HH JUDGE RUSSEN QC

Approved Judgment

Palmer Birch v Lloyd

Neutral Citation Number: [2018] EWHC 2316 (TCC)

Case No: C41BS210

IN THE HIGH COURT OF JUSTICE

BUSINESS & PROPERTY COURTS AT BRISTOL

QUEEN'S BENCH DIVISION

TECHNOLOGY AND CONSTRUCTION COURT

Bristol Civil & Family Justice Centre

2 Redcliff Street

Bristol BS1 6GR

Date: 24 September 2018

Before :

HH JUDGE RUSSEN QC

(Sitting as a Judge of the High Court)

- -

Between :

PALMER BIRCH (a partnership) **Cla**

- and -

(1) **MICHAEL LLOYD**

Defe

(2) **CHRISTOPHER LLOYD**

- -

- -

Matthew Bradley (instructed by **Gresham Legal**) for the **Claimant**

Krista Lee (instructed by **Michelmores**) for the **Defendants**

Hearing dates: 9th, 10th, 11th, 12th, 13th, 16th, 17th and 30th July 2018

- -

Judgment Approved

HH Judge Russen QC :

Introduction

1.
The claimant, Palmer Birch ("PB"), is a partnership between Mr John Palmer and Mr Nelson Birch which carries on a construction business specialising in the refurbishment of large houses. PB's claims in these proceedings arise out of their entry in January 2012 into a JCT Standard Building

Contract with Quantities (2011) ("the Contract") with the employer Hillersdon House Limited ("HHL"), and, more specifically, what PB claim to be the unpaid value of work carried out by them and the value of lost contractual rights against HHL (together with a distinct claim for the value of tools and materials alleged to have been wrongly taken from them) when the Contract was terminated in April 2015.

2.
This claim reveals the perils of contracting with an undercapitalised limited liability company, with no guarantees from the individuals associated with it, as HHL was plainly one such company.

3.
The claim also reveals less directly the potential pitfalls for those individuals who choose to operate through the medium of such a limited company which proves not to be good for its contractual obligations, including those who may have directed its affairs from the shadows (or quite openly but perhaps not quite constitutionally). Whether or not in this case they extend to the individuals concerned having incurred direct tortious liability to PB is the fundamental point running through the issues I have to decide.

4.
That said, despite the thrust of that part of the defendants' cross-examination which related to their respective input in the affairs of HHL, and what I say below about the precarious financial position of that company from the outset of its short, non-trading life until it went into liquidation, this is not a claim made by the liquidator of HHL, for the benefit of PB and any other creditor proving in the company's liquidation, in respect of the conduct of any director or shadow or de facto director prior to that event. No such claim was brought by the liquidator after HHL went into liquidation on 25 June 2015 with unsecured debts in excess of £11 million (including not only a claim by PB but also outstanding borrowing of about £6m and funded both directly and indirectly by one of the defendants) and what proved to be realisable assets of only about £115,000. Nor is it a claim by HHL that PB might have sought the Companies Court's permission to pursue (again for the benefit of the class of unsecured creditors) in respect of an alleged misfeasance on their part arising out of such conduct.

5.
It is instead a direct claim made by PB, made for its sole benefit, which relies upon common law principles of tort law rather than any provision of the Insolvency Act 1986. Aside from a claim in conversion in respect of the missing tools and materials, it is a claim under three economic torts I analyse below: inducing a breach of contract, unlawful interference and an unlawful means conspiracy.

6.
The defendants to those tortious claims are two brothers, Michael Lloyd and Christopher Lloyd. In this judgment I will refer to them individually as "Michael" and "Christopher". Christopher was the sole shareholder and appointed director of HHL. That said, and as appears below, Michael in his testimony accepted that, from his position of funder (both direct and indirect) of HHL's building works, he came to scrutinise and have a significant say in the way HHL spent its money. Although this is a matter requiring further analysis below, in my judgment it is a fair summary to say that Michael "called the shots" in this regard because HHL's expenditure was recognised by him and by Christopher to be, in large part, for Michael's personal benefit. Indeed, my assessment of the evidence has led me to conclude that Christopher's voice as a director was almost ventriloquial. The property which was the

subject of the Contract, Hillersdon House ("the Property"), was to be and has since late 2014 been Michael's English home.

7.
Expressing myself in necessarily vague terms at this stage, Christopher and Michael therefore each stood behind HHL (Christopher as it shareholder and director and Michael, even on his own case which falls short of the degree of control alleged by PB, as both its direct and indirect funder). And Michael stood behind Seizar Holdings Limited ("SHL") as the beneficial owner of that Cypriot company which had purchased the Property and from which company HHL derived its own leasehold interest in the Property and, by way of a loan, a considerable part of the funding to meet the cost of the Contract for its refurbishment.

8.
Leaving to one side the claim in conversion in respect of the tools and materials, which PB say were wrongfully taken from them after HHL had terminated the Contract and for which Michael and Christopher are said to be independently responsible, each of the economic torts alleged against one or both brothers hinges upon HHL having breached the Contract. That leads them to contend, in circumstances where the breach is said to have been referable to a lack of cash or available funding within HHL, that two of the tortious claims which I address below (those relying upon the inducement tort and the tort of unlawful interference) rest upon an impermissible attempt by PB to pierce the corporate veil which assumes that HHL had an entitlement to some part of Michael's personal financial resources. And, in relation to all three pleaded economic torts including the third resting on an unlawful means conspiracy, the defendants say that HHL's insolvency by the time the Contract was terminated is a reason why PB cannot succeed in establishing the necessary causal link to actual loss arising out of the breach. Therefore, and again by way of contrast with any claim that might have been brought against them under the Insolvency Act for a later contribution to the insolvent estate, the limited liability of the insolvent HHL, in the period leading up to the breach, is said to be a reason why they cannot be liable to PB.

9.
It is by reference to these lines of defence that the defendants persuaded the court to direct a preliminary trial of issues of liability in the terms set out below. This is my judgment following a trial of those issues.

10.
On the trial of those preliminary issues PB has been represented by Mr Matthew Bradley and Michael and Christopher by Ms Krista Lee. I am grateful to both of them for the clear and constructive way in which they have addressed the evidence and legal principles relevant to my determination of them.

Background

11.
In this section of my judgment I must at least attempt to exercise some restraint in providing what would otherwise be an even lengthier summary of the events leading up to the events in late 2014 and early 2015 upon which PB base their claims. In providing their own narrative the defendants' witness statements for the trial run to 668 paragraphs and 399 paragraphs respectively, a total of 116 pages excluding exhibits.

12.

The Contract related to the repair, alteration and extension of Hillersdon House as well as landscaping and external works at the Property. The Property is a 14 bedroom manor house of about 18,000 square feet and set in about 200 acres of land at Collumpton, Devon.

13.
SHL had acquired the freehold interest in the Property on 18 June 2010 for the price of £3.2m (in October 2012 SHL purchased some additional adjacent land for £250,000). SHL had been incorporated in Cyprus in December 2009 for that purpose. The purchase price was funded by a loan from Bluecoat Trust Limited, another Cypriot company in which Michael was the sole shareholder.

14.
HHL was incorporated on 6 April 2010.

15.
On 20 April 2011 SHL granted HHL a 21 year lease of the Property. The permitted use by HHL was corporate hospitality, conferences, educational purposes, shooting, grazing and "any other use which is specified in an Approved Business Plan".

16.
On 23 May 2012 SHL granted HHL a licence to carry out refurbishment works at the Property.

17.
An invitation to tender for refurbishment works which included those that later became the subject matter of the Contract was sent out by Savills on behalf of HHL in July 2011.

18.
PB's tender was submitted on 7 September 2011 in the sum of £6,925,112.90 and based on an 18 month (72 week) project. Before the Contract was concluded the sum was negotiated down to £5,115,000 through deletion of some items, though the 72 week period for completing those works still remained the same.

19.
The Contract was dated 9 January 2012 (though signed on behalf of HHL some time later). HHL was named in the Contract as the Employer, care of Christopher at a London address.

20.
Mr Birch told me that he regarded Michael as the client under the Contract (wrongly in the sense of Michael having any contractual obligations to PB) and Michael said in his witness statement:

"I could fully understand Nelson regarding me as a key decision maker insofar as this project was concerned as I am sure he will have known or come to believe that I owned Hillersdon House beneficially. Very probably I will have told him this was the case."

21.
Under the original terms of the Contract Johnston Cave Associates ("JCA" whose representative was Mr Rory Duncan) were to act as Architect and Contract Administrator and Savills (acting by Mr James Paradise) were to act as Quantity Surveyor. By a later Deed of Variation dated 12 December 2013, which also formally corrected PB's name as the Contractor, Gates Construction Consultants Limited ("GCC" who acted through Mr Kevin Binmore) were appointed as replacement Contract Administrator and Peter Gunning & Partners (to which firm Mr Paradise had moved) were confirmed as the Quantity Surveyor with effect from 20 March 2013. PB had their own quantity surveyor in Mr David Young.

22.
Until February 2013 Savills (by Mr Nathan Williams) had also been the Project Manager but they were replaced in that role by GCC (acting by Mr Binmore).

23.
The Contract Recitals record the Works as being: “Main house repairs, alterations and kitchen/ swimming pool extension, landscaping and external works at Hillersdon House” (for which HHL “has had drawings and bills of quantities prepared which show and describe the work to be done”) and that PB were “to provide detailed programme showing latest dates for release of specified information”.

24.
The Contract Sum was £5,114,714.95 and the Particulars provided for:

i)
a date of possession of the site of 9 January 2012;

ii)
a date for completion of 31 July 2013;

iii)
liquidated damages for delay of £2,500 per week;

iv)
monthly interim payments from a first due date of 9 December 2011; and

v)
a 5% retention.

25.
Section 4 of the Contract (clauses 4.9 to 4.13) made provision for interim payments in accordance with sections 110 and 111 of the Housing Grants Construction and Regeneration Act 1996. Clause 4.14 provided for PB’s right of suspension, on giving 7 days’ notice, in the event of HHL’s failure to pay an interim certificate in accordance with the clause 4.12. The Contract did not give HHL any right to suspend the Works.

26.
Interim payments (calculated in accordance with clauses 4.9 and 4.16) could include amounts claimed by PB, and approved by the Contract Administrator under clause 4.23, in respect of direct loss and expense attributable to “Relevant Matters” which included the alteration or modification of the quantity or design of the Works through the addition of any work.

27.
Clauses 2.26 to 2.29 made provision for adjustment of the completion date by reference to “Relevant Events” which included “exceptionally adverse weather conditions” and impediments to timely progress of the Works caused by HHL, the Architect/Contract Administrator or others for whom HHL was responsible rather than PB. It was for PB to apply for any such any extension of the completion date, by notice specifying the event relied upon, and for the Contract Administrator, if of the opinion that grounds for one existed, to specify a later date for completion estimated to be fair and reasonable.

28.

Section 8 of the Contract addressed the grounds for its termination. Under clause 8 the Employer's insolvency was a ground for termination by the Contractor and the Employer was obliged to notify the Contractor of any step which initiated a clause 8.1 insolvency event.

29.
The original completion date under the Contract was therefore 31 July 2013. PB commenced the Works on 9 January 2012. By around February 2013 the Works were about 6 months behind schedule and by early 2015 a substantial part of them still remained to be completed.

30.
During the progress of the Works interim valuations had been prepared by Mr Paradise and invoices raised by PB in respect of them. Up until Interim Certificate 34 issued on 1 December 2014 the invoices had been paid by HHL, though sometimes late.

31.
PB's last invoice to be paid was that raised in respect of Interim Certificate 33 which was paid on 11 November 2014 in the sum of £181,880.80.

32.
The payment of PB's invoices by HHL was funded both by Michael and by borrowing from Michael's bank in London, EFG Private Bank Limited ("EFG"). That which came during the life of the Contract from Michael's own monies was advanced to HHL by way of loan from SHL. So too were the monies provided by EFG. To quote from Ms Lee's submissions:

"The project was funded directly and indirectly through Michael. Most of the payments into HHL's account are transfers from SHL. In turn SHL's account was funded by Michael and finance obtained from EFG Bank.

The 2 main sources of finance for the Building Contract were:

(a) A £5m loan from SHL to HHL dated 18 July 2012. This loan was funded by deposits from Michael as shown on SHL's Bank Statements:

(i) 15-05-12 £4,005,593.01

(ii) 13-02-13 £250,000.00

(iii) 15-03-13 £260,000.00

(iv) 19-04-13 £320,000.00

(v) 22-07-13 £340,000.00

TOTAL £5,175,593.01

(b) A £2.3m loan facility from EFG Bank to SHL dated 28 December 2012. The deposit of these funds is shown on SHL's Bank Statements from 20-12-13 to 8-04-14. Subsequently this loan was extended by way of an overdraft."

The £5m loan agreement from SHL to HHL was expressly stated to be used for the purpose of financing the building works (clause 2). ……."

33.

Interim Certificate 34 was issued on 1 December 2014. An invoice was raised by PB on the same date as the certificate in the VAT inclusive sum of £243,557.90. This fell due for payment on 15 December 2014. It remained unpaid by HHL.

34.
Interim Certificate 35 was issued on 6 January 2015. PB issued an invoice that same day for £200,740.67 including VAT. It fell due for payment on 20 January 2015 but remained unpaid by HHL.

35.
By the time Interim Certificate 34 was issued on 1 December 2014 further funding had become an issue for Michael. I will have to return below to the circumstances surrounding this in my assessment of the evidence but the general picture of things by that time was one where:

i)
in 2012, Michael had agreed to pay his ex-wife a “very substantial cash sum” (as he expressed it in his witness statement) under their divorce settlement which had led him to approach EFG for funding, thereby giving EFG a degree of say in relation to the project;

ii)
in August 2013, Mr Binmore (as Contract Administrator) had awarded an extension of time of 34½ days by reference to PB’s clause 2.27 notice in November 2013 based upon exceptionally adverse weather conditions;

iii)
by August 2013 Michael was falling out with Savills (wearing their Project Manager hat) and was unhappy to pay their fees because he regarded them as responsible for a failure to manage the project so as to be on budget and within time. This led Savills to say that they would be terminating their Quantity Surveying services and, in turn, that led Michael to say (in an email dated 14 August 2013) that he would be consulting with HHL’s solicitors with a view to making a claim against them in the region of £250,000;

iv)
in November 2013 Michael had agreed to pay PB what was described as “an ex-contractual payment” of £75,000 in recognition of additional preliminaries and loss and expense incurred in respect of works instructed and delays prior to 30 November 2012. Also in November 2013 Mr Binmore of GCC granted a further EOT of 45 days (to 16 December 2013) by reference to the other matters, beyond adverse weather, that PB had relied upon in their clause 2.27 notice a year earlier (such as missing or inaccurate information and delayed receipt of a sanitary ware schedule);

v)
by November 2013, further works were instructed to be added to the Works stipulated in the Contract (when the anticipated costs of completing those were estimated in September to have risen to £5.7m) at an additional cost of £923,280. Many of the items in the additional works were ones that had previously been pruned during the tender process to keep the Contract price down;

vi)
in February 2014, following a site meeting with Michael and Nelson Birch, Mr Binmore was recording an agreement for the payment “on account” of preliminaries in respect of the period after 16 December 2013 until such date as might be fixed by a further EOT decision;

vii)

in June 2014, Mr Paradise, with the caveat that the figures were ever changing and did not take account of the further anticipated claim for preliminaries in the light of PB's recent purported notice on 31 May 2014 seeking a further extension of time (see below), informed Michael that £5.868m had already been paid under the Contract. With a total anticipated cost of £7.217m there was a further £1,349,497 plus VAT to pay. By June 2014, Michael and/or HHL had paid a total of £185,250 in respect of preliminaries (in effect PB's standing costs and overheads incurred regardless of progress, or lack of it) with a further £32,760 plus VAT sought in respect of them in the May valuation and duly paid. The July and August valuations also included claims in respect of preliminaries (totalling approximately £90,000 plus VAT) which were paid, so that a VAT inclusive figure of £355,476 came to be paid in respect of preliminaries;

viii)
by late July 2014 the £2.3m facility from EFG had been more than exhausted (and the excess of £352,585 over the £2.3m facility was being treated as repayable on demand rather than on 31 October 2015). This led the bank to indicate that Michael's and Christopher's London property at Albion Street, W2 should be sold unless Michael either refinanced with a third party lender or made some progress in realising an investment he had made in Kenya. In October 2013, and therefore during the life of the Contract and the EFG loan, Michael had (through offshore companies in the BVI and Mauritius) made an investment of an unspecified amount in a property development known as Buffalo Mall, Navisha, Kenya ("Buffalo Mall"). His witness statement says that he made it in the hope that it would realise £1m by the end of 2014 and £1m by 2016;

ix)
in August 2014 Michael had written to Mr Binmore expressing alarm that PB were (in place of a completion date of 16 October anticipated by their May request for an EOT) talking about completion in December. He said: "WE need a proper program and for that program to be managed! Why do persist [sic] in letting PB get away without providing a proper program?"

x)
by mid-September, by a letter dated 18 September 2014 referring to the information that had since been provided to support the EOT requested on 31 May 2014, PB were indicating that practical completion would be 17 March 2015;

xi)
by late September 2014 Michael was investigating the possibility of obtaining alternative funding from Secure Trust Bank (who had proposed an investment loan of £3.5m supported by security not only over the Property but also a charge over a £500,000 cash deposit, a personal guarantee and second legal charges over Albion Street and Michael's Cornish property). However, his preference was to stay with EFG and, to that end, he told them he had prepared Albion Street for sale though his preference was to realise instead the value of his investment in Buffalo Mall. He also told me that he did not then have a cash deposit of £500,000 which could only have come from the proceeds of Buffalo Mall;

xii)
by late October 2014 Michael had formed the view that Mr Binmore was not up to his role (or certainly the adjudication upon the EOT request) and he had discussed with Mr Offen the idea of engaging an independent programming expert "to sort out this mess" (per Michael's email of 31 October 2014). Mr Offen had spoken to Mr Roger Gibson who they had in mind as the expert and who had indicated he was prepared to act;

xiii)
on 11 November 2014 EFG had agreed, in the light of HHL's receipt of a VAT refund. to advance a further £360,000 on certain specific conditions related to the commissioning of the heating system at the Property and independent certification of the value of invoices;

xiv)
by early November 2014 Michael and Michelmores had raised with Mr Binmore, at a meeting on 7 November 2014, their idea of HHL and PB jointly instructing an independent programming expert who (in place of Mr Binmore) would make a binding decision upon the amount of additional time to be awarded to PB to complete the works; and

xv)
by early December 2014 the position appeared to be one where any further funding of the project by Michael or SHL was dependent upon the receipt of the Buffalo Mall monies.

36.
A flavour of how the Contract was plainly not going to plan, by reason of those factors and other matters of detail that emerge from the trial bundle, appears from an exchange of correspondence between JCA and Michael in January 2014.

37.
By a letter dated 21 January 2014, JCA's Mr Hammett referred to a "rather unpleasant and, at times, unproductive meeting on site with you and Christopher, the Project Consultant and Contractor" a week before. The letter expressed to Michael their shared concerns about the lack of progress on site and the frustration and additional costs occasioned by the delay. It went on to explain the reasons for this, including "a large amount of additional work included in the project during the course of the Contract" and additional repairs to the fabric of the house, and went on to point out that there was no planning permission or listed building consent for the amended works to Jane's Cottage (within the grounds of the Property) instructed the previous November. In relation to additional fitting-out, Mr Hammett stated: "Of course, as Client you may introduce as many changes as you wish but the ensuing delays and frustration experienced by the Contractor cannot be attributed to the Consultants".

38.
The following day Michael provided what he described as "a prompt, robust and full response". It included the following statements:

"I am glad you share my frustration at the lack of progress on site and the additional costs that have been incurred as a direct result of this. As I stated at the meeting, this job looks like being a year late in its completion and is also likely to well over budget [sic] because of this. I am glad you agree this is an unacceptable state of affairs given the level of "professional" input that has been paid for."

"As far back as March 2013 I have raised my concerns to JCA about the cost and completion timetable when it became apparent that JCA were not able to manage the contractor, resulting in the client having to concede an additional 4 months to the contractor for delays up until that stage."

Having used the carrot up until now all that is left for me to do is to use the stick! I hear the same old complaints at every meeting "we do not have enough information to do the job.

If this is not the case, why has this attitude not been resolved with the contractor during the course of the 24 months they have been on site and if it is true, why does the contractor not have the information. May I remind you, this is not a “design and build” contract.”

“I have made the utmost effort to make sure that all consultants questions and queries and answered as soon as possible and at least within 24 hours and also to make sure **everyone of you is paid up to date. That is my responsibility as a client. All I ask is that the professional team to do the same!**”

39.
Michael’s reference to the Contract not being a “design and build” contract (but instead one intended to be with supplied quantities and drawings) was at odds with Mr Birch’s impression of what had become the reality by the Spring of 2014. By a letter dated 31 May 2014 PB gave a further notice under clause 2.27 of a delayed completion date (of 16 October 2014) and that a further application for loss and expense would be made in accordance with clause 4.23 of the Contract. Mr Birch said the notice related to the period from 18 November 2012 to the date of the letter. Indeed, the letter sought that the EOT be “automatically increased on a weekly basis until such time that all outstanding construction information is received and certified as complete by our Hillersdon Site Manager.” The “Relevant Event” relied upon was “the continued failure of the Design Team to provide accurate and timely instruction” causing PB to be unable to complete the programme as planned. The letter went on to state that the Architect/Contract Administrator had failed to provide accurately dimensioned drawings and detailed construction information which PB had had to ask for on a daily basis. Mr Birch said that “by being flexible and non-contractual” PB had saved a minimum of 11 weeks of further delay. He concluded his 9 page letter by saying the EOT was requested “in recognition that we are unfortunately working on a design and build contract”.

40.
PB’s letter of 31 May 2014 did not pass muster with Mr Binmore of GCC (or Mr Offen of Michelmores who was advising Michael and HLL upon the request for an EOT and generally). Mr Binmore made it clear that he would not issue a further EOT without further supporting information. Further information was provided by PB on a piecemeal basis as appears from their letter dated 18 September 2018 which indicated a practical completion date of 17 March 2015.

41.
Having been raised in November 2014, as mentioned above, the proposal of the parties jointly instructing an independent programming expert did not take root, though Michael understood it was still being considered by PB during the month of December 2014. Mr Offen had written a without prejudice letter to Mr Birch on 19 December 2014 (referring to a conversation between them on 9 December) on the matter and saying “we agreed that following receipt you would give careful thought to this proposal”.

42.
Despite his sense of frustration over what he regarded as unwarranted delay up to 2014, Michael had come to hope that the Works upon the main house at the Property would be complete so that he could move his furniture (from Kenya) into the house and spend Christmas 2014 there. But by that time the Works had not reached practical completion. Nevertheless, on 19 December 2014 Michael took possession of parts of the main house.

43.
The day before he did so Mr Binmore issued his EOT certificate awarding PB an extension of 210 days, on an interim basis, and thereby extending the completion date from 16 December 2013 (under the EOT awarded in November 2013) to 16 October 2014. Mr Binmore noted Michael's verbal request on 19 December not to issue an EOT for the time being. He made it clear that the extension was subject to review which could lead to either an earlier or later date being fixed and that the Contract permitted the fixing of a different completion date within 12 weeks of practical completion). This interim EOT award did not come to the attention of the parties until after Christmas as Mr Binmore's evidence was that he sent it by post rather than email as he did not wish to upset either of them during the holiday period in circumstances where he thought neither side would be happy with his decision (PB had sought a completion date of 17 March 2015).

44.
Michael certainly was not happy with the decision or the way in which it was communicated (attributing to Mr Binmore knowledge that, once received, it would be too late for him to do anything about it). Mr Binmore's decision was, he says, completely unexpected in circumstances where he thought the independent programming expert proposal was still under consideration. He wrote an email to Mr Binmore on 5 January 2015 saying that Mr Binmore had done the polar opposite of what he had agreed to do at a meeting on 19 December. The email said:

"Well congratulations. You have now caused a major problem to arise between Hillersdon House Limited and Palmer Birch. You have specially gone against your client instructions and best interest and put Hillersdon House LTD in a very disadvantaged position with regard to the claim made by Palmer Birch."

"I expect a call first thing tomorrow from you to explain yourself as to why you have gone against me and my legal counsel."

45.
The "legal counsel", Michelmores, did themselves write to Mr Binmore by letter dated 12 January 2015. By reference, it appears, to what had been discussed at the meeting on 7 November 2014, Mr Offen of that firm said he found it quite extraordinary that Mr Binmore had proceeded to issue the EOT certificate. He asked for details of the reasons behind it, in the form of a schedule, within 7 days and asked Mr Binmore to "note that Hillersdon withdraws your authority to issue any further extensions of time until further notice" and not to communicate the fact of that instruction to any other person.

46.
As I have mentioned Invoice 34 that had been issued on 1 December went unpaid after its due date of 14 December 2014. On 6 January 2015 Invoice 35 was issued but also remained unpaid after 20 January 2015. By mid-to-late January HHL therefore owed PB about £444,000.

47.
It is accepted by the defendants that the failure to pay the invoices in respect of Interim Certificates 34 and 35 was a breach of contract on the part of HHL.

48.
In the period surrounding HHL's default in relation to Invoices 34 and 35 the company did have available some monies which might have been used towards the payment of the invoices but which were not applied towards them.

49.
On 11 November 2014 EFG had advanced to SHL £254,000 of the further £360,000 it had agreed to advance on certain conditions. That had indeed been remitted to HHL and used in the payment of Invoice 33. By 9 December 2014 Michael was able to confirm that HHL had received the VAT repayment (of £135,541) which the bank had in mind when saying that, with its advance of the balance of £106,000, there would be "a total of £243k available for the next payments at the end of November". On 23 December 2014, in the light of the commissioning of the heating system at the Property to EFG's satisfaction, SHL had lent to HHL most of the balance (the sum of £100,348) of the further finance that the bank had agreed to make available to SHL.

50.
During the trial it also became apparent that payments had been made by HHL to the administrator of SHL ("Oana") and to EFG. In the period between 25 November 2014 and 30 January 2015 the payments to Oana amounted to approximately £36,000 (with about a further £24,000 paid up to the end of April). The payments to EFG were evidenced by cheque stubs showing that three payments (each in the region of £10,500) had been made on 11 November 2014 and 2 February and 27 April 2015.

51.
Aside from the payments to Oana and EFG, HHL's bank statements show that payments were made to other creditors including the interior designers, HHL's accountants and Michelmores solicitors. Those bank statements show that on the due date for payment of Invoice 34 HHL's bank balance was approximately £149,000 (about £90,000 short of the sum required to discharge it) and, when Invoice 35 fell due, the company was short of the sum required to meet both invoices by about £313,000.

52.
The day before Invoice 35 was issued, on 5 January 2015 and therefore on the same day that he came to write his email to Mr Binmore, Michael met Mr Birch on site. Mr Birch's email to Mr Binmore (sent 10 minutes after Michael's to him) said:

"For the record he has informed me that he doesn't have any funding in place at this present time to meet his current financial obligations with regard to Palmer Birch. He has instructed me to suspend works on site. While this is very disappointing, tomorrow we will issue our formal response in accordance with the terms and conditions of our contract with him."

