Neutral Citation Number: [2018] EWHC 3424 (Ch)

Case No: HC2014001272

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

Royal Courts of Justice
The Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 13/12/2018

Before:

MRS JUSTICE ROSE DBE

- -

Between:

PETER WILLERS	**Claimant**
- and –	
(1) ELENA JOYCE **(2) JOHN NUGENT** **(in substitution for and in their capacity as executors of Albert Gubay, deceased)**	**Defendants**

Hugo Page QC and Adam Chichester-Clark (instructed by **De Cruz Solicitors Ltd**) for the Claimant
Paul Mitchell QC and Tom Shepherd (instructed by **Laytons LLP**) for the Defendants

Hearing dates: 11, 12, 15, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, 31 October and 6 and 7 November 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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ROSE J

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Mrs Justice Rose:

I. INTRODUCTION

1. The Defendants in this action are the executors of the estate of Albert Gubay who died in January 2016. During a long career Mr Gubay built up two successful businesses, the first a chain of cut-price grocery stores under the brand name Kwik Save and the second a chain of fitness gyms in Ireland and the North of England under the brand name Total Fitness. His businesses were operated through a group of companies variously referred to as the Anglo Group, the Santon Group or the Derwent group as the name of the holding company changed over the decades. The Total Fitness gyms business was operated by a company called Total Fitness UK Ltd based in the United Kingdom. In 2004 that business was sold for many millions of pounds and Total Fitness UK Ltd changed its name to Langstone Leisure Ltd. I shall refer to that company as TFUK or Langstone.

2. TFUK contracted with a small company called Aqua Design & Play Ltd ('Aqua') to install swimming pools and pool covers in some of the Total Fitness gyms. The swimming pools and their covers were defective and TFUK brought proceedings against Aqua in 2000. Aqua went into a creditors' voluntary liquidation in January 2001 and Mr Simon Haskew of Begbies Traynor was appointed liquidator. Mr Haskew brought proceedings as liquidator of Aqua against David Adams and Shaun Adams who had previously run the business of Aqua, alleging that they had caused the company to trade when insolvent and had made a preference by paying a debt owed by Aqua to its parent company Adams Holdings Ltd.

3. The proceedings brought by Mr Haskew on behalf of Aqua were funded by indemnities provided by TFUK or other companies in the Anglo Group. The solicitor with conduct of the proceedings on behalf of both Mr Haskew and TFUK was Mr Sorrell. At the start of those proceedings against Aqua and the Adamses, Mr Sorrell was a partner in the firm Wacks Caller. He moved to Pannone LLP in July 2006 taking the work with him.

4. The wrongful trading proceedings brought by Mr Haskew against the Adamses dragged on for many years. They ended in defeat for Mr Haskew when the claims were dismissed by consent in early 2010 and Mr Haskew had to pay the Adamses' costs. This left Langstone with a very substantial liability to pay Mr Haskew's legal costs, the Adamses' legal costs and Mr Haskew's own fees.

5. In 2010 Langstone brought a claim against the Claimant in these proceedings Peter Willers ('the Langstone Action'). Mr Willers had been a director of TFUK/Langstone from the time the dispute about the defective swimming pools started until he left the Anglo Group in July 2009. Mr Willers had worked for the Anglo Group for many years and had been Mr Gubay's "right-hand man". He had been a director not only of TFUK but also of many other companies in the Anglo Group.

6. The Langstone Action alleged that Mr Willers had been in breach of the fiduciary duties he owed Langstone as its director, because he had caused the company to enter into the indemnities in respect of the wrongful trading proceedings. Mr Willers defended the Langstone Action on the basis, broadly, that it had been Mr Gubay and not him who had been in control of the conduct of the litigation against Aqua and the Adamses and who had taken all the relevant decisions in the litigation. He denied that he was liable to Langstone and he brought Part 20 contribution proceedings against Mr Gubay.

7. Mr Willers' departure from the Anglo Group in July 2009 led to great bitterness between him and Mr Gubay. The Langstone Action was not the only litigation between Mr Willers

and the Group or Mr Gubay personally after he left. In September 2009 Mr Gubay sued Mr Willers in the Isle of Man to recover £139,941 he alleged Mr Willers had wrongly taken from him. That claim was discontinued after a few months but Mr Willers had counterclaimed for over £1.6 million which he alleged Mr Gubay had promised to pay him during the years when he worked for the Anglo Group ('the Isle of Man Proceedings'). The progress of Mr Willers' counterclaim also became protracted and expensive and ended in defeat for Mr Willers in December 2017.

8. The Langstone Action became complicated and expensive. This was in part because Langstone also brought an action against its former legal advisers alleging that they had negligently handled the proceedings against Aqua and the Adamses. Also Mr Haskew, when sued for unpaid fees by Pannone, counterclaimed in negligence against Pannone and Wacks Caller and against counsel who were alleged negligently to have advised him in the Aqua litigation.

9. In April 2013 the Langstone Action was discontinued and the various actions against the former legal advisers were compromised. Following the discontinuance of the Langstone Action, Newey J ordered Langstone to pay Mr Willers his costs on the standard basis and also Mr Willers' costs of bringing the Part 20 proceedings against Mr Gubay. There was then a long and complicated assessment of costs for the Langstone Action, leading to judgments in which the costs judge substantially cut down the costs recoverable by Mr Willers against Langstone in various respects. Those costs included success fees under conditional fee agreements with Mr Willers' solicitors and counsel. Mr Willers ultimately accepted a Part 36 offer made by Langstone to settle the detailed assessment, although he was then left with a significant amount of costs which he asserts he is still liable to pay his former legal team for their conduct of the Langstone Action on his behalf.

10. Mr Willers issued this claim against Mr Gubay alleging that Mr Gubay maliciously prosecuted the Langstone Action against him. He asserts that Mr Gubay was in reality in control of all the companies in the Anglo Group and everything that happened in those companies happened because Mr Gubay directed that it should. This includes he says the decision ostensibly by Langstone but really by Mr Gubay to launch the Langstone Action against him. Mr Willers alleges that the Langstone Action was one of many vindictive and wholly unjustified measures that Mr Gubay instigated, or caused others to instigate, against Mr Willers once Mr Gubay, for reasons that have never been entirely clear, turned against him during the first half of 2009.

11. Mr Willers' claim for malicious prosecution was initially struck out on the grounds that there was no tort known to English law of malicious prosecution where the case which is alleged to have been maliciously brought was a civil action rather than a criminal prosecution. The judge who struck out Mr Willers' claim granted a "leapfrog" certificate under section 12 of the Administration of Justice Act 1969 so the case could proceed directly to the Supreme Court. The appeal was heard by a bench of nine Justices of the Supreme Court. The Supreme Court held in *Willers v Joyce and Nugent* [2016] UKSC 43 ('*Willers UKSC*') by a majority of five to four that there is such a tort. To establish Mr Gubay's liability, Mr Willers must show:

    a. It was Mr Gubay who prosecuted the Langstone Action against Mr Willers;

    b. The Langstone Action was determined in Mr Willers' favour;

    c. Mr Gubay did not honestly believe that there was any reasonable and probable cause for bringing the Langstone Action and, objectively speaking there was no reasonable and probable cause;

d. Mr Gubay brought the Langstone Action motivated by malice towards Mr Willers;

e. Mr Willers has suffered loss and damage as a result of the malicious prosecution.

12. Mr Willers claims loss and damage from Mr Gubay under several heads. He claims that his health has suffered as a result of the stress of defending himself against the Langstone Action. He claims loss of earnings because he was unable to find alternative employment after leaving the Anglo Group in July 2009 partly because his time and energies were consumed by fighting the case and partly because no employer would consider him with the accusations of breach of fiduciary duty hanging over his head. Mr Willers also claims as damages the excess of the costs he has to pay his legal team over the amount he recovered from Langstone once the costs were assessed.

13. Following Mr Gubay's death in 2016 the defence of the claim has been continued by his executors Mr Nugent and Ms Joyce. They deny that Mr Gubay was the prosecutor of the Langstone Action for these purposes, they deny that there was lack of reasonable and probable cause for bringing the Langstone Action against Mr Willers and they deny there was malice as that term should be understood for this tort. They also deny that Mr Willers has suffered any recoverable loss.

II. THE PARTIES AND THEIR WITNESSES

(a) Witnesses for the Claimant

14. **Peter Willers** worked with Mr Gubay for many years and was a director of several companies in the Anglo Group. He qualified as a barrister and was appointed in-house counsel in 1986. The real nature of their working relationship was one of the issues in this case. Mr Willers described Mr Gubay as an autocratic and intimidating business leader. Although Mr Willers was a director and was referred to as a managing director on occasion, he says that his own role was simply implementing to the best of his abilities the many instructions that Mr Gubay gave him covering all aspects of the business, including the litigation that he was involved in over many years. He goes so far as to say that in all the time he worked for the Anglo Group and for Mr Gubay personally, he was never expected to exercise the usual decision-making responsibilities that a senior executive normally undertakes, nor would he have dared to do so, given that he would expect to be dismissed immediately if he questioned or disobeyed any orders that Mr Gubay gave him.

15. Mr Willers came across as a confident witness. However, I treat his evidence with considerable caution for two reasons. The first is that he has clearly been deeply distressed and enraged by what he sees as the betrayal of his many years of loyal service to Mr Gubay, culminating in his ignominious dismissal and the subsequent campaign against him. This anger means that there is a risk that he has reinterpreted the relevant events, many of which happened many years ago, to fit his current mental picture of how the Anglo Group operated. The second reason is that there are occasions where Mr Willers has presented inconsistent versions of the same situation when his interest so requires. For example, as I describe later, one issue that Mr Willers raises in these proceedings is whether the Anglo Group companies of which he was a director between 1998 and 2006 were truly managed and controlled in the Isle of Man for tax purposes or whether in reality they were managed and controlled by Mr Gubay who was resident in the United Kingdom at that time. Mr Willers during those years represented on many occasions and to many different people that the companies were managed and controlled in the Isle of Man because it suited him and the Anglo Group for that to be the case. In these proceedings, however, his interest lies in showing that the position is the opposite of what he said at the time. Another example

is his apparently inconsistent stance in these proceedings as to the nature of his role working for the Anglo Group companies. His claim, as I have indicated, rests in large part on his assertion that his role as a director was effectively minimal and he was simply obeying instructions from Mr Gubay without exercising any material discretion or decision-making function himself. In his interview with his expert employment consultant witness, it suited him to maximise his loss of earnings claim by presenting himself as an experienced main board director who had been involved in many major property development projects over a long and successful career as a senior manager. The inconsistency between those two positions did not seem to be as apparent to him as it was to me.

16. Although I am satisfied that Mr Willers was not deliberately seeking to mislead the court at any stage, I must discount some of his evidence where it conflicts with that of witnesses who I consider have a more balanced and less emotionally charged attitude towards the events that occurred.

17. **Christopher Sorrell** is a solicitor and currently a partner in the firm of FS Legal Solicitors LLP. He qualified as a solicitor in 1979. He began conducting litigation work for Mr Gubay in about 1983. Mr Sorrell changed firms a number of times between 1983 and August 2009 when his relationship with Mr Gubay and the Anglo Group came to an end. His litigation work for the Anglo Group went with him:

    a. between January 1983 and January 2000 Mr Sorrell was a partner in Davies Wallis Foyster ('DWF');

    b. between January 2000 and July 2006 Mr Sorrell was a partner in Wacks Caller;

    c. from July 2006 until the withdrawal of instructions, Mr Sorrell was a partner in Pannone.

18. Mr Sorrell's witness summary in these proceedings was largely based on the statement he made in the Langstone Action in 2012 and 2013 when his memory was clearer. Unfortunately, Mr Sorrell was not an impressive witness either in the witness box or as he emerged from the contemporaneous documents concerning his handling of the Aqua litigation. He has shown throughout a very unsure grasp of his professional duties and I regard some of his evidence as exaggerated and self-serving.

19. **Brian Stowell** Mr Stowell was a close friend of Mr Gubay for about 30 years and had known Mr Willers through his work for Mr Gubay and the Anglo Group since about 1986/87. Mr Stowell was not able to give evidence specifically about the period between 1996 and 2006 which is the key period for these proceedings. In cross-examination it became clear that Mr Stowell could not stand by some of the material in his witness statement and he softened some of the more extreme statements that he had made. It also became clear that the drafting of some of his witness statement had created an impression that there were links between events recounted that was not intended. I was not satisfied that Mr Stowell was able properly to distinguish between the impressions and opinions he had at the time of the events and his impressions looking back on events now.

20. **Andrew Styles** is an accountant who has worked in the property industry for more than 20 years. He became the Finance Director of Derwent Holdings Ltd, the parent company of the Anglo Group in March 2010 and was appointed Chief Operating Officer in July 2011. He held that position until 24 May 2012. I accept Mr Styles was generally a truthful witness seeking to assist the court.

21. The other witnesses appearing for Mr Willers were:

a. **Patrick Herring** who was finance director of the Anglo Group companies between 2004 and 2007 and the co-director of Langstone with Mr Willers during the course of the Aqua Litigation.

b. **Stephen Wotton** who joined Anglo International Holdings Ltd in October 2004 and worked under the direction of Mr Herring. He also worked as accounts manager for Cross Atlantic Ventures Ltd. He resigned from the Group in June 2013. He first had direct contact with Mr Gubay only after Mr Willers was dismissed.

c. **Michael Proffitt** met Mr Gubay in about July 2003. He was an experienced hotel developer and operator and was interested briefly in buying the Mount Murray Hotel and Country Club.

d. **John Jones** worked on projects for Mr Gubay between 1985 and 2015 as a self-employed joiner and carpenter and as his site foreman. In 2015 he began to be employed by one of the Anglo Group companies. He worked in the Isle of Man and in England on business developments and on Mr Gubay's private residential property.

22. The evidence of these witnesses was largely directed at describing the character of Mr Gubay and the extent of his involvement generally in the businesses of the Anglo Group. I consider that these men were honest witnesses, but some of their written evidence contained a great deal of 'spin'.

(b) Witnesses for the Executors

23. **Mr Gubay** was born in 1928 in Rhyl, North Wales. In 1959 he formed Value Foods Ltd which later became the Kwik Save chain of grocery retailers and developed to become hugely successful as a low price, no-frills chain. The business was floated in 1970 and with the capital gained from that Mr Gubay repeated the success of this chain in New Zealand, Ireland and the United States during the 1960s to 1980s.

24. In 1983 Mr Gubay returned to live in the Isle of Man and turned his attention to property development and land ownership with various projects and developments both in the Isle of Man and the United Kingdom. This included, in 1988, the Mount Murray development which included a golf course, sports facilities and a hotel complex. He also formed a bank called Celtic Bank based in the Isle of Man. In the mid-90s Mr Gubay became interested in creating a chain of fitness clubs trading under the brand of Total Fitness. The concept was to build a comprehensive gym with swimming pool and spa facilities. The first one was built in Ireland and then further premises were constructed in the United Kingdom.

25. As Mr Gubay's wealth accumulated, he decided to settle his assets on what became the Santon 1994 Settlement Trust. The aim was to combine the assets which were at that time owned personally by Mr Gubay with the assets that were already settled on trusts into one settlement. That trust could then set out the arrangements needed to give effect to the charitable bequest which Mr Gubay wanted to make on his death and also provide funds for his family on his death. Advice on setting up these arrangements was given by Robert Venables QC who also provided all the draft documentation. The trust assets were held in two Funds, the A Fund contained the assets that came from previous settlements from which Mr Gubay was excluded from benefiting and the B Fund contained the assets that came from Mr Gubay personally. These included the shares in the holding company that owned the Anglo Group of companies.

26. The principal trusts were altered in October 2008 so that on Mr Gubay's death ownership of all the Anglo Group passed to Foundations and a reduced though still substantial sum of

cash passed to benefit his family and to make gifts to family friends and people he had worked with. The trustees have changed over the years but between 1994 and October 2005 comprised both individual trustees (including Mr Nugent) and corporate trustees including Castleside and Santon Private Trust Company Ltd ('SPTCL'). Mr Willers was a director of both those companies from 1994 until his dismissal in 2009.

27. A great deal of time was spent at the trial in cross-examining witnesses about the purpose behind the Santon Trust, the efficacy of the Santon Trust and Mr Willers' contention, not necessarily that it was a sham, but that it enabled Mr Gubay to treat the assets held in the Trust as if they were his own. What emerged as incontrovertible was that the instructions given to Robert Venables QC, with which presumably he complied, were to set up a Trust which was effective, amongst other things, to shield the very substantial assets settled on the trust from UK taxes whilst giving Mr Gubay as much control over those assets as was consistent with achieving the required tax status. There is nothing to suggest that Mr Venables failed in his task or that the validity of the Trust and its consequent tax efficacy has ever been challenged by HMRC.

28. The residence of Mr Gubay at different periods is important in the narrative of this case:

    a. from 1983 to October 1996 Mr Gubay was resident in the Isle of Man;

    b. from 1996 to 1998 Mr Gubay was resident in the Republic of Ireland;

    c. from 1998 to 2006 Mr Gubay was resident in the United Kingdom;

    d. from 2006 to 2015 Mr Gubay was resident in the Isle of Man;

    e. from 2015 until his death in January 2016 Mr Gubay lived in the United Kingdom.

