act inconsistently with it.
>
> (2) It is unnecessary that the arrangement or understanding should be contractually enforceable. Indeed, if there is an agreement which is enforceable as a contract, there is unlikely to be any need to invoke the Pallant v Morgan equity.
>
> (3) It is necessary that the pre-acquisition arrangement or understanding should contemplate that one party ("the acquiring party") will take steps to acquire the

relevant property; and that, if he does so, the other party ("the non-acquiring party") will obtain some interest in that property. Further it is necessary, that (whatever private reservations the acquiring party may have) he has not informed the non-acquiring party before the acquisition (or, at the least, before it is too late for the parties to be restored to a position of no advantage/no detriment) that he no longer intends to honour the arrangement or understanding.

(4) It is necessary that, in reliance on the arrangement or understanding, the non-acquiring party should do (or omit to do) something which confers an advantage on the acquiring party in relation to the acquisition of the property; or is detrimental to the ability of the non-acquiring party to acquire the property on equal terms. It is the existence of the advantage to the one, or detriment to the other, gained or suffered as a consequence of the arrangement or understanding, which leads to the conclusion that it would be inequitable or unconscionable to allow the acquiring party to retain the property for himself, in a manner inconsistent with the arrangement or understanding which enabled him to acquire it.

(5) That leads, I think, to the further conclusions: (i) that, although, in many cases, the advantage/detriment will be found in the agreement of the non-acquiring party to keep out of the market, that is not a necessary feature; and (ii) that, although there will usually be advantage to the one and co-relative disadvantage to the other, the existence of both advantage and detriment is not essential — either will do. What is essential is that the circumstances make it inequitable for the acquiring party to retain the property for himself in a manner inconsistent with the arrangement or understanding on which the non-acquiring party has acted."

94. The most recent consideration of the principles by the Court of Appeal was in *Crossco No.4 Unlimited v Jolan* [2011] EWCA 1619. Etherton LJ pointed out (at [79]-[80]) that in the light of Lord Scott's speech in *Cobbe* and references to it in other cases in the Court of Appeal, the decision in *Banner Homes* cannot be called into question despite the "very mixed reception" which it has received from academic commentators.

95. As originally pleaded in November 2014 Mr Micheal made only a limited claim that Mr Phillips held the freehold of 142 South Street on a constructive or resulting trust for the benefit of himself and HRC because funds of HRC had been used to pay three monthly instalments of a loan secured on the property. The original pleading nevertheless included the allegation that after the Management Agreement had been entered into Mr Micheal agreed that Mr Phillips could acquire the freehold of the premises (for which he had been negotiating with Mr Marks) on condition that, if the share sale did not proceed, Mr Phillips would sell the property on to Mr Micheal. The claim to a *Pallant v Morgan* equity was based on that allegation, and was made by amendment on 5 April 2016; at that stage nothing was said about the price at which it was intended any transfer to Mr Micheal would proceed. By a further amendment on 10 February 2017 it was suggested (apparently for the first time) that it had been agreed that the purchase price would be the same as that originally agreed between Mr Micheal and Mr Marks.

96. In his closing submissions Mr Hornett made it clear that the Mr Micheal's primary case was that he is entitled to a transfer of the property in return for a payment of £260,000; in the alternative, he submitted, the Court has a wide discretion in equity to make an order requiring a transfer at a different price, including a price reflecting current market value.

97. The following facts are clear from the contemporaneous correspondence.

98. At some point before the middle of 2010 Mr Micheal negotiated with Mr Marks to purchase the freehold of 142 South Street. A meeting took place on 9 August at which terms were discussed between them and in an undated letter written before 24 September 2010 Mr Marks accepted Mr Micheal's offer subject to a number of conditions. A cash sale price of £260,000 was agreed, but this was to be paid by monthly instalments over a period of 5 years; each instalment was to be £5,000 which included a total sum for interest of £40,000. The total price including interest would therefore be £300,000, but with an option to overpay or pay up in full in which case the interest component would be recalculated.