53.
Of course, PB had no contract with Michael as Michael's own email to Mr Binmore - which perhaps emphasised the true identity of PB's counterparty in a way that earlier communications and minuted meetings (the most recent being with his solicitors on 19 November 2014) had not – made abundantly clear.

54.
In relation to his meeting with Michael on 5 January, Mr Birch accepted in cross-examination that he did remember Michael saying that he was trying to get monies from a Kenyan project and that:

"He asked me to ease men down, which …. and leave certain people there. Looking at it now, I know why, but electricians and plumbers and things, and that he would pay me."

55.

On 12 January 2015 Michael wrote to Mr Birch on a without prejudice basis (the draft had been prepared by Michelmores) to outline the proposal discussed by them the previous week and about which they had had a further conversation on the day of the letter. He referred to the fact that "Hillersdon has a short term cash flow issue (which, as you know, will soon be rectified with a sale of a property that I own in Kenya)" and went on to say that "it may be sensible for you to formally suspend performance and temporarily withdraw from site, the majority of your personal [sic], plant etc." He went on to explain why he referred to the majority of, and not all personnel (plumbing and electrical works being singled out alongside works to ensure health and safety compliance) and that PB might be able to conclude certain residual packages of work through sub-contractors without prejudice to the suspension. PB would not issue legal proceedings on the outstanding invoices and in return would be entitled to a higher rate of interest (Base Rate plus 6%) than that specified by the Contract.

56.
When, on 8 January, Mr Offen had sent the draft of that letter for Michael to send he had asked Michael whether HHL had any assets of substance against which PB might enforce and, later, whether "the lease (and the debt position) leave Hillersdon in a useful negotiating position if push comes to shove?" Michael responded: "Not sure of the value of the lease but debts are about 5 million GBP".

57.
The proposal which came to be made in Michael's letter of 12 January did not commend itself to PB. They had already instructed Ashfords, solicitors, who two days previously had written to HHL (care of Christopher at Albion Street as per the Contract). By two letters dated 10 January 2015 Ashfords wrote, firstly, to say that PB reserved the right to bring proceedings after 20 January in respect of sums due and falling due under Invoices 34 and 35 and, secondly, to give 7 days' notice under clause 4.14 of the Contract of PB's suspension of the Works. Both letters referred to what they described as an instruction by Michael to Mr Birch on 5 January to suspend works on site (when there was no contractual entitlement to do that) which was said to be a repudiatory breach that PB was entitled to accept should they choose to do so.

58.
On 15 January 2015 there was a meeting on site at which, amongst others, Mr Birch, Mr Binmore and Mr Paradise were present. Mr Birch said in his evidence that Christopher was present at the meeting, but only for a small part of it, but that Michael did not attend though he was in the main house at the time. Although there are no minutes of that meeting, Mr Birch said that, in circumstances where work on site had been suspended, Mr Paradise proposed that there should be a valuation of further work and materials on site and Mr Birch's understanding was that "it was agreed that such valuation would be agreed to the point of a possible final account". By a later email of 28 January 2015 to PB's quantity surveyor, Mr Young, Mr Paradise set out a list of matters to be considered under the heading "Valuation following suspension".

59.
Mr Birch wrote directly to Michael by a letter dated 15 January 2015 in terms that had evidently been drafted by Ashfords. They asked Michael to countersign the letter to confirm his unconditional guarantee of the outstanding sums and that he would personally pay them (with the rate of interest Michael had proposed) if HHL did not pay by 15 April 2015.

60.
The next day, 16 January, Mr Offen advised Michael not to sign the guarantee as "it undermines substantially the purpose of trading via a limited liability company." He said that, if Michael did not

sign the proposed guarantee, he firmly expected PB to formally suspend performance of the remaining Works and that, if they did so but did not argue or succeed in establishing that the non-payment gave rise to grounds for terminating the Contract, then they “might lose the outstanding debt” and “might lose the Retention”.

61.
Before turning to the likely consequences of signing a guarantee and stating “[I]t is difficult to see where the balance of power lies”, Mr Offen concluded his observations upon the likely financial consequences of a formal suspension for PB with the following statement:

“ …..(all this depends on such things as how you can and might wish to deal with the lease or how Seizar might be able to deal with the lease – you will want to give this careful thought it might be something you are content to see fall away and be replaced by another arrangement or it might be something you are very keen to maintain).”

62.
Mr Offen’s email of 16 January also pointed out that the downside of the liquidation (“if this were to present as an option and then your preference”) would be that it would scupper any claims against the architect and others but “[O]n the other hand, it might also remove the need as I assume that Seizar will in reality continue to enjoy the benefits of ownership of the freehold including the building works undertaken to date."

63.
There was a further email exchange between Michael and Mr Offen the same day with Michael responding to Mr Offen’s advice with reference to what he described as idle threats from Mr Birch that he might close off the services to the Property so that the house becomes uninhabitable and hazarding the guess that he would not be able to do that “as we have had a partial handover”. Mr Offen thought that was not an option properly available to PB.

64.
In the last week of January 2015 there were a number of email exchanges between various persons involved in the project which related to the costing out of the remaining mechanical and electrical works (at the request of PB), approximately 70 brass Lutron electrical face plates (which had not been paid for by PB and which were urgently required by the Lutron specialists) having gone missing from the museum room in the house, and PB refusing access to the plant room and/or not providing the requisite personnel to enable specialist contractors to complete, test and fully commission the mechanical and electrical installations at the house.

65.
In mid-January and February 2015 Michael was still in discussions with Mr Andrew Imlay of EFG about further funding for the Contract (they had met at the Property for two days in mid-January to discuss that and a quite separate matter) and Michael was promising to keep the bank informed of progress over Buffalo Mall.

66.
On 16 February 2015 (by an email and revised version of the letter he had sent to Michael on 15 January) Mr Birch sent to Michael his proposal in relation to the provision of a personal guarantee and which now included provision for PB (“despite the fact that we have given you notice that we will be suspending our works under the Building Contract”) to carry out specified plumbing and electrical works for £199,815 plus VAT.

67.
On the same day Michael wrote to Guy Goodfellow (who was responsible for architectural and interior design services) taking issue with certain aspects of his claim for payment of £113,722 plus VAT and stating: “With everyone blaming everyone else and as you will know, I have now decided to suspend the contractor and seek independent advice on where exactly things have gone wrong. I have told the contractor that he will be receiving no further funds from me until this issue is resolved.” Michael had earlier that day, 16 February, sent Christopher a draft of that email with its reference to Michael’s decision to suspend PB and the statement that no further payments would be made until the issue (over delays) had been resolved. By an earlier email of 12 February, Guy Goodfellow had expressed the hope that “we will proceed with most of these works without the involvement of the current contractor.”

68.
After Michelmores’ letter to Mr Binmore of 12 January 2015, both Mr Offen and Michael had chased Mr Binmore for a response in circumstances where they said they had heard nothing from him since December. By an email of 18 February, Mr Binmore told Michael that, following PB’s suspension of works on 20 January 2015, his work was limited to the final resolution of PB’s EOT request, the agreement of the final cost up to the suspension of the Works and the cost to complete the project. He said that the ongoing review of the EOT request would take several months and that PB had been asked for further information in relation to delays associated with the main house. Mr Binmore said he had been made aware of discussions over PB completing the mechanical and electrical installation “outside of the main contract by way of a personal guarantee and that they are awaiting your approval to proceed?”.

69.
Having forwarded Mr Binmore’s email to Mr Offen, Michael told him of his understanding from Mr Paradise that PB were “cooking up” further information to substantiate their claim, as he feared, and said “I am sorry but we need to jump on this very hard, very fast”.

70.
On 23 February 2015 Michael sent an email to Mr Imlay of EFG saying that the disposal of Buffalo Mall was going in the right direction, with the deposit expected at the end of the month and completion anticipated on 31 March, and that there had been some interest in Albion Street but the London property market was flat.

71.
In early March, at the request of Michael, PB carried out some work in relation to the electrical supply to the machinery store at the property and invoiced HHL the sum of £972.50 plus VAT. HHL paid that invoice on 5 March 2015.

72.
On 11 March 2015, Christopher on behalf of HHL wrote to Mr Binmore terminating GCC’s retainers as Project Manager and Contract Administrator with immediate effect. The letter had been drafted by Mr Offen and sent by email to Michael the day before with the message: “I think this needs to come from a director. Obviously you will use headed notepaper.” One of the many complaints made in the letter was the suggestion that they had been “singularly unsuccessful in securing, encouraging and otherwise managing proper effective and timeous information flow as between the design team and contractor”. The letter went on to repeat the complaint that Mr Binmore should not have issued the last EOT. Mr Binmore later came to respond to this letter terminating his firm’s retainers by a letter of

24 April 2015 in which he rejected the criticisms levelled against it. He concluded the letter with the statement that: “[T]he proposed termination of our appointment has come as a surprise, especially when the contract is in suspension and our role as Project Manager and Contract Administrator has not been completed”. On 30 April GCC wrote to HHL again, in connection with their fees, referring to two outstanding invoices from January and March 2017 and submitting two further invoices for over £80,000 plus VAT. HHL responded on 7 May 2015 disputing the further invoices and saying that any monies otherwise due would be set off against a sum of approximately £250,000 in respect of voluntary payments made to PB to prevent them walking away from the project “and therefore under duress”. GCC were never paid the outstanding fees claimed by them.

73.
On 17 March 2015, Mr Imlay of EFG wrote to Michael with an update on the outcome of his report to the bank’s Credit Committee:

“I submitted my updating report last Thursday. The committee was pleased to hear that the funds from Kenya were still expected at the end of the month. They accept that you will need to pay around £400k into the HHL account to meet outstanding creditors but would like the remainder of the £600k to be paid into the Seizar account. The funds can then be released as you incur the remaining costs on the project. I think this is fair and I hope you agree.”

“The committee would also like to receive a monthly report from Chris on progress with the sale of Albion Street. I am due to provide my next report on 16th April and will be preparing my report on 10th April. Could you ask Chris to provide a report to me by then please?”

74.
By a letter dated 23 March 2015 the bank informed SHL of its right to charge interest at a default rate if certain milestones were not met. The milestones included the deposit of £1m with EFG by 16 April (on the understanding it would be used on the refurbishment of the Property) and completion of the Works by 31 July 2015. The covering email from Mr Imlay to Michael made it clear that no formal decision to exercise the right had been made and that the bank would take into account the overall relationship when making such a decision.

75.
On about 20 March Mr Andrew Edmondson of Alder King, property consultants, visited the Property either following or during a meeting with Mr Offen. By a letter of that date he wrote to Michael indicating his firm’s preparedness to take on the role of Contract Administrator and setting out his initial thoughts and recommendations as to how to the take the project forward to completion. These included, in relation to the works at the main house, a recommendation that PB be retained (even though the relationship might be fractious) but “if this is not possible, ideally the mechanical and electrical sub-contractors should be retained to maintain continuity in relation to completion of outstanding works and final commissioning.”

76.
In respect of other works (to the stables, folly and external grounds) there was no recommendation of PB over switching to another contractor. I should note here that over two months previously, the gardener at the Property (Mr Graham Burton) had written an email to Michael in terms which indicated that Michael had already arranged with PB’s sub-contractor for landscape works, Morley Yeandle, that he should be paid direct for work in stripping top soil. The email of 16 January 2015 said: “As you know, this is work that Morley “subbed” to Nelson, which we are all presuming he will not get paid for. He has already spoken to you regarding payment, I believe.”

77.
On 7 April 2015 PB's quantity surveyor, Mr Young, sent Mr Paradise PB's valuation number 36 (including a claim for preliminaries and materials in site) in the sum of £187,922. Mr Paradise responded saying that certain adjustments did not seem to appear in the valuation "for things like the Morley works paid direct". Within a few days PB's solicitors, Ashfords, were also liaising with Mr Paradise over the suggested justification for the claim to preliminaries.

78.
On 9 April, Michael told EFG that the deposit on Buffalo Mall had been received with the price to follow ("500k and then 4.5m $") and that it should all be paid the following week. That same day he also had an email exchange with Mr Edmondson of Alder King which said he had arranged a meeting for the following week, with Mr Offen and Mr Paradise also, "to go through the costings and the legal position". Mr Edmondson's email had suggested such a meeting to go through what he described as the two main options of continuing some or all of the works with PB and terminating the Contract and the employment of a new contractor or contractors to complete the various remaining elements of the Works as one-off projects. He flagged the need to understand the contractual implications of the second option and the potential for PB to make further claims upon HHL.

79.
On 12 April 2015, in advance of the meeting arranged for the following day, Michael sent Alder King the signed letter of their appointment (signed by Christopher on behalf of HHL on 10 April). Therefore, in place of GCC and their Mr Binmore, it would be Mr Edmondson of Alder King who would have been responsible for certifying the amount due in respect of any application in respect of valuation number 36. Mr Edmondson attended the site meeting with Michael and Mr Offen on 13 April (Michael says, that in the event Mr Paradise attended by telephone).

80.
Christopher had not been present at the site meeting on 13 April 2015. However, Christopher says that Michael told him about it and in particular Michael's alarm to have heard Mr Edmondson express doubts over the quality of quite a bit of the work undertaken and, therefore, concern over the sums claimed by PB. Although not obviously related to such concerns, Christopher says that, after that meeting and his conversation about it with Michael, he found himself speaking to Ms Karen Dunstone, an associate at Michelmores specialising in insolvency.

81.
Christopher says that he spoke to Ms Dunstone and (to quote from his witness statement) "she advised strongly that I should meet with an insolvency practitioner to discuss what should be done insofar as HHL was concerned given that it had no means at that time of paying its debts, many of which had fallen due some time previously." He says the result was that he met Mr David Kirk, an insolvency practitioner, with Mr Offen and Ms Dunstone at Michelmores on 21 April 2015. Neither brother suggests that Michael was present at the meeting. Michael's witness statement says that he "had very little involvement with David Kirk or Michelmores or anybody else in connection with the winding-up of HHL; as was to be expected, Christopher took the lead."

82.
PB dispute that such a meeting ever took place on 21 April. The point is significant because Christopher says that Mr Kirk advised him at the meeting that HHL had no realistic option other than to terminate the Contract because it had no realistic option other than to enter into liquidation.

Christopher says that it was a result of that meeting that he asked Michelmores to prepare an appropriate form of letter terminating the Contract.

83.
On 20 April 2015 (the day before the meeting relied upon by Christopher) Michael wrote to Mr Imlay of the bank saying he was hopeful that he would that week receive a minimum of £800,00 from Buffalo Mall with a top up of a further £200,000 or so the following week. He stated: “I will then be able to lend both amounts to Seizar for the completion of the project”.

84.
On 22 April 2015 Michelmores sent two letters to PB’s solicitors, Ashfords.

85.
One of the letters of 22 April was an open letter giving notice on behalf of HHL terminating the Contract with immediate effect. It suggested that PB had been aware from the commencement of the project that HHL’s payment obligations had been met “from borrowed funds provided by third parties, including, in particular Seizar Holdings Limited” and that HHL had made voluntary payments under protest in the face of repeated threats by PB to walk away from its contractual obligations. It stated: “[P]resently, no third party funder is prepared to extend any existing loan facility or provide any new funding facility to HH to allow HH to make any further payment to your client under the Contract or allow for the completion of the outstanding works under the Contract.” It said that HHL had no means of repaying its very substantial debt obligations and that the inevitable consequence, sooner or later, was that the company would be placed in liquidation. “In the event of a liquidation there will be no distribution to your client”.

86.
That open letter also said that PB had no obligation or right to return to the Property and that Michelmores would write further in relation to PB’s collection of its equipment and accommodation and storage units “once we have secured the necessary authority from the freehold owner of Hillersdon House.”

87.
I have referred in paragraph 25 above to the provisions in the Contract which enabled PB, but not HHL, to terminate the Contract in the event of HHL becoming insolvent. It is accepted by the defendants that HHL had no right to terminate the Contract at will and that the open letter of 22 April 2015 was a repudiatory breach of it.

88.
The other Michelmores letter of 22 April 2015 was marked without prejudice. It made a proposal which, if accepted, would have resulted in PB abandoning its claims under Invoices 34 and 35, any further claim under valuation number 36 and any claim to the Retention. It also required PB to acknowledge that the goods and materials on site belonged to HHL (two lists prepared by Mr Paradise were attached). In return, HHL proposed a payment of £50,000 to PB within 14 days (payment to be made by Michael personally) and release of all potential claims or outstanding obligations under the Contract (including any repayment obligation or obligations in respect of defective workmanship). The offer was open for acceptance before 4pm on 29 April 2015. It was expressed to be non-negotiable and final.

89.

On 24 April 2015 Ashfords wrote to Michelmores with their initial response to the open letter, saying that they would reply more fully by a separate letter. Their letter of 24 April said it was unsatisfactory for Michelmores to say that arrangements for PB's collection of their property should await the authority of the freehold owner. It said "Michael Lloyd lives at Hillersdon House and our Client requires that their plant and equipment is returned to them forthwith." It notified Michelmores that PB would be attending the Property at 8am on Monday 27 April to collect their property and required HHL to make arrangements for access.

90.
Mr Birch and three of PB's employees did attend the site on the morning of Monday 27 April 2015. It was then that he discovered that one of the containers had been broken into, through a change of locks, and, so Mr Birch says, tools and materials belonging to PB had been taken. The events of that day form the basis of PB's claim in conversion and I return to them below in my conclusions upon the evidence.

91.
Ashfords' letter of 29 April contained their fuller response to the open letter of 22 April. The response contained a number of points including a denial that PB were originally aware of the need for third party borrowing to fund the Contract (saying that Michael had only mentioned the involvement of EFG in May 2013), a reference to the instruction of more than £600,000 of additional works which caused delay and a costs overrun, and a denial that PB had threatened to walk away from its contractual obligations. With reference to the contemplated liquidation of HHL it said that HHL had clearly been guilty of wrongful trading, that there was clear evidence that Michael had been acting as a shadow director and that these matters would be taken up with any liquidator. The letter said that, in the absence of any provision in the Contract justifying the step, the purported termination by HHL was a repudiatory breach.

92.
The letter also picked up on the events of the Monday morning: "[R]egarding our Client's containers/ storage units, someone had burnt out the locks on these containers and all the material and equipment within them had vanished."

93.
By their letter of 30 April 2015, Michelmores responded to both letters from Ashfords, complaining that the letter of Friday 24th was received by fax at 17:29 by which time Mr Offen had left the office with the result that no proper notice of PB's intentions and plans for the following Monday was given. It gave HHL's version of events of the Monday morning, including that "a number of threats of violence were made by or on behalf of your client against Mr Michael Lloyd, Mr Lloyd's family and also the property at Hillersdon House (which is not owned legally or beneficially by Mr Michael Lloyd). Details of the threats have been reported to the police." Reverting, it appears, to the subject matter of their without prejudice letter, Michelmores said that PB had "elected to wholly disregard the civilised proposal advanced by our client." Ashfords responded the next day denying that threats had been made. Their letter of 1 May questioned what civilised proposal was in their mind and said "but it is your Client who has ordered hundreds of thousands of pounds worth of construction work from our Client and failed to pay for it."

94.
On 1 May Mr Paradise wrote to PB stating his understanding that the Contract had been terminated and that he would not be entering into any further communications in relation to the project. PB's last

communication with Mr Paradise had been on 29 April in relation to their claim for preliminaries under valuation 36. On 21 April Mr Paradise had sent PB's Mr Young a "supplementary list of the additional "Materials on Site" that we viewed" on a site visit earlier that day.

95.
On 5 May Mr Imlay of EFG asked Michael by email whether or not all the Buffalo Mall monies had been received. Michael responded by expressing frustration that they had not been, though the deposit was being held by his representatives and a revised completion date was under discussion.

96.
On 6 May 2015 Mr Duncan of JCA wrote an email to Mr Goodfellow indicating that they proposed to terminate their own retainer as Architect on the ground that HHL had not paid their fees. Mr Duncan had spoken to James Paradise who had already written to PB on 1 May saying that he understood the Contract had been terminated and that he would not be entering into any further communication with them in relation to the project. Mr Duncan's email said that he believed JCA could and should terminate their agreement with HHL "even though the client seems to be terminating everyone's employment."

97.
On 28 May, in anticipation of receiving the Buffalo Mall monies, Michael wrote to Mr Imlay saying "[T]he liquidation of HHL will mean that the last two invoices from the builder will not be paid nor any further sums for delay. I intend to pay all other creditors so the total cost to complete will be circa 600,000 GPB but obviously I am trying to keep this as low as possible."

98.
Michael's share of the Buffalo Mall monies was received by him on 3 June 2015 in two instalments totalling £1,484,613.

99.
By a letter to creditors dated 16 June 2015, Mr David Kirk (the insolvency practitioner who Christopher says he took advice from on 21 April) gave notice of a meeting on 25 June to put HHL into creditors voluntary liquidation.

100.
At the meeting on 25 June 2015 representatives of PB, GCC and JCA Associates attended and Michael and SHL voted by proxy. Mr Kirk was appointed liquidator. The report on HHL's history, in Christopher's name and presented to the meeting by Mr Kirk, concluded with the following paragraphs:

"On December 19th 2014 the project manager acting against direct instructions from the company and its legal advisers inexplicably and without notice issued an extension of time to the contractor."

In the light of the seeming loss of control of the project manager the sixteen month overrun and increasing costs the financial backers to Hillersdon House Ltd expressed their lack of confidence in the company and its ability to control the project, they therefore decided to cease any further funding for the company, as a result of which the company was forced to file for insolvency."

"On 10th June 2015 the company sought advice from an Insolvency Practitioner and on 15th June it was decided that there was no option but to put the company into voluntary liquidation."

101.

The fact that the Statement of Affairs presented to the meeting showed an estimated deficiency of over £11m forms the backdrop to PB's tortious claims against Michael and Christopher. At that meeting PB estimated the value of their claim against HHL to be £1,082,000.

Observations

102.
In March 2017, by an Order to which I need to return below, HH Judge Havelock-Allan QC struck out PB's attempt to claim that the actions of Michael in setting up the structure which led to HHL contracting with PB, with him controlling the funds to be made available under the Contract, were themselves the basis of a tortious claim. He held that there was no prospect of PB proving that the contractual structure was in any way "unlawful" for the purposes of either the tort of unlawful interference or of an unlawful means conspiracy.

103.
Whilst I therefore recognise that the direct and indirect interests in HHL (or through that company) do not fall to be analysed too strictly for the purposes of testing the existence or absence of a cause of action, in my judgment it is appropriate to consider the reality of the position so far as respective interests of Michael (through SHL) and HHL in the property were concerned. Doing so lends colour and context to the chronology of events summarised above and to the surviving allegations of wrongdoing levelled against him and Christopher and is necessary to assist in determining whether any of them are made out.

104.
In my judgment, reached following an assessment of the evidence at trial, the reality of the position is that the Property was acquired by SHL for Michael, for him to use it as his home once it had been refurbished and he had decided to return from living abroad (he had homes in Switzerland and Romania) so as to spend at least a significant part of the year in England. Indeed, Michael's own witness statement said as much (at paragraphs 11 to 18, 19, 38 and 39, 78 to 83, 118 and 146). By the date of that witness statement of April 2018 Michael confirmed that Hillersdon House is now his primary residence where he lives for 8 to 9 months of the year and that it is also where Christopher resides for the greater part of the year.

105.
It is right to note that Michael's witness statement also referred to what he (at his paragraph 18) identified as the second principal objective, namely "in due course, to operate a high end "English Country House experience" with paying guests renting out all or parts of the House from time to time in order to meet its running costs and ideally return a profit". This idea, coupled with a distancing of the fiscally non-resident Michael and the VAT saving mentioned below, led to the incorporation of HHL and its acquisition from SHL of a leasehold interest in the property. Michael observed (at his paragraph 16) that the size of Hillersdon House and its surrounding acres was "far in excess of what I needed as a residence or could possibly wish to live in, refurbish and maintain solely on my own or for my own benefit."

106.
So far as the cost of refurbishment was concerned, Michael was entirely open about how the interposition of the VAT registered HHL would lead to him recouping approximately £1m of the Contract costs from the Revenue. To quote from his witness statement (where his use of the first person singular hints at the reality of the position):

“113. What I was aware of and what was important to me was that I expected to be able to recover all or most of the VAT paid on the cost of the building works and that if successful this would make an extremely valuable contribution to the cash flow that would be available to HHL to fund the project.

114. I had reckoned that approximately £1,000,000 of VAT would be recoverable throughout the term of the building works.”

107.
Those passages in his statement followed a reference to the fact that he and Christopher had prepared a business plan for HHL, the accountancy advice being that it was necessary to produce one to demonstrate to HMRC that “HHL was a trading entity and it was to be used in support of HHL’s claim for VAT rebates”. In the witness box Christopher confirmed that assisting the accountants with “the VAT component” was a reason for preparing it, alongside it assisting him and Michael in providing clarity of thought as to what they wished to do by way of any business. Therefore, whether or not HHL ever did commence trading upon completion of the building works, so as to fund what would no doubt be the very substantial running costs for the property or even to make a profit having borne them, there was an immediate financial advantage to Michael in having a significant part of the refurbishment costs funded by the Revenue. Neither he nor SHL could have made a VAT reclaim if either of them had contracted with PB. Of course, having derived that tax benefit, HHL went into liquidation before it had commenced business and even before the Contract works were completed.

108.
At the time of the entry into the Contract in 2012 Michael was not UK domiciled for tax purposes. Again, he was quite open (at paragraph 31 of his witness statement) about how his desire to preserve his non-domiciled status was the only reason why he did not become a director of HHL. Nor did he acquire any shares in HHL. Christopher was appointed as the sole director of HHL and acquired all of its £100 issued shares.

109.
In paragraphs 316 to 320 of this judgment I return to the summary of the evidence which shows, overwhelmingly, that Michael regarded himself as the effective client of PB. That he did so is entirely consistent with the passages in his witness statement mentioned in paragraph 104 above.

110.
Michael therefore had no interest in the company with the immediate legal right to possession under its 21 year lease. Yet he had funded SHL’s purchase of Hillersdon House (to the tune of £3.2m) and was also to provide the many millions of pounds that HHL was to expend upon the property and its contents. His witness statement explained (at paragraph 504) that by the end of April 2015 SHL had advanced £8.7 million to HHL (£3.7m of which had come from EFG Bank under a facility secured by his personal guarantee and other property of his) and he personally had lent the company some £1.7 million.

111.
It would have been and was obvious to Michael and his advisors from the outset that HHL had no means of repaying the many millions of pounds that he was to inject into the property via that £100 company, nor even, prior to the commencement of any business, the means to pay any rent to its landlord SHL for the use of the property (allowing for Michael’s intended co-occupation) which even in its pre-refurbished state was a valuable one. Therefore, from the outset and well over a year before HHL entered into the Contract with PB, his solicitors Michelmores were proposing in August 2010

that the relationship between SHL and HHL would be regulated by three agreements: (1) the Lease; (2) a Loan Agreement; and (3) a Put and Call Option.

112.
The combined effect of those three agreements ensured that Michael's further, post-acquisition investment in Hillersdon House was not truly at risk by virtue of the fact that it had been channelled through a limited company that very arguably was never solvent during its short life.