29. Six witness statements from Mr Gubay were served by the Executors under Civil Evidence Act notices in this action. Five are statements made by Mr Gubay in the Isle of Man Proceedings between May 2012 and November 2013 and one was made in May 2012 in the Langstone Action.

30. I have not of course had the opportunity to assess Mr Gubay myself and I do not know what impression he would have made in the witness box under sustained cross examination. Mr Page QC, appearing for Mr Willers, points out that Mr Gubay has been shown to have lied on oath on at least two occasions. There is some criticism in Mr Willers' closing submissions of the absence of any witness statement from Mr Gubay in these proceedings even though they were commenced two years before Mr Gubay's death. But there is plenty of evidence that some years before his death, Mr Gubay's mental and physical state had deteriorated very severely. It would not be fair to infer anything adverse from the absence of such a statement. I have concluded that I should treat Mr Gubay's evidence with the same caution as I treat Mr Willers'.

31. **John Nugent** is the joint executor with Elena Joyce of the estate of Mr Gubay. His areas of expertise have included UK property transactions, tax residence for companies and individuals and the holding of assets by non-residents of the UK. For much of the material time, he was chairman of PKF (Isle of Man) LLC which provided professional accountancy and tax services to the Anglo Group of companies. He is also a director of Derwent Holdings Ltd, the main operating company for the Santon Group.

32. I find that Mr Nugent was a scrupulous, honest and balanced witness; one of the few people involved in these proceedings who has managed to retain his objectivity and some sense of proportion despite the personal attacks on him. I accept his evidence as truthful and fair.

33. **Alan Gough** has been an Isle of Man Advocate since 1975 specialising in civil and commercial disputes. His firm, Gough Law, acted for Mr Gubay for many decades in contentious matters both those arising from his personal affairs and in relation to his Isle of Man business interests. There was less contact between them when Mr Gubay was living outside the Isle of Man between 1996 and 2006. No criticism is made by Mr Willers of Mr Gough's evidence.

34. **Neil McDougall** is a South African attorney living in Cape Town. He worked with Mr Gubay over many years and also worked with Mr Willers between about 1989 until Mr Willers' dismissal in 2009. He is currently a director of the corporate trustee of the Albert Gubay Charitable Foundation. I found Mr McDougall to be a truthful and fair witness doing his best to assist the court.

35. **Christopher Barr** joined the Anglo Group at the beginning of 1988 as an in-house legal adviser. In 1995 he was made a director of most of the companies within the Anglo Group although this did not lead to a material change in his role. He worked very closely with Mr Willers who was his immediate boss for a number of years although he was not involved with the Aqua Litigation. When Mr Willers left the Anglo Group in July 2009, Mr Barr took over the senior management roles that Mr Willers had vacated. He was therefore involved with the ultimate disposal of the Aqua Litigation and he was a director of Langstone at the time the Langstone Action was launched.

36. I accept Mr Barr was a truthful witness. He was cross-examined about some of the ways in which he was involved in the investigations into Mr Willers' conduct after Mr Willers left the Group in July 2009. It appeared to me that he rather regretted having complied with Mr Gubay's instructions in respect of certain matters but unlike some of the other witnesses, he did not seek to shift the blame for his conduct onto others.

37. **Krystina Twizell** is a qualified barrister having been called to the Bar in 2009. She was employed by the Anglo Group from 2007 until April 2010. She was initially employed as Mr Willers' legal assistant and became the Group's Legal Officer when Mr Willers left in July 2009 until she left the Group herself. She was made a director of Langstone on 8 January 2010. In that role she was involved in commencing and pursuing the Langstone Action against Mr Willers. She was not involved in the conduct of the Aqua Litigation before Mr Willers left.

38. Ms Twizell has adopted an ambivalent approach to this litigation. The Executors served under a Civil Evidence Act notice a witness statement that Ms Twizell had made on 18 May 2012 in the Langstone Action on behalf of Langstone. She made that witness statement to rebut the allegations made by Mr Willers that decisions to pursue the Aqua Litigation were not taken by him but by Mr Gubay who was by that time the Defendant to Mr Willers' Part 20 claim.

39. Ms Twizell was initially content for her previous statement to be relied on by the Executors in this case though she was unwilling to attend court for cross-examination in these proceedings for personal reasons. However, she made another witness statement on 23 October 2018 by which time this trial was already well underway. That statement was served under a Civil Evidence Act notice by Mr Willers. She says that she has repeatedly told the Executors' solicitors Laytons Solicitors LLP that she was not prepared to support the Executors' defence of Mr Willers' claim and that she does not agree to the use of her earlier witness statement. Her new witness statement states that she would have preferred not to be involved in the earlier proceedings either. In the new statement she does not

retract her previous evidence but revises what she said in certain respects, presumably in the hope that the Executors will abandon reliance on her earlier statement.

40. In response to that new witness statement, Mr Thomas, of Laytons made a witness statement also dated 23 October 2018, exhibiting the correspondence between his firm and Ms Twizell documenting her change of mind. The friendly exchanges of correspondence between Ms Twizell and Mr Thomas during the summer of 2017 showed Ms Twizell fully prepared to make a statement in support of the Executors and to attend the trial of this claim. There is a handwritten attendance note of Ms Parker of Laytons taking instructions from Ms Twizell for the purpose of drawing up a fresh statement. The content of that note very much accords with the content of her earlier statement in the Langstone Action and contains no hint of the concerns she has more recently expressed. The day after that meeting, Ms Twizell wrote to Laytons that she had decided not to give oral evidence in the case. She gave personal reasons for avoiding the stress that would be involved. There was nothing in that correspondence in August 2017 to indicate that Ms Twizell was casting doubt on the evidence she had given before or that she was unwilling for the earlier statement to be used in these proceedings.

41. On 2 May 2018 Ms Twizell was back in contact with Laytons saying that she did not consent to her earlier statement to be used in these proceedings. Mr Thomas responded pointing out that the parties do not need her permission to use her earlier statement as it was put in evidence in the Langstone Action. Again, there is nothing in the correspondence that casts doubt on the truth of her previous evidence. I accept the Executors' submission that there is no reason why her earlier evidence might be unreliable.

42. The other witnesses giving evidence for the Executors were:

    a. **Andrew Whalley**'s fourth witness statement in the Langstone Action was served by the Executors under a Civil Evidence Act notice. He was a solicitor in DWF who acted for Langstone in that action.

    b. **David Keown** is Head of IT for the Anglo Group of companies. His evidence covered his relationship with Mr Gubay and his impressions of Mr Gubay and Mr Willers.

    c. **Rebecca Bennetts** was previously the secretary first to Mr Willers and Mr Barr and then to Mr Gubay. She is currently the secretary to Mr Nugent. Her evidence covered the relationship between Mr Willers and Mr Gubay and also Mr Willers' relationship with Mr Sorrell.

(c) Other points about the evidence available at trial

43. There were many other witness statements in the bundles that were made in the different earlier claims and proceedings by the witnesses appearing before me. I indicated during the trial that I did not regard these as contemporaneous documents. They were not evidence of the matters stated in them unless they had been served in these proceedings under a Civil Evidence Act notice or the contents of them were adopted by a witness during cross examination.

44. One of the difficulties in a malicious prosecution suit is that it necessarily involves a consideration of the views of the claimant in the earlier prosecuted claim about the merits of that claim and the reasons why he prosecuted that claim. That material is generally covered by legal professional privilege. In these proceedings neither Mr Willers nor Langstone has waived legal professional privilege in the advice they had received or any

other communications between them and their respective lawyers in relation to the Langstone Action.

45. Further, as Langstone is not a party to these malicious prosecution proceedings, it was under no obligation to give disclosure of its documents relating to the Langstone Action - even those documents not covered by privilege. In July 2016 Laytons asked Langstone's solicitors to make available for their inspection documents belonging to Langstone, in particular documents relating to the Langstone Action before the claim was launched in May 2010 and those relating to the period covering the service of the notice of discontinuance. Langstone's solicitors' response was that it was concerned that acceding to the request would imply a waiver of privilege in respect of all its documents concerning the Langstone Action and it declined to make the documents available.

46. Mr Willers did not seek a third party disclosure order against Langstone because, he said, he could not afford the costs if he lost the application. He was also not confident that there would be a sufficient volume of relevant documents not protected by privilege to make such an application worthwhile.

47. Both parties reminded me of the absolute nature of the protection that the courts must afford to legally privileged material: see *R v Derby Magistrates Court ex parte B* [1996] AC 487. In *Medcalf v Mardell* [2003] 1 AC 120, the House of Lords was considering a situation where a firm of solicitors defending a wasted costs application was unable to disclose what advice and warnings they gave to their client and what instructions they received because their client refused to waive privilege. Lord Bingham of Cornhill said that where a practitioner is precluded from giving his account, the court must be very slow to conclude that a practitioner could have had no sufficient material: "Speculation is one thing, the drawing of inferences sufficiently strong to support orders potentially very damaging to the practitioner concerned is another.": [23]. Lord Hobhouse of Woodborough also concluded that the answer to the dilemma in which the solicitors found themselves was "to require the court to take into account the possibility of the existence of such material and to give the lawyers the benefit of every reasonably conceivable doubt that it might raise": [61].

48. The analogy between the malicious prosecution jurisdiction and the wasted costs jurisdiction cannot be pushed too far. I do not agree that in the present case the claim can only be made out if Mr Willers can establish that there could be nothing in the Langstone privileged material which would help Mr Gubay. But I consider that in the absence of such material, the court needs to put itself in the shoes of the person who would wish to rely on anything positive in the privileged material even if that involves to some degree speculating as to what their thought processes were likely to be.

49. Similarly, although Mr Willers could have waived privilege in his communications with his legal team in the course of the Langstone Action if he chose, I do not draw any inferences from this refusal. Given that the malicious prosecution jurisdiction exists, it would be unfair in effect to require the waiver of privilege in the earlier claim as the price of bringing the subsequent malicious prosecution proceedings.

50. Privilege was waived during the Langstone Action in respect of legal advice given to Langstone and to Mr Haskew during the Aqua Litigation. That material was therefore before the court in this trial.

III. THE AQUA LITIGATION

(a) The Aqua Defects Claim

51. I shall use the term "the Aqua Litigation" to refer compendiously to all the litigation that arose from the initial dispute between the Anglo Group on the one hand and Aqua, Adams Holdings Ltd, David Adams and Shaun Adams on the other. The Aqua Litigation arose from the defective supply of swimming pools installed by Aqua in a number of Total Fitness gyms. There were separate contracts with Aqua for each of the swimming pool installations. The problem with the Aqua swimming pools was primarily with the covers, referred to as Hydrodecks, which were supposed to slide automatically out of housing at the bottom of the pool up the side of the pool and then across the surface of the pool. This would then conserve the heat in the water when the pool was closed to customers. The covers cost about £30,000 to £35,000 each. They did not work in any of the large swimming pools where they were installed. Aqua itself was a small company dependent on the input of funds from its parent company Adams Holdings Ltd ('Holdings'). The contractual documentation concluded between TFUK and Aqua was supposed to include a collateral agreement under which Holdings would in effect guarantee the work done by Aqua. In fact when Aqua returned the signed documents, instead of naming Holdings in the collateral warranty, it named Aqua itself. It appears that no one in Mr Willers' office noticed that no collateral warranty had actually been given by Holdings for Aqua's work until March 1998. Mr Willers wrote to Holdings in respect of the Total Fitness gym in Dublin on 2 March 1998 asking the company to sign and return the collateral agreement. Holdings consistently refused to do so in respect of that or any other gym installation.

52. TFUK tried various tactics to pressure Holdings to guarantee its subsidiary's liabilities under Aqua's contracts with TFUK. There was some attempt to withhold payment for work done on site, prompting Aqua to object that this was an attempt retrospectively to vary the terms of the agreement. On 16 September 1999 Mr Willers wrote to Aqua asking Aqua to provide a report on the defects and undertake remedial work. Failing this, he said, TFUK would place an advertisement in the trade press expressing concern about Aqua's business practices, naming the directors of Aqua and referring to "worthless" warranties. Mr Willers prepared a draft of that advertisement which he sent to the Adamses though in the end it was never published. Mr Willers did, however, make good on another threat to the Adamses to write to the Department of Trade and Industry Company Law and Investigations Section in October 1999. Mr Willers complained to the DTI that the financial stability of Aqua "was illusory" and that it was plainly the intention of Holdings to withdraw its support at any time, in the light of very substantial potential claims arising out of the four swimming pool installations carried out for TFUK. Mr Willers also wrote to the President of the Swimming Pool and Allied Trades Association describing the problems that had arisen with the defective swimming pools. He invited the Association to enquire into the practices of Holdings and its subsidiaries and requested that they be excluded from the benefit of the trade association "unless and until they regularise their business practices" and cease to trade through a worthless company. Mr Willers also instructed inquiry agents to find out about David Adams' earlier business career and whether he and his family had any money.

53. The Adams family stood firm, however, and refused to provide a warranty from Holdings to cover Aqua's liabilities. Mr Willers accepted in cross examination that the Adamses had never agreed at the time of contracting that Holdings would provide a guarantee.

54. On 10 November 1999 Mr Willers wrote to David Adams giving the details of the solicitors who would be dealing with the matter on TFUK's behalf, DWF (where Mr Sorrell was at that time working). The next day Aqua wrote to Mr Sorrell at DWF saying:

> "I understand you act on behalf of a company or companies under the control of Mr A Gubay. Mr Gubay, through his office in the Isle of Man has failed to ensure my Company is paid monies, which are overdue in connection with various works carried out for Total Fitness."

55. The letter went on to say that Mr Adams wished to support both his customer and the products supplied and described the efforts that they had already made and intended to make to put right the problems that had arisen. Mr Sorrell wrote back on 12 November saying that DWF were the English solicitors for TFUK and Anglo International Holdings. Mr Sorrell went on:

> "For the record, and for the avoidance of any doubt, we can tell you categorically that those companies are not either owned by or controlled by Mr. Albert Gubay who is, we believe, the individual to whom you have made reference in the first paragraph of your letter".

56. Mr Willers was asked in cross-examination to comment on that response. He described it as a standard thing which happened on quite a number of occasions. He confirmed that his evidence now is that what Mr Sorrell had said was untrue, at least so far as Mr Gubay controlled the companies. But he said he had been content to instruct the solicitor to make untrue statements to opponents in litigation at that time because the standing instruction within the Group was that Mr Gubay's involvement in the business was always to be denied.

57. As regards these pre-action steps, Mr Willers' evidence is that every step he took was only taken after detailed discussion with Mr Gubay. I doubt whether Mr Gubay was really so involved with the drafting of the letters as Mr Willers claims. But on balance I accept that he approved the stance that Mr Willers adopted because the swimming pools and the covers really were causing serious problems at the gyms. He would want to apply maximum pressure to Aqua to resolve the problems. I note however that none of the steps threatened or taken actually cost TFUK any money. They all had a clear commercial basis even if some people would regard them as unpleasant, even bullying tactics.

58. Instructions were sent to counsel to draft the claim form and Particulars of Claim against Aqua and Holdings. Initially Mr Willers proposed joining David Adams as a defendant but he was advised by counsel that this would be struck out. By this time Mr Sorrell had moved from DWF to Wacks Caller.

59. The claim was ultimately commenced by TFUK and Crown Grade Construction Ltd (which was the Anglo Group company in charge of construction work) against both Aqua and Holdings. Proceedings were issued in the Salford District Registry of the Queen's Bench Division on about 20 April 2000 (TCC No 26/00SF009017) ('the Aqua Defects Claim'). Although the Particulars of Claim as served are not in the bundles before me, their content is clear from the Defence and Counterclaim that was served by Aqua and Holdings in June 2000. In the Defence the defendants:

    a. deny that Holdings granted a guarantee to TFUK "either in consideration of [TFUK] agreeing that [Crown Grade] could enter into a contract with [Aqua] or at all";

b. admit installing the swimming pools but deny that the pool covers were defective;

c. aver that if, which is not admitted, the pool covers do not work, that is not because of defective installation but because of failures of TFUK's part to ensure that parts were installed correctly or because of misuse or because of faulty manufacture of which Aqua was unaware.

60. The counterclaim brought by Aqua and Holdings alleged that the claimants were in repudiatory breach of contract by failing to pay for the work in full and sought payment of about £20,000 in outstanding monies. Holdings applied to have the claim struck out against it. Faced with that application, TFUK discontinued the claim against Holdings on 16 November 2000 and agreed to pay Holdings' costs.

