Neutral Citation Number: [2022] EWHC 345 (Ch)

Case No: BL-2018-000004

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

Royal Courts of Justice
Rolls Building, London, EC4A 1NL

Date: 17 February 2022

Before :

HHJ PARFITT SITTING AS A DEPUTY HIGH COURT JUDGE

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Between :

BNM PARKSTONE LLP	**Claimant**
- and -	
(1) LUCAS KHAZAI	**Defendants**
(2) SAFFRON HMO LIMITED	

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Clifford Darton QC (instructed by **Edward Harte Solicitors**) for the **Claimant**
James Morgan QC (instructed by **Sydney Mitchell LLP**) for the **Defendants**

Hearing dates: 25 to 28, 31 January & 1 to 4 February 2022

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Judgment Approved by the court for handing down

HHJ Parfitt :

Introduction

1. This dispute is about a business providing local authority accommodation in licenced houses of multiple occupation on Jevington Gardens in Eastbourne ("the HMO Business"). The Claimant LLP owned the freehold to various buildings including those from which the HMO Business was carried on ("the Eastbourne Properties"). The Claimant acquired its interest in the Eastbourne Properties in 2011 and sold it on 3 July 2018.

2. The Claimant's prime mover and main witness was Mr Mahmood Shababi. By at least spring 2015, Mr Shababi was unhappy with the existing management of the HMO Business. Mr Shababi was friendly with and something of a mentor figure to the First Defendant, Mr Lucas Khazai. Mr Shababi installed Mr Khazai to oversee the operation of the HMO Business in the summer of 2015.

3. On 3 September 2015 the Claimant and Mr Khazai entered into an agreement, drafted by Mr Shababi, under which Mr Khazai acquired a 10% interest in the Claimant and agreed to manage the HMO Business ("the Contract"). It is common ground between the parties that Mr Khazai's ownership interest in the Claimant included only payment rights related to the Eastbourne Properties and another property, Peacehaven, acquired by the Claimant on 19 January 2017.

4. The basic structure of the envisaged operation under the Contract was as follows: the Eastbourne Properties were owned by the Claimant; an operating company would manage the HMO Business; Mr Khazai would be a member of that operating company and responsible for the everyday running of the HMO Business; a "rent" agreed at £320,000 per annum until 31 March 2017 would be payable by the operating company to the Claimant; the profits would be payable to Mr Khazai.

5. All seemed well until 31 March 2017. After this date the parties to the Contract were meant to "decide" the amount of the future payment from the operating company to the Claimant. No such agreement was ever reached. Instead, the parties negotiated about their capital positions. More significantly, during the period from April 2017 onwards any trust that had existed between Mr Shababi and Mr Khazai disappeared.

6. It is common ground that around July 2017, without prior notice to or agreement with the Claimant, Mr Khazai transferred the operation of the HMO Business to the Second Defendant.

7. Eventually, the Eastbourne Properties were sold on 3 July 2018. The parties' disputes are about the financial reconciliation between them for the period between 1 April 2017 and 3 July 2018.

8. The parties have been well served by their respective counsel. There was an agreed statement of issues which I address, briefly, as an annex to this judgment.

9. The principal issues, in my formulation with the benefit of the closing submissions, are:

i) Was there an oral agreement entered into shortly after the Contract under which the Claimant would reimburse Mr Khazai for the cost of "major and/or non routine works of renovation and repair" after the first £40,000 of cost ("the Renovation Agreement"). The quotation is from the reamended defence and counterclaim.

ii) The amount to be paid by Mr Khazai from the HMO Business to the Claimant following 31 March 2017 when the £320,000 per annum agreed sum period came to an end ("the Rent Dispute"). This has nothing to do with rent as normally understood (accept by analogy) but is the word used to describe that payment in the Contract. Like the parties and the Contract, in this judgment I use "rent" in the same way.

iii) When and if Mr Khazai lost his right to the profits from the HMO Business prior to 3 July 2018 ("the Profits Dispute").

10. The cause of the dispute is the falling out between Mr Shababi and Mr Khazai. Much of the evidence has been directed at demonstrating in general terms which of them is to blame and which is the victim. The witness evidence was prepared before the introduction of CPR PD57A and many of the statements are narrative and conclusion heavy and direct relevant evidence light. In this judgment I have focused on the issues set out above and the evidence relevant to those issues.

The Contract

11. A curiosity, but not one which either counsel has sought to make anything of, is that there are two versions of the Contract in the bundle. Mr Khazai says he signed one that did not include the names of other members of the Claimant. The terms of the two documents are the same. Mr Shababi drafted the Contract and Mr Khazai accepts that it was the subject of discussion and amendment between them.

12. The parties to the Contract were Mr Khazai and the Claimant.

13. In the first part Mr Khazai "agreed to purchase 10 percent of shares from existing shareholders of [the Eastbourne Properties]" for a price of £239,512.04. The Eastbourne Properties were identified and the accommodation in each numbered: 30 & 32 Jevington Gardens, 10 flats; 27 Jevington Gardens, 8 flats; 29 Jevington Gardens, 8 flats; the Lynwood Hotel, Jevington Gardens, 8 flats and 74 rooms.

14. Mr Morgan for the Defendants said that the Contract was divided into the 10% capital acquisition and the HMO Business operation. There is at least one respect in which the two are directly linked. At clause 4 [the Claimant] "will provide financial backing with the existing loan with Lloyd's Bank". This "financial backing" was a prerequisite for the HMO Business.

15. By clause 6 Mr Khazai was to "become a designated member of BNK (operating company) or any other LLP incorporated instead of BNK. [Mr Khazai] will be responsible for the everyday running of the operation of [the HMO Business]".

16. Clause 7 began "The agreement between BNK and BNM will be as follows:…". There then followed a series of clauses about the operation of the HMO Business:

i) "[Mr Khazai] will provide his services to BNK or any other LLP incorporated instead of BNK on a full time basis as a partner and manager and will perform his duties to the best of his abilities."

ii) "7-1 [Mr Khazai] will provide [the Claimant] with the BNK income and expenses by email in a spreadsheet format agreed by both parties on a monthly basis."

iii) "7-2 BNK and [the Claimant] will use the services of Lloyds Bank and all income and payments will be handled through these accounts. The terms of signing cheques and payments to be agreed between the parties concerned. If for any commercial reason BNM decides to change the services of Lloyds Bank, BNK will also change the bank and use the services of the new bank…"

iv) "7-3 BNK will use the services of FairBalance Accounting Company for all accountancy and PAYE matters until the parties agree in writing to use the services of another company"

v) "7-4 BNK or any other LLP incorporated by partners will pay £186600.00 for the period 1 9 2015 to 31 3 2016 as rent or any other method that the BNM partners require. For year 01 04 2016 until 31 03 2017 the total amount for the entire year will be £320000.00. The remaining balance will belong to [Mr Khazai]. For the subsequent years the amount will be decided by all parties concerned"

vi) "7-5 If [Mr Khazai] decides to leave BNK or any other LLP incorporated by partners, he should give a minimum of three months' notice in order that BNM can introduce a proper manager and [Mr Khazai] will train the new manager in all aspects of the management of the LLP to make sure the new manager can take over all the responsibilities to run the business in a proper manner. The cost of the above representative shall be paid by BNK. If the above solution is not economical, BNM will seek any suitable alternative solution such as change of use etc in order to minimise the losses."

17. Clause 8 addressed the relationship between the "rent" payment and possible sales of the underlying properties. In short, the "rent" amount would be reduced by an agreed percentage if any of the Eastbourne Properties were to be sold which broadly equated to the accommodation available within the property sold. If I use the same ordering of the properties as set out above, the reductions were 20%; 10%; 10%; 60%. Clause 8 continued "BNM has to reduce the loan with the bank by the above percentages hence BNK will reduce the monthly payments to BNM. Should BNM decide not to reduce the bank loan, BNK will still be entitled to reduce the monthly payments…".

18. Clause 9 allocated profits to Mr Khazai: "After deducting all relevant operating expenses including rates, wages, insurance, maintenance, general repairs and renovations, legal fees, payments to BNM as per item 7-4 above, the profit will belong to [Mr Khazai]".

19. Clause 10 provided a time limited right for Mr Khazai to acquire a greater share of the Eastbourne Properties based on the same price calculation. This right was not exercised.

20. Other than the signatures, the Contract ended by stating "This agreement continues until BNM sells or develops the site" and "Any disputes are to be determined by an independent arbitrator".

The Operating Companies

21. BNK Jevington LLP "BNK" was the operating company through which the HMO Business was operated by the previous managers. From 1 September 2015 Mr Khazai assumed the management role within BNK and BNK operated the HMO Business until 31 March 2016.

22. From 1 April 2016, the operating company was BLSM LLP ("BLSM"). The members of BLSM included Mr Shababi and Mr Khazai but in August 2016 a change was made, apparently for tax reasons, and the membership was held by a Mr Shababi company, Trademist Limited and a Mr Khazai company, the Second Defendant ("Saffron"). BLSM was set up prior to the Contract and it is likely that it was always the parties' intention that BLSM would take over at the first financial year end.

23. BLSM operated the HMO Business until the end of 2016 after which, Mr Shababi says for tax reasons, from 1 January 2017 the operation of the HMO was carried out directly through the Claimant. The intention, according at least to Mr Shababi, was for the ownership of the Eastbourne Properties to be held and the operation of the HMO Business to be carried out by a new company owned by the Claimant's members. In the events which happened this never came about.

24. Mr Morgan accepted in his opening statement that it would be unrealistic to suggest that after the Claimant became the operating company it was not agreed that the Contract would continue with the Claimant as the operating company. The parties have approached the case on that assumption.

25. It seems to me that the transfer of the operation of the HMO Business to the Claimant was a recipe for confusion and conflict and so it proved. Not least because both Mr Shababi and Mr Khazai would want to take money from the same accounts. This being a symptom of the mixing together of what had previously been separated monies (i.e. the operating company's income and expenses / the "rent" payable to the Claimant / the operating profit to be taken by Mr Khazai / the Claimant's other income and expenses).

Witnesses

26. Mr Morgan encouraged the court to prefer the evidence of the Defendants' witnesses to that of the Claimant's. Mr Darton recognised that the court was unlikely to want to resolve the issues in this case by choosing one group of witnesses over the other but rather by looking at the overall evidential picture in particular the documentary record and inherent probabilities and keeping in mind the fallibility of memory. I agree with Mr Darton's approach in this respect but given Mr Morgan addressed me on a witness by witness basis I give my subjective impressions of the witnesses in this section. The outcome of this process is largely to reaffirm the basis for Mr Darton's submissions – the witness evidence, of itself, must be treated with considerable caution and those parts of the evidence which are less obviously self-serving have far more weight.

27. Mahmood Shababi. Mr Shababi was not an impressive witness. He found it difficult to give straightforward answers to any questions and favoured giving submissions and/or general and exculpatory background. Mr Shababi demonstrated, in my view, an expedient attitude toward the truth and/or honesty. In relation to both the First Defendant and the previous individuals running the HMO Business his major criticism was their lack of honesty. Mr Shababi told the court that he would want nothing to do in business with those who were dishonest. At the same time Mr Shababi explained that he would exaggerate if he was writing to a valuer and did not tell his previous manager that something was untrue as a negotiating tactic. In short, I formed the strong impression that the truth was nothing more than a negotiating card to be used, ignored or manipulated whenever it might suit Mr Shababi's wider interests. The clearest demonstration of this was Mr Shababi's justification for an allegation made in his witness statement that in the run up to the signing of the Contract, Mr Khazai had "hidden" a posited future improvement in revenue for the HMO Business based on an increase in government funding for HMOs. On cross-examination the basis for the allegation turned out to be nothing more than Mr Shababi's reasoning that if Mr Khazai knew, then he did not tell, and so since Mr Shababi "suspected" Mr Khazai knew, then Mr Khazai must have hidden the likely increase from him. This is no evidence at all.

28. Sam Hassani. Mr Hassani was put into the HMO Business by Mr Shababi at a time when he was concerned about Mr Khazai's conduct and when Mr Hassani might have taken over the management role for the Claimant if Mr Khazai was bought out. In general Mr Hassani's evidence was full of conclusion and supposition but had very little admissible evidence. It was quickly apparent during cross-examination that there was a vicious circle involved in the evidence of Mr Shababi and Mr Hassani. Mr Shababi would tell Mr Hassani there was dishonesty going on and Mr Hassani would investigate to find dishonesty on that assumption and then report back that he had found dishonesty – so far as I could tell based on that same assumption – which would reinforce Mr Shababi's capacity to find dishonesty and so on. Mr Hassani admitted in evidence that he was an employee of Mr Shababi and was extremely grateful to him and was taking the Claimant's side. His evidence carries no weight.