113.
The Lease between SHL and HHL was dated 20 April 2011 and provided for a 21 year term over the whole of Hillersdon House. It reserved a "base rent" of £10,000 payable quarterly and (from 24 June 2012) the greater of the base rent and a "turnover rent" calculated by reference to a percentage of HHL's gross turnover. Default interest was payable on any unpaid rent whether it had been formally demanded or not. The Lease contained the usual proviso for forfeiture in the event of HHL entering into some form of insolvency process or failing to pay its rent for 21 days (again, whether formally demanded or not).

114.
Although the Lease reserved that rent, some Heads of Terms which Michelmores had drafted in August 2010 indicated that HHL would enjoy rent-free occupation until practical completion of the refurbishment works. Ms Lee's opening submissions said that this accounts for the fact that HHL's business plans did not include any rent and in practice no rent was demanded by SHL, though as I mention below there was a suggestion that some rent was paid in late 2014. A first draft of a Business Plan prepared in the Spring of 2011 (for the period 2010-2015), of the kind contemplated by the user clause in the Lease, had not anticipated any expenditure on rent.

115.
The Loan Agreement between SHL and HHL is undated but was concluded on or about 18 July 2012. It provided for a loan up to £5 million. In September 2010 SHL had advanced €300,000 to HHL (repayable after one year but with the possibility of an extension by written agreement of the parties) on terms which did not provide for interest. When advising on the arrangements in December 2010 Michelmores had observed that any further interest-free lending would obviously be seen not to be on arms' length terms. The Loan Agreement of July 2012 therefore provided for interest to be paid quarterly in arrears at 3.5% above LIBOR with default interest of an additional 2% if not paid. The unsecured lending of up to £5m was to be drawn down against evidence of expenditure upon the building works "which expenditure is expected to be within the budget for the building works which has been agreed between the parties". It was a condition precedent to the lending that HHL and Christopher would each satisfy their part of the conditions precedent for the making of the loan by EFG Bank to SHL ("to part fund the refurbishment works") under the facility which then stood at £2.3 million; namely that Christopher would provide a personal guarantee and HHL would charge its leasehold interest to EFG.

116.
The Loan Agreement provided for repayment of the principal upon the expiry or earlier determination of the Lease or any lawful assignment of it. However, it also enabled SHL to call in the outstanding loan upon a number of identified "events of default". Those included a failure by HHL to pay any sum falling due (i.e. the interest payments), Christopher's death or agreement to sell or dispose of his shares in HHL, HHL entering into some kind of insolvency process, HHL being unable to pay its debts as they fell due or being in a position where its assets were less than its liabilities.

117.
As I return to below, it seems that HHL paid some interest to SHL under the Loan Agreement near the end of its life but there is certainly no question of it having done so in the first couple of years of lending.

118.
The Put and Call Option was not in the trial bundle but Christopher told me that he thought he had signed one and Michael's witness statement referred to it being part of the security for SHL's loan. The best indication of its terms are contained within a letter dated 14 December 2010 from Michelmores to Michael and Christopher. The options provided for Christopher to call upon SHL to buy his shares in HHL or for SHL to call upon him to sell them, in either case at their nominal value, upon the happening of certain events. Christopher could exercise the put option in the event of HHL's lease terminating or expiring or him ceasing to be employed by HHL on the ground of ill health or incapacity (he told me that he had not in fact entered into any employment or service contract with HHL). SHL could exercise its call option upon the occurrence of one of a number of specified events which included an event of default under the Loan Agreement, the turnover rent under the Lease falling below £15,000 p.a. in any three consecutive years or Christopher resigning his directorship of HHL or suffering an untimely death.

119.
The combined effect of the Lease, the Loan Agreement and the Put and Call Option show just how precarious HHL's own stake in Hillersdon House really was, given HHL's lack of independent financial resources, and, additionally, how easy it would have been for Michael (through SHL) to acquire ownership of HHL should he have so wished. The accounts of HHL for each of the years 2013 and 2014 (prepared on the accounting basis mentioned shortly below) showed, as for the two previous years, a position of net current liabilities. Further, unless HHL kept back some of the SHL loan monies and did not use them for the specified purpose of the building works, it is not clear how it could have begun to fund the payment of interest under the Loan Agreement or the rent under the Lease. As I return to below, it appears that no thought was given to it discharging either liability until late 2014, if at all. Grounds for SHL forfeiting the Lease, calling in the loan and calling upon Christopher to transfer his shares therefore probably arose almost as soon as the rights to do so were conferred.

120.
In what is a further reflection of the reality of the situation - where the nature of those rights (and the brotherly control of HHL for the time being) would have given Michael comfort that he was in a very strong position to displace HHL from his intended home - SHL did not call in the loan or forfeit the Lease. But the precariousness of HHL's interest and investment in Hillersdon House and of its intended business outlined in the business plan was highlighted by the actual turn of events in 2015. The brief email exchanges between Michael and Mr Offen on 8 January 2015 (see paragraph 56 above) show that Michael was by the early part of that year fully aware of a further advantage to result from HHL being interposed between himself and the Property; namely his negotiating strength against PB when HHL was a company with uncertain assets and significant debts.

121.
In HHL's filed accounts the company had been credited with the value of the sums paid to PB and others in respect of the property, so that in its last accounts for the year ended 30 April 2014 its balance sheet showed fixed assets of over £8 million (stated at cost less depreciation). By far the greater part of that value would have reflected leasehold improvements and fixtures rather than chattels. After HHL went into liquidation in June 2015 the liquidator arranged for a professional

valuation of its leasehold interest the result of which was (in the light of the forfeiture provision in the Lease) inevitable and obvious. The Lease was worth nothing and the liquidator's account established that HHL only owned some plant and machinery which, together with cash of £27,585, produced assets worth approximately £115,000.

122.
In relation to the relatively few chattels owned by HHL and identified in the liquidator's Final Account, Michael in his testimony said of his purchase of them from the liquidator at the independent valuation of £87,281 that "through the liquidation process I had to buy them again". This was another reflection of the reality of the position that HHL's expenditure on the Property and its contents had been as much if not more for Michael's actual benefit than HHL's. That would have been obvious to all, from the outset, in relation to those improvements and additions to the Property that would clearly outlast HHL's lease (even if it had run its term) and also in relation to the contents that he could make use of while he came to occupy it for a substantial part of the year.

123.
Whereas HHL's filed accounts had appropriated to HHL's balance sheet the full value of the Contract works and other corporate expenditure the position on the ground was, therefore, necessarily somewhat murkier. In the light of the mixed use or intended mixed use of the Property by Michael and HHL, I asked Christopher whether council tax or business rates or both had been paid on the property. He told me that council tax had been paid until quite recently which had then been transferred to business rates. I took the "quite recently" to relate to a time after HHL's liquidation and the commencement of business by the new company (this time with Michael as sole shareholder and director) of Country Sporting Experience Limited ("CSEL"). During his testimony, Christopher also made reference to ongoing discussion with HMRC in relation to a VAT rebate of about £137,000 that HHL was expecting to receive in 2014 and which was paid into its bank account (in a slightly lesser sum) on 13 November 2014. The company's accountants had been dealing with that VAT reclaim and, when I asked him what the discussions had been about, Christopher indicated that they reflected HMRC's observation that the company was reclaiming a lot of input tax but not declaring any output tax. The payment which HMRC made indicates that they were persuaded that the expenditure in question was purely of a business nature. Christopher clarified that HHL never came to declare any output tax and it was only CSEL which came to do so.

124.
I have made these observations upon the reality of the position – that the works under the Contract were carried out ostensibly for HHL when Michael knew that their value to him personally would inure despite or, perhaps no less accurately, because of the demise of HHL – because they are key to a proper assessment of the evidence in relation to each of PB's heads of claim. As things turned out, HHL never came close to running any business and it can in hindsight be seen to have been nothing more than a conduit for the receipt of funding provided or arranged by Michael and substantial VAT reclaims that would not have been available to him or SHL. With no significant assets of its own to be lost in any insolvency, the liquidation of HHL would come at the cost of any third party creditors but not (because of the nature of SHL's rights under the three agreements) at any real price to SHL or Michael as its funders.

125.
Although Mr Offen had not been involved in his colleagues' preparation of the Lease, the Loan Agreement and the Options, I have already noted in paragraphs 56 and 120 how, in January 2015, he

was reminding Michael of the basic protection which he and SHL enjoyed in the event of HHL being forced into liquidation “if this were to present as an option and then your preference”.

126.
On a general level, my determination of the economic tort claims (at least at the stage of assessing the conduct of Christopher and/or Michael) involves consideration of the question whether in late 2014 or the first few months of 2015 a decision was made by the brothers, or by Michael, to leave HHL and its third party creditors (or at least some of them including PB) high-and-dry. It was a key element of PB’s case that Michael’s knowledge that the liquidation of HHL could save him significant sums in respect of work already undertaken in relation to the Property (owed not just to PB but other third party creditors of the company) underpinned what PB says was his preparedness to engage in tortious conduct.

127.
The reality of the situation is also of real significance given the lines of defence adopted by the brothers in response to the alleged torts. As I have already touched upon above and address further below, it is a central plank of their defence that the distinct legal personality of HHL and the absence of any obligation upon Michael or SHL to commit further funds to HHL, beyond those previously agreed to be lent and already advanced, means that (for the purposes of the inducement tort) there was no relevant inducement as opposed to non-actionable prevention. And, in respect of all three torts, they say no loss was caused when it is apparent that HHL in any event lacked the means to pay PB. Whether or not those are good defences I have found to be one of the more difficult matters to decide.

128.
The reality also is that, even when Michael was encountering his cash-flow difficulties in late 2014 and early 2015, and endeavouring to persuade PB to suspend works until things improved, he appears not to have treated the scope of the Contract works as being capped by any contractually agreed level of funding but instead governed by something of a “pay as you go” arrangement with himself as the real client. That is certainly the kind of arrangement that EFG appear to have had in mind in the Spring of 2015 when, with the prospect of the Buffalo Mall receipts which were then expected at the end of March but which did not in fact arrive until early June, the bank said that (after utilising £400,000 to meet HHL’s outstanding debts) the further £600,000 could be paid into SHL’s account and the funds then “released as you incur the remaining costs on the project.”

129.
There is certainly no indication that Michael was otherwise than quite relaxed about the terms of lending by SHL to HHL or that he thought to invoke the contractual rights which SHL enjoyed against HHL as he would no doubt at least have considered doing so had the two companies been at arm’s length.

130.
In that regard, the way HHL’s history was presented to creditors at the meeting on 25 June 2015 is illuminating (see paragraph 100 above). The demise of HHL was explained then by reference to the financial backers losing confidence in HHL’s ability to control the project and a decision to cease further funding of the company. Yet there was in reality only one financial backer whose further funding was in question and the provision of which would keep the outstanding loan from EFG to SHL in place to see the expanded Works through to completion. There is no indication in the contemporaneous documents that he, Michael, had lost confidence in HHL as opposed to those with

whom it contracted. Indeed, such an expression of lost confidence on the part of Michael would have amounted to a loss of confidence in himself when (as I explain below) the evidence shows that he effectively ran HHL's construction project and it was he, rather than Christopher, who sought to call the shots in HHL's dealings with PB and the professionals retained on the Contract.

The Issues for Determination

131.
By his Order dated 5 September 2017 His Honour Judge Cotter QC directed the trial of the issues mentioned in the Introduction above ("the Issues") in the following terms:

"There shall be a 5 day preliminary trial to determine all issues of liability including:

(a) the issues and claims set out in paragraphs 10 and 53 to 67 of the Re-Amended Particulars of Claim;

(a)
the Defendants' defences to those issues and claims, including the defence of justification and that the Claimant has suffered no loss as Hillersdon House Limited never had the means to pay the Claimant;

(b)
the legal issue as to whether if the Defendants are liable, the measure of damages for the claims of procuring breaches of contract, unlawful interference and/or unlawful means conspiracy is:

(i)
the sums certified under Interim Certificates 34 and 35 and the sum that the Claimant alleges was due to be certified under Interim Certificate Certificate 36, i.e. £200,740.67 (inc. VAT) plus release of retention (as set out in paragraph 69 and 71 of the Re-Amended Particulars of Claim); or

(ii)
the proper valuation of the Claimant's works, including an assessment of the Claimant's entitlement to extensions of time and loss and expense, in accordance with the building contract on a final, rather than interim, basis (as set out in paragraph 92 of the Amended Defence)."

132.
In the event, the trial of the Issues occupied 8 days of court time, with seven of those taken up with evidence and the last being devoted to closing submissions.

133.
The reference in the September 2017 Order to "all issues of liability" must be read in the light of an earlier Order of HHJ Havelock-Allan QC dated 8 March 2017 by which he struck out certain parts of PB's then Amended Particulars of Claim. The reasoning in support of that Order appears in his judgment of that same date.

134.
The later Order refers to paragraph 10 of the Re-Amended Particulars of Claim ("RAPOC") which were served in the light of the later one and the issues to be determined by me can be identified by setting out the terms of that paragraph below, the aforementioned paragraphs 53 to 67 elaborating upon the claims for (a) procuring breaches of contract; (b) conversion; (c) unlawful interference; and (d) unlawful means conspiracy. Paragraph 10 – including one aspect of the claim struck out by Judge Havelock-Allan QC – reads as follows:

“10. Palmer Birch claims in these proceedings losses arising from the loss of materials and tools and the non-payment of sums due under the Contract for which both ML and CL are liable in that:

10.1. ML procured or induced breaches of contract by HHL in that on his instructions or as a result of his demand payments due to Palmer Birch under the Contract, as particularised below, were not paid;

10.2. ML procured or induced a breach of contract by HHL in that on his instructions or as a result of his demand HHL acted in repudiatory breach of contract by refusing to allow Palmer Birch to complete the works and purporting to terminate the Contract when HHL was not entitled to do so;

10.3. on or about 27 April 2015 a quantity of materials and tools stored in secure storage on the site at Hillersdon House by Palmer Birch and which remained the property of Palmer Birch under the Contract were removed from Palmer Birch’s storage by or under the instructions of ML which amounted to trespass to or conversion of goods the property of Palmer Birch by ML;

10.4. ML procured or induced a breach of contract by Gates Construction Consultants Limited, being the Contract Administrator under the Contract at the material time, by instructing or persuading the Contract Administrator not to issue an Interim Certificate for an interim payment pursuant to the Contract or ensuring that it did not issue the certificate;

10.5. ML procured or induced breaches of contract by sub-contractors contracted to Palmer Birch for works under the Contract by engaging them to carry out the same works directly for HHL after HHL acted in breach of contract.

10.6. CL agreed with ML or acted on his instructions or acquiesced in his demands or requests in acting as the sole director of HHL in causing HHL to act in breach of contract in all the respects detailed above and also in converting the goods referred to above to HHL’s use and, in addition, in so acting CL and ML conspired to injure cause damage to Palmer Birch by unlawful means.

10.7. ML and CL conspired or acted in concert in arranging the use of HHL for ML’s personal interests and in order to ensure or allow ML to avoid payment of debts in respect of works that he commissioned for his own personal interest and benefit which he would otherwise be liable to pay and to place HHL in liquidation to attempt to avoid payment to Palmer Birch for the works that ML commissioned for his own benefit.”

135.
In addition to the words struck through in paragraph 10.5 of the RAPOC, the following allegations were also struck out in March 2017: (i) that, by setting up the structure through which HHL contracted with PB (when the works for his benefit) and by controlling the funding available to pay for them, Michael had committed the tort of unlawful interference; (ii) that Michael and Christopher had been guilty of a conspiracy to injure (or lawful means conspiracy); and (iii) that PB had lost profit on all of the work that remained to be carried out under the Contract including that later undertaken for HHL by those who had previously stood in a sub-contracting relationship with PB.

136.
The nature of the brothers’ defence to the claim can be gleaned from paragraph 18 of the Amended Defence (responding to paragraph 10 of the RAPOC) which is in the following terms:

“18. For the reasons set out more fully below, it is denied that the Defendants are liable to the Claimant for any of the alleged losses, as summarised in paragraph 10. In summary the Defendants’ Defence is as follows:

(a)
The Claimant entered into the Building Contract with HHL.

(b)
HHL was a new company that was dependent upon third party funding to finance the Building Contract.

(c)
The Claimant was at all times aware of this.

(d)
Due to cost and time overruns, the prospect of substantial claims from the Claimant and the lawful withdrawal of financial support from HHL by its third party funders, HHL terminated the Building Contract before completion and entered creditor's voluntary liquidation.

(e)
The Claimant's claims against the Defendants in economic tort are ill-conceived attempts to pierce the corporate veil of HHL and/or SHL.

(f)
The Claimants has no claim against either of the Defendants for losses arising from the liquidation of HHL and/or relief in respect of the commercial risk that the Claimant undertook in entering into a contract with HHL."

137.
As with the pleading to which it is a response, the Amended Defence goes on to develop the case and, in relation to the economic torts, the defendants say that the case against them lacks proper factual or legal particularisation and in particular makes the point that Michael had no legal obligation to provide funds to HHL. The fifth to seventh summary points in paragraph 18 of the Defence find reflection in that point and in the defence that Michael was "justified in acting in its [sic] own commercial interests and in the interests of SHL and its other investors." The defence of the conversion claim also rests upon a lack of particularity on PB's part and a denial that Michael removed from the storage containers any property which PB had a right to possess.

The Dispute over the Issues

138.
Although the Order dated 8 March 2017 appears to be clear, and was not challenged, there was in fact a dispute between the parties over the true scope of the Issues to be determined by me. This "issue over the Issues" can only properly be resolved by considering the terms of the previous Orders made by HH Judge Havelock-Allan QC and HH Judge Cotter QC and the reasoning behind each.

139.
The first matter on which the parties disagreed was whether or not it was open to PB to run at trial the allegation that Michael had procured a repudiatory breach of the Contract in its entirety (paragraph 10.2 of the RAPOC), as opposed to the allegation that he had procured breaches by HHL through non-payment (paragraph 10.1). The second matter relates to the limits, at this stage of a preliminary trial, of my determination of limb "(c)" of the Order dated 5 September 2017 quoted in paragraph 131 above.

140.

As to the first contentious aspect over the true scope of the issues, this came to the surface on day 7 of the trial, towards the end of Michael's cross-examination, during exchanges between counsel. That said, Ms Lee's Skeleton Argument had made the observation that the economic tort claims are "very narrowly cast as relating only to interim payments 34, 35 and 36 as set out in paragraphs 55-57, 65 and 67 of the [RAPOC]". Indeed, Mr Bradley's skeleton argument had identified those same "key allegations" in support of each of the three pleaded torts.

141.
Ms Lee's observation has some force in that paragraphs 55 to 57 (appearing under the heading "Procuring breaches of contract") are confined to allegations against Michael based upon the "non-funding" of interim payments 34 and 35 and him preventing the Contract Administrator from issuing what would have been Interim Certificate 36. Those are the allegations anticipated by paragraphs 10.1 and 10.4 of the RAPOC. Mr Bradley, on the other hand, points to the fact that, although not picked up by later paragraphs of the pleading, paragraph 10.2 (set out in paragraph 134 above) stands independently and does so untouched by the striking-out under the Order dated 8 March 2017. He also makes the point, by reference to the transcript of the later hearing before Judge Cotter QC (at which he did not appear but Ms Lee did) that, as the wording of the judge's Order dated 5 September 2017 clearly indicates, paragraph 10.2 forms part of the issues of liability to be determined by me. Ms Lee countered by saying that paragraph 10.2 was mere background to the true allegations which come later in the pleading.

142.
This first procedural issue is not an entirely straightforward one, as evidenced by the fact that Mr Bradley engaged in a separate written analysis of it in the form of Annex A to his written closing submissions. I can readily see why the defendants consider there to be grounds for suggesting that the wider allegation of Michael's procurement or inducement of a breach is not reflected in the later paragraphs under the procurement heading. Reading the judgment of Judge Havelock-Allan QC (at paragraph 97, which is to be read in the light of his paragraphs 65 and 91) I can also see that he permitted some different "background" material to remain – the setting up of the contractual structure - even though it could not form part of the case on conspiracy once equivalent wording in paragraph 66 had been struck through as the basis of an allegation of wrongful interference. His paragraphs 77, 83, 90 and 99 (addressing each of the pleaded torts in turn) lend considerable support to the defendants' stance, as they focus upon the specific allegations of procurement of breach made in paragraphs 55 to 57 of the RAPOC.

143.
However, having reflected upon the parties' rival submissions, I have decided that those of PB are correct for the following reasons:

i)
First and foremost, there is the obvious point that paragraph 10.2 has not been struck out as sub-paragraph 10.5 and other later paragraphs plainly have been. It is important to note that the defendants did not invite me to rule that it should be struck through (whether on the ground of want of any particularisation or elaboration in later paragraphs or any other ground). I am therefore confined to looking at what the two previous judges have said and, more importantly, ordered.

ii)
As to that exercise, there is nothing in the judgment of Judge Havelock-Allan QC or the transcript of the hearing and judgment of Judge Cotter QC to suggest that paragraph 10.2 should have been struck

through and not formed part of the preliminary trial before me. On the contrary, Mr Bradley's Annex A indicates that paragraph 10.2 was initially part of the target on the defendant's strike-out application but it appears to have dropped out of the focus of the argument at the actual hearing of the application. As for the hearing before HH Judge Cotter QC in September 2017, Mr Bradley produced a copy of the Case Summary prepared for that hearing by his predecessor which expressly contemplated that the allegation in paragraph 10.2 still formed part of PB's causes of action and this appears to have stood uncorrected by the defendant. Nothing in the transcript of proceedings before HHJ Cotter QC indicates that paragraph 10.2 had dropped from the issues and when directing that the issues of liability and quantum should be split for the purposes of trial the judge referred more than once to the issues of liability in paragraphs 10.1 to 10.7 ((though sub-paragraph 10.5 had of course by then been struck out). The terms of his Order, as set out above, reflect that.

iii)
Lastly, I do not accept that paragraph 10.2 can be dismissed as mere "background" which cannot form the basis of standalone allegation of procuring a breach of contract. If that was the correct analysis of it then it raises the question as to why it was thought necessary to strike out paragraph 10.5 which might similarly have been regarded as mere background and, so the argument runs, the only true allegation made in the light of it being that contained in paragraph 58 (also struck out). I recognise that paragraph 10.2 itself does not have an equivalent follow-up paragraph and that might be said to be the difference between the two but, as appears from the previous point above, the defendants were not phlegmatic about the standalone presence of paragraph 10.2 when launching their strike-out application. Moreover, there is in paragraph 69 (under the heading "Damage") a claim to "the loss of retention monies under the Contract and profit lost from the additional work to complete the Contract". That claim remains despite Judge Havelock-Allan QC having struck out an allegation that Michael procured breaches of the separate contracts between PB and its sub-contractors (by engaging those former sub-contractors to complete the outstanding works and thereby depriving PB of the profit element of them). As Mr Bradley contended, it is therefore difficult to see what foundation remains for claiming those losses, beyond the amount of actual or proposed interim certificates, if it is not that within paragraph 10.2.

144.
Reverting to the first reason above, in his judgment on the strike-out application the judge observed (at paragraph 83) that "it should be remembered that it is not alleged that Mr Michael Lloyd procured the repudiation of the entire building contract by the writing of the letter on 22 April 2015" (to which letter I return below). That observation followed immediately after a reference to the duly struck-out allegation based upon poaching of sub-contractors. It was an obviously correct observation in terms of the lack of any mention of the letter of 22 April 2015 in the statement of case. But the fact remains that the more generalised allegation of repudiatory breach in paragraph 10.2 survived under his Order dated 8 March 2017 and, on that basis, it qualifies as a relevant breach of contract for the purposes of the cross-references in paragraph 10.6 (alleged unlawful interference) and paragraph 67 (alleged unlawful interference and unlawful means conspiracy) of the RAPOC. Paragraph 78 of his judgment – stating that "whether or not it can be shown Michael Lloyd intended to procure a breach of the Building Contract by HHL will be a matter to be inferred from all the evidence" - can be read either as relating to the more generalised allegation or limited to the allegations about the interim certificates addressed in the previous paragraph of his judgment.

145.

Before turning to the second disagreement between the parties over the true scope of the Issues I should note Mr Bradley's observation that paragraph 10.2 acquired greater significance in the light of the defendants' clarification that a Contract Administrator was in place as at 22 April 2015, namely Mr Andrew Edmondson of Alder King (who, as mentioned above, had written to Michael on 20 March with his views as to the way forward). Ms Lee made this clear on the first day of the trial, by way of correction to a point made in her written opening submissions that, regardless of any acts by Michael, there was in any event no Contract Administrator in place who might have issued Interim Certificate 36 on 10 April 2015. The correction was made by reference to a recently disclosed document in the form of an email from Michael dated 12 April 2015 referring to Mr Edmondson's appointment. PB, who had previously assumed that the defendants had been correct when saying that no Contract Administrator was in place at the time HHL's solicitors gave notice purporting to terminate the Contract on 22 April 2015, say that the presence of one lends flavour and force to their analysis of what the defendants recognise to have been a repudiatory breach in the absence of any right of the employer to give such notice of termination.

146.
The second matter arising from the formulation of the Issues upon which the parties could not agree, for the purpose of taking matters forward, was whether or not there was at this stage of the proceedings an evidential burden upon the defendants to establish that the measure of damages for any of the economic torts was something other than the amount of Interim Certificates 34 and 35 and what PB says was the anticipated value of Interim Certificate 36.

147.
During his closing submissions Mr Bradley submitted that, if liability for any of the economic torts was established, the absence of evidence from the defendants (or emanating from HHL or its liquidator) to the effect that the true value of PB's unpaid work was something other than the sums in Interim Certificates 34 and 35, or the sum which would have been identified in any Interim Certificate 36, meant that there was nothing to displace the conclusion that PB was at this stage of the proceedings entitled to a money judgment for the total amount certified or (in the case of No. 36) proposed to be certified. I questioned the correctness of that approach when I had understood that the purpose of the preliminary trial ("to determine all issues of liability") had been to keep the hearing "fact free" in terms of quantum evidence. I could well see that there was a burden upon the defendants to establish through legal argument that any entitlement of PB was otherwise than as certificated, or proposed to be certificated, but not that the absence of evidence to support alternative figures should hinder them.

148.
Mr Bradley took me to paragraph 8 of HH Judge Cotter's judgment of 5 September 2017 and his comment that the preliminary trial would include what he described as "the certification argument" and the observation that "of course, if the claimant wins on a certification argument the quantum evidence falls away". I do not read that part of the judge's reasoning in support of a split trial as being at odds with my understanding of what should be the proper approach to determining the last of the Issues. Avoiding the need for any quantum evidence might be the consequence of PB winning on that issue (by persuading me that the first suggested answer to that issue is the correct one) but the absence of such evidence at this stage is not a reason why they should win on it.

149.
Ms Lee did indeed submit that, at this stage, the court was only asked to decide as a matter of principle what the correct approach to any quantification of damages should be. I return below to her detailed submissions on this point but, for the moment, I record that they rest only upon legal

argument and not upon what the defendants' evidence on quantum issues, produced at the appropriate time, might support by way of a conclusion on the proper measure of damages. In my judgment that is the correct approach.

150.
With those two procedural matters decided and reverting to the Order dated 5 September 2017, quoted in paragraph 131 above, it can therefore be seen that the trial before me was of the surviving issues of liability, together with the proper measure of damages triggered by such liability.

