Neutral Citation Number: [2023] EWHC 720 (Ch)

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

Rolls Building
Fetter Lane
London, EC4A 1NL

4 April 2023

Before :

MRS JUSTICE BACON

- -

Claim No. BL-2020-001109

Between:

(1) CUTLERS HOLDINGS LIMITED
(formerly SHEFFIELD UNITED LIMITED)
(2) SCARBOROUGH GROUP INTERNATIONAL LIMITED

Claimants

- and -

SHEPHERD AND WEDDERBURN LLP

Defendant

Claim No. BL-2021-001132

And between:

CUTLERS HOLDINGS LIMITED
(formerly SHEFFIELD UNITED LIMITED)

Claimant

- and -

(1) ANDREW JOHN BLAIN
(2) PHILIP ANDREW SEWELL

Defendants

- -
- -

Ben Elkington KC, **Thomas Ogden** and **Pippa Manby** (instructed by **Penningtons Manches Cooper LLP**) for the **Claimants**
Charles Hollander KC, **Sarah Bousfield** and **Allan Cerim** (instructed by **DAC Beachcroft LLP**) for the **Defendants**

Hearing dates: 31 January, 1–3, 6–10, 20–22 February 2023

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on 4 April 2023 by circulation to the parties or their representatives by email and by release to the National Archives.

MRS JUSTICE BACON:

INTRODUCTION

1. This is the hearing of claims for solicitors' negligence arising from a dispute about the ownership of Sheffield United Football Club (the **Club**). Prior to the events which have given rise to these proceedings, the Club was owned by Sheffield United Limited (**SUL**), the first claimant in these proceedings. SUL was formerly known as Sheffield United plc, or SUPLC, and has now been renamed Cutlers Holdings Limited. Throughout these proceedings, however, it has been referred to as SUL. The second claimant, Scarborough Group International Limited (**SGIL**), is SUL's ultimate parent company. Both SUL and SGIL are companies in the Scarborough group, which was founded by Kevin McCabe.

2. The Club is now owned by Prince Abdullah bin Mosaad bin Abdulaziz Al Saud (**Prince Abdullah** or the **Prince**), a Saudi Prince, through his company UTB LLC (**UTB**). The claims in these proceedings arise from the circumstances of Prince Abdullah's acquisition of the Club, leading to an expedited trial before Fancourt J in 2019 in which the judge found largely in favour of UTB: *UTB LLC v Sheffield United Limited* [2019] EWHC 2322 (Ch) (the **UTB trial**). That was followed in 2020 by an arbitration before Professor Graham Chase, which determined the price to be paid by UTB for the property assets associated with the Club, including in particular the stadium at Bramall Lane (the **Stadium**).

3. Both claims turn on essentially the same facts. Claim BL-2020-001109 (the **LLP claim**) is brought by SUL and SGIL against Shepherd and Wedderburn LLP (**S+W**), the solicitors who acted for SUL in relation to its agreement with Prince Abdullah, and then throughout the litigation in 2018–2020. The LLP claim alleges negligence arising from:

    i) the drafting of the initial Investment and Shareholders' Agreement (the **ISA**) between SUL and Prince Abdullah/UTB in 2013;

    ii) the drafting of an option agreement relating to the Stadium (the **Stadium Option**), which was one of several property option agreements which accompanied the ISA in 2013;

    iii) advice given to SUL in December 2017 as to the exercise of a call option under the ISA in respect of Prince Abdullah/UTB's shareholding; and

    iv) the failure to advise SUL in 2018 (and thereafter) that S+W were in a position of own interest conflict, given that they had been responsible for drafting and advising SUL on the meaning and effects of the ISA, and failing to advise that SUL should therefore seek independent legal advice. There is also an allegation of breach of fiduciary duty in this regard.

4. Claim BL-2021-001132 (the **Partner claim**) is brought by SUL (only) against two partners in S+W who had key involvement in the matters giving rise to the LLP claim: Mr Andrew Blain, who was the client relationship partner throughout the acquisition and subsequent proceedings, and Mr Philip Sewell, who was the litigation partner responsible for the conduct of the litigation before Fancourt J and the subsequent arbitration. It alleges

negligence by Mr Blain in respect of the December 2017 advice, and breach of fiduciary duty by both partners in respect of the conflict issue.

5. The defendants' position is that their drafting and advice was not negligent, that S+W were not conflicted, and that S+W and the partners were entitled to continue to act for SUL without advising the clients to seek independent advice. Furthermore, even if there was any liability in negligence or breach of fiduciary duty, the defendants say that the claim should fail on causation, since SUL would have acted in precisely the same way even if it had been properly advised. The claim for loss said to have been sustained by SGIL is, the defendants submit, an entirely bogus and dishonest claim, and any individual duty owed by the partners is denied. In relation to the conflict claims the defendants also rely on limitations of liability in their 2018 letters of engagement.

6. The trial took place over the course of four weeks, during which I heard oral evidence from witnesses on both sides. Submissions were made by Mr Elkington KC for the claimants, and by Mr Hollander KC for the defendants.

WITNESSES

7. Much of the factual background giving rise to the claims turns on matters recorded in the contemporaneous documentary evidence before me, including numerous exchanges of emails. There are, however, some key issues which are addressed by the evidence of the witnesses on both sides, in particular the evidence about what was said at meetings for which the documentary record is incomplete or unclear, and what the various individuals understood at the relevant times. The claimants' witnesses also gave evidence as to what they said would have happened if they had been properly advised by the defendants.

8. It is therefore appropriate for me to make some preliminary comments on the evidence of the witnesses at the trial. With the exception of Mr Di Ciacca, who gave evidence remotely via Microsoft Teams, the witnesses were cross-examined in person at the hearing.

The claimants' witnesses

9. Kevin McCabe was the claimants' main witness, and was cross-examined over the course of two days. He was the founder of the Scarborough group and remains its chairman. He played a central role in negotiating the 2013 agreements with Prince Abdullah, and was the main decision-maker within SUL in the exercise of the call option in 2017 and the conduct of the litigation thereafter. He gave extensive evidence in the UTB trial and was clearly very bruised by the outcome of that trial.

10. Mr McCabe ascribed Fancourt J's appraisal of his evidence in the UTB trial to his lack of witness training before that trial. He appears to have taken the comments in that judgment about the way in which he gave evidence to heart, because at the outset of his oral evidence in this trial he presented as a careful witness, who was doing his best to answer the questions put to him. As his cross-examination progressed, however (and particularly by the second day), he increasingly avoided answering difficult questions and refused to concede points that were obvious on the face of the contemporaneous documentary evidence.

11. I do not consider that Mr McCabe was being deliberately dishonest. But his evidence on many key points across both days of his cross-examination was in my view disingenuous and inconsistent with the documentary material, blaming others for the events that occurred and refusing to accept responsibility for the instructions that he gave to his legal team and the strategic decisions that he took. I have therefore treated his evidence with considerable caution, and on disputed points I have placed little weight on it where it is not corroborated by other more reliable evidence.

12. Simon McCabe is one of Kevin McCabe's sons. He has worked for the Club and the Scarborough group in various roles for many years, and is one of the directors of SUL. He was involved in discussion of the property option agreements in 2013, including in particular the Stadium Option, and to a limited extent in the discussions with S+W which led to SUL's service of the call option in 2017. Thereafter he had some limited involvement in the UTB litigation and the subsequent arbitration. I considered him to be a generally straightforward and honest witness who was doing his best to assist the court. I do not, however, accept some of his evidence as to what he would have done if he had been advised differently in relation to the Stadium Option. Nor do I place any weight on his evidence as to what SUL might have done had it been advised differently in 2017, given his acceptance that the ultimate decision-maker in that regard was Kevin McCabe.

13. Scott McCabe is Kevin McCabe's other son, who like Simon McCabe has worked for the Club and the Scarborough group for many years, and is a director of SUL. He was not involved in the 2013 agreements with Prince Abdullah, but was present at one meeting with S+W in December 2017 and thereafter had some involvement in the UTB litigation, particularly around the start of 2018. His cross-examination was very short. It was apparent that he was not involved in the detail of the 2013 negotiations, and was not the decision-maker regarding service of the call option. I do not, therefore, consider that I can place any weight on his evidence on those points.

14. Cesidio di Ciacca is a qualified solicitor who has been a consultant to and director of various companies in the Scarborough group (including SUL) since the late 1990s. He was involved in the initial meetings with S+W and counsel at the outset of the litigation in 2018, as well as a meeting with Mr Blain after the judgment of Fancourt J had been handed down, and gave limited evidence about those matters. His cross-examination was very short. I considered him to be a straightforward and reliable witness who was careful not to give evidence on points that he did not recall.

15. Jeremy Tutton was and remains the finance director of SUL and SGIL. He is also a director of numerous other companies within the Scarborough group, and was – alongside Kevin McCabe – heavily involved in the negotiations for the agreements in 2013. He played a central advisory role in SUL's decision to serve the call option in 2017 and the litigation thereafter. Mr Tutton was cross-examined for almost a day. He was not an impressive witness. He came across as nervous and uncertain through his evidence, avoided answering questions, and gave answers that were frequently rambling and incoherent. He became increasingly argumentative and defensive as his cross-examination progressed. I have placed little weight on his evidence where it is not corroborated by other more reliable evidence.

The defendants' witnesses

16. Andrew Blain is a partner at S+W, and was the head of S+W's corporate group from 2013–2018. Since 2019 he has been the Managing Partner of S+W. He was the client relationship partner for the Scarborough group from November 2007 until July 2020 (i.e. shortly after the conclusion of the property arbitration). While he had only limited involvement in the negotiation of the agreements with Prince Abdullah in 2013, because he was on holiday for much of the period during which those agreements were drafted, he played a central role in advising SUL on the exercise of the call options in 2017, and was also involved in advising SUL at the outset of the litigation in 2018. Thereafter the litigation was mainly overseen by Mr Sewell.

17. Mr Blain was cross-examined for almost two days. Perhaps unsurprisingly given his limited involvement at the time, he did not have a clear recollection of the details of the negotiation of the 2013 agreements. By contrast, he claimed to have a detailed recollection of his thought processes in relation to the advice that he gave in 2017, which I do not consider was credible. More generally, his evidence as to the events of late 2017 and 2018 was defensive to the point of implausibility, and I do not accept his account of advice on the conflict point said to have been given to Mr Sewell by counsel in January 2018. I have therefore placed little weight on his evidence, where not corroborated by other more reliable evidence.

18. Philip Knowles is a partner in the corporate team at S+W, and was the partner responsible for working on the draft ISA in 2013. He was a straightforward and measured witness. Unsurprisingly, he could not recall (and did not purport to recall) the details of his thought processes during that drafting period in 2013. I considered his evidence to be generally reliable, albeit somewhat defensive on occasions.

19. Sally Morris-Smith was from 2013 until 2018 a partner in the real estate team at S+W, and is now a partner at DAC Beachcroft LLP, the solicitors acting for S+W in this trial. She was responsible for working on the draft property options in 2013, including the Stadium Option, and she also had some involvement in the drafting of the ISA. She was, like Mr Knowles, a straightforward witness who made some appropriate concessions. I did not, however, accept her attempts to justify her conduct as having been reasonable.

20. Philip Sewell is a litigation partner at S+W, and was responsible for managing the UTB litigation from January 2018 onwards. He gave extensive evidence as to the conduct of the litigation and the advice given to SUL in that regard from January 2018 onwards, and he was cross-examined on those issues for one and a half days. He repeatedly avoided giving straight answers to questions, instead giving obfuscatory and highly defensive answers or (on several occasions) simply refusing to respond to the questions asked. He was argumentative and combative, making implausible claims as to the matters which he supposedly considered during the relevant period of time. As with Mr Blain, I was unable to accept his account of a key conversation with counsel said to have taken place in January 2018. I have therefore placed very little weight on his evidence, save where corroborated by other more reliable evidence.

21. Before court on the morning of 10 February 2023, mid-way through the cross-examination of the defendants' last witness Mr Sewell, I was informed that as a result of comments made by Mr Sewell on the previous day his solicitors had searched for and discovered various sets of manuscript meeting notes made by Mr Sewell in a notebook covering the period

December 2017 to February 2018, as well as a typed transcription of one of those sets of notes, which should have been disclosed. The new materials were provided to the court and the claimants before the start of the hearing that day, with an unreserved apology for the failure to disclose the materials before. Following a discussion at the start of that day's proceedings without Mr Sewell present in court, it was agreed that Mr Sewell's cross-examination would be concluded that day, and that both parties would consider the new materials produced and would inform the court whether they wished to recall Mr Sewell or any other witness for further cross-examination. On 13 February 2023 both parties confirmed that they did not wish to recall any witness for cross-examination on the new materials.

FACTUAL BACKGROUND

22. A detailed account of the uncontested facts which gave rise to the UTB trial is set out in the judgment of Fancourt J at §§11–133. That is informative as to the history of the dispute that gave rise to the litigation. The disputed issues for the purposes of these proceedings are largely different and turn on evidence not before Fancourt J. There are, however, some overlaps, such that the question arose as to the extent to which reference may be made to the factual findings in Fancourt J's judgment.

23. Pursuant to notices to admit served on both sides, various factual findings in that judgment were admitted by the claimants and the defendants (including a further response served by the defendants on the second day of the trial), and I will refer to them in so far as relevant below. Some of the findings referenced in the claimants' notice to admit were, however, not admitted by the defendants. I have therefore needed to reach my own conclusions on those points where necessary, by reference to the evidence before me, including the transcripts of the evidence at the trial before Fancourt J.

24. The following paragraphs set out the main background facts relevant to these proceedings, with my findings where necessary on disputed points.

Ownership of the Club by Scarborough

25. Kevin McCabe is a successful businessman who founded the family-run Scarborough group. He was born in Sheffield and has been a lifelong fan of Sheffield United Football Club (nicknamed "the Blades", reflecting Sheffield's history of cutlery production). During the 1990s he became a director of the Club and started to acquire its shares through Scarborough group companies. The Club was (and is) run by The Sheffield United Football Club Limited (**SUFC**), which became a subsidiary of SUL. By early 2013 the Scarborough group company Scarborough United Group Limited (**SUGL**) owned around 87% of the shares of SUL, with the remaining 13% owned by around 9000 individual supporters of the Club. SUGL is in turn owned by SGIL.

26. It is common ground that, over the years, the Scarborough group invested around £100m in SUFC, including rebuilding the Stadium and building a training academy (the **Academy**), a hotel and other properties associated with the Club. By 2012, however, Kevin McCabe was approaching 65 years of age, and decided to look for someone to whom he could pass on the baton as the new owner and benefactor of the Club. At that stage, the Club was languishing in League One, the third tier of English football below

the Premier League and Championship League. Mr McCabe hoped, however, that a new owner would make the investments needed to return the Club to the Premier League.

27. To make the Club more affordable for a potential investor, Kevin McCabe decided to split the ownership of SUFC itself from the ownership of the Stadium and the other Club properties (together **the Properties**). To that end, in April 2013 a new subsidiary of SUL was created, called Blades Leisure Limited (**Blades**), to which SUL's shares in SUFC were transferred. The Properties were retained by SUL and Scarborough group entities. That allowed an incoming investor to acquire an interest in the Club by acquiring shares in Blades, without (initially) also having to acquire the Properties. The intention was that the Properties would be resold to, and therefore reunited with, SUFC once it was under new ownership.

28. To reduce the expenses of the Club until a new owner was found, new leases of the Properties were granted by SUL and the other group companies to SUFC, at concessionary rates.

Initial agreement with Prince Abdullah

29. Around the end of 2012 Kevin McCabe was introduced to Prince Abdullah, who was interested in investing in the Club. During early 2013 Mr McCabe and the Prince agreed that the Prince would invest £10m in the Club over two years, in return for which he would acquire ownership of 50% of the shares of Blades through a corporate vehicle controlled by him, which eventually became UTB (a name chosen as a nod to the Club slogan "Up the Blades"). The hope was that UTB would eventually purchase the remainder of SUL's shares and become the sole owner of the Club.

30. The agreement was progressed in stages. Initially, Kevin McCabe and Prince Abdullah agreed on Heads of Terms dated 1 July 2013. These set out the agreement for the Prince to invest £10m in return for 50% of the shares of Blades, as well as the common intention of the parties to work together to achieve, within the next three to five years, the promotion of the Club to the Premier League and the reunion of the Properties with the Club.

31. SUL then contacted Mr Blain and instructed S+W to act in relation to the transaction. Mr Blain brought in Mr Knowles as the corporate partner and Ms Morris-Smith as the property partner. Mr Blain attended the initial meeting for the deal on 24 July 2013, but then went on holiday to the US two days later, leaving the drafting of the transaction documents to Mr Knowles and Ms Morris-Smith. He returned from holiday on 15 August 2013, a fortnight before the transaction was completed, but did not involve himself in the detail of the transaction as it was being dealt with by his colleagues.

32. On 2 August 2013 Prince Abdullah and SUL agreed non-binding "Proposed Deal Terms". These repeated the intention of the parties to achieve promotion to the Premier League and reunite the Properties with the Club. Under the deal terms, Prince Abdullah was to invest £10m in tranches from completion to June 2015, in return for 50% of the share capital of Blades. The terms provided for new leases for the Properties to be entered into, with the annual rent for the Stadium set at £250,000 subject to revision if the Club was promoted.

33. The terms also provided (in clause 4.15) for Prince Abdullah to have various call options on SUL's remaining shares in Blades. In the event that the Prince acquired 75% or more of the share capital of Blades, clause 4.15(c) specified that he would simultaneously acquire the Properties at a price to be agreed.

34. From there the transaction progressed to the detailed drafting of the final contractual documents, comprising (i) the ISA; (ii) new Articles of Association for Blades; (iii) the option agreements for the purchase of the Properties, including in particular the Stadium; and (iv) new leases for the Stadium and the Academy, and a variation of the lease for certain other Club properties.

35. The final package of agreements was executed on 30 August 2013. What follows is an overview of the main relevant terms, for the purposes of these proceedings, and the relevant features of the drafting history of each of the agreements.

Drafting of the ISA

36. The ISA was the main document which governed the share purchase by UTB and the future relationship between the parties. On 7 August 2013, shortly after the deal terms were agreed, Prince Abdullah's negotiator Jim Phipps sent an email to Kevin McCabe listing "five points" which the Prince wanted to clarify in the ISA. Two of those points related to clause 4.15 of the deal terms, in relation to which the Prince proposed that:

    i) The call option should take the form of what is commonly known as a Russian Roulette clause, whereby it could be exercised by each party nominating a price at which they were willing to buy the other party's shares, and the other party could then accept the offer or buy the offering party's shares at the same price.

    ii) The "price at which SUFC (rather than HRH as currently stated)" should acquire the properties in the event that a party holds 75% or more of the shares should be market value as determined by an independent expert.

37. Mr Phipps' email made clear that, as far as the Prince was concerned, agreement on the points raised was essential if the transaction was to go ahead: "In plain terms, Prince Abdullah confided to me that not reaching agreement on these points would make it impossible for him to proceed."

38. The first draft of the ISA was prepared by Onside Law, the solicitors for Prince Abdullah, and sent to S+W on 9 August 2013. There were then several rounds of comments and revisions, with Mr Knowles taking the lead in providing comments on behalf of SUL.

39. Of particular relevance is the drafting history of clause 9.1.12, which is the clause that was intended to reflect clause 4.15(c) of the deal terms. In the original draft from Onside Law, that clause read:

> "**Property Call Options**
>
> 9.1.12 on any Shareholder acquiring 75% or more of the entire issued share capital of the Company, SUFC shall be compelled and shall be deemed to have exercised each and every Property Call Option on the date that the

> Shareholder acquires 75% or more of the entire issued share capital of the Company, unless each of SUPLC and the Investor agree otherwise;"

40. It appears that this clause was not considered by Mr Knowles in his comments on the earlier drafts of the ISA. He did, however, review it on 20 August 2013, when he sent an email to Ms Morris-Smith commenting that the drafting was "not elegant by any means … but it works!" Ms Morris-Smith did not agree that the clause worked, and suggested the following amendments:

> "Delete … 'SUFC shall be compelled and shall be deemed to have exercised'
>
> And insert …
>
> 'and each party hereby authorises SUFC to forthwith execute and serve Option Notices under such Property Call Options in respect of …'"

41. Mr Knowles then amended the clause, albeit not in exactly the way that Ms Morris-Smith had suggested. His amendments were agreed and remained unchanged in the final wording of the ISA (set out below).

42. There was discussion between the parties on the drafting of various of the other clauses of the ISA. Those clauses are not material for present purposes. What is relevant to note, however, is the tenor of the contemporaneous emails, which strongly indicated that Prince Abdullah had the upper hand and that SUL were in general inclined to agree with changes suggested by Onside Law in an attempt to get the deal done as quickly as possible.