29. Sybille Shababi. Mrs Shababi is married to Mr Shababi. Mrs Shababi is also a partner in the Claimant. There was little of significance in her evidence but Mrs Shababi confirmed the serious falling out between her husband and Mr Khazai, which upset Mr Shababi, and described an unfortunate incident where Mr Khazai had old furniture that had been stored in one of the Eastbourne Properties dumped at Mr and Mrs Shababi's home. This incident does Mr Khazai no credit but for evidence purposes does nothing more than illustrate the falling out / struggle to dominate between the two men.

30. David Ross. Mr Ross is the accountant behind FairBalance Accounting. Mr Ross has been Mr Shababi's accountant for some time and the two are friends. Mr Ross had spoken to Mr Shababi about his statement. Mr Ross explained that Mr Shababi would provide accounts information in spreadsheet format running income and expenditure altogether and it was Mr Ross' view that Mr Shababi liked to keep a close eye on his businesses and would keep Mr Ross on his toes. Mr Ross was an engaging and frank witness but with the almost exception of his telling the court that Mr Shababi kept an

accountant on their toes, there was little of direct relevance in his evidence which could not be better found in the documents.

31. Mehrdad Eshghipour. The Defendants did not require Mr Eshghipour to be cross-examined. This was not surprising. His witness statement amounted to little more than a character reference for Mr Shababi which is not admissible (Phipson, 20th ed, 18-23). Mr Eshghipour says he was approached by Mr Shababi to take over the HMO Business in late March 2015.

32. Lucas Khazai. Mr Khazai was an unhelpful witness. He was guarded and less than frank. In contrast to Mr Shababi, Mr Khazai 's answers tended to be short but always qualified. So, in answer to an early and uncontroversial question about May 2015 being when he first got to know of the HMO Business, Mr Khazai 's answer was "not May, April or May, I think April" and a later answer was to say, "I did not have access to all books and account" (the stress was in the oral answer). At all times I got the impression Mr Khazai provided answers which would give him an escape route if he needed it. A further example was when Mr Khazai was taken to two of his witness statements which gave differing versions of the discussions that led to the Contract. Mr Khazai said both are true recollections. This might be a true answer but if so (i) the recollection is flawed on both occasions, and (ii) the evidence given is partial on both occasions. In material summary, while Mr Khazai gave me the impression of being a slightly more reliable witness than Mr Shababi, I cannot place much weight on his evidence without support from reliable documents (the qualification is necessary because of the parties' habit of writing self-serving emails) or inherent probability.

33. Andre Darabi. Mr Darabi provided day to day assistance to Mr Khazai. It was his evidence that a large part of the outgoing transactions involving the HMO Business were carried out in cash. The source of this cash was said to be petty cash bank withdrawals but also third-party money which the HMO Business would then reimburse. Mr Darabi said his own money was used in this way. Mr Darabi had substantial sterling cash sums from a property sale in Iran but did not want to put such monies directly into the UK banking system. Instead, the cash was placed into the larger of two safes at the HMO Business office on the top shelf, in a bag, and then used to pay builders and/or casual labourers (Mr Darabi said "contractors would keep coming in and going out, many contractors"). The operating company would then write cheques reimbursing Mr Darabi that he was happy to pay into his bank account. Mr Darabi's credibility has relevance to the dispute about the circumstances and motivations around the transfer of the HMO Business operation to Saffron in July / August 2017 because he says he forgot to carry out the invoice run for 17 July 2017 until at least 20 July 2017, after which Mr Khazai told him to delay because Mr Shababi had removed Mr Khazai from the Claimant's bank mandate. The invoices were sent out in August 2017 in the name of Saffron.

34. Cyrus Khazai. Cyrus is Mr Khazai's brother. His evidence was limited to explaining his role as an employee of the operating company. Though based in Birmingham, Cyrus Khazai said that once or twice a week he would drive down from Birmingham to Eastbourne and bring supplies and/or workman for the benefit of the Eastbourne Business. For this he was paid about £800 a month. When not doing this Cyrus was running his restaurant business in Birmingham, Del Villaggio on Broad Street ("Del Villaggio"). Cyrus said that Del Villaggio would not use pre-cooked lamb meals of

the type that the Defendant said were purchased in Birmingham for the HBO Business, but the Claimant says was for Del Villaggio. Cyrus was another third-party recipient of HMO Business money explained by reimbursement of cash funds used to pay builders or similar.

35. Ferenc Peter Kiraly. Mr Kiraly was a builder and hotelier based in Eastbourne who said he was able to assist Mr Khazai by providing access to locally based East European skilled building labour. Mr Kiraly said this had the benefit of being cheaper and more available than using established companies. Like Mr Khazai, Mr Kiraly was uncooperative in giving evidence. There was an employee called Ferenc Kiraly in the HMO Business books. Mr Kiraly was asked several questions about this which he just denied until eventually providing the obvious information that this was not him but his father. Mr Kiraly said that works were done to the roof of the front conservatory of the larger building (my description) but that he did not recall a full covering of scaffold during the time of Mr Khazai's operation of the HMO Business.

36. Simon Palmer. Mr Palmer was a night porter at the Eastbourne Properties. He recalled the common presence of builders coming in just before 9 am when his shift finished.

Narrative Overview

37. This section sets out the relevant narrative findings of fact which provide the framework for determining the issues. I thank the parties for agreeing a chronology which I have used for this section. I have ignored various issues raised by the parties in their evidence designed to demonstrate that subjectively the Contract was a better deal for one or the other and those issues where the parties generally differ in their categorisations about certain conduct which is neither here nor there to determine the main issues.

38. These are irrelevant to any issue I need to decide and neither counsel sought to persuade me otherwise during closing submissions, albeit Mr Morgan's written submissions did go through the statement of issues and invite various findings of fact (I have addressed these briefly as an annex).

39. Mr Khazai became involved in the HMO Business from the spring of 2015 and soon, to all intents and purposes, took over the management of the HMO Business for the Claimant.

The Previous Managers

40. It was common currency between Mr Khazai and Mr Shababi before they fell out that the previous managers were not to be trusted. Mr Khazai wrote to Mr Shababi on 9 January 2016 "I went through your email, and I can see you have been lenient enough not to mention all the fake invoices they have produced…I admire your fairness…". In evidence, Mr Khazai said that he was wrong about this and no longer took the view that the previous managers were necessarily dishonest. Mr Khazai's experience of Mr Shababi's change of attitude after 1 April 2017 had altered his perception.

41. For both parties this history is said to be evidentially relevant to the falling out between Mr Shababi and Mr Khazai after 1 April 2017. Mr Morgan says it is similar fact evidence of Mr Shababi manufacturing allegations to remove a no longer wanted

manager. Mr Darton says Mr Khazai's case is undermined by wanting to change history.

42. In my view, the parties' dealings with the previous managers carry no weight on any of the main issues. First, it is not fair to those managers in these circumstances to seek to make findings of dishonesty against them without hearing from them. Second, those circumstances include that there is no evidence put forward to support any allegations of dishonesty outside of the witnesses' own conclusions (either at the time or subsequently) and that is no evidence at all. Third, in those circumstances the court cannot make any meaningful findings about the underlying facts said to be similar.

43. I have expressed my view above about Mr Shababi's ability to make groundless allegations of dishonesty but that is derived from his evidence about Mr Khazai in this case not otherwise.

44. Mr Khazai's conduct as manager of the HMO Business is best determined as relevant to the main issues raised in this litigation on the evidence directly relevant to those issues. In neither case do I get any assistance from what I have been told about the history prior to the Contract.

Condition of the Eastbourne Properties Before 3 September 2015

45. On 17 April 2015 Mr Shababi forwarded Mr Khazai an email describing repair and renovation works required at the Eastbourne Properties. In evidence Mr Shababi said the email was not credible and he and Mr Khazai laughed about it. They treated it as a joke since it was so obviously untrue. Mr Shababi appeared concerned not to give weight to Mr Khazai's case about the Renovation Agreement (if there were works to be done then it was more likely that such an agreement would be reached and vice versa).

46. I was not impressed by this explanation. This is because (a) the email described works said to be required that would leave the Eastbourne Properties "reasonably maintenance free" for 10 – 15 years and so it would not be surprising given the nature of the Eastbourne Properties for substantial works to be necessary to achieve such a goal; (b) on 7 May 2015 a contractor produced an informal estimate for a major refurbishment of the main property at a level just over £350,000, which even with appropriate caveats suggests at least there were works that could be carried out; (c) during 2011/12 the Claimant carried out refurbishment works and a valuation dated 14 March 2012 referred to those recent works (i.e. it took the completion of those works into account) but also said the properties were tired and required a rolling programme of refurbishment and renewal; (d) a valuation dated 2 November 2016 referred to works that had been done and the need for further refurbishment type works given the age and use of the properties. All of which is consistent with the Eastbourne Properties needing works and the email of 17 April 2015 reflecting that even if its details can be argued about.

47. Furthermore, Mr Shababi accepted in his evidence that there were discussions between himself and Mr Khazai about the need for separate agreements to take place regarding works that were akin to capital expenditure: an example given was said to be an architect saying that the roof needed replacing. The difference between the

parties is not whether the subject matter of the Renovation Agreement was discussed but whether an agreement was made.

BLSM

48. On 20 August 2015 BLSM was registered. This is consistent with the parties' intentions under the Contract being that BLSM would take over as operating company.

49. From 1 April 2016 BLSM was the operating company. The HMO licence was transferred to BLSM on 11 August 2016 (which if nothing else shows the administrative lag in getting the paperwork to be consistent with how the parties were operating on the ground).

The "Rent" Calculation

50. The Contract provided for a "rent" payment assessed at a rate of £320,000 per annum (this being £186,000 from 1.9.15 to 31.3.16). Mr Khazai says and Mr Shababi denies that this was derived on a yield basis based on the valuation of £5,000,000. I indicated to the parties my view that the determination of the post 1 April 2017 "rent" figure would be based on objective criteria and not subjectively on how the parties might have reached the £320,000 figure. In closing submissions neither counsel attempted to persuade the court otherwise. For what it is worth, I did not find Mr Khazai's evidence about the yield basis persuasive. The section of his witness statement dealing with it read more like after the event reconstruction not least because it was inconsistent with Mr Khazai also relating the £40,000 reduction from £360,000 to the alleged Renovation Agreement.

The Contract & the Alleged Renovation Agreement

51. It is important to place Mr Khazai's allegations about the Renovation Agreement in a chronological context.

52. It is clear from the documents that the general structure of the Contract had been established by 1 August 2015 (this is apparent from a draft in the bundle given that date). It is also common ground that there was a meeting on Tuesday 1 September 2015 and then another meeting and signatures on Thursday 3 September 2015. At trial, following permission being given for a re-amended defence and counterclaim relevant to the timing of the Renovation Agreement, Mr Shababi provided documents which showed he left the UK for France on Monday 7 September 2015.

53. The original defence stated that on 3 September 2015 but after the Contract was signed, Mr Khazai and Mr Shababi discussed and agreed the Renovation Agreement.

54. The re-amended defence presented another narrative: discussions both before and at the meeting on 3 September 2015 but then agreement at a meeting around one week later at Mr Shababi's house (so around Thursday 10 September 2017). This was not possible given Mr Shababi was in France from 7 September.

55. In his oral evidence Mr Khazai gave a more detailed account of the day on which the Renovation Agreement was said to be made involving meeting at Mr Shababi's house

in East Grinstead, shaking hands on the Renovation Agreement and then driving in two cars to the Eastbourne Properties for an inspection.

56. Mr Darton makes the good point that even allowing for the difficulties in recollection experienced by witnesses this account is very different from that which comprised the pleaded case from February 2018 and different in a way which would make the original assertion an unlikely mistake to make. There is considerable force in these submissions but my overall conclusion as to the Renovation Agreement requires a consideration of all relevant evidence.

The HMO Business Operation to 31 March 2017

57. Although both parties seek to go back and reinterpret the history of the operation of the HMO Business between 4 September 2015 and 31 March 2017 generally it is common ground that the HMO Business prospered, and turnover increased substantially.

58. In closing Mr Darton had no hesitation in expressing his client's view that this was down to the management of Mr Khazai. This appears correct, given the general evidence from all of Mr Khazai's witnesses about improvements brought about by Mr Khazai's management and the clear evidence of greatly increased turnover – in broad terms up to levels of £1,200,000 or more per annum compared to figures struggling to reach £600,000 prior to Mr Khazai's management.