(b) The liquidation of Aqua and the appointment of Mr Haskew

61. On 21 December 2000 Aqua held an EGM of its members and resolved to go into a creditors' voluntary liquidation and to appoint Mr Haskew of Begbies Traynor to be liquidator. Mr Haskew produced a statement of affairs dated 4 January 2001 to be presented to the meeting of the creditors. The introduction to that statement described the reason for the liquidation. It referred to Aqua's involvement as a subcontractor in a number of contracts where the contract employer was a company called Healthland UK Ltd. That company had gone into administration in October 2000 and "this had both immediate cash flow and longer-term viability consequences for Aqua". Aqua's largest creditor, a Scottish company, had issued a writ on 27 October 2000 for £254,120 and had obtained a court order attaching sums due to Aqua from main contractors on around six contracts. Following these events, the main objective had been to preserve the value of Aqua's assets for the benefit of the company's creditors generally. The estimated statement of affairs as at 21 December 2000 showed that preferential creditors could be paid in full but there was a deficit as regards non-preferential creditors. The estimated deficiency as regards creditors was said to be £383,957. On those figures, recovery for unsecured creditors would be 28p in the pound. However, TFUK realised that the position was worse than that since TFUK had not been invited to the meeting of creditors because Mr Haskew was unaware of the claim that would need to be added to the value of the unsecured creditors. The advice received by Mr Willers from the outset was thus that there was very unlikely to be any significant dividend for the unsecured creditors.

62. In his witness statement, Mr Willers says this about the liquidation of Aqua:

> "90. In January 2001, I heard from Mr Sorrell that Mr Adams had put Aqua into liquidation. The Aqua Statement of Affairs was faxed to Mr Sorrell on 5 January 2001. When I told Mr Gubay, he was furious and said: "*I told you that Adams was a bad bugger*" or words to that effect. His assessment of Mr Adams was absolutely correct since instead of resolving and settling the Hydrodeck problems Mr Adams took his inter-company loan out of Aqua and let it fold. This made Mr Gubay even more determined to get him. He decided to obtain judgment against Aqua because he wanted Langstone to control the liquidation. It was as a prelude to the claim he wanted to make against Mr Adams."

63. This evidence is puzzling because it is clear from the Statement of Affairs that the insolvency was not the result of Holdings calling in an intra-group loan but rather first, the

entry into administration of the main contractor from which Aqua was then unlikely to receive payment on a number of contracts and secondly the enforcement of the debt by the largest creditor. If Mr Willers himself saw the Statement but told Mr Gubay a different reason for the insolvency, causing his fury, then it is certainly unfortunate that Mr Gubay did not check the Statement of Affairs himself. I do not believe that he could have read the Statement of Affairs as suggesting that Mr Adams had engaged in some kind of sharp practice by withdrawing support from Aqua in the face of TFUK's claim.

64. Mr Willers' evidence is that at this early stage he and Mr Gubay were discussing the possibility of bringing a claim against the Adamses personally. He also said that at this stage both he and Mr Gubay believed that if David and Shaun Adams had substantial funds and a claim against them was successful, then all the creditors of Aqua would be paid in full. Mr Willers says that Mr Gubay told him in January or February 2001 that he would be prepared to fund litigation brought by Mr Haskew against Aqua's former directors. The two men were influenced in part by the successful outcome, from their perspective, of earlier proceedings taken against a firm of architects called Clayton. The firm had designed the cladding on the building which housed the Celtic Bank in the Isle of Man. The cladding was defective and negligence proceedings were brought against the firm. The architects submitted to judgment in favour of one of the companies in the Anglo Group accepting liability in the sum of about £500,000. Although they were initially allowed to pay by instalments, they failed to make the payments and bankruptcy proceedings were commenced against them and against their wives to whom property had been transferred. There was a settlement shortly before trial resulting in the whole of the bankruptcy debt together with interest and costs being recovered.

65. On 19 January 2001, shortly after Aqua went into liquidation, TFUK obtained judgment in the Aqua Defects Claim for damages to be assessed. On 2 March 2001 the damages payable to Aqua were assessed at £120,944 and Aqua was ordered to pay TFUK's costs assessed at £22,959. Mr Haskew was ordered to pay costs of £1,270. That brought the Aqua Defects Claim to an end and crystallised the judgment debt in respect of which TFUK was an unsecured creditor in the Aqua liquidation at £143,539.

(c) The proceedings brought by Mr Haskew

66. In March and April 2002 there were discussions between Mr Willers and Mr Sorrell about TFUK providing an indemnity to Mr Haskew if he would agree to take action against the Adamses. Mr Willmott from Wacks Caller attended a meeting with Mr Haskew on 11 March 2002. In his attendance note Mr Willmott records:

    a. Mr Haskew made it clear at the outset of the meeting that "he is not prepared to go on a fishing exercise for [TFUK] but that if any matters benefit creditors as a whole he will assist".

    b. Mr Haskew also indicated that in order to take matters further he would want to see evidence of a legitimate commercial grievance with Holdings and evidence of funding of his investigation and any application. He was prepared to issue applications under section 236 of the Insolvency Act 1986 if TFUK funded them and provided the information sought was for the benefit of the creditors as a whole.

    c. They discussed other enquiries that Mr Haskew was carrying out to pursue other claims that Aqua might have against third parties.

67. Mr Sorrell sent a copy of that attendance note to Mr Willers asking whether he could tell Mr Haskew that TFUK would fund the section 236 application on the condition that Mr

Haskew instructed Wacks Caller to represent him. Mr Willers must have agreed because Mr Sorrell wrote to Mr Haskew on 24 April 2002 to say that he acted for TFUK and proposing a constructive way forward in relation to the investigation and possible pursuit of any legitimate commercial grievances that Mr Haskew or substantial creditors had against the Adamses. He confirmed in that letter that provided that his firm, Wacks Caller, was instructed in the matter, all Wacks Caller's legal fees in pursuing any matters and advising the Liquidator, including in this context, advice provided by Leading and Junior Counsel would be paid for by TFUK. In addition, TFUK confirmed through him that they would indemnify Mr Haskew against any adverse costs orders connected with pursuing such matters. With that letter Mr Sorrell enclosed a draft application pursuant to section 236 of the Insolvency Act, summoning the directors of Aqua to court. Mr Haskew wrote back on 29 April 2002 reminding Mr Sorrell that the indemnity they had discussed had included Mr Haskew's own fees as well as his legal costs and any adverse costs order. He also asked for a personal guarantee from Mr Gubay and set out his firm's hourly charges. Mr Haskew emphasised that he would need to disclose to the court when making his application that Wacks Caller also acted for TFUK and that TFUK were funding the application. He concluded:

> "Independence
>
> You will appreciate that I need to satisfy myself, notwithstanding indemnification that the nature of the application is reasonable and proportional in all the circumstances, that it is necessary in the interests of the winding up and that it is not likely to be viewed as oppressive or unfair to the Respondents. To that end I would require third party legal advice, the costs again to be met by your client."

68. On 20 May 2002 Mr Sorrell passed some of this request on to Mr Willers, suggesting two counsel who might be able to give Mr Haskew comfort that the proposed action would not be viewed as oppressive or unfair.

69. Matters then progressed very slowly. When he was asked about this delay in cross examination, Mr Sorrell was not able to explain why and could not recall any chasing up by Mr Gubay to find out what was happening. On 30 October 2002, Mr Sorrell sent a draft of the indemnity to be given by TFUK to Mr Haskew. It covered only the proposed s 236 application against David and Shaun Adams but covered Mr Haskew's own fees as well as his legal costs and any adverse costs order made against him.

70. At first the support of TFUK for Mr Haskew in pursuing those against whom Aqua might have a claim bore fruit. In March 2003 Mr Haskew on behalf of Aqua issued proceedings against the sister company of Aqua called Golden Coast alleging that it had supplied Aqua with the defective swimming pool covers. Those proceedings were issued in the Manchester District Registry (Claim MA 390270) ('The Golden Coast Proceedings'). On 22 January 2004 the parent company of TFUK, called Total Fitness Ltd (later renamed Cashtal Ltd) provided Mr Haskew with an indemnity to pursue the Golden Coast Proceedings. The Proceedings were compromised by a consent order dated 2 March 2004 under which Golden Coast paid £90,000 plus costs to Aqua so the indemnity was never called upon.

71. In the first half of 2003, nothing significant appears to have happened in progressing the claims against the Adamses. At some point Mr Willers and Mr Sorrell instructed Mr Chris Hine to give advice about the value of the potential claim against Shaun and David Adams

for wrongful trading. Mr Hine was an accountant and partner in RSM Bentley Jennison. He produced a preliminary report on 3 April 2003 advising that there was a strong case for further investigation. In August 2003 the possibility of a section 236 application against the Adamses was raised again and Mr Sorrell wrote to Mr Haskew saying that he was under some pressure to have proceedings issued. There was a phone conversation between Mr Haskew and Mr Sorrell in which Mr Haskew reiterated his desire to obtain independent advice about the propriety of the application (independent that is of TFUK as creditor and funder). In reporting this matter to Mr Willers, Mr Sorrell described the stance of Mr Haskew as "irritating and tedious", wondering whether Mr Haskew could be persuaded "to relinquish the job in some way". Mr Sorrell referred in one letter to working with Mr Willers and with Michael Booth QC to get Mr Haskew "set up in the best possible way" for a removal application by driving Mr Haskew into a corner so far as they could. His plan was to push Mr Haskew to act in a way which would make it appear to a Court that Mr Haskew was acting unreasonably.

72. At the same time as he was discussing with Mr Willers how to replace Mr Haskew as liquidator with someone more compliant with TFUK's wishes, Mr Sorrell resisted Mr Haskew's attempts to obtain independent advice, assuring him that Wacks Caller regarded their "first duty professionally" as being to Mr Haskew as liquidator. Mr Sorrell strongly discouraged Mr Haskew from seeking independent advice by reassuring him that Wacks Caller's advice was "wholly independent and designed to serve your best interests and the interests of the creditors in the liquidation as a whole". He threatened, however, that funding by TFUK would be withdrawn if Wacks Caller were replaced with other solicitors and that if that in turn led to the failure to bring "a perfectly good claim" then the unsecured creditors "could well regard such a decision on the part of the liquidator in this case as being entirely perverse".

73. As the section 236 application was still being considered, some progress was made in relation to a claim for wrongful trading against Shaun and David Adams. Mr Hine interviewed them in about August 2004 and produced a draft report for the purposes of proceedings against them. Mr Hine concluded that the directors of Aqua should have ceased trading when the financial accounts for 1995/1996 were signed off in January 1997, alternatively when the following year's accounts were signed off. He also highlighted anomalies in the 1998 and 1999 accounts which he thought suggested that the directors had manipulated recharges by Holdings to give the impression that the company was doing better than it was. Mr Hine assessed the quantum of the wrongful trading claim, that is to say the amount that Shaun and David Adams were liable to contribute to Aqua's assets, as between £400,000 and £425,000 depending on when trading should have ceased. He also drew attention to the possible preferential payment made in the run up to Aqua's insolvency.

74. A three hour conference with counsel was held on 14 October 2004 to discuss the claim, including Mr Hine's approach to quantum. Mr Casement of counsel was recorded in Wacks Caller's attendance note of the conference as advising "that this was an extremely strong case...".

75. A letter before claim was sent by Mr Sorrell in respect of the wrongful trading and preference claims to Shaun and David Adams on 23 December 2004. The Adamses instructed Mr Firmin at Messrs Samuels to represent them. They asserted that the net deficiency was the consequence of failures and actions of others which could not have been reasonably foreseen.

76. Mr Sorrell had a call with Mr Casement on 13 April 2005. They discussed the need for Mr Haskew to obtain the sanction of the court for commencing proceedings and some revisions that Mr Casement wanted to make to Mr Hine's report. In the call Mr Sorrell stressed that he was "very anxious indeed to get on with these proceedings" and that he was under "some pressure" from the client to move matters on. He also referred to the need for an indemnity. A fresh deed of indemnity was entered into at the end of April 2005 covering the wrongful trading proceedings. Mr Casement provided an advice in May 2005 for the purposes of obtaining the court's sanction to bring proceedings against the Adamses. He advised that there were very good prospects of persuading the court that the directors were liable for wrongful trading and that Holdings was liable for a preference. Mr Hine produced a final version of his report on 9 May 2005.

77. Proceedings were issued by Mr Haskew against Shaun and David Adams and against Holdings on 10 August 2005 by Mr Sorrell in the Manchester District Registry. The claim was drafted by Michael Booth QC and David Casement with a statement of truth signed by Mr Sorrell. The proceedings ('the Wrongful Trading Proceedings') alleged that:

    a. as at January 1997 Shaun and David Adams as directors knew or ought to have concluded that there was no reasonable prospect that Aqua would avoid going into insolvent liquidation and hence they engaged in wrongful trading. They were liable pursuant to section 214 of the Insolvency Act 1986 to make a contribution to Aqua's estate in the sum of £449,153.

    b. alternatively, as at March 1998 David and Shaun Adams knew or ought to have concluded that the company could not avoid insolvency and were liable to make a contribution to Aqua's assets in the sum of £425,528.

    c. the company having gone into insolvent liquidation on 21 December 2000, the sum of £96,968 paid during October 2000 to Holdings being a connected company constituted a preference pursuant to section 239 of the Insolvency Act and therefore had to be repaid to Aqua by Holdings with interest. In the particulars as to why this payment was a preference the claim referred to October 2000 as the month in which Healthlands went into administration: "Healthlands was a major and significant debtor and any impact upon its financial health was bound to be significantly adverse to the Company".

    d. David Adams was a shadow director of Aqua.

78. Points of Defence were served by the Adamses on 12 October 2005 denying liability. Shortly after the service of the Points of Defence, five lever arch files of papers were sent by Samuels to the offices of Mr Hine. This generated concern on the part of Mr Haskew and Langstone since the Adamses had previously denied having documentation of this kind. In a letter of 18 October 2005 to Mr Willers informing him of this development, Mr Sorrell referred to the possibility that Mr Hine would "virtually have to rewrite his report from scratch", with "horrendous financial consequences". Mr Sorrell noted in that letter that the process of producing the Particulars of Claim had been long drawn out and expensive. He said: "That is, perhaps, given the complexity of the case, to be expected, but nevertheless an enormous amount of legal costs have been incurred which are now going to have to be revisited.". He said that he wanted "to make the hugest song and dance about all of this" and to use the new documents as a reason to pursue David and Shaun Adams for wasted costs. This would also be a chance to revisit the possibility of having them cross-examined in court. He concluded "A further advantage of taking this course of action is that we can, in the manner of Clayton, establish that we are absolutely going to track them down to the

ends of the earth and get them come what may". Mr Sorrell wrote in similar terms to Mr Booth and copied that letter to Mr Willers saying that he expected to be making "fairly substantial applications for costs against the other side" including the costs incurred by having to revisit Mr Hine's evidence.

79. Mr Hine sent a 10-page letter to Mr Sorrell on 27 October 2005 analysing the information now provided in the files sent by Samuels and setting out in great detail the requests for documents that had previously been made. He concluded his letter:

> "Given that we have incurred costs of nearly £75,000 (net) on this matter to date, my provisional estimate, for producing a further substantive report to take account of this new documentation, and including a revision of the entire content of my previous report, is in the region of £35,000-£40,000 (excluding VAT and disbursements)."

80. On 11 November 2005 Mr Hine wrote a further 13-page letter to Mr Sorrell saying he had considered the impact of the new documentation on the matters covered by his report. He described these comments as arising out of his "first initial review" and stated that he intended to elaborate on those comments and raise further points not set out in this letter when looking through the files in more detail for the purposes of re-drafting his report.

81. The production by the Adamses of these new documents prompted a revival of the idea of applying to the court for David and Shaun Adams to be cross-examined on oath. In March 2006 Mr Haskew issued an application for an order pursuant to sections 234 and 236 Insolvency Act 1986 for them to be examined on oath and to produce documents. The hearing of the application together with the hearing of an adjourned case management conference took place over two days before District Judge Khan in August 2006. In his judgment, the judge referred to the application being supported by a witness statement from Mr Haskew with exhibits comprising some eight lever arch files. He recorded that the liquidator was represented at the hearing by both leading and junior counsel. He also noted that since the issue of the application in March 2006, the liquidator had taken no further steps to pursue the wrongful trading claim. The District Judge described in detail the documents sought and the questions which Mr Haskew wish to put to the Adamses. The District Judge dismissed the application. He said that he did not understand why no attempt had been made by Mr Haskew to clarify with the Adamses the information they had provided, nor why an invitation from the Adamses to Mr Haskew to view backup tapes on which Aqua documents were stored had not been taken forward. The District Judge criticised the evidence filed by Mr Haskew as not containing a clear statement of the documents he already had in his possession. There had been no proper list prepared of the documents; this was a fundamental exercise because without a complete and itemised list, it was not possible to test the suggestion that a particular item was missing: [71]. Working through the various categories of documents sought, the judge explained why he was not satisfied that there were any documents missing.

82. As to the questions Mr Haskew said he wanted to put to the Adamses, the District Judge found that a number of categories of questions proposed by Mr Haskew appeared to relate to areas which either had been covered or could have been and should have been covered already in the section 235 interviews. He rejected all the categories of questions that Mr Haskew wanted to put to the Adamses.

83. Mr Sorrell wrote to Mr Willers on 16 August 2006 recording that DJ Khan had found against them. They were advised against an appeal. Inevitably Mr Haskew was ordered to

pay the Adamses' costs including an interim payment on account of £15,000. Those costs together with Mr Haskew's costs were paid by a company in the Anglo Group pursuant to the indemnity provided by Langstone.