43. Mr Knowles thus noted in internal emails on 20 August 2013 that Onside Law had been "a little bit heavy handed … particularly on the warranties", such that the draft was "a bit unbalanced against [SUL]", but then commented that "They of course perhaps just realise that we will ultimately accept most of it!" In similar vein the next day Mr Knowles sent an email to Mr Blain with a list of outstanding issues, noting that Kevin McCabe's instructions were "that he does not really care about the warranties because he is an old dog and can sort things out with the prince following completion". In relation to a clause regarding approval rights for the business plan, Mr Knowles said that he had "pushed back on this point with Onside Law but the gist of Kevin's instructions were that he doesn't really care and I should just accept their position unless I can agree something better without holding things up."

44. There were, however, several points on which Onside Law was willing to accept SUL's position. These included the provisions on surrender of tax losses, and also the insertion of a new clause to clarify the continuation of Prince Abdullah's guarantees in the event of a share transfer.

The final ISA

45. The final ISA was an agreement between Blades (defined as the Company), SUFC, SUL (then named SUPLC), SGIL, UTB (defined as the Investor) and Prince Abdullah. A background section at the start of the ISA set out the following:

> "(A) The investor wishes to subscribe for 50% of the fully diluted share capital of the Company in return for the payment of £10 million (ten million pounds) to the Company in a number of tranches on the terms of this Agreement.
>
> (B) The intention of the Company, SUFC, SUPLC and the Investor is to work together to seek to achieve the following within the period covering Seasons 2015/2016 to 2017/2018:
>
> (i) promotion of Sheffield United Football Club to the English Premier League; and
>
> (ii) the re-unification of the freehold and leasehold interests in the properties leased to SUFC.
>
> (C) This Agreement sets out the terms and conditions upon which the investment shall be made by the Investor and regulates the basis on which the Company and SUFC shall be operated."

46. Clause 1.4 of the ISA provided that words and expressions defined in the Articles of Association should have the same meaning when used in the ISA, unless otherwise defined or otherwise required by the context.

47. While the option agreements included in the package of agreements enabled SUFC to purchase the Properties at any time during an option period of 10 years, i.e. until 29 August 2023, the only provision in the contractual documents which *required* those options to be exercised was clause 9.1.12. That clause formed part of a set of subclauses under clause 9.1, as follows:

> "9.1 The Company undertakes to SUPLC and the Investor that it shall (and the Shareholders shall exercise all voting rights and other powers of control available to them in relation to the Company so as to procure, insofar as they are able by the exercise of such rights and powers, that the Company shall):
>
> …
>
> ***Property Call Options***
> 9.1.12 on any Shareholder acquiring 75% or more of the entire issued share capital of the Company, SUFC shall be compelled to exercise and (and each party hereby authorises and instructs SUFC to forthwith execute and serve Option Notices in respect of) each and every Property Call Option on the date that the Shareholder acquires 75% or more of the entire issued share capital of the Company, unless each of SUPLC and the Investor agree otherwise;"

48. Notwithstanding Mr Hollander's valiant efforts to persuade me otherwise, it is immediately apparent that clause 9.1.12 does not make grammatical sense when read together with clause 9.1. Nor (even leaving aside the grammar) is it obviously apparent how clause 9.1 should work when combined with 9.1.12, given the different ways in which the various parties' obligations are expressed in those clauses. Mr Knowles said that this was the reason why he had described the drafting of clause 9.1.12 as "not elegant". His redraft did not, however, resolve those difficulties.

49. The call option was set out in clause 11, and took the form of the Russian Roulette clause specified in Mr Phipps' email. As envisaged in that email, either shareholder could exercise the call option to purchase all of the shares of the other shareholder during certain specified periods, by serving on the other shareholder a written call option notice which stated, among other things, the price per share that was offered (the option price). The other shareholder could then either accept that offer, or choose to buy out the offeror at the option price.

50. Importantly, for the purposes of what subsequently happened, clause 11.9 specified that at completion the transferring shareholder was to deliver to the purchasing shareholder "(or as it may direct)" a duly executed transfer in respect of the transferring shareholder's shares in favour of the purchasing shareholder "(or as it may direct)". The effect of the parenthesis was that the purchasing shareholder could direct that its shares be transferred to a third party rather than to the purchasing shareholder itself.

51. The ISA also explicitly acknowledged that both UTB and SUL could transfer their shares to third parties on the basis set out in the Articles of Association. Clause 16.3 thus provided:

> "Subject always to the Articles, the Investor and SUPLC shall be entitled to transfer their Shares with all rights attaching to those Shares (including, without limitation, any rights set out in this Agreement) and the parties to this Agreement agree to allow the transferee to enter into a Deed of Adherence."

Articles of Association

52. The term "Shareholder" was not defined in the ISA, but was defined in the new Articles of Association for Blades, which were part of the package of documents that Mr Knowles was reviewing for the completion of the transaction. The Articles contained the following definition:

> "**Shares** mean the issued shares in the capital of the Company from time to time, and a **Shareholder** shall be any person who from time to time is the holder of Shares."

53. Article 7 contained detailed restrictions on the transfer of shares, including consultation and pre-emption rights on the part of existing shareholders. Under Article 9, however, those restrictions did not apply to "permitted transfers", which included transfers of shares to a privileged relation or family trust (subject to various requirements, including that the relation or trust should undertake to exercise voting rights in accordance with the directions of the shareholder), as well as to a nominee or bare trustee of the shareholder. In addition, and importantly for present purposes, the permitted transfers included the transfer of shares by a shareholder to a company controlled by that shareholder, or any subsidiary or holding company of the shareholder, or any other subsidiary of any such holding company (i.e. a sister company).

54. As with the ISA, Mr Knowles reviewed the Articles of Association. He specifically drew the share transfer provisions (including the permitted transfer provisions) to the attention of Kevin McCabe, Simon McCabe and Jeremy Tutton, and he also appears to have amended the permitted transfer provisions, as he noted in an internal email on 21 August 2013.

Stadium Option

55. By the last week of August 2013, the main outstanding part of the transaction was the finalisation of the Stadium Option agreement, in relation to which Ms Morris-Smith was the lead partner at S+W. The specific sticking point was the mechanism for valuation of the Stadium, if and when it was purchased by the Club (including pursuant to clause 9.1.12 of the ISA).

56. For all of the Properties other than the Stadium, the price payable was the market value of the relevant property. In relation to the Stadium, however, Onside Law had suggested that the valuation mechanism should be determined according to a more complex formula which included reference to an aggregate of the market value of the land with the book value of the stadium, with provision for capital improvements made in the period until exercise of the option. That suggestion was initially rejected by S+W, but Onside Law maintained its position and the point was included as one of the "five points" in Mr Phipps' email of 7 August 2013.

57. At some point during August, a different firm of solicitors, Maple & Black, had become involved in the drafting of the property options on behalf of Prince Abdullah, and they said on 19 August 2013 that they were taking instructions on the valuation mechanism. By 27 August, however, S+W were still chasing Maple & Black for their proposals on this point. Those proposals were finally sent late on that day, with a cover email explaining that "my client is proposing a half way solution between OMV [i.e. open market value] and the 'aggregate' valuation it had previously requested by agreeing a purchase price of the mean of the two".

58. Early the following morning (29 August 2013) Ms Morris-Smith forwarded the proposal to Simon McCabe, who was dealing with this issue, copied to Mr Tutton, asking what the effect of this on the purchase price would be:

> "Looking at this – does this calculation produce a higher price … than just OMV? … What would the Aggregate Land Value (aggregate book value of Stadium and land value excluding buildings) be currently – Jeremy can you comment?"

59. Simon McCabe replied within what appears (from the email chain) to have been a matter of 11 minutes, agreeing to the aggregate formula but making a comment on the way in which capital contributions by SUFC were treated. His evidence, which I accept, was that the treatment of SUFC's capital contributions was a point he had been concerned to get right. In a further email shortly thereafter Simon McCabe noted that the "OMV is higher than the book cost so we are happy with this clause".

60. On that basis, Ms Morris-Smith returned a draft of the agreement to Maple & Black with small amendments on her part. By that point, the agreement provided for the purchase price to be the mean of the "Property Market Value" and the "Aggregate Value", with the following definitions:

    i) Property Market Value was defined as the market value assuming a willing buyer and willing seller in an arm's length transaction.

ii) Aggregate Value was defined as the aggregate of the Land Market Value and the book value of the stadium, less capital contributions and expenditure incurred by SUFC in making improvements to the stadium, from the date of the agreement until the date of the option notice.

iii) Land Market Value was defined as the market value of the land as a whole, assuming a willing buyer and willing seller in an arm's length transaction.

61. By the morning of the following day (29 August 2013) SUL had signed all of the documents, including the version of the Stadium Option which Ms Morris-Smith had returned to Maple & Black. At 12:57, however, Maple & Black sent through a markup of some further amendments to the Stadium Option. Those amendments included the amendment of the definitions of both the Land Market Value and the Property Market Value to incorporate two further assumptions: (i) an assumption of vacant possession of the land, save for the hotel lease and business centre lease; and (ii) an assumption that the permitted use was restricted to the permitted use as defined in the lease.

62. Three minutes later, at 13:00, Ms Morris-Smith replied "This is agreed – may I please have clean versions for signature please?" It is common ground that she did not obtain SUL's instructions before agreeing that change.

63. After receiving the clean copy, she forwarded that onto Simon McCabe with the comment:

> "Small amends to this from Deloitte. Capital letters and including presumption of Vacant Possession and Cross referencing Hotel Lease and BEC Lease.
>
> Not material.
>
> Can you either re-execute or authorise me making a page swap?"

64. Simon McCabe replied asking her to make a page swap.

65. With the changes made in that final round of amendments, the relevant definitions in the Stadium Option as executed read as follows:

> **"Aggregate Value:** the aggregate value of the following:
>
> (a) Land Market Value; and
>
> (b) The book value of the stadium situated on the Property,
>
> Less
>
> (c) Capital contributions and expenditure incurred by SUFC in making improvements to the stadium from the date of this agreement up to the date of the Option Notice.
>
> …

> **Land Market Value:** the land market value as defined in the then current RICS Appraisal and Valuation Standards issued by the Royal Institute of Chartered Surveyors (known as the Red Book) for which the Land as a whole should exchange as at the date of exercise of the Option, assuming:
>
> (a) a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties have each acted knowledgeably, prudently and without compulsion;
>
> (b) vacant possession of the Land (save for the Hotel Lease and the Business Centre Lease); and
>
> (c) the permitted use is restricted to the Permitted Use (as defined in the Lease).
>
> …
> **Property Market Value:** the market value as defined in the then current RICS Appraisal and Valuation Standards issued by the Royal Institution of Chartered Surveyors (known as the Red Book) for which the Property as a whole should exchange as at the date of exercise of the Option, assuming:
>
> (a) a willing buyer (excluding Blades Leisure Limited registered in England and Wales with company number 6963761, SUFC and any group company of Blades Leisure Limited and SUFC) and a willing seller in an arm's length transaction after proper marketing wherein the parties have each acted knowledgeably, prudently and without compulsion;
>
> (b) that in the event of any damage to or destruction of the Property due to any insured or uninsured risk, the Property has been fully reinstated;
>
> (c) vacant possession of the Property (save for the Hotel Lease and the Business Centre Lease); and
>
> (d) the permitted use is restricted to the Permitted Use (as defined in the Lease)."

66. Clause 13 then defined the purchase price as the mean of the Property Market Value and Aggregate Value. It went on to provide that if the parties could not reach agreement on that price, the matter could be referred for arbitration to an independent Chartered Surveyor to determine the price payable.

67. Clause 15 specified that completion was to take place 12 months after the date of service of the option notice (or sooner by agreement).

68. The option agreements for the other Properties were executed at the same time as the Stadium Option, and contained the same clause as to the completion date (i.e. 12 months after the date of service of the option notice, or sooner if agreed).

Lease agreements

69. The final documents in the package of agreements were the new leases for the Club properties, in particular the Stadium and the Academy. The Stadium and Academy leases provided for new terms of 25 years from the date of the leases, i.e. until 29 August 2038. The Stadium lease specified a highly discounted rent of £250,000 per annum. A rent review clause in the lease provided for the rent to be set at the greater of £250,000 or "such other sum as the Landlord and Tenant may agree". Absent agreement, therefore, the annual rental payment could not increase during the term of the lease.

70. The Academy lease was in similar terms, setting a discounted annual rent of £60,000. As with the Stadium lease, the rent review provisions required both the landlord and the tenant to agree on any different figure.

Exercise of the call option

71. The effect of the 2013 agreements was that the Club was owned on a 50/50 basis by SUL and Prince Abdullah's company UTB. Unfortunately, from around 2015 onwards, the relationship between the two owners started to break down.

72. The reasons for this are addressed in the "Undisputed Factual Narrative" at §§11–133 of the judgment of Fancourt J and do not need to be repeated here. It is sufficient to say that the disagreements between the parties were wide-ranging and included the management of the Club, the ongoing funding of the Club, and UTB's refusal to consider rent increases for the Stadium and the Academy. In April 2017 the Club was promoted from League One to the Championship, but matters did not improve. There was in particular, from around the summer of 2017, increasing conflict between the McCabes and Mr Giansiracusa, a lawyer from Jones Day who was acting for the Prince.

73. The state of mistrust on the part of Kevin McCabe prompted an email from Mr Tutton to Mr Blain on 11 September 2017, asking him to investigate UTB's failings under the various agreements, no doubt with a view to identifying a way of bringing the relationship to an end:

> "UTB LLC may have a route to take us out of football and real estate. Naturally we don't trust them particularly as they have been dishonourable regarding the property rents. Given we gifted 50% of SUFC to UTB with the stated aim of regaining PL status and reuniting the real estate with the club, regardless of what the Agreements state, there is a clear agreement the rent does get reviewed every year, and now that the club have moved up a tier there is no reason to deny it.
>
> Kevin wants an aggressive lawyer to poke UTB in the eye, review all the agreements and back ground leading up to signing, pretty much stating UTB have not done what they promised to do, i.e. the game changing investment to get us through the leagues (reason why we sold so cheaply).
>
> … Kevin will go as far as saying no more investment from Scarborough because of dishonourable behaviour from UTB over rents and lack of investment from UTB, in other words had we known he was not the game

> changing owner we held out to be we would not have gifted him 50% of the club for £1 or provided the Real estate Options.
>
> In short Kevin wants a fight to take Yusuf [Giansiracusa] of Jones Day on."

74. Around the same time, Kevin McCabe was discussing an alternative investor in the form of the American businessman Alan Pace and his company ALK. Mr McCabe and Mr Tutton started to discuss whether, with financial backing from Mr Pace, SUL could terminate the arrangement by serving a call option on UTB under clause 11 of the ISA. On 3 November Mr Tutton instructed Mr Blain to provide ALK with access to SUL's data room, so that ALK could start due diligence.

75. Mr Tutton sought Mr Blain's advice on the implications of exercising the call option. Mr Blain's initial advice was sent by email on 22 November 2017. Among other things, he considered what consequential obligations would arise in relation to the property call options under clause 9.1.12 of the ISA. On that point, Mr Blain's advice was that:

> "• if a shareholder acquires 75% or more of the BLL shares SUFC is compelled to exercise the Property Call Options on the date the relevant shareholder acquires 75% (unless UTB and Scarborough agree otherwise)
>
> • if SUFC did not exercise the Property Call Options following UTB's acquisition of Scarborough's shares in BLL, Scarborough's remedy would be to enforce this obligation under the Investment and Shareholders Agreement against SUFC. The legal position is clear, but in practice there are obviously PR/financing implications to consider if UTB refuses to comply"

76. Following further discussions with Mr Blain, Mr Tutton sent Kevin McCabe a detailed email later on 22 November 2017 entitled "SUFC – Texas shoot out". His recommendation was to look to conclude an investment agreement with Mr Pace, to enable SUL to serve a call option at £10m. He emphasised, however, that this was a risky course of action:

> "I think we should look to structure a deal with USI with the full intention of taking UTB out via the 'Option Share' route. This route is fraught with risk so it is important to be relatively happy with whatever outcome arises from a Texas shoot out with HRH. To my mind I would not trust HRH to honour the Property Call Options and therefore if UTB end up taking control of BLL the price should [be] big enough to compensate having a poor tenant at Bramall Lane and Shirecliffe. If we worked on the basis of offering £10 million for the option shares, we would need to have finance in place to actually follow through on the deal."

77. Mr Tutton assumed that a bank loan would not be available for that purpose, which meant that the finance would need to come from Mr Pace. He considered it "highly debatable" whether Prince Abdullah would be able to secure similar funding, and thought that the Prince might therefore be inclined to accept the offer of £10m for his shares and "cash in his losses as he has done in the past in other businesses". If the Prince did serve a counternotice to buy out SUL, Mr Tutton noted that:

> "The disadvantages of UTB taking control are.

> 1. If SUFC did get promoted at the end of the season, you'd probably be very happy as a football fan and unhappy as a businessman. The opposite if they do not get promoted. This scenario is unlikely given HRH's appetite to only spend £1 million in the January transfer window.
> 2. UTB do not honour property contracts in the knowledge that only insolvency/liquidation of SUFC will make the real estate leases void. He may be tempted to test your resolve, but there again he is Royalty and he'll get a reputation.
> 3. Potentially more litigation which will be as much a bad PR exercise for HRH as it will be for you and SUFC.
>
> …"

78. Mr Tutton continued to raise questions with Mr Blain concerning the property options, noting that if UTB bought out SUL but did not have the money to buy the Properties then "our only remedy is the desperately unattractive one of suing SUFC". This was a concern which Mr Tutton had raised with Kevin McCabe as early as 5 September 2017 (in an email where he had commented that "if SUFC don't have the money to buy the real estate how could we enforce other than putting SUFC into Administration?").

79. Further versions of Mr Blain's advice, building in responses to Mr Tutton's additional questions, were sent to Mr Tutton on 8 December and 11 December 2017. The advice on the two points set out at §75 above was, however, unchanged, save for a redrafting of the first of those points to refer specifically to a counternotice being served by UTB:

> "• If UTB purchases the Scarborough shares pursuant to the counter notice, it will own more than 75% of the BLL shares, and SUFC will be compelled to exercise the Property Call Options (on the same date as UTB acquires the Scarborough shares) unless UTB and Scarborough agree otherwise."

80. Alongside the discussions as to the implications of exercising the call option, Kevin McCabe progressed his negotiations with Mr Pace, leading to draft heads of terms being discussed in early December 2017. The proposal at that stage was for ALK to loan SUL £10m in order to enable SUL to buy out UTB under the call option. On 4 December Mr McCabe wrote to Mr Pace saying that given UTB's past reluctance to "go for it", he thought that "a modest but sensible and respectful offer would see us successful in reclaiming full control of the Football Club". He said that he genuinely expected to win a "shootout" under clause 11 of the ISA.

81. An email from Mr Tutton to Mr Pace on 11 December 2017 said that Kevin McCabe was "keen to see the Options triggered before Christmas if at all possible, and Kevin is minded to strike a price of £9 million, being the £10 million we discussed less £1 million. The deduction is in lieu of the fact UTB would not have to inject £1 million that they pledged for January's transfer window budget at the last board meeting."

82. The next day, however, Mr Pace replied to Mr Tutton saying that while in principle he thought that there was agreement on the broader points, there were a number of things that needed to be completed both from a due diligence perspective and on the terms of the loan, if the loan was going to be used to support the call option. He did not think that completing the transaction prior to Christmas was feasible.

83. Revised draft heads of terms for a loan from ALK were circulated by Mr Tutton on 15 December 2017, providing for ALK to pay £17m for 85% of the shares of Blades, of which £10m could be used for the purchase of UTB's shares. Mr Tutton's cover email suggested a conference call early the following week to finalise the document, "as we are keen to trigger the Call Option with UTB LLC as soon as possible". Those heads of terms were not, however, signed by ALK.

84. During this time it appears that litigation against Prince Abdullah was also in contemplation, and on 12 December 2017 Mr Tutton emailed Mr Blain saying that Kevin McCabe was keen to explore a potential libel case against the Prince and Mr Giansiracusa. At that point Mr Blain brought in his litigation partner, Mr Sewell.

85. Mr Blain continued to advise on the call option notice, and sent a draft notice to Mr Tutton on 22 December 2017. By that time, Kevin McCabe had decided to offer only £5m for UTB's shares, rather than the £10m figure which Mr Tutton had originally proposed (and which had been reflected in the draft ALK heads of terms). Mr McCabe's evidence at this trial was that he set the £5m price thinking that this would enable Prince Abdullah to buy both the SUL shares and the Properties, under clause 9.1.12, being aware that the Prince was likely to have difficulty raising the funds. That echoed his evidence at the UTB trial, which was to the effect that he wanted to set a price that would allow the Prince to take full ownership of the Club if he wished, with funds to invest in SUFC.

86. I do not accept the entirety of that account. The contemporaneous emails made clear that there was significant animosity and mistrust on the part of Kevin McCabe as regards Prince Abdullah and his associates, to the extent that Mr McCabe was contemplating a libel action. He clearly regarded the Prince as dishonourable and lacking in commitment to the Club, and was in advanced discussions regarding ALK exploring investment with an alternative partner. As set out above, Kevin McCabe's view as expressed to Mr Pace was that he expected to succeed in buying out UTB's shares under the call option, and it was clear from the tone of his correspondence this was his desired option. Simon McCabe also said in his witness statement that SUL "didn't want to sell the Club to Prince Abdullah". None of that is consistent with Kevin McCabe's professed wish to enable the Prince to buy out SUL.