151.
Those issues of pure liability include the allegation in paragraph 10.2 of the RAPOC which in principle is capable of supporting the unlawful means conspiracy alleged in paragraph 67 (unlike the "background" of the contractual structure which still appears in that paragraph and has not suffered the same striking out which emerges at paragraph 66). And, in relation to damages, if liability for any of the economic torts is established, I am tasked with deciding what, as a matter of principle, is the proper measure of damages for the purposes of a later hearing to assess those damages.

152.
That Order inevitably embraces the trial of any defences relied upon by the Lloyds in defence of the four heads of claim and expressly mentions the defence of justification (said to be relevant to both the inducement tort and the conspiracy tort) and the point they take on an absence of loss given that they say HHL lacked the means to pay PB. Although that second point is expressed in the Order (as I read it) in terms of loss, or causation, the absence of funding within HHL towards the end of the life of the Contract – and the circumstances behind its inability to pay PB – are also central to the allegations of inducement and unlawfulness which are levelled against one or both brothers.

Legal Principles

153.
The nature of the allegations against the defendants, now to be considered in the light of the extensive evidence and the number of authorities cited by counsel is such that it is necessary to set out in some detail the core principles underpinning the three economic torts upon which PB rely.

154.
There is no real issue between the parties on what is required to establish a case in conversion.

155.
When addressing the economic torts I will not include within the analysis of each the key component of loss and damage save to mention how, in an unlawful means conspiracy, the concept of unlawful means appears now to provide a clear link with the issue of resultant damage to the claimant.

Inducing Breach of Contract

156.
Inducing a breach of contract is a tort of secondary liability. Without primary liability on the part of the contract-breaker, whose breach of contract the defendant has induced or procured, there can be no such secondary, tortious liability on the part of that defendant. In OBG Ltd v Allan [2008] 1 A.C. 1, at [44], Lord Hoffmann made it clear that there is no wider tort of interference with contractual relations where no breach occurs, though if the form of interference involves unlawfulness then there may well exist a claim for the tort of unlawful interference addressed next. The secondary liability nature of the present tort, alongside it resting upon a different kind of intention than that required for

unlawful interference, is one of the distinguishing features of this tort from that separate tort of primary liability.

157.
In OBG Ltd v Allan their lordships referred to this cause of action as “the Lumley v Gye tort” after the well-known case – Lumley v Gye (1853) 2 E & B 216 – which established that liability could flow from an inducement of a breach of contract. This was in the context of them scotching the idea – the unified theory that had previously acquired traction under earlier authorities beginning with Lumley v Gye – that the unlawful interference tort was an indirect form of the inducement tort, and, by so doing, explaining the different principles applicable to each. Of course, the facts of a particular case may trigger the application of both sets of principle – the acts of inducement may involve independent unlawfulness as Lord Hoffmann remarked - and PB’s contention is that this is just such a case.

158.
For the purposes of this judgment I shall refer to the present tort as “the inducement tort”.

Inducement

159.
Whereas the unlawful interference tort (and an unlawful means conspiracy) rests upon the use of means which are themselves unlawful, the necessary ingredient of a breach of contract in the inducement tort means that the liability of the alleged tortfeasor rests instead upon a degree of participation in the breach of contract which satisfies the general requirements of accessory liability for the wrongful act of another person.

160.
That element of participation on the part of the defendant has been alternatively described as “procurement” and “inducement” and in OBG Ltd v Allan, at [36], Lord Hoffmann expressed himself in terms of “the defendant’s acts of encouragement, threat, persuasion and so forth.” The decision of the House of Lords removed the distinction between direct and indirect communications between the defendant and the contract-breaker.

161.
Material to the present case is the distinction between such acts of inducement and what instead might be described as “mere prevention”, where the defendant’s conduct prevents the third party from performing the contract but any concomitant breach cannot be said to be the result of any inducement or procurement. This is a point that Miss Lee pressed strongly on behalf of the defendants. She cited the speech of Lord Nicholls in OBG Ltd v Allan, at [178]-[179] where he observed that, in a prevention case, the element of joining with the contracting party was missing, and with it the basis for accessory liability, and the defendant’s actions are to be viewed as being independent of those of the contracting party.

162.
The dividing line between inducement and prevention will often not be clear cut as was recognised by Lord Evershed MR in DC Thomson & Co Ltd v Deakin [1952] Ch 646, 686, where he noted the distinction between persuasion and advice. The decision of the Court of Appeal in DC Thomson & Co Ltd v Deakin probably provided the firmest foothold for the unified theory of “interference” (that the principle of Lumley v Gye extended to indirect interference with contractual relations by unlawful means) which, as I have already noted above, no longer survives OBG Ltd v Allan. But so far as analysis of the present, discrete tort is concerned the decision provides a useful reminder of what the

Master of the Rolls there described as the necessary element of “pressure, persuasion or procuration” on the part of the defendant union officials if interlocutory injunctive relief was to be granted against them.

163.
The decision of the Court of Appeal in Meretz Investments NV v ACP Ltd [2008] Ch 244 provides a more recent example of mere prevention not founding liability on the part of the defendant responsible for it. The case concerned a complex contractual arrangement over the development of a number of flats. The first defendant was the leaseholder which was to undertake the development and which had granted a leaseback option to the claimant. The option was exercisable in the event that ACP failed to meet the contractual timetable for the development. The second defendant separately agreed to provide finance to the leaseholder, which supported a charge over the leasehold containing a power of sale. When the project failed it exercised its power of sale, thereby rendering it impossible for the first defendant to fulfil its obligation to grant the leaseback. The claimant’s claim against the second defendant for inducing breach of contract failed. Arden LJ held it was a case of prevention but not inducement. The second defendant’s actions left the first with no choice about whether to perform its contract.

164.
In this case the particularised allegations of inducement on the part of Michael (at paragraphs 55 to 57 of the RAPOC) are that, with full knowledge of the existence and terms of the Contract, he failed to provide or failed to authorise or instructed the refusal of funding to HHL to pay the invoices rendered by PB pursuant to Interim Certificates 34 and 35 and that, either directly or through his brother, he prevented the Contract Administrator from issuing what would have been Interim Certificate 36. By identifying those allegations I do not, of course, intend to ignore the allegation in paragraph 10.2 of the RAPOC which I have addressed in paragraphs 140 to 144 above.

165.
In relation to the “failure to fund” allegations, Miss Lee submitted that the evidence showed that Michael had not crossed the line between prevention (or simply advising HHL of a lack of funds) and inducement.

166.
Two further authorities bear upon PB’s case that the alleged deprivation of funds, at the behest of Michael, is actionable and serve to illustrate what may sometimes be the very fine line between inducement and prevention. More specifically, in a case like the present one, they raise for consideration the potentially significant distinction between the deprivation of funding to the contract-breaker and the dissipation of assets, or funds, from that party.

167.
The decision of the Court of Appeal (and of Thomas J at first instance) in Stocznia Gdanska SA v Latvian Shipping Co and others (No. 3) [2002] EWCA Civ 889 needs to be treated with caution in the light of OBG Ltd v Allan: at paragraph 112 of his judgment Rix LJ cited the judgment of Lord Evershed MR as a convenient statement of the law in relation to the concept of “indirect inducement” which then formed part of the unified theory. Nevertheless, the decision supports the proposition that a parent company will not be liable under the inducement tort if, without being under any obligation to do so, it decides not to put its subsidiary in funds so that the subsidiary is inevitably left in the position of being unable to make contractual payments to the claimant. That was the conclusion of the trial judge, though Thomas J went on to find the parent liable for “indirect inducement by unlawful

means” (i.e. what is now clearly the separate tort of unlawful interference) and on both aspects he was upheld by the Court of Appeal: see [2001] 1 Lloyd’s Rep 537 at [252] and [2002] EWCA Civ 889 at [105]-[107]. In concluding that the Court of Appeal should not interfere with the trial judge’s finding on the inducement tort, Rix LJ, with whom the other judges agreed and echoing Lord Evershed MR 60 years on, noted (at [108]) that textbook authority indicated the “delicacy of the issues which can arise as to whether some action does or does not amount to the required status of persuasion or inducement.”

168.
The observation in Stocznia Gdanska SA v Latvian Shipping about what is sometimes that delicate question was made in circumstances where Rix LJ expressed himself to be puzzled by the judge’s distinction between a request of the subsidiary by the parent to break its contract and a request “to do nothing” on the basis that it would not be receiving funds with which to pay an instalment falling due to the claimant under the contract. The judge had found that the latter had occurred but he had not been prepared to infer that any request to break the contract, nor indeed the instruction to do so that had been alleged by the claimant, had been made by the parent when, so he found, the subsidiary’s board comprised experienced and independent Isle of Man solicitors who would have passed a resolution in the light of either having been made. The Court of Appeal observed that judge’s distinction would make sense if the subsidiary could not pay without being provided with funds.

169.
On the assumption that there was no contractual obligation upon the parent company to fund (owed to the subsidiary) it is difficult to see how the conclusion in Stocznia Gdanska SA v Latvian Shipping Co could have been otherwise when the judge had found there to have been no inducement of the subsidiary by the parent in the form of an instruction or request. The law of tort cannot ride roughshod over long-established company law principles which reflect a company’s separate personality, and its own limited liability, unless factors of inducement (for the purposes of this economic tort) or unlawfulness (for the purposes of the other two addressed below) justify it doing so. In this case the defendants lay great store by the principle in Salomon v Salomon [1897] AC 22, and they place it most prominently in their defence of those other two tortious claims, when saying there was nothing unlawful in the “failure” of Michael or SHL to fund the Contract to its completion.

170.
In the present case, PB’s submissions in support of the conclusion that I should infer that Michael instructed or demanded that HHL should break its contract include some which are similar to those unsuccessfully relied upon by the claimant at the trial before Thomas J; namely that the parent company made all the decisions and the absence of certain evidence or disclosure providing an indication of something to hide. I address these submissions below, alongside consideration of the funding arrangements behind the Contract (given Michael’s self-evident personal interest in its performance) for the purpose of assessing whether – as in Stocznia Gdanska SA v Latvian Shipping – this is simply a case of the contracting party lacking the monies to comply with its contractual obligations and the defendant, who is said to have committed the inducement tort, being neither under any obligation to provide those funds nor under any guarantee-based liability.

171.
A more recent decision in relation to a defendant’s responsibility for a corporate contract-breaker’s absence of funds is to be found in Marex Financial Limited v Sevilleja [2017] EWHC 918 (Comm), at [24]-[26]. In that case Knowles J held that the claimant had at least a good arguable case that a defendant who was alleged to have stripped a number of corporate defendants of their assets, leading

them to be unable to satisfy money judgments in favour of the claimant, did not merely prevent compliance with the money judgment but procured their breach. This was therefore an interlocutory decision which proceeded on the basis that it is well arguable that the tort of inducing or procuring another to act in wrongful violation of rights under a judgment does indeed exist. I note that the defendant was the controller and beneficial owner and alleged de facto or shadow director (and presumably, therefore, the directing mind and will) of the companies whose breach he was said to have procured, so there would probably be an issue over the basic requirement that the liability be accessory based. But the decision indicates that the "dissipation" of funds, brought about by the defendant and resulting in the breach, may be sufficient to trigger liability under the inducement tort. No permission to appeal this aspect of the judge's decision was granted (it must be remembered that it was an interlocutory one) and it remained unaffected by an appeal to the Court of Appeal: [2018] EWCA Civ 1468.

172.
It seems to me that the first instance decision in Marex can be analysed as falling within the broader proposition that liability for the inducement tort may arise in circumstances where the contract breaker is a willing party to the breach, without the need for persuasion by the defendant, but the defendant (with knowledge of the contract) has dealings with the contract breaker which he knows to be inconsistent with the contract: see DC Thomson & Co Ltd v Deakin, at 694. The Court of Appeal's decision in Stocznia Gdanska SA v Latvian Shipping reinforces, in the context of the inducement tort, the point about the general impregnability of corporate veils and conditions what may properly be regarded as inconsistent dealings for this purpose.

173.
In Prest v Petrodel Resources Ltd [2013] UKSC 34, at [34], Lord Sumption reminded us that a corporate veil may be pierced only to prevent an abuse of corporate legal personality and that it is not an abuse for those behind a company to rely upon the incidents of its limited liability. He made that observation in relation to both contractual and non-consensual liabilities (albeit pre-existing ones rather than ones that can be said to arise only when and because the company's own resources do not match the extent of its legal liability). It is difficult to reconcile an allegation that a member or other person financially interested in the company has committed the inducement tort merely by failing to fund the company's further contractual performance, without more, when there is no obligation upon him to do so, with the basic concept of limited legal liability.

Intention

174.
In order for liability to be established under the inducement tort, the result intended by the defendant must be a breach of contract. But that is both necessary and sufficient and there is no need for the claimant to go further by establishing an intention to cause damage, nor does it avail the defendant to say that he thought the breach would improve the claimant's position: OBG Ltd v Allan, at [8].

Justification

175.
No doubt because the intention which suffices for the inducement tort does not extend to any contemplated damage to the claimant, whether desired in itself or as an inevitable by-product of the defendant's own motivation of self-gain, the inducement tort admits of a defence of justification.

176.

In OBG Ltd v Allan Lord Nicholls mentioned, for completeness and without elaboration, this defence of justification to the inducement tort. He referred to the decision of the Court of Appeal in Edwin Hill & Partners v First National Finance Corporation Plc [1989] 1 WLR 225 upon which the parties have, with different emphasis, relied before me.

177.
In Edwin Hill & Partners the defendant bankers had financed a property development project. When the proposed development ran into financial difficulty following the collapse of the property market and tighter regulation of office development, instead of calling in the loan as they were entitled to do, the defendant agreed to finance the completion of the development on condition that the developer replaced his architect. This resulted in the developer breaching the contract with the architect. The architect sued the bankers for the inducement tort but the Court of Appeal held that the defendant's actions were justified. It was common ground between the parties that the defendant had a contractual entitlement to call in the entire loan in order to protect its rights, which included a power of sale as mortgagee in possession and the power to appoint a receiver who might have built out the development using a new architect. The fact that they reached an accommodation with their borrower, which protected those rights in a different way which also resulted in a breach of the architect's contract, did not lead to a different conclusion.

178.
In his judgment in Edwin Hill & Partners Stuart-Smith LJ referred to previous authority upon what did or did not amount to justification as a defence to the inducement tort (expressed as it was in 1988 in terms of the tort of wrongful interference with contracts). Included within those where the defence of justification had not succeeded were those in support of the proposition that "the commercial or other best interests of the interferer or the contract breaker" did not amount to justification. On the other side of the line were those which determined the outcome of the case before him in supporting the proposition that justification exists where "the contract interfered with is inconsistent with a previous contract with the interferer".

179.
Stuart-Smith LJ went on to give guidance upon what had been referred to in one of the authorities cited by him as "an equal or superior right" to justify the defence of justification to what is now the inducement tort. He said, at 233:

"Justification for interference with the plaintiff's contractual right based upon an equal or superior right in the defendant must clearly be a legal right. Such right may derive from property, real or personal, or from contractual rights. Property rights may simply involve the use and enjoyment of land or personal property. To give an example put in argument by Sir Nicolas Browne-Wilkinson V-C, if X carries on building operations on his land, they may to the knowledge of X interfere with a contract between A and B to carry out recording work on adjoining land occupied by A. But unless X's activity amounts to a nuisance, he is justified in doing what he did. Alternatively, the law may grant legal remedies to the owner of property to act in defence or protection of his property; if in the exercise of these remedies he interferes with a contract between A and B of which he knows, he will be justified. If, instead of exercising those remedies, he reaches an accommodation with A, which has a similar effect of interfering with A's contract with B, he is still justified notwithstanding that the accommodation may be to the commercial advantage of himself or A or both. The position is the same if the defendant's right is to a contractual as opposed to a property right, provided it is equal or superior to the plaintiff's rights."

180.
Earlier passages in the judgment make it clear that for any contractual right of the defendant to be equal or superior it must be one that arises under a contract which pre-dates the contract whose breach has been induced. So much must be obvious if attempts by contract-breaker and interferer to mask what would otherwise be tortious activity with a colourable cloak of contractual respectability are to be avoided. But if the inducer enjoys a genuine pre-existing contractual right which justifies his actions then the claimant cannot complain that his causes of action do not extend beyond that for breach of contract against the contract-breaker (whether or not the competing contractual right was disclosed or warranted against by the contract-breaker).

181.
Mr Bradley provided me with each of the authorities cited by Stuart Smith LJ in support of the negative proposition as to the absence of justification when it rests only upon the commercial best interests of the inducer. They include the decision of Porter J in De Jetley Marks v Lord Greenwood [1936] 1 All ER 863, at 873. Mr Bradley relied upon the judge's observation that "[T]he good cause which excuses the procurement of a breach of contract must be something more than a belief by the servants or agents of a company that the company might become insolvent if the contract was not broken. To allow such causes to be sufficient would be to excuse the procurement of a breach where a breach itself could not be justified." He did so in circumstances where the Lloyds place great emphasis upon professional advice as to HHL's insolvency being the reason why the Contract was terminated.

182.
As I will return to below, Ms Lee submitted that the defence of justification was available to Michael in circumstances where SHL had rights as HHL's lender and landlord, and where Michael had given a personal guarantee to SHL.

183.
This part of the judgment is as good a place as any other to address the defendants' argument that the defence of justification extends beyond the inducement tort. In her oral closing submissions Ms Lee submitted that the defence of justification should also extend to the claim based upon an unlawful means conspiracy if (which I address below in the context of that tort) I was persuaded that a breach of contract qualifies as "unlawful means". However, for the reasons given below, I do not agree that the defence of justification can be reconciled with or has a place within either of the two torts of primary liability (unlawful interference and unlawful means conspiracy) addressed below.

184.
In relation to unlawful interference, due allowance must be made for the fact that judicial recognition of the justification defence emerged when the unified theory of interference held sway and the separate discussion below of the unlawful interference tort would therefore probably not have been justified. However, it was only in the context of the inducement tort that Lord Nicholls in OBG Ltd v Allan, having already highlighted (at [172]) the different rationale and ingredients of what were established to be the two distinct torts, referred to the potential defence of justification.

185.
I observe again that when the liability is of an accessory nature, where the secondary liability in tort cannot arise without the primary liability on the part of the contract-breaker, it stands to reason that the defendant ought in principle to be able to invoke a defence which rests upon any pre-existing rights that equal or trump those of the counterparty to the breached contract. The defence of

justification provides a necessary restraint against liability for the inducement tort arising on the part of someone whose acts of encouragement, persuasion or even threat are shown to be justified by reference to independent rights (or, one might say, “lawful”). However, it is difficult to identify a principled basis for an equivalent defence to a claim based upon the other two torts relied upon in this case. As appears below, liability under either of those two torts is of a primary nature and will not arise unless the defendant has himself been guilty of conduct, accompanied by the element of intended harm also discussed below, which is to be categorised as independently actionable (and, for unlawful interference, it needs also to be actionable by a third party, subject to the gloss about the missing ingredient of damage not preventing “actionability” for this purpose).

186.
Any argument over the defendants’ actions having been lawful (when judged by reference to their own rights) or carried out without the requisite intention to harm (when his intention falls to be assessed in the light of those rights) is one that will therefore surface within the in-built ingredients of liability for each of those torts. No discrete defence of justification is required to limit further the proper boundary of liability. Indeed, allowing for what precisely qualifies as justification in law on the Edwin Hill & Partners test, recognition of a justification defence in that context would seem to involve a serious encroachment upon what was established long ago in Lonrho plc v Fayed [1992] 1 AC 448, at 465-6: that “it is no defence to an unlawful means conspiracy to show that the defendants’ primary purpose was to further or protect their own interests.” As for any suggestion that the defence of justification has a place in the tort of unlawful interference, that could produce the strange outcome where the acts in question might have ticked the box of “actionability” vis-à-vis the third party but the defendant nevertheless escapes liability to the claimant by reference to his justification defence. These thoughts confirm my view that, outside the inducement tort, any considerations of “justification” are really wrapped up in the elements of unlawfulness and intention.

187.
The conclusion that the defence of justification has no place in a conspiracy claim appears to me to be consistent with the observation of Lord Lindley in Quinn v Leathem [1901] AC 495, at 537, which he made in the context of claims of conspiracy, that “[T]he intention to injure the plaintiff negatives all excuses”.

188.
However, Ms Lee relied upon the recent judgment of the Supreme Court in JSC BTA Bank v Ablyazov (No. 14) [2018] UKSC 19, at [11], both on the issue of justification as a defence to conspiracy and the concept of a breach of contract as qualifying “unlawful means” (which I address below). She highlighted the court’s statement that “the real test” as to what constitutes unlawful means is “whether there is a just cause or excuse for combining to use unlawful means”.

189.
It is not immediately obvious how the words just quoted from the judgment of Lords Sumption and Lloyd-Jones are to be reconciled with their statements in the preceding paragraph. Those statements may be read as saying that a person never has the right (or, therefore, the just cause or excuse which they equate with such a right) to deploy unlawful means. However, taking the two paragraphs together and the sentences and paragraphs that follow on from the quote, I take them to be saying that there may be categories of unlawfulness which a combiner may be excused from agreeing to perpetrate either because of the classification of the unlawful act (identified by reference to the purpose or duty which it subverts) or because it is too incidental to the claimant’s position to be actionable. If that is the correct interpretation then it reinforces my view that any “justification”

arguments will be contained with the analysis of whether or not unlawful means have been established.

190.
I therefore do not regard the passage in paragraph 11 of the judgment in Ablyazov (No. 14) as support for the existence of a discrete defence of justification to an unlawful means conspiracy allegation. The words relied upon by Ms Lee have to be read in their context, including earlier paragraphs of the judgment which refer to both Quinn v Leathem and Lonrho plc v Fayed in recognising that, provided it is the means by which damage is inflicted, it is in the fact of conspiracy that the unlawfulness resides; and also that there can be no “just cause or excuse” to combine to use unlawful means any more than there can be to act with the predominant intent required for a lawful means conspiracy.

191.
In OBG Ltd v Allan, at [153]-[155], Lord Nicholls addressed the element of unlawful means within the tort of unlawful interference (not conspiracy). He favoured the wider rationale for that tort, which was that it seeks to curb clearly excessive conduct, and that:

“The law seeks to provide a remedy for intentional economic harm caused by unacceptable means. The law regards all unlawful means as unacceptable in this context.”

192.
I regard that observation as entirely apposite in the context of an unlawful means conspiracy. If defendants have agreed to deploy unlawful means with an intention to harm, and harm to the claimant has resulted, then I do not see how their conduct can be unacceptable but “justified”.

193.
In my judgment, therefore, it follows that justification, as a defence, only falls to be addressed in the context of the inducement tort and cannot be raised as a defence to an otherwise established unlawful means conspiracy.

Unlawful Interference

194.
In OBG Ltd v Allan Lord Nicholls also gave the tort of unlawful interference its long title “interference with a trade or business by unlawful means” and the short title “unlawful interference”. Lord Hoffman referred to it as the tort of “causing loss by unlawful means”. He explained (at [47]) that the essence of the tort is wrongful interference by the defendant with the actions of a third party in which the claimant has an economic interest with an intention thereby to cause loss to the claimant.

195.
Unlike the inducement tort, liability for unlawful interference does not depend on the existence of a prior contractual relationship and a breach of contract by the third party. It is a tort of primary liability and because it exists independently of any other wrong committed by a third party (the contract breaker in the context of the other tort) against the Claimant it cannot exist independently of a primary wrong. Unlawful interference requires the use of means which are unlawful in themselves.

196.
The two law lords differed as to what amounted to an unlawful act for the purposes of the tort. Lord Nicholls (at [150]-162] would have held that “all acts a defendant is not permitted to do, whether by the civil or the criminal law” and explained, by a non-exhaustive list, that they encompassed common law torts, statutory torts, crimes, breaches of contract, breaches of trust and equitable obligations and

breaches of confidence. However, Lord Hoffmann, in the majority, on the other hand, held that there was one important limitation upon the concept. He said (at [49]):

“In my opinion, and subject to one qualification, acts against a third party count as unlawful means only if they are actionable by that third party. The qualification is that they will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss.”

197.
It follows, as Lord Hoffmann sought to make clear by his reliance (at [13], [45] and [135]) upon the description of the tort by Lord Watson in Allen v Flood [1898] AC 1, 96, that the unlawful acts of the defendant must be the means by which the claimant’s interests are harmed and that involves them being directed against him.

198.
Like the inducement tort (and unlawful means conspiracy address below) it is a tort of intention, though the result which must be intended is different. For liability for unlawful interference to be established damage to the claimant must be intended (as it must with an unlawful means conspiracy). The intention differs from that which suffices for the inducement tort where, as noted above, an intention to cause a breach of contract is necessary but also sufficient.

199.
In relation to the intention required for this tort, Lord Hoffmann said (at [62] to be read in the light of [42]-[43]) that it is necessary to distinguish between ends, means and consequences. If the defendants aim to harm to the claimant then the requisite intention will be established. So too if harm to the claimant is the means by which the defendants seek to secure some other end, most obviously some benefit to themselves, even if the defendants would rather have secured that end without causing harm to the claimant. His lordship (at [60] and [135]) disapproved of the approach of the Court of Appeal which appeared to require a highly specific intention “targeted” at the claimant. However, his favoured approach was not so wide as to lead to the requisite intention being established if the harm (being neither the ends nor the means) was simply the foreseeable result of the defendant’s unlawful action.

200.
In the light of OBG Ltd v Allan the components of the tort can therefore be identified as follows:

(1) Unlawful acts used against, and independently actionable by, a third party (though the absence of loss suffered by the third party should not be taken to preclude actionability);

(2) Interference with the actions of the third party in which the claimant has an economic interest;

(3) Intention to cause loss to the claimant by the use of unlawful means; and

(4) Loss in fact caused to the claimant.

201.
For the reasons given in paragraphs 183 to 186 above, I do not consider the tort of unlawful interference to be susceptible to a defence of justification.

202.
Ms Lee submitted on behalf of Michael that the APOC do not allege any unlawful actions on his part as he was under no contractual obligation to provide funding to HHL with which the company might have paid PB’s invoices. As with her position on the other economic torts (which finds reflection in the

second of the Issues) she also relies upon the resulting lack of funds within HHL to say that no loss to PB was in any event caused by him.

Unlawful Means Conspiracy

203.
The decision of Newey J (as he then was) in Constantin Medien AG v Ecclestone [2014] EWHC 387 (Ch), at [321] (citing the Court of Appeal in Kuwait Oil Tanker v Al Bader [2000] 2 All E.R. (Comm) 271 at [108]) supports the following summary of the necessary ingredients of any claim based upon an unlawful means conspiracy:

(1) An agreement, or "combination", between a given defendant and one or more others;

(2) An intention to injure the claimant;

(3) Unlawful acts carried out pursuant to the combination or agreement as a means of injuring the claimant;

(4) Loss to the claimant suffered as a consequence of those acts.

204.
By that summary, I have re-ordered and slightly re-worded Newey J's enumeration of the necessary elements of the claim. He listed the requirement of an intention to injure last. I will address them in turn.

Agreement

205.
"Agreement" in this context is to be understood loosely. As the Court of Appeal explained in the Kuwait Oil Tanker case, at [111]:

"[I]t is not necessary to show that there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end."