84. Thus Mr Sorrell's hope that the Adamses would receive what he described as "a good kicking" as a result of their late disclosure of documents was comprehensively dashed. Far from recovering the costs thrown away by the lawyers or the substantial additional fees for Mr Hine, Langstone had to pay the Adamses' costs as well as Mr Haskew's own fees. Mr Sorrell did not recall speaking to Mr Gubay about this defeat nor did he recall any contact from Mr Gubay in response to what happened.

85. After the section 234 and 235 application was issued but before the hearing before DJ Khan, an offer of settlement was made by the Adams family. On 5 April 2006 Samuels made a written offer to settle the Wrongful Trading Proceedings on the basis that the Adamses pay Mr Haskew £150,000 inclusive of damages, interest and costs in full and final settlement of all claims which Mr Haskew had brought or might bring. Mr Sorrell advised Mr Haskew that the offer was "far far too low" and should be rejected. He said that when the offer was raised to £500,000 plus costs they could "begin to give serious consideration to any offer made". I have not seen any explanation of where that figure of £500,000 came from. Mr Willers' evidence was that he spoke to Mr Gubay about this and Mr Gubay agreed that the offer should be rejected.

86. On 12 May 2006 Samuels made a further written offer of settlement on terms that the Adamses would pay Aqua £360,000 inclusive of damages, interest and costs in full and final settlement of all claims which Mr Haskew might bring. In the letter accompanying that offer, Samuels said that they were instructed that given the costs which both sides were incurring and would incur if the matter progressed through the courts, neither Shaun nor David Adams would have assets with which to meet Mr Haskew's costs let alone leaving anything for the ordinary creditors. Again, Mr Willers says, and I accept, that he discussed this offer with Mr Gubay though it is not clear what if anything Mr Willers told Mr Gubay about the costs incurred to date. Mr Sorrell wrote to Mr Haskew on 26 May 2006 informing him about the offer and attaching his schedule of Wacks Caller's costs. It showed that the costs to date were £230,000 and that the estimate of further costs up to the end of trial was £365,000. Those figures did not include Mr Haskew's own fees. He continued to advise Mr Haskew that the offer was not attractive and was still far too low to be seriously entertained. He said that he was arranging for enquiries to be carried out as to the Adamses' assets but that he had no doubt that "these apparently extremely well-off individuals are going to be good for the kind of sums that we are looking for".

87. On 23 August 2006, that is after the parties had seen the draft judgment of District Judge Khan dismissing the documents and questions application, Samuels made a further written offer to pay £250,000 in damages and interest together with the claimants' costs in full and final settlement. The offer was made under Part 36 and was held open until 4 pm on 30 August 2006. There was some delay in Mr Sorrell responding to Mr Haskew's request for advice about the offer and Mr Booth of counsel was asked to advise Mr Haskew on whether to accept the offer or continue. Mr Sorrell was clear that he did not speak to Mr Gubay about this offer himself. Mr Booth's advice to Mr Haskew was that:

    a. it was important to bear in mind from the outset that although the claim against the Adamses would be for the benefit of the creditors generally, it was being funded by one creditor only. The costs risks remained with that creditor (that is Langstone).

b. There was no reason to suppose that the Adamses would not be able to pay whatever contribution was ordered although there had been "the usual grumblings" about their financial position.

c. The loss claimed in the section 214 claim was between £423,000 to £449,000. However, he referred to a claim now being put forward against Aqua by Bournemouth County Council saying that in the event that that claim was admitted, or could not be resisted, the quantum of the claim would increase to over £1 million. This was because, as he put it, "both the potential deficit and the actual value of the claim ... increase simultaneously."

d. There was no evidence that the directors of Aqua had given serious consideration to the nature and extent of the risks of insolvency and the expert view of Mr Hine that the directors should have considered the prospect of insolvency on receipt of the 1996 or 1997 accounts "seems cogent".

e. The potential recoveries were significantly greater than the amount on offer even discounting the Bournemouth claim. The fact that the costs were being paid by the creditor, in his view, tipped the balance in favour of continuing.

88. There seems to have been little further progress during the rest of 2006 and 2007.

89. At the case management hearing before District Judge Khan on 10 January 2008 the judge unsurprisingly expressed concern that no real substantive steps had been taken since the previous directions order other than disclosure. He said he wanted to move things along. The attendance note of the hearing records that the judge "clearly wanted to send a message to the parties that it was his perception that the parties and their solicitors were not conducting the litigation so as to achieve the overriding objective". District Judge Khan expressed his exasperation that it was abundantly clear that the parties had "taken their eyes off the ball and followed their own agenda for whatever reasons". He criticised the parties for the fact that none of the steps ordered in the previous case management order had been followed. Nothing had been done and the case management hearing which was supposed to be listed in April 2007 had not taken place. Mr Haskew had done nothing to relist the claim – something which the judge said "beggars belief".

90. A report was prepared on the Adamses' financial status showing that they owned valuable properties but that they were charged to banks and it was not clear what equity remained.

91. Later in 2008 an issue also arose in the proceedings about the independence of Mr Hine. There was a hearing listed for 28 May 2008 which was adjourned. That hearing was attended by Leading Counsel for Mr Haskew. Following the hearing, on 3 June 2008, Messrs Samuels wrote to Pannone LLP (where Mr Sorrell now worked) querying the need for leading counsel to be instructed. In that letter, Mr Firmin also raised the question of the test that Mr Hine had applied in his expert evidence and whether it was consistent with the relevant case law. This was a point that had already been raised by Messrs Samuels and which was to feature in the later claims alleging mishandling of the Wrongful Trading Proceedings.

92. Further directions were given in the Wrongful Trading Proceedings by District Judge Khan on 25 July 2008:

a. the judge ordered that unless Mr Haskew provided a clarification of the breakdown of the quantum of the claim and further information as to how he said that the Adamses were obliged to make a contribution to Aqua by 5 September 2008, he would be limited to advancing part of the claim only.

b. he dismissed an application to strike out Mr Haskew's application.

c. he set a time table for the service of evidence leading up to a three week trial not before April 2009 with witness statements to be exchanged on Friday 3 October 2008.

93. In September 2008 DJ Khan granted an application by the Adamses for disclosure of Mr Haskew's instructions to Mr Hine. Mr Casement advised that Langstone should fund an appeal against that order by Mr Haskew. At that hearing the Judge also dealt with the costs that he had reserved from the July directions hearing. He ordered Mr Haskew to pay the Adamses' costs of their application for an unless order but ordered the Adamses to pay Mr Haskew's costs of the strike out application.

94. The witness statement prepared by Pannone for Mr Willers to provide in the Wrongful Trading Proceedings was 108 pages long including his commentary on the expert evidence of Mr Hine. Mr Sorrell accepted in his evidence at the trial before me that it would have cost a great deal of money to prepare. By this time, also, Mr Hine's fees were over £250,000. Again, Mr Sorrell accepted that this was a great deal of money for a Wrongful Trading Proceedings action of this size and that it might give rise to questions of proportionality on any detailed assessment of costs.

95. On 21 April 2009 HHJ Pelling QC allowed in part the appeals by Mr Haskew against the July orders of DJ Khan and ordered the Adamses to pay the costs of the appeal. HHJ Pelling also reserved future conduct of the case to himself and set down the trial of the Wrongful Trading Proceedings for 15 February 2010 with a time estimate of 4 to 5 weeks.

96. On 28 April 2009, there was a consultation with Mr Casement, now QC, and David Mohyuddin, now junior counsel in the case. Among the matters discussed was a suggestion from Mr Sorrell that a possible outcome would be the Adamses "settling directly with Total Fitness on the basis that the funder would then withdraw from the funding of the litigation." The other creditors could then be left to prove in the liquidation but there would be no money for them. Mr Casement's response, not surprisingly, was that "there was an obvious conflict of interest" as they were all supposed to be acting for the liquidator who was in turn acting for the general body of creditors. His advice was that they "could not be seen to be getting involved in something that preferred the interest of one creditor over and above the general body of creditors". It was agreed that a sensible way forward was to push for a mediation of the dispute whilst at the same time working "to crank up the pressure as much as possible". Mr Sorrell wrote to Samuels suggesting a mediation but this was not progressed. Mr Willers' evidence was that by May 2009, Mr Gubay's enthusiasm for the proceedings was fading though he could not explain why.

(d) The withdrawal of instructions from Mr Sorrell

97. The events leading to the withdrawal of instructions from Mr Sorrell started with a letter sent on 11 August 2008 by Pannone to PKF, Mr Nugent's firm of accountants who were the auditors of companies in the Anglo Group. The letter, sent by Louise Gill from Pannone, was intended to provide details of any litigation in which there was a prospect of one of the Anglo Group companies incurring a liability for costs. The information given for the Wrongful Trading Proceedings was that it was for about £700,000 together with interest and substantial costs. The letter went on:

> "This is a strong claim for the Client and it is likely to be successful however in the unlikely event that the Client does not

> succeed, the potential adverse costs liability could be in the region of some £200,000".

98. There were two things wrong with that letter. First it was not true that one of the Anglo Group companies had a claim for £700,000. Rather the company was providing an indemnity to Mr Haskew who had a claim for that amount on behalf of all the creditors and Langstone was a creditor of Aqua with a judgment debt of £143,539. The second mistake was, it turned out, that the reference to £200,000, although that might be an estimate of the costs incurred by Mr Haskew so far, was very much less than the potential adverse costs liability if the claim failed. Mr Sorrell was unable to explain how the second mistake had been made. On 9 July 2009 Pannone sent a similar letter to PKF for the next annual accounts of the Anglo Group. This letter was more accurate in describing the claim as brought by the Liquidator, funded by the Anglo Group, describing it now as a claim for about £500,000 together with interest and substantial costs. But the identical paragraph about the likelihood of success and the potential adverse costs being £200,000 was repeated in this letter. This error was even more regrettable by this stage since Mr Sorrell had shortly before sent a letter to Samuels suggesting a mediation in which he estimated the potential costs on both sides as amounting to £2 million.

99. In July 2009 Mr Willers left the Anglo Group in circumstances I describe below. Mr Barr was rather reluctantly promoted to the roles that Mr Willers had performed in the Group.

100. On about 23 July 2009 Mr Barr happened to be in the office of the then Finance Director of Langstone Mr Alan Bath. Mr Barr overheard a telephone conversation between Mr Bath and someone from PKF, Mr Nugent's accountancy firm. PKF were reporting to Mr Bath a discussion they had had with Louise Gill, Mr Sorrell's assistant at Pannone. In that conversation it had become apparent that there had been an error in the letter which PKF had received from Pannone dealing with the Aqua Litigation. Ms Gill had informed PKF that the figure for a potential liability for adverse costs to be paid by Langstone was in fact much higher than £200,000. It appears that Ms Gill had immediately phoned Mr Sorrell who was on holiday in Majorca. Mr Sorrell, realising the difficulty that this might create, phoned Mr Barr from his holiday to reassure him that as soon as he returned he would come to the Isle of Man and go through the whole matter with Mr Barr explaining everything and allaying all his concerns.

101. Mr Barr identified the files in his office relating to the Aqua Litigation and asked his colleague Ms Twizell to look at them over the weekend. Ms Twizell came back on the Monday and reported what to her seemed an inexplicable situation namely that over £1 million had already been spent in legal costs pursuing a claim for £143,000 of which Langstone could expect to receive only 29p in the pound. Mr Barr and Ms Twizell went to see Mr Gubay to explain this to him. Ms Twizell described Mr Gubay's initial reaction as being that he knew about the Aqua Litigation and that it was his understanding that if the litigation was successful, Langstone would obtain substantial recoveries and get all the money it had spent back. She explained that this was not necessarily the case because monies recovered would be shared with other creditors. Mr Gubay told her that she did not know what she was talking about. She persisted, saying that she did know what she was talking about and explaining that the claim was being funded by Langstone for the benefit of all the creditors. Her evidence was that:

> "37.3 Mr Gubay then asked how much Langstone had spent so far and I advised that it was in the region of £1 million. Mr Gubay could not believe this figure and could not believe it when I

> explained to him that these monies had been spent to recover a maximum of around £143,000 for Langstone.
>
> 37.4 After I had explained this, Mr Gubay looked visibly shocked. It was quite obvious to me that this was the first time that: (1) Mr Gubay had any idea about the amount spent in pursuing the Aqua Litigation; (2) that any recoveries made would not be recoveries for Langstone but for all the creditors of Aqua and (3) that the monies were being spent to recover only around £143,000. In fact, it took me several attempts to make him understand how the Aqua Litigation had been funded and what that meant for Langstone and for the Liquidator. He sat looking bemused and I had to show him papers from the files, including the pleadings, which he had plainly never seen before. His was not the reaction of a man who was the guiding mind behind the Aqua Litigation. It was the reaction of a man completely shocked by how much money had been expended for such a small potential return. ... He was absolutely shocked by the sheer waste of money".

102. Mr Barr also says that it was clear to him when Ms Twizell explained the position that Mr Gubay could not quite grasp what she was saying and he asked her to explain the position a couple of times.

103. Ms Twizell also says that in the course of her investigation into the Aqua Litigation she has not seen any documents containing instructions from Mr Gubay to Mr Willers or to Mr Sorrell nor any document created by the lawyers recording having received such instructions.

104. A meeting was arranged for 27 August 2009 when Mr Sorrell would attend the Anglo Group's offices and explain to everyone what had happened in the Aqua Litigation. Mr Sorrell prepared a Report on the proceedings which was sent to Ms Twizell and Mr Barr the day before that meeting. The Report set out the procedural steps that had been taken, laying much of the blame for the delays and expense incurred on District Judge Khan's case management. A nine-page list of the procedural steps taken in the proceedings was attached to the Report. As regards costs, the Report recorded that costs (solicitors' fees, disbursements and counsels' fees) so far billed and paid totalled £657,000. There was a further £151,000 of unbilled fees already incurred. Estimated costs up to trial were a further £35,500 and trial costs (assuming the trial took only three weeks instead of the judge's time estimate of five weeks) were £173,000.

105. Mr Sorrell's Report also set out the quantum of the claim. It stated that when the claim was lodged in 2005, the quantum pleaded on advice of Leading Counsel was £449,153 (with interest, £772,543) or £425,528 (£731,908 with interest) depending on the date at which insolvency should have been anticipated. It also stated that if the Respondents were correct in the challenge they had repeatedly made to the methodology used by Mr Hine, the quantum was less, £388,515 (£668,245 with interest) or £270,643 (£465,505 with interest). These figures did not take account of the Bournemouth Borough Council claim in the liquidation.

106. The Report referred to the preference claim which was valued at £96,968 (£166,784 with interest). The offer of £250,000 in settlement was referred to and the Report closed with

the suggestion that an offer be made to settle "with a view to putting pressure on the other side".

107. Nowhere in the Report did it make clear that the figures referred to as the quantum of the claim would have to be shared among the creditors rather than being the value of Langstone's claim. It did not refer to the fact that the judgment debt which Langstone was proving in the liquidation was £143,539 plus interest. The Report did not refer to Mr Gubay or describe the nature of the proceedings being non-commercial or being pursued for some reason other than the recovery of money.

108. A series of meetings took place at the offices of the Anglo Group on 27 August 2009. A detailed note of what occurred was taken by Mr Grindey of Pannone. Ms Twizell attended the meeting together with Mr Barr, Mr Bath, Mr Taylor, Mr Sorrell and Mr Grindey. There was a short discussion before Mr Gubay arrived. Ms Twizell briefly spoke with Mr Sorrell and Mr Grindey in a downstairs office expressing her doubts about the case. Mr Sorrell said to her "You've got a lot to learn, young lady" which she regarded as patronising and an odd way of approaching a meeting in which his professional integrity and advice was going to be discussed. Then there was a short meeting with Mr Gubay at which the discussion focused on Mr Willers, who had by this time left the Group, and Mr Sorrell's offer to meet Mr Willers to broker an arrangement between him and Mr Gubay. Mr Grindey described that part of the meeting as cordial.

109. Mr Gubay then left the meeting so that Mr Sorrell and Mr Grindey could have a discussion with Mr Barr, Ms Twizell and the others in the boardroom. Ms Twizell and Mr Barr indicated that they had read the Report prepared by Pannone. Ms Twizell chaired this part of the meeting explaining that the purpose was for Mr Sorrell to explain why nearly £1 million of costs had been spent on the Aqua Litigation. Mr Sorrell told Ms Twizell that the case had never been run as a normal piece of commercial litigation or on a commercial basis. Mr Gubay had wanted to use the proceedings "to inflict the maximum pain on the Adams family following David Adams' refusal to provide a Group guarantee for Aqua". Mr Sorrell said that there were a number of cases that were run "for non-commercial reasons where someone had "wronged AG" and where AG wanted to make a point." By this stage Mr Sorrell's stance was that his preferred route was to have a mediation. Mr Sorrell then referred to his plan that at a private meeting during the course of the mediation he could "pitch a deal" to the Adamses which would involve their paying a couple of hundred thousand pounds to Langstone and paying Mr Haskew about £100,000. Langstone would promise in return to withdraw funding from the litigation on the basis that all costs would be paid by the Adamses.