87. The far more likely explanation for the reduction in the offer price, in my view, is the one given by Mr Tutton at the UTB trial, which was that by the time the call option was served Mr Pace had not completed his due diligence, and that "I don't believe Alan was there with us at all at this point of time". That was consistent with Mr Pace's 12 December 2017 email expressing doubt that the ALK agreement would be ready in time for Christmas. At the trial before me, Mr Tutton agreed that the fact that Mr Pace was not yet on board as an investor was one of the reasons why the offer price changed from £10m to £5m.

88. The fact that Kevin McCabe was willing to serve the call option even without a firm agreement for investment by ALK indicates that he was determined to bring matters to a head as soon as possible and extricate himself, one way or another, from the partnership with Prince Abdullah. The price of £5m was accordingly set, not to ensure affordability for the Prince, but to ensure affordability for SUL if the Prince accepted SUL's offer to buy UTB's shares.

89. I do, however, accept Kevin McCabe's evidence that he knew that the Prince was likely to have difficulty raising the funds to pay for the property options within a year. Simon McCabe said the same; Mr Tutton had made similar comments in emails to Kevin McCabe and Mr Blain; and that was consistent with the funding problems that had led to the breakdown in the relationship with the Prince since 2015. In light of that knowledge, and despite the reduction in the offer price to £5m, I think it likely that Kevin McCabe expected the outcome of the call option to be that SUL would regain sole control of the Club, paving the way for SUL to progress the deal with ALK (or another investor). Simon McCabe said exactly that, in his witness statement. Nevertheless, the McCabes knew that there was at least a chance that the Prince would serve a counternotice; SUL therefore had to be willing to sell its shares for £5m in that eventuality.

90. On 24 December 2017 Kevin McCabe asked Mr Blain (copied to Mr Tutton) whether the ISA required Prince Abdullah to guarantee SUFC's obligations if UTB decided to buy SUL's shares. Both Mr Tutton and Mr Blain replied confirming that the Prince was not obliged to guarantee SUFC's obligations under the property options. Mr Tutton added that the consequence was that if SUFC did not find the cash to purchase the property, then SUL would have to enforce against SUFC. Mr Blain had of course given that advice consistently since 22 November.

91. That added to the risk of serving the call option. Nevertheless Kevin McCabe decided to proceed. By 28 December 2017 a final draft of the call option notice was ready, and it was served on UTB on 29 December, with an offer price of a total of £5m. The notice specified a completion date of 2pm on 6 February 2018.

UTB's service of the counternotice

92. Once the call option had been served, UTB had the option either to accept SUL's offer to buy its shares for £5m, or to buy SUL's shares for the same price. Prince Abdullah's evidence at the UTB trial was that he realised that the offer was a smart one:

> "When I got the offer, I thought it was a smart offer by Kevin, because the real estate is like rented for long time at low rent, and the only way he will realise it, if he forced me to buy it, and he knew that I would not have money to buy the real estate, so he will put me in a tough position, either to accept 5 million, which was like way below the price I paid for, not mind that when I paid it I was in League One and now we are in Championship and competing in a better share, and so I will be .. between [a rock and a hard place]. So I either have to take a loss, a huge loss, or exercise the option and if he gets the money, if he gets the real estate then he is out of this … rent for 25 years or 20 years. …
>
> … he knew I will not be ready to buy the real estate for 35 or whatever million, and he knew that I would be stuck with a team in Championship and will have to pay the deficit, and he knew that what I spent was much more … than 5 million".

93. Prince Abdullah therefore decided to buy SUL's shares. He did not, however, serve UTB's counternotice until 26 January 2018. Before then he took two steps, identified by Mr Giansiracusa, to try and avoid the operation of clause 9.1.12 of the ISA:

i) First, he incorporated a new company under his control called UTB 2018, and on 24 January 2018 UTB executed a stock transfer form for the transfer of 80% of its shareholding in Blades (i.e. 40% of the total share capital in Blades) to UTB 2018. This was referred to at the trial as **Device 1**.

ii) Secondly, UTB entered into agreements with Mr Giansiracusa and Prince Musa'ad bin Khalid Al Saud, pursuant to which UTB would direct SUL to transfer SUL's shares to those parties on completion rather than to UTB. On 29 January 2018 UTB sent SUL a draft sale and purchase agreement, which directed that SUL's 50% shareholding should be transferred as follows: 30% to Mr Giansiracusa, 10% to Prince Musa'ad and 10% to UTB. This was referred to as **Device 2**.

SUL's consideration of its strategy, and response to the counternotice

94. As I have already noted, even before the call option notice was served by SUL, Kevin McCabe was starting to think about proceedings against Prince Abdullah, and Mr Sewell had been instructed for that purpose. It is also apparent that Mr McCabe contemplated that the response to the call option might not be straightforward, because on 4 January 2018 he emailed Mr Blain asking various questions about the possible outcomes of the call option, and commenting:

> "Seems sensible to get our 'ducks in line' as presume there's no turning back unless the two parties agree? I'm pretty sure that Yusuf Giansiracusa of Jones Day will use every trick in the book to prevaricate and make life difficult as since his involvement this ploy has been self apparent. He demonstrates a desire to 'build a case' against either SUL, Scarborough or myself and I do think in turn we should 'be prepared' and look at ways of building our case against UTBLLC, Prince Abdullah and/or his representatives."

95. The next day, Kevin McCabe asked Mr Tutton to compile a list of potential breaches by UTB of the ISA, commenting that "We know there's bound to be a claim on the way from Yusuf/Jones Day so no point in waiting for the inevitable – lets go on the attack".

96. On 17 January 2018 Mr Sewell attended a meeting with Mr Blain, Kevin McCabe, Simon McCabe, Scott McCabe and Mr Tutton, where Kevin McCabe explained various concerns that he had about the conduct of the Prince and his associates in the management of SUFC. There was also some discussion about what would happen in the event of SUL being obliged to either buy or sell its shares following the call option notice. That meeting was followed by an email from Mr Tutton to Mr Sewell on 20 January setting out a long and detailed list of grievances against UTB, including personal complaints about the Prince and "each and every one" of his representatives including Mr Giansiracusa.

97. Once SUL had received UTB's counternotice on 26 January 2018, as well as notice of the share transfer to UTB 2018, it became apparent that this was an attempt to avoid the property options. S+W's advice was to hold off registering the share transfer while their strategy was considered. Initial instructions were given by Mr Sewell to Paul Downes KC over the weekend of 27–28 January, with further instructions by telephone on 29 January. On 30 January there was a conference in person with Mr Downes, which was attended by Mr Blain, Mr Sewell, Kevin McCabe, Simon McCabe and Mr Tutton.

98. Kevin McCabe's instructions were to go on the offensive. On 27 January 2018 he sent an email to Mr Blain and Mr Sewell saying:

> "Reflecting on 'where we're at' in the recent actions as to the future ownership of both SUFC and SUL's Real Estate and understanding the 'nature of the beast' it becomes clear that we must go on the offensive in order to protect all parts of Sheffield United.
>
> Can we look as to how we negate/rescind UTB's Counter Option Notice as a result of the owner (HRH) attempting to reduce UTB's interests in SUFC by 'passing' a %age of his shares to another corporate he purports to control (UTB2018) one day prior to the Counter Option being served."

99. He asked Mr Blain and Mr Sewell to consider "how we attack", suggesting that the finger of blame be pointed at Prince Abdullah. "I will as always politely communicate with HRH advising him that we/SUL consider the Counter Option is invalid in order to 'fight fire with fire'. … Offensive actions please."

100. On 30 January 2018, apparently after the conference with counsel, S+W wrote to the directors of SUFC noting that UTB had exercised its rights under the call option to require SUL to transfer its shareholding in Blades to UTB, and stating that under clause 9.1.12 of the ISA the directors were required to execute and serve option notices in relation to the Properties on or before 1 February 2018.

101. Prince Abdullah in response emailed the directors of SUFC to say that the position set out in the S+W letter was not accepted, and telling the directors that no action should be taken to execute and serve the property option notices. On 31 January 2018 his solicitors Jones Day wrote to the SUFC directors to the same effect, stating that UTB considered that the obligation under clause 9.1.12 of the ISA to exercise the property options had not been triggered. On the same day, Jones Day wrote to S+W asserting that no one shareholder of Blades had acquired 75% or more of the share capital, given the transfer of shares from UTB to UTB 2018, and the direction that SUL's shares be transferred to persons other than UTB.

102. S+W's advice to SUL, following that letter, was to "press the 'Nuclear' button" in the dispute, by refusing to register the share transfer, claiming repudiatory breach of the ISA, reserving rights to bring proceedings claiming unfair prejudice pursuant to s. 994 of the Companies Act 2006, and threatening to bring a conspiracy claim. Kevin McCabe agreed, asking S+W to "Hit them hard and don't forget to expose Prince Abdullah by name".

103. There was then some discussion with Kevin McCabe as to his priorities for the litigation. Mr McCabe's view (in an email on 1 February 2018) was that he "reluctantly" accepted an outcome whereby SUL would sell the Club and Properties to UTB, since SUL had triggered the process creating the risk of UTB serving a counternotice. However, he said that he would be happier if the outcome was to buy out UTB's interests in SUFC.

104. Following further discussion with S+W and SUL, Mr Downes sent Mr Sewell a draft response to Jones Day, accompanied by a very brief email summary of "points to discuss", saying that the argument as to the interpretation of clause 9.1.12 was "how I

expect to win the case". Tactically, however, his advice was to combine that with the mooted s. 994 and conspiracy claims to strengthen SUL's position.

105. Mr Downes did not ever set out his advice formally in writing. It is apparent, however, from the final version of the response sent to Jones Day later on 1 February 2018, that the argument on the interpretation of clause 9.1.12 (which he, S+W and SUL later referred to as the "construction argument") was that, properly construed, the reference to a shareholder "acquiring" 75% or more of the shares of Blades included the acquisition of a beneficial interest in shares or the right to direct how votes were exercised in the shares. Accordingly, the argument was that following service of the counternotice UTB obtained control of 100% of the shares in Blades, and the property obligation under clause 9.1.12 was triggered. The response to Jones Day also threatened to bring proceedings claiming unlawful means conspiracy and unfair prejudice pursuant to s. 994 of the Companies Act 2006, and contended that UTB was in repudiatory breach of contract.

106. Following further correspondence, on 5 February 2018 S+W issued an ultimatum to Jones Day: either UTB confirmed by 2pm that day that it would immediately instruct the directors of SUFC to execute and deliver the property option notices in accordance with clause 9.1.12, or SUL would accept UTB's conduct as a repudiatory breach of both the ISA and the collateral agreement created by the call option and the counternotice.

107. No such confirmation was provided by UTB. On 6 February S+W therefore sent a letter to Jones Day stating that SUL "considers itself released from any obligation that might otherwise have existed in relation to its shares in Blades". SUL thereafter refused to complete the transfer of its shares to UTB.

LITIGATION FROM 2018 ONWARDS

Initiation of the UTB proceedings

108. UTB issued proceedings on 9 February 2018 claiming specific performance of SUL's obligation to sell its shares, and a declaration that the obligations under clause 9.1.12 of the ISA had not arisen.

109. SUL decided to pursue the litigation strategy which had been discussed at the start of the month. Kevin McCabe emailed Mr Downes on 11 February 2018 saying that:

> "I'm up and ready to ensure we win – either via seeing the transaction done in the manner intended or by it aborting. My preference now is for it to abort as we really are dealing with dreadful people who are not fit and proper to own Sheffield United."

110. Consistent with that strategy, on 27 March 2018 SUL filed a defence and counterclaim relying on a series of defences, including implied terms in the ISA, claims that UTB was in repudiatory breach of the ISA and any contract of sale relating to SUL's shares, a claim that SUL was entitled to rescind the contract for sale of its shares on the ground of unilateral mistake, and a claim that UTB was party to a scheme which involved unlawful and unconscionable conduct. On the same day SUL served an additional claim, claiming damages for breach of contract and conspiracy against UTB, Prince Abdullah and Mr Giansiracusa.

111. On 14 May 2018 SUL served in addition a petition under s. 994 of the Companies Act 2006 alleging conduct unfairly prejudicial to its interests as a shareholder of Blades. The petition was issued against UTB, UTB 2018, Prince Abdullah, Mr Giansiracusa, Prince Musa'ad and Blades. It included the allegation that Prince Abdullah had received a bribe in the form of an interest free loan to Blades from a company called Charwell Investments Ltd (which turned out to be owned by the bin Laden family), with the agreement that part of that loan which was novated to UTB would not have to be repaid. The relief sought included an order setting aside SUL's option notice and UTB's counternotice, and relief allowing SUL to buy UTB's shares at a fair value to be determined by the court or an independent valuer, with a discount to reflect the loss suffered as a result of the pleaded unfair prejudice.

112. Unsurprisingly given the breadth and seriousness of the allegations, what ensued was heavily contested and expensive litigation, throughout which SUL was represented by S+W and Mr Downes.

113. During May and June 2018 UTB and SUL discussed settlement terms, leading to a draft of a settlement agreement being circulated by UTB, on terms which would have seen the Prince/UTB acquiring SUL's shares and the Bramall Lane properties. Despite agreement in principle apparently being reached between Kevin McCabe and Prince Abdullah, the detailed settlement terms were not ultimately acceptable to SUL and the agreement was abandoned. A mediation in September 2018 likewise failed to resolve the dispute.

114. By April 2019 the Club was about to be promoted to the Premier League, and on 25 April 2019 (two weeks before the start of the trial) UTB gave its consent to the exercise of the property options by SUFC, subject to confirmation of the Club's promotion (which was then confirmed a few days later). That change of position reflected the fact that promotion to the Premier League meant that the Club would receive substantial broadcast revenues which would allow it to pay for the Properties. The property options were eventually exercised on 1 July 2019, a few weeks after the end of the trial.

115. It might be asked why the trial went ahead in circumstances where UTB's consent to the exercise of the property options meant that SUL had obtained what it had originally sought at the end of January and start of February 2018. The reason was (as Fancourt J also noted at §§234–5 of his judgment) that by then SUL's position was no longer that it wanted to sell its shares in Blades, but was rather that it wanted the ISA and the share sale and purchase contract set aside, and (on the basis of the unfair prejudice petition) sought the right to buy out UTB's shares in Blades.

116. It is apparent from Kevin McCabe's emails in early February 2018 that reacquisition of the Club from UTB (consistent with what he had expected to happen on service of the call option) was his preferred outcome from the start of the litigation with UTB. Although SUL had engaged in settlement discussions and a mediation in 2018, those had failed as described above. Discussions with Alan Pace/ALK had, by contrast, continued during the course of the litigation, and on 1 April 2019 ALK and SGIL signed heads of terms providing for the purchase by ALK of the Club and Stadium for £40m if the Club was in the Championship, or £50m if it was in the Premier League at the time of completion.

117. The agreement with ALK was premised on the outcome of the litigation (whether by settlement or judgment following trial) being on terms that SUL reacquired sole legal and beneficial ownership of the entire share capital in Blades. That was, by the time of the

trial, the outcome that SUL wished to achieve. As I describe below, when that outcome did not come about, and SUL instead lost control of the Club following Fancourt J's judgment, that was regarded by SUL as a disastrous result.

Fancourt J judgments

118. Fancourt J's judgment following the trial was handed down on 16 September 2019. His main findings were as follows:

i) He rejected most of the implied terms contended for by SUL. The one implied term which he found to arise, in relation to the ISA, was a term that a shareholder must not wilfully obstruct or hinder the reunification of the property assets pursuant to clause 9.1.12, where that would otherwise take effect in connection with the operation of clauses 10 or 11 (§§224, 529–30).

ii) On the facts, however, UTB's attempts to avoid acquiring 75% of the shares of Blades (and thereby to avoid the operation of clause 9.1.12 of the ISA) were in any event unsuccessful without reference to the implied term (§533).

iii) Specifically, the transfer of the shares to UTB 2018 (Device 1) was "papered" by Jones Day, and was not a genuine transaction that was agreed by anyone. There was therefore no transfer of the beneficial interest in the shares of Blades from UTB to UTB 2018 on execution of the stock transfer form (§§251–3). UTB could not, moreover, escape clause 9.1.12 by merely transferring shares to a nominee. It therefore retained all of its original 50% shareholding of Blades at the time of the counternotice (§§257–8).

iv) As regards UTB's direction that SUL's shares should be transferred in part to Mr Giansiracusa and Prince Musa'ad (Device 2), the correct analysis was that UTB would (but for SUL's refusal to complete the contract of sale and purchase) have acquired all of the shares pursuant to the counternotice, but there would then have been a sub-sale of those shares to Mr Giansiracusa and Prince Musa'ad. The direction did not, therefore, prevent UTB acquiring SUL's shares for the purposes of clause 9.1.12 (§267).

v) If UTB had, however, genuinely sold or gifted most of its existing shares to another person, who had become registered as the holder of those shares before completion of the contract of sale and purchase, then the outcome would have been different (§269).

vi) SUL was aware of the risk that the property assets might not be paid for on time, but did not foresee that this might be because UTB disputed its obligation under clause 9.1.12 to do so. That was not the kind of mistake that entitled SUL to avoid the contract of sale and purchase arising from the call option notice and counternotice (§§270, 281–4, 531).

vii) UTB's instruction to the directors of SUFC not to execute the property call options was an anticipatory breach of its obligations under clause 9.1.12, as well as a breach of the implied term because it hindered the operation of clause 9.1.12. That entitled SUL to terminate the ISA, giving SUL a claim for damages against UTB (§§381–

2, 534). But there was no loss from that breach because the property call options were ultimately exercised in July 2019 (§535).

viii) The contract of sale and purchase of SUL's shares in Blades (which came into existence as a result of the call option notice and the counternotice) was, moreover, a separate contract from the ISA, which was not affected by the termination of the ISA (§§384–5, 398, 537). There was no need to imply a term into the contract for sale and purchase to the effect that the contract could not stand without the rights under clause 9.1.12 (§389).

ix) The allegations of conspiracy and unfair prejudice were rejected in their entirety (§§399–487, 532, 538).

x) The sale and purchase contract therefore remained, and there were no grounds to refuse specific performance of SUL's obligation to sell its shares to UTB under that contract (§§488–514, 537).

xi) The judge noted, however, that if UTB had succeeded in preventing clause 9.1.12 from being triggered, he would have refused specific performance except on terms that the property options were exercised (§§389, 496).

119. At the consequentials hearing Fancourt J gave an *ex tempore* judgment on costs. In relation to UTB's claim for specific performance, SUL's counterclaim and SUL's additional claim, UTB was the successful party. Since UTB was willing to cause SUFC to exercise the property options on the Club's promotion to the Premier League, but SUL nevertheless proceeded with the litigation, UTB was awarded the entirety of its costs from 29 April 2018 onwards. As regards the costs incurred before that date, UTB recovered only 60% of its costs having regard to SUL's partial success on the merits. UTB was also awarded the entirety of its costs of the s. 994 petition on an indemnity basis, on the grounds that the allegations of bribery were the most important issues in the petition, were very serious allegations, took a disproportionate amount of time in the trial, and had no proper foundation on the evidence.

120. Permission to appeal was refused by both Fancourt J and the Court of Appeal.

121. From SUL's perspective the judgments of Fancourt J were an unmitigated disaster. Kevin McCabe's evidence was that the day he received the draft trial judgment was the worst day of his life, and that he had never in his business career had something go so badly wrong as losing ownership of the Club to Prince Abdullah.

The arbitration

122. By the conclusion of the trial, a large amount of S+W's fees remained unpaid. SUL refused to pay the outstanding fees until the proceeds from the sale of the Properties had been received. S+W were instructed to continue to act for SUL, but were told that another firm of solicitors (Penningtons, who acted for the claimants in this trial) had been instructed to provide a second opinion on the ongoing litigation.

123. By January 2020, SUL and UTB had been unable to agree a price for the Properties following the exercise of the property options. An arbitration was therefore commenced,

with Professor Graham Chase as the arbitrator, and Lord Neuberger as the appointed legal assessor to the tribunal.

124. The arbitration award was handed down on 30 June 2020, determining the values of the Properties. The Stadium value was held to be £20,206,138. Part of the arbitrator's calculation methodology, under the provisions of the Stadium Option, was a calculation of the Land Market Value of the Stadium. On the basis of the permitted use assumption in the definition of the Land Market Value, the arbitrator determined that a notional redevelopment of the land had to include a sports stadium. That, he found, reduced the developable land by 1.5 acres. That in turn reduced the Land Market Value by a total of £1.2m. The effect of the formula in clause 13 of the Stadium Option (by which the purchase price was the mean of the Property Market Value and Aggregate Value) was therefore that the total award was £600,000 lower than it would have been if the developable land area had not been subject to the reduction of 1.5 acres.