206.
In that case there was direct evidence of the agreement from which the conspiracy could be established but the court pointed out that, in most cases, the position of the claimant will be such that the court is asked to infer its existence from the acts of the alleged conspirators. That said, the parties to the alleged conspiracy must be shown to have been sufficiently aware of the relevant circumstances, and to have had a sufficiently similar objective, before it can be inferred that they were acting in combination at the time of the unlawful acts.

Directors as "combiners"

207.
In this case (as appears from paragraphs 10.6 and 67 of the RAPOC) the allegation is that the two brothers agreed to cause HHL to act in breach of contract and to convert goods to HHL's use. In relation to each of those unlawful acts (assuming they occurred) HHL was acting by Christopher as its sole director. It is not alleged that Michael conspired with HHL (acting by its sole director). I highlight the identity of the alleged conspirators at this stage because Ms Lee submitted in both her skeleton argument and her closing submissions (and this is a submission I must return to below when

addressing the facts) that Christopher was “at all times acting as a director and agent of HHL and no personal liability can attach to him”.

208.
In support of that submission Ms Lee relied upon the general rule that a director is not personally liable on his company’s contracts, even one he had no authority to make unless he has impliedly warranted the existence of such authority. For the purposes of the inducement tort she said the rule in Said v Butt [1920] 3 KB 497, at 506, means that an agent acting bona fide within the scope of his authority who procures a breach of his principal’s contract is not liable in tort for doing so. Ms Lee cited the judgment of Lord Evershed MR in DC Thomson & Co Ltd v Deakin [1952] Ch 646, 681, where he approved textbook authority which relied upon Said v Butt for just that proposition where the company would be vicariously liable for its servant’s acts of procurement or breach taken within the scope of his own authority. She submitted the latter principle is no less applicable to the tort of conspiracy (based upon a wrongful breach of contract) than it is to the inducement tort. Accordingly, Ms Lee submitted, no personal liability can attach to Christopher personally in respect of any conspiracy that HHL should breach the Contract with PB.

209.
In Digicel (St Lucia) Ltd v Cable & Wireless Plc [2010] EWHC 774 (Ch) at Annex I, [78], Morgan J (referring to MCA Records Inc v Charly Records Ltd [2003] 1 BCLC 93) observed that a director or shareholder who does no more than carry out his constitutional role within the company, in the relevant capacity, will not ordinarily be liable with the company in conspiracy. MCA Records Inc v Charly Records was in fact a decision concerning a director’s potential liability as a joint tortfeasor with his company, more specifically whether he was personally liable as a joint tortfeasor for procuring breaches of copyright where the company (of which he had acted as a de facto or shadow director) was the primary infringer. It was not a conspiracy case and the proposition derived from it by Morgan J seems unsurprising. Claims in conspiracy (or for the inducement tort or unlawful interference or many other torts where the concepts of separate corporate personality and vicarious liability have some meaning) would become very oppressive tools if, without more, mere fulfilment of board functions or attendance at members’ meetings exposed individuals to joint liability with the company of which they were directors or members.

210.
Consideration of the proposition does, however, raise the question as to whether a director (or shareholder) who has the necessary intention to injure the claimant - and who, for his part, therefore satisfies the second of the ingredients mentioned in paragraph 203 above – can nevertheless be said be said to be carrying out his constitutional role within the company or, for that matter, acting bona fide. I note that, immediately after the passage in DC Thomson & Co Ltd v Deakin upon which Ms Lee relied, Lord Evershed MR went on to note that the author of the textbook later stated: “If the servant does not act bona fide, presumably he is liable on the ground that he has ceased to be his employer’s alter ego, and so on.”

211.
Although the point is of no direct relevance to the present claim (because neither is it argued that Christopher conspired with “his” company, HHL) there may well be difficulties in the way of establishing, for the purposes of a civil law conspiracy, that a “one-man company” under the sole control of that individual can be party to a conspiracy with him of the kind that the criminal law would not recognise because the two cannot, in such circumstances, be attributed with separate minds. I am aware that there are some first instance authorities in the civil context, which I need not dwell upon

here, which recognise the possibility of a person conspiring with a company that is his alter ego, as well as other decisions which express doubt on the point. Fiona Trust & Holding Corporation v Privalov [2010] EWHC 3199 (Comm) at [1521] is one of the cases cited to me (on a different element of unlawful means conspiracy addressed below) and it is within the latter class. There Andrew Smith J said that "it is not clear whether for the purposes of a civil action there can in English law be a conspiracy between a company and its sole controller" and he expressly did not determine the point.

212.
As I say, that particular point does not fall to be determined by me but the way PB put their case (favouring Christopher as a defendant to the conspiracy claim over the insolvent HHL) raises the question as to whether Ms Lee is right in her suggested extension of the rule in Said v Butt. As I would summarise it, the point is whether Christopher cannot be personally liable in respect of any conspiracy if PB could, or perhaps even should, instead have alleged that it was HHL (to whom Christopher's relevant thoughts and deeds are attributable) who was Michael's co-conspirator. HHL's insolvent state clearly made that an unattractive litigation step.

213.
In Digicel (Annex I, at [61] and [77]) Morgan J held that a director can conspire with a company of which he is a director (he was not there addressing the position of a sole controller). Whether or not he had done so was, the judge observed, dependent upon a detailed examination of the facts and also subject to what he described as the limitation in MCA Records v Charly Records.

214.
Mr Bradley relied himself upon MCA Records v Charly Records though this was really for the purpose of equating Michael's position (not Christopher's) to that of Mr Young in that case. In his closing submissions in reply, Mr Bradley reminded me of the way that Michael's non-constitutional control of HHL, and his involvement and participation in its affairs, was pleaded in the APOC (para. 40.4), the Reply (paras. 13, 17 and 27) and the Response (No. 17) to the Request for Further Information.

215.
So far as Christopher's potential personal liability is concerned, the judgment of Chadwick LJ in MCA Records v Charly Records shows that this may hinge upon an "elusive question" (as Rimer J at first instance had put it). But it is clear that liability on the part of a director for the tort of conspiracy can arise where the company itself is also a wrongdoer. So much is clear from the judgment of Chadwick LJ (with whom Tuckey and Simon Brown LJJ agreed). He said (at [37]) "the relevant enquiry is whether he has been personally involved in the commissions of the tort to render him liable as a joint tortfeasor" and (at [41]) "would A's involvement in the acts of B be such as to give rise to liability as a joint tortfeasor if A were not a director of B". These statements were made by reference to a number of authorities and the judge was addressing the position of joint tortfeasors generally. They included The Koursk [1924] P 140, at 156, and Williams v Natural Life Health Foods Ltd [1998] 1 WLR 830, at [20]-[21], and Chadwick LJ recognised that a director who becomes concerned with his company in a joint act done in pursuance of a common purpose, or who procures or induces the company to commit the tort, himself becomes a joint tortfeasor.

216.
It is certainly not the case, therefore, that a director cannot be personally liable in tort for acts taken by him in that capacity any more than it is the case that merely acting as a director or employee will result in the office-holder being jointly liable for any tort committed by the company with his involvement. As Morgan J said in Digicel, the question will involve a detailed examination of the facts,

subject always, in a case of conspiracy, to the observation I have made about the doubt over a claim which is made only against a company and its sole controller. The claimant needs to show a degree of involvement in the tort on the part of the director, and that his acts (and, where relevant, intention) are sufficiently bound up in the company's acts, to make him personally liable. In this case, the thrust of PB's allegations against Christopher is that he in fact abnegated his duties to HHL and knowingly, and therefore without any good faith on his part, permitted the company to carry into effect Michael's conspiratorial designs.

217.
I have already noted that MCA Records v Charly Records was a decision upon joint tortious liability (the claimant had already obtained judgment against the corporate infringer and the director was the only defendant at trial) and in this case PB has chosen to proceed on the basis that the joint tortfeasance was that committed by Michael and Christopher and not by Michael with HHL or with Christopher and HHL jointly. If the enquiry prompted by that decision reveals Christopher to have been guilty of acts that would have rendered HHL jointly liable with him then the absence of HHL from these proceedings would not impact upon his liability, and nor did Ms Lee submit that it should.

218.
I should for completeness note that Ms Lee's point that Christopher cannot be personally liable is not one that is suggested to have any impact upon Michael's potential liability in respect of a conspiracy which (on her analysis) took place, if at all, not between Michael and Christopher but between Michael and HHL. In fact, the Said v Butt point is not articulated in the Defence. That pleading does (at paras. 18 and 88) deny liability on the part of both defendants under what is said to be an "inadequately and incoherently particularised" allegation – I should note here that it is not Mr Bradley's work – and, as already recorded, it asserts that the claim involves an ill-conceived attempt to pierce the corporate veil of HHL. No point of legal principle is taken by Ms Lee that Michael cannot be personally liable as a conspirator. Any suggestion along those lines would be at odds with Michael's general protest that his brother was the sole director of HHL and fulfilled a meaningful role in that capacity. On Michael's own case, he stood well beyond that veil.

Intention to Injure

219.
The second component of an unlawful means conspiracy is the intention to injure. A defendant must intend to cause damage to the claimant. Unlike the case of a lawful means conspiracy, sometimes still referred to as a "conspiracy to injure", it is not necessary for that to be the defendant's predominant purpose (and in the absence of which or anything else unlawful that type of conspiracy would not be made out). All that is needed for unlawful means conspiracy is an intention to injure: see Lonrho Plc v Fayed [1992] 1 A.C. 448 at 468; Kuwait Oil Tanker v Al Bader [2000] 2 All E.R. (Comm) 271, at [118]. Many conspiracies, like the one alleged in the present case, are undertaken with a view to illicit gain on the part of the conspirators (or one of them) at the expense of the victim. Where gain to the conspirators is necessarily at the expense of loss to the victim then the requisite intention to injure is established.

220.
As explained above, in OBG Ltd v Allan [2008] 1 A.C. 1, at [62] and [164], the House of Lords was concerned with the degree of intention required to establish liability in the related economic torts of inducing a breach of contract and unlawful interference. Subsequent decisions have established that the test of intention as formulated in OBG Ltd v Allan for unlawful interference applies also to

unlawful means conspiracy. See Meretz Investments V v ACP Ltd [2008] Ch 244, at [146]; Digicel (St Lucia) Ltd v Cable & Wireless Plc [2010] EWHC 774 (Ch) at Annex I [84] and Constantin Medien AG v Ecclestone at [333].

221.
In the light of OBG Ltd v Allan, therefore, where loss to the claimant is the other side of the coin to that of the defendants' gain, and the defendant knows that to be so, then the two are inseparably linked and the requisite intention is established.

222.
It will be for the claimant to establish the "inseparable link" between the defendants' primary intention of self-gain and damage to the claimant. That will prompt consideration of the third element of an unlawful means conspiracy or, more specifically, the second component of that element: the unlawful "means".

Unlawful Means

223.
The third element of the claim requires it to be shown that unlawful acts have been carried out, pursuant to the agreement, as a means of injuring the claimant. Each word in the phrase "unlawful means" carries with it a separate concept. The first concerns the unlawfulness of the act or conduct, and requires consideration of which types of unlawful act are, as a matter of law, capable of founding liability. The second concept concerns the question of whether an unlawful act is, in fact, the "means" by which injury is inflicted upn on the claimant. It is clear from the House of Lords' decision in Total Network that these are two separate concepts. As I have noted, in JSC BTA Bank v Ablyazov (No. 14) [2018] UKSC 19, at [11] the Supreme Court considered that the real test for what constitutes unlawful means in the tort of conspiracy is whether there is a just cause or excuse for combining to use unlawful means, which depends in turn upon, firstly, the nature of the unlawfulness and, secondly, its relationship with the resultant damage to the claimant.

(a)
"Unlawful"

224.
So far as the first matter is concerned, in OBG Ltd v Allan the House of Lords considered what qualified as an unlawful act so far as the separate tort of unlawful interference was concerned, the majority deciding in particular that the unlawful act had to be independently actionable. For the purposes of an unlawful means conspiracy the category of relevant unlawful acts is wider and includes some crimes even though not independently actionable: see Total Network.

225.
Paragraph 67 of the RAPOC alleges that the unlawful acts on which the brothers agreed were "in setting up the structure involving HHL, and the provision of funding through SHL controlled by [Michael], committing the breaches of contract described herein and in the trespass to and conversion of [PB's] goods".

226.
The first of those matters cannot now be relied upon as "unlawful" in the light of the earlier judgment of HH Judge Havelock-Allen QC (which is reflected in the striking through of the preceding paragraph 66 which had sought to rely upon those same matters in support of the unlawful interference claim)

and Mr Bradley did not seek to contend otherwise. In paragraph 97 of his judgment the judge said it did indeed follow from his interlocutory decision on the unlawful interference claim that: “it is of no assistance to any case of unlawful means conspiracy. But it does not fall to be struck out solely on that account, because the contract structure may be relevant background to the alternative claim for conspiracy to injure.” Yet he went on in paragraphs 100 to 104 of his judgment to strike out the alternative claim based upon a conspiracy to injure (or lawful means conspiracy) saying that it was inadequately particularised, not least in relation to the requisite predominant intent to injure, and that PB should not be given a further opportunity to attempt to improve its pleading; and paragraph 67 of the RAPOC reflects that ruling. The first limb of the passage from paragraph 67 of the RAPOC quoted above cannot therefore assist PB in support of its remaining claim in conspiracy.

227.
In her written opening submissions Ms Lee had accepted that an act of conversion could constitute the necessary element of unlawfulness for an unlawful means conspiracy. However, as I explain below, by her closing submissions she had moved to a position of “non-acceptance” on this point. Plainly, in my judgment and despite the defendants’ revised stance, two or more defendants may conspire to commit an act of conversion though (as recognised at paragraph 98 of the interlocutory judgment of Judge Havelock-Allan QC) there will usually be limits upon the level of contract-based damages that may be said to be the consequence of them having done so. In Total Network, at [122]-[132], the House of Lords rejected the submission that an unlawful means conspiracy excludes actionable torts or that the conspiracy merged in the tort once committed.

228.
Although I had not read Ms Lee’s opening submissions as involving a direct attack upon the proposition that a breach of contract could form the relevant “unlawful” act for the purposes of an unlawful means conspiracy, she had submitted that, in relation to Michael, the allegation added nothing to the other two alleged torts (and, in relation to Christopher, that he benefited from the rule in Said v Butt). I therefore mentioned to counsel on the first day of the trial that I was aware of a number of authorities initially expressing some doubt and then perhaps a little more certainty on the point as to whether a breach of contract did qualify as a relevant unlawful act. Counsel have helpfully provided with their closing submissions copies of the decisions mentioned by me and they are Digicel (Annex I, at [65] to [67]); Aerostar Maintenance International Ltd v Wilson [2010] EWHC 2032 (Ch), at [170]-[172]; Fiona Trust & Holding Corporation v Privalov [2010] EWHC 3199 (Comm), at [69]; Novoship (UK) Ltd v Mikhaylyuk [2012] EWHC 3586 (Comm), at [103] (not affected on this point by the subsequent appeal: [2015] Q.B. 499). By her closing submissions Ms Lee did come to dispute that either a breach of contract or conversion could constitute the necessary unlawful means for the purposes of a conspiracy claim. Her fall-back position was to say that, if either could do so, then a defence of justification should be open to her clients.

229.
The question of whether a breach of contract could qualify as such was left open by Lord Devlin in Rookes v Barnard [1964] AC 1129, at 1209-1210, in his consideration of the tort of intimidation. In JSC BTA Bank v Ablyazov (No. 14) [2018] UKSC 19, at [15], in a passage relied upon by Ms Lee, Lords Sumption and Lloyd-Jones commented that the reasoning in Total Network, addressing acts “directed at” the claimant, “leaves open the question of how far the same considerations apply to non-criminal acts such as breaches of civil statutory duties, or torts actionable at the suit of third parties, or breaches of contract or fiduciary duty.” Ms Lee said the Supreme Court did not comment on whether non-criminal acts could constitute the necessary unlawful means and (per her written closing

submissions) said “it is therefore not accepted that procuring breaches of contract and/or conversion could comprise the necessary unlawful means.”

230.
I do not regard the paragraph in Ablyazov (No. 14) upon which Ms Lee relies as supporting her position. Its focus is upon whether the relevant unlawfulness can be said to have constituted unlawful means for targeted wrongdoing. I address that separate concept below. The paragraph relied upon concludes with this sentence (with my emphasis): “For present purposes it is unnecessary to say anything more about unlawful means of these kinds.”

231.
In the Digicel case Morgan J discussed the point as to where a breach of contract could be unlawful means, expressing doubt as to the appropriateness of recognising liability for a conspiracy to breach a contract existing alongside liability for inducing breach of contract. But he declined to decide it. He did note that OBG Ltd v Allan confirmed that a breach of contract could constitute unlawful means for the purposes of the interference tort and that, coupled with the narrower scope of that tort, was an indication that the same might follow for the tort of conspiracy. His doubt reflected uncertainty over whether it would be undesirable to recognise the existence of a tort to commit a breach of contract alongside the inducement tort when the intention required for each tort was different.

232.
Of course, there is scope for overlap between the first two economic torts addressed above, even though they rest upon different intentions, as appears from OBG Ltd v Allan, at [21], per Lord Hoffmann. The creation of a hard border between the inducement tort and that of conspiracy to use unlawful means, by keeping breaches of contract out of the latter, may therefore not be a realistic aspiration. Nor indeed a desirable one. One might imagine a case where the number of persons conspiring to bring about a breach of the claimant’s contract was greater than that made up of the contract-breaker and the inducer(s) properly so described. In such a case, some of the alleged conspirators might wish to argue they had not been guilty of any actual persuasion or inducement in relation to the breach of contract. However, proof that they were nevertheless party to a conspiracy that others should bring about the breach ought to result in liability, provided always that the claimant can show they had the requisite intention to harm him. The possibility of such a case arising suggests to me that there is a place for an unlawful means conspiracy which rests upon a breach of contract and I would have thought the fact that the claimant faces a higher hurdle in establishing an intention to harm is a reason which supports rather than undermines that view.

233.
In his later decision in Aerostar Maintenance International Ltd v Wilson [2010] EWHC 2032 (Ch), at [170]-[172] Morgan J repeated the concerns over dual liability which he had expressed in Digicel but, having been shown a number of cases which proceeded on the basis that breaches of contract (and breaches of fidicuary duty) are unlawful means he reached the conclusion that he should “follow the general approach and hold that such breaches are unlawful means for the tort of conspiracy to injure by unlawful means”. In that judgment given in July 2010 Morgan J did not identify the cases cited to him on the point but later first instance judgments which have made the same assumption include Fiona Trust & Holding Corporation v Privalov [2010] EWHC 3199 (Comm), at [69] per Andrew Smith J and Novoship (UK) Ltd v Mikhaylyuk [2012] EWHC 3586 (Comm), at [103] per Christopher Clarke J (not affected on this point by the subsequent appeal: [2015] Q.B. 499).

234.

I proceed on the same basis, that a breach of contract is an “unlawful” act for the purposes of an unlawful means conspiracy. To borrow the expression used by Nourse LJ in Kuwait Oil Tanker v Al Bader [2000] 2 All E.R. (Comm) 271 at [130] (which he applied to the suggested exclusion of tortious means from its scope and made the obiter observation that breaches of contract were within it) it would be anomalous to exclude breaches of contract from the eligible categories of legal wrong. In my judgment it would be anomalous to do so for the reason touched upon in paragraph 232 above (there may be others) and also because to do so would appear to ignore the very essence of actionability in the conspiracy context (the Quinn v Leathem point about unlawfulness lying in the fact of conspiracy which I have addressed in paragraph 187 above in the context of the unavailability of a justification defence). I also bear in mind the requirement, discussed below, for the relevant breach to be instrumental in relation to the claimant’s loss - to be the means by which harm is inflicted - rather the a merely incidental fact of the conspiracy.

235.
PB rely only upon the unlawfulness in the form of breaches of contract and conversion. In paragraph 89 of his judgment of March 2017, HH Judge Havelock-Allan referred to the reliance by PB’s counsel (not then Mr Bradley), in his skeleton argument on the strike out application, upon Christopher breaching his duties as a director of HHL by abdicating control in favour of Michael. As the judge then said, no such breaches of duty are pleaded in support of the alleged unlawful means conspiracy (nor are any alleged in connection with the unlawful interference claim). I mention the point here because of my findings below in relation to the manner in which the affairs of HHL were run by Christopher (to the extent he ran them at all during its short, non-trading life) and what I believe can, in the light of those findings, fairly be described as the de facto directorial basis on which Michael effectively took decisions on behalf of HHL. Any breaches of duty to HHL that may have been involved in the way the brothers ran the company are not, however, relevant to the pleaded claim in conspiracy.

236.
As to Ms Lee’s fall-back position that the defence of justification should be open to a conspiracy claim based upon a breach of contract (or indeed conversion) I have already concluded in paragraphs 185 to 193 above that no such defence is open to a defendant who is otherwise found to have been motivated by an intention to injure the claimant.

(b) “Means”

237.
So far as the second element of the “means” is concerned, the Supreme Court in JSC BTA Bank v Ablyazov (No. 14) [2018] UKSC 19, at [11]-[15], explained the concept of the relationship between the unlawfulness and the damage caused to the claimant by reference to the judgments of Lords Walker, Mance and Hope in Total Network, in which at [93], Lord Walker held that “unlawful means” included criminal conduct, “provided that it is indeed the means … of intentionally inflicting harm.” Lord Mance agreed, referring to the commission of an offence “intentionally targeted at” the claimant in that case. On this aspect there is resonance with the tort of unlawful interference: see paragraph 197 above. For conspiracy, in light of the decisions in Total Network and Ablyazov (No. 14), there is clearly a need to show that the unlawful act was one objectively directed or targeted at the claimant.

238.
In Abylazov (No. 14) the Supreme Court treated the language of unlawful acts “targeted at” or “directed against” the claimant as synonymous with Lord Walker’s requirement in Total Network that the unlawful act must be the means by which intentional damage is inflicted on the claimant. There is

plainly substantial overlap between the two. That approach means that the language captures not just an element of the intention to injure (the second component) but that it also recognises the need to show that the unlawful acts caused the claimant loss (the fourth). In other words, the unlawful acts need to carry with them an element of instrumentality in relation to the claimant's loss if they are to be actionable.

Causation/Loss

239.
The fourth component of an unlawful means conspiracy is damage caused by the conspiracy. The claimant must prove that each unlawful act relied upon was causative of loss and that each such act was carried out pursuant to the alleged conspiracy: Kuwait Oil Tanker Company SAK v Al Bader [2000] 2 All ER (Comm) 271 at 311-312. I have just noted that the question of causation is wrapped up in the concept of unlawful means.

240.
As indicated at the outset of this section of my judgment, I now turn to address the question of loss in the context of all three economic torts.

Loss (the economic torts)

241.
None of the three economic torts is actionable without consequential loss damage.

242.
In relation to the first of them Mr Bradley cited Exchange Telegraph Company Limited v Gregory & Co [1896] 1 QB 147, at 153, where Lord Esher MR said in an early decision on the inducement tort:

"Though I think there must be some damage to support an action for the infringement of the plaintiffs' common law right, it is enough to shew that the act complained of was done in such a way as to be likely to damage the plaintiff, though proof of specific damage be not given."

243.
On the back of that authority Mr Bradley says that the damages are "at large".

244.
The expression that damages are "at large" is one that also applies to a claim in conspiracy and, although no authority was cited to me which shows it use in the context of the tort of unlawful interference, I cannot see any reason why it is not equally apt for that tort. In OBG v Allan [2008] 1 AC 1, at [8], Lord Hoffmann (in distinguishing the need for contractual relations in the inducement tort) referred to it being sufficient that the intended consequence of the wrongful act is "damage in any form; for example to the claimant's economic expectations". I have already cited, in another context, Lord Nicholl's statement in the same case (at [153]) that the law seeks to provide a remedy for intentional economic harm caused by unacceptable means. All three torts are economic torts where the recovery of economic loss is not the exception but the rule.

245.
Use of the expression does not mean, however, that that the court is untroubled by concepts of causation or has a discretion to award general damages which are unrelated to pecuniary loss. Instead, as the citation of Exchange Telegraph v Gregory indicates, it means that the court is not limited to those damages which can be strictly proven. The claimant still has the burden of

establishing that he has suffered some loss as a result of the relevant tort which, if and only if established, will complete the cause of action. But, if established, I take the “damages at large” approach to justify the court attempting its best assessment of the heads of financial loss suffered (and proved to have been suffered) by the claimant. And, certainly in the case of the torts of unlawful interference and unlawful means conspiracy where an intention to injure the claimant is established, the conduct of the defendant and the nature of the wrongdoing is likely to form a significant part of that assessment.

246.
My observations in the preceding two paragraphs have been made without any authorities beyond Exchange Telegraph v Gregory (and textbook authority for the general proposition that damages are at large under the inducement tort) having been cited to me. Obviously, I believe them to be correct but I have deliberately not strayed into uncited authority and, given the constraints of time operating upon counsel when making their oral closing submissions in quite a complex case raising numerous factual issues, I have not had the benefit of their observations upon these or any other pertinent points.

247.
I make these remarks at this point of my judgment because, reflecting upon it in the light of the voluminous material prepared for and arising out of the trial, I can see that issues of causation and loss – and the need for further legal submissions on the correct approach to damages in tort – may still subsist following any favourable determination for PB on the first and second of the Issues and notwithstanding my decision on the third.

248.
For the purposes of the first two Issues which raise the question as to whether any liability is established, PB recognise that they need to establish that the brothers’ alleged wrongdoing has caused them loss. Without loss they do not have a cause of action under any of the economic torts. The proper approach to the quantification of loss, if liability is established, is the subject matter of the third Issue directed to be tried by HH Judge Cotter QC. But within the second Issue directed by him is the determination of the defence that PB have suffered no loss because HHL never had the means to pay them. Ms Lee submits that, even if damages are at large, the conduct alleged against her clients ultimately comes down to the point that they caused an impecunious party to break its contract with PB. As I explain below, and competing against that contention, a significant part of Mr Bradley’s cross-examination of the brothers was aimed at establishing that there was money within HHL which could have used to pay at least something towards PB’s Interim Certificates in late 2014 had it not been otherwise paid away.

249.
If I am persuaded that HHL could have paid something to PB then (assuming the other elements of the relevant economic tort are established) that should lead to success for PB on the first and second issues. In that eventuality, the defendants will not have made good their “no loss” defence identified by the second Issue. But, in that eventuality, I can see that there may be more to the evidence relevant to the quantum trial (as to which see my decision on the second dispute over the scope of the Issues in paragraph 142 to 149 above) than the measurement of the true value of PB’s works which is presently contemplated by the third Issue.

250.

As I say, this is probably a matter for further consideration by the parties. Whereas Ms Lee's submissions at the present trial lead to me to think she would say there is still a need for further investigation into the financial means of HHL at the time of the relevant wrongdoing (a phrase I have deliberately kept rather open-ended for the purposes of these present remarks) I can also foresee that Mr Bradley is likely to argue that it is only the correct answer to the third Issue (and, for PB's prospects of recovery of damages, the financial means of the tortfeasor) that should be of any concern if the "no loss" argument under Issue 2 has failed. This may be particularly so if the essence of essence of any established wrongdoing is that HHL was kept out of monies otherwise available to it.