Invoices

59. There were several disputes about invoicing and payments which were explored in the evidence.

60. By the end of the oral evidence, it was apparent that a dispute about a charity payment of £8,000 was less serious than Mr Shababi characterised it, since he knew in general terms that such a payment would be made and was related to Mr Khazai not taking payment for his work prior to 3 September 2015. However, so far as I can tell, Mr Khazai benefited Del Villaggio by that payment yet put it through the HMO Business' books as an advertising expense.

61. In a similar way cheques made payable from the HMO Business to Mr Khazai's own accountant were known about by Mr Shababi in August 2016 but Mr Shababi's forensic use of those cheques in the proceedings failed to mention that. However, Mr Khazai's explanation that the sums were the payment of third-party debts where the third party owed money to the accountant and the HMO Business owed money to the third party could hardly be said to be an everyday way of operating a business. There were other examples of cheques paid to third parties in sums in the tens of thousands said to be reimbursement of cash sums. I have already referred to the evidence of Mr Darabi and Mr Cyrus Khazai in this respect.

62. There were other invoices which lacked the type of information about the business in question that should appear on such documents (e.g. addresses, names, VAT numbers where relevant). There were invoices for services and products which might have related to Del Villaggio rather than the HMO Business. Mr Khazai and his witnesses denied this.

63. I do not consider it either necessary or appropriate to determine the validity of these invoices in this judgment. This is because they are not relevant to the issues I need to decide and because the level of evidential analysis has been limited to assertion and counter-assertion rather than, for example, hearing from a person who carried out work or made use of the relevant goods.

64. However, what is relevant is that I do consider that the Claimant has established that Mr Khazai's approach to running the HMO Business was unorthodox, for example in so far as Mr Khazai was content to use the HMO Business to bring third party cash into the UK banking system for the benefit of the individuals holding that cash. There were genuine queries to be raised by the Claimant about the treatment of expenses within the books and records of the relevant operating entity. It is no answer to these queries to say that it did not matter because the profit would all be Mr Khazai's at the end of the day. I agree with the Claimant that it was entitled to have good accounts within the operating company. For present purposes this means that I consider the Claimant's questions about invoices and those raised by Mr Ross from time to time were not a fabricated smokescreen designed to provide false grounds for excluding Mr Khazai.

Mr Khazai "resigned" by Mr Shababi from the Claimant

65. It is Mr Khazai's case that his belief that Mr Shababi was planning to remove him from the HMO Business had its origin in Mr Khazai discovering on 19 April 2017 that he had been resigned as a member of the Claimant on 10 March 2017 (effective from 31 December 2016). Mr Shababi's case is that this was known to Mr Khazai because it was part of a restructuring plan for tax purposes.

66. It is true that a restructure was planned. This is addressed in an email from a different accountant dated 17 December 2016 who explains a plan to have the Claimant takeover the operation of the HMO Business (the accountant says "transfer back") and to incorporate a limited company owned by the same people as the "old partnership" (i.e. the Claimant) which would takeover the business as a going concern.

67. There are a number of documents which demonstrate that this plan went beyond the planning stage. These include a letter from Mr Darabi about the BLSM employees moving to BNM because of a merger as of 2 January 2017. Mr Shababi instructing Mr Ross, copied to Mr Khazai, to have the Claimant registered for VAT (BLSM's number was reallocated). Mr Ross emailed about steps taken to transfer the HMO Business operation from BLSM to the Claimant. The local authorities were told about the change and that future payments should be made to the Claimant.

68. As part of this exercise Mr Ross, instructed by Mr Shababi, appears to have created resignations from the Claimant for Mr Khazai and Mr Shababi's daughter. Mr Khazai was not involved in this being done.

69. Mr Shababi said the resignations were about making the members of the Claimant the same as the original members as per the accountant's advice. It does not seem to me that this was what the accountant was advising at all (at least based on his email of 16 December 2016) but rather the accountant was drawing a distinction between the new ownership / operating company and the old partnership (i.e. the Claimant). There is

nothing said about the original members, and it is hard to see why they would be relevant to the plan. I do not accept Mr Shababi's explanation.

70. Mr Khazai did not find out about this purported resignation until 19 April 2017. On 20 April 2017, Mr Ross told Mr Shababi that Mr Khazai was upset to have found out about it. This is understandable.

71. However, I do not follow Mr Khazai concluding from this purported resignation that Mr Shababi was trying to exclude Mr Khazai from the Claimant. It is obviously a hopeless plan to fabricate a resignation. Mr Khazai had paid £239,512.04 for his equity stake in the Claimant. It has never been suggested in the material I have seen, by or on behalf of Mr Shababi that Mr Khazai did not have whatever rights he acquired by that payment. There is no evidence of any other action on the part of Mr Shababi tied to the resignation that would support Mr Khazai's theory. The resignation of Mr Shababi's daughter, done at the same time by Mr Ross, points to some less conspiratorial explanation.

The Parties' Dealings At and After April 2017

72. After 1 April 2017 there was no agreement under the Contract about the "rent". It is common ground that soon after 1 April 2017, not least at a meeting on 19 April 2017 and thereafter, the parties probably spent more time discussing potential buyouts than agreeing a new "rent" payment. Mr Khazai rent position was the same but no more than £400,000. Mr Shababi's position, according to Mr Khazai, was £700,000 - £800,000.

73. Another consistent theme in the documents is the accounting of expenses within BLSM. Mr Shababi and Mr Ross were asking questions about the expenses being run through the HMO Business (for example in an email of 9 April 2017 but the topic is raised consistently and frequently). I note that for the most part Mr Khazai and Mr Darabi respond and provide information / documents. As is often the case such responses provoke further questions.

74. In the parties' witness statements there are differing and largely self-serving accounts of various meetings during which they attempted to address and resolve their differences in the period before solicitors became involved. I have not found it necessary or helpful to either address or resolve these differences of view. This is because they are not relevant to the decisions in this judgment and because all that can be reliably said is that they fell out and then acted in what each perceived to be their own interest. It is common ground that no enforceable agreements were reached (there was an informal or subject to contract agreement for Mr Khazai to be paid £700,000 for his interest).

75. In any event, Mr Khazai, on 20 April 2017 withdrew £139,440 from the Claimant's bank account. Mr Khazai explained that this was because he knew that as of 20 April 2017 there was at least that amount which was attributable to profits of the HMO Business and so payable to Mr Khazai under the Contract. I do not find that a convincing explanation.

76. It is an obvious fallacy to think that just because at any particular time the income from the HMO Business less whatever expenses had been paid and the "rent" payable

to the Claimant produced a surplus that such surplus amounted to profit which could be treated as belonging to Mr Khazai. This is because it cannot be determined what expenses might be applicable until after the relevant accounting period and in the course of that determination it might be appropriate to make allocation of income against future expenditure. I bear in mind that the Contract says that the profits "belong" to Mr Khazai. It still seems to me necessary for the relevant profits to be duly identified as such and this cannot happen until after the event (likely to be year end and the drawing of accounts).

77. I also agree with Mr Darton, who submitted in closing that such withdrawals could not be fairly described as in the ordinary course of business.

78. In any event, once Mr Shababi expressed concern about Mr Khazai's withdrawals, such concerns including that £74,000 of the money was already earmarked for distribution to the other Claimant partners because its source was a deposit sum on a transaction outside of the HMO Business, on 26 April 2017 Mr Khazai caused Saffron to repay £80,000 back to the Claimant.

79. Mr Shababi's general position at about this time was addressed in an email from him dated 23 April 2017. Mr Shababi expressed concern about BLSM accounting, referred to on-going discussions about buy-outs or similar, mentioned the £139k withdrawal and asked for an urgent meeting.

80. Mr Khazai's general position was set out in his own email dated 24 April 2017. Mr Khazai was critical of Mr Shababi wanting a more than 100% increase in the rent payment when it was Mr Khazai's work and spending more than £400k that had increased the income to £1.3m and of Mr Shababi's treatment of expenses relating to both the HMO Business and otherwise. Mr Khazai said he would speak to his own accountant about best options.

First Documentary Mention of the Renovation Agreement

81. On 11 May 2017, following a telephone conversation of the same date, Mr Khazai emailed Mr Shababi and says he referred to the Renovation Agreement. Mr Khazai referred to a "VERBAL agreement" and described that agreement as including that Mr Khazai would be responsible for the first £40,000 of expense and then the Claimant would be responsible for the rest. This was said to relate generally to "expenditure on the buildings" but was also linked to "…your encouragement to carry out all the jobs <u>where we will sort out the costs in between us in a later stage</u>." [my emphasis]. I refer to this email and Mr Shababi's reply in more detail below.

82. Mr Khazai noted that the Claimant was considering selling the Eastbourne Properties for a gain which Mr Khazai considered he had won by his hard work and payment of costs. Mr Khazai would prepare a list of expenses for discussion.

Mr Shababi's Reply Email of 13 May 2017

83. Mr Shababi's email responded on 13 May 2017. Mr Shababi had just returned from Iran. His email addressed: works related to sprucing up 30-32 Jevington for sale; the on-going invoice / accounts problems (which is returned to several times); a possible renovation cost of £3.8 million being fantasy; the Contract being up to 31 March

2017; the Claimant having decided in November / December 2016 to sell the Eastbourne Properties; a further meeting to "solve this matter amicably".

84. Mr Morgan's best point in favour of the existence of the Renovation Agreement was Mr Shababi not contradicting the assertion of "VERBAL agreement" in his email replying to Mr Khazai.

85. Mr Shababi's explanations for this included that he did not often write emails and that English was his second language. These were inadequate explanations not least because as between Mr Shababi and Mr Khazai, Mr Shababi's emails are generally longer and always more articulate. I have no doubt Mr Shababi liked to make use of the telephone for business purposes, as he told the court, but he was not a stranger to writing emails.

May 2017 – negotiations and problems continue

86. On 16 May 2017 Mr Shababi emailed Mr Khazai and complained about £69,940 withdrawn from the Claimant's bank account since 10 May 2017. Mr Shababi said that since March 2017 only "proper and relevant expenses" should be withdrawn and made it clear that Mr Khazai's access to the bank account might be stopped.

87. On 17 May 2017 Mr Khazai incorporated Saffron Housing LLP.

88. The parties met and negotiated on 17 May 2017. From an exchange of emails on 21 and 22 May 2017, the parties considered an agreement had been reached and that solicitors would be able to draft. Mr Khazai was to start training Mr Hassani as the new manager.

The 2 June 2017 resignation letters

89. On 2 June 2017 Mr Khazai obtained the signatures of various employees of the HMO Business on one sentence letters which said: "Please accept my resignation of my employment at BNM Parkstone LLP, so my last day of employment will be 30/6/2017".

90. In answers to questions from the court during his cross-examination Mr Khazai explained that he saw those letters as something he could "keep in his pocket" and use if necessary, during the ongoing dispute. Mr Khazai explained that so far as he was concerned and he said he explained as much to the employees, this was technical only and their employment within the HMO Business would continue. It is common ground that Mr Shababi / the Claimant was not told about these letters.

Buyout Discussions Continue / Tactical Manoeuvres

91. The emails about finalising accounts continue during June 2017. These are from Mr Shababi and are answered by Mr Darabi. In general, the impression given is that work is on-going, and the accounts are getting closer to completion.

92. Mr Shababi and Mr Khazai met again on 4 July 2017 about the proposed buyout. There was disagreement about how such a deal might be structured and Mr Khazai was unhappy in an email of 5 July 2017 about any proposal other than a capital purchase of his interest. These disagreements are reflected in emails of 14 July 2017

(Mr Shababi) and 17 July 2017 (Mr Khazai). Mr Khazai asked for the Claimant's accounts.

93. On 11 July 2017 Mr Khazai applied to enter a restriction on the titles for the Eastbourne Properties. These were premised on Mr Khazai having an interest arising out of a resulting trust because under the Contract he had paid the Claimant for a 10% interest in the Eastbourne Properties.

94. On 17 July 2017 Mr Khazai sent Mr Shababi an account statement for the period covering April 2017 to July 2017. Mr Khazai had allowed an uplifted rent payment of £400,000 but even then, he said, the Claimant had withdrawn more than £15,775 over what it should have done.

95. Also, on 17 July 2017 Mr Darabi might normally have but did not send out the invoice run for occupation of the Eastbourne Properties for the period from 10 July 2017. Mr Darabi told the court he forgot about it until Mr Khazai told him to delay.