125. S+W asked for their fees to be deducted from the proceeds of sale, which they received into their client account on 1 July 2020. SUL refused.

The present proceedings

126. On 16 July 2020 Mr Blain met Kevin McCabe. Mr McCabe was furious at the outcome of the litigation and indicated that he was considering pursuing a claim against S+W for negligence. That led Mr Blain to email Mr McCabe on 23 July 2020 saying that S+W could no longer act for SUL.

127. Just over a week later, on 31 July 2020, SUL issued the LLP claim against S+W. The Partner claim followed on 28 January 2021.

128. At the pre-trial review before Roth J on 2 December 2022, the claimants were permitted to make extensive revisions to their particulars of claim, particularly in respect of the breaches of duties pleaded. The amendments included a new pleaded case as to the way in which clause 9.1.12 could (on the claimants' case) have been drafted so as to comply with the agreement between the parties and prevent the operation of Devices 1 and 2.

THE ISSUES FOR DETERMINATION

129. The issues for determination are in summary as follows:

    i) Whether S+W were negligent in the drafting of clause 9.1.12 of the ISA and the advice given as to the interpretation of that clause, and if so whether that caused any loss on the part of SUL.

    ii) Whether S+W were negligent in the drafting of the Stadium Option, and if so whether that caused any loss on the part of SUL.

    iii) Whether S+W were negligent in the advice given by Mr Blain in December 2017 as to the consequences of the exercise of the call option under the ISA, and if so whether that caused any loss on the part of SUL.

    iv) Whether S+W were negligent and in breach of fiduciary duty by failing to advise SUL in 2018 that they were in a position of own interest conflict, and that SUL

should seek independent legal advice, and if so whether that caused any loss on the part of SUL.

v) The quantum of any loss suffered by SUL for which the defendants are responsible.

vi) Whether SGIL can claim for further losses said to be suffered by it as the ultimate parent company of the Scarborough group.

vii) Whether S+W can rely on any limitation of liability in their letters of engagement sent to SUL in relation to this case, for the period from 2018 onwards.

viii) Whether SUL can bring the Partner claim against Mr Blain for negligence in relation to the December 2017 advice, and against both Mr Blain and Mr Sewell for breach of fiduciary duty in respect of the conflict issue. A further claim against Mr Blain in respect of the drafting of the ISA was not pursued.

130. A further time-bar argument raised by the defendants in their defence, in relation to the claims for negligent drafting of the ISA and Stadium Option, was not pursued by Mr Hollander in his closing submissions.

131. Before turning to the issues set out above, it is appropriate to make some preliminary comments on the law relating to solicitors' duties and the assessment of loss. The specific duties of solicitors in relation to conflicts of interest are considered further below.

PRELIMINARY COMMENTS ON THE LAW

Solicitors' duties in contract or tort

132. At the outset, the following principles as to the duties owed by a solicitor (whether in contract or tort) were common ground before me:

i) The source of a solicitor's duty to their client is the retainer between them, and the nature and scope of the duty is principally determined by that retainer: *Jackson & Powell on Professional Liability* (9th ed, 2022), §11–004.

ii) A solicitor is required to exercise reasonable skill and care. A solicitor will be negligent if they have acted in a way in which no reasonably competent solicitor would have done: *Jackson & Powell*, §2–006.

iii) It is implicit in a solicitor's retainer that the solicitor will provide advice that is reasonably incidental to the work that the solicitor is carrying out. In determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client: *Minkin v Landsberg* [2015] EWCA Civ 1152, §38.

133. The claimants also placed considerable reliance on the line of authority derived from *Dixey & Sons v Parsons* (1964) 192 EG 197 regarding the duty of a solicitor to take reasonable care to protect their clients from the risk of litigation, such that even if the advice given by the solicitor turns out to be vindicated at trial, the solicitor may still be negligent if they have failed to advise the client of the possibility of litigation where there is an obvious risk that a different view might be taken.

134. In opening submissions, there seemed to be something of a difference between Mr Elkington and Mr Hollander as to the scope of the *Dixey* line of cases. By the time of closing submissions, however, I do not think that there was much (if anything) between their positions. In *Barker v Baxendale Walker* [2017] EWCA Civ 2056, [2018] 1 WLR 1905, §60, Asplin LJ emphasised that the question of what advice ought to have been given by the reasonably competent practitioner turns on the particular factual circumstances at the time, and whether contrary arguments as to construction are of "sufficient significance to require specific mention when taken with the degree of risk inherent in the circumstances and the importance in those circumstances of a balanced view of the provision". She then set out at §61 the following principles:

> "(i) The question of whether a solicitor is in breach of a duty to explain the risk that a court may come to a different interpretation from that which he advises is correct is highly fact-sensitive …;
>
> (ii) If the construction of the provision is clear, it is very likely that whatever the circumstances, the threshold of 'significant risk' will not be met and it will not be necessary to caveat the advice given and explain the risks involved;
>
> (iii) However, depending on the circumstances, it is perfectly possible to be correct about the construction of a provision or, at least, not negligent in that regard, but nevertheless to be under a duty to point out the risks involved and to have been negligent in not having done so …;
>
> (iv) It is more likely that there will be a duty to point out the risks, or … that a reasonably competent solicitor would not fail to point them out when advising, if litigation is already on foot or the point has already been taken, although this need not necessarily be the case …; and
>
> (v) The issue is not one of percentages or whether opposing possible constructions are 'finely balanced' but is more nuanced."

135. The *Dixey*–type duty has been applied in a wide range of cases including the drafting of a share purchase agreement and Articles of Association (*Richards v Speechly Bircham* [2022] EWHC 935 (Comm)), advice on the meeting of a non-competition clause in a shareholders' agreement (*Levicom v Linklaters* [2010] EWCA Civ 494), advice on the meaning of a restrictive covenant (*Dixey* itself, and *Queen Elizabeth's Grammar School v Banks Wilson* [2001] EWCA Civ 1360) and advice on a tax avoidance scheme *Barker v Baxendale*).

136. The threshold of a "significant risk" means, however, that the solicitor's duty does not extend to protecting their client from a fanciful or spurious position taken against them (and see by analogy for insurance brokers *Jackson & Powell*, §§16–068).

Fiduciary duties

137. Neither the claimants nor the defendants, in their submissions, drew a clear distinction between the duties of solicitors in contract or tort, and their fiduciary duties to their clients. But as the Court of Appeal made clear in *Bristol & West Building Society v Mothew* [1998] Ch 1, at 18, the duties of a solicitor in contract or tort to act with

reasonable skill and care are not fiduciary duties. Rather, the distinguishing obligation of a fiduciary is a duty of single-minded loyalty to the client. That encompasses a variety of obligations: that the fiduciary must act in good faith, must not make a profit out of their trust, must not place themselves in a position where their duty and interest may conflict, and may not act for their own benefit or the benefit of a third person without the informed consent of their principal.

138. Furthermore, it follows from the nature of the duty that breach cannot arise from negligence alone. As Millett LJ explained in *Mothew*, at 18–19:

> "Breach of fiduciary obligation … connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty … Conduct which is in breach of this duty need not be dishonest but it must be intentional. An unconscious omission which happens to benefit one principal at the expense of the other does not constitute a breach of fiduciary duty, though it may constitute a breach of the duty of skill and care."

139. A breach of a solicitor's fiduciary duties therefore requires at least intentional disloyalty to the client, even if that does not go as far as a finding of dishonesty. In *Barrowfen v Patel* [2021] EWHC 2055, §304, Tom Leech QC (sitting as a deputy judge) described this as a "conscious or deliberate breach of its duties to the company".

Liability of LLP partners

140. As regards the liability of individual LLP partners to their clients, it was common ground that the starting point for liability in negligence is that there must have been an assumption of responsibility such as to create a special relationship with the partner themselves. In that regard the inquiry will focus on whether the partner by their statements or conduct conveyed directly or indirectly that they assumed personal responsibility towards the client: *Williams v Natural Health Foods* [1998] 1 WLR 830, 835. That will include consideration of any provision in the retainer agreement which seeks to exclude individual liability of the partners to the LLP.

141. The claimants' position was that essentially the same test applies to the question of whether individual partners owe fiduciary obligations to their clients, relying on the commentary in Whittaker & Machell, *The Law of Limited Liability Partnerships* (5th ed, 2021), §18.16. The defendants did not suggest any different test.

142. While the LLP structure means that a partner cannot be held personally liable for the conduct of another partner or employee, where a personal duty is owed the partner can in principle be sued for their own negligence or breach of fiduciary duty.

Loss of a chance

143. In a case such as the present where the claimants' claims turn on the hypothetical actions of themselves and third parties, if the contractual drafting or advice given had been different, the courts distinguish between what the claimant must prove and what is to be assessed on the basis of the evaluation of a lost chance. If the relevant causation question turns on what the claimant would have done, that must be proved by the claimant on a balance of probabilities. If the question is what others would have done, that depends on

a loss of chance evaluation: *Perry v Raleys Solicitors* [2019] UKSC 5, [2020] AC 352, §20.

144. When assessing the loss of a chance, the claimants must establish that there was a real and substantial, as opposed to a purely negligible, chance of the claimed losses being avoided: *Allied Maples v Simmons & Simmons* [1995] 1 WLR 1602, 1614; *Mount v Barker Austin* [1998] PNLR 493, 510. Prospects of success of 10% or less may be regarded as negligible and therefore disregarded: *Thomas v Albutt* [2015] EWHC 2187 (Ch), §461. The authorities encourage, however, a "generous assessment" given that it is the defendant's negligence that has deprived the claimant of the chance of a better result: *Mount v Barker Austin*, at 511.

145. Whether the court is seeking to determine what the claimant would have done had it been correctly advised, or what others would have done in that hypothetical situation, the court is likely to have to rely on inference from all the relevant facts and circumstances: *Allied Maples*, at 1610 and 1614. In many (or even most) cases that is not an exercise which will yield a precise answer; rather, the court simply has to do the best that it can on the evidence available to it.

ISSUE (1): DRAFTING OF THE ISA

146. The claimants' case is that S+W were negligent in both the drafting of clause 9.1.12 of the ISA, and in failing to give advice as to the risk of litigation arising from the ISA. Even in the amended particulars of claim, following the redrafting permitted by Roth J, their case was not a model of clarity. Mr Elkington's submissions at the trial can, however, be summarised as follows:

    i) Even though Device 1 failed on its facts (as Fancourt J found), there was a loophole in the ISA in that if UTB had genuinely sold or gifted most of its shares to a permitted transferee controlled by Prince Abdullah, and later acquired SUL's shares, UTB would have been able to acquire control over SUFC without the obligation to exercise the property options. That loophole should have been closed in the drafting of clause 9.1.12, which would then have prevented UTB from seeking to employ Device 1 as it did.

    ii) S+W should in any event have advised that clause 9.1.12 was unclear and could permit UTB to seek to avoid the operation of clause 9.1.12 by transferring shares to a permitted transferee, giving rise to a risk of litigation.

    iii) S+W should also have drafted clause 9.1.12 so as to impose an express obligation on Blades or its shareholders to procure SUFC to exercise the property options and subsequently pay the purchase price, once the super-majority of a 75% shareholding was achieved; or S+W should at least have advised SUL that clause 9.1.12 contained no such obligation. It was apparent from Mr Elkington's submissions, however, that he placed far less weight on this point than on the drafting/advisory points in relation to Device 1.

147. The amended particulars of claim further contended that, even though Fancourt J also found in favour of SUL on Device 2, it was at least reasonably arguable that clause 9.1.12 could be avoided if the purchasing shareholder directed under clause 11.9 that their shares

(or some of them) should be transferred to a third party on completion. Mr Elkington's submissions focused on permitted transfers/Device 1, and said very little about Device 2, but since that point was pleaded I will address it for completeness.

148. The claimants say that a non-negligent drafting of the ISA would have closed off both Devices 1 and 2, and required UTB to procure the exercise of the property options by SUFC, and would thereby have precluded Prince Abdullah from serving the counternotice in January 2018. The litigation would then have been avoided, and SUL could have bought UTB's shares and then sold the Club on to a third party such as ALK.

Breach of duty

Permitted transfers/Device 1

149. Mr Elkington's central contention was that the drafting of clause 9.1.12 on its face permitted UTB to avoid triggering the property options by moving most of its original shareholding to another company via a permitted transfer under Article 9 of the Blades Articles of Association, before acquiring SUL's shareholding. On that basis Mr Elkington submitted that UTB could have gained control of Blades without acquiring the 75% shareholding required to trigger the obligation under clause 9.1.12 to exercise the property options and reunite the Properties with the Club.

150. On the facts of this case Device 1 was found by Fancourt J to have failed for lack of a genuine transaction transferring shares from UTB to UTB 2018. Moreover, even if it had worked, this would have been likely to breach the implied term found by the judge, namely the requirement that a shareholder must not wilfully obstruct or hinder the reunification of the property assets pursuant to clause 9.1.12. If, therefore, UTB had succeeded in transferring its shares to UTB 2018, Fancourt J indicated that he would have refused specific performance of the sale and purchase contract except on terms that the property options were triggered (see §§389 and 496 of the judgment).

151. Mr Elkington relied, however, on the indication at §269 of the judgment that the outcome would have been different if UTB had genuinely sold or gifted most of its existing shares to another person, who had become the registered holder of the shares before completion of the contract of sale and purchase.

152. The first point to note in that regard is that Fancourt J's comments at §269 fall far short of an express finding that Device 1 would have succeeded if the transfer of shares to another company in the same corporate group was genuine and not a means of circumventing clause 9.1.12. Since that was not the situation before the judge, those comments can only be regarded as *obiter*. Furthermore, as the defendants pointed out in their closing submissions, if that situation *had* arisen, it would have been necessary to consider whether the shareholdings of companies in the same corporate group, split between the group for genuine reasons, should be treated together for the purposes of clause 9.1.12.

153. What is clear, however, is that the express wording of clause 9.1.12 does not preclude a situation where UTB could gain control over the entirety of the Blades shareholding but avoid exercising the property options by splitting that shareholding across two or more group companies via permitted transfers under Article 9 of the Articles of Association. The drafting of the ISA therefore gave rise to a *prima facie* lacuna, such that any

requirement to exercise the property options in those circumstances would depend on the existence of implied terms, such as the term implied by Fancourt J in the present case.

154. On the express wording of clause 9.1.12, when read with Article 9 of the Articles of Association, there was therefore (at the very least) a significant risk that the intention to require the reunification of the Club with the Properties could be frustrated by splitting the Blades shares across two or more group companies.

155. Mr Knowles' evidence was (unsurprisingly, given the passage of time) that he could not recall whether he thought about that possibility. The contemporaneous documents indicate, however, that the point did not occur to him. As I have set out above, Mr Knowles does not appear to have given clause 9.1.12 any specific consideration until fairly late in the drafting of the ISA. When he did turn to consider it on 20 August 2013, his view was that it achieved what it was intended to achieve (see §§39–41 above). If Mr Knowles had realised the lacuna created by the existence of the permitted transfer provisions, I would have expected that to have been raised in his comments on the ISA, whether internally or in discussion with SUL.

156. In my judgment, a reasonably competent solicitor would and should have identified the point. The ISA and Articles of Association were part of a package of documents that were negotiated together and were intended to be read together. Clause 16.3 of the ISA permitted share transfers on the terms set out in the Articles of Association. Those terms were provided in Articles 7 and 9 of the Articles of Association. The effect of those Articles on the ISA generally and clause 9.1.12 in particular should, therefore, have been considered by S+W.

157. It is notable that S+W *did* consider the effect of the share transfer provisions on a different clause of the ISA, namely clause 15 which set out guarantees from the parties, including guarantees from Prince Abdullah in relation to the obligations of UTB under the agreement. On 25 August 2013 Mr Knowles emailed Onside Law, commenting that the deed of adherence to be entered into following a transfer of shares would potentially allow UTB to transfer its obligations under the agreement, and thereby circumvent the Prince's guarantee. He asked for a discussion as to how to address that, "most likely by ensuring that the HRH guarantee applies notwithstanding any such transfer".

158. On 27 August 2013 Onside Law replied with a revised draft of the ISA to Mr Knowles, noting that:

> "We have proposed wording in new clause 15.17 to cover your concern regarding the Investor Guarantor's Guarantee remaining in place following a transfer of shares to a new shareholder. On the basis of the new clause, I do not think that we also need to include provisions in the deed of adherence but happy to discuss further."

159. If the interaction between the share transfer provisions and Prince Abdullah's guarantees under the ISA was – quite rightly – considered by S+W, it is difficult to understand why similar consideration was not given to the effect of the share transfer provisions on clause 9.1.12.

160. Had that been considered, it follows from my findings above that any reasonably competent solicitor would have concluded that there was a *prima facie* lacuna in the

wording of clause 9.1.12, which gave rise to a significant risk of frustration of the objectives of the clause. SUL should then have been advised of that risk. The reason that Mr Knowles did not do so was not that the point was fanciful or insignificant, but rather that he had simply failed to consider the impact of Article 9 of the Articles of Association on the operation of clause 9.1.12.

161. The next question is whether a reasonably competent solicitor, having identified the point and advised SUL of the risk, would have suggested alternative drafting which sought to eliminate the lacuna. The claimants contended that this would have occurred, and proffered an initial suggested rewording of clause 9.1.12 in a response to a request for further information from the defendants. That redraft was, however, abandoned in favour of the suggestion in the amended particulars of claim that the 75% threshold in clause 9.1.12 should have included any shareholding previously transferred to a third party, as follows (my underlining, for emphasis):

> "9.1.12 upon any Shareholder (1) acquiring or having in aggregate acquired 75% or more of the issued share capital of the Company (<u>whether or not any part of such shareholding has been transferred, assigned or otherwise disposed of to a third party</u>) and/or (2) having completed the purchase of the other Shareholder's shares pursuant to Clause 10.9 or 11.9 …"

162. As the defendants pointed out, that redraft does not work either, because it would trigger the obligations under clause 9.1.12 even if (for example) 40% of the Blades shareholding had been sold by UTB via an arm's length transaction to an unconnected third party, prior to UTB's acquisition of the SUL's remaining shareholding. Even if (as Mr Elkington countered) such a sale to a third party might have provoked a bespoke renegotiation of clause 9.1.12, I do not consider that a reasonably competent solicitor would propose a clause that would on its face manifestly overreach the effect intended.

163. Mr Hollander's submission was that, having had several years to consider this point at leisure, with the best efforts of (in total) two leading counsel and three junior counsel, if the claimants could not come up with a workable alternative draft of clause 9.1.12 which closed the lacuna in the original wording, the court's conclusion should be that a better formulation was impossible. Alternatively, at the very least, S+W were not negligent in failing to come up with a better formulation themselves during the rather more pressured timetable in August 2013.

164. Mr Hollander's argument in this regard was persuasively presented, and has some intuitive appeal. On careful consideration, however, I do not accept the submission. As Mr Elkington acknowledged, the difficulty with the redraft in the amended particulars of claim was that it was an attempt to resolve all of the issues pleaded by the claimants under this head of their claim. If the issue is reduced to that of permitted transfers/Device 1, the problem is a more limited one, for which the claimants' draft goes too far. The difficulty is perhaps inherent in any case in which multiple errors in contractual drafting are claimed, and where the claimant does not know which of those (or which combination of those) will ultimately be accepted by the court.

165. The essential point in relation to Device 1 is that what clause 9.1.12 needed to do was to take account, in the 75% threshold, of permitted transfers under Article 9 of the Articles of Association. That is essentially a narrower version of the additional term suggested in the amended particulars of claim, in the underlined passage above.

166. Far from being impossible, the defendants' closing submissions positively averred that such a term could have been implied into clause 9.1.12 if the court had needed to consider a genuine transfer of a shareholding between companies in the same corporate group. In such a case, the defendants contended that there is "a powerful argument that, on a proper construction, they [i.e. the shares of companies in the same corporate group] should be treated together for the purpose of Clause 9.1.12 where the two companies genuinely hold the shares". If, as the defendants contend, such a term could and should have been implied in that scenario, then it would *a fortiori* have been possible for S+W to draft such a term expressly into clause 9.1.12.

167. I do not think that the claimants' case on breach of duty must fail simply because a precise alternative draft for clause 9.1.12 has not been pleaded. There are (as Mr Elkington rightly said) various ways in which S+W could have sought to address the lacuna which arose on the face of the existing wording. Inevitably, it would have been necessary to consider whether that required consequential changes to other provisions of the ISA or Articles of Association. That is a normal incident of contractual drafting. The key question is whether a reasonably competent solicitor would have sought to address the point in the drafting of the ISA, which brings with it the question of whether that would have been a reasonably feasible exercise. My conclusion is that it would have been reasonably feasible to do so, and a reasonably competent solicitor would therefore have sought to address the point rather than leaving a lacuna on the face of the clause.

168. My conclusion is therefore that by failing to identify the lacuna on the face of clause 9.1.12 and accordingly failing to warn SUL of the risk arising from the wording, and failing to suggest drafting designed to avoid the lacuna, S+W breached their duties to SUL.