99. Mr Micheal informed his solicitor, Mr Baker of Lodders, of the intended purchase in September, and they wrote to Mr Marks' solicitors, F Barnes & Son, on 28 October 2010. After leisurely exchanges over the costs of the transaction a draft contract for the sale of the property to Mr and Mrs Micheal was eventually received by Mr Baker on 24 January 2011.

100. On 12 January 2011 Mr Micheal informed his solicitors by email that "the prospective purchaser" was deciding whether to purchase personally or through his new company and on 20 January he confirmed that "the name on the title deeds will be Gary and Lynn Phillips" and that funds would be provided by A1 Group. A few days later, in an email to Mr Micheal, Mr Baker referred to the "linkage" between the property transaction and the sale of HRC. It is therefore clear that the key conversation between Mr Micheal and Mr Phillips had taken place by early January 2011.

101. Mr Micheal subsequently arranged a meeting between Mr Phillips and Mr Marks which all three attended on 13 April 2011. At this meeting it was agreed that Mr Phillips could take over the deal Mr Micheal had agreed with Mr Marks. On the next day Mr Micheal told his solicitor that Mr Marks now knew who the buyer would be; he also requested that the transaction should proceed slowly. The request was apparently at the suggestion of Mr Phillips, as Mr Micheal subsequently explained in an e-mail of 6 May to Mr Marks who was becoming impatient at the lack of progress.

102. On 14 June Mr Marks reminded Mr Micheal that completion of the sale had originally been intended to take place in June and asked pointedly "should I actively seek another buyer?" The matter continued to stall but at the end of July 2011 the parties met again to keep the deal on track. Mr Phillips' own solicitors, Sackvilles, first became involved on 15 August 2011 when they wrote confirming their instructions that the purchase was to be by their clients at a price of £245,000 plus fixtures and fittings and was to proceed on the same basis as had previously been agreed by Mr Marks with Mr Micheal, with the price being paid by monthly instalments secured by a charge over the property.

103. In October 2011 Mr Marks wrote to Mr Micheal telling him that he had been made aware that the purchaser of Mr Micheal's mini-cab business had proved to be "not so hot on keeping up the payments schedule you had agreed". If the purchaser in question was Mr Phillips, Mr Marks said, "I won't give him the facility of the private mortgage deal I offered you."

104. The terms of the transaction agreed between Mr Phillips and Mr Marks were subsequently re-negotiated. On 22 December 2011 Mr Phillips' solicitors wrote recording that their

instructions were now that the transaction was to proceed as a straightforward purchase, and it was agreed between solicitors that the matter should be left in abeyance until it became clear whether Mr Phillips could sort out alternative mortgage arrangements.

105. On 24 March 2012 Mr Marks wrote to Mr Phillips offering him an option to purchase the property for renewable periods of three months on payment of an option fee (apparently of £15,000) which would be deductable from the purchase price on completion. The proposed option arrangement seems to have been agreed as on 7 May Mr Marks told Mr Phillips he would be happy to renew the option for a further period of three months from 25 June if the sale had not been concluded by then.

106. By April 2012 Mr and Mrs Phillips received an offer of a £260,000 mortgage advance from Barclays but this was subsequently reduced to £240,000. The reduction led to a further reconsideration of the terms of the transaction. The purchase price was increased to £325,000 but it was agreed that only part of this sum would be paid on completion. The balance of £37,000 would be payable with interest by 36 monthly instalments of £1,388 secured by a charge on the property in favour of Mr Marks. The transfer was completed on those terms on 27 July 2012.

107. The remaining factual basis of the claim that Mr Micheal was to be entitled to acquire the property at the price of £260,000 originally agreed between Mr Micheal and Mr Marks if the share sale fell through, depends entirely on Mr Micheal's uncorroborated recollection of a single conversation at which the whole arrangement is said to have been agreed. Mr Micheal told me that the conversation occurred shortly before the Management Agreement was entered into in December 2010, and not after it as originally pleaded. He did not tell his solicitor what had been agreed, nor does Mr Phillips appear to have done. He told me that because he had so many other things to do and because he had not foreseen any problem with the completion of the share sale he had forgotten about the conversation after he had shaken hands with Mr Phillips on the deal.