110. Ms Twizell's evidence is that she realised that Mr Sorrell's plan was not only fanciful but also completely improper particularly in a situation where Mr Sorrell was supposedly acting for both Langstone and the liquidator. She said: "It just highlighted to me the fact that Mr Sorrell's position was untenable because he was labouring under very serious conflicts of interest and was seemingly willing to abuse his position to "cut a deal" behind the Liquidator's back". At the meeting Ms Twizell expressed her doubts that the Adamses would be prepared to pay any substantial amount to settle the case if that involved them paying £900,000 in costs.

111. At that point Mr Barr and Ms Twizell left the meeting to talk to Mr Gubay. Ms Twizell advised Mr Gubay that the relationship with Pannone was damaged beyond repair and could not possibly continue: Mr Sorrell's instructions should be withdrawn. The remaining members of the meeting then came into Mr Gubay's office. In his attendance note, Mr

Grindey describes Mr Gubay as in a very agitated state throughout the next stage of the meeting. The note says: (referring to Mr Sorrell as 'Kit' and to Mr Gubay as 'AG'):

> "AG started out by saying that he was not in business to lose money. He then asked Kit whether he had ever received instructions from him. Kit saying that he had but the vast majority of instructions came from [Mr Willers]. AG saying he had never given Kit instructions. He said he could not give instructions as he was not a lawyer. He had only had discussions with Kit and at no stage during those discussions had Kit ever told him that it was unlikely he would be able to recover his money. AG asking Kit whether he had ever told AG that he would not be able to get all of his money. Kit saying that he had regularly discussed the matter with [Mr Willers] and if it was, indeed, the case that [Mr Willers] had not told AG that he was deeply shocked by that.".

112. At that point Mr Sorrell said that it appeared that he was being accused of acting negligently and he therefore had a duty to advise Mr Gubay to take independent legal advice. Mr Gubay offered to meet alone with Mr Sorrell to try to resolve matters. But Mr Sorrell repeated that given the allegations of negligence he had to advise Mr Gubay to take independent legal advice and the meeting then concluded. Mr Sorrell recalls, though this is not recorded in Mr Grindey's note, that Mr Gubay told him to pass the files in the case back to DWF. For a few days Mr Sorrell entertained the hope that Mr Gubay's anger might die down and Pannone could continue with conduct of the matter. But on 2 September 2009 Mr Barr's office rang Mr Sorrell and told him to transfer the files to DWF.

113. Mr Haskew was reluctant to transfer his own instructions from Pannone to DWF because of the damage such a late change of solicitors might do to the preparations for trial of the Wrongful Trading Proceedings due to start in February 2010. On 8 October 2009 Mr Haskew wrote to DWF recognising that Langstone had lost confidence in Pannone and that Langstone was now evincing a strong desire to settle the Wrongful Trading Proceedings. He reminded DWF that he had raised the issue of the proportionality of the costs in June 2007 and again in March 2009. He referred also to the fact that Mr Willers might not be available now to give evidence at the trial. He concluded that he was prepared to withdraw instructions from Pannone and instruct DWF instead on the basis that this was more likely to lead to the rapid conclusion of the proceedings for the benefit of the creditors as a whole. In their initial advice on 14 October 2009 DWF express their view that the level of costs incurred to date together with the further costs needed to take the matter to trial "are already disproportionate to the maximum recovery that may be achieved". Every effort therefore should be made "to obtain as orderly exit as possible from the proceedings but on the best commercial terms that can be achieved".

(e) The compromise of the Wrongful Trading Proceedings

114. Alaric Watson of Counsel was instructed by DWF to advise Langstone and Mr Haskew on 3 November 2009. He sent an email on 12 November 2009 setting out to DWF the reasons why he regarded the state of the Aqua Litigation as "frankly in a mess", and as being a long way from being ready for the forthcoming five week trial. There are five aspects of the case on which Mr Watson focused his criticism:

    a. First was the failure to include in the claim a parallel claim for misfeasance under section 212 of the Insolvency Act 1986. Mr Watson said: "Whether a s 212 claim

was contemplated and rejected at an early stage, or simply overlooked, I have no way of telling, but its absence is surprising".

b. Secondly, he advised that the expert evidence in support of the wrongful trading element of the claim had been prepared in a way which was inconsistent with the well-established authorities setting out what a liquidator must show in order to make good such a claim. Mr Watson referred to the "careful and fully articulated analysis" of Park J in *Re Continental Assurance Company of London plc* [2001] BPIR 733 (*'Re Continental'*). He described it as "very surprising" that the formulation of the expert advice was "not at all in line with the decision of Park J". He advised that the "dogged resistance" of the liquidator for over a year to formulate his case in such a way as it could bring itself within that analysis was "all the more surprising". He said that it seemed to him "at first blush that the Liquidator's obdurate stance on this issue was both misguided and ultimately detrimental to his own cause". The result was that much of the expert evidence and a good deal of the lay evidence seemed to him "to be very much beside the point".

c. He had further severe criticisms of the numerous expert reports compiled by Mr Hine. His advice was that although there had been five attempts by Mr Hine to produce a useful expert report, Mr Watson was not convinced that most of the final report was even admissible. Mr Hine opined on matters which were not for him and strayed away from his proper remit. Mr Watson concluded that "taken as a whole, Mr Hine comes across as being an extremely partial witness whose evidence strays from the matters with which he should be concerned so frequently and so alarmingly as to render his assurances (where he has even given them) that he understands that his first duties to the court and that he has discharged that duty virtually meaningless".

d. As to the future conduct of the case Mr Watson pointed out that the deadline for the experts to meet had long passed. This was ominous given the approaching pre-trial review hearing. However, Mr Watson advised that allowing the experts to meet was likely to have adverse effects, namely showing clearly to the other side's expert and legal team the weakness of the Liquidator's case. An experts' meeting would be throwing good money after bad. However, the penalties likely to be imposed for further obstructing the meeting of the experts might outweigh the difficulties in allowing it to take place.

e. He noted that the liquidator's costs were "so utterly disproportionate already" that Mr Haskew was likely to have to bear a significant proportion of the enormous costs bill without recourse to the other side even if he won across the board. That was particularly so given the existence of the Part 36 offer of £250,000 in 2006, the existence of which Mr Watson described as "alarming to say the least."

115. It was these factors which caused Mr Watson to advise that the need for speed in settlement was very urgent indeed.

116. Following the receipt of Mr Watson's advice, DWF wrote to Samuels on 20 November 2009 making a Part 36 offer to settle the claim on the basis that Mr Haskew would accept the sum of £397,000 inclusive of interest plus payment of their client's costs. This met with a robust response from Samuels in their letter of 7 December 2009. They asserted that they believed that Mr Haskew had been wrongly advised to persist in his claim and that their clients had had to spend a small fortune in response. David and Shaun Adams intended to attend for trial unless Mr Haskew withdrew the Wrongful Trading Proceedings and paid

their costs. They further invited Mr Haskew to withdraw his preference claim on the basis that each side meet its own costs. But that offer was dependent on Mr Haskew accepting that the Wrongful Trading Proceedings be dismissed with costs. By 23 December 2009, DWF were advising their clients that they should withdraw the Wrongful Trading Proceedings before Christmas and ask the Adamses to make a proposal to resolve the preference claim.

117. The Wrongful Trading Proceedings were disposed of as follows:

a. There was a consent order with Shaun and David Adams dated 7 January 2010, dismissing the Wrongful Trading Proceedings with costs to be assessed. Mr Haskew agreed to make an interim payment to the Adamses on account of those costs of £150,000.

b. There was a further consent order between Mr Haskew and Adams Holdings dated 5 February 2010 providing that the company was to pay about £34,000 to Mr Haskew; there was no order as to costs from 10 August 2005 to 31 August 2006 and Mr Haskew was to pay Holdings' costs thereafter to be assessed if not agreed.

118. According to the Particulars of Claim in the Langstone Action, the liability ultimately incurred under the indemnity to Mr Haskew was in excess of £1.3 million inclusive of VAT in respect of its own costs and a further £650,000 in respect of the Adamses' costs as a result of pursuing and funding the Wrongful Trading Proceedings.

IV. MR WILLERS' CAREER WITH THE ANGLO GROUP

(a) Mr Willers' income from the Anglo Group and Mr Gubay

119. Mr Willers first came to work for Mr Gubay in 1986 when he responded to a newspaper advertisement. Mr Willers' duties were to act as general in-house legal counsel to Anglo Holdings, Celtic Bank and to Mr Gubay and his family.

120. Given that Mr Willers has included a claim for loss of earnings, it is relevant to consider what his earnings were during the course of his career with the Anglo Group. Mr Willers' salary was modest, starting at £25,000 in 1986 and ending at £105,000 by the time he left in 2009, £65,000 paid by Anglo International Holdings Ltd and £40,000 by the Celtic Bank. These sums were supplemented from time to time by payments made to Mr Willers directly from Mr Gubay's personal funds. Sometimes these were of cash but sometimes they took the form of indications (to use a neutral word) that Mr Gubay would arrange for the Trust fund that would be established on Mr Gubay's death to make a payment to Mr Willers then. It was well known that Mr Gubay's advisers maintained a list of payments that Mr Gubay wanted to be made on his death to friends and family. Individual names came on and off that list over the years and the amounts next to those names waxed and waned as the person came into or fell out of Mr Gubay's favour. The first payment to Mr Willers was a cash payment in 1990 of £50,000 on the disposal of a project called the Rye Marina. Then in about 1994 Mr Gubay told Mr Willers he would receive a capital allocation on Mr Gubay's death of £1 million. Further, Mr Willers and two other executives, John Peers and Robin Johnson were given £1 million cash each by Mr Gubay on the successful completion of the sale of the Total Fitness business in 2004. At that time also Mr Gubay personally paid off a substantial part of Mr Willers' debt to the Group to the value of over £350,000. Mr Gubay also told Mr Willers in 2008 that he intended to ensure that Mr Willers received an additional £1 million from the assets of the Santon Trust when Mr Gubay died (that is in addition to the £1 million promised in 1994 and the £1 million actually paid in 2004).

(b) The lead up to the departure of Mr Willers in July 2009

121. Things began to go sour in the relationship between Mr Willers and Mr Gubay in the first half of 2009. Mr Willers and several of the witnesses were still mystified as to precisely why Mr Willers fell from grace so swiftly and so completely. I find it was a combination of factors. The first was the building work that Mr Willers was having carried out to extend and refurbish his home on the Isle of Man. In 2008 Mr Gubay arranged for £400,000 of the £2 million that he intended Mr Willers to receive on his death to be advanced to Mr Willers to be used for renovations to Mr Willers' home. Mr Willers then came back to Mr Gubay and asked for an additional £100,000. Mr Gubay refused, saying that the rest of the money should be available for Mr Willers in his retirement. It appears that this indication from Mr Willers that £400,000 was not enough to pay for the work he was having done to his house led Mr Gubay to suspect that Mr and Mrs Willers were living beyond their means. It was a small jump from that to a suspicion that Mr Willers must be supplementing his income in some clandestine way that was to the Group's disadvantage. I should say that it is clear to me that all these fears and suspicions of any financial impropriety on the part of Mr Willers were entirely unfounded – but there is no doubt that they were genuine so far as Mr Gubay was concerned and that they preyed on Mr Gubay's mind.

122. Also at the start of 2009, Mr Gubay became concerned that a clique was forming around Mr Willers within the senior management of the Group of men who owed their loyalty more to Mr Willers than to Mr Gubay. He was worried that this might develop into a power struggle in which Mr Willers and his clique would at some stage try to wrest control of the Group from the Santon Trust which held the shares in the Group. Mr McDougall described how as Mr Gubay had concerns about his own health. Mr Gubay was worried that if he died suddenly, the people in control of the Anglo Group companies might set themselves up in rivalry with those in control of the Trust and the corporate trustees. Mr Gubay discussed this with Mr McDougall and Mr Nugent in February 2009. Again, I am satisfied that this was all in Mr Gubay's imagination and that Mr Willers never contemplated being disloyal to Mr Gubay or setting himself up in opposition to the people Mr Gubay wanted to be in charge of the Trust on his death.

123. Unfortunately, Mr Gubay's suspicions about Mr Willers' wish to cement his position in the business at the expense of Mr Gubay coalesced around the issue of the appointment of John Taylor and Gerard Carney as additional directors for some of the companies in the Anglo Group, including Langstone. Mr Taylor and Mr Carney had an independent surveying practice as Taylor & Co Chartered Surveyors and were the Group's advisers in relation to property acquisitions, disposals and lettings. Mr Gubay thought it would be a good idea to bring them in house so that they worked directly for the Group. Mr Gubay's evidence in the Langstone Action was that in early 2009 he approached Mr Nugent about bringing them onto the boards as two new directors. Mr Nugent wrote to Mr Willers about this in February 2009, saying also that Mr Gubay himself (now that he was resident in the Isle of Man) also wanted to be appointed to be a director of companies in the Group.

124. Mr Taylor and Mr Carney were both resident in the UK. Mr Willers raised with Mr Nugent his concerns that their appointment would cause problems with the non-UK tax residence status of the Isle of Man companies to which they were going to be appointed. Mr Nugent was initially sympathetic with these concerns but on further reflection he took the view that the risks were worth taking for the expertise that the two men provided. He thought that there were arrangements that could be put in place to ensure that they were careful not to take decisions which ought to be taken in the Isle of Man in order for the non-UK tax resident status to be maintained and to be seen to be maintained. Nonetheless Mr Willers continued with his opposition, because he doubted that Mr Carney and Mr Taylor

were of a temperament to comply properly with any such arrangements. His continued opposition fuelled Mr Gubay's suspicions that Mr Willers' real objection was that he did not want any rivals to his influence on the boards of the companies of which he was a director.

125. Matters came to a head at a series of meetings in mid May 2009. Mr Gubay wanted to understand better why Mr Nugent thought the risks of having two UK based directors of Isle of Man resident companies could be managed and why Mr Willers was still so resistant to the appointment of Mr Carney and Mr Taylor. Mr McDougall came over from South Africa to the Isle of Man and chaired a meeting. There was a discussion about Mr Carney and Mr Taylor and also about Mr Gubay joining the company boards. As Mr Gubay was now resident in the Isle of Man there could be no tax problems with this. Mr Willers raised some query about inheritance tax which appeared to everyone else to be entirely spurious.

126. At the end of the meeting on 13 May 2009, the matter had ostensibly been resolved with Mr Willers' accepting the appointment of Mr Carney and Mr Taylor. But the damage was done. Mr McDougall said that he came out of that meeting realising that the trust between Mr Gubay and Mr Willers had broken down. Mr Nugent met Mr Gubay on 15 May 2009 and Mr Gubay again expressed to him the view that Mr Willers was spending more money than he had. It is clear that following that meeting Mr Willers was unlikely to survive for long within the Group although the manner of his departure was still open. Indeed, the contemporaneous notes which Mr McDougall took indicate that the possibility of Mr Willers still working part-time for the Group was on the table and that Mr Gubay was concerned that Mr Willers be adequately provided for in his slightly early retirement.

127. Mr Gubay's evidence in his fifth witness statement in the Isle of Man Proceedings was that by July 2009 he had made up his mind that he could no longer work with Mr Willers. The two men met on 16 July 2009 and Mr Gubay told Mr Willers that he wanted him to stop working immediately. He proposed that Mr Willers should continue being employed but on gardening leave on his full salary until his 65th birthday in January 2010. In addition, Mr Gubay proposed that he would personally pay Mr Willers six annual payments of £100,000 starting in January 2010 and that Mr Willers would then still receive a £1 million payment on Mr Gubay's death (that is the original £2 million less the £400,000 advanced for the house refurbishment and less now the £600,000 in annual instalments). Mr Gubay was also at this point still prepared to pay Mr Willers 10% of any profit made in respect of the disposal of the Mount Murray resort, something that had been discussed between the two men previously. Mr Willers and Mr Gubay immediately went into a board meeting and explained to those present that Mr Willers was leaving the company.

(c) The investigations following Mr Willers' departure

128. Mr Nugent and Mr Willers met for lunch on 21 July 2009 in a restaurant in Douglas. Mr Nugent made detailed notes of the meeting which I accept as being an accurate record of what was discussed. The aim of the meeting from Mr Nugent's point of view was to persuade Mr Willers to resign from his role as director of the various companies in the Anglo Group and of the corporate trustees of the Santon Trust. Mr Willers told Mr Nugent that he was not prepared to resign his posts until all the elements of the offer that Mr Gubay had made him, namely the continued payment of his salary, the profit share in the Mount Murray proceeds of sale, the £600,000 over six years and the £1 million on Mr Gubay's death were properly documented. Mr Nugent counselled him strongly against refusing to resign saying that he did not think that Mr Gubay regarded the offers as a contractual entitlement. Mr Nugent said that if Mr Willers took that that stance it "would only create unnecessary stresses and entrenched positions" that could jeopardise any eventual "deal".