96. Mr Khazai, through Saffron, took £19,954.15 from the Claimant's account on 19 July 2017.

97. Also on 19 July 2017 Mr Khazai, through Mr Darabi, stopped the Claimant's architect from visiting to complete an ongoing survey connected to the marketing of the Eastbourne Properties. Mr Darabi told him "due to unforeseen events providing you with access this week won't be possible. I will let you know when the situation changes". Mr Shabani complained about this to Mr Darabi on 20 July 2017.

98. On 20 July 2017 Mr Khazai sent an email to Mr Shababi complaining about Trademist withdrawals from the Claimant in a total sum of £47,500.

Mr Shababi stops the bank mandate / Mr Khazai Reacts

99. On 20 July 2017 Mr Shababi instructed BNM's bank to withdraw Mr Khazai's mandate on the bank account. Mr Khazai says he discovered this that afternoon when he could not make a remote payment.

100. On 20 July 2017 at 15.58 Mr Darabi emailed Mr Khazai with a draft email intended to be sent to local authorities. The gist of the email was that management of the HMO Business would revert to BLSM to whom "future payments from now" should be made.

101. On 21 July 2017 Mr Darabi emailed both Mr Shababi and Mr Khazai to say that he had been unable to make a payment via card to HMRC.

102. Mr Darabi told Mr Shababi on 21 July 2017 that Mr Khazai had banned Mr Hassani from the Eastbourne Properties.

103. On 21 July 2017 there was an incident at Mr Shababi's home following which Mr Shababi told Mr Darabi that he did not want to talk or see Mr Khazai again but would deal through solicitors. In cross-examination Mr Shababi said that his intention at about this time was to cut Mr Khazai out if he was dishonest.

104. It appears that Mr Khazai's intention was to seek accounts information from the Claimant's head office (also Mr Shababi's home). There was another visit to Mr Shababi's house on 23 July 2017 at which furniture was left behind a car.

105. On 24 and 27 July 2017 Mr Shababi sent emails to Mr Darabi, not copied to Mr Khazai, about PAYE and related payments. Mr Shababi said that since Mr Khazai had no payment authority over the Claimant's bank account from 22 July 2017, when invoices needed to be paid, they should be sent to Mr Shababi for payment and Mr Darabi should ensure that all income was credited to the Claimant's Lloyds bank account.

Saffron takes over

106. On 31 July 2017 Mr Khazai caused an email to be sent to the relevant local authorities substantially in the format drafted by Mr Darabi on 20 July 2017 except the name of Saffron replaced that of BLSM as the new operating company. There is an email exchange of the same date with Eastbourne BC regarding changing the HMO Licence name.

107. It is apparent from an internal Eastbourne BC email dated 1 August 2017 that Eastbourne BC had been told around 31 July 2017 that the HMO Business was going to be sending three weeks' worth of invoices within the next few days for payment to Saffron.

108. The bundles include a list of invoices generated to take in the income for the HMO Business for the July 2017 period. Those dated 17 July 2017 and thereafter, covering the period from 10 July 2017, were sent on behalf of Saffron. They were sent on or shortly after 1 August 2017. It is common ground that from that time Saffron received the HMO Business income.

Was the Transfer of the HMO Business Only a Response to the Bank Mandate?

109. There was some dispute about whether the timing of the new invoice run and the transfer of the operation of the HMO Business to Saffron was indicative of a plan made prior to 20 July 2017 or was only carried out in response to Mr Shababi's action stopping Mr Khazai's bank authority on that day.

110. For me to accept the Defendant's position that it was a response to the stopping of the bank mandate, I need to accept Mr Darabi's evidence not only that he sometimes forgot to do the invoice run for a day or two but that in this instance he was forgetful up until sometime during 20 July 2017. Thereafter, the Defendants say, it was deliberate and done as part of protecting Mr Khazai's rights under the Contract.

111. I have no doubt that Mr Darabi was lying to the court about forgetting to carry out the invoice run. This is partly based on how unlikely it would be for a person in Mr Darabi's position not to do the weekly invoice run when it was due to take place or not to do it because he forgot (presumably for Monday, Tuesday, Wednesday and then into Thursday late afternoon). This is scarcely credible, particularly given how convenient it was in the circumstances and Mr Darabi's manner of saying it during his cross-examination did nothing to make it anymore believable.

112. I am satisfied that it is more likely than not that Mr Khazai instructed Mr Darabi not to carry out the invoice run for invoices dated 17 July 2017 and thereafter until such time as arrangements had been put in place to divert the income represented by those invoices away from the Claimant and within the control of Mr Khazai.

113. In the event by at least 31 July 2017, it had been determined by Mr Khazai that the way to control the income would be to use Saffron as the operating company. Mr Khazai told the staff about it on that day.

Initial Problems

114. In early August 2017 the HMO Business employees found that they had been paid twice for July 2017. This came about because Mr Shababi actioned the payments from the Claimant not knowing that Mr Khazai had transferred the employees to Saffron and had made payments from Saffron to the same employees. Saffron was receiving the income related to services provided since 10 July 2017, although as Mr Darton pointed out it must have been the Claimant providing those services for July 2017.

115. The duplicated payment is an example of the lack of communication by Mr Khazai about what he had done to the HMO Business and Mr Shababi carrying out the intention he expressed in his email dated 27 July 2017 about making HMO Business payments from the Claimant.

116. In the second week of August 2017 Mr Shababi discovered that the Claimant was no longer receiving income from the HMO Business. On about 11 August 2017 the Claimant instructed solicitors.

117. On 11 August 2017 there was a further incident at Mr Shababi's home which I do not need to consider further.

Solicitors' Correspondence / Affirmation / Termination

118. The solicitor's correspondence between mid-August 2018 and November 2018 is relevant to issues around the Profits Dispute: repudiatory breach, affirmation and acceptance, all arising from the situation where Mr Khazai had unilaterally transferred the operation of the HMO Business to Saffron. I summarise the material gist of the correspondence. I refer to the Claimant and Mr Khazai, but the letters are from their respective solicitors (DMH Stallard for the Claimant and Sydney Mitchell for Mr Khazai).

119. The Claimant wrote on 18 August 2017. The Claimant wanted an overall settlement but, in any event, wanted the Defendants to put right some of his recent actions. There was concern about Mr Khazai's drawings and invoicing. Mr Khazai was asked not to divert business income away from the Claimant and to Saffron. The Claimant was looking to exchange contracts for 30 & 32 Jevington on 25 August 2017.

120. While Mr Khazai's solicitors were still seeking instructions, they wrote to at least Wealden BC a letter dated 23 August 2017 saying that Saffron was the company "which is currently operating and managing the Eastbourne Properties" and [the Claimant] "no longer operates and manages the Eastbourne Properties and so should

no longer be paid by the Council". It is likely that similar letters were sent to other local authorities.

121. Mr Khazai responded to the Claimant on 29 August 2017. It is relevant to note that no reference is made to the Renovation Agreement. On the contrary, reference is made to Mr Khazai's "investment…of £400,000 in respect of renovations and maintenance through BNK and BLSM". The letter says that Mr Shababi has tried to unlawfully exclude Mr Khazai by "persuading our client to change the operating company from BLSM to [the Claimant]". In order to protect the operation of the business, it was transferred to Saffron which is entitled to the income ("in accordance with the Agreement and prior custom and practice…") and not the Claimant. No payments will be returned.

122. Mr Khazai wrote again on 5 September 2017. The letter emphasised Mr Khazai's responsibility for running the day-to-day operation of the HMO Business and entitlement to the income. The Claimant should contact the local authorities and ensure the income payments are made to Saffron. If the Claimant disagreed it should litigate rather than interfere with the payments.

123. The Claimant replied to the 29 August 2017 letter by letter dated 6 September 2017. The letter still pursued the settlement and comply strategy. The letter referred to "an irretrievable breakdown in the relationship of trust". It stated that the transfer to Saffron was not agreed with Mr Shababi and was wrongful. The letter stated the Claimant's position regarding invoicing and accounting issues and withdrawals. The Claimant said that any renovation and repair works would have been done under the Contract. The letter posited the idea that there was a partnership at will regarding the property interests but the operating agreement for the HMO Business was separate but that after 1 April 2017 and in the absence of any other agreement about profit share than the parties would revert to an equal sharing of profits under their partnership rights in the Claimant (this was not a theory pursued in the litigation). The transfer to Saffron was unlawful. The letter concluded by saying that the Claimant had a compelling claim for breach and for reverse of the transfer of the HMO Business but preferred a negotiated settlement.

124. Mr Khazai's response was dated 28 September 2017. The transfer of the HMO Business to Saffron was necessary because of Mr Shababi's actions which would have meant Mr Khazai could not perform the Contract. The Contract allowed Mr Khazai to transfer the HMO Business to Saffron. Saffron would continue to operate the Business and would meet any outstanding expenses paid by the Claimant. Mr Khazai remained entitled to the profits under the Contract. There was no partnership regarding the HMO Business. A buy-out either way was possible but in the meantime the Contract remained in place, which meant that Saffron was entitled to payment from the local authorities and would pay rent to the Claimant.

125. On 29 September 2017 the Claimant wrote a brief letter seeking confirmation that Mr Khazai had no objection to a sale of any of the Eastbourne Properties and would assist with the marketing by way of giving access and the like. The Claimant reserved the right to claim damages.

126. On 3 October 2017 the Claimant addressed accounting issues in the Claimant, BNK and BLSM. However, at the end of the letter the Claimant set out its case that Mr

Khazai had transferred the HMO Business without consent and required performance of the information obligation in the Contract.

127. On 6 October 2017 Mr Khazai replied to the letters of 29 September and 3 October. Mr Khazai did not object to any sale provided he was registered as a 10% owner of each of the Eastbourne Properties and given information to consider the proposed sales. Mr Khazai reiterated that the dispute did not begin because of accounting issues but because of Mr Shababi's attempts to exclude him. Mr Khazai wanted new independent accountants to be appointed. Mr Khazai was owed £360,000 because "it was agreed with Mr Shababi that £360,000 of [£400,000] would be repaid by your client / Mr Shababi".

128. On 10 October 2017 the Claimant wrote regarding the potential sale of 30 – 32 Jevington and said that the existing bank loans secured over the Eastbourne Properties were due for repayment in December 2017 / January 2018.

129. There were email exchanges regarding the provision of access for an inspection on behalf of the proposed buyer which I do not need to detail.

130. On 16 October 2017 the Claimant wrote a first letter regarding accounting information and a second letter regarding access. The letters take the present issues no further (the particulars of claim raise obstructing sale as a potential breach, but this was not picked up during the trial and I say no more about it).

131. Mr Khazai wrote again on 24 October 2017. Mr Khazai required various matters to be dealt with prior to any sale. These included the demands made previously for registration of a 10% property interest and an independent accountant. Mr Khazai also asked to be re-registered as a member of the Claimant. Mr Khazai's position was that the Claimant had been overpaid and while rent would be recommenced at the rate "set out in the agreement" of £320,000 until agreed otherwise this would need to consider such overpayments. Mr Khazai was willing to have sensible discussions about "a rent review based on current market values". It was said that the Claimant could not use the proceeds of sale of one of the Eastbourne Properties to reduce the borrowing on all.

132. The next Claimant letter, 25 October 2017, is the first of two letters relied on by the Claimant as bringing the Contract to an end by the acceptance of Mr Khazai's repudiatory breach. The letter states that it gives one last opportunity to resolve matters amicably before legal proceedings are started.

133. The Claimant enclosed a draft arbitration statement of case which in substance became the particulars of claim in the proceedings before me. Of most relevance given the previous correspondence and the issues I have to decide are the following elements of that draft statement: (a) Mr Khazai had membership rights in the Claimant regardless of the "administrative step" of the filed resignation which was of no effect in law; (b) financially those rights included a 10% interest in the income and capital value of the Eastbourne Properties and Peacehaven subject to reduction by liabilities relevant to those assets; (c) various breaches were set out including the transfer of the HMO Business to Saffron; (d) this was said to have terminated the Contract and any right that Mr Khazai might have had to operate the HMO Business or receive its income and profits; (e) the relief included an account of all monies

received and a declaration that such monies were received for the Claimant and orders excluding Mr Khazai from the Eastbourne Properties.

134. I note that (a) and (b) have become common ground between the parties. So that the assumption before me has been that while Mr Khazai is and remains a member of the Claimant, his financial participation as a member is limited to the benefits / obligations arising from the 10% interest described in the Contract (and Peacehaven). One consequence of this is that the parties also agree that there will need to be an account to identify the amount owed by the Claimant to Mr Khazai consequent upon his rights.