108. The gist of the conversation which Mr Micheal recalled concerned what would occur if the share sale was not completed. It was agreed that in that event Mr Phillips would transfer the property to Mr Micheal at the price Mr Micheal had agreed with Mr Marks. Mr Micheal's evidence was surprisingly vague regarding this conversation, in particular in saying nothing about exactly what that price was expected or agreed to be. No figure was pleaded in the particulars of claim, nor was any mentioned in his witness statement; in his oral evidence the most Mr Micheal could say was that it had been agreed that the price would be the same as had been agreed in the Purchase Option. I understood that to be a reference to the sum of £260,000 plus interest in the event of deferred payment which is referred to in the Purchase Option as the price at which A1 Group was to be entitled to acquire the property within six months of completion of the share sale.

109. It is apparent from the witness statement of Mr Phillips that he did not dispute that the parties had a conversation about what would happen to the property in the event that the share sale did not proceed. Mr Phillips evidence would have been that the conversation took place after the Management Agreement had been entered into and concluded with him reassuring Mr Micheal that there was no risk that the sale would not complete so that, in effect, there was no need to worry about what might then happen.

110. In the absence of any challenge to Mr Micheal's evidence, and despite the fact that it is vague, I am satisfied that a conversation took place early in January 2011 at which it was

agreed that Mr Phillips would seek to acquire the property rather than Mr Micheal. The conversation continued broadly as Mr Micheal describe, and an understanding was reached that if the share sale was not completed he would have the opportunity to purchase the property at the same price as was provided for in the Purchase Option.

111. Despite being satisfied that a conversation to that effect took place, I do not accept that it gave rise to a constructive trust of the *Pallant v Morgan* variety. I have reached that conclusion for the following reasons.

112. First, and most fundamentally, the understanding and context relied on lack the quality of joint venture described by Lord Scott in *Cobbe* and elaborated on by Chadwick LJ in *Banner Homes*. That is hardly surprising as the basis of the parties' arrangement was a sale by which Mr Micheal was disposing of HRC to Mr Phillips rather than going into business with him. I accept that there was an understanding, reflected in the Purchase Option and in the oral agreement, that the property should be acquired and held together with the business (or at least that the person owning the business should have that option) but the understanding was given incomplete contractual effect. It was not contemplated that the business would be run, or the property enjoyed, jointly by Mr Micheal and Mr Phillips. Even during the prolonged buy-out period the profits of the business were to go first to pay the salaries of Mr and Mrs Micheal and the share price, and only then was A1 Group to benefit.

113. Secondly, and closely related to the first objection, is the fact that the arrangement lacked any intention that the parties would concurrently enjoy an interest in the property. If matters proceeded as expected Mr Phillips was to have the property solely for his own benefit. If the share sale did not proceed Mr Micheal would be entitled to call for the property to be transferred, again solely for his own benefit. No element of joint exploitation of the opportunity presented by Mr Marks' willingness to sell is to be found in the arrangement and when Mr and Mrs Phillips refurbished and let the upper floors of the building they did so without prior discussion with Mr Micheal, and at their own risk and expense. For that reason also I consider that the *Pallant v Morgan* principle is not engaged.

114. Mr Hornett relied on *Kearns Brothers v Hova Developments* [2012] EWHC 2968 in support of a submission that it was not necessary for the agreement to contemplate that the non-acquiring party would acquire a legal or beneficial interest in the property; in that case a right to share in the proceeds of sale of a property after redevelopment was considered sufficient. But there was no doubt in *Kearns* that the property was to be exploited after acquisition for the joint benefit of both parties and I do not consider that it assists Mr Hornett to overcome the absence of any such understanding in this case.