It would also prevent Mr Willers having a continued role in the Group by which he could try to regain the trust of Mr Gubay. Mr Willers' response was that he was contemplating unfair dismissal proceedings and claiming a contractual entitlement to the elements offered. Mr Nugent reported the gist of the meeting back to Mr Gubay who was angry at Mr Willers' attitude.

129. On 15 August 2009 Mr Willers met Mr Barr in a coffee shop on the Isle of Man. Mr Barr's note of the meeting which I accept as accurate describes Mr Willers as becoming belligerent towards the end of the meeting, threatening to sue Mr Gubay for what he believed was due to him.

130. Immediately after Mr Willers left, steps were taken to investigate his financial relationships with the companies in the Group. Mr Willers interprets this as already the start of Mr Gubay's vendetta against him. I do not accept that. I accept Mr Nugent's evidence that as a matter of course when a senior executive who has been so closely involved with the running of so many different companies over so many years leaves as abruptly as Mr Willers left, it is common sense to take stock of where he stands vis-a-vis the companies in terms for example of any director's loan account. As a result of the investigations carried out into Mr Willers' financial dealings with the Group, various issues arose about the propriety of Mr Willers' dealings with the Group.

131. **Cross Atlantic Ventures Ltd.** Cross Atlantic Ventures ('CAV') was the company within the Anglo Group that project managed the Group's substantial building works, buying in supplies of goods and services. Mr Gubay says in his fifth witness statement in the Isle of Man Proceedings, [39], that he recalled discussing with Mr Willers the building works that Mr Willers wanted to carry out on his home. Mr Gubay accepted that he told Mr Willers that he could purchase materials through CAV so that he could pay wholesale rather than retail prices.

132. On 26 August 2009, Mr Nugent wrote to Anglo International Holdings Ltd on behalf of the corporate trustee of the Santon Trust which ultimately owned the Anglo Group. He summarised the information available about Mr Willers' use of company funds. He stated that Mr Willers had used CAV to purchase materials and work and that a substantial debt had built up until Mr Willers owed the company over £320,000 in March 2009. He recorded, however, that Mr Willers had promptly paid all invoices that had been presented to him and had made large payments in June and July 2009 to clear the outstanding amounts. Mr Nugent made the point that (a) no profit element or interest on outstanding sums had been charged to Mr Willers and (b) Mr Willers had been invoiced for a concessionary rate of VAT at 5%, the reduced rate applicable for building work, whereas CAV had actually had to account for VAT at the standard rate. Mr Nugent advised that the concessionary rate did not in fact apply because CAV had supplied only materials, not materials together with labour as required to qualify for the reduced rate.

133. The upshot of this was that new invoices covering the earlier materials were issued to Mr Willers and also naming Mrs Willers. The invoices included a profit element and the additional VAT. Mr Willers refused the pay the additional amounts. Ultimately CAV brought a claim in the Isle of Man small claims court seeking to enforce one of the invoices as a test case. There was a hearing before Deemster Roberts in March 2011. She decided that the higher rate of VAT was payable by Mr Willers but she rejected the claim for the profit element and she dismissed the claim against Mrs Willers.

134. **Penham oil deal** Another matter that came to Mr Nugent's attention after Mr Willers' departure from the Group was a transaction involving Mr Gubay's nephew who lived in

New York. A document emerged which appeared to be a non-disclosure agreement relating to the purchase of 100 million barrels of crude oil from Russia in May 2009. The agreement was signed by Mr Willers in his capacity as managing director of Penham Ltd, described in the agreement as the "Buyer's facilitator". Mr Willers said that Penham was a vehicle into which Mr Gubay put a large gift of money to his nephew to enable him to start a US stock broking business. Mr Willers said in evidence that he thought that the transaction was a profit-sharing agreement. He knew that Mr Gubay had lent his nephew a substantial amount of money and his understanding was that the nephew had entered into what was supposed to be a lucrative oil deal, intending to split the profit he made with Penham Ltd by paying a commission of $70 million. By this indirect route, he would pay his uncle back for the loans he had received. The concern was raised that Mr Willers appeared to have exposed Penham, a company in the Anglo Group to an unknown risk arising from what looked like a very murky deal. Mr Willers denied in cross-examination before me that there was anything troubling about the arrangement to which he was committing Penham and he denied that there were any indications that the deal was a fraud. Mr Nugent was not so sanguine when he learned about the proposed deal in June 2009. He expressed doubts that Mr Gubay' nephew was suddenly in a position to be able to generate $143 million of commission on one oil deal or that he "would simply give away $70 million of it". His conclusion was that "it stinks" and that at best it was a fantasy designed to impress someone that the nephew was involved in large transactions. Mr Willers says that he discussed the potential deal with Mr Gubay who wanted to go ahead with it but in the event the nephew did not proceed with the deal.

135. **The payment of £139,941.** Perhaps the most contentious issue that arose after Mr Willers' departure from the Anglo Group was the investigation into a payment that was made by Mr Gubay to Mr Willers of £139,941. The background to the problem was as follows. As I mentioned earlier, when the Total Fitness business was sold in 2004, Mr Gubay wanted to make a payment from his personal funds of £1 million to each of John Peers, Robin Johnson and Mr Willers in recognition of their contribution to the successful sale. Mr Gubay also said that he would release certain debts that the men owed to the Anglo Group. It was agreed that Mr Willers would deal with the logistics of making the payments. The sum of £3 million was therefore drawn down from Mr Gubay's personal bank account and transferred to the personal bank account of Mr Willers in August 2004. In September 2004, a further payment of £725,245 was made from Mr Gubay's account to Mr Willers. The indebtedness of the three men to a company called Bellona International Ltd was then discharged as to £200,000 for Mr Willers' debts, £372,675 for Mr Peers' debt and £139,941 for Mr Johnson's debt. The query arose because on 17 May 2006, a further sum of £139,941 was debited from Mr Gubay's account and paid into a joint account in the name of Mr and Mrs Willers. In May 2009 Mr Gubay had set in train an investigation as to how the payments to Mr Willers, Mr Peers and Mr Johnson had been handled, following discussions with Mr Nugent and Mr McDougall. The problem of this apparent double payment took many months to be resolved and triggered the Isle of Man Proceedings, as I describe below.

136. The upshot of the investigations into the CAV payments, the Penham oil deal and the uncertainty over the £139,941 led to disciplinary proceedings being brought against Mr Willers. There was a hearing on 27 August 2009 (shortly before the meetings with Mr Sorrell described earlier) conducted by Mr Barr. The allegations which Mr Willers was required to answer related to the purchases of goods and services through CAV, the treatment of VAT on the CAV invoices and the Penham deal. Mr Willers prepared a statement about the allegations made against him and provided that at the hearing. The

result of the hearing was that Mr Willers was dismissed for gross misconduct. Mr Barr accepted at the hearing before me that the disciplinary hearing had been a rushed process and was not as fair as it could have been. Mr Willers commenced proceedings for unfair dismissal in the Employment Tribunal but they have remained stayed, pending, as I understand it, the conclusion of the Isle of Man Proceedings.

(d) The Isle of Man Proceedings

137. Mr Gough wrote to Mr Willers on 7 September 2009 asking for an explanation of the second payment of £139,941 I have described earlier. Mr Willers' explanation was that once he received the £3 million into his account, he set up two other accounts, also in his own name but notionally one for Mr Peers and one for Mr Johnson. He moved £1 million into each of those accounts. He says further that although Mr Gubay had initially agreed to pay off all the men's indebtedness to the Group, he later changed his mind and said that he would pay off only part of Mr Willers' loan and he would not pay off Mr Johnson's debt of £139,941. Mr Johnson then asked Mr Willers to discharge the debt of £139,941 out of the £1 million standing in his notional account, which Mr Willers did. Mr Gubay then had a further change of heart in May 2006 and decided to pay Mr Johnson the £139,941 after all. As the debt had already been discharged by Mr Johnson, Mr Willers drew down a further £139,941 to give to Mr Johnson to make good the dent that had been made in Mr Johnson's £1 million to discharge the debt. However, the second payment was initially paid into a joint account in the names of Mr and Mrs Willers. It was then paid out from that account to Mr Johnson.

138. Mr Willers' evidence was that although these money movements were a little complicated, the matter was capable of a clear explanation. Mr Johnson, when asked, confirmed Mr Willers' explanation that there had been nothing untoward and he had received all the money that Mr Gubay wanted him to have. However, the oddity from Mr Gubay's point of view was that in 2006, the £139,941 was paid into an account in the joint names of Mr and Mrs Willers and this appeared to be a different account from the account that Mr Willers had held notionally for Mr Johnson. Mr Willers believes that there was really no concern on the part of Mr Gubay and that this supposed uncertainty over the payment was fabricated; it could all easily and quickly have been sorted out by simply asking Mr Johnson to explain. But Mr Gubay waited fifteen months until November 2010 until seeking confirmation from Mr Johnson. I am sure that in other circumstances, this matter could have been sorted out quickly and amicably and without the need to resort to litigation. But the great hostility that by this time existed between Mr Gubay and Mr Willers made that impossible.

139. Mr Gubay brought proceedings in his own name against Mr and Mrs Willers in the Isle of Man to recover the supposedly missing £139,941. Those proceedings in the Isle of Man were issued on 22 September 2009. The Isle of Man Proceedings are relevant first because they were running alongside the Langstone Action and secondly because they were the first occasion on which Mr Willers raised in litigation the allegation that the Anglo Group companies were tax resident in Ireland and the UK throughout the time that Mr Gubay was resident in those jurisdictions because of Mr Gubay's continuing management and control of the business.

140. The Particulars of Claim in the Isle of Man Proceedings set out the money movements I have described. The pleaded case was that although Mr Gubay recalled having signed the transaction authorisations for the £3 million and the £725,245, he did not recall and could not say whether he had signed the authority for the £139,941 in May 2006. If he did, he could not recall the reason for the payment being brought to his attention by Mr Willers.

The Particulars continued that a letter had been sent to Mr Willers asking for an explanation but that no proper explanation has been forthcoming for the May 2006 payment.

141. Mr Willers' Defence and Counterclaim was served on 13 November 2009. The pleading went into some detail about Mr Willers' employment history with the Anglo Group. It then referred to the creation of the Santon Trust and alleged that "the settlement is a settlement in name only" and that the Anglo Group "is and was in 1986 under [Mr Gubay's] direct and sole control ... Once the veils of trust and incorporation are lifted the Claimant is in total control as if neither the trust nor the companies exist".

142. The Defence set out Mr Willers' explanation about the £139,941. It denied that Mr Willers had failed to give an explanation and averred that he gave an oral explanation to Mr Barr in August 2009. The Counterclaim alleged that Mr Gubay and Mr Willers had entered into various agreements for the payment of substantial sums to Mr Willers. These included a 10% interest in the Mount Murray development on the Isle of Man and another related to the Total Fitness business in relation to which it was alleged that the parties had agreed that Mr Willers would be entitled to a 25% interest.

143. The Counterclaim also alleged that in around January 2005, Mr Gubay had agreed with Mr Willers in consideration of Mr Willers' continuing in his employment that he would make substantial further future capital payments via a Letter of Wishes so that on Mr Gubay's death Mr Willers would remain as managing director and in house legal counsel for the Trust for as long as he wished to do so. It was alleged that Mr Gubay had reneged on his promise and that Mr Willers' continued employment with the Anglo Group had been 'on false pretences'. The claim was for loss of earnings and benefits being pension, health insurance and life cover from the date that payments of those ceased to a date three years after Mr Gubay's death. Mr Willers therefore sought an order for the valuation an account of the profit on the Mount Murray development, £200,000 plus interest (being Mr Willers' debt that had not in fact been discharged following the sale of the Total Fitness business), £1.6 million and other sums.

144. A Reply to the Defence and Counterclaim was served, drafted by Mr Gough. As to the averments about Mr Willers' employment history and the allegations about Mr Gubay's control of the Santon Trust, the Reply pleaded "whilst this background may be interesting it is not accepted as being accurate or relevant to the claim herein ...". As regards the sums of money paid in the past and claimed, it was alleged that these were gifts made at the sole and total discretion of Mr Gubay.

145. The claim by Mr Gubay for £139,941 was eventually discontinued on 18 April 2011. Thereafter the Counterclaim continued as a separate claim. There were various interlocutory hearings in the Isle of Man Proceedings. It appears that Deemster Corlett, who was in charge of the case management of the proceedings, delivered ten substantive interlocutory judgments most of which were appealed to the Staff of Government Division, the appeal court in the Isle of Man. The trial started on 25 March 2014 before Deemster Corlett. It was interrupted in early April 2014 when Mr Gubay declined to attend further for cross-examination. Mr Gubay said that he could not attend because of his ill-health; Mr Willers has contended all along that Mr Gubay did not attend because he did not want to answer difficult questions about his role in the Santon Trust and the Anglo Group. On 15 September 2014 Deemster Corlett dismissed Mr Gubay's application to be excused from giving further evidence and ordered him to resume his cross-examination at the start of October 2014. Mr Gubay appealed against that judgment and sought permission to appeal further to the Privy Council from the dismissal of the appeal by the Staff of Government Division. The Privy Council refused permission on 2 April 2015. At that point Mr Gubay

made a further application to be released from attendance at court. In light of his by then deteriorating physical condition, that application was granted in December 2015. Mr Gubay died on 5 January 2016. Many of those who have been witnesses in the trial before me also gave evidence in the Isle of Man Proceedings, including Mr Sorrell, Mr Nugent, Mr McDougall and Mr Barr.

146. Deemster Corlett handed down judgment in the Isle of Man Proceedings on 5 December 2017. In the opening paragraph, he recorded that the judgment "marks the culmination of eight years of intense litigation between Albert Gubay (now deceased) and his former right-hand man Peter Willers". He said that the complexity of the case derived "more from the manner in which it has been conducted rather than from any particular legal complexity". The result of the case was that all Mr Willers' claims were dismissed with the exception of a small sum which was admitted to be due because of a clerical error. At the close of a judgment running to 571 paragraphs, the Deemster said he was minded to make no order as to costs because although he had dismissed the claim, there was much in the conduct of Mr Gubay towards Mr Willers that he had found objectionable. However, after further argument, the Deemster did order Mr Willers to pay Mr Gubay's estate's costs of the action on the standard basis. This was on the basis that it was not appropriate to take into account the conduct which he had found objectionable because it did not affect the decision to dismiss Mr Willers' claims. Mr Willers appealed to the Staff of Government Division against the decision of Deemster Corlett, acting as a litigant in person. That appeal was partially successful. On 15 June 2018 that court made an order remitting to Deemster Corlett the question whether the terms on which Mr Gubay agreed to give Mr Willers a share in the Mount Murray complex were too uncertain to be enforceable. In July 2018 Mr Willers' application to appeal to the Privy Council against the dismissal of the rest of his appeal was dismissed by the Staff of Government Division.

V. THE LANGSTONE ACTION

147. I have already described how the Aqua Litigation was brought to an end in January and February 2010. I have also recorded that there has been no disclosure in these proceedings of Langstone's files relating to the action and no waiver of privilege by Langstone, Mr Gubay or Mr Willers in relation to the Langstone Action.

148. DWF sent a letter before action to Mr Willers on 17 February 2010. The letter set out the history of Mr Willers' involvement with the Anglo Group and the progress of the Aqua Litigation, including the signing of the indemnities and the total costs incurred by August 2009 of £992,000 paid, a further unbilled sum of £203,000 and adverse costs orders of at least £26,000. Under the heading "The Claim" the letter asserted that Mr Willers owed Langstone a duty to exercise reasonable care, skill and diligence in the exercise of his functions as director, in particular to safeguard the assets of Langstone, to supervise and control its affairs and to maintain sufficient knowledge and understanding of Langstone's affairs to enable him properly to discharge his duties.

149. The letter sets out the breaches of duty alleged against Mr Willers namely:

a. Mr Willers recklessly committed Langstone to the pursuit and unlimited funding of the highly expensive and risky Aqua Litigation in circumstances where the likely costs to be expended would be wholly disproportionate to any return likely to be derived by Langstone.

b. Mr Willers was aware that any proceeds from the Aqua Litigation would be shared among the creditors as a whole, as had happened with the proceeds from the Golden Coast Proceedings. He was also aware that Aqua's creditors were owed £861,502.

c. Mr Willers knew that even on a successful outcome, Langstone could never recover full repayment of the judgment debt and the costs expended. The most that could be expected was a recovery of between 32 pence and 89 pence per pound of the judgment debt, depending on the court's assessment of quantum. There were therefore bound to be irrecoverable litigation costs.

d. Mr Willers had agreed the terms of the indemnity without safeguards for Langstone, for example the ability to terminate the obligation if advised that the litigation was not worth pursuing.

e. Mr Willers failed to review the merits of funding or continuing to fund the litigation, in particular he had failed to appreciate the significance of the Bournemouth Claim, failed properly to consider offers of settlement and in particular the fact that Michael Booth QC's advice to Mr Haskew to reject the offer was not advice to Langstone and was based on the assumption that the litigation was risk free (which it was for Mr Haskew but not for Langstone).

f. Mr Willers failed to appreciate that in the course of 2006 – 2008 the risk profile of the litigation changed because there were a number of expensive and unsuccessful interlocutory applications. These indicated that "the court was not regarding the way in which the claim had been formulated with particular favour".

g. Mr Willers failed to exercise his independent judgement because had he kept the matter under proper review, the only rational conclusion would have been that he should extricate Langstone from its obligations as soon and as cheaply as possible.