135. The letter continued and asserted that Saffron was not entitled to operate the HMO Business. However, a temporary compromise was proposed where the income would be paid to the Claimant's solicitors from where payment out could be made by agreement for operating expenses. If that was not acceptable then further letters would be sent to the local authorities. In any event Mr Khazai was required to hand back the operation of the business to the Claimant by 4 pm on 1 November 2017. An injunction was threatened if the business was not handed back.

136. Mr Khazai responded on 30 October 2017. The first point made was that it appeared from the letter of 25 October 2017 that an on-going without prejudice process had ended. Mr Khazai disagreed with the mediation proposal being conditional. The operation aspects were regarded as ancillary to the goal of an overall settlement. It would be unreasonable to suggest a handing over of the business when a possible settlement would be Mr Khazai buying out the Claimant. A mediation was still conditional on the outstanding issues raised in the letter of 24 October 2017.

137. I suspect that Mr Khazai's letter of 30 October crossed with the Claimant's letter of 1 November 2017 which addressed Mr Khazai's letter of 24 October 2017. The Claimant said it would make good the records at Companies House to show that Mr Khazai always remained a member of the Claimant and otherwise repeated the position set out in the letter of 25 October 2017. The Companies House record was put right by 15 November 2017.

138. The second or fall-back letter relied upon by the Claimant as accepting the repudiatory breach is dated 2 November 2017. It replied to Mr Khazai's letter of 30 October 2017. It addressed mediation and arbitration. It addressed the lack of income from the Eastbourne Properties coming into the Claimant yet the Claimant still having expenses. It said that a handing back of the HMO Business was not premature "because the agreement has been terminated by your client's action" and "the business should therefore be handed back to our client without further delay". The Claimant had instructed its solicitors to apply for an injunction unless mediation was agreed.

139. There followed further attempts to further some form of ADR but without success. On 3 January 2018 the present proceedings were issued.

The Main Issues (1) The Renovation Agreement

140. This is an issue of fact. Mr Khazai bears the burden of proving that shortly after the Contract was signed, Mr Shababi and Mr Khazai entered into an agreement that Mr Khazai would pay for certain works and that the Claimant would reimburse that cost.

The Parties' Cases

141. Mr Khazai's case in closing was that the Renovation Agreement addressed the commercial need for the party owning the Eastbourne Properties to pay for works which would enhance the capital value. It was relevant that the Eastbourne Properties needed works to be carried out. Mr Shababi accepted that there was some discussion about this problem, including as admitted in the reply, an "in principle" payment of the costs over £40,000 and there is evidence of other oral agreements outside the Contract. It is a likely and sensible agreement to have reached. The existence of the Renovation Agreement is given considerable support by the lack of any disagreement about the "VERBAL agreement" in the email exchanges of May 2017 and Mr Shababi's obviously untrue explanations about his email competence. Any difficulties about the division between major / minor works (or capital / income works) could be dealt with after the event.

142. The Claimant's case was that the Renovation Agreement did not happen. The Claimant relied on the lack of any contemporary documentary record – it was not referred to until May 2017 after the parties had fallen out. The changing pleading of the alleged agreement demonstrated its lack of substance. This was matched by inconsistencies in the account given by Mr Khazai in his witness statements. There was no evidence of Mr Khazai performing the alleged Agreement during the operative period (i.e. until 31 March 2017) because no claim was made for reimbursement before the falling out. Even Mr Khazai's lawyers contradicted the existence of the Renovation Agreement in their letter of 29 August 2017.

Discussion

143. I have no doubt that the Claimant is right for the reasons which Mr Darton set out in his closing. Although I agree with Mr Morgan that there was a commercial context in which further consideration about capital type works was not unlikely, what is unlikely is for Mr Shababi to have agreed the Renovation Agreement. On the contrary, from an objective commercial perspective it would have been in both parties' interest to approach capital type works expenditure on an as required basis. I agree with Mr Shababi (since it is inherently likely) that the Claimant would not want to commit itself to large scale expenditure without having some control over the decision to incur the cost or the level of that cost. The proposed Renovation Agreement would put all that control in the hands of Mr Khazai to the likely detriment of all concerned except Mr Khazai. Mr Shababi gave a good illustration of this in evidence – the Claimant might be considering a sale and so would not want to incur substantial capital expense or have capital type building works on-going during a sale or marketing period. It follows that in context it is an unlikely agreement to have been reached.

144. Regardless of that context point, Mr Khazai's conflicting assertions about the Renovation Agreement undermine themselves. This relates to the inconsistencies in

the pleadings and the witness statements. The final version given in the oral evidence, with trips to Mr Shababi's house and then a directly related inspection of (or at least trip to) the Eastbourne Properties was a significant enough event, if true, for at least the gist of it to stick in a witness' mind. On the contrary, the partial and changeable assertions made about the Renovation Agreement demonstrated, at best, a failure of recollection beyond the generous allowance I would make to any witness. This makes the oral evidential platform for the agreement entirely without sufficient foundation.

145. In a similar way I agree with Mr Darton that there is an absence of "documentary footprint" (Ashley v Blue [2017] EWHC 1928, [65]). If the Renovation Agreement existed, it would in all likelihood have resulted in different conduct on the part of Mr Khazai (i.e. seeking reimbursement for works at or soon after payment had been made). There is nothing of this kind.

146. Likewise, when Mr Khazai's solicitors first referred to the £400,000, it is done in a manner which is contrary to the existence of the Renovation Agreement because the £400,000 is described as an "investment" by Mr Khazai.

147. Against the overwhelming weight of these points the failure on Mr Shababi's part to contradict the assertion of "VERBAL agreement" is neither here nor there. Email exchanges are not pleadings. I have rejected Mr Shababi's given explanation for not addressing separately the "VERBAL agreement" but nevertheless I do not consider it remarkable that Mr Shababi did not respond to that aspect of the email. His bad explanation is an example of a witness giving an explanation thought to improve his case nothing more sinister.

148. On the contrary, given that the parties were in negotiation at that time it seems likely that Mr Shababi would want to progress resolution from his perspective rather than descend to details. This is what his reply did by focusing on not accepting the £3 million plus renovation cost. I note that in the further negotiations the Claimant was prepared to make allowance for some recovery on capital works. This appears to me consistent with the Claimant's recognition that capital works cost was something to be discussed rather than evidence of the Renovation Agreement.

149. I take on board that it can be said that Mr Khazai's lack of engagement regarding capital works between September 2015 and May 2017 is inconsistent with the Claimant's case of a recognition about the need to agree. But even this point cannot bear the weight that would be required to move the scales given the compelling evidence the other way.

150. A slightly more nuanced point is that the alleged agreement referred to in Mr Khazai's email of 11 May 2017 is not obviously one and the same with the Renovation Agreement. After referring to "the VERBAL agreement", Mr Khazai wrote "I always had your encouragement to carry out all jobs where we will sort out the costs between us in a later stage". This does not sound like an agreement to reimburse but a recognition by Mr Khazai that some sorting out of cost was required. It does not undermine this point that it could be a working out of the difference between capital and income cost because it might not be. It is the uncertainty which has an evidential impact.

151. In balancing the relevant evidence and submissions on this issue, I have no doubt that the Renovation Agreement was never made. In the absence of that agreement or any other claim put forward by Mr Khazai to the contrary, the relevant building costs must lie where they fall – with the operating company.

The Main Issues (2) The Rent Dispute

152. I can take this briefly because by the end of closing submissions neither side were putting forward a different position. It was common ground on the pleadings and before me that the last sentence of clause 7.4 of the Contract, "For the subsequent years the amount will be decided by all parties concerned", was not an agreement to agree but an agreement to pay a reasonable price (see Mamidoil-Jetoil v Okta Crude Oil [2011] EWCA Civ 406, Rix LJ at [69]).

153. In the witness evidence the parties, to some extent, touched on what they might have agreed and the drivers for them to reach an agreement and there was some reflection of this in at least the written closings.

154. In my view as expressions of subjective intention these are irrelevant to the exercise required to establish "reasonable price". My exclusion of "subjective intention" evidence includes evidence about what was in the parties' minds when agreeing to £320,000 per annum or what was in their minds in September 2015 about what would be in their minds in April 2017 or what might in fact have been in their minds in April 2017 or indeed what the parties could have done to improve their position in a hypothetical negotiation had one taken place in April 2017 or thereafter.

155. The court's role under the Contract is to step in where the parties have failed and honour the parties' default agreement, as an implied term of the Contract, for an objective "reasonable price" determination.

156. In order to reach such a determination, it will be necessary to have valuation evidence. I agree with Mr Darton that such evidence need not concern itself with the actual costs incurred by the HMO Business because valuers can take an objective and reasonably broad-brush view of the level of achievable cost consistent with maintaining the turnover.

157. There was also some suggestion, primarily from the Claimant's pre-action correspondence and Mr Shababi's emails and/or statements, that the exercise would be about the division of profits. However, if that is intended to mean that the other terms of the Contract are to be revisited then that would be wrong. The "reasonable price" exercise is premised on the Contract otherwise being effective in all its terms.

158. It follows that the question for the court and upon which the court will require the assistance of valuation evidence will be: what is a reasonable price as at 1 April 2017 for the right given to Mr Khazai to both run and take the profits from the HMO Business as provided by the Contract for the year ending on 31 March 2018. This will mean that the actual terms of the Contract will be essential for that exercise – so, for example, that the Contract would come to an end if the Claimant decided to sell or develop the site and that the Claimant was free to sell individual sites but with the agreed reduction in the rent.

159. I have said until 31 March 2018 because the Contract says, "for subsequent years". Only one year is required but the valuation must be as at 1 April 2017 and should not take into account subsequent events.

160. It will be necessary for directions to be given regarding the expert evidence process and I will consider further submissions about that process should counsel not be able to agree them.

161. If I may make an observation, based on the accountancy evidence to date in this case, I suspect the valuers would be better assisted by carrying out their task collaboratively with each other rather than by getting instructions from the clients. I would suggest a joint statement to begin with followed by separate statements on areas of difference. I can see little or no role for the clients in this process beyond answering any questions the experts might have, such questions to be raised on a joint basis.

The Main Issues (3) The Profits Dispute

162. This issue requires the court to determine at what point, if at all prior to the sale of the Eastbourne Properties on 3 July 2018, Mr Khazai lost his right to the profits of the HMO Business.

163. The determination of this issue requires consideration of the interplay between fiduciary duties and the Contract. Since I consider the answer to the issue about the Claimant's entitlement to account different depending on whether the Contract was in existence or not, I deal with the matters in this general order: (i) Mr Khazai as a fiduciary (ii) breach of contract and termination (iii) unauthorised profits.

The Parties' Cases

164. The Claimant accepts that Mr Khazai was entitled to the profits of the HMO Business under the Contract, including after 1 April 2017 when those profits would be subject to prior payment of the new "rent", but asserts that Mr Khazai's rights to such profits ended (a) when the HMO Business was transferred to Saffron in July 2017 or (b) on termination of the Contract on either 25 October 2017 or 2 November 2017.

165. The Defendants' case is that Mr Khazai was entitled to the profits throughout because that was his right under the Contract. Mr Khazai was entitled to transfer the HMO Business to Saffron and needed to do so to protect his rights under the Contract from Mr Shababi's intention to drive him out. In any event, the alleged termination of the Contract fails because there was no repudiatory breach on Mr Khazai's part, not least because he was performing the Contract and always intended to honour the obligation to pay rent to the Claimant. Even if this is wrong, the Claimant affirmed the Contract and did not accept any repudiatory breach.

The Remedy of Account

166. Since the remedy sought by the Claimant is an account of profits, the Claimant must establish that Mr Khazai was in breach of a legal rule that would entitle the Claimant to such a remedy. The Claimant says Mr Khazai was a fiduciary who acted in breach of fiduciary obligation when transferring the HMO Business to Saffron without

consent. The Claimant also says that Mr Khazai was in breach of the rules imposed on him as a member of the Claimant.

167. The law in relation to accounting for unauthorised profits made by a fiduciary was considered in detail in Murad v Al Suraj [2005] EWCA Civ 959, to which I was referred, and more recently in Parr v Keystone Healthcare Limited [2019] EWCA Civ 1246, Lewison LJ at [10] to [21]. It is clear from both cases that regardless of causation a fiduciary who holds profit (or property) belonging to the principal and/or being in breach of duty makes an unauthorised profit connected with that breach must account for that profit.

Was Mr Khazai a fiduciary?