115. Thirdly, the necessary element of either detriment or benefit is missing. I do not regard the mere introduction of Mr Phillips to Mr Marks as a benefit conferred on him by Mr Micheal. Mr Marks wished to sell and was free to deal with Mr Phillips or not as he chose. As Mr Phillips was the person running the business from the premises and had contracted to buy that business, he was an obvious prospective purchaser after January 2011. Mr Micheal no longer had any reason to acquire the property and certainly no reason to compete with Mr Phillips in a way which might push up the price. That would have been obvious to Mr Marks. Mr Hornett acknowledged that there was nothing in the evidence to suggest that the price agreed between Mr Micheal and Mr Marks was a favourable one or anything other than market value, so it is difficult to regard the opportunity to purchase

at that price as any particular advantage conferred by Mr Micheal. In any event, Mr Phillips was not ultimately in a position to purchase at the price agreed by Mr Michael and had to pay significantly more.

116. The only favourable element of the original deal was Mr Marks' willingness to defer the payment of the purchase price over a period of up to five years. That opportunity was briefly available to Mr Phillips but had been withdrawn by October 2011. As a result Mr and Mrs Phillips were only able to complete the purchase by borrowing the greater part of the price from Barclays on commercial terms.

117. Mr Hornett submitted that the beneficial opportunity of the private mortgage had been lost because of Mr Phillips' delay in progressing the transaction, and that the benefit he had received when the offer was extended to him was enough to satisfy the *Pallant v Morgan* requirement. I do not agree. Mr Micheal himself was complicit in the dragging of feet which caused irritation to Mr Marks, having instructed his own solicitors to delay at Mr Phillips' request (it appears Mr Marks became aware of this instruction when it was revealed inadvertently to his solicitor). Mr Micheal was aware by June 2011 that Mr Marks' response to the lack of progress was to threaten to offer the property elsewhere. He was also well aware that Mr Phillips was "not so hot on keeping up the payments" and must by October 2011 at the latest have appreciated that the favourable terms previously on offer to him were not now available to Mr Phillips. The sale of the property to Mr and Mrs Phillips then remained in a state of uncertainty for almost six months and was not finally completed until July the following year. There was nothing to prevent Mr Micheal, had he so wished, from seeking to revive the purchase for his own benefit, especially after his solicitors gave their equivocal notice of termination of the Management Agreement on 26 May 2011 and indicated a desire to renegotiate the arrangement if Mr Phillips could produce a satisfactory business plan. Mr Micheal was free at that point (as he had been all along) to act solely in his own interests and to return to the market or remain out as it suited him. That he chose not to do so was not the result of any understanding with Mr Phillips.

118. I therefore consider that key components of the *Pallant v Morgan* analysis are missing in the dealings between the parties. Looking at the matter more broadly I can see nothing inequitable in Mr and Mrs Phillips retaining the property for their own benefit even after the agreement for the sale of the shares in HRC had been terminated. It had always been open to Mr Micheal to protect himself against that contingency by inserting a term in the Purchase Option to reflect the understanding that had been reached; he chose not to do so, and did not inform his solicitor of what had been agreed, preferring to take a risk which has not worked out to his advantage.

119. Even if I am wrong about Mr Phillips' position, I can see nothing in these facts which should burden the conscience of Mrs Phillips. Mr Hornett relied on the witness statement of Mrs Phillips and accepted that she had had no direct involvement in the negotiations over 142 South Street with either Mr Micheal or Mr Marks. She had from time to time signed documents requested by her husband without being concerned about their effect, leaving all business dealings to him. Mr Hornett submitted that she acted as Mr Phillips' nominee and for that reason alone she must be bound by whatever he agreed with Mr Micheal. I do not accept that analysis. While the evidence shows that Mrs Phillips was content to do as her husband requested in connection with his business, the acquisition of the South Street premises was not a business transaction, but a joint purchase by the couple subject to a mortgage for which both were and continue to be liable. It is accepted

that Mrs Phillips was unaware of the undocumented arrangements between her husband and Mr Micheal and in those circumstances I can see no justification for regarding her as bound by any interest to which those arrangements gave rise.

120. I therefore dismiss the claims for relief in relation to the freehold of 142 South Street.

121. I invite counsel to prepare a draft order giving effect to this judgment.