150. DWF invited Mr Willers to give a full and detailed explanation of his conduct within 28 days. In his evidence in these proceedings, Mr Willers described the receipt of the letter before action as devastating. He says that he immediately realised that Mr Gubay meant to ruin him through litigation, but he was determined not to allow Mr Gubay to drive him into the ground. He said that he knew that the Aqua Litigation had been run by him "exactly as Mr Gubay had wanted" but that Mr Gubay would do everything possible to enable him to deny involvement.

151. Mr Willers did not engage with the substance of the allegations in response to the letter before action. There was instead a protracted exchange of correspondence in which Mr Willers repeatedly asked to be provided with more and more documents over the course of several months. There was no mention by Mr Willers in his letters to DWF responding to the letter before action of Mr Gubay's involvement in the Aqua Litigation or of the non-commercial reasons for pursuing the Adams. It is of course open to Mr Willers to adopt whatever tactics he wishes when responding to such a letter before action. But his failure for several weeks to respond to the allegations of breach or to give any explanation for his conduct along the lines of the Defence he later put forward is, in my judgment, relevant to the question of whether Langstone and Mr Gubay should have realised straight away that its claim had no reasonable and probable cause – one of the elements of the tort of malicious prosecution.

152. On 23 April 2010, DWF wrote bringing the pre-action process to an end on the grounds that Mr Willers had deliberately refused to engage:

> "To be frank, we simply do not understand your continued reluctance to provide even a basic explanation as to your position. If we have got it wrong then tell us why. The allegation as to failure on our part to participate in the pre-action process is

> nothing more than an attempt by you to create a smokescreen as to your own obstructive conduct".

153. They set out examples of how Mr Willers had avoided answering their questions and concluded "This letter constitutes the fourteenth attempt to tease out of you why it may be contended that the factual assessment contained within our Letter of Claim dated 17 February 2010 is wrong. We are no further forward".

154. The pre-action correspondence continued in the same unsatisfactory way until 3 May 2010 when Mr Willers wrote to Mr Todd at DWF asserting that although Mr Gubay "fronted all his businesses with limited liability companies" he was in fact in management terms a sole trader:

> "The effect of this is that every decision made, in relation to every company, is made by Mr. Gubay alone. All my role was and all I have ever done is to implement all of Mr. Gubay's decisions".

155. Mr Willers' letter of 3 May 2010 went on to say that Mr Gubay loved litigation and was prone to pursuing legal actions as a personal vendetta. He suggested that the claim for breach of duty was in reality being brought to combat Mr Willers' counterclaim in the Isle of Man Proceedings. As regards the Aqua Litigation, Mr Willers said that it was commenced and continued on the sole instructions of Mr Gubay. He said that he kept Mr Gubay fully informed as to all aspects of the case and that he was aware that Mr Gubay spoke often with Mr Sorrell about this litigation. He stated that there was "every prospect of winning" the claim at the time Mr Willers was asked to leave the Anglo Group in July 2009. He also referred to his intention to serve Third Party proceedings on Mr Gubay if proceedings were commenced against him by Langstone.

156. The claim in the Langstone Action was issued by Langstone against Mr Willers in the Chancery Division on 26 May 2010 claiming £1.95 million, being the sums paid out under the indemnity to Mr Haskew. The claim was for damages or equitable compensation.

157. In addition to the claim brought by Langstone against Mr Willers there were two other actions arising out of the lawyers' handling of the Aqua Litigation. At some time in 2010, Pannone sued Mr Haskew for unpaid invoices. Mr Haskew counterclaimed in negligence ('the Haskew/Lawyers Claim'). Judgment was entered for Pannone on the unpaid invoices, but enforcement was stayed pending the resolution of the negligence claim. At a case management conference in April 2011 Mr Haskew was given permission to amend his Defence and Counterclaim and to join as additional defendants Wacks Caller, Michael Booth QC and David Casement QC.

158. Secondly, Langstone did not only sue Mr Willers but also itself sued Wacks Caller and Pannone for negligence in the Chancery Division in London ('the Langstone/Lawyers Claim'). The claim form and Particulars of Claim in those proceedings are unfortunately not before the court but the defences of the two firms are, served in January and February 2012, and one can glean from that what the allegations made in the claim must have been.

159. In defending the Langstone Action Mr Willers was initially a litigant in person but he then instructed De Cruz Solicitors on a CFA, dated 9 July 2010. De Cruz entered into a CFA with counsel, Mr Page QC and Mr Chichester-Clark who represented Mr Willers both in the Langstone Action and in the current malicious prosecution proceedings.

160. The nature of the allegations against Mr Willers in the Langstone Action is, in my judgment, crucial to the question whether the claim was brought maliciously. It is necessary therefore to look at the pleaded case carefully. The original Particulars of Claim attached to the Claim Form in the Langstone Action and served in May 2010 were not available to the court in these proceedings, but an Amended Particulars of Claim dated 8 February 2013 is included in the papers before me. I have set out in some detail what was pleaded in the Statements of Case in the Langstone Action in the Annex to this judgment. The Particulars set out first the contractual history of the dispute with Aqua over the defective swimming pools. It is alleged at [6] that the dispute was conducted on behalf of Langstone by Mr Willers as "in-house" legal Counsel for the Group. Mr Willers, it is pleaded "coordinated and was integral to the conduct of the litigation". The Particulars of Claim describe the insolvency of Aqua and plead that the total sum owed by Aqua to Langstone was assessed as £143,903.52, that being the judgment debt.

161. The other matters pleaded as part of the background to the claim include:

a. the threats made by Mr Willers and Mr Sorrell to Mr Haskew that they would try to remove him as liquidator if he did not comply with their wish to pursue the Adamses:

b. the conflict of interest of Wacks Caller acting both for Langstone as funder and for Mr Haskew as liquidator;

c. the engagement of Mr Hine, his analysis of quantum and the start of the Wrongful Trading Proceedings;

d. the emergence of the Bournemouth Borough Council claim in the insolvency;

e. the questions over whether the Adamses had the resources to meet any liability for damages and costs;

f. the offers of settlement;

g. the emergence of the legal problem with the way Mr Hine had quantified loss;

h. the dismissal of Mr Willers and the settlement of the proceedings.

162. In paragraphs 56 and 57, the Particulars of Claim set out the duties which Mr Willers owed to Langstone as a director. The Particulars then turn to the allegations of breach of duty by Mr Willers.

163. The first alleged breach is that Mr Willers committed Langstone to the Wrongful Trading Proceedings and the indemnity "in circumstances where the likely costs to be expended would be wholly disproportionate to any return likely to be derived by the Claimant". The pleading then sets out various particulars of that first alleged breach. These are grouped under the headings:

a. failure to obtain any proper advice on the merits for Langstone of pursuing and funding the Wrongful Trading Proceedings;

b. failure to ensure that Langstone received independent advice (that is, advice from someone other than Wacks Caller who were acting for Mr Haskew);

c. causing Langstone to agree to the indemnity to fund the Wrongful Trading Proceedings even though those proceedings were not in the best interests of Langstone;

d. failure to consider any advice on the appropriate terms of the indemnity;

e. failure to consider or engage with the other creditors of Aqua with a view to sharing the costs.

164. The second alleged breach of duty (paragraphs 69 – 71) relates to Mr Willers' alleged failure to keep the progress of the Wrongful Trading Proceedings under regular review, in the light particularly of the emergence of the Bournemouth claim; the offers to settle; the mounting expense and complexity of the proceedings with extensive requests for disclosure and further information and other interlocutory hearings and appeals over a number of years; and the realisation that the way Mr Hine had calculated the quantum was wrong because he had been wrongly instructed as to the test to be applied.

165. Finally the loss and damage pleaded in the Particulars of Claim were the costs incurred under the indemnity of about £1,950,000 if the claim succeeded on the allegation that the commencement of the Proceedings was a breach of duty. In the alternative some lesser sum was claimed if the breach established is in the subsequent continued pursuit of the proceedings after they had been started.

166. Mr Willers served a Defence on 10 August 2010 and brought Part 20 proceedings against Mr Gubay. The version of the Defence in the papers before me was the Re-Re-Amended Defence served in the Langstone Action on 15 February 2013.

167. In the opening paragraphs, Mr Willers' Defence in the Langstone Action dealt with the establishment of the Santon Trust in 1994. Allegations in the original version of the Defence that Mr Gubay was the beneficial owner of all the shares in Langstone and of the property in the Santon Trust had to be excised from the pleading because Mr Willers was prohibited by court order from advancing that case. It was alleged that the directors of all the companies were accustomed to act in accordance with Mr Gubay's instructions. It was asserted therefore that Mr Gubay was at all material times a shadow director and controlling mind of and agent for Cashtal (the parent company of Langstone) and/or Langstone itself and/or Derwent Holdings and that all the companies including Cashtal and Langstone "were bound by instructions given to Mr Willers by Mr Gubay": [11].

168. Mr Gubay was then described in [12] as exceptionally litigious and examples are given of cases brought "under the direct orders of Mr Gubay" to deter others from seeking to avoid their obligations to Mr Gubay and his companies and to retain and reinforce his reputation as an aggressive and exhaustive litigator who was not to be trifled with.

169. Mr Willers put Langstone to proof that he was the director of all the companies in the Anglo Group although he admits and avers that he was a de jure director of many of them. It is pleaded that Mr Willers conducted the affairs and business of the companies strictly in accordance with Mr Gubay's instructions.

170. The Defence then sets out the history of the relationship between Mr Gubay and Aqua and describes the dispute which arose about the absence of a parent company guarantee and the double payment of Aqua for some work done in Liverpool which it is alleged made Mr Gubay "extremely upset".

171. As regards other allegations:

a. in response to the allegation that Wacks Caller had a conflict of interest, it is denied that there was any conflict: see e.g. [70].

b. it is denied in each instance that Mr Willers conducted and controlled the litigation and asserted that Mr Gubay did. Any instructions which it is alleged in the Particulars of Claim that Mr Willers gave are averred to be in accordance with the directions of or on the orders of Mr Gubay;

c. in response to the alleged failure to obtain advice on the merits of the Aqua Litigation it is averred that it was not necessary to advise Langstone as to the merits of the investigations because Mr Gubay was capable of making up his own mind as to the merits and had done so;

d. in response to the alleged failures to assess the wisdom of pursing the claim, given the disparity between the likely costs and the low recovery it is averred that this was irrelevant because Mr Gubay's aim was to deter others from avoiding their obligations to him;

e. it is alleged that Mr Gubay was well aware of the costs and the risks of complex litigation;

f. as to the allegation that Mr Willers failed to take steps to ascertain the Adamses' financial position, it is pleaded that the Adamses were known to be wealthy and successful;

g. as to the Bournemouth claim, it is averred simply that it was not admitted to proof by Mr Haskew;

h. it is denied that the Wrongful Trading Proceedings made no commercial sense at the time they were discontinued and it is averred that Mr Gubay acted "wholly unreasonably abandoning the litigation in January 2010";

i. as to the allegation that Mr Willers should have negotiated a costs sharing arrangement with the other creditors, the Defence avers that Mr Gubay insisted on sole control of the litigation and would not have agreed to any form of cooperation with other creditors.

172. No admissions are made about the duties owed by Mr Willers to Langstone: [63]. In response to the alleged breach of duty in committing Langstone to the pursuit and funding of the Wrongful Trading Proceedings, Mr Willers pleads that it was Mr Gubay, as agent, controller and/or shadow director of Langstone and its parent company, not Mr Willers, who caused or procured the actions complained of.

173. In the Part 20 claim, launched on 10 August 2010, Mr Willers claimed an indemnity or contribution from Mr Gubay personally. It is asserted that the acts complained of by Langstone were done on the instruction of Mr Gubay. It was alleged that Mr Gubay was a shadow director of Langstone and that Langstone's actions in pursuing the Aqua Litigation "were, in so far as they were in fact [Mr Willers'] acts, done on the instructions of [Mr Gubay]". The allegations made are in similar terms to those made in this malicious prosecution claim namely that the Santon Trust and the Anglo Group were all under the individual control of Mr Gubay; that Mr Willers' function was simply to put into effect Mr Gubay's wishes and that the companies did exactly what Mr Gubay wanted. It is alleged that all major steps taken in the proceedings were on the express oral instructions of Mr Gubay and that it had been unreasonable or perverse to abandon the Aqua Litigation:

> "The Defendant will invite the Court to infer that the Third Party procured the abandonment of the claim without any attempt to settle in order to deliberately cause the Claimant loss and to put the Claimant into a position to make an apparently substantial (though in fact baseless) claim against the Defendant so as to punish the Defendant and/or to induce him to drop a counterclaim made by the Defendant against the Third Party in proceedings in the Isle of Man."

174. Mr Willers also comments in his Part 20 Claim on the allegation made by Mr Haskew in the Haskew/Lawyers Claim that one reason for the abandonment of the Wrongful Trading Proceedings was that Mr Willers was no longer available to give evidence. Mr Willers pleads that he was not asked to attend trial by Mr Haskew and would have done so had he been asked.

175. Mr Gubay served his Defence to the Part 20 claim on 29 October 2010. In it he denies that he was involved in the day-to-day management of the Anglo Group between 1996 and 2009. More specifically Mr Gubay denies that he gave any instructions to commence or continue the Aqua Defects Claim or the Wrongful Trading Proceedings or that he gave any instructions in relation to the conduct of that litigation until his reappointment as a director of Langstone in May 2009. He avers that his knowledge of the Aqua Litigation was gained from infrequent discussions with Mr Willers primarily by telephone and occasional conversations with Mr Sorrell which occurred approximately once every six months. He avers that it was only at the meeting on 27 August 2009 that he found out that:

a. Langstone had by July 2009 incurred costs of almost £1 million;

b. the most the claim could be worth was between £250,000 and £400,000; and

c. the claim was for the benefit of all the creditors of Aqua.

176. Mr Gubay says further that he was never shown any written advice provided by Mr Sorrell or by leading or junior counsel; any offers of settlement or any fee notes or other records of fees incurred. He denies that he ever gave instructions that the Wrongful Trading Proceedings should be pursued regardless of cost or indicated that he was indifferent to costs. He says that he was unaware that Langstone was providing an indemnity in respect of all the costs of the Wrongful Trading Proceedings when the proceedings were pursued for the benefit of all the creditors of Aqua. As to the allegations about the abandonment of the Wrongful Trading Proceedings, Mr Gubay pleads no admissions as he took no active role in the management of those proceedings. After the departure of Mr Willers and the withdrawal of instructions from Pannone those proceedings were managed by Mr Barr and Ms Twizell. He denies that he was a shadow director and that he is liable to indemnify Mr Willers.

177. Langstone served a Reply in the Langstone Action. The version available at trial was an Amended Reply served on 8 February 2013. This dealt in some detail in refuting the parts of the Defence dealing with the Santon Trust and the Anglo Group whilst denying that those allegations have any relevance to the issue of Mr Willers' professional negligence. In paragraph 15 of the Reply, Langstone pleads that the impression that Mr Willers sought to create that he had no responsibility for the operation of the business does not provide him with a defence. The duties of a director are imposed by law and it is denied that "as a matter of law these duties can be avoided or discharged by merely following the instructions or directions of another person".

178. As regards the Aqua Litigation, the Reply denies that Mr Gubay gave instructions to commence or continue the Aqua Defects Claim or the Wrongful Trading Proceedings; "the instigation and management of litigation, including the Aqua Litigation fell squarely within [Mr Willers'] area of expertise and responsibilities on behalf of [Langstone] and was commenced, managed and continued by him". The Reply notes what Mr Gubay has said in his Defence to the Part 20 claim and pleads that that accords with Langstone's knowledge and understanding. It is also pleaded that any "high level views" that Mr Gubay may have expressed would have been based on the information and advice provided by Mr Willers

and on Mr Willers complying with his duties to Langstone in giving effect to Mr Gubay's views.

179. On 25 January 2012 there was a case management hearing before Morgan J in all three actions, the Langstone Action, the Haskew/Lawyers Action and the Langstone/Lawyers Action. Pannone had applied for an order that all three actions be tried together, a step which Mr Willers opposed. Morgan J acknowledged that the cases were at different stages of readiness and that the Langstone Action was sufficiently advanced to come to trial in April 2012 with a time estimate of 10 days. If all three cases were heard together, the time estimate would be 25 days and the hearing could likely not take place until the first half of 2013. Although he recognised the disadvantages to Mr Willers of being swept up into a much longer trial, Morgan J held that the correct course in the interests of fairness to the greatest number of people was for the three actions to be case managed together with a trial of all three at the same time. The trial was subsequently listed for five weeks commencing on 15 April 2013.