168. The parties' pleadings dispute that Mr Khazai was a fiduciary. The Amended Particulars of Claim set out a general statement of fiduciary duties and the Re-Amended Defence and Counterclaim denies their applicability to the "day to day operation of the Eastbourne Properties" because Mr Khazai was doing that on his own account under the Contract.

169. In closing submissions, Mr Morgan's focus was on the terms of the Agreement as the governing document which would modify and/or restrict any fiduciary duties that might otherwise apply.

170. There were some general assertions by both parties as to whether the HMO Business was properly described as Mr Khazai's business, because he was entitled to the profits, or the operating company's business because it operated the HMO Business.

171. While I consider that to some extent there can be different answers depending on who is asking the question, the relevant answer when considering the question of whether Mr Khazai was a fiduciary is that the HMO Business belonged to the Claimant. Without the consent of the Claimant, the freeholder and person in legal possession of the Eastbourne Properties, the HMO Business could not be operated and so, most obviously, the Claimant was always able, if it so determined, to sell the Eastbourne Properties, with the HMO Business as a going concern. Nobody else had that ultimate control.

172. It was the Claimant's permission under the Contract that enabled Mr Khazai to be involved with and run the HMO Business. Immediately prior to the Contract, it was the Claimant's permission that allowed BNK to be the operating company. It was the Claimant's permission that enabled BLSM to become the operating company and for the Claimant itself to takeover from 1 January 2017.

173. This conclusion is supported by and consistent with the leaving provisions in the Contract (Mr Khazai could stop running the business on three months' notice but was required to train up a new manager as a cost of the operating company) and the Claimant could change its mind about its plans for the Eastbourne Properties ("sell or develops") and bring the contract to an end and deal with the business opportunity represented by the existing HMO Business as it wished.

174. As it was the Claimant's business, so in my judgment Mr Khazai was a fiduciary in relation to the HMO Business and owed those duties to the Claimant. This is because

under the Contract Mr Khazai was appointed to manage the day-to-day operation of the HMO Business by the Claimant and within the terms created by the Contract, for the Claimant. The Claimant placed Mr Khazai in that position, and it was necessarily a position where the Claimant placed trust and confidence in him. This remains the case irrespective of the Claimant's agreement that Mr Khazai was entitled to the profits. The profits are not the only benefit to be had from the HMO Business. There is also the capital benefit and/or goodwill benefit which would ultimately rest with the Claimant. The ability to sell the Eastbourne Properties with the HMO Business as a going concern being an obvious and sufficient illustration.

175. It was correctly common ground between counsel that the fiduciary obligations would be subject to the Contract and that the Contract was the primary document for the rights and obligations of the Claimant and Mr Khazai so far as the operation of the HMO Business was concerned (F & C Alternative Investments (Holdings) Ltd v Barthelemy & Anor [2011] EWHC 1731 Ch, Sales J at [225] to [227])

176. In addition (or more accurately in complement) Mr Khazai owed potential fiduciary obligations in his capacity as a member of the Claimant. There is discussion as to this in The Law of Limited Liability Partnerships 4th ed at 13.8 where with reference to F&C it is stated that outside of the Default Rules, general fiduciary obligations will depend on "the specific roles and circumstances" relevant to the person concerned.

The Default Rules

177. As a member of the Claimant Mr Khazai owed the default obligations set out as "rules" in the Limited Liability Partnership Regulations 2001 ("the Default Rules").

178. The Default Rules relied on by the Claimant are as follows:

> (6)…no change may be made in the nature of the business of the limited liability partnership without the consent of all the members.
>
> (9) If a member, without the consent of the limited liability partnership, carries on any business of the same nature as and competing with the limited liability partnership, he must account for and pay over to the limited liability partnership all profits made by him in that business.
>
> (10) Every member must account to the limited liability partnership for any benefit derived by him without the consent of the limited liability partnership from any transaction concerning the limited liability partnership or from any use by him of the property of the limited liability partnership, name or business connection.

179. It is common ground between counsel that in so far as the Contract might modify or supplant these rules then the Contract would take precedence.

180. In my view given the finding I have made about Mr Khazai's position under the Contract being one giving rise, subject to the Contract, to fiduciary obligations there is little relevance in also considering the Default Rules.

181. This also means it is not necessary to deal in detail with the question whether the power that Mr Khazai was exercising when he transferred the HMO Business to Saffron was a power that he held subject to the Default Rules or a power that he only held as a result of the position he was placed in under the Contract. I favour the latter as being the better answer.

Repudiation: Breach of Contract

182. Mr Khazai says that there is no obligation to account for the profits because throughout the relevant period any profits belong to him. There can be no question of an obligation to account for "authorised" profits.

183. In answer the Claimant says that the Contract was terminated for Mr Khazai's repudiatory breach on 25 October 2017 (or 2 November 2017) but in any event the profits following the transfer to Saffron were not authorised because that transfer was not done pursuant to the Contract and so the Contract cannot be a defence to the assertion that it was a breach of fiduciary duty (or duty under the Default Rules).

184. I take the repudiation issue first and then deal with the different question as to whether the profits between July 2017 and 25 October 2017 were authorised in any event because of the Contract.

185. It is the Defendants' case that in transferring the HMO Business to Saffron, Mr Khazai did not breach the Contract.

186. This depends on a limited construction of the terms of the Contract. It is common ground that the law as to contractual construction is to ascertain the objective meaning of the language used within the relevant context (Wood v Capita Insurance Services Ltd [2017] UKSC 1173, Lord Hodge JSC [10] to [15]). Of some relevance in the present case is that the "nature, formality and quality of the drafting" can influence the extent to which it is necessary to look at wider context to get to the appropriate objective meaning.

187. The relevant context to look at the Contract does not include the various subjective disputes in the parties' evidence about who got the better of the bargain represented by the Contract. This seems to me neither here nor there and almost necessarily something on which the parties can have different views without either of them being right or wrong in a manner which would have a bearing on the meaning of any clause within the Contract.

188. Mr Morgan's main construction argument, in my summary, is that the scope of the description of the operating company changes with the precise language used to refer to that entity at different points in the Contract. So that if the Contract refers to BNK without additional wording then that should be construed to mean BNK and no other operating company because when the intention is to refer to BNK or any substitute then the Contract says so in terms. In my view this is an inappropriate use of literalism in the context of this Contract.

189. The starting point is that this is a contract drafted by a lay person and not a lawyer. The quality of the drafting is informal and practical rather than careful and defined. The second point is the general context: the general purpose of the Contract was for

Mr Khazai to have day to day management of the HMO Business subject to the basic obligations set out in the Contract. The basic structure of the operation was to be the Claimant as the property holding company and contracting counterparty to Mr Khazai, for Mr Khazai to be part of the Claimant, for there to be an operating company carrying out the business, for Mr Khazai to also be a member of that operating company and to provide Mr Khazai's services through that operating company.

190. A further relevant point of context was that Mr Shababi was an existing member of BNK and that BNK had been the operating company for some time as at the date of the Contract but that the parties had incorporated BLSM on 20 August 2015 as a likely future operating company. Both Mr Shababi and Mr Khazai were members of BLSM. This was known to both sides.

191. It is also relevant to bear in mind my conclusion above that the HMO Business belonged, subject to the terms of the Contract, to the Claimant.

192. Given that background it is clear to me that objectively the following phrases used in the Contract connote the same thing, namely such operating company as the Claimant has determined: in clause 6 "BNK (operating company) or any other LLP incorporated instead of BNK"; in clause 7 generally "BNK" and "BNK or any other LLP incorporated instead of BNK"; in clause 7-4 "BNK or any other LLP incorporated by partners"; in clause 7-5 "BNK or any other LLP incorporated by partners" and "the LLP"; in clause 8 "BNK".

193. The literalism argument, as well as running contrary to what would be understood objectively as the reasonable commercial intention of the parties, also produces obvious absurdities. It would mean, for example, that the right to reduce the rent payment after a sale of the largest Eastbourne Property by 60% would only apply while BNK was the operating company since only "BNK" is referred to in clause 8.

194. Objectively, the better construction is that BNK refers whenever it is mentioned to BNK or whichever is the current operating company.

195. Mr Morgan also argues for a looser and more purposive construction of "incorporated by partners" in clause 7-4 which would mean that so long as a proposed operating company (i.e. Saffron) was incorporated by someone who was a partner in the Claimant (i.e. Mr Khazai) then such a company was capable of being an operating company under the Contract.

196. I disagree. Not so much because the Contract refers to "partners" rather than "any partner" (although in a better drafted agreement that would be a sufficient reason) but because it would be potentially chaotic and lack any commercial purpose for Mr Khazai or any other person who was a partner in the Claimant from time to time to be able to introduce a new operating company but makes perfect sense that the Claimant could do and that Mr Khazai would then be bound under the Contract to operate the HMO Business through that company as before.

197. It follows that properly construed Mr Khazai's obligations under the Contract to provide income and expense information (clause 7-1); to use Lloyds Bank or such other account as the Claimant determined (clause 7-2); to use FairBalance Accounting

for accountancy and PAYE until the parties agree in writing otherwise (clause 7-3) were obligations of Mr Khazai that did not terminate once BNK ceased to be the operating company but continued throughout the life of the Contract.

198. In addition, Mr Khazai was not permitted as a 10% member of the Claimant or as a contracting party to unilaterally incorporate a new operating company and impose that new operating company on the HMO Business and the Claimant. Mr Khazai's obligations under the Contract to provide services to the operating company related to whatever operating company the Claimant determined on.

199. Clause 6 ensured that Mr Khazai and the Claimant would both have an interest in the operating company (Mr Khazai was obliged to the Claimant to "become a designated member of…operating company). It is implicit in the phrase "or any other LLP incorporated instead of BNK" that the selection of a new operating company would be done by the Claimant because it was the Claimant that might so incorporate. Any operating company required the Claimant's consent to occupy the Eastbourne Properties and run the HMO Business.

200. Clause 7 obliged Mr Khazai to "provide his services to BNK or any other LLP incorporated instead of BNK". The phrase "to BNK or any other LLP incorporated instead of BNK" must be read as meaning "operating company as determined by [the Claimant]" and in any event cannot include a unilateral transfer to Saffron. It makes no difference that BNM itself took over as the operating company from about January 2017 but in any event, Mr Khazai accepted that this happened with his consent at the time.

201. Mr Darton also argued, and I agree, that a transfer to Saffron was not an exercise of the obligation to "be responsible for the day to day running of the operation of the above properties…" because a change in the operating vehicle or structure is outside "day to day" management and so it was a decision made outside of the Contract.

202. The transfer to Saffron without the consent of the Claimant was a breach of clauses 6 and 7 of the Contract.

Repudiation: Repudiatory Breach

203. A breach of contract will not necessarily lead to the other party being entitled to bring the contract to an end. There was some suggestion by the Claimant that Mr Khazai had breached a condition of the Contract but in my view all the various clauses relied on are better described as intermediate terms (see the discussion in Lewison 6th ed at 16.10)

204. Consequently, whether any breach is of sufficient seriousness to give rise to an entitlement to end the Contract will depend on the circumstances. The nature of those circumstances is always fact specific.

205. I was taken to the summary of the law in Eminence Property Developments v Heaney [2010] EWCA Civ 1168, Etherton LJ at [61] to [64]:

"…the legal test is simply stated…It is whether looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the

innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract…[62]…is highly fact sensitive…[63]…all the circumstances must be taken into account in so far as they bear on the objective assessment of the intention of the contract breaker…motive may be relevant if it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been, aware and throws light on the way the alleged repudiatory act would have been viewed by such a reasonable person…"

206. I have already held that Mr Khazai was in breach of the Contract. The assessment of the seriousness of the breach regarding the transfer to Saffron requires an assessment of that breach in the context of the Contract as a whole.

207. As I have said, the information / operating requirements specified in the subordinate clauses of clause 7 (income and expenses; banking; FairBalance) were not limited to the period when BNK was the operating company but applied throughout the Contract. The commercial purpose of those provisions was to provide visibility to the Claimant and if necessary, an opportunity to take action if there were concerns.

208. This visibility and control aspect is also demonstrated by the banking provision, clause 7-2: "The terms of signing cheques and payments to be agreed between parties concerned. If for any commercial reasons BNM decides to change the services of Lloyds bank BNK will also have to change the bank and use the services of the new bank nominated by BNM".

209. These detailed sub-clauses in clause 7 are controlled and extended by the overarching clause 7 obligation about Mr Khazai performing his duties as partner in the operating company and manager. These were requirements on Mr Khazai as to how his duties were to be performed and were an important benefit to the Claimant.