Third party direction under clause 11.9/Device 2

169. As with permitted transfers/Device 1, it is apparent from the material before me that Mr Knowles did not give any thought to the possibility that UTB might seek to avoid the operation of clause 9.1.12 by directing the transfer of shares, on completion, to a third party.

170. I do not, however, consider that S+W were in breach of duty by failing to advise SUL of the risk that UTB might seek to exploit clause 11.9 as a means of avoiding the requirement to exercise the property options, or by failing to draft clause 9.1.12 (or the other clauses of the ISA) to avoid that eventuality. Fancourt J robustly found at §267 that Device 2 failed for numerous reasons:

> "UTB 'acquires' all the Blades shares sold by SUL in those circumstances. It does so because it completes the contract of sale and purchase, under which it has agreed to buy those shares, by paying to SUL the full price for all the shares. The fact that it directs that certain shares be transferred to others, as it is entitled to do under the ISA, cannot mean that it has not at that time acquired the shares within the meaning of clause 9.1.12. It has acquired them from SUL. … It cannot have been intended that clause 9.1.12 would not be triggered simply because UTB exercised its right (expressly given by the ISA) to have transfers executed in favour of third parties. … The purchase of the shares pursuant to clause 11 of the ISA is one of the principal means of 'acquisition' of more than 75% of the shares by UTB, and completion of a

> contract arising under clause 11, entitling UTB to take the shares from SUL, must have been intended by the parties to be acquisition for the purposes of clause 9.1.12."

171. Unlike the position on permitted transfers/Device 1, therefore, the express wording of clause 9.1.12 did not enable avoidance by means of a third party direction under clause 11.9. Nor do I think that a reasonably competent solicitor would and should have advised that UTB might contend the contrary, given the multiple reasons why such an argument would fail, as set out by Fancourt J in the passage above. Had S+W considered the point, therefore, it would have been reasonable for them to regard the raising of such an argument by UTB as being spurious, and not something that they needed to draw to the attention of SUL.

172. That conclusion is not (contrary to Mr Elkington's submissions) undermined by the fact that Mr Giansiracusa spotted the point and UTB then sought to deploy it. Spurious and indeed hopeless arguments are routinely advanced in litigation. Indeed Fancourt J found that certain of the allegations advanced by SUL itself in the UTB litigation were made without any proper foundation and could not possibly succeed. The threshold for negligence is therefore rightly not based on what arguments might potentially be dreamed up by the other side, no matter how fanciful those arguments might be. Rather, it is based on the risk that those arguments might be accepted by the court.

173. Accordingly, in so far as this point is pursued, I reject the claim for breach of duty in this regard.

Procurement of SUFC to exercise property options

174. The particulars of claim contend that S+W were negligent in failing to draft the ISA so that the property call options had to be exercised in the event that the call option was exercised, and in failing to advise SUL that the ISA did not require Blades or the shareholders to procure SUFC to exercise the property call options. That claim is, however, premised on a fallacy, because clause 9.1.12 does indeed contain such a provision (in the words "each party hereby authorises and instructs SUFC to forthwith execute and serve Option Notices in respect of" the property call options). That is why Fancourt J found at §381 that Jones Day's initial instructions to the directors of SUFC not to execute the property call option notices were an anticipatory breach of UTB's obligations under clause 9.1.12, as well as a breach of the implied term that he had found.

175. Mr Hollander also contended that an obligation on the part of UTB could be derived from clause 9.1. As noted at §48 above, the wording of clause 9.1 does not make much sense when set alongside clause 9.1.12. But this doesn't really matter given the explicit obligation on the face of clause 9.1.12.

176. At the trial Mr Elkington refocused the claimants' submission by saying that the problem with clause 9.1.12 was the point explained by Mr Blain in December 2017, namely that if SUFC had failed to complete the purchase of the Properties, by paying the purchase price, the only remedy would have been to bring enforcement proceedings against SUFC, which would have been (in Mr Tutton's words) "desperately unattractive".

177. That was, however, not the result of any breach of duty by S+W, but resulted from the terms of the bargain struck between the parties. As I have recorded at §36.ii) above, one

of Prince Abdullah's "five points" set out in Mr Phipps' email to Kevin McCabe on 7 August 2013 explicitly stated that the provision which became clause 9.1.12 of the ISA should be reworded to impose the obligation on SUFC rather than on the Prince to acquire the Properties. That made perfect sense given the express intention (recorded in recital (B) to the ISA) to reunite the freehold and leasehold interests in the Properties. The intention was therefore that the ownership of the Properties should be reacquired by SUFC, not by UTB or the Prince. That intention was then reflected in the drafting of the ISA by Onside Law.

178. S+W did not, therefore have to draw this to SUL's attention: the point had been made expressly by Mr Phipps to Kevin McCabe; and the wording of clause 9.1.12 reflected that correspondence; and the location of the purchase obligation was consistent with the intention of the parties to reunite the Properties with the Club. I therefore reject the claim of a breach of duty arising from this point.

Causation and loss

Permitted transfers/Device 1

179. The claimants' case is that if S+W had put forward an alternative draft of clause 9.1.12 which made clear that the 75% shareholding threshold included any shareholding that had been transferred pursuant to the permitted transfer provisions under Article 9 of the Articles of Association:

    i) There is a 100% probability that UTB would have agreed to enter into an ISA on terms which did not include what I have referred to as the lacuna.

    ii) Accordingly, when SUL served its call option notice in December 2017, UTB would not have had any basis to dispute that the obligation to exercise the property call options would arise upon completion of the transfer of shares, and therefore most likely (with 70% probability) would not have served a counternotice.

    iii) As a result, SUL would have acquired all the shares in Blades. It would then most likely (with 70% probability) have sold the shares and the Properties to a third party such as ALK, and would have avoided the litigation before Fancourt J.

180. The defendants' case is that:

    i) It is fanciful to suggest that Prince Abdullah would have agreed to a significant change to the drafting of clause 9.1.12. If he and the UTB legal team had pushed back on the point, SUL would have conceded it, as it did in relation to almost all of the Prince's demands during the negotiation process.

    ii) Even if clause 9.1.12 had been amended to close off Device 1, it was uncommercial for Prince Abdullah to do anything other than exercise the counternotice. He would therefore have taken any steps arguably open to him, whether in good faith or not, to acquire SUL's shares.

    iii) The litigation would not, therefore, have been avoided.

181. Starting with the question of whether, if S+W had proposed a redraft of clause 9.1.12, Prince Abdullah would have agreed, I bear in mind the following factors:

i) As I have noted at §§42–43 above, it is clear that Prince Abdullah had the upper hand in the negotiations during August 2013, and SUL were willing to agree to most of the changes raised by Onside Law if that meant getting the deal done. On various outstanding issues, S+W's instructions from Kevin McCabe were not to push too hard, and to accept Onside Law's position.

ii) The negotiation was not, however, wholly one-sided, and on several points Onside Law did accept SUL's position. One point related to the surrender of tax losses, which was of considerable importance to SUL. Another was the insertion of a new clause in the guarantees, following a concern raised by Mr Knowles that the draft as it stood would allow the Prince's guarantee to be circumvented following a transfer of shares (see §§157–158 above). Mr Knowles' drafting amendments to clause 9.1.12, following his discussion with Ms Morris-Smith, were also accepted without further discussion (see §§40–41 above).

iii) The reunification of the Club and the Properties was a common intention that had been recorded in the agreements from the Heads of Terms onwards. The expectation, from the very outset, was that once the Prince acquired 75% or more of the share capital of Blades, SUFC would then acquire the Properties. There is no indication, in the contemporaneous documents, that it was in the contemplation of the Prince in 2013 that he might seek to avoid that obligation. That being the case, it is difficult to see why the Prince would object to a provision that sought to avoid the circumvention of clause 9.1.12 in the event of a transfer of shares to permitted transferees, especially given the fact that his own lawyers were willing to draft in a provision which sought to avoid the circumvention of the Prince's guarantee obligations in the event of a share transfer.

182. In light of those considerations, while it cannot be said with 100% certainty that the Prince would have agreed to a redraft of clause 9.1.12 which sought to close off Device 1, it is in my judgment very likely that the Prince would have agreed that without significant dispute.

183. It is, however, then necessary to consider how the Prince would have reacted when served with SUL's call option in December 2017. On the basis of my findings above, the counterfactual situation would have been that clause 9.1.12 had been redrafted so as to preclude (or at least attempt to preclude) Device 1, but that no attempt had been made to counter Device 2, such that the position on Device 2 would have been precisely as it was in real life.

184. If that had been the situation, I agree with the defendants' submission that the Prince would still have sought a means to serve a counternotice and buy SUL's shares. The Prince's evidence at the UTB trial was that accepting the call option would have been wholly uncommercial for him, requiring him to take a huge loss and accept a price that was far below what he had paid for his original investment, at a time when the Club was in League One rather than the Championship. Far from being a "respectful offer", as Kevin McCabe claimed, the offer of £5m was an insult to the Prince, and Mr McCabe must have known that. He had gambled, however, on the Prince's impecuniosity making it difficult for the Prince to raise the funds to buy both SUL's shares and the Properties.

185. It is common ground that at the time the call option was served the Prince knew that he did not and would not have the means to pay the combination of the £5m buyout sum for

SUL's shares and the purchase price of the Properties, within the 12-month completion deadline required by the property options. SUFC would also, if controlled by UTB, have been in substantial difficulties in raising the money within a year. That was why, as the Prince said candidly at the UTB trial, the call option placed him between a rock and a hard place. The only way of extricating himself from that situation was to find a way to serve a counternotice while avoiding exercising the property options.

186. Fortunately, Mr Giansiracusa had by then already identified Device 2 as a potential means of doing so. Mr Giansiracusa's evidence at the UTB trial was that he had become aware of Device 2 on 22 November 2017, and took further advice on the point; and by 28 November he was satisfied that clause 11.9 "provided a likely way to not trigger this clause". Fancourt J found at §505 of his judgment that UTB decided on 10 January 2018 to serve a counternotice, and that at that time the only "avoidance" device that it had in mind was nominating transferees of SUL's shares other than UTB (i.e. Device 2). In response to a notice to admit served by the defendants in these proceedings, the claimants admitted that finding.

187. Prince Abdullah therefore decided to serve a counternotice on the sole basis of Mr Giansiracusa's advice as to Device 2. That being the case, the overwhelming likelihood is that the Prince would have done precisely the same in the hypothetical situation in which clause 9.1.12 had closed off Device 1. The Prince might also have sought another way out on the basis of the (hypothetically redrafted) clause 9.1.12 as it stood then. The Prince might also simply have served a counternotice in the hope that sufficient funds could be found within 12 months. I do not, however, have to reach any firm conclusion on those possibilities given that the Prince would, in the counterfactual case, already have been told by Mr Giansiracusa that Device 2 was a "likely" way out. The chance that in those circumstances, despite that advice from Mr Giansiracusa, the Prince would have backed down and accepted the loss is negligible – and would make no sense when set against the facts of what actually happened.

188. It follows that if the Prince had agreed to a redraft of clause 9.1.12 as contended for by the claimants, the outcome would nevertheless have been the same as actually occurred: the Prince would have served the counternotice but maintained that the property options did not have to be exercised, and litigation between the parties would then have ensued. The claimants have not invited me to go down the route of speculating as to whether the litigation might have unfolded differently in such a case.

189. The remaining question is what would have happened if the Prince had objected to a redraft of clause 9.1.12 (which is conceivable albeit, for the reasons given above, very unlikely in my view). I do not think that this would have been a dealbreaker from SUL's perspective. The advice which S+W would most likely have given, in that scenario, was that although there was a significant risk in proceeding with the clause as drafted, there would be ways of seeking to address that – should the need arise – through the implication of terms. If presented with that advice I consider it likely that Kevin McCabe would have accepted that position, in order to get the deal done with an investor who (at the time) he clearly regarded as a promising and trustworthy business partner.

190. That would have left SUL and UTB's contractual positions the same as they were in fact in December 2017. The only difference would have been that SUL would then have known of the risk of avoidance when it considered service of the call option (having been, on this hypothesis, advised of the point in 2013). For the reasons which I give below in

relation to the December 2017 advice, I do not consider that this would have made a difference to SUL's decision-making at the time.

Device 2 and procurement of SUFC

191. In light of my conclusions above that no breach of duty arose in relation to the third party direction under clause 11.9/Device 2, or the provisions on the procurement of SUFC to exercise the property options, it is not necessary to consider whether any loss was caused by the drafting of the clause 9.1.12 in those respects. For completeness, however, if it had been necessary to address these, I would not have found any causation of loss for the following reasons.

192. On the third party direction/Device 2 point, even if Mr Knowles had raised the point with SUL, the correct advice would have been that the risk of this mechanism succeeding was very small, for precisely the reasons given by Fancourt J. In that situation I consider that Kevin McCabe's instructions would most probably have been to accept the risk, given SUL's overriding wish to get the deal done as quickly as possible, and Mr McCabe's view of the Prince as a trustworthy business partner with whom he could negotiate if necessary (essentially as I have found on the scenario addressed at §189 above).

193. The position would then have been as identified at §190 above, namely that the contractual position in December 2017 would have been the same as it was in fact, the only difference being SUL's knowledge of the risk of avoidance which, again for the reasons I give below, I do not consider would have made a difference to SUL's decision-making.

194. In relation to the obligation on SUFC (rather than UTB or Prince Abdullah) to exercise and pay for the property options, SUL was aware of the point from Mr Phipps' email to Kevin McCabe on 7 August 2013. Even if S+W had queried this with SUL, the uncompromising terms of Mr Phipps' email made it very unlikely that SUL would have sought to derail the deal by attempting to introduce a mechanism whereby Prince Abdullah guaranteed SUFC's purchase obligation under clause 9.1.12.

195. Moreover, if SUL had suggested such a mechanism, I do not consider that there is any serious prospect that the Prince would have agreed it, given the Prince's express stipulation that the obligation should fall on SUFC rather than him, and the fact that the Prince was otherwise only guaranteeing the financial obligations of UTB under the ISA (and not those of SUFC). Assuming, therefore, that the Prince would have refused to change course, I do not think that SUL would have resisted; and I certainly do not think that it would have abandoned the deal on this basis.

196. In this case, therefore SUL would have been in precisely the same situation in which it found itself in December 2017.

Conclusion on the drafting of the ISA

197. My conclusion on the drafting of the ISA is that S+W were negligent in failing to identify the possibility of Device 1, and in failing thereafter to advise on and suggest drafting in the ISA designed to preclude UTB's use of Device 1. I do not, however, consider that S+W were negligent in failing to advise on the possible use of Device 2, or in failing to

advise SUL that any enforcement proceedings in respect of the completion of the purchase of the Properties would have to be brought against SUFC.

198. As regards S+W's negligence in relation to Device 1, I have found that this did not cause the claimants any loss. Assuming that S+W would, if properly advised, have proposed alternative drafting which sought to avoid the possibility of using Device 1, and assuming that Prince Abdullah would have agreed to that drafting, upon receipt of the call option notice I consider that the Prince would nevertheless have served a counternotice and sought to avoid exercising the property options by deployment of Device 2. In the unlikely event that the Prince had objected to the alternative drafting, I consider that SUL would have accepted the position, and events would then have unfolded as they did in fact. Ultimately, in both cases, the parties would have been in the same positions as they were in by January 2018, and SUL would not have avoided the litigation which ensued.

ISSUE (2): DRAFTING OF THE STADIUM OPTION

199. The material facts are set out above at §§55–67 (drafting of the Stadium Option) and §§122–124 (the arbitration). The claimants' case is that S+W were negligent in agreeing to the last-minute addition by Maple & Black of the permitted use assumption in the definitions of Land Market Value and Property Market Value without taking instructions from SUL. The effect of that assumption, the claimants contend, was to depress the purchase price for the Stadium in the arbitration by £600,000.

Breach of duty

200. It is not disputed by the defendants that Ms Morris-Smith agreed to the insertion of the permitted use assumption within the space of three minutes at lunchtime on 29 August 2013, without discussing that with SUL in any way. When she did forward the amended agreement to Simon McCabe later that day, she sent the clean copy of the agreement only, without referring to the insertion of the permitted use assumption, and commenting that the other side had made "Small amends" which were "Not material".

201. Ms Morris-Smith in her evidence unsurprisingly could not recall where she was when she received the proposed amendments from Maple & Black, nor could she recall what she had thought about in the three minutes between receiving and agreeing to those amendments. She conceded, however, that she had simply not realised or appreciated that the permitted use assumption might have the potential effect of reducing the Aggregate Value in the formula for the calculation of the Stadium Option purchase price. She also accepted that if she had thought that the assumption did have that effect, she would not have been able to recommend that SUL should sign the Stadium Option on those terms.

202. In my judgment, Ms Morris-Smith was quite clearly negligent in failing to bring the amendment to the attention of SUL in order to obtain their consent, instead simply telling SUL that the amendments were small and immaterial.

203. Ms Morris-Smith was an experienced property lawyer, but she was not a property valuation expert, and Mr Hollander correctly stated in his closing submissions that working out the effect of the assumption on the valuation of the Stadium was beyond the scope of her expertise. As he put it, "it was far beyond something that she ought to be looking at". In similar vein the defendants' written closing submissions stated that the

impact of the permitted use assumption was "far from obvious" and not something that Ms Morris-Smith could have been expected to identify. That being the case, it is evident that she could not properly approve the amendment without seeking SUL's instructions. A reasonably competent solicitor, faced with an amendment to a contract the effect of which is unclear and outside the scope of their expertise, should refer the issue to the client to seek their further instructions.

204. It is notable that Ms Morris-Smith had done precisely that the previous day, on 28 August 2013, when she asked Simon McCabe whether the new formula suggested by Maple & Black produced a higher value than the open market value price which was being used for all the Properties other than the Stadium (see §§55–59 above). She quite properly only agreed the formula once Simon McCabe had given his consent on behalf of SUL. That is what she should have done in relation to the permitted use assumption.

205. The defendants contended that Ms Morris-Smith was nevertheless reasonable to conclude that the insertion of the permitted use assumption was an immaterial change, which did not have to be referred to the client before she agreed it. They relied, in that regard, on statements by Ms Morris-Smith in her witness statement to the effect that she had understood that the Stadium use was also the consented planning use, such that even in the absence of the inclusion of the permitted use in the valuation definition the valuer would be valuing the land as a Stadium in any event. That was, the defendants contended, a reasonable view for Ms Morris-Smith to take.

206. As Ms Morris-Smith clarified in her oral evidence, however, she could not actually recall her reasoning at the time when she accepted the permitted use assumption. The comments in her witness statement as to her reasoning were, therefore, simply speculation as to what might have been her thought process.

207. In any event, even if that had been her reasoning, I do not accept that it would have justified her failure to revert to the clients:

    i) The contention that it would have been reasonable to conclude that the change was immaterial is contradicted by the defendants' assertion that the impact of the permitted use assumption was "far from obvious". If the impact of that provision was not obvious, then Ms Morris-Smith could not properly have concluded that it was immaterial.

    ii) Given Ms Morris-Smith's lack of property valuation expertise, she should not in any event have been making any assumption about the way in which a valuer would take into account any planning consent in the assessment of the Stadium value according to the agreed formula.

    iii) Even if, notwithstanding her lack of expertise, she had sought to consider the basis on which the valuation would be carried out, it would not have been reasonable to assume that the valuer would be valuing the land as a Stadium even in the absence of the permitted use assumption, given that the Land Market Value was defined as assuming vacant possession of the land save for the hotel lease and the business centre lease. Absent the permitted use assumption, therefore, the Land Market Value required valuation of the land, other than the hotel and business centre, as a hypothetical cleared site. There is no reason why a hypothetical cleared site should

be assumed to have a specific restricted use for the purposes of what was (as Ms Morris-Smith accepted) a land-only valuation for this part of the formula.

iv) The defendants contended that Ms Morris-Smith was aware that SUL would not countenance the Stadium being demolished or the site being used other than as a football stadium. That is, however, to confuse the actual use of the site and the leases with the question of the value of the site under a formula which assumed, in the Land Market Value part of the calculation, a hypothetical situation of vacant possession.

v) The fact that the Land Market Value assumed a hypothetical cleared site did not of course mean that the use of the land as a Stadium was ignored in the valuation. The point of the Aggregate Value part of the formula was that it separated the Land Market Value from the book value of the Stadium, and provided for a separate valuation of each of those, with the two values then being added together before subtracting the capital contributions and expenditure incurred by SUFC on stadium improvements. The Stadium use was therefore taken into account in the book value part of the valuation mechanism.

208. The defendants also contended that the acceptance of the permitted use assumption was justified on the basis that SUL's main concerns regarding the Stadium valuation had by that time been addressed in the formula, with the definition of Aggregate Value being drafted to take account of capital contributions and expenditure incurred by SUFC. They relied on Simon McCabe's evidence as to this part of the formula (see §§57–59 above). Ms Morris-Smith did not, however, at any time in her evidence suggest that this was a consideration that she took into account (or even might have taken into account) at the time. Furthermore, even if she had thought that SUL's main concerns had been addressed by that point, that would not on any basis have justified the acceptance of an amendment which had a potential material effect on the valuation of the Stadium, without first confirming SUL's consent to that amendment.