180. A mediation took place in the Langstone Action in early 2013. It was completely unsuccessful as both sides maintained entrenched positions. It became clear that the matter would not be resolved short of a full trial. On 28 March 2013 Langstone served notice of discontinuance of all its claims against Mr Willers. The proceedings were brought to an end by order of Newey J on 16 April 2013. Newey J ordered that:

    a. Langstone pay Mr Willers' costs of the action, such costs to include both his cost of defending the action and of his Part 20 claim against Mr Gubay;

    b. that Langstone pay Mr Gubay's costs of defending the Part 20 proceedings;

    c. Langstone make an interim payment on account in the sum of £1 million to Mr Willers' solicitors;

    d. Mr Willers' application that Mr Gubay be jointly and severally liable with Langstone for the payment of his costs be dismissed;

    e. the five-week trial date listed for 15th of April 2013 be vacated.

181. The Langstone/Lawyers Claim was compromised on terms that Langstone paid £100,000 in full and final settlement of Wacks Caller's costs and £300,000 in full and final settlement of Pannone's costs. The Haskew/Lawyers Claim was also settled; the terms of that settlement are confidential but I assume for present purposes that it did not result in any damages being paid to Mr Haskew by the solicitors or counsel involved.

182. Following the order of Newey J there was a protracted and highly contentious assessment of the costs. Mr Willers assigned certain of his rights under the order of Newey J to De Cruz, his solicitors, in exchange for their extending time for payment. Mr Willers' evidence was that he would have been bankrupted if De Cruz had enforced their costs invoices against him.

183. The detailed assessment led to a judgment of Master O'Hare on 30 October 2014. The Master said in that judgment that Mr Willers' bill of costs before him exceeded £3 million and included a success fee for the solicitors of 90% and hourly rates of £450, £200, and £140 for different grades of fee earners. He reduced the success fee to 43% and the hourly rates to £400, £200, and £130. The final order on costs was made by Master O'Hare on 2 September 2015 following Mr Willers' acceptance of a Part 36 offer made by Langstone on 25 June 2015. The order provided that:

a. by consent, Mr Willers' bill of costs was assessed at £1,450,000, which included the costs claimed in the bill, interest, costs otherwise payable by Mr Willers to Langstone (for various interlocutory matters where Mr Willers had been ordered to pay Langstone's costs) and all interlocutory costs liabilities where Langstone had been ordered to pay Mr Willers' costs.

b. Langstone was ordered to pay Mr Willers' costs of the detailed assessment. A timetable was set for the parties to exchange a certified bill of costs so that the costs could be assessed by Master O'Hare on 5 October 2015.

c. Langstone was ordered to make an interim payment to Mr Willers of £250,000.

184. Langstone paid Mr Willers all the monies that it was required to pay in respect of Mr Willers' costs of the Langstone Action.

VI. MALICIOUS PROSECUTION: THE LAW

185. Mr Willers' claim was struck out by Ms Amanda Tipples QC, sitting as a Deputy High Court Judge as disclosing no cause of action known to English law: [2015] EWHC 1315 (Ch). Ms Tipples concluded that she was bound by *Gregory v Portsmouth City Council* [2000] 1 AC 419 to hold that an ordinary civil action cannot support the tort of malicious prosecution. She granted a 'leapfrog' certificate under section 12 of the Administration of Justice Act 1969 and permission to appeal was given by the Supreme Court. It was common ground before the Supreme Court that Mr Willers' case as pleaded included all the necessary ingredients for a claim of malicious prosecution if such an action was sustainable in English law. Mr Willers' appeal was heard by a panel of nine Justices. Lord Toulson gave a judgment with which Lady Hale DPSC, Lord Kerr, Lord Clarke and Lord Wilson JJSC agreed. After extensive analysis of previous authority Lord Toulson said:

> "The common law is prized for its combination of principle and pragmatism. The doctrine of precedent in the words of Dean Roscoe Pound is "one of reason applied to experience": The Spirit of the Common Law, 1963 ed, pp 182-183. "Growth" he said "is insured in that the limits of the principle are not fixed authoritatively once and for all but are discovered gradually by a process of inclusion and exclusion as cases arise which bring out its practical workings and prove how far it may be made to do justice in its actual operation." The case law on the tort of malicious prosecution is in point. It shows how the courts have fashioned the tort to do justice in various situations in which a person has suffered injury in consequence of the malicious use of legal process without any reasonable basis. Drawing on that experience, the court has to decide whether the tort should now apply to the malicious and groundless prosecution of a civil claim causing damage of the kinds alleged in the present case. This requires consideration of the justice and practical consequences whichever way the question is decided. ...."

186. Lord Toulson then discussed the policy arguments that were put forward against extending the tort of malicious prosecution to apply to civil proceedings beyond the assortment of instances already recognised by the case law. These included floodgates arguments, the public interest in finality and avoiding unnecessary satellite litigation,

inconsistency with witness immunity from civil liability and lack of reciprocity (that is, that there is no tort of maliciously defending proceedings).

187. The elements of the tort of malicious prosecution as applied to this case require Mr Willers to show:

a. Mr Gubay was the prosecutor of the Langstone Action brought against him;

b. the Langstone Action was determined in Mr Willers' favour; the Executors accept that this element is satisfied here;

c. Mr Gubay had no reasonable or probable cause for prosecuting those proceedings;

d. Mr Gubay acted maliciously in prosecuting those proceedings; and

e. as a result of Mr Gubay's actions Mr Willers has suffered loss which sounds in damages.

VII. WAS MR GUBAY THE PROSECUTOR OF THE LANGSTONE ACTION?

(a) The legal test for identifying the prosecutor of a civil claim

188. Mr Gubay, now his Executors, was the only Defendant to this claim by Mr Willers but the earlier claim which Mr Willers alleges was maliciously brought against him was brought by Langstone not by Mr Gubay. Mr Willers therefore has to establish that it was Mr Gubay who prosecuted the Langstone Action. Mr Gubay was not a de jure director of Langstone nor was he the legal or beneficial owner of that company. At the time the action was issued, the de jure directors of Langstone were Mr Barr, Ms Twizell and Mr Carney.

189. The leading authority on identifying the prosecutor in a claim for malicious prosecution is *Martin v Watson* [1996] 2 AC 74. In that case the House of Lords was considering a defendant who had falsely and maliciously given a police officer information indicating that the claimant was guilty of indecently exposing himself to her in the back garden of her house. Lord Keith of Kinkel (with whom the other four members of the House agreed) said that this ingredient of the tort was correctly stated in Clerk & Lindsell on Torts: "the plaintiff must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge;". Although the charge sheet had not been signed by the defendant in the case, Lord Keith stated that the circumstance that a defendant in an action of malicious prosecution "was not technically the prosecutor should not enable him to escape liability where he was in substance the person responsible for the prosecution having been brought": 86B. He went on:

> "Where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in court of the matters in question, it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant, as was the position here, then it becomes virtually impossible for the police officer to exercise any independent discretion or judgment, and if the prosecution is instituted by the police officer the proper view of the matter is that the prosecution has been procured by the complainant"

190. That test was applied in *Mahon v Rahn (No 2)* [2000] 1 WLR 2150, [267] where Brooke LJ said that it would be unwise to be over-prescriptive in setting out the circumstances in which a lay informant may properly be regarded as the prosecutor, or as one of the prosecutors, for the purposes of the tort of malicious prosecution. In *AH v AB* [2009] EWCA Civ 1092, Sedley LJ commented that however fact sensitive the prosecutor issue may be, it does not mean that there is no boundary set by principle: [39].

191. More recently, the issue of who has prosecuted a criminal offence was considered in *Rees & Ors v Commissioner of the Metropolitan Police* [2018] EWCA Civ 1587 in which the Commissioner accepted that she would be vicariously responsible for any tortious liability of the investigating police officer. The Commissioner also accepted that, in principle, there may be more than one prosecutor in an individual case: see [45]. In that case the issue focused on the point that Lord Keith had made in *Martin v Watson* about the facts of the alleged offence being peculiarly in the putative prosecutor's knowledge. That meant that the nominal prosecutor could not exercise any independent judgement when deciding whether to prosecute, or that "it was virtually, in practical terms, impossible" for the nominal prosecutor to exercise an independent discretion, to use the wording adopted by Pill LJ in *Ministry of Justice v Scott* [2009] EWCA Civ 1215 [43]. In *Rees* McCombe LJ (with whom Coulson and King LJJ agreed) held that the investigating officer who had presented suborned evidence to the CPS was the prosecutor. This was because the decision by the CPS to prosecute was overborne and perverted by the police inspector's presentation of the material which had been procured by his own criminality. The CPS had been deprived of their ability to exercise independent judgement and the police officer was undoubtedly a prosecutor in the sense decided by the authorities.

192. It is possible for a company to be the defendant in a malicious prosecution case: see for example *Commonwealth Life Assurance Society Ltd. v Brain* (1935) 53 CLR 343 and *Commercial Union Assurance Co of NZ Ltd v Lamont* [1989] 3 NZLR 187 referred to by Lord Keith in *Martin v Watson* at p. 81 and p. 82 respectively. There is clearly a difficulty, however, in transposing the test set out in the authorities arising from criminal prosecutions into a situation where the previous prosecution is of a civil claim and more specifically to the facts of this case. When the CPS brings a prosecution, it is relatively straightforward to identify who, outside the organisation, has provided the information which results in the decision to prosecute. Where a company decides to embark on a major piece of litigation there are many different individuals inside and outside the corporate structure who will have contributed their information and opinions.

193. The case is put for Mr Willers on the basis that Mr Gubay was the "controlling mind" of Langstone and indeed of every company within the Anglo Group. Examples are given of Mr Gubay's alleged control of the assets of the Santon Trust, of the fact that the directors of the Anglo Group companies were accustomed to act in accordance with his instructions, that he exercised control over buying and selling properties, currency trading, commencing, pursuing and compromising contentious litigation, setting salaries and using company residential properties as his own. It is alleged that "in the premises Mr Gubay was at all material times "shadow director" and controlling mind of and agent for all of the companies within the Santon Trust". Mr Willers also refers to statements made in the past by Mr Gubay himself that he adopted "a very hands on approach to business"; that his business ideas were usually accepted and that he was "the central character" in the Group and so forth.

194. As Mr Mitchell QC, appearing for the Executors, pointed out, the concept of an individual being the "controlling mind" of the company is part of the test that is deployed when the

court is considering whether to attribute the conduct and/or state of mind of an individual to the company in order to fix the company with liability. In this case, if Mr Willers had sued Langstone for malicious prosecution, he would no doubt have sought to attribute to Langstone the malice of Mr Gubay on the grounds that Mr Gubay was the controlling mind of the company. The circumstances in which the court will attribute the conduct of the individual who is the "controlling mind" or the "directing mind and will" of the company to the company in order to make the company liable has been the subject of much case law, notably the speech of Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 506B and by Lord Sumption in *Petrodel Resources Ltd v Prest* [2013] 2 AC 415, [8]. But in the present case Mr Willers is not alleging that Mr Gubay is the controlling mind of Langstone in order to attribute his conduct to the company but rather the other way round; he alleges that because Mr Gubay is the controlling mind of Langstone, Langstone's conduct is to be attributed to Mr Gubay so that Mr Gubay is regarded as the prosecutor of the claim brought by Langstone.

195. Mr Willers' case was therefore at base that provided I can be satisfied that in general, Mr Gubay was the controlling mind of Langstone's business, that is enough to make him the prosecutor of any claim that Langstone brings for the purposes of the tort of malicious prosecution. Mr Mitchell initially argued that the attempt by Mr Willers to fix Mr Gubay with personal liability for the prosecution of the Langstone Action was misconceived even if it was true that Mr Gubay was the "controlling mind" or "directing mind and will" of the Group in general and Langstone in particular. Mr Mitchell argued that that would be a radical revision of company law because generally the directors of a company do not incur personal liability for the tortious conduct or breaches of contract committed by the company, even if they were instrumental in causing the company to act in an unlawful way. However, in closing submissions he modified this stance somewhat. There is case law that establishes that a tortfeasor remains liable for his tort even though his act was also the act of a company, see for example *Standard Chartered v Pakistan National Shipping Corp* [2003] 1 AC 959 [Z1/11] at [20]-[28] per Lord Hoffmann [40] to [41] per Lord Rodger where the director was liable for the tort of deceit because he knowingly made false representations and *Barclay Pharmaceuticals v Waypharm* [2012] EWHC (Comm) 306 [Z1/13] per Gloster J at [239] to [244]. The defendant there was not being sued for the company's tort but for his own tort because all the elements of the tort were proved against him. Mr Mitchell accepted that the authorities such as *Martin v Watson* show that it is possible for an individual to be personally liable for the tort of malicious prosecution and their conduct is not, as it were, so absorbed into the nominal prosecutor as to erase their own responsibility for that conduct. Mr Mitchell still strongly resisted the idea that Mr Willers is entitled to jump from saying that generally speaking Mr Gubay ruled his business empire "with a rod of iron" or that he adopted "a very hands on approach to business" or that "no one did anything without his approval" to concluding that he must have been the prosecutor of the Langstone Action.

196. In my judgment it is not enough for Mr Willers to show that Mr Gubay was the controlling mind or directing mind and will or a shadow director of Langstone in some general sense in order to establish that he was the prosecutor of the Langstone for the purposes of the tort of malicious prosecution. Such a test would mean that in many cases where a company which is controlled by a properly functioning board of directors there could be a large number of individuals who together comprise the "controlling mind". It is not clear whether the consequence of Mr Willers' submission is that they would all be prosecutors of any action that the company pursued. Mr Willers might say that the court can work backwards from identifying the person alleged to have malice and see whether it

is possible to regard that person as a prosecutor. But I do not consider that such reverse engineering provides a defensible test. If one limits the circumstances in which an individual is treated as a prosecutor to the situation where there is one dominant personality who usually or always gets his own way, that leads to the question: did he in fact exercise his dominance in respect of the decision to bring the allegedly malicious prosecution? To put it another way, I do not see that the fact, if proven, that Mr Gubay may have decided what properties the Anglo Group should buy and sell, or that he may have fixed all the staffs' salaries or generally treated the assets of the Santon Trust as his own, should mean that he is the prosecutor of the Langstone Action unless it can be shown that he exercised some more specific control over the decision to bring that claim. Moreover, if most people employed in the Group were accustomed to act in accordance with his instructions, I do not accept that that matters if he did not in fact give any instructions as regards this specific matter or if the particular executives who took the decision were not themselves so accustomed. Evidence of how the decision came to be taken is relevant if it might rebut a general impression that someone was regarded as 'the boss'.

197. A more targeted approach to the issue of whether Mr Gubay was the prosecutor of the Langstone Action is much more consistent with the case law on attribution to which I referred earlier. Lord Hoffmann in *Meridian* stressed that the rule of attribution is a matter of interpretation or construction of the relevant substantive rule. It is necessary to tailor the attribution rule to the terms and policies of the substantive rule for which it is being applied. The identity of the individual with the "controlling mind" may differ depending on the decision in question. Similarly here, in deciding whether an individual who generally has a position of influence within the company should have the company's actions attributed to him, I consider it is necessary to examine in detail his role in the particular decision taken, not simply to move from generalised expressions of his dominant – even terrifying - personality to an assumption that he took the decision in question, at least where there is evidence about how the particular decision was actually taken.

198. The question is therefore in what way does Mr Gubay have to have been involved in the decision by Langstone to launch the Langstone Action and how influential does he have to have been in order to make him the prosecutor? The case law suggests that this is a stringent test. In *Martin v Watson* Lord Keith said that in that case it had been "virtually impossible" for the nominal prosecutor "to exercise any independent discretion or judgment" when deciding to prosecute. The Court of Appeal in *AH v AB* also expressed the test as setting a high threshold. In that case, the Court rejected the contention that a defendant who had alleged that the claimant had raped her was the prosecutor of the criminal proceedings, saying at [47]:

> "It would have been necessary to establish that she had deliberately manipulated [the police] into taking a course which they would not otherwise have taken if, pursuant to *Martin v Watson*, she was to be regarded in law as the prosecutor".

199. In *Mahon v Rahn (No 2)* Brooke LJ contrasted a simple case like *Martin v Watson* with a complex case prosecuted by the Serious Fraud Office where the authority is in receipt of evidence from a variety of sources and has to decide in the exercise of its discretion whether the evidence is sufficient to justify setting the law in motion against the defendant. The issue before the Court of Appeal was an interlocutory appeal in which it had to be assumed that the claimant would succeed at trial in showing that the defendants had knowingly given false information and withheld evidence to the contrary. Even so, the Court held that there

was no real prospect of the claimant proving that the defendants were the prosecutors. The SFO had still conducted a wide investigation and exercised its own independent discretion.

200. In my judgment, therefore, it is necessary for Mr Willers to show that Mr Gubay had a dominant influence over the board of directors when they decided to bring the Langstone Action. Mr Mitchell accepted that if one had the situation of Mr Gubay sitting in the Langstone boardroom with a sword threatening the directors then that would amount to overpowering their will. I do not accept that the brandishing of a sword is necessary for the test to be satisfied; if it can be shown that Mr Gubay bullied the directors to take the step that they would not have taken if left to their own independent judgement then he would be a prosecutor. Alternatively, if Mr Gubay misled the directors with false information, or by withholding information so that they took a decision that they would not otherwise have taken to go ahead with the