210. The transfer to Saffron was a serious breach of these duties: Mr Khazai no longer provided his services to the agreed operating company; Mr Khazai no longer performed his duties to that operating company to the best of his abilities but did not perform them at all because he replaced those duties with duties owed to his own company Saffron; Mr Khazai made it impossible to provide the Claimant with the operating company income and expenses under the Contract because Saffron was not such a company; Mr Khazai changed the basis for the signing of cheques and payments out of the operating company without agreement; Mr Khazai stopped using FairBalance Accounting (and indeed insisted through solicitors that an independent accountant be appointed).

211. Mr Khazai says that so long as the HMO Business was being operated well and there was a commitment to pay the rent then the Claimant had nothing to be concerned about. The receipt of "rent" is said to be the Claimant's determining performance interest.

212. As part of this argument, it is said, with some superficial force, that Mr Khazai is entitled to the profits of the HMO Business and so is entitled to do whatever is necessary to preserve those profits and his rights under the Contract so long as the rent is paid.

213. There are aspects of this argument that are not disputed. Mr Darton made the point in closing that Mr Shababi does not disagree that Mr Khazai ran the HMO Business successfully nor that he was ultimately entitled to the profits under the Contract, assuming his rights remained in place.

214. However, as Mr Darton submitted, what the good custodian of the HMO Business argument ignores is that under the Contract Mr Khazai was appointed to manage the business through the operating company. While Mr Khazai had day to day responsibility, he did not have the right to remove oversight and control of the HMO Business from the Claimant by unilaterally substituting his own operating company for that authorised by the Claimant.

215. It is true that by the Summer of 2017, there was no separate operating company since the Claimant by agreement had taken on that role. But this cannot make Mr Khazai's position any better because in so far as under the Contract he had promised to the Claimant to perform his duties to the operating company then those duties were directly owed to the Claimant.

216. The centrality of the governing structure envisaged by the Contract and the Claimant's position as ultimate source of authority for the operation of the HMO Business is well illustrated by clause 7-5. The starting point of this provision was not if Mr Khazai wants to terminate the Contract but "If [Mr Khazai] decides to leave BNK or any other LLP incorporated by the partners, he should give a minimum of three months' notice in order that BNM can introduce a proper manager and [Mr Khazai] will train the new manager in all aspects of the management of the LLP to make sure the new manager can take over all the responsibilities to run the business in a proper manner…If the above solution is not economical, BNM will seek any suitable alternative solution such as change of use etc…". This makes clear that the HMO Business was the Claimant's and that Mr Khazai's obligation under the Contract was to run that business through the operating structure required by the Claimant.

217. A useful illustration of the Claimant's interest in the HMO Business over and above the rent payment is the express recognition in the Contract that the Claimant might decide to sell the Properties and such sale might well include selling the HMO Business as a going concern. This capital interest was one that belonged to or was controllable by the Claimant whether through its right to bring the Contract to an end by such a sale and so freeing the Claimant to enable a purchaser of the Eastbourne Properties to take over the HMO Business or by changing the operating company.

218. The transfer to Saffron threatened and undermined these core elements of the contractual structure and so was a substantial threat to the Claimant's interests. Saffron was a company outside of the Claimant's control and to whom it gave no consent to either enter the Eastbourne Properties or run the HMO Business.

219. Mr Morgan submitted that Mr Khazai "remained personally responsible for the running of the business" and always intended to pay what was owed. But this is to rewrite, or cherry pick the Contract.

220. Under the Contract the HMO Business was not Mr Khazai's to do as he liked with subject to the need to pay the rent to the Claimant but a business which was ultimately controlled by the Claimant and run to benefit its Eastbourne Properties.

221. I have also considered the objective impression to be had regarding Mr Khazai's motivation. There are addressed in more detail below but in short at best Mr Khazai was preferring his own position over the detailed requirements of the Contract. The objective observer would see that Mr Khazai wanted to control the HMO Business through Saffron so as to free himself from the need to involve the Claimant and would see that such was contrary to the structure under the Contract and for the Claimant to have no right to terminate the Contract in those circumstances would be to force the Claimant, at Mr Khazai's choosing, into an entirely different structure for the HMO Business with additional and not necessarily manageable risks in particular relating to its business decisions about what to do with the Eastbourne Properties and/or the HMO Business.

222. In return for running the HMO Business under the terms of the Contract, which included operating it through a structure determined by the Claimant, Mr Khazai was entitled to whatever profits were made after "all relevant operating expenses" and the "rent" payment. Mr Khazai's unilateral actions in operating the HMO Business through Saffron was not him choosing to perform the Contract within its terms but him carrying out the Contract in a fundamentally different way – without the Claimant having visibility or legal control over the operation. This meets the test for repudiation.

223. I add, although it was not argued, that it is no answer to the Claimant's repudiation case to say that Mr Shababi was himself in breach by unilaterally removing Mr Khazai from the bank mandate or that Mr Shababi had determined to get rid of Mr Khazai, not least that it is no part of Mr Khazai's case that he accepted these things as repudiatory and so bringing his obligations to an end (see Chitty at 27-068 and in particular the quotation from State Trading Corp of India v M Goldetz Ltd [1989] 2 Lloyds Rep. 277, Kerr LJ).

Repudiation: Affirmation

224. Mr Khazai says that the Claimant affirmed the Contract by pressing for performance in its solicitors' letters between August 2017 and prior to 25 October 2017.

225. I was referred to Chitty and the basic principles were not disputed. For present purposes they are well summed up in the quotation at paragraph 27-056 from Yukong Line Ltd of Korea v Rendsburg Investments Corp. of Liberia [1996] 2 Lloyds Rep. 604, Moore Bick J at 608: "…the law does not require an injured party to snatch at a repudiation and he does not automatically lose his right to treat the contract as discharged merely by calling on the other to reconsider his position and recognize his obligation."

226. In the present case there is nothing in the correspondence which crosses the line between calling for performance and affirmation. I have summarised the correspondence above. The Claimant in the letters of 25 August 2017, 6 September 2017 or 3 October 2017 said nothing to affirm Mr Khazai carrying on performing the

Contract through Saffron rather than through the Claimant or another Claimant required operating company.

227. On the contrary once the Claimant had been told about the transfer of the HMO Business to Saffron, the correspondence is clear that due performance of the Contract cannot be carried out through Saffron, and Mr Khazai must reverse the position and duly perform the Contract. These letters are about requiring Mr Khazai to perform his obligations and reverse the transfer to Saffron. There was no affirmation.

Repudiation: Acceptance

228. The test for an acceptance of repudiatory breach is summarised by Lord Steyn in Vitol v Norelf [1996] AC 800 at 810H – 811A: "an act of acceptance requires no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiation party that the aggrieved party is treating the contract at an end".

229. I have summarised the Claimant's letter of 25 October 2017 above. It included the draft statement of case for the proposed arbitration. The letter was unequivocal in its statement of the position regarding the Contract: it had ended, and Mr Khazai no longer had any right to its benefits. Mr Khazai was required to give back the HMO Business and vacate the Eastbourne Properties. On the face of it this looks like a clear statement that the Contract was at an end even though it did not use the language of acceptance of repudiatory breach.

230. Mr Morgan made the following points, which I have underlined, with my comments following:

i) There was no plea of repudiatory breach in the draft claim. This is true up to a point but the draft includes the assertion that the Contract was terminated, an account and payment of all income received and an order excluding Mr Khazai from the Eastbourne Properties. All these are clear and unequivocal indications that the Contract is regarded as over. It would be impossible for Mr Khazai to perform the Contract without access to the Eastbourne Properties, whether for himself or his agents / proxies.

ii) Mr Shababi in his evidence in support of the injunction dated 3 January 2018 stated that the Agreement terminated on 31 December 2017. This is irrelevant to the objective interpretation of a letter written about 9 weeks previously but in any event what Mr Shababi said was that he had had accounts prepared "for the entire duration of the Agreement (i.e. from 3 September 2015 to 31 December 2017)". Mr Shababi was explaining his accounts not addressing whether or not the Contract had been terminated but certainly what he said is inconsistent with the acceptance case being put forward at trial. However, it does not change the clear meaning of the letter dated 25 October 2017 that the Contract and Mr Khazai's right to manage was regarded as over. In short what Mr Shababi said on 3 January 2018 is neither here nor there and does not alter the court's conclusion.

iii) Mr Khazai's lawyers wrote on 3 January 2018 and expressed their view that the Contract remained in effect. This is no more relevant than Mr Khazai

making a submission that Mr Khazi's conduct was not a repudiatory breach (i.e. the parties' arguments do not establish their own validity). It is irrelevant what Mr Khazai or his lawyers thought. The correspondence about acceptance must be constructed objectively not with regard to the subjective views of the recipient (but even that is not necessarily represented by Mr Khazai's lawyers letter of 3 January 2018).

iv) The Claimant's lawyers wrote on 4 June 2018 and referred to "…the Agreement comes to an end upon the sale of the Eastbourne Properties". This is also irrelevant to the correct construction of a letter dated 25 October 2018. But I note the letter of 4 June 2018 was addressing who might be responsible for making Mr Darabi redundant and so can be seen as looking at the matter from the Defendants' perspective.

v) The parties reached a comprise of the injunction which allowed Mr Khazai to remain in place operating the HMO Business pending sale or trial. I agree with Mr Darton that these pragmatic and sensible arrangements made during litigation cannot of themselves and in the context of this case make any difference to the parties' substantive rights to be determined at trial. In any event, for the reasons already explained above this later conduct cannot impact on the correct interpretation and legal consequences of a letter written and sent many months previously.

231. It is true that the HMO Business was sold as a going concern on 3 July 2018 along with the Eastbourne Properties but of itself that does not impact the correct construction of the letter dated 25 October 2017 or illustrate anything more than the HMO Business connected as it was to the Eastbourne Properties had an existence independent of the Contract.

232. The Claimant's letter of 25 October 2017 accepted Mr Khazai's repudiation of the Contract.

Was the Transfer to Saffron a breach of Fiduciary Duty?

233. I have held that in managing the day-to-day operation of the HMO Business, Mr Khazai was a fiduciary but a fiduciary whose rights and obligations were subject to and controlled by the Contract. Just because the transfer to Saffron was a repudiatory breach of contract does not mean that it was also a breach of fiduciary duty.

234. The equitable remedies arising out of a breach of fiduciary duty are tied to decisions or actions taken when using or abusing the powers granted to that fiduciary (see the reference to acting beyond the scope of a power at [229] of F&C).

235. Mr Khazai's fiduciary position arose because he was running a business that belonged to the Claimant albeit in circumstances where the profit "belonged" to him (to use the expression in the Contract).

236. I do not accept Mr Morgan's argument that the Claimant's business was limited to holding the Eastbourne Properties and receiving the rent and that the operating company role was not part of its business but only administrative. On the contrary, the Claimant's business included permitting the operation of the HMO Business and

determining in the Claimant's best interests what to do with the HMO Business and the Eastbourne Properties.

237. In addition, from January 2017, the Claimant's business included being the operating company for the HMO Business. I do not disagree that this can be described as "administrative", at least in a sense, but this does not mean it is not part of the business of the Claimant.

238. Mr Khazai argues that his action was not a breach given that the court will assess a breach of fiduciary obligation by reference to the "conscience of the fiduciary and his subjective good faith in acting…" (F & C at [253]). Further Mr Khazai seeks relief pursuant to s.1157 of the Companies Act 2006 as applicable to LLPs. In either case it can be said that the obligation to account might be limited if these defences are made out. I consider them together because the answer to both depend on findings about Mr Khazai's state of mind.

239. F & C at [253] explains "…the courts will have regard to what [the fiduciary] genuinely believed to be in the best interests of the LLP…".

240. It is common ground that what is relevant to s.1157 relief is (a) whether Mr Khazai acted honestly (b) whether he acted reasonably and (c) whether regarding all the circumstances he should be excused.

241. I reject Mr Khazai's case that the transfer away from the Claimant was done in response to Mr Shababi's actions in removing Mr Khazai from the bank mandate on 20 July 2017. I agree with the Claimant's case that Mr Khazai had been planning at least the possibility of removing the HMO Business from the Claimant without the Claimant's consent at least as far back as 2 June 2017.

242. When Mr Khazai obtained resignation letters from the HMO Business employees this was done so that he was able to transfer the HMO Business if he wished. It was about control. I do not accept that this was done only because of an agreed settlement with Mr Shababi. Indeed, if Mr Khazai was to be bought out, which was the most likely scenario, the employees would not be Mr Khazai's concern. Moreover, if that had been the motivation then there would have been no reason not to tell Mr Shababi about what Mr Khazai had done and no reason to keep the resignations in Mr Khazai's back pocket.