209. Finally, the defendants relied on SUL's instructions to S+W to get the deal done as quickly as possible, and Ms Morris-Smith's awareness that the conclusion of the transaction was being held up by the negotiation of the Stadium valuation mechanism. That is not, however, a justification for the failure to take instructions from the clients on an amendment whose impact was, as Ms Morris-Smith knew, outside her area of expertise, and which she could not therefore assume was immaterial.

Causation and loss

210. The claimants' case is that if Ms Morris-Smith had acted with due skill and care, she would have realised that the addition of the permitted use assumption had the potential to reduce the price payable for the Stadium, and would then have objected to the permitted use assumption, in which case Prince Abdullah/Maple & Black would have accepted the removal of the clause. Alternatively, she would have sought SUL's instructions, advising on the potential to reduce the value, in which case SUL would not have agreed to the amendment, and the Prince/Maple & Black would have backed down.

211. The defendants' case is that SUL would not have considered the insertion of the permitted use assumption to be material, and would therefore have agreed it when asked, particularly given Kevin McCabe's wish to complete the deal as soon as possible.

Accordingly, in so far as there was a breach of duty, it did not cause the claimants any loss.

212. On this issue, in my judgment, the defendants are correct. It follows from my findings above that what Ms Morris-Smith should have done on receiving the amendments from Maple & Black on 29 August 2013 was to revert to SUL for its instructions. On this point, Simon McCabe was taking the lead for SUL, given his property experience. Given that the impact of the permitted use assumption was unclear and outside Ms Morris-Smith's expertise, it would have been inappropriate for her to object to its inclusion without discussion with SUL.

213. Simon McCabe's evidence showed that he had a good understanding of the mechanics of the Stadium Option. He gave a clear and coherent explanation of why the valuation mechanism had been redrafted to include the Aggregate Value. In particular, as he explained, the purpose of this was to enable the valuation to take into account the investment by SUFC in the Stadium. While he fairly said that he didn't have the opportunity to comment on the permitted use assumption, he expressly conceded that if Ms Morris-Smith had asked him whether the clause was okay, he would have said yes.

214. Simon McCabe then said that if he had been advised that he "might want to check it out" because the amendment might be material to the valuation, he would have sought the assistance of a property valuer before agreeing to it. With hindsight, this may well be what Mr McCabe thought he should have done. I do not consider, however, that he would realistically have done that at the time, for several reasons.

215. In the first place, as explained at §§55–59 above, on 27 August 2013 (two days before the permitted use assumption was inserted) Maple & Black sent Ms Morris-Smith a proposal to change the Stadium valuation formula from a straight open market valuation (which was the case for all the other Properties) to a mean of the open market value and an Aggregate Value calculation. The next day Ms Morris-Smith forwarded this to Simon McCabe, explicitly – and quite properly – asking for comments on the impact on the valuation. Mr McCabe replied within (it appears) 11 minutes, agreeing to the formula. His comment shortly afterwards was that he was happy with the proposal because the open market value was higher than the book cost.

216. In Simon McCabe's oral evidence, he said that he had spoken to Mr Tutton about the proposal, and that Mr Tutton had been content that it was a sensible mechanism to value the Stadium. Neither of them, however, had taken the advice of a property valuer, and Mr McCabe said that this was because that was not necessary. He agreed, however, that the change to the formula could have made a quite significant difference to the total figure in the valuation.

217. If that was Simon McCabe's approach to the introduction of a wholly different valuation formula, it is unrealistic to suppose that the insertion of an additional assumption in certain parts of the formula (which was, on its face, a far more minor change) would have induced him to seek advice from a valuer.

218. That is particularly the case given that by late August 2013 there was considerable pressure from Kevin McCabe to get the transaction finalised. On 27 August Kevin McCabe sent an email to Mr Knowles, Simon McCabe and Mr Tutton (copied to, among others, Ms Morris-Smith) saying "We complete tomorrow – come hook or by crook!"

While I have found that the time pressure did not justify a failure on the part of S+W to seek instructions on the permitted use assumption, from SUL's perspective the imperative to get the deal done meant that Simon McCabe would, I consider, have been very reluctant to hold matters up on this point on 29 August, at a point when SUL had already signed all of the documents. The reality is, in my judgment, that Simon McCabe would have accepted the amendment on the basis that it was acceptable – precisely his instinctive view in his oral evidence, as I have noted above.

219. S+W's breach of duty in failing to obtain SUL's instructions on the permitted use assumption did not, therefore, cause the claimants any loss, since even if Ms Morris-Smith had raised the issue with Simon McCabe he would in my view very probably have accepted the amendment. The claimants would therefore have been in the same position in which they found themselves when it came to the arbitration.

Conclusion on the drafting of the Stadium Option

220. My conclusion on the drafting of the Stadium Option is that S+W were negligent in failing to seek SUL's instructions on the permitted use assumption, and in informing SUL that the amendment was immaterial. I have found, however, that this did not cause the claimants any loss, because even if S+W had sought SUL's instructions on the point, Simon McCabe would most likely have accepted the amendment.

ISSUE (3): DECEMBER 2017 ADVICE

221. The material facts are set out at §§71–91 above. The claimants' case is that S+W were negligent when Mr Blain failed to advise SUL, in December 2017, that there were two ways in which UTB could serve a counternotice but still not own more than 75% of the shares of Blades, thereby having a reasonable chance of avoiding any obligation to exercise the property call options, namely Devices 1 and 2.

222. Had he given that advice, and SUL had thereby been properly informed, the claimants say that Kevin McCabe would have decided to serve the call option at a higher price – either £10m or £20m. Both cases would have reduced the prospect of Prince Abdullah serving a counternotice. But even if a counternotice had been served, the claimants say that the subsequent litigation would likely have been avoided, because SUL would not have been surprised by UTB's conduct, and would not have regarded UTB as having unlawfully acquired its shares at an undervalue.

223. I note for completeness that the amended particulars of claim also pleaded that S+W were negligent in failing to advise SUL that the ISA was drafted so that a separate contract of sale and purchase of shares would come into existence in the event that the call option was exercised, the performance of which was separate from the exercise of the property call options – i.e. the point made by Fancourt J and summarised at 118.viii) above. This point was not, however, put to Mr Blain in cross-examination and was not pursued by Mr Elkington in his submissions at the trial. I will therefore say no more about that.

Breach of duty

224. The analysis of the claimed breach of duty is essentially the same as set out above in relation to the drafting of the ISA, in relation to Devices 1 and 2. (The December 2017

advice claim does not criticise Mr Blain's advice in relation to the SUFC procurement point, because he did correctly advise S+W that if SUFC did not exercise the property options then the remedy would be to enforce against SUFC, rather than UTB.)

225. Given that I have found that S+W were negligent in failing to identify Device 1 and advise SUL of the risk in 2013, it follows that they were also negligent in failing to do so in December 2017.

226. Mr Blain claimed, in his oral evidence, that he had thought about the possibility of permitted transfers, but formed the view that clause 9.1.12 would cover a permitted transfer to a controlled company. He also suggested that he thought that clause 9.1.12 would continue to apply if a direction was given under clause 11 for shares to be transferred to a third party. He suggested that he had not raised these points in his advice to SUL because "I am not drafting a document in giving this advice. I am not – I am not drafting it in legal terms. I am – I am setting it out in as plain English as I possibly can."

227. I am afraid that I do not believe any of those claims. It was clear during the course of Mr Blain's cross-examination that he had a poor grasp of the contractual implications of the call options, despite advising SUL on that point and addressing in his witness statement the advice that he gave at the time. That made his repeated claims to have considered particular details of the contractual provisions unconvincing: I do not believe that he ever had sufficient understanding of the detail of the agreements to have engaged in the thought processes which he now claims to have gone through. Still less do I believe that he can recall those thought processes at this point more than five years later. The suggestion that he was not drafting his advice "in legal terms" was, moreover, utterly absurd: legal advice was precisely what he was being asked to give.

228. While Mr Blain, with hindsight, might have convinced himself that he did think about these points, the reality is in my judgment that, at the time, it simply did not occur to either him or anyone else in the S+W team who was assisting him that either Devices 1 or 2 might be used by UTB to avoid their obligations under clause 9.1.12.

229. As regards Device 1, that was negligent on S+W's part for the same reasons as given above in relation to the 2013 drafting of the ISA. As regards Device 2, given my finding that S+W were not negligent in failing to raise the point in 2013, I consider that they were likewise not negligent in December 2017.

Causation and loss

230. The question is then whether, if Mr Blain had advised SUL of the risk of Device 1 being employed, SUL would have reached a different decision in relation to the exercise of the call options. The defendants' case was that even if SUL had been aware of the risk, it would have continued to exercise the call option at £5m – in other words, exactly the same decision would have been taken.

231. The first point to deal with in this regard is the claimants' objection in their closing submissions that the defendants' case on this was not put to SUL's witnesses, and that the SUL evidence on this point was not properly challenged. The key relevant passage in SUL's evidence was §68 of Kevin McCabe's witness statement, which read:

> "Had I known in 2017 that the ISA was negligently drafted and did not do what was intended (and what I had agreed with Prince Abdullah), I would not have served the Call Option Notice on UTB for £5 million. Instead, I would have served a call option notice at a time and price of my choosing to ensure that I obtained control of the Club to avoid any risk of the Club and the Properties being split up, for reasons that I have explained above."

232. Simon and Scott McCabe also both said that if they had been advised of the problems with the drafting of the ISA, they thought that SUL would not have served the call option notice.

233. Kevin McCabe was challenged on §68 of his witness statement in cross-examination by Mr Hollander, in terms that made it clear that Mr McCabe's account was disputed. But Mr Hollander's specific questions focused on asking what it was that Mr McCabe did not know in 2017, in light of the ultimate findings of Fancourt J that the Prince was indeed required under the ISA to purchase the property options. Those questions reflected the bald terms in which Mr McCabe's evidence was put (that the ISA "did not do what was intended") and the defendants' primary position in relation to that, namely that the ISA did precisely what it should have done. What was not put to Mr McCabe was the defendants' alternative case, which was that even if SUL should have been advised of the *risk* that the objectives of clause 9.1.12 could be frustrated by splitting the Blades shares across two or more group companies, he would still have served the call option notice on UTB for £5m. Simon and Scott McCabe were not challenged on their evidence on this point at all.

234. I do not, however, consider that that is necessarily fatal to the defendants' case. The question of whether an adverse case has been sufficiently put to a witness is case-specific and will turn on considerations of overall fairness. *Chen v Ng* [2017] UKPC 27, §55, sets out some of the factors to be taken into account, namely the importance of the issue, the grounds that were put to the witness, the reasonableness of the particular points not having been put, whether the particular point had been raised in submissions, and the question of whether the witness might have given a satisfactory answer if asked about the point.

235. In addition, it seems to me that the nature of the particular issue may be highly relevant. As I have already noted, in assessing what the parties or third parties might have done in a hypothetical future situation, the court will inevitably have to rely on inferences from the available evidence. When a witness gives evidence about what they would have done in a particular situation, that is inevitably speculative and may carry little weight especially where the evidence is obviously self-serving. While in an ideal world the witness evidence should be challenged by a party that wishes to impugn the credibility of that evidence, there may be other reliable material before the court from which the judge can fairly conclude that the witness evidence is not credible.

236. That point applies *a fortiori* where – as in the present case – there are multiple layers of potential hypothetical scenarios, depending on the court's identification of the nature of the alleged breaches of duty. It may in such a case be unrealistic to expect every version of the various alternative scenarios to be considered by the relevant witnesses and put to them in cross-examination. Nor should the parties have to do so, if the other available evidence in the case establishes the relevant party's case to be implausible in any event.

237. In the present case, it is apparent from the contemporaneous documents that Kevin McCabe took the decisions for SUL as to the service of the call option notice (and Simon McCabe confirmed this expressly in his witness statement). It was therefore reasonable for any questions on this to be put to Kevin McCabe rather than Simon or Scott McCabe.

238. As for Kevin McCabe's evidence, that focused on the question of what he would have done if he had known that the ISA was negligently drafted and "did not do what was intended". When cross-examined on that by Mr Hollander (in the terms set out above), Mr McCabe was not able to give any coherent explanation of what he meant by that. It is not surprising, in those circumstances, that Mr Hollander did not seek to explore further what Mr McCabe might have done in other more nuanced hypothetical scenarios, such as a situation in which he was advised of a *risk* that the ISA might not do what was intended.

239. Furthermore, given Kevin McCabe's responses to the questions that he was asked on this point, I do not think it at all likely that he would have given a reliable answer to such a question in any event. Mr McCabe's repeated answer to Mr Hollander's questions on this point was to assert that he "always knew" that if Prince Abdullah decided to buy SUL's shares, he would then have a legal obligation to buy the properties within 12 months. That was of course untrue: as set out at §90, Mr McCabe had been told by both Mr Tutton and Mr Blain that the Prince was not obliged to guarantee SUFC's obligations under the property options. Given Mr McCabe's failure, in that regard, to give an accurate account of what he did in fact know at the time, and my overall conclusions about Mr McCabe's reliability as a witness, it is in my judgment highly unlikely that he would have given any more satisfactory and reliable an answer if asked about his hypothetical response to advice on the risk of Device 1 being employed.

240. The question is therefore what I can draw from the contemporaneous evidence on this point. As I have described above, SUL's decision to exercise the call option was taken in the context of a relationship with Prince Abdullah which had by late 2017 completely broken down. I have found at §88 above that Kevin McCabe was determined to extricate himself from that arrangement as soon as possible. He had been informed by Mr Tutton in no uncertain terms, on 22 November 2017, that the exercise of the call option was "fraught with risk". Mr Blain had also repeatedly advised of the risk that even if a counternotice was served by UTB, SUFC might not exercise the property options, leaving SUL with what Mr Tutton described as the "desperately unattractive" remedy of suing SUFC. As is apparent from Mr McCabe's later email of 4 January 2018 (§94 above), he firmly expected UTB to "use every trick in the book to prevaricate".

241. SUL decided to proceed to serve the call option despite those risks. Mr Blain's notes of the first conference with Paul Downes on 30 January 2018 included a note of Kevin McCabe saying "we served option + took risk re them completing on property option – we knew that". When cross-examined on this point, Mr McCabe claimed that he didn't regard it as a risk. That was a wholly implausible answer given the contemporaneous documents to which I have just referred. In my judgment Mr McCabe's state of mind was exactly as recorded in Mr Blain's note: he knew that there was a very considerable risk that SUFC would not complete on the property options if a counternotice was served, but decided to proceed regardless.

242. In those circumstances I consider it very unlikely that Mr McCabe would have decided to abandon the idea of serving the call option if he had been informed of the possibility

of Device 1 being employed by UTB. In similar vein to my finding at §189 above, if Mr Blain had identified the point in December 2017, the advice which he would most likely have given was that although there was a significant risk that UTB might seek to avoid exercising the property options by transferring shares to permitted transferees, there would be ways of seeking to address that through the implication of terms, particularly given that (by that point) it would have been clear that any share transfer would most likely be designed to frustrate the effect of clause 9.1.12. Given the risks which SUL already knew that it faced, I do not consider that advice along these lines would have made any material difference to its strategy.

243. I am aware that this conclusion is different to Fancourt J's finding at §282 of his judgment that Kevin McCabe "would not have taken the risk of losing all control over Blades if there was a real prospect of UTB not having to procure payment for the property assets". I have reached my conclusions above on the basis of the evidence before me, which necessarily includes evidence that was not before Fancourt J.

244. I also reject the claimants' suggestion that if SUL did serve the call option after being advised of the risk of Device 1 being deployed, it would have sought to mitigate the risk of a counternotice being served by offering a higher price for UTB's shares, such as £10m or £20m. Given the known risk that SUFC might not exercise the property options, it was already in SUL's interests to mitigate that risk by offering a realistic price for UTB's shares.

245. Mr Tutton had previously suggested that SUL should offer £10m, consistent with the figure specified in the draft ALK heads of terms. As I have found, the problem with that figure was that it was premised on investment by ALK. By the end of December 2017, ALK was still doing its due diligence and had not made a firm commitment to invest. A lower figure of £5m was therefore set to ensure affordability for SUL if the Prince accepted the offer to buy UTB's shares (see §§87–88 above).

246. The claimants suggested that SUL could have waited until ALK was ready to lend, or could have utilised financing from within SGIL or from Kevin McCabe personally. But if those had been options which SUL would have regarded as acceptable, that is what SUL would have already done in December 2017, in the situation in which it found itself. Kevin McCabe was evidently not, however, prepared to wait until ALK's due diligence was completed, and was likewise evidently not willing to draw on lending from SGIL or his own personal funds so as to increase the offer to UTB.

247. That being the case on the facts as they stood in December 2017, and with the level of risk already well known to SUL, I do not consider that the knowledge of a potential increase in risk due to the possibility of the use of Device 1 would have materially altered SUL's decision.

Conclusion on the December 2017 advice

248. My conclusion on the December 2017 advice is that S+W were negligent by failing to advise SUL as to the risk that UTB might seek to use the permitted transfer provisions/Device 1 to avoid exercising the property options under clause 9.1.12. I have found, however, that this did not cause the claimants any loss, because even if Mr Blain had properly advised SUL on this point, SUL would most likely have made exactly the same decision to exercise the call option and offer £5m for UTB's shares.

249. It is therefore not necessary for me to consider the possible consequences of other hypothetical courses which SUL might have taken: my conclusion is that on the balance of probabilities the alternative options of increasing the price for UTB's shares or waiting to serve the call option would not have been pursued by SUL.

ISSUE (4): FAILURE TO ADVISE ON CONFLICT OF INTEREST

250. The claimants' case is that S+W breached their contractual, tortious and fiduciary duties to SUL by failing to advise SUL in January 2018 and thereafter that (i) S+W were in a position of own interest conflict, and (ii) that SUL should seek independent legal advice on their position, in circumstances where there was a significant risk that S+W had been negligent in their drafting of the ISA and advice given on the effects of the ISA.

Solicitors' duties to advise on conflicts of interest

251. A solicitor will be in a position of own interest conflict where the solicitor's duty to act in the best interests of a client in relation to a matter conflicts, or there is a significant risk that it may conflict, with the solicitor's own interests in relation to that matter or a related matter: *Flenley & Leech: The Law of Solicitors' Liabilities* (4th ed, 2020), §4.34, reflecting the definition given in the glossary to the SRA Code of Conduct.

252. A paradigm case in which an own interest conflict will arise is where a solicitor has been negligent, or there is a significant risk that the solicitor has been negligent, in earlier advice given on the matter on which the solicitor is continuing to advise the client.

253. The 2011 version of the SRA Code of Conduct, which was applicable at the relevant time, provided that a solicitor was required to "inform current clients if you discover any act or omission which could give rise to a claim by them against you" (Outcome 1.16). This would generally include "considering whether a conflict of interests has arisen or whether the client should be advised to obtain independent advice where the client notifies you of their intention to make a claim or if you discover an act or omission which might give rise to a claim" (Indicative Behaviour 1.12). The 2011 Code of Conduct also provided that a solicitor should not act at all if there was an own interest conflict, or even a significant risk of an own interest conflict (Outcome 3.4), with no exceptions to that prohibition.

254. The requirements of the SRA Code of Conduct will not inevitably be treated as representing the duties imposed on a solicitor at common law. The duties set out in the Code can, however, be taken as a guide to the standard of conduct which is normally to be expected of the reasonably competent solicitor. In *Barrowfen v Patel*, Tom Leech QC noted at §307 that the Code of Conduct provided useful assistance in identifying the situations in which it was permissible for a firm of solicitors to act for two clients when there was a client conflict.

255. The same must in my judgment be true of an own interest conflict. In my judgment, where an own interest conflict arises the reasonably competent solicitor must at the very least inform the client and advise them to seek independent legal advice. That duty, in my judgment, arises irrespective of the degree of sophistication of the client, and irrespective of whether or not the client is aware of the facts which might establish prior negligence by the solicitor.

256. A duty to advise the client to seek independent legal advice will not, however, arise in every case where the solicitor's drafting or advice is called into question in a subsequent dispute. That is apparent from the cases of *Gold v Mincoff Science & Gold* [2001] 1 Lloyds Rep PN 423 and *Ezekiel v Lehrer* [2002] EWCA Civ 16, [2002] Lloyd Rep PN 260, which concerned the question of whether a claim for solicitor's negligence which was time-barred could be pursued by making a secondary claim that the solicitor had, at a later point in time, failed to advise the client of their earlier negligence.

257. In *Gold v Mincoff*, at §98, Neuberger cautioned that the court should not be too easily persuaded of the existence of a fresh cause of action, and said that it would be a "relatively exceptional case" where the court would be prepared to hold that a solicitor's negligence claim that was otherwise statute-barred could be resurrected on the basis of a claim that the solicitor had later failed to advise of the earlier negligence. That approach was followed by Ward LJ in *Ezekiel v Lehrer*, where in an *obiter* passage at §24 he commented that any duty to advise the client that the solicitor was negligent, or to advise the client to seek independent advice to establish whether or not the solicitor was negligent, "can only arise if the solicitor knew or ought to have known" that they were guilty of an earlier breach of duty.