251.
Subject to those potential further considerations, the third of the Issues raises the question of principle as to what economic loss PB suffered as a result of any of the three economic torts having been committed. The focus of the issue is therefore upon the nature of PB's contractual rights at the time of HHL's repudiation of the Contract.

252.
PB's case on the third Issue is that the amounts of Invoices 34 and 35 and the sum due to be certified under Interim Certificate 36 (£200,740 including VAT), together with the balance of the 5% retention under the Contract, are effectively "in the bag" so far as the value of PB's lost contractual rights are concerned.

253.
The defendants, however, submit that the proper approach to valuing PB's contractual rights involves recognition of the point that the invoices were based upon interim certificates and that any Certificate No. 36 would likewise have been an interim one within the meaning and effect of clauses 4.9 and 4.10 of the Contract. They say that, especially in circumstances where Interim Certificates 34 and 35 included payments on account of claims for loss and expense and preliminaries (in circumstances where PB's request for an EOT had not been finally determined) and where the contemporaneous evidence shows that PB's valuation 36 (which also included a claim for preliminaries) had not been agreed or finalised by Mr Paradise by the date of termination. Even if an Interim Certificate had been issued, they say that it could have been met with a Pay Less Notice by HHL under clause 4.13.

254.
These rival contentions are to be considered in the light of the general principle that damages in tort are designed to put the claimant he would have been in if the tort had not been committed. The fact that damages may be "at large" for economic torts does not displace the general principle.

255.
In my judgment, this means that PB must establish the true value of its economic expectations under the Contract which it claims have been frustrated by the brothers' wrongdoing.

256.
I cannot, as a matter of principle, see how PB may rely upon the amounts certified by Interim Certificates 34 and 35, and what they say was the amount agreed upon to be certified on valuation 36, without at the same time recognising the true contractual status and effect of the certificates themselves. The fact that HHL repudiated the Contract and (as Mr Paradise's letter of 1 May 2015 serves to illustrate) thereby stopped the mechanism within it for what ultimately would have been final certification after completion of the Works does not, in my judgment, mean that the interim certificates acquire a different character following that repudiation.

257.
If the Contract had subsisted until practical completion PB's true financial entitlement in respect of the Works would have been determined by reference to the provisions of clause 4.15 of the Contract which governs the issue and quantification of the Final Certificate. And any further interim certificates issued under clause 4.9 would themselves have been based upon a further measurement of the Works in accordance with the Gross Valuation provisions of clause 4.16.

258.
It is clear from the final certification provisions of clause 4.15 (and in particular sub-clause 4.15.2) that, although it would not affect any right of the contractor to have received payment under any outstanding interim certificate, the Final Certificate is capable of adjusting the account between the employer. Having regard to the sums "already stated as due in Interim Certificates" and any adjustment to the Contract Sum - which might include, say, the deduction of any liquidated damages for delay (in accordance with clauses 2.32.2.2 and 4.3.2.4) or in respect of defects (clause 4.3.2.2) – the Final Certificate might adjust the account by stating that the balance is not due to the contractor from the employer but the other way about. That result is expressly contemplated by clause 4.15.2 and it confirms that an Interim Certificate really is only interim. Clauses 1.9 and 1.10 of the Contract also clearly highlight the distinction between Interim Certificates and the Final Certificates so far as the lack of conclusiveness (that works are in accordance with the Contract) of the former is concerned.

259.
Ms Lee cited several authorities to me in support of the proposition that the employer's obligation to make interim payments (under similar but not identical standard form contracts to the present one) is of a provisional nature. Two of them – Melville Dundas Ltd (in receivership) v George Wimpey UK Ltd [2007] UKHL 18, at [11], and Wilson and Sharp Investments Ltd v Harbour View Developments Ltd [2015] EWCA Civ 1030, at [53], – concerned an insolvency situation and the second involved the insolvency of the employer. In summary, those authorities confirm that the interim certification of payments to the contractor is part of a statutory-led regime for ensuring cash-flow to the contractor and not one that should prejudice the employer's right to make cross-claims in respect of the works covered by them.

260.
The third authority relied upon by Ms Lee was the decision of Coulson J (as he then was, giving his "last substantial judgment in the TCC") in Grove Developments Ltd v S&T (UK) Ltd [2018] EWHC 123 (TCC). In his decision, addressing the provisions of the JCT Design & Build Contract 2011, the judge emphasised (and again I summarise) that interim certificates operated by reference to sums "stated as due" which may be different from the sum actually due. On that basis, he concluded that it was open to an employer to make a challenge (by way of adjudication or litigation and by reference to what he considers to be the "true valuation" of the application) to the contractor's interim application (made in reliance upon the interim certificate) even where the employer had not served a Pay Less Notice. The fifth of six reasons why Coulson J decided it was open to the employer to take this step, having paid the sum stated as due, was one of equality and fairness (in circumstances where the contractor can refer to adjudication the question of true valuation in the event of the employer serving a Pay Less Notice).

261.
The decision of Coulson J does not subvert the cash-flow regime of interim certification (as he makes it clear that the "sum stated as due" must be paid regardless of any challenge over the true valuation)

but it is further confirmation that the employer's obligations in respect of interim certificates are provisional in nature.

262.
Accordingly, I accept the defendants' argument on Issue 3 that any assessment of damage caused by any of the economic torts will involve a proper valuation of PB's works, as if on a final certification basis.

Conversion

263.
The legal principles governing the conversion claim were not in dispute and the questions I have to decide are primarily factual.

264.
In her opening submissions Ms Lee said it was for PB to prove that they had a right to possession of the materials in question; that they were in the containers prior to Michael opening them; that they were in fact removed by Michael; and that (so far as the claim against Christopher pleaded at paragraph 61 of the RAPOC was concerned) that Christopher had some involvement for which he rather than HHL should be held liable.

265.
Ms Lee submitted that the list of invoices compiled by PB in support of its conversion claim proved very little. She submitted that, save for a few which indicated delivery to the Property, they did not establish that they had been purchased for the Contract or, even if so purchased, that they had not already been incorporated in the Works and paid for by HHL (by settlement of an invoice up to Invoice 33). Nor, she further submitted, do they establish a correlation with what was said to be in the containers at the time Ashfords wrote to say that PB would be collecting them after the weekend.

266.
Mr Bradley made the point in his submissions that the trial of the Issues did not extend to quantification of the conversion claim. The parties' positions were therefore somewhat reversed from those adopted in the debate about the effect of Judge Cotter's third Issue. Mr Bradley said that, in the light of the evidence which showed that HHL had on 22 April 2015 made an unsuccessful without prejudice offer to purchase the materials on site and then, four days later, Michael had caused two of the containers to be broken into, it was difficult to see why the defendants should be given the benefit of the doubt. He relied upon the principle in Armory v Delamirie (1721) 1 Strange 505; 93 E.R. 664. As well as establishing that a finder of property can maintain a conversion claim against others who are not its rightful owner, that case is authority for the proposition that, unless the converted property is returned, the strongest should be presumed against the defendant (in that case the goldsmith whose apprentice had returned to the plaintiff his chimney sweep his find minus its jewel) so far as its value is concerned. In his brief oral opening, Mr Bradley said it was not the expectation of the parties that they would at this trial be getting into the nitty-gritty of the list of allegedly converted items.

The Evidence

267.
With that lengthy discussion of the legal principles out of the way, I now turn to my overall assessment of the witness evidence.

268.

That assessment falls to be made when the scope of the factual investigation necessary for the determination of the Issues is delineated by the following paragraphs within Mr Bradley's written closing submissions:

"9. A number of factual conflicts are engaged in this case, including whether or not [Michael] procured, in fact, the breaches of contract set at paragraphs 10.1, 10.2, 10.4 and paragraphs 55 to 57 of the [RAPOC], as well as the question of whether [Michael] (in particular) effected the conversion of PB's goods.

10. Those specific factual issues aside, at the heart of this case, factually speaking, lie two inter-related factual issues, namely the extent of Michael's control over:

(1) the building project at Hillersdon House; and

(2) the corporate life of HHL.

11. PB accepts that, if the Lloyds truly can show that [Christopher] acted entirely independently of [Michael] in not paying PB's invoices, in terminating the Contract in repudiatory manner (in the process ensuring, among other things, the non-certification of valuation 36) and in putting HHL into liquidation, then realistically its claims (other than that for conversion) are unlikely to proceed much further."

269.
In his oral closing submissions Mr Bradley said that the end of October 2014 - and the exchange of emails between Michael and Mr Offen on 31 October in relation to the proposed engagement of Roger Gibson as a programming expert – marked the start of Michael's "plan" to obtain partial possession of the Property, procure the suspension of the Works and then re-engage PB or others to complete them at a later point in time.

Claimant's Witnesses

Nelson Birch

270.
Mr Birch's evidence is not particularly central to the claims in economic tort where it is the brothers' actions which are under scrutiny. Clearly, his evidence has a more direct bearing upon the conversion claim where it is his firm which is alleging that its property was effectively stolen.

271.
Mr Birch struck me as a straightforward and open witness. Recognising that naivety in a witness (at least one remote from the central allegations of wrongdoing) may be more of an attribute than a flaw, he did strike me as somewhat naïve in his approach to Michael Lloyd's perceived responsibility for honouring the Contract. But, even then, his statements to the effect that he was left in no doubt by Michael that it was his project and his money and decision-making behind it have every support in Michael's own evidence, save for the singular fact that it was HHL's name on the Contract, not Michael's. And, despite Mr Birch's efforts in early 2015, Michael was not a guarantor either. Mr Birch told me that he did not really think he was entering a contract with a company but a contract with Michael. I do not doubt that he may genuinely have regarded Michael as the client, given their discussions before PB entered into the Contract, but that is one piece of evidence I certainly cannot act upon.

272.

When asked questions by reference to documents such as site meeting minutes which indicated that Christopher may have had more of a say in the project than Mr Birch's witness statement recognised, he said:

"I was working for Mike Lloyd. When Michael wasn't there, Christopher was his representative. So I took it to be that he was my boss when Mike was not around, like in my company, you know."

273.
Mr Birch did not accept that it had been envisaged at the outset that there wold be a business at the Property though he did say that, when PB were nearing completion of the main house, they were instructed to take up floors and take out doors "to bring them up to the fireproof standard because it was now going to be used as a …. wanted to be used as a commercial building." He also accepted there was an instruction for the installation of emergency lighting, a toilet for the disabled and the need to re-align the driveway they had put it in so that coaches might use it. But, when asked about the consequences of delay for HHL's proposed business, he said he was "unaware of any income being generated off the property."

274.
Mr Birch denied that he had ever threatened to resign from the project though he had questioned with Nathan Wilmott, when Savills were the Project Manager, the point of PB being on site when they were not getting the information and drawings required: "I'm paying for men to be in the shed waiting to be told what to do." He accepted that he became "very upset both for myself and the person that was paying me that we weren't receiving the information." A programme existed but it did not show when the information was required from consultants. He did not have the impression that Michael had felt blackmailed into personally paying the first £75,000 in respect of preliminaries. His position in relation to the later payments on account of preliminaries was that he told Michael that he expected to be paid a fair day's pay for a fair day's work and that, if there were men on site, PB expected to be paid.

275.
Overall, there was nothing in Mr Birch's testimony that struck me as revelatory so far as setting the context of the allegations against Michael and Christopher was concerned. He did not accept that exchanges between Michael and EFG in late 2014 showed that Michael was doing everything to get funds to pay PB and his position was that he should have honoured "his agreement" to pay. When shown bank accounts of HHL which showed there was not enough at the time to pay Invoice 34 (but a sum of £186,000 as at 1 December 2014) his response was "so why couldn't he have paid me that then?"

276.
In relation to HHL's breaches of the Contract, Mr Birch's statement said that, at a meeting with Michael in mid-December 2014, Michael told him that payment was imminent (in reliance upon which PB carried on work with a view to him moving into the main house) and then, later that month when payment had still not been made, that payment would be made before the Christmas break.

277.
In relation to the conversion claim, Mr Birch denied cutting the chain on the gates at the Property so as to gain access to the site on the morning of 27 April 2015. He also disputed the statement of Mr Clark, who Michael had retained for security that day, which said he (Mr Birch) had been abusive and threatening and remonstrating about a missing box of electrical equipment. Mr Birch had in fact made a further witness statement addressing the alleged threats to Michael, mentioned by Mr Clark, and

pointing out a number of matters which he said undermined the idea he had been guilty of threatening behaviour.

278.
He was cross-examined about the absence of any documentation to support the case of tools having gone missing and the absence of an insurance claim in respect of tools. He said tools were stolen though he accepted that some probably belonged to the workmen themselves rather than PB. As for the insurance claim that had been made in respect of missing materials, Mr Birch accepted that the insurers had rejected this on the grounds that it had been fraudulently made, though it is important to note that the reason behind the insurer's rejection was that PB had not informed the insurer of his claim against Michael (the insurance claim had said "no suspect identified").

279.
The thrust of Ms Lee's cross-examination of Mr Birch in relation to the materials was that the materials on site as at 27 April 2015, as shown by valuation 36, were the same or substantially the same as those which had been included within valuation 33 for which PB had been paid (and indeed valuation 34 for which they had not been). Mr Birch said that he was not involved in the valuations but "James Paradise would not value twice or three times over, would he and neither would our David." Ms Lee put it to him that further materials would not have been delivered to site in 2015 when PB had suspended their works. Mr Birch said "there were items on order, quite a few huge items, actually" and he went on to refer to "exotic item" such as pool marble that might have been delivered.

280.
A suspected scenario which only came out later in Michael's evidence was not put to Mr Birch in cross-examination. This was that, that after the locks on two of the containers had been changed on the Sunday, at Michael's request, and they had been locked again at about 4pm on the Sunday evening, persons unknown to Michael came and moved items into one or more containers in order to be able to demonstrate that one particular container didn't have very much in it by the time photographs were taken of it**.** Michael went on to say that he imagined Mr Birch would have done this (though he doubted it was before nightfall as he had walked the dogs around the Property before dark) and he went on to say that the contents of the relatively empty container may have been consolidated with those of another in anticipation of the containers being moved the next day so as to avoid contents sliding about.

<u>Kevin Binmore</u>

281.
As I have explained Mr Binmore's employer GCC was the Contract Administrator between 12 December 2013 and March 2015.

282.
Mr Binmore was the first of PB's witnesses to testify when it had originally been anticipated that Mr Birch would be giving evidence first. However, Mr Binmore attended the first day of the trial (which for reasons I shall now briefly explain proved to be slightly less than half a day) because he had recently been served by the defendants with a witness summons to produce documents. The service of that witness summons was not technically "late" (see CPR 34.5(1)) but it had overlooked the possibility of the matter being addressed at an earlier "Khanna" hearing (cf CPR 34.3(2)(b)).

283.

Mr Binmore had responded to the summons by producing three boxes of documents which he had compiled over the weekend before the trial at the end of a working week following his return from holiday the preceding weekend. In general terms, the focus of the defendants' further investigation was upon the circumstances in which Mr Binmore had come to issue his EOT in late December 2014 and whether or not, and now expressing the point rather bluntly, there had been some collusion between him and PB in relation to his certification.

284.
At the start of the trial the documents produced by Mr Binmore were still being reviewed by the defendants' solicitors and PB's solicitors had yet to see them. But Ms Lee indicated to me the defendants' team's impression that they might not contain much in the way of new documentation that was not already in the trial bundles. She mentioned that Mr Binmore might also have access to drawings (which were unlikely to be evidentially significant) and had not produced any emails because of time constraints; and the focus of the defendants' interest was upon how he had managed to issue the EOT in circumstances where he had told Mr Offen in November 2014 that it might take four months to certify the extension.

285.
Ms Lee said any shortcomings in the production of documents was probably a matter for cross-examination and it was "issues of credibility" that had influenced the timing of the summons. That timing meant when the trial resumed on Tuesday 10 July, following an adjournment at around midday on the Monday so as to enable the produced documents to be considered, it was Mr Binmore who gave evidence first. In fact, after Mr Binmore had given evidence and during it had identified (but by then not produced) the email of 7 January 2015 mentioned below, the defendants asked me to look again at the terms of the witness summons and to compel Mr Binmore's compliance with one aspect of it. By a short ruling (which I do not intend to summarise here but which appears in the transcript for 10 July 2018) I refused that application, in effect by varying the terms of summons as the CPR provide may be done.

286.
Mr Binmore was cross-examined on a number of points which essentially went to the suggestion that he had failed in his project management duties and permitted the timetable to slip. In response to those he said that the Contract and project had not been set up correctly and he did the best he could with the design team and their service contracts which he inherited. The information necessary for a contract to build was not available at the outset as it should have been. It was also suggested to him that the making of "on account" payments in respect of preliminaries, before an EOT was granted, was unorthodox and not in accordance with the Contract. He accepted that it was not normal but that had been the agreement made and he also maintained it was consistent with the Gross Valuation provisions of clause 4.16. He also accepted that the payment "on account" agreement reached in February 2014 had been necessary to keep the project going forward, thereby giving some support to the defendants' case that the project was otherwise at risk of PB walking off site.

287.
Mr Binmore was also tested in cross-examination about the circumstances in which he had granted the EOT in December 2014 which was the focus of the witness summons served upon him. He said it was a coincidence that it resulted (on a provisional basis) in a completion date of 16 October 2014 which was the same date as that originally requested by PB and he denied the general suggestion that he had favoured PB by involving Mr Birch more than Michael/HHL. He repeated that (having met Mr Birch on 18 December and Michael the following day) neither side was happy with his decision.

288.
On these points, which related to the lack of timely performance of the Contract and the steps taken by Mr Binmore in relation to it, I found him to be an honest witness whose evidence caused me to have no doubts about the propriety of his actions. He said that he had at no stage given a commitment not to proceed to determine the EOT (in the face of the proposal to appoint a programming expert which Michael and Michelmores were to take up with PB but he heard no more about) and his grant of one reflected his own independent assessment, on an interim basis, of what was fair and reasonable. Although Mr Binmore was challenged on his evidence that had not explained to Michael in the New Year the reasoning for what he had done, an email and attachment that he had in mind when giving evidence were then produced during the trial to show that he had indeed sent to Michael on 7 January 2015 a note justifying his decision (it was sent to an email address that Michael had used, and used shortly before, though he had others).

289.
Even if there had been some cause for doubting Mr Binmore's actions, it is not immediately apparent to me how much of a bearing that would have had upon the trial of the Issues. The Issues in the main relate to the brothers' actions in relation to HHL's breaches of the Contract. By 22 April 2015 HHL was firmly in repudiatory breach of the Contract, having previously failed to pay Invoices 34 and 35. There is no suggestion in the contemporaneous documents that any suspicion of collusion between Mr Birch and Mr Binmore (which I find not to have been warranted) was relied upon by HHL, prior to that date, as providing lawful justification for its actions vis-à-vis PB. Neither is it clear to me that any established failings on Mr Binmore's part would have sustained a justification defence to the inducement tort relied upon by PB against Michael.

290.
Instead, the lines of cross-examination of Mr Binmore appear to have had more of a bearing upon the commercial motivation for HHL and Michael acting as they did in late 2014 and the first part of 2015. In that regard, Mr Binmore's witness statement referred to a telephone conversation which he and Michael in early January 2015 (the one demanded in Michael's irate email of 5 January) when Michael accused him of having pulled the rug from under his feet by issuing the EOT. Mr Binmore recalled that Michael told him that, having obtained possession of the house, he had been hoping to withhold payments from PB because he had already paid significant monies on account of preliminaries and until that issue had been resolved he would not be making any further payments. He said that Michael's view was that, even though the EOT was on an interim basis, it legitimised some of the preliminaries on account of which payment had been made. Mr Binmore was not challenged on this aspect of his evidence.

Mr Palmer

291.
Mr Palmer attended the site on 27 April 2017 to assist in the collection of containers by PB in the presence of Mr Birch, two other PB employees and the specialist transport team.

292.
Mr Palmer said the gates to the site were open, and not secured by a chain, and they had not forced entry by cutting a chain. He said he took some of the photographs of one of the containers that had been broken into (exhibited to his statement and showing it to have little in the way of contents) and that, having done so, he called the police to report the theft of goods. He told the police officer by phone of his suspicion that the contents had been removed to the main house. He accepted in cross-

examination that he could not assist with what would have been in the containers prior to that day as he had not been working on the site. Only one of the containers, on which the locks had been changed, concerned him. He said that, when the police officer arrived and PB explained the situation, he said it was “a civil argument between two parties” and did not look for the goods elsewhere. According to Mr Palmer the officer was a Mr Steer-Frost and not Mr Halliday, the defendant’s witness, who arrived later to conduct forensics.

293.
Mr Palmer appeared to me to be an honest witness and I have no reason to doubt what he said.

Mr Goodfellow

294.
Mr Goodfellow’s company was responsible for the architectural and interior design services which it had provided to HHL both through a sub-contract and directly. Mr Goodfellow had been a close and long-standing friend of Christopher and they had known each other for about 20 years.

295.
Mr Goodfellow’s witness statement confirmed that the refurbishment of the Property had been expressly designed around the living requirements of Michael and that it appeared to him that Christopher was “fully employed/funded by his brother.” He said Michael made nearly all the decisions in relation to design matters. He rejected the suggestion in cross-examination that it was Christopher who discussed the design features and aesthetics with him. He said “Mike thoroughly enjoyed the process of every detail of the design and all the finishes and Christopher was enjoying the process” and that in “every instance it was decisions between Mike and I. Chris would have been involved through his interest not his decision”.

296.
He said he had known in 2009 of the brothers’ intention to buy the Property and to develop it as a high-end venue for weddings and hospitality events. He went on to say: “My understanding was that the business side was a potential by-product that …. to enable the house to function as a fall back if Mike ever decided that it was too expensive to run as a private house. So it was always there as a potential to a greater or lesser extent.”

297.
Mr Goodfellow said that his company was owed over £150,000 by HHL at the time of that company’s liquidation and that, at a meeting with Michael at the Property on 17 June 2015, Michael had promised to pay a revised amount of £137,335 (including VAT). He said Michael mentioned CSEL and new invoices were duly addressed to that company. However, despite emails from Michael in July 2015 indicating that the sum would be paid, and indeed that the sum of £48,081.55 had been, nothing was in fact paid. It appears that Michael took umbrage over what Mr Goodfellow said was a light-hearted remark to the effect that a sofa would not be returned unless the balance over the part-payment (as Mr Goodfellow then believed it to be) was paid.

298.
Mr Goodfellow was a frank and reliable witness, whose evidence entirely accords with the picture revealed by the contemporaneous evidence and what emerges from my assessment of the evidence of Christopher and Michael.

Defendants’ Witnesses

Christopher

299.
Christopher was an unimpressive witness. His failure to make a positive impression grew from the fundamental point, reinforced by the evidence later given by his brother, that the evidence plainly showed that he deferred to his brother when it came to significant decisions about the Contract and the position, expectations and claims of PB whilst it subsisted. In essence, Christopher could assist me little with the circumstances giving rise to HHL's contractual failures and the funding issues encountered by Michael. This was a reflection of the reality of the position as I have explained it in my observations above.

300.
When taken to the terms of his and his brother's witness statements on the strike-out application, Christopher accepted that they had stressed the relatively limited involvement of Michael on redevelopment project and the high level of control of it by himself. By contrast, his witness statement for the trial contained a shift to the project being a highly collaborative venture. Christopher accepted that there were more "I" references in his first statement than his second.

301.
At one point in his cross-examination Christopher appeared to concede that the final decision upon contractual appointments on the project lay with Michael though he still stressed that there would have been considerable discussion between them.

302.
The basic problem for Christopher, however, was that the justification for any reference to him either having made decisions on the project without reference to Michael, or even together with Michael as his equal, were really very limited. The shift of emphasis between Christopher's two statements was troubling in itself but I have concluded that even the revised stance did not present an accurate picture. In his written closing submissions Mr Bradley made what in my judgment was a fair summary of the position revealed by Christopher's and Michael's evidence in relation to their respective roles. He said:

"By the close of the Lloyds' evidence, it was apparent that Michael's greater experience across multiple domains effectively left Christopher competent only to: (i) ring around various hotel and venue providers so as to obtain their prices (ii) make design decisions of his own accord where the cost impact was less than £5,000 and (iii) attend to the administrative tasks of paying invoices and so on."

303.
In relation to the payments which HHL had made to Oana and to SHL (see paragraph 50 above) Christopher said those made to Oana were "to pay taxes that were were due". He said there had been a change in the law in Cyprus which meant that SHL was at risk of being struck off if the tax was not paid and there was a very short window for that to be done.

304.
Christopher was shown a letter from Michelmores dated 23 March 2018 which stated "the payments including the reference "Oana" reflect payments to Seizar including payments in respect of interest due". The relevant passage in Christopher's cross-examination includes the following:

"Q. So that was untruthful from what you're telling us.

A. I can't tell you -- I mean, I know that monies were paid to Oana to pay tax payments that were due -- that were due. Whether any of those payments were demanded as rent, I couldn't tell you.

Q. Well, I'm asking you about interest there, not rent.

A. Oh, sorry. In respect of interest?

Q. Mm-hm.

A. Yes, I mean -- sorry. I couldn't tell you whether any of them were specifically due for interest.

Q. You just told us they were not, they were because of this tax change?

A. Well, some of them may have been for the tax change. Some of them may have been for interest due, but I couldn't tell you one way or the other which was which."

305.
The one key milestone leading towards HHL's repudiation of the Contract (by Michelmore's open letter of 22 April 2015) upon which Christopher did give evidence and of which he had a much firmer understanding was of the meeting which he says took place with Mr Kirk the previous day, 21 April 2015, but which PB maintain is pure fiction.

306.
Christopher was adamant that he had attended a meeting with Mr Kirk, Mr Offen and Ms Dunstone at Michelmores' offices on 21 April 2015. He said the advice from Mr Kirk and the two lawyers present was very clear and to the effect that liquidation was unavoidable and that, even though he did not see prior drafts of the letters which Michelmores came to send the next day, he knew the two letters were to be sent.

307.
When taken to a cheque stub dated 27 April 2015 (and therefore after the date of the meeting relied upon by him) which indicated that another interest payment of £10,425 had been made by HHL to SHL, in what looked to be a preferential way if Mr Kirk had indeed advised upon a liquidation, Christopher said he could not recall any advice being given about avoiding preferential payments.

308.
Christopher's evidence was similarly uninformative about certain emails that were written before HHL had gone into liquidation and which indicated that certain of the company's creditors other than PB would be paid, including Michael's email to Mr Imlay on 28 May and his own of 2 June redirecting Savills to CSEL. His answers on the topic, which amounted to acknowledging that some creditors were paid, involved him saying "I don't know the specifics". It was plain to me that Christopher had very little involvement in the decisions as to who would be paid and who would be left to prove in HHL's liquidation.

309.
Christopher did tell me that the successor company, CSEL, had begun business activities at the Property. He referred to shooting parties, weddings and visits to the gardens by gardening societies.

Michael

310.

It is right to note at the outset that Michael was subjected to cross-examination by Mr Bradley that was even more rigorous than that conducted with Christopher and Michael remained calm and courteous throughout. But in my judgment Michael did not come out of it well.