243. Likewise, the delaying of the invoicing expected on 17 July 2017 for the period after 10 July 2017 was done deliberately to increase the income that would be available once Mr Khazai determined to take the operation of the HMO Business away from the Claimant.

244. Mr Morgan argues that Mr Khazai acted in good faith in what he regarded as the best interest of the Claimant. I disagree. I cannot see that Mr Khazai had any genuine regard to the interests of the Claimant at all. On the contrary, in my view he was determined to take as much control over the HMO Business as he could for his own purposes. His concern was to be able to run it and remove such cash as he considered represented profit from it as he wished without oversight from the Claimant.

245. I do not go so far as to find that Mr Khazai's conduct was dishonest because I consider he wished to secure his own position as best as he could pending buyout agreement or sale but in circumstances where he would at least at some point have paid rent over to the Claimant.

246. But I do agree with Mr Dalton that Mr Khazai made a choice to prefer his own interests over the interests of the Claimant and as such it was a breach of the core fiduciary obligation to act in the interest of the beneficiary. It is no answer to say that Mr Khazai was acting in his interests under the Contract because his conduct ignored the Claimant's interest under that Contract in circumstances when there was no consent from the Claimant to do so, either as a result of the Contract or otherwise.

247. Mr Khazai's conduct was not reasonable in the circumstances. It was not reasonable to take the HMO Business, contrary to the Contract and unilaterally replace the Claimant as the operating company with Saffron. This was unreasonable because there were other obvious options available, even given the growing conflict with Mr Shababi. These included suggesting a new operating company or a return to BLSM or even setting up a separate bank account within the Claimant for the income and expenses of the HMO Business.

248. I also agree with Mr Darton's point that as Mr Khazai operated the HMO Business in the first few months under the Contract without signature rights on the bank account, that remained an option.

249. Above all, I consider that communication with the Claimant about the situation was required. Even only to require the Claimant to perform the Contract or threaten his own termination for repudiatory breach. But Mr Khazai took unilateral action to improve his own position and disregarded any interest of the Claimant beyond a recognition, in principle, that a rent payment at least at the level Mr Khazai thought appropriate, should be made.

250. A more general point is the secrecy with which Mr Khazai acted. It was not until Mr Khazai's solicitors told Mr Shababi in their letter of 29 August 2017 that the HMO Business had been transferred to Saffron.

251. Mr Khazai's relevant actions as a fiduciary were not carried out in good faith and there is no scope for s1157 relief in this case.

252. There is no doubt that making use of the Eastbourne Properties to run the HMO Business <u>through Saffron</u> was done without the consent of the Claimant unless the Claimant had given its consent to such a transfer of the business under the Contract and for the reasons set out above in relation to repudiatory breach, the Claimant had not done so.

253. I find that Mr Khazai's transfer of the HMO Business to Saffron was a breach of fiduciary obligation and so *prima facie* he is liable to account.

254. I am not satisfied that this same conduct was a breach of the Default Rules. This make no difference to the outcome but the reason for this is because I do not consider that transferring the HMO Business to Saffron was an abuse of powers granted to Mr

Khazai as a member of the Claimant but by abusing the fiduciary position he was in as a result of the Contract.

Unauthorised Profits

255. The Claimant argued that Mr Khazai's rights to profit were necessarily conditional on him performing the Contract and so if Mr Khazai was managing the HMO Business outside of the Contract, then he disentitled himself to those profits. An analogy was drawn with an employee who would not be entitled to salary if they, without cause, did not work.

256. In my view it is a false analogy. Mr Khazai's actions were not the same as a person who walked away and left the HMO Business. His actions had consequences and gave rise to rights in the hands of the Claimant but did not bring about an automatic failure of a condition subsequent to his profit entitlement. Even though he was in repudiatory breach, Mr Khazai was intending to honour the rent obligation and so was not so much stealing the HMO Business as hiding it.

257. In closing written submissions, Mr Morgan relied on the consent under the Contract to Mr Khazai being able to take the profits of the HMO Business as inconsistent with any argument that his breaches of fiduciary duty or the Default Rules should lead to an obligation to account for profits.

258. Mr Darton's response is that it cannot be consented to by the Contract if the circumstances which have given rise to the profit are outside of the Contract. If Mr Khazai has acted in breach of the Contract, then necessarily there is no consent.

259. I agree with Mr Morgan on this issue. It seems to me to follow from the circumstances of this case. Even though I have found that Mr Khazai was in breach of contract and in breach of fiduciary duty, for so long as the Contract was in being then the profit derived from the HMO Business was a profit which he was authorised to take from that Business.

260. Mr Darton suggested that Mr Khazai's actions were equivalent to his not giving 3 months' notice under clause 7-5 or purporting to assign a personal contract which was not capable of assignment. However, I do not think these categorisations of the position after July 2017 are correct.

261. On the contrary even though in breach of contract, during the time that the contract subsisted, I consider that the Contract gave the Claimant's consent to Mr Khazai being entitled to the profit. It seems to me that to find otherwise would be to render the Contract nugatory but until such time as it was duly terminated, the Contract should still be the primary source of the parties' rights and obligations.

262. The argument that the Claimant did not consent to Mr Khazai making a profit by operating the HMO Business through Saffron rather than through the Claimant or another agreed operating company, is nothing more than a distinction without a difference on the present facts and one which ignores the subsistence of the Contract until the Claimant chose to terminate it. The right to profit is not conditional in a way that would cause it to fail on the facts of this case where I have found that Mr Khazai was always intending to pay the rent and was not stealing the HMO Business.

263. It is a necessary part of this finding that Saffron is nothing more than a proxy for Mr Khazai without itself imposing any additional financial cost on the HMO Business. The accounts to be taken following this judgment must be prepared on that premise. It has not been argued otherwise.

264. Accordingly, I find that Mr Khazai's right to profits did not end when he transferred the HMO Business to Saffron but on 25 October 2017 when the Claimant terminated the Contract.

265. I add that there is no claim for damages or equitable compensation arising out of the breaches of Contract or breaches of the Default Rules / fiduciary duties.

Conclusion

266. I return to the determinative issues I described above.

267. The Renovation Agreement I dismiss the Defendants' case that there was a Renovation Agreement. Mr Khazai has no right to be reimbursed by the Claimant for the claimed expenditure.

268. The Rent Dispute The determination of the objective rent value requires expert valuation evidence and further submissions. I will consider any directions in this respect. Such rent will be payable from 1 April 2017 to 25 October 2017 (a period of 207 days)

269. The Profits Dispute Mr Khazai's right to profits came to an end on 25 October 2017 but thereafter Mr Khazai must account for profits until 3 July 2018.

270. It follows from the above that the following accounts and/or inquiries need to be taken:

    i) An account (if it is considered necessary) of the HMO Business from 1 April 2017 to 25 October 2017. This will require determination of the rent figure. It will also enable Mr Khazai's profit figure to be determined.

    ii) An account of the HMO Business from 26 October 2017 to 3 July 2018. Mr Khazai is the accounting party. The profit after the deduction of reasonable expenses shall be payable to the Claimant. I say nothing about any claim by Mr Khazai for an allowance.

    iii) An account of Mr Khazai's interest in the Claimant to establish the value of his 10% share in capital and profit derived from the Eastbourne Properties and Peacehaven. I understand this to be agreed and it is a remedy between members of an existing LLP which may or may not require some further consideration.

    iv) I understand that Mr Khazai may seek further orders relevant to determine his profit figure for the BLSM period (1.4.16 to 31.12.16) and 1.1.17 to 31.3.17. I will consider that further at the consequentials hearing.

271. Finally, I include as an annex to this judgment my response to such of the statement of issues that survived the exclusion of accountancy issues. In the event only Mr

Morgan structured his submissions by reference to these issues and I answer those addressed by Mr Morgan without repeating what I have said above. If anyone thinks there is a tension between what is stated in the annex and the judgment, the judgment is determinative.

272. I will leave Counsel to contact me by direct email about consequential matters.

ANNEX: STATEMENT OF ISSUES

(Paragraph numbers refer to the issue number. I have attempted to include the issue in the answer)

1. It is irrelevant whether the terms of the Contract were favourable to the First Defendant. The agreed value in the Contract was just that – an agreed value for the purposes of the Contract. It is common ground that the HMO Business was less profitable before Mr Khazai's involvement than afterwards. Of itself this is irrelevant to any determinative issue in the action.

2. The £186,000 for the period from 1 September 2015 to 31 March 2016 was calculated on the same basis as the £320,000. It is irrelevant how the parties arrived at that figure. There is no reliable evidence about that in any event. All that can be said with certain is that was the figure the parties were prepared to agree upon for the purpose of the "rent" payment until 1 April 2017.

3. The Eastbourne Properties required regular maintenance and a programme of works.

4. There was no implied term that Mr Khazai would comply with his statutory and fiduciary duties in the Contract because this was not necessary. The Contract contained an express obligation on Mr Khazai's part to perform his duties to the best of his abilities. Mr Khazai was obliged to perform his duties personally. Mr Khazai could not assign the Contract (but never purported to do so). There was no relevant conditionality to Mr Khazai's right to profits (i.e. to the extent that Mr Khazai's performance was a breach of contract such breaches were not conditions to his right to be paid). Clause 7.4 meant that a reasonable price would be determined if the parties failed to agree the rent applicable after 1 April 2017.

5. There was no Renovation Agreement (either as an oral variation or otherwise).

6. Mr Khazai owed and was in breach of the obligations referred to in the main judgment with consequences set out therein.

7. No relevant arguments were raised about any variation of the Contract or other agreements arising out of the circumstances in which the Claimant took over the HMO Business from BLSM.

8. The rent determination requires expert evidence. It is to be determined on an objective basis – what is a fair price for the rights granted to Mr Khazai under the Contract by the Claimant.

9. In my view the terms of the Agreement did not allow Mr Khazai to withdraw the sums referred to in this issue because the profits for the relevant period were yet to be determined. But in the event the issue did not arise in this form.

10. Mr Khazai was not permitted to operate the HMO Business through Saffron because the Claimant did not give consent to that.

11. There are a number of sub-issues under 11:

i) There were legitimate questions asked regarding Mr Khazai's accounting for the period down to 31 March 2017, but no such accounts are now sought by the Claimant.

ii) In my view Mr Shababi was not entitled to remove Mr Khazai's access to the bank account since the Contract provided for such access to be agreed and at least notice should have been given. However, nothing was said to turn on this.

iii) Mr Khazai could not transfer any part of the HMO Business to Saffron.

iv) Mr Khazai has yet to account to the Claimant but will need to do so for the period from 1 April 2017.

v) The point about access became irrelevant and/or was not relied upon.

12. Mr Khazai was in repudiatory breach of the Contract by transferring the HMO Business to Saffron without the knowledge or consent of the Claimant.

13. There was no affirmation, and the repudiatory breach was accepted by letter dated 25 October 2017.

14. Until 25 October 2017 Mr Khazai, in breach of the Contract, purported to carry out some of his obligations under the Contract with Saffron as the operating company.

15. Mr Khazai is not obliged to account to the Claimant for his profits until after 25 October 2017. Mr Khazai is obliged between 1 April 2017 and 25 October 2017 to make payment to the Claimant in the rent sum to be determined (207 / 365 x [the determined sum]).

16. As Mr Khazai accepted the obligation to account in respect of the HMO Business and neither party contend that Saffron was anything other than a proxy for the operating company under the Contract there does not appear to be any requirement for any separate order against Saffron and I did not understand Mr Darton for the Claimant to be asking for such (Mr Morgan having expressly raised this in his own written and oral closing).

17. The Claimant is entitled to remedies against Mr Khazai.

18. The harassment allegation was not raised as cause of action and could not have been by the Claimant. I have referred to the incidents in so far as is appropriate in the judgment.

19. There was no Renovation Agreement.

20. I do not understand there to be dispute about the need for a determination for the benefit of Mr Khazai regarding (a) his interest in the Claimant and (b) any outstanding profit arising under the Contract for the period 1 April 2016 to 31 December 2016 (when BLSM was the operating company) and from 1 January 2017 to say 9 July 2017 (when the Claimant was the operating company) and if not covered otherwise from 10 July 2017 to 25 October 2017. There may be issues associated with this that

will need to be addressed at the consequentials hearing. I would urge practicality on all concerned.

21. There was no argument addressed to me about rule 12 of the Default Rules.

22. I have already dealt with the Claimant's obligation to account to Mr Khazai as a member of the Claimant albeit a member whose rights are limited to the 10% interest in the Eastbourne Properties and Peacehaven.