258. In the present case the time-bar point taken by the defendants in relation to the 2013 drafting has (as I have noted) not been pursued. What the cases above indicate, however, is that the duty to inform the client to seek independent legal advice will only arise where a solicitor either knows or ought to know that there is an own interest conflict.

259. Mr Elkington's formulation of a duty arising wherever there is the "potential" for an allegation of negligence therefore, in my view, sets the bar too low. Just as the solicitor does not come under a duty to advise their client of a risk of litigation where that risk is fanciful or spurious, they should equally not be required to do so where there is no significant risk that they were negligent, and therefore no significant risk of an own interest conflict. The duty will, however, arise where the solicitor knows or ought to know that there is a significant risk that their earlier advice was negligent.

260. Where it is said that the failure to advise the client of a conflict was not merely negligent, but was in breach of fiduciary duty, there is (as set out above) an additional requirement that there must be an intentional, i.e. conscious or deliberate, breach of the solicitor's duties to the client, albeit that it is not necessary to show dishonesty. In the context of an alleged conflict of interests, this was explained further at §360 of *Barrowfen v Patel* as follows:

> "I have held that it is necessary for Barrowfen to prove not only that the actual conflict rule was engaged but also that Mr King and Ms Philipson understood this and then consciously preferred the interests of Girish to the interests of the company. Unless Mr King and Ms Philipson consciously appreciated that they were acting against Barrowfen's interests, then in my judgment they did not commit a breach of fiduciary duty. However, I accept their evidence that they honestly believed that it was in Barrowfen's wider interests to refuse to recognise Bedford's rights as a shareholder. In my judgment, therefore, they did not have the relevant state of mind."

261. It is not, therefore, enough for a breach of fiduciary duty to show that the solicitor negligently failed to inform the client of a conflict of interests or advise the client to seek

independent legal advice. What is required is evidence of conscious disloyalty to the client.

Whether S+W's conduct was negligent

262. Once it became clear at the end of January 2018 that UTB considered that it could serve a counternotice while avoiding exercising the property options pursuant to clause 9.1.12, it was apparent to S+W that the effectiveness of the clause which it had reviewed (and in part drafted) in 2013, and the advice it had given in December 2017, were being put in issue by UTB and UTB's legal team. That did not in itself require S+W to advise SUL to seek independent legal advice; what S+W first needed to do was to consider the strength of the case being made by UTB. If that gave rise to a significant risk that their earlier drafting and/or advice had been negligent, they should then have advised SUL to seek independent legal advice.

263. That was also required by S+W's 1 November 2017 version of its "Conflicts of Interest Policy and Procedures", which specified that the firm should "never act where there is a conflict, or a significant risk of a conflict, between the firm (or one of its lawyers) and the client". In the event of uncertainty as to whether there was an own interest conflict or a potential risk of an own interest conflict, the policy stated that this should be discussed with a member of the firm's Conflicts Committee. The Conflicts Committee was supposed to maintain a record of its decisions, and those of individual members of the Committee, in relation to conflict situations.

Whether there was an own interest conflict

264. The defendants' submissions were that (i) Mr Blain and Mr Sewell considered that UTB could not lawfully avoid its obligations under clause 9.1.12 of the ISA; (ii) the strong advice from counsel (Mr Downes, Justin Fenwick KC, and junior counsel) reinforced that view; and (iii) the advice was ultimately vindicated by Fancourt J. On that basis, the defendants' case was that Mr Blain and Mr Sewell properly and reasonably took the view that S+W were not conflicted.

265. There are several problems with those submissions. The first is that the relevant question was not whether S+W thought that SUL would ultimately win on the construction of the ISA, but the risk that they might not do so. Secondly, as to that question, S+W were well aware that counsel had *not* advised that there was no material or significant risk of losing the argument on the construction of clause 9.1.12:

    i) On 1 February 2018, shortly after Mr Downes was instructed, he said that he expected to win the construction argument (see §§104–105 above), but advised SUL to pursue the other arguments on s. 994 and conspiracy so as to "place pressure on a Judge to find for us on cl 9.1.12" and because that would help on the merits generally. That was far from an unequivocal endorsement of the strength of the construction argument: if the construction argument was so compelling that there was no serious risk of it being unsuccessful, it is difficult to see why Mr Downes would have wanted to pursue the serious and fact-heavy allegations of unfair prejudice and conspiracy in order to bolster the merits of SUL's case.

    ii) An internal email on 1 February 2018 from Mr Sewell to Stephen Gibb, S+W's Compliance Office for Legal Practice (who was, in that capacity, a member of

S+W's Conflicts Committee), noted "the high risk strategy that we are adopting", and said that "We cannot guarantee them a win but we are doing all that we can to help them to resolve this as favourably as possible." That was an express acknowledgement that it was far from certain that SUL would prevail.

iii) In an email on 5 March 2018 Mr Downes set out a series of arguments which he proposed to make in response to the claim filed by UTB. Five of those arguments were predicated on UTB's construction of clause 9.1.12 being valid. There was no suggestion in that email that these were wholly fanciful arguments on which there was no risk that UTB would succeed.

iv) S+W's note of a meeting with SUL on 12 March 2018 recorded Mr Sewell as saying that S+W were "confident that they will be successful in pursuing the case against UTB and defending the claim against SUL and have received an opinion from Counsel that supports this". S+W had not, however, received any written opinion from counsel; the most they had by then was oral advice given in conference and Mr Downes' emails of 1 February and 5 March 2018.

v) On 26 March 2018 S+W instructed Mr Fenwick to advise on the specific issue of bringing a claim against Jones Day. Mr Fenwick was not asked to advise on the merits of the other arguments. Mr Sewell's notes of an initial call with him that day nevertheless recorded that Mr Fenwick considered that there was a good case on the construction argument, but that he described the ISA as "far from perfect". That contradicts Mr Sewell's claim in his oral evidence that Mr Fenwick had confirmed that the interpretation of clause 9.1.12 was "completely clear".

vi) Mr Sewell's notebook then recorded a conference with Mr Fenwick and Mr Downes the following morning. His notes of comments made by Mr Downes included:

> "Needed more in construction argument
> …
> Cts – increased focus literal
> Concern re exploitation of lacuna"

Nothing in those notes suggested that Mr Downes (or indeed Mr Fenwick) regarded the prospects of success on the construction argument as so strong that the risk of losing could be described as insignificant. In fact Mr Sewell accepted in cross-examination that his comments referred to a risk that the judge might not come to what SUL regarded as the "right conclusion" on the basis of the literal wording of the ISA.

vii) According to Mr Sewell's note of a conference with Mr Downes on 5 June 2018, Mr Downes again advised that SUL would win the construction argument, but repeated that he didn't want to run that on its own; rather, he wanted to include the other arguments on s. 994 and conspiracy. As with Mr Downes' similar previous comments, that continued to indicate a lack of confidence in the merits of the construction argument taken alone.

viii) At S+W board level, Mr Blain described UTB's position in a 15 October 2018 memo as the exploitation of a "loophole" in the ISA. He proposed that S+W's

activity should for internal accounting purposes be recorded at 50% of the agreed charge out rates, in the expectation that Kevin McCabe would seek a discount on S+W's fees whatever the outcome. Nothing in the memo suggested that Mr Blain considered that SUL was certain to win the litigation.

ix) On 6 May 2019 after receipt of UTB's skeleton argument for the trial, Mr Downes sent an email to Mr Sewell with comments on the percentage prospects of success on the various arguments being put forward by SUL in the proceedings. He thought that the prospects of winning on the construction of clause 9.1.12 were "Very good – 70%". The same advice was given to SUL in a conference two days later on 8 May, as is apparent from the photographs of a flipchart used by Mr Downes to present his advice to the clients. Nothing in those documents indicates, however, that Mr Downes considered the case to be so strong that there was no significant prospect of losing on this point.

266. The position taken by Mr Downes was therefore undoubtedly that he expected to win on the construction of 9.1.12. None of the materials before me, however, suggest that S+W or SUL were ever advised that the risk of losing on the point was immaterial or insignificant; and Mr Downes was noticeably not called to give evidence on this.

267. I therefore reject Mr Sewell's characterisation of the risk of losing the construction point as "insignificant", and his claim that Mr Downes' advice was that the construction of clause 9.1.12 was "completely clear". It is quite apparent that there was a real risk that the drafting of the ISA allowed UTB to avoid the obligation to exercise the property options under clause 9.1.12 despite acquiring control of Blades. That in turn gave rise to a significant risk that S+W's drafting and advice on the point had been negligent.

268. As regards the conclusions of Fancourt J, those were of course not known to S+W until his draft judgment was circulated at the end of August 2019. They could not, therefore, have informed S+W's decision-making as to the risk of a conflict before then. But the judgment of Fancourt J is, in any event, consistent with my findings as to the risks arising from the drafting of the ISA. In relation to Device 2, Fancourt J robustly rejected UTB's position, and I have likewise rejected the claim that S+W were negligent in that regard. In relation to Device 1, however, Fancourt J did *not* vindicate the drafting of the ISA: quite the contrary, he indicated that Device 1 would or might have succeeded if UTB had genuinely sold or gifted its shares to another person. It is therefore clear that there was a *prima facie* lacuna in the drafting of the ISA, as I have found at §§153–154 above.

S+W's consideration of the conflict issue

269. S+W should therefore have been aware that there was a significant risk that their drafting of and advice given in relation to clause 9.1.12 of the ISA was negligent. Indeed, the evidence shows that the problem *was* immediately apparent to both Mr Blain and Mr Sewell. Mr Blain's evidence at the trial was that he had consulted S+W's Compliance Officer, Mr Gibb, on the evening of 26 January 2018 (i.e. as soon as SUL received UTB's counternotice and notice of the share transfer to UTB 2018). He said that he had done so because he was "alive to the fact that there was – we needed to consider whether or not there was an own interest conflict". Mr Blain also said at the trial that S+W needed to obtain the advice of counsel as to the merits of the case in order to assess whether there was a conflict or a significant risk of conflict. He accepted that it was "clearly important"

that he had a conversation with SUL about whether there was a conflict in S+W continuing to act for it.

270. Mr Sewell, in his witness statement, said that independent advice from counsel needed to be obtained before a decision was taken about what to say to SUL about the conflict issue. At the trial he explained that this was because it "wasn't certain to me that the ISA would hold up to scrutiny and allow SUL to insist upon its rights that it acquired at that stage under clause 9.1.12", and he agreed that he had in mind the possibility of a claim against the firm.

271. Mr Blain and Mr Sewell were no doubt very encouraged by Mr Downes' confidence of winning on the construction argument. But (for the reasons set out above) they cannot sensibly have taken from his advice the impression that Mr Downes considered UTB's arguments on that point to be so spurious that there was no significant prospect at all of them succeeding.

272. Nor, in reality, do I accept that this is what they believed. Mr Sewell's email to Mr Gibb on 1 February 2018 reveals what Mr Sewell really thought: that SUL was adopting a high risk strategy in the litigation, and that S+W could by no means guarantee that it would succeed. Mr Sewell likewise admitted, in cross-examination, that he "wasn't certain that the drafting of the ISA … would defeat the scheme that had been deployed". Mr Blain's note of a conversation between him and Mr Sewell on 21 February 2018 also recorded "Just keep going – client in the right – client able to form own views – conversation in the future re drafting", thereby acknowledging that there was an issue with the drafting of the ISA which might prompt a "conversation in the future".

273. Mr Blain and Mr Sewell's defence to the Partner claim further sought to justify their position by saying that on 29 January 2018 Mr Downes had informed Mr Sewell that he did not think that there was a problem in S+W acting for SUL in the dispute. (This point was, noticeably, not made in the defence to the LLP claim; nor – again – was Mr Downes called to give evidence on this point.) Mr Blain in his witness statement claimed that he had been told about this conversation by Mr Sewell after the conference with Mr Downes on 30 January 2018. In his oral evidence at the trial he said the same, and claimed that this had formed part of his decision as to whether S+W could continue to act in the matter.

274. Mr Sewell's witness statement, however, did not include any reference at all to this conversation with Mr Downes. Indeed, his witness statement was drafted in terms that made clear that the point had *not* been discussed with or raised by Mr Downes. In particular, Mr Sewell said that Mr Downes did not at any stage advise him or anyone else at S+W that S+W should cease acting because of an actual or potential conflict of interest. He also said that having worked with Mr Downes for a long time, "I have no doubt that he would have raised it with me and hence also the firm, as well as with SUL/Scarborough, if he thought there was any actual or potential conflict of interest arising".

275. That is squarely inconsistent with any suggestion that Mr Sewell had specifically discussed the point with Mr Downes and received Mr Downes' advice on this, whether on 29 January 2018 or on any other occasion. It is also notable that Mr Sewell's notes of his telephone discussion with Mr Downes on 29 January 2018, and the consultation with counsel in person the following day, made no mention of any such advice having been given by Mr Downes.

276. When asked about this at the trial, Mr Sewell's responses ranged from evasive to obstructive. On the first day of his cross-examination, he was asked about the pleaded assertion that Mr Downes had advised him on this matter, and he responded that "I believe it to be true". He (like Mr Blain) claimed that Mr Downes' advice had been an important factor in his decision as to how to proceed regarding the conflict issue, and accepted that he should have referred to it in his witness statement, but said that he had "overlooked" the point when drafting the witness statement, suggesting that his lawyers had told him what to cover in the statement. When Mr Elkington returned to the point during the next day of cross-examination, pointing out the inconsistency of the pleaded defence with the terms of Mr Sewell's witness statement described above, Mr Sewell refused to give any answer other than repeating that the conversation had taken place "to the best of my recollection":

> "Q. … what you have said there is just completely inconsistent, isn't it, with [Mr Downes] having positively advised you on 29 January, because if he had positively advised you, you wouldn't be relying on the absence of him having said something, you would be relying on the fact that he did say something?
> A. No, I think for clarity … he had advised me on 29 January to the best of my recollection and belief there was no problem, no conflict. And then there was a subsequent discrete issue uncovering what also happened during those other periods.
> Q. But it is not another period. You are talking about 29 January … and nowhere in your statement do you refer to this critical part of your case that Mr Downes advised you there was no problem in S+W acting.
> A. You have heard my answer, Mr Elkington.
> Q. Can I suggest to you the conversation didn't happen at all?
> A. You have had my answer.
> MRS JUSTICE BACON: Can you answer the question, please?
> A. Can you put the question again?
> MR ELKINGTON: He didn't give that advice to you, did he? Because if he had done you would have referred to it in your evidence.
> A. To the best of my recollection he did give that advice."

277. I am afraid that I regard Mr Blain and Mr Sewell's evidence on this point as highly unsatisfactory. If Mr Downes had given Mr Sewell the advice set out in the defence to the Partner claim, that would have been an extremely important point to record both in Mr Sewell's notes of the discussions and meetings with counsel, and in his witness statement. That is particularly the case given that Mr Sewell's witness statement did address whether he had discussed the possibility of a conflict with Mr Downes. Given that Mr Sewell was thereby directly addressing his mind to what Mr Downes had (or had not) said on the point, it is difficult to conceive how he could simply have "overlooked" this conversation if it had indeed happened.

278. In my judgment, the fact that this conversation was not referred to in either Mr Sewell's notes or his witness statement (or, indeed, in any other contemporaneous document) is strongly indicative that the conversation did not take place. Mr Sewell's evasive answers in cross-examination reinforced my doubts as to his and Mr Blain's evidence on this point. On the material before me I am unable to accept that this conversation occurred.

279. As a final point regarding S+W's decision-making, Mr Blain claimed that having discussed the matter with Mr Gibb following counsel's advice, he and Mr Gibb agreed

that there was not a significant risk of a conflict and that S+W could continue to act. While the contemporaneous emails do include emails from Mr Blain and Mr Sewell to Mr Gibb regarding the UTB litigation, there is no record of any of Mr Blain's discussions with Mr Gibb on the conflict issue. Nor is there any record of a decision being taken by Mr Gibb or anyone else in S+W's Conflicts Committee as to whether or not there was a significant risk of a conflict if S+W continued to act.

280. Mr Blain accepted that the failure to record the decision was contrary to the requirements of the firm's conflicts policy, but sought to justify that on the basis that "things needed to be dealt with quickly". I do not accept that explanation. Over two and a half years elapsed between UTB's service of the counternotice and Mr Blain's email in July 2020 notifying Kevin McCabe that S+W were withdrawing from acting for SUL. During that time, it is evident that there was considerable discussion at S+W board level as to the status of the case, SUL's outstanding fees, and the way that S+W's time spent would be accounted for. In that entire period, however, it appears that no-one thought to make a record of what decision had been reached as to the existence (or not) of a conflict of interests. It is also notable that Mr Gibb has not been called by S+W to give evidence on this point. In those circumstances I do not think that I can reach any reliable conclusion as to what Mr Blain and Mr Gibb did or did not decide.

281. I do not, therefore, accept S+W's attempts to justify their decision-making on this point. It is clear that there was at least a significant risk that S+W's drafting of and advice given in relation to clause 9.1.12 of the ISA had been negligent, and S+W either knew or should have known that this was the case. Counsel's advice on the merits was optimistic as to success, but did not suggest that there was no significant risk of SUL's construction argument failing; nor was the drafting of the ISA vindicated by Fancourt J, in relation to Device 1. I do not accept that Mr Downes gave any advice as to whether S+W were conflicted. Nor is there any record of a decision being taken by Mr Gibb or anyone else in S+W's Conflicts Committee as to whether S+W could continue to act in the matter. In any event, however, even if Mr Gibb had decided that no conflict arose, that would not have been justified by the advice that S+W had been given.

The advice given to SUL

282. On the basis of my conclusions set out above, S+W should have advised SUL that there was an own interest conflict, given the significant risk that S+W had been negligent. They should also have advised SUL to seek independent legal advice on the point.

283. In their initial letter of response to SUL's letter of claim, S+W said that "Mr Blain advised Mr McCabe on several occasions that if there was any suggestion that the contract had been drafted negligently or that the firm had in any way acted negligently the firm could not act. Mr McCabe said that the last thing they wanted was for this firm to withdraw from acting." That assertion was abandoned and not pursued at the trial.

284. Instead, in the defence to the LLP claim, the defendants said that Mr Blain advised Mr Di Ciacca (not Kevin McCabe) that S+W could not act if there was any concern or suggestion that the contracts had been negligently drafted, and asserted by reference to that discussion that S+W "did advise SUL that they should seek independent legal advice should they have any concerns that the drafting of the ISA was negligent". The latter claim was then also abandoned, and S+W accepted that they had not ever advised SUL to seek independent legal advice on this point.

285. As to the advice that was given to SUL, Mr Blain said in his witness statement that he had discussed the conflict issue at a meeting with Mr Di Ciacca on 7 February 2018 (corrected at the trial to 8 February). In his oral evidence, he claimed that he had also discussed the matter with Mr Di Ciacca on the telephone prior to their meeting. There is, however, no record of that prior conversation having taken place, and indeed emails between Mr Blain and Mr Di Ciacca on 7 February indicate that they did not speak in person until the following day. Mr Di Ciacca in his evidence confirmed that he had spoken to Mr Blain on 8 February. I do not, therefore, accept that there was any discussion of the conflict point with Mr Di Ciacca on 7 February (or indeed on any occasion other than the 8 February meeting).

286. There was, however, broad agreement between Mr Blain and Mr Di Ciacca as to the content of the 8 February 2018 conversation. They agreed that Mr Blain said something along the lines that S+W could not continue to act if the contracts had been negligently drafted. They also agreed that Mr Blain said that he considered that S+W had *not* been negligent, and so could continue to act for SUL without there being a conflict.

287. The only real disagreement concerned a claim by Mr Blain that Mr Di Ciacca had said that S+W withdrawing from the case was "the last thing Scarborough needs at this point". Mr Di Ciacca had no recollection of saying this. There is no contemporaneous note from Mr Blain, or any other record as to what was said at the meeting. In those circumstances, and given my general findings as to the reliability of (respectively) Mr Blain and Mr Di Ciacca's evidence, I would be inclined to prefer the evidence of Mr Di Ciacca on this point.

288. The more important point, however, is that this meeting cannot be characterised as a discussion with SUL on conflict issue, because Mr Di Ciacca was not (and did not hold himself out to be) a director of SUL. Mr Blain accepted that he did not follow up the 8 February 2018 meeting with any discussion with Kevin McCabe about the conflict issue. Indeed, it was undisputed that Mr Blain had no discussion whatsoever with Mr McCabe or any director of SUL, at any time prior to S+W's withdrawal from the case, as to the question of whether a conflict of interest had arisen.