311.
Regardless of any actionable wrongdoing that may have been involved, Michael's part in the narrative set out above did not reveal a particularly edifying picture. He commissioned ever more expensive works through an undercapitalised company, effectively controlled by him, with no significant risk to SHL's and his interest in the Property. Perhaps with some justification give what Mr Binmore said about the poor implementation of the Contract at the design level, he sought to blame in succession the various professionals for the fact that (whatever the ultimate financial reckoning with PB might be under the Contract) PB was in a position of seeking multiple and ongoing extensions of time with attendant cost to HHL. He says that the need to seek lending from EFG was prompted by the need to make a substantial payment to his ex-wife in 2012 but presumably that should have been foreseen at the date of the Contract, and even if it was not, it did not stop him from later adding almost £1m of additional works to the Contract the following year. Michael's protests in the witness box that when (as a consequence of the EOT's granted by the professionals) money had become extremely tight for SHL and HHL he had done his level best to raise further moneys, and even dipped directly into his own pocket for the first £75,000, really served to highlight the financial risks created for those working on the project rather than to provide a compelling justification for his own position.

312.
Michael's evidence at trial did not have the most promising start when, as Mr Bradley submitted, aspects of the brothers' Defence and the evidence relied upon by them on the strike-out application before Judge Havelock-Allan QC (with some success) were at odds with the true picture which emerged at trial. In particular, I accept the following points made by Mr Bradley which show that Michael's earlier stance in these proceedings was a materially misleading one:

i)
the reference in paragraph 76 of the Defence to Michael having been justified in acting in his own commercial interests "and in the interests of SHL and its other investors" was misleading. Michael accepted in his evidence that there were no such other investors;

ii)
Michael should have admitted in an instant the allegation at paragraph 5 of the RAPOC that he had effective control over SHL instead of advancing a plea of "no admissions" in response;

iii)
the averment at paragraph 63 of the Defence that "HHL/the defendants arranged for a locksmith to gain access to the containers" was misleading when Michael had in fact asked the landscaper Mr Yeandle to burn out their locks;

iv)
the account at paragraph 54 of the Defence and (and in his first witness statement), to the effect that the sale of Buffalo Mall did not complete until July 2015 – and, significantly therefore, only after HHL had gone into liquidation - was similarly untrue. The monies were received in early June;

v)

the pleading at paragraph 70 of the Defence, which asserts that on 13 April 2015 Michael and SHL "would be demanding repayment of the moneys loaned to HHL" was, Michael accepted in cross-examination, incorrect.

313.
Mr Bradley categorised all of this as untruthful, misleading and evasive. So far as the alleged evasion is concerned he took Michael to the first letter that Michelmores wrote in the context of these proceedings, on 14 August 2015, and its statement that their client (Michael) had no legal or beneficial interest in the Property. Michael also accepted that was untrue.

314.
In his witness statement in support of the strike-out application, Michael said:

"I acted as an agent and adviser to HHL and my brother in construction works, which was a perfectly natural and reasonable activity given my skills and experience. I did so on an as and when basis in line with my visits to the UK. But at all times Christopher was in charge of HHL as a business."

315.
Quite apart from the fact that HHL never commenced any business, the suggestion that Michael's role in relation to the project was secondary and subservient to that of Christopher and HHL is simply irreconcilable with the wealth of contemporaneous documentary evidence. I have mentioned above the shift in Christopher's position from his own witness statements on this key aspect.

316.
The corollary of Mr Bradley's summary of the really quite limited involvement of Christopher in the project was that he was able, in his closing submissions, to point to passages in the testimony of both brothers which recognised that Michael was involved in drawing up a business plan for HHL; procuring funding for the company; appointing PB as the Contractor; liaising throughout with HHL's solicitors Michelmores in relation to the redevelopment; and (because of his greater experience of JCT contracts) aspects of value engineering, discussions over potential damages claims against Savills as project manager, terminating the appointment of Savills and appointing a replacement project manager, taking the lead with the project team, handling costs, EOT's and the payment of preliminaries.

317.
In relation to dealing with Michelmores in connection with the Contract, the trial bundle was replete with communications between them and Michael. Michael was treated as the client alongside HHL and, with few if any independent communications between between Christopher and the solicitors, he gave instructions in relation to the Contract on that basis. At the very outset, when advising upon the structure between HHL and SHL, by a letter to Michael dated 26 August 2010, Michelmores had said that both HHL and the Cypriot company would be their clients and "so far as possible, you wish for our instructions to be rooted [sic] through Hillersdon House Limited and, so far as possible, our fee accounts will be addressed to Hillersdon House."

318.
As with Christopher, Michael too has therefore shifted his position during the course of these proceedings. And, as with his brother's evidence, I am left with the concern that the shift may not have gone far enough. Although Michael put it in terms of him having been "mandated to do a lot of things", he appeared to be running the project generally.

319.
Given what I have said above in my observations upon the reality of Michael's interest in the Property (which rest in large part upon what he has said in his own witness statement for trial about what he said was his openness in relation to his beneficial interest) and the actual extent of his decision-making in the redevelopment project, it is curious that Michael was at such pains in his evidence to underplay the true level of his involvement. A central theme of his answers in the witness box as to why he could be seen from the documents to be taking the lead role in relation to PB and others retained on the project was that he was doing so as "funder". He was not, however, prepared to concede that this meant he had ultimate control over all aspects of the building project (what Mr Bradley had presented to Michael at the outset of his cross-examination as "option 2" which, in the form of a series of propositions, Michael might accept as the alternative to being taken through the detail of many documents designed to show his ultimate control, as in fact happened).

320.
I have concluded that the reasons for Michael's reluctance to concede a greater level of involvement and control over HHL's contract with PB lay not only in his recognition that it might not present him in such a favourable light on the Issues (when so much of the impetus behind those being singled out for trial derived from the separate legal personality of HHL) but also his anxiety to ensure that, certainly for the period when he was not domiciled in the United Kingdom, he should not be too closely associated with the affairs of a company of which, on advice, he had deliberately not become a director or shareholder. I can think of no other reason.

321.
In relation to the first reason, it is right to record that Michael rejected all suggestions of wrongdoing put to him in the witness box including Mr Bradley's summation (in the light of the various torts alleged against him) that he was "not only a liar, but a thief". He protested that, from his perspective as a funder, he had tried his best to raise funds so that PB might be paid and the contemporaneous documents showed that.

322.
As to the second reason, a flavour of this appears in the following exchanges (which occurred soon after Mr Bradley had embarked upon "option 2"):

"Q. So do you at least accept that significant sums, if they were to be spent, you were the ultimate decision-maker on that topic?

A.
It would be raised to me as whether I approved of the intended spend as the funder of the project, absolutely.

Q. We're not doing well, I'm afraid, on my option 2, but the second proposition that I put to you, the overriding one, is you had ultimate control over all aspects of the corporate life of Hillersdon House Limited, didn't you?

A. I had absolutely no control over the corporate life of Hillersdon House. Deliberately so because from the very outset Hillersdon House was established to be independent of me and totally without my influence, for specific tax reasons. And those tax reasons are that if I was controlling it, my domicile would be deemed to be onshore which is what I didn't want to have. So it was specifically established that Christopher would be the sole shareholder, the sole director and he would be entirely responsible for the corporate life of HHL. And it's always been that way."

323.
The difficulty created by that answer is that, aside from the formal administration of HHL, the "corporate life" of the company (in the sense of its business) was the Contract over which Michael had taken the reins. And HHL's business never moved beyond that.

324.
Michael was even involved in HHL's liquidation, he rather than Christopher being the one who attended a meeting with Mr Kirk on 10 June 2015 (which, so far as the contemporaneous documents are concerned is the first referenced date for the company seeking advice from an insolvency practitioner). Michael was unable to provide a convincing explanation for his attendance at that meeting which was at odds with his witness statement that he had very little involvement with Mr Kirk, or Michelmores, in connection with the liquidation and that Christopher took the lead as was to be expected. He said it was a meeting to discuss the chattels at the Property but, as one would expect, that only took place later (in December 2015) and well after Mr Kirk had been appointed liquidator.

325.
The upshot of Michael's unwillingness, for whatever reason, to recognise that he often acted as if he was the client under the Contract is that I did not find his answers generally, on the significant matters in dispute in this case, to be ones over which I could have any real confidence in their reliability.

326.
My concerns about the reliability of Michael's evidence become particularly acute when, in relation to HHL's admitted breaches in first not paying Invoices 34 and 35 and then terminating the Contract, it is his and Christopher's case that those breaches took place in circumstances where:

i)
(taking the words from paragraph 321 of Michael's witness statement) by early December 2014 neither SHL nor Michael had any ability to provide further funding to HHL in the shorter term with the consequence that HHL could no longer meet its payment obligations to Palmer Birch as and when they fell due;

ii)
(per paragraphs 70 and 71 of the Defence, at least until Michael's witness statement and testimony when he said that it was incorrect to say he decided to call in the loans on 13 April) Michael decided in early April 2015 to cease providing funding to HHL and to call in his and SHL's loans to HHL, and informed Christopher of his decision on 13 April 2015; and

iii)
it was that decision by Michael which precipitated the liquidation of HHL (upon which Christopher says he received professional advice a little over a week later).

327.
Michael says that those circumstances explain the unfortunate commercial circumstances in which HHL and PB, as the company's counterparty, found themselves at what proved to be the end of the Contract, whereas PB (who of course bear the legal burden of establishing as much) urge me to conclude that these suggested explanations are a mask for the wrongdoing which lies behind them.

328.

As to Michael's protest that the funding for payment of Invoices 34 and 35 was simply not there, I have already noted that this is true at least so far as payment in full of either of them was concerned. Even though EFG, when agreeing to advance the further £360,000 in November 2014, appeared to contemplate that what became Invoice 34 would be paid using its monies and the VAT refund, that did not happen and monies that might, together with the balance in HHL's account, have been used to pay that invoice were applied elsewhere instead.

329.
In relation to the payments made by HHL to Oana and SHL, Michael gave these answers in cross-examination:

"… during 2014 the Cypriot authorities had had a change of legislation that required companies to bring all of their accounts up to date with immediate effect, to pay any taxes that were due, obviously, and to pay a new tax that was introduced called the defence tax, which was an arbitrary tax, as far as I could understand it, but something that the Cypriot government were doing to raise funds, and that defence tax was levied on company loans, both in and out of companies, I believe. There was a sudden notification from the Cypriot managing company that all of the companies needed to be brought up to date by the end of the year to comply with this legislation or the companies would risk being struck off. It was a way of, you know, raising funds for the Cypriot government in short order ……."

" …… part of the legislation was also a stipulation that all company loans, whether external or inter-company loans, had to carry interest. Prior to that, under Cypriot law, contracts weren't required to carry interest and they obviously changed it and suddenly everything had to be adjusted. But I seem to remember, I think I'm right in saying, that the Seizar loan to Hillersdon had a provision for interest in it."

330.
In relation to his conversation with Mr Binmore in early January 2015 (see paragraph 290 above) Michael said initially that Mr Binmore's account was not truthful, then that it was "a version of events" and that his (Michael's) remarks were specifically focused upon his unwillingness not to pay any further sums in respect of preliminaries rather than any sums at all. However, as Mr Bradley submitted, the difficulty with that explanation is that two months earlier (at the meeting at Michelmores on 7 November 2014) Mr Binmore had already taken on board that "the client has refused to pay the preliminaries and the client has threatened to walk".

331.
Michael denied that he had singled out PB for prejudicial treatment (and it is right to note that he was cross-examined about other decisions he had made to challenge invoices from Savills and Guy Goodfellow Limited) and he maintained the position that it was only after 27 April 2015, and what he said were the threats to him made by Mr Birch, that "I decided on my own that relationships -- my relationship with Nelson had irrevocably broken down, and that I felt no compunction because I had no legal liability to pay him that I should be concerning my limited funds to paying him."

332.
Michael arranged for Mr Yeandle, who had been carrying out landscaping works, to burn off the locks of two containers on the Sunday before PB arrived to collect their containers from the site. He did so because he wanted to recover the Lutron electrical faceplates when his suspicion was that he would otherwise not see them again. Michael denied being responsible for any items being removed from PB's containers on that last weekend in April 2015 other than the Lutron face plates (for which HHL had paid and for which Christopher had been looking since January) and items of sanitary ware

intended for Jane's Cottage which he said also belonged to HHL. He said that when he went into the containers to look for the Lutron faceplates there had been materials all over the racks. I have already mentioned, in connection with Mr Birch's evidence, Michael's suspicion that others came to move the contents of the one container after it had been locked again (the new keys being left in the replacement locks). He said he thought it was Mr Birch who was responsible.

333.
Michael said he engaged the services of Nobby Clark to provide security for PB's visit the next day because he "expected that Nelson would take more than just his own property and react aggressively to the recovery of the faceplates."

Mr Halliday

334.
Mr Halliday was the scene of crime officer who attended the site on 27 April 2015 and inspected one of the containers (only) on which the original locks had been burnt out and fitted with replacement locks and keys. He took the new locks and keys away for forensic testing and DNA analysis. His witness statement exhibited the photographs he took that day. In the witness box Mr Halliday produced his short crime scene report which he made that day. It records a visit of about an hour, the suspected offence of "theft" and mentions having spoken to Mr Palmer and "items taken from within".

335.
Until he gave his evidence Mr Halliday was unaware that Michael had asked Mr Yeandle to burn out the locks.

336.
Mindful of what was said in Mr Clark's witness statement, I asked Mr Halliday whether he remembered telling anyone that he would not be undertaking any fingerprinting or forensic testing. He replied: "No, I would have said I would have took the locks for forensic testing, my Lord." Like the rest of Mr Halliday's evidence, that statement struck me as being demonstrably true in the light of what transpired that day.

Mr Clark

337.
Mr Clark had been hired by Michael, in the light of Ashfords' letter of Friday 24 April, to provide security services at the time of PB's visit. He attended with his son Carl.

338.
Mr Clark's witness statement said that he had had previous dealings with Mr Birch and that he was prone to behaving aggressively from time to time.

339.
Even though Mr Birch and the PB representatives and specialist transporters had arrived earlier than Ashfords had indicated, Mr Clark was there before they arrived. He said that when he arrived Michael told him that Mr Birch had made a number of verbal threats of violence directed at himself, his family and the Property. Mr Clark said that when Mr Birch arrived later he was indeed angry and verbally threatening towards him (Mr Clark) and also intimating threats towards his son. He maintained this position whilst recognising that a photograph showed them drinking takeaway coffee together (which Mr Clark said was later and after he made it clear the aggression "wasn't going to work with me"). He

said that Mr Birch went into both the containers that had been broken into and again became loud and angry (and repeated threats directed at Michael) when he could not find a box of electrical items.

340.
Mr Clark said that he spoke to the scene of crime officer who was not in uniform (and which must therefore have been Mr Halliday) and that he told him he would not be undertaking any fingerprinting or forensic testing. Mr Clark thought that the reason why photographs of one of the containers showed it looking quite empty was because it was taken by the police officer and PB had started clearing the site. On that basis, and recognising he may have made a mistake, he qualified his witness statement which was to the effect that when the two containers which had been broken into had been lifted onto the low loader the weight of their contents caused the hydraulic lifting arm to struggle under the load.

341.
I have concluded that I cannot place much reliance upon Mr Clark's evidence in circumstances where his evidence about what Michael told him (about prior threats of violence having been made by Mr Birch) and what Mr Halliday told him (about there being no intention to conduct forensic tests) is not supported by those other witnesses; and where Mr Clark appears to have been confused as to whether or not the containers in question were or were not filled with contents.

Mr Yeandle

342.
Mr Yeandle had carried out landscaping at the Property, initially as a sub-contractor of PB and then directly for HHL. He said that, as a result of being on site, he was familiar with the shipping containers which had the usual kind of building materials within them such as bags of sand and cement, wiring, piping and (in a container whose locks were not changed) paint. He said that tools were not stored in the storage containers but in the site office.

343.
Mr Yeandle said he changed the locks on the two containers, at Michael's request, after he had telephoned a locksmith who was unable to attend (because the locksmith had, in fact, lost his keys). In those circumstances, he agreed with Michael that he would burn out the existing locks with an oxyacetylene torch. It was necessary to do this on two containers because Michael could not find what he was looking for within the first and it was only the second which yielded a box (not a big one) which Michael took away. He did not see Michael remove anything else but he did see that both containers were full of builders materials, both on the floor and on the side racking. He clarified that they were not filled to the brim but there were materials in both, allowing for a "pathway" on the floor. He said he did not later see any pile of the materials that had been in the containers anywhere else at the Property.

344.
As to what happened the next day, Mr Yeandle said that when he arrived to meet Mr Clark he had noticed the chain and padlock on the site gates were missing and he was suspicious it had been cut. On advice from Mr Clark he kept away from the PB representatives that day and said he became aware (without recalling how) that Mr Birch had made a fuss about a box of components having been taken. He said that he spoke with Michael the following day and was unaware that any threats had been made the previous day but was concerned that there might be repercussions and advised him to hire a security team with dogs.

345.
I have some doubts as to whether Mr Yeandle did bother to call a locksmith, as opposed to offering immediately to cut out the locks, but otherwise his evidence struck me as generally reliable.

Findings

346.
In the light of my assessment of the testimony considered against the contemporaneous documents, I reach the following findings.

i)
Finding 1: Michael was fully aware by no later than 19 November 2014 that HHL had no right to suspend the Works.

Reason: Mr Offen advised as much at a meeting with Michael on that date.

ii)
Finding 2: The non-payment of Invoice 34 after 15 December 2014 and non-payment of Invoice 35 after 20 January 2015 constituted breaches of contract by HHL. As already noted, this is admitted by the defendants and correctly so.

iii)
Finding 3: The payments to Oana, SHL's administrator, around the time Invoices 34 and 35 were falling due constituted a misapplication of HHL's monies but the payments to SHL in respect of interest did not.

Reasons: I note at the outset that (consistent with the leitmotif of this judgment) the brothers' testimony in relation to these payments showed that Michael had a greater understanding of the purpose of these payments than did Christopher. As for the payments to Oana, routed through Christopher's bank account and often made to her in a lesser sum than HHL had paid to him, I can see no justification for HHL having made these payments for the benefit of SHL (in discharge of a tax or other administrative cost) so that it might avoid being struck-off. HHL's relationship with SHL was purely contractual and the only payment obligations to SHL were those under the Lease and the Loan Agreement. Christopher's acts in making the payments to Oana therefore appear to have amounted to a breach of his duty to HHL. Although there is no direct evidence of Michael having instructed the payments to be made, the fact that he was the beneficial owner of SHL and was otherwise in close control of HHL's affairs lead me to conclude that he was implicated in the misfeasance. In relation to the payments to SHL, I have already observed that (whatever may have been said in HHL's accounts about the SHL loan being repayable on demand, unsecured and interest-free) the Loan Agreement of July 2012 did contain a provision for interest to be paid quarterly in arrears. Although, consistent with the nature of the legal advice which led to its inclusion, it appears that SHL did not in practice charge interest prior to late 2014, Michael's evidence on this point explained why SHL came to do so as a result of a change in Cypriot law in relation to the charging of interest. There was nothing wrongful in SHL, as a result of that change, invoking the interest provision in the Loan Agreement.

iv)
Finding 4: By no later than early January 2015 Michael had fully in mind the negotiating leverage available to HHL as a limited liability company with no cash resources of its own, significant debts and a precarious tenure of the Property.

Reasons: Michael's email exchanges with Mr Offen on 8 January and 16 January 2015 brought to the fore the prospect of HHL dropping out of the picture with the value of the Works preserved for SHL. Michael cannot have been previously unaware of this possibility given the careful structuring of the interests of SHL and HHL about which I have made observations. Indeed, he may have been more mindful of it than Mr Offen who, it appears, had not been involved in the earlier advice upon that structure given by his colleagues. On 8 January, Mr Offen had sent Michael the draft of the letter which he came to send to Mr Birch on 12 January 2015 proposing a general suspension of work. I have a suspicion that the benefits of limited liability and of the contractual structure had come back to the front of Michael's mind, in the context of ongoing issues over the EOT, claims for preliminaries and what came to be unpaid Invoice 34, at an earlier point in time. I say that because of the terms of the emails passing between Michael and Mr Offen on 31 October 2014 (the date upon which Mr Bradley relies as the start date of the plan to get partial possession of the Property and then suspend the Works). The "angles that we can take advantage of so let us be careful about what is said to PB" were not, it appears, set out in a fuller email the following week as Mr Offen contemplated. For all I know, those angles may have covered the liquidation scenario. But I do not regard suspicion on that front to be a safe enough foothold for any earlier date in the finding I make next. For all I know, the further option (beyond "plan A" mentioned in what appears to have been Mr Offen's next email of 25 November 2014) may have been the suggestion of a consensual suspension of works, which is what Michael did in fact later suggest to PB.

v)

Finding 5: By no later than the end of January 2015 Michael and Christopher (whose involvement was necessary because he was the sole appointed director of HHL) had decided that the preferred route for getting rid of the existing and further contemplated financial claims by PB under the Contract, with SHL continuing to enjoy the benefit of the Works to date, was the liquidation of HHL. By no later than that time, they decided and colluded to act accordingly.

Reasons: At the beginning of January 2015 Michael was furious that Mr Binmore had proceeded to determine valuation 34. Michael had been holding out for the appointment of an independent programming expert as the way forward in lieu of any early determination of PB's EOT application. In his cross-examination he had confirmed that an email he had written to Mr Paradise on 7 December 2014 (about an additional heating item to be included in valuation 34) had in mind that payments would not be paid pending the proposed joint expert determination. However, by proceeding to award the (interim) EOT Mr Binmore had frustrated Michael's expectations and Michael's email to Mr Binmore of 5 January speaks for itself. It appears that Michael gave up on the Contract Administrator after that. He did not attend the site meeting which Mr Birch said took place on 15 January 2015 (even though Mr Birch said Michael was at the house) whereas, that time, Christopher did (at least for part). Mr Offen's email of 16 January had highlighted that liquidation might not only become an "option" but also a "preference" and that SHL would "enjoy the benefits of the freehold including the building works undertaken to date." It cannot have been anything but obvious to Michael and Christopher (in circumstances where they knew HHL could not suspend the Works and had not persuaded PB to agree a consensual extension on HHL's proposed terms) that their self-help remedy for the grievances over the delays and attendant cost which had been building up over the previous year, and now the further EOT award, was one which lay in leaving PB high-and-dry on its outstanding invoices through the liquidation of HHL. The liquidation of HHL was not an inevitable outcome as at the end of January 2015. EFG were not at that time threatening to pull their funding of SHL but were instead content to see it in place in anticipation of the receipt of the Buffalo Mall monies. The EFG facility remained in place (even though the Buffalo Mall monies were, in the event, received by

Michael later than anticipated) and by the end of 2014 the bank had released the full £360,000 conditionally agreed in November. Mr Imlay's later email of 17 March 2015 (see paragraph 73 above) summarises EFG's position in relation to the anticipated use of the Buffalo Mall monies to pay past debts and future costs of the project. The continued funding by EFG and the receipt of the Buffalo Mall monies would have enabled the remaining Works to be completed. However, Michael had told Mr Binmore in early January that he did not intend to make further payments to PB (a position entirely consistent with his email of 5 January complaining that Mr Binmore had put HHL in a very disadvantaged position). And in his meeting with Mr Birch on 5 January Michael had proposed, if not instructed, a suspension of works and he followed that with his without prejudice proposal on 12 January inviting PB to suspend the Works and not to press for outstanding payments in the meantime. Even though Ashfords, on 10 January, gave formal notice of suspension, by 15 January Michael and Christopher knew that PB were reserving the right to bring proceedings in respect of Invoices 34 and 35 after 20 January and proposing that Michael provide a personal guarantee in respect of them if they were not to be paid until after 15 April 2015. There matters might have rested, so far as any the parties' respective positions under the Contract was concerned, but Michael was also acutely aware that, unless something was done by HHL to stop it, the process which would in due course lead to Interim Certificate 36 would continue. When Mr Binmore told him in January that he was working on the final resolution of the EOT request and the cost up to PB's suspension, Michael expressed his concern to Mr Offen that PB were cooking up a further claim to payment and that they needed to "jump on this very hard, very fast". The liquidation of HHL would mean that, using the Buffalo Mall monies, the project could be completed otherwise than through PB under the Contract with no financial exposure to Michael and, instead, only benefit to him (as the ultimate beneficial owner of the Property). The fact that those monies were received before HHL first took formal insolvency advice from Mr Kirk on 10 June 2015 (as to which see my seventh finding below) confirms that a decision had been made not to use them in further funding of the Contract but instead to liquidate HHL.

It is right to note that in the period between January and June 2015 there is not much in the way of email traffic involving Christopher which might be said to implicate him in a plan to see HHL abandoned as the development vehicle. However, Christopher confirmed in the witness box that his practice at the time was to permanently delete emails quite soon after receiving them (with his deleted items folder automatically deleting after a while) so that there were relatively few from him throughout the period of the Contract. His witness statement says that (having received Interim Certificate 35) he had "a number of telephone conversations with Mike in early January 2015; not discussing the interim payment certificates, rather, discussing the longer term solution to HHL's problems." He also says that he firmly advised Michael in the middle of January against providing the personal guarantee that Mr Birch had proposed. The brothers were therefore discussing the general position of HHL under the Contract. Also, it is obviously the case that, as the sole appointed director of HHL, his involvement in the decision to abandon HHL, and the Contract, was plainly necessary. The references to Michael telling Christopher about the meeting on 13 April (see my next finding) and to Christopher saying he attended a meeting on 21 April (see my seventh) confirm the point.

That Christopher was a willing if less active participant in the plan to see HHL go into liquidation, and to repudiate the Contract in anticipation of that event, is illustrated by him being willing to relinquish to Michael the decision-making on behalf of HHL. For example, it appears he did not think to question the implications of Michael's email to Guy Goodfellow of 16 February 2015 (indicating there would be no more payments to PB) when he received the earlier draft of it. And he was content that Michael should attend the meeting with Mr Kirk on 10 June 2015 on behalf of HHL. The basic point is that Christopher's prior agreement and support was, of course, necessary to bring about the demise of

“his” company HHL so that it might be replaced by CSEL (a point highlighted by the fact that it was, inevitably, his name at the bottom of the narrative of the company’s history, including the reference to it seeking insolvency advice on 10 June, which was presented at the section 98 meeting).

vi)
Finding 6: The replacement of GCC as Contract Administrator by Alder King did not dissuade Michael and Christopher from pursuing the liquidation option but instead reinforced their decision to pursue that course.

Reasons: Although the termination of GCC’s appointment on 11 March 2015 was the way in which HHL directly (and temporarily) “jumped on” Mr Binmore’s ongoing determination of the EOT request, the attraction of liquidation as a means of securing the value of the Works to date without paying for those covered by Invoices 34 and 35 would still have been obvious to Michael and Christopher. Mr Binmore’s replacement, Mr Edmondson, by his letter of 20 March 2015, left open the option that another contractor or contractors might complete some or all of the remaining works instead of PB. Mr Edmondson attended the site meeting 13 April 2015, the day after Michael had formally confirmed Alder King’s appointment, to discuss “costings and the legal position”. Michael (who was present at the meeting) and Christopher (who said Michael spoke to him about it) said that nothing much was decided at the meeting. I have already noted that this was a departure from the terms of their Defence. However, the terms of Michelmores’ open letter of 22 April 2015 support the clear inference that a decision was made at the meeting to stick with the liquidation option and to decide upon how it should be implemented. I say that because the statements in the letter that no third party funder was prepared to extend any existing loan facility or to provide any new funding facility to HHL, to enable payments or completion of the Contract, were certainly against the spirit of what Michael and EFG were telling each other in the weeks and days before (see paragraphs 73, 78 and 83 above). If the Michelmores’ letter was strictly and literally accurate, because the communications between Michael and EFG were (perhaps now conspicuously) silent in relation to any funding for future works being routed through HHL, then that is only because liquidation was inevitable only once Michael, looking to SHL’s and his own interest in the Property, had decided to abandon HHL as his chosen vehicle for developing it. Michael’s emails to Mr Paradise on 28 April 2015 (in which he said “we will push on with the works regardless” of whatever PB decided to do in the light of the Michelmores letters “so soon as you have a handle on the costs to complete”) and to Mr Imlay on 28 May 2015 (quoted in paragraph 97 above) say it all in relation to his chosen course. In relation to the email to Mr Imlay, I note, bearing in mind part of EFG’s security for its loan to SHL included a guarantee from HHL supported by a charge over HHL’s lease of the Property, that the bank does not appear to have greeted the announcement of the company’s liquidation with any surprise or objection.

vii)
Finding 7: Christopher did not receive advice on 21 April 2015 from Mr Kirk, the insolvency practitioner later appointed as liquidator, that HHL should be put into liquidation so as to justify (commercially if not contractually) HHL giving notice of immediate termination of the Contract the following day.

Reasons: First, there is the absence of any note of the meeting, a point heavily emphasised by PB in circumstances where other solicitors’ attendance notes have been disclosed. That is an indication either that no meeting took place or (which would be consistent with my above observation about the inaccuracy of the open letter of 22 April) that the minutes of it would not support the case that the proposed liquidation was borne by genuine concerns over HHL’s then ability to meet past and future claims under the Contract but was instead a purely tactical manoeuvre. The lack of a documentary

record extends to an absence (despite solicitors' correspondence on the point) of any note, record or contemporaneous email from Mr Kirk who later reported to creditors at the section 98 meeting that insolvency advice was sought from him on 10 June 2015. Nor is there any contemporaneous evidence of Christopher communicating with Michael about the advice allegedly given by Mr Kirk which, having regard to what would have been Michael's obvious interest in learning of it, is a further oddity. There is then the point that I have made in connection with my fifth finding above that the continuing preparedness of EFG to lend support for SHL (which still held good for April, in the light of the anticipated receipt of the Buffalo Mall monies, as it had for January) meant that there was no obvious reason why HHL should have felt more financially exposed in April than it had been before. The fact that Michael, in his testimony, confirmed that the Defence was wrong to say that he decided on 13 April to call in the loans to HHL further reduces the pretext for Christopher obtaining insolvency advice at that time. On 20 April, the day before the alleged meeting and in the belief that the Buffalo Mall monies would be arriving the following week, Michael had told EFG he would be able to lend £1m to SHL for the completion of the project. True it is that PB had through Ashfords reserved the right to sue over Invoices 34 and 35 but no proceedings had been brought against HHL by mid-April. As for the work towards what might become Invoice 36, the replacement of GCC by Alder King in March 2015 meant that there was less financial pressure for HHL on that front than there had been in January. That advice had been given on 21 April to put the company liquidation is also at odds with the terms of Michelmores' letters written the following day. As to the open letter, it talked about liquidation "sooner or later" and, when read alongside the without prejudice letter, it is clear that the prospect of liquidation was being used as a negotiating lever in a manner wholly consistent with my fourth finding. As for Christopher's claim that the letter instead reflected advice received from Mr Kirk the previous day, it also seems to me inherently unlikely that (at an initial meeting) Mr Kirk would have offered advice to justify Michelmore's assertion that "in the event of a liquidation there will be no distribution to your client". The idea of Mr Kirk forming such a view at an initial meeting is at odds with the fact that, once appointed as liquidator, he took steps to obtain a formal valuation of HHL's leasehold interest. Christopher said in his evidence that the alleged meeting had lasted about an hour, or possibly an hour and a half, and that (allowing for what he said was the likelihood that Michelmores would have provided Mr Kirk with some background) he had not had significant discussions with him about the financial status of HHL, but only talked about the company's bank balance and the amount of outstanding invoices. Finally, there is the point that if advice to put the company into liquidation had been given on 21 April then one would have thought it would have involved Christopher being told to consider carefully the implications of HHL making any further payments out of its bank account and yet Christopher could not recall such advice and further payments to Oana, SHL and others were thereafter made. The fact that Christopher has sought to introduce what I have found to be the fiction of an earlier meeting with Mr Kirk on 21 April 2015, in an attempt to provide commercial justification for HHL's action in terminating the Contract the following day, bolsters my fifth finding of collusion between the brothers.

viii)
Finding 8: The notice of immediate termination of the Contract given by Michelmores' letter dated 22 April 2015 was a repudiatory breach of the Contract. This is admitted by the defendants and, again, correctly so.

ix)
Finding 9: Christopher's collusion with Michael after January 2015 was not such that he can properly be described as having acted only within the scope of his constitutional role within HHL, so that his

part in it cannot be treated as justifying liability only on the part of HHL (which has not been alleged by PB) and not him personally.

Reasons: Had Christopher been acting constitutionally he would not have permitted his brother to operate as a de facto director of HHL in controlling the construction project and adding to the scope of the Works. I say de facto director, rather than shadow director, because there was no question of Michael lurking in the shadows. Michael's decision-making in relation to the Contract was open and plain for all to see at the time, including Mr Birch and HHL's (and his) solicitors Michelmores. The termination of GCC's appointment in March 2015 is but one example: Mr Offen prepared a letter of termination for Michael, saying it should be put on HHL's letterhead and signed by a director, and Christopher duly obliged without, it seems, giving any independent thought to it in his capacity as director (or shareholder). If Christopher had been acting constitutionally, and in so doing recognised and respected his sole de jure directorship, he would have kept some written record of the advice which he said he received at the alleged meeting on 21 April 2014, if not held a properly minuted board meeting to record that momentous advice. As I have found that the meeting did not in fact take place, that is one part of the evidence which shows that neither was Christopher acting bona fide. The evidence goes further than that. If the concept of "bona fide" in this context (see paragraph 208 above) is conditioned by the duty to act bona fide in the best interests of HHL then there is no indication that, in his discussions with his brother, Christopher sought to protect the lease and proposed business of HHL. He was instead content to play his brother's tune. True it is that HHL had no "claim" upon SHL or Michael for further monies and the reality of the position behind the funding arrangement (paragraph 128 above) brings one full circle back to the reasons why Christopher had been content from the outset to see Michael run the project which bore HHL's name. But Christopher knew that monies were available to see the project through to completion. So much is obvious from the fact that it was CSEL which stepped into the breach: a 2015-2013 Business Plan appears to have been prepared for CSEL even before HHL went into liquidation (it was undated and appears to have adopted some text that would have been appropriate for HHL writing as at May 2014 but, consistent with other text within it, appeared in the trial bundle as if prepared in the Spring of 2015). HHL lost to CSEL the substantial investment in the Property that had been recorded in its accounts without, it appears, demur from Christopher. For example, there is no indication that Christopher sought to press Michael as to why the total sum of up to £1m which EFG had confirmed on 17 March 2015 could be used to pay past and future debts on the project, upon receipt of those Buffalo Mall monies, should not continue to be channelled through HHL (which were received before the meeting of HHL's creditors was convened). Instead, when Savills pointed out to Christopher in early June 2015 that a relatively small invoice of theirs remained outstanding from 2014, Christopher was content to respond on 2 June 2015 that "Hillersdon House Limited has now been closed down and new invoices should be sent to: Country Sporting Experience Limited (address details etc remain unchanged)". That was before Michael had even met Mr Kirk on 10 June 2015. It is clear, therefore, that Christopher was not acting on behalf of HHL but acting independently of the company's interests to serve instead the interests of his brother.

x)
Finding 10: Christopher therefore acted in a way which exposes him to liability under the one economic tort which is alleged against him, the unlawful means conspiracy.

Reason: He cannot seek the protection of a corporate veil which had become largely shredded by a combination of his own actions and abnegation of his own director's role during the life of the Contract. If, as was the case, Christopher was prepared as often as not to act as if he was not the sole

de jure director of HHL then testing his potential personal liability on the hypothesis that he was not a director, in accordance with the MCA Records v Charly Records test, becomes quite straightforward.

xi)
Finding 11: For much the same reasons Christopher cannot seek shelter behind HHL in respect of the claim in conversion that is made against him if he participated in any act of conversion.

Reason: The allegation against him in paragraph 61 of the RAPOC is that he "used or agreed to the use of the materials and tools on behalf of HHL". Although I have concluded that a decision to see HHL founder had been made prior to events of 27 April 2015, the company did not go into liquidation until 25 June 2015 and its leasehold interest subsisted until some point after. There is, therefore, at least a temporal basis for the allegation.

xii)
Finding 12: Materials belonging to PB (but not tools) were removed by Michael, or on his instructions, when he had no right to take them.

Reasons: This conclusion rests fundamentally upon my assessment of the witness evidence in the light of the known and uncontroversial facts. Those facts include Michael having caused the locks of two containers to be burned out so that he could gain access to them and remove two items of property (treating the faceplates as one) which he said belonged to HHL. I consider it inherently unlikely, in circumstances where PB's solicitors had given notice on the Friday of their intention to collect their property after the weekend and where Mr Clark and Mr Yeandle were at the Property on the Monday morning before PB's representatives arrived, that PB managed to gain access to the containers overnight, after Michael had walked the dogs. That allegation was not put to Mr Birch or Mr Palmer. Only Mr Clark's evidence appeared to contemplate that the containers might have been emptied that morning, during the arranged visit, and I do not find his account to be a reliable one. Michael and Mr Yeandle said that both containers were quite full of materials on the Sunday. As for the suggestion that some or all of those materials had already been paid for by HHL under valuation 33, that is at odds with what Mr Paradise described in his email to Mr Young as the "supplementary list of the additional "materials on site" that we viewed" on 21 April. Although the terms of the letter did not recognise PB's ownership of the materials, those shown in Mr Paradise's list, and an earlier one, were the subject matter of Michelmore's without prejudice letter of 22 April. However, I am not satisfied on the balance of probabilities that there were tools in either of the containers and, on the very limited evidence which relates to tools as opposed to materials, I find that any tools (whether belonging to PB or their workmen) would have been in the other container or containers used as a site office.

xiii)
Finding 13: There is no evidence to implicate Christopher in the conversion of PB's materials.

Reasons: The cross-examination of Christopher did not seek to implicate him in the removal of tools and materials. Further, any involvement on his part (of which I am not persuaded) would have been ostensibly for the benefit of HHL and yet it follows from my fifth and ninth findings that at the end of April 2015 the brothers recognised that HHL was to have no subsisting interest in the Property.

Decision

347.
Where, then, do those findings lead in terms of my determination of the Issues?

348.

In relation to the inducement tort alleged in paragraphs 10.1, 55 and 56 of the RAPOC, I conclude that Michael has not incurred any tortious liability in respect of his failure to fund. It is important to note that, despite the quite general terms in which the allegations in those paragraphs are expressed, they do assume a “failure” on Michael’s part to put HHL in funds so as to avoid a breach, through non-payment, arising when Invoices 34 and 35 respectively fell due for payment.

349.
Although HHL was from the outset of its life dependent upon Michael (either personally or through SHL) providing funding for the Works, there was no obligation to fund beyond that which had already been complied with under the terms of the £5m loan from SHL by the time Invoice 34 was submitted. I refer to paragraph 32 of this judgment and Ms Lee’s references to the contractual commitments for lending to HHL and the actual lending that had taken place.

350.
The authorities I have referred to in paragraphs 167 to 173 above are clear in establishing that the inducement tort is not committed simply through a suggested failure on the part of the defendant to feed the coffers of a limited liability company, to enable it to meet its contractual obligations, when in fact there is no legal obligation to do so.

351.
However, paragraph 10.1 of the RAPOC (but no part of the later paragraphs 55 and 56) is in fact cast in sufficiently general terms to embrace an argument that Michael’s “instructions”, which led to payments due to PB not being paid, covered those payments which I have addressed in my third finding above. The same is true of any instruction on the part of Michael, that may safely be inferred to be have been given by him to Christopher, that HHL should not pay the £150,000 odd which, I have already noted, stood to the credit of HHL’s bank account when Invoice 34 fell due (despite the further lending by SHL of just over £100,000 at the end of the year the balance had not materially improved by the time the additional liability under Invoice 35 fell due). This potential width of paragraph 10.1 may be of some significance in relation to causation and loss if those payments pre-date the commencement of any conspiracy of the kind alleged in paragraphs 10.6 and 10.7.

352.
However, it must be noted, as Ms Lee correctly pointed out, that there is no pleaded allegation that the payments constituted a wrongful disposal of HHL’s funds and neither Christopher nor Michael had any notice that they would be challenged on them in cross-examination.

353.
In any event, I do not believe the evidence sustains the conclusion that the failure of HHL to make partial payment towards Invoice 34 in circumstances where payments were made to others - including, for example, £7,952 to Christopher for onward payment to Oana and £44,877 to Guy Goodfellow Limited at the very time the invoice fell due for payment – can be attributed to any wrongful inducement on the part of Michael. The fact is that HHL did not have enough monies to pay PB in full under either Invoice 34 or Invoice 35, alongside all other creditors, and I accept the evidence of Christopher that he took the decision not to pay PB. He explained that HHL did not have enough money to satisfy the invoice and that he had paid Guy Goodfellow “some money” because he had been ringing and ringing him, asking for payment.

354.
The evidence therefore reveals only a picture of the director of an over-extended company making decisions as to who to pay. Obviously, the payments to Oana were apparently unjustified and ones

which were made indirectly for Michael's benefit, to the potential prejudice of PB, but, again, it is reading too much into the evidence to say that they were procured by Michael in a way which triggers liability under the inducement tort. It must be noted that the payments to Oana which could be said to be material to the non-payment of Invoices 34 and 36 came to the relatively modest sum of £36,000 by the time the latter fell due for payment.

355.
My conclusion that Michael did not instruct HHL not to pay Invoice 34 (it appears that HHL would have had no monies available for Invoice 35 had it done so) is consistent with the point that this was not the gravamen of PB's case on the inducement tort. Paragraphs 55 and 56 of the RAPOC are expressed in terms which predicate that HHL either already had sufficient funds to pay the invoices or should have been put in funds by Michael to enable them to be paid. My conclusion is also consistent with my determination below (in relation to the conspiracy allegation) that it was not until after both invoices had fallen due that the brothers began colluding to bring about an early end to the Contract.

356.
Accordingly, I determine that PB has not established the claim against Michael identified by paragraph 10.1 of the RAPOC.

357.
However, in relation to paragraph 10.2 of the RAPOC, I conclude on the basis of my fourth to eighth findings above that Michael did procure HHL's repudiatory breach of the Contract and thereby committed the inducement tort alleged in that paragraph so far as the termination of the Contract and cessation of the Works were concerned.

358.
Unlike my finding in relation to paragraph 10.1 (based on the alleged failure to fund) the allegation of inducement in paragraph 10.2 does not, in my judgment, fall foul of the authorities which see the tort circumscribed by well-established principles of separate corporate personality. Those authorities highlight that the distinction between mere prevention and inducement can sometimes be a delicate one. In relation to the failure to pay Invoices 34 and 35, Michael is able to rely upon the basic fact that, at the time they fell due, the company simply lacked the financial means to pay them and that fact alone accounted for the relevant breach.

359.
However, HHL's repudiatory breach of the Contract on 22 April 2015 – committed in circumstances where PB had formally suspended the Works and performance of the Contract would therefore have been in abeyance allowing for any ongoing certification of further work and materials – was one actively brought about by Michael as a result of the decision, reached by no later than the end of January 2015, to bring about the liquidation of HHL but not, with that event, the cessation of any further refurbishment of the Property. By 22 April 2015 Michael may have had enough of PB but there was no reason why HHL should have done so. HHL had been in place as the chosen development vehicle for 3 years and at a fairly early point in that period had commissioned further works which meant that their initial cost of £5.115m was significantly exceeded. It is evident from Michael's dealings with EFG up to and including April 2015 that he was to be the source of the additional funding required to see the Works through to completion. Subject to the process of their evolution since January 2012, those Works were specified by the Contract which was HHL's contract. The circumstances were therefore such that Michael could and, on the basis of the previous 3 years, would have been expected to make that funding available to HHL as the chosen development vehicle

through which all previous available funding had necessarily been channelled as the Works proceeded (and expanded). Indeed, allowing for the possibility of Michael having communicated a different proposal to Mr Imlay during his January visit to the Property, a fair reading of Mr Imlay's email of 17 March 2015 is that all of the Buffalo Mall monies (and not just £400,000 of them to meet outstanding debts) would in due course be remitted to HHL. Instead, by pressing on with the decision to liquidate in accordance with my fifth, sixth and seventh findings, Michael did cross the line from prevention to inducement. And he did so by purporting to speak for HHL as if he was the Client under the Contract. This is not, therefore, a case where the alleged inducer can say that the breach would in any event have taken place without any inducement on his part.

360.
By causing HHL to repudiate the Contract, when the funds which were then made available to CSEL could instead have been made available to HHL in time to enable it to perform the Contract and to meet its contractual obligations, Michael's conduct was not a reflection of HHL's separate corporate personality but an abuse of it. The point is illustrated by the fact that the liquidation of HHL, the inevitability of which had been identified as the ground for the purported termination on 22 April 2015, did not occur until 25 June 2015, by which time the Buffalo Mall monies were available to see the project through. Those monies were also received before Mr Kirk's advice was sought on 10 June 2015 and notice of the creditors' meeting was thereafter given.

361.
If the fine dividing line in this case between prevention and inducement turns upon the ability to categorise Michael's actions as a diversion of funds away from HHL then, on the particular facts of this case and even in the absence of any unperformed contractual obligation to fund HHL, he was guilty of that. Although those funds did not reach HHL's bank account, they could and should have done so. Whereas a simple finding that Michael could have made the funds available to HHL, but simply chose not to, might arguably leave PB on the wrong side of that fine line, my further conclusion that he should in the circumstances have done so sustains their claim under paragraph 10.2 of the RAPOC. In my judgment, to conclude otherwise (against the factual background yet further distilled in paragraph 359 above) would mean that my fifth finding was of no real consequence for the purposes of that claim. Given the terms of that finding, so far as it concerns the part played by Michael as the principal beneficiary of the Works, that would be a surprising conclusion when, but for the decision referred to in that finding, HHL would have received the Buffalo Mall monies to fund the ongoing Works under its Contract.

362.
The defence of justification relied upon by Michael is not in my judgment a good one. The absence of any unperformed contractual obligation upon Michael or SHL to fund HHL provides part of the answer to this defence, in that Michael did not enjoy any equal or superior legal right to PB's which justified him bringing about the repudiation of the Contract. He confirmed that he had not decided in mid-April 2015 to call in his and SHL's loans to HHL; and he had been reminded by Michelmores in January how his own commercial self-interest might be better served by seeing HHL go under, leaving SHL with the benefit of the Works undertaken to date. Michael was looking out only for his own commercial best interests regardless of whether he might say that HHL's state of insolvency would only have worsened without termination of the Contract (a highly questionable thought given that the discussions between him and EFG in March and April 2015 anticipated there would be sufficient monies available to fund anticipated Interim Certificate 36 and to keep the Contract on track). In my judgment, Michael therefore falls on the wrong side of the line drawn by the authorities of De Jetley

Marks v Lord Greenwood and Edwin Hill & Partners addressed in paragraphs 178 to 181 above. That he was motivated by nothing more than commercial (and property-based) self-interest is illustrated quite starkly by the way in which the debt-free CSEL was simply slotted into the place that HHL had previously occupied.

363.
Nor do I accept the “no loss” defence which is also identified in the second of the Issues. As I have observed, the very essence of Michael’s tortious conduct was that of diverting away from HHL funds that could have been used to meet PB’s claims under the Contract, even though, by the date of the repudiatory breach, the actual funds standing to the credit of the company’s bank account (which had never been sufficient to pay Invoice 34 when that fell due) had fallen to just under £30,000.

364.
Accordingly, I determine that PB have established their claim against Michael identified in paragraph 10.2 of the RAPOC, with the measure of his liability in damages to be determined at a trial on quantum. Argument over the effect of his tortious conduct so far as “refusing to allow Palmer Birch to complete the works” (when they had formally suspended the Works in January 2015) will be a matter for argument and determination in the quantum trial.

365.
In relation to the allegations at paragraphs 10.4 and 57 of the RAPOC, I do not consider the evidence justifies a finding that Michael prevented the Contract Administrator from issuing what would have been valuation 36 and thereby induced a breach of the Contract. Although Mr Binmore of GCC was replaced by Mr Edmondon of Alder King in the Spring of 2015, Michael’s instructions were not as specific as alleged. In my judgment, any complaint by PB that no such valuation was issued by the time HHL repudiated the Contract on 22 April 2015, and claim for recovery of damages as a result, is one that is either covered by the alleged unlawful means conspiracy, or not.

366.
For the same reason as applies to the inducement tort based upon a failure to fund, namely the lack of any legal obligation on the part of Michael (or SHL) to lend further sums to HHL beyond those already advanced, I conclude that Michael did not commit the tort of unlawful interference alleged in paragraph 65 of the RAPOC. That allegation is based upon the allegations made in paragraphs 55 to 57. However, I have already determined that there was nothing “unlawful” in Michael not providing or procuring further funding at the time Invoices 34 and 35 fell due.

367.
As appears from my third finding and as I have touched upon in relation to paragraph 10.1 of the RAPOC, Michael, as a de facto director, and Christopher appear to have been responsible for HHL having made payments to Oana which in my judgment were capable of being categorised as acts of misfeasance. However, as I have already noted above in paragraph 235 (in connection with the earlier Order of HH Judge Havelock-Allan QC) and in paragraphs 354 and 355, no breaches of duty to HHL were pleaded in the RAPOC in support of the unlawful interference claim. Whether or not the payments were “instructed” by Michael for the purposes of paragraph 10.1, they do not feature as part of the pleaded case of “unlawfulness”. In my judgment, it would not be right to reach a different conclusion in relation to the unlawful interference tort by reference to any such breach of duty to HHL which the evidence shows may have taken place.

368.

Accordingly, I determine that PB have not established liability on their claim against Michael identified in paragraph 65 of the RAPOC.

369.
However, in relation to the unlawful means conspiracy alleged against Michael and Christopher in paragraphs 10.6, 10.7 and 67 of the RAPOC, I conclude on the basis of my fourth to tenth findings that Michael and Christopher did collude to bring about the repudiatory breach of the Contract.

370.
I make it clear that, in reaching this finding, I have well in mind that an allegation of conspiracy (whether a lawful means conspiracy or an unlawful means one) is a serious allegation and one to which the principle in Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563, at 586, applies. Although Ms Lee did not expressly rely upon this principle, cogent evidence is required to prove a civil conspiracy on the balance of probabilities. That said, as appears from the decision in Kuwait Oil Tanker (see paragraphs 205 and 206 above), the existence of a conspiracy may be established by reference to a tacit agreement between the conspirators and inferred from their actions. It must therefore follow, when the number of cases in which the claimant is able to prove an express agreement will be relatively rare, that most other cases such as the present one will require a careful review of the evidence to establish whether or not the defendants' acts or omissions support the inference of one. I would summarise the approach to analysing the evidence in support of an allegation of conspiracy as one requiring an appropriate degree of rigour but not undue rigidity in terms of timeframe.

371.
In my judgment, the evidence safely supports the inference that by no later than late January 2015 Michael and Christopher had reached an agreement to bring about the liquidation of HHL so that it might escape from the Contract and thereby avoid meeting PB's existing and anticipated claims. The correspondence from April and May 2015, which I have mentioned in support of my sixth finding, clearly establish that the necessary intention to injure PB (with concomitant advantage to Michael starting again through CSEL).

372.
In my judgment, the evidence also clearly shows that Christopher was prepared to play his part in implementing Michael's decision that HHL should be left to founder without recourse to any further funding. I refer to my reasons (in relation to Christopher) in support of my fifth and seventh findings.

373.
For the reasons given in support of my ninth finding, Christopher cannot shelter behind HHL in denying personal liability for his part in the conspiracy.

374.
I note that as at late January 2015 there was only about £120,000 in HHL's bank account and by 22 April 2015 that credit was under £30,000. Allowing for the question whether this corporate conduit for the construction costs had ever been solvent, at the time of the repudiatory breach it plainly could not meet all of its liabilities falling due. However, for the reasons explored somewhat tentatively in paragraphs 249 and 250 above, I am not prepared to accept that the case for any personal liability of Michael and Christopher in conspiracy is met by the "no loss" argument identified in Issue 2. Acceding to that argument, in circumstances where Michael was openly stating to Mr Paradise and Mr Imlay his intention to carry on with the works before HHL had gone into liquidation, would be

tantamount to saying that the conspiracy was so effective (in its diversion of funds away from HHL) that not even a legal remedy lies in respect of it.

375.
I have already observed in paragraph 102 above (in the context of the earlier Order of 8 March 2017) how the reference in paragraph 67 of the RAPOC to the setting up of the structure involving HHL and the chosen means of funding the Contract no longer form part of the conspiracy allegation against the brothers.

376.
As for the alleged conspiracy to convert PB's goods, by my thirteenth finding I have found that Christopher was not implicated in the conversion of materials on site. That conspiracy allegation against Michael and Christopher therefore fails.

377.
Accordingly, I determine that PB have established their claim against Michael and Christopher for an unlawful means conspiracy, so far as those means were the repudiatory breach of the Contract but not otherwise, with the measure of his liability in damages to be determined at the further quantum trial.

378.
In relation to the unlawful interference with PB's goods alleged in paragraphs 60 to 64 of the RAPOC, the allegation against Christopher in paragraph 61 is that he "received and used or agreed to the use of the materials and tools on behalf of HHL". Yet the allegation against Michael in paragraph 60 is that he (Michael) "converted them to his own use or benefit by using them in further works on Hillersdon House".

379.
Although I have already remarked that there was a window of time, between 27 April and the actual liquidation of HHL on 25 June 2015, for the allegation in paragraph 61 to have taken root, it has not been established against Christopher. In my judgment, which is consistent with my conclusion upon the true limit of the conspiracy between them and which follows from my twelfth and thirteenth findings, the allegation in paragraph 60 reflects the true position.

380.
Accordingly, I determine that PB have established their claim in conversion against Michael, in respect of certain materials on site before 27 April 2015, and the measure of damages in respect of that claim will be determined at the further quantum trial.

381.
The measure of liability in respect of the established claims under 10.2 and 10.6 and 10.7 (the repudiation of the Contract being the relevant unlawful means) will, in accordance with my analysis at paragraphs 255 to 261 above, include a proper valuation of PB's work and EOT entitlement as contemplated by the second limb of Issue 3.

382.
I will invite the parties to make representations about the appropriate directions for the quantum trial at a further hearing to be convened after the formal handing down of this judgment.