289. Nor did Mr Sewell or anyone else from S+W raise the point with Kevin McCabe/SUL. Mr Sewell's evidence was that Mr Blain had told him that he was discussing the conflict point with Mr McCabe/SUL, and that Mr Sewell did not need to be involved in that conversation. Mr Sewell thereafter left the matter to Mr Blain. He neither consulted S+W's conflicts policy, nor checked that Mr Blain had indeed had the conversations that he had said that he was going to have. When it was put to Mr Sewell, in cross-examination, that he had effectively washed his hands of the conflict issue on the basis that Mr Blain was sorting it out, Mr Sewell protested that this was not a fair comment. I disagree: the evidence shows that that is precisely what Mr Sewell did.

290. It is therefore apparent that the only discussion that S+W ever had with anyone associated with SUL on the conflict issue was Mr Blain's informal and undocumented conversation with Mr Di Ciacca on 8 February 2018, in which his view was that there was no conflict. Mr Blain claimed that this discharged S+W's duties to the client. It did not come close to doing so, given my findings above as to what SUL (i.e. Kevin McCabe, or one of the other directors of SUL) should have been told.

291. I reject the defendants' protestations that Kevin McCabe had, from January 2018 onwards, all the information that he needed to make a decision to take independent legal advice, on the basis that he knew that S+W had participated in the drafting of the ISA, and had advised on the ISA and the exercise of the call options. That did not absolve S+W from their duty to provide proper advice to SUL on the conflict issue. Indeed, if that were an answer, it would likewise be an answer to every case in which the client knows that the solicitor drafted or advised on a document or agreement which is subsequently called into question. The defendants have not, however, produced any authority which suggests that in such a situation the client's knowledge means that no duty to advise of an own interest conflict arises.

292. S+W were therefore, in my judgment clearly negligent in failing to advise SUL that there was an own interest conflict, and in failing to advise SUL to seek independent legal advice on the point.

Whether S+W were in breach of fiduciary duty

293. The claimants' closing submissions elided the issues of breach of fiduciary duty with the question of negligence in relation to the conflicts issue. As explained above, however, it does not follow from a finding of negligence that there is also a breach of fiduciary duty: for the latter, a conscious or deliberate breach of duty must be shown.

294. The particulars of claim (even in the amended version) do not plead that S+W consciously or deliberately breached their duties to SUL in this regard. Mr Elkington said, nevertheless, that the evidence established a breach of fiduciary duty, on the basis that S+W were aware that there was a potential conflict problem, but took a deliberate decision not to inform SUL of this.

295. Mr Blain and Mr Sewell's evidence was that on the basis of their expectation that SUL was likely to win on the construction argument, they took the view that no conflict arose. Their view that there was no conflict was also what was conveyed to Mr Di Ciacca. That view was, for the reasons I have given above, wholly misconceived. There is, moreover, no evidence that anyone in S+W ever properly directed their minds to the question of whether there was a significant risk that they had been negligent. That is a quite astonishing dereliction of duty, given Mr Blain and Mr Sewell's seniority in the firm, the fact that the matter was also apparently discussed with S+W's Compliance Officer Mr Gibb, and the fact that clear guidance on conflicts of interest was (and is) given in not only the SRA Code of Conduct but also in S+W's own conflicts policy.

296. I am not, however, persuaded that Mr Blain and Mr Sewell knew that there was a conflict of interests and took a deliberate decision not to inform SUL. Although it may seem extraordinary that their consideration of their duties was as superficial as it appears to have been, the way they sought to answer the questions put to them in cross-examination makes it entirely plausible, in my judgment, that despite knowing the risk that their drafting would turn out to have been defective, they simply convinced themselves that there was not a conflict. In so far as they had any regard to the guidance set out in the SRA Code of Conduct and S+W's conflicts policy (which is not clear on the evidence before me), I consider it unlikely that they gave any proper or objective thought to the definition of an own interest conflict, or their duties if such a conflict arose.

297. That was most certainly negligent, but the evidence does not in my judgment go so far as establish a conscious or deliberate breach of S+W's duties to their clients. I therefore reject the claim that S+W were in breach of their fiduciary duties in this regard.

Causation and loss

298. The remaining question is whether, if S+W had properly advised SUL that there was an own interest conflict, and that SUL should take independent advice, the subsequent litigation would have turned out any differently.

299. The claimants' case is that if SUL had been advised of the possibility of a conflict of interest and that it should seek independent legal advice, it would have done so. That advice would then have been that SUL's best course of action would be to have a narrow dispute with UTB over the meaning and effect of the ISA and (if SUL lost that dispute) to seek compensation from S+W. SUL would have followed that advice and would have thereby avoided the huge costs of the litigation with UTB.

300. In their written closing submissions, the defendants' case on causation was put at a high level of abstraction, without condescending to any discussion of the principles of causation, or any of the authorities on the point. It was, in short, that since the claimants do not criticise any other aspect of S+W's handling of the litigation, no loss or damage can be said to have been caused by the failure to advise SUL of a conflict of interest. Moreover, when SUL did seek independent advice, it continued to instruct S+W and did not bring a negligence action until after the arbitration had been concluded, having not paid for S+W's services in the meantime.

301. In Mr Hollander's oral closing submissions, his position came down to the contention that even if independent advice had been obtained, the litigation strategy would have been the same, because it was not devised because of or affected by the conflict of interest (and the contrary was not pleaded by the claimants).

302. In light of those submissions, it is convenient to consider the various stages of the litigation.

The outset of the litigation

303. I accept that SUL would probably have sought independent legal advice at the outset of the litigation, if they had been advised to do so. Indeed, it was not put to their witnesses that they would not have done so; nor is there any other evidence indicating the contrary. I am not, however, persuaded that SUL would have sought to replace S+W in their conduct of the UTB litigation. It seems far more likely that SUL would have obtained advice as to whether, if the UTB litigation went badly, they might ultimately be able to sue S+W, but that they would have retained S+W in the meantime.

304. That is because that is precisely what SUL did do after Fancourt J's judgment was handed down. At that point, S+W were told that another firm of solicitors had been instructed to provide a second opinion on the litigation, but S+W were nevertheless instructed to continue to act for SUL in the meantime (which they duly did). If that was the way that SUL behaved after a judgment which it considered a complete disaster, I think it very improbable that it would have sacked S+W and replaced them with other solicitors at a

much earlier stage in the litigation, when the advice SUL was getting from counsel was that it was likely to succeed on the question of the construction of clause 9.1.12.

305. Furthermore, even if SUL had replaced S+W completely in the litigation, I am unconvinced that SUL's instructions and decision-making as to the strategy at the outset of the litigation would have been different; and that applies *a fortiori* if SUL had simply obtained independent advice as to the strategy in parallel with S+W's conduct of the litigation.

306. The contemporaneous email discussions show that even before the call option notice was served by SUL, Kevin McCabe was starting to think about bringing proceedings against Prince Abdullah in relation to his conduct in the management of the Club. That made it no surprise that his instructions were to "attack" the Prince with "Offensive actions" once UTB's counternotice was received (see §§94–99 above).

307. While S+W's advice was to go "nuclear" in the dispute (§102 above), that was no doubt a response to the belligerent tone of Kevin McCabe's instructions up to that point. S+W did, moreover, explicitly ask Mr McCabe what his priorities were in the litigation at the outset. His response was that his preference was to buy out SUL, which was confirmed in his 11 February 2018 email (§§103 and 109 above). That required the pursuit of arguments beyond a simple question of the construction of clause 9.1.12. Mr Downes had also advised that it would be tactically preferable to combine the argument as to the construction of clause 9.1.12 with the s. 994 and conspiracy arguments, to strengthen SUL's position (§§104 and 265.i) above).

308. Although Kevin McCabe sought to deny any responsibility for the litigation strategy which was adopted, it is apparent that the initial strategy was formulated on the basis of a combination of the instructions given by Mr McCabe and the advice given by counsel. That litigation strategy led to the defences pleaded by the defendants, the additional claim, and the s. 994 petition. I do not consider that there is any evidence to suggest that this strategy was influenced by S+W's conflict of interest, such that SUL's decision-making would have been different if independent advice had been given. Nor, as Mr Hollander said, have the claimants pleaded such a point.

The course of the litigation during 2018 and early 2019

309. As to the development of the litigation strategy during the course of 2018 and leading up to the trial in 2019, the claimants say that this was the result of the advice given (or not given) to SUL, which Kevin McCabe always followed. In particular, Mr Elkington said that SUL was not determined to litigate at all costs but hoped for settlement for much of the litigation.

310. I agree that notwithstanding the aggressive response to UTB's proceedings, at least part of SUL's strategy during 2018 appears to have been to achieve a settlement with UTB. In an email on 29 April 2018 to Mr Blain, Kevin McCabe suggested a tactic of backing down and accepting the "cheating route" that UTB chose while retaining the Properties and the rights to continue litigation for compensatory damages. Some initial settlement discussions then took place, as I have recorded at §113 above.

311. While those discussions ultimately proved fruitless (as did a subsequent mediation in September 2018), the claimants have not put forward any explanation of how that

outcome would or might have been different if SUL had been advised by different solicitors, in circumstances where it is not suggested that (apart from the conflict of interest) any part of S+W's conduct of the litigation was negligent.

312. Following the failed settlement discussions and mediation, discussions with Alan Pace/ALK progressed to the point of agreeing heads of terms premised on the reacquisition by SUL of UTB's shares. As I have already found, that is no doubt why SUL decided to proceed with the litigation despite UTB's consent to the exercise of the property options, at the end of April 2019. Although it is not clear whether S+W or counsel ever discussed with SUL the possibility of settlement at that point, it would have been obvious to everyone that if SUL was content to receive what it originally bargained for when it served the call option notice, the trial did not need to go ahead. The reason it did so was that, as Fancourt J recorded, SUL's position was that it no longer wanted to sell its shares in Blades.

313. That was a commercial decision taken by SUL, and the claimants have not suggested that this was influenced by S+W, or that things would have been different if SUL had been independently advised.

The 8 May 2019 conference

314. As I have already noted, there was a conference with Mr Downes on 8 May 2019 at which detailed advice was given on the prospects of success and possible outcomes, following the exchange of skeleton arguments for the trial. There was also some discussion of the trial strategy. Mr Elkington contended that SUL was not advised at that conference to settle the litigation and/or of any risks of continuing to fight on, and that (quite the contrary) SUL thought that it was going to win at trial.

315. Mr Sewell contended that SUL was in fact advised at the conference that it could settle having achieved what they originally set out to do; but that Kevin McCabe was adamant that he did not want to settle, since he wished to gain full control of Blades. By contrast, Mr McCabe and Mr Tutton both denied any recollection of advice being given about settlement. Given my comments above regarding the reliability of all three of these witnesses, and the fact that I do not have any evidence from Mr Downes as to what he said at the conference, it is necessary to consider whether either of the opposing accounts is corroborated by the contemporaneous evidence.

316. As to that, I note that an email sent by Mr Sewell to Mr Downes ahead of the conference with a list of issues to be covered at the conference did not refer to settlement. Mr Sewell's (extensive) notes taken during the conference and the photographs of the flipchart used by Mr Downes at the conference likewise made no mention of settlement. The contemporaneous evidence does, therefore, tend to corroborate SUL's account. But the claimants' case is not that S+W were negligent in failing to advise on settlement at that point; nor did the claimants explain how S+W's advice at the time could have been caused by S+W's conflict of interest.

317. It is also notable that Mr Sewell's notes of the 8 May 2019 conference include the following comments:

> "<u>All McCabes</u>
> V imp to get HRH shares

Want to humiliate him"

318. Those comments reinforce my conclusion that Kevin McCabe's decisive position by this point was that he wished to buy back UTB's shares. That being the position, even if SUL had been advised that it should settle at that point, I consider it improbable that it would have decided to do so.

319. As regards the advice on prospects of success, Kevin McCabe and Mr Tutton's evidence was that they left the conference somewhat confused as to the advice that they were being given, save that they thought that they would win. Having seen Mr Sewell's notes of the conference, the photographs of the flipchart, and the emails exchanged between Mr Sewell and Mr Downes prior to the conference, I can readily accept that Mr McCabe and Mr Tutton did not have a clear understanding of the advice that was given to them. It is apparent that Mr Downes presented a rather complex series of interconnected outcomes, by reference to arguments raised in the UTB claim, SUL's additional claim, and the s. 994 unfair prejudice petition. While Mr Downes had emailed Mr Sewell two days before the conference to explain his thoughts on the "matrix of outcomes" with percentage prospects of success, that email had not been copied to SUL.

320. Mr Sewell's email to Mr Downes on the morning of the conference showed, moreover, that Mr Sewell did not entirely understand Mr Downes' position on the various outcomes. Indeed, despite Mr Sewell's reliance in his witness statement on the "clear advice" given at the conference as to the most likely outcomes at trial, in his oral evidence he was unable to explain his understanding of that advice. If Mr Sewell, the S+W litigation partner responsible for the conduct of the trial, was unable to explain what advice had been given to the client at a key conference shortly before the trial to discuss the prospects of success, I am not surprised that Mr McCabe and Mr Tutton claim not to have understood that advice.

321. I also think it likely that Kevin McCabe and Mr Tutton thought from the advice that they were being given that they were going to "win". The problem was that their understanding of what a "win" meant appears to have differed from that of Mr Downes. Mr Downes was advising that they had a 70% chance of winning on the construction of clause 9.1.12. But that in itself didn't give SUL more than it had already, given UTB's agreement to exercise the property options. What it needed if it was to proceed with the sale to ALK was to win on the arguments which sought to set aside the ISA and contract of sale for SUL's shares, and the arguments in the s. 994 petition which led to a claim to buy UTB's shares. Mr McCabe's evidence at trial suggested that this is what he, at least, thought of as "winning". Mr Downes' advice appears to have been that the prospects of success on those arguments were not as high as on the construction point. Mr Tutton recognised this in a note circulated after Fancourt J's judgment was received, in which he commented that "our own legal advice was that our unfair prejudice/conspiracy claim was not at all strong." But the permutations of possible outcomes were complex, and it seems entirely plausible that these were not fully understood by Mr McCabe and Mr Tutton before the trial.

322. Nevertheless, the point remains (yet again) that the claimants have not explained how any of that was caused by S+W's conflict of interest. The advice at the conference was given primarily by Mr Downes, and there is no allegation of negligence by S+W in relation to any of the advice given around that time. There is therefore nothing to suggest

that SUL's decisions would have been any different had they been advised by different solicitors.

Conclusion on the conflict claim

323. I have concluded that S+W were negligent in failing to advise SUL that there was an own interest conflict, and in failing to advise SUL to seek independent legal advice on the point. I have not, however, found them to be in breach of fiduciary duty in that regard. I have also concluded that the claimants have not established that the outcome of the litigation would have been any different if SUL had been advised by different solicitors. S+W's negligence therefore did not cause SUL any loss.

ISSUES (5) (6) (7): REMAINING ISSUES IN THE LLP CLAIM

Quantum

324. In light of my findings above, it is not necessary to address the parties' further arguments on the quantum of any loss suffered by the claimants. It was agreed at the hearing that it would be inappropriate for me to attempt to address the quantum arguments on the basis of hypothetical alternative findings on breach and causation.

SGIL's claimed losses

325. The claim by SGIL is brought in the alternative to SUL's claim for interest on its losses. The basis of the claim is a contention that SGIL, as the parent company of the Scarborough group, suffered loss due to the funds that it did not receive from SUL as a result of the breaches of duty by S+W. As a result of not having access to those funds, SGIL says that it was not able to invest in financially profitable property developments, and claims damages at a rate of 15% per annum on the sums from the dates on which it would have had use of them.

326. In light of my findings above, this aspect of the claim does not arise. Had it done so, however, I would have rejected it. The evidence before me does not support the existence of any duty of care owed to SGIL, as opposed to SUL, in relation to the issues which are the subject of the LLP claim. SGIL was a guarantor under the ISA, but nothing turns on that for the purposes of these proceedings.

327. Furthermore, the claim by SGIL is advanced on the basis that SGIL was required financially to support SUL and was unable to use those funds to invest elsewhere. That contention was supported by the evidence of Mr Tutton in his witness statement that there was a net increase in the debt owed by SUL to SGIL between 2017 and 2020. During Mr Tutton's cross-examination, however, he agreed that there were no loans from SGIL to SUL; rather, the loans to SUL came from other Scarborough companies, namely SUGL (which is a subsidiary of SGIL) and Scarborough Luxembourg Sarl (which is owned by the McCabe family but is not within the UK group). That is also consistent with SUL's accounts for the years ending 2017 to 2020. The premise of SGIL's claim therefore fails.

328. Insofar as SGIL's claim is in fact based on an (unpleaded) contention that, but for SUL's losses, dividends would have been paid up the group structure to SGIL, that would in any

event be barred on the basis of the "reflective loss" principle considered in *Marex Financial v Sevilleja* [2020] UKSC 31, [2021] AC 39.

Limitation of liability in the letters of engagement

329. At the outset of the trial, S+W relied on the terms of business attached to letters of engagement sent to SUL in 2012 and on 24 January 2018. On the basis of those terms, S+W's pleaded case was that it was not liable for any of the losses claimed, since they were "indirect or consequential losses" in respect of which S+W terms excluded all liability. In the alternative S+W relied on terms limiting its liability to the minimum amount of professional negligence insurance required at the time, which was £3m.

330. By the end of the trial, however, S+W's submission on the letters of engagement was only pursued in relation to the period from January 2018 onwards, on the basis that Mr Hollander accepted that there was no evidence that SUL had received the 2012 letter of engagement.

331. Given my findings above, the issue of limitation of liability by S+W does not arise, and I do not think it appropriate to express a view on the point on the basis of hypothetical alternative findings.

ISSUE (8): THE PARTNER CLAIM

332. As I have already indicated, the Partner claim was only pursued in relation to the claim against Mr Blain for negligence in relation to the December 2017 advice, and the claims against both Mr Blain and Mr Sewell for breaches of fiduciary duty in relation to the conflict issue.

333. The claims fail from the outset for the simple reason that there is no evidence before me showing that either Mr Blain or Mr Sewell assumed personal responsibility to SUL for either the December 2017 advice (Mr Blain) or the conduct of the litigation thereafter (Mr Blain and Mr Sewell):

    i) There is no dispute that the Scarborough group was a longstanding client of both Mr Blain and S+W. Mr Blain was the relationship partner for SUL, and was asked to advise in December 2017 no doubt because of the client relationship and his previous involvement in the 2013 transaction – or at least the start of the negotiations for that transaction, There is not, however, anything to suggest that when advising on the exercise of the call options in December 2017 Mr Blain conveyed, directly or indirectly, any assumption of personal responsibility.

    ii) Mr Blain was not a litigation partner and therefore did not run the litigation from 2018 onwards (or purport to do so). He was involved in some of the meetings in the initial stages in January and February 2018, but after that left matters to Mr Sewell who was the litigation partner. The claimants say that SUL trusted that Mr Blain was keeping an eye on the proceedings to protect its interests. That does not come close to showing that he was assuming personal responsibility to the client for the conduct of the litigation.

iii) Mr Sewell was the litigation partner who had overall responsibility for the UTB litigation. He did not have a longstanding client relationship with Scarborough, and had only joined S+W in November 2017, very shortly before the UTB litigation commenced. While the claimants are correct to say that Mr Sewell did most of the work in the UTB litigation himself, it does not follow that Mr Sewell assumed personal responsibility to SUL, over and above the responsibilities owed by S+W as an LLP.

334. Even if there had, however, been assumptions of personal responsibility by Mr Blain and/or Mr Sewell, the claims would have failed for the reasons set out above in relation the LLP claim. As with the LLP claim, therefore, I do not need to consider any further defence arising from the terms of the relevant letters of engagement.

CONCLUSIONS

335. For the reasons set out above, my conclusions are as follows:

i) In relation to the drafting of the ISA in 2013, S+W were negligent in failing to identify the possibility of Device 1, and in failing thereafter to advise on and suggest drafting in the ISA which would have sought to preclude UTB's use of Device 1. I reject the claims of negligence by S+W in relation to Device 2 and the obligation on SUFC (rather than Prince Abdullah/UTB) to exercise the property options and pay for the purchase of the Properties.

ii) In relation to the drafting of the Stadium Option in 2013, S+W were negligent in failing to seek SUL's instructions on the permitted use assumption, and in informing SUL that the amendment was immaterial.

iii) S+W were negligent in the advice given in December 2017, by failing to advise SUL as to the risk that UTB might seek to use Device 1 to avoid exercising the property options.

iv) S+W were negligent in failing to advise SUL that there was an own interest conflict, and in failing to advise SUL to seek independent legal advice on the point. S+W were not, however, in breach of their fiduciary duty in that regard.

v) The claimants have not established that any loss was caused by the negligence of S+W in relation to the drafting of the ISA and Stadium Option, the December 2017 advice, or the conflict of interest issue.

vi) It is therefore not necessary for me to make any findings about the quantum of loss.

vii) The claim by SGIL therefore does not arise, but I would have rejected it in any event.

viii) The question of limitation of liability by the LLP in its letters of engagement also therefore does not arise.

ix) I reject the Partner claims against Mr Blain and Mr Sewell for the same and additional reasons.

336. The claims therefore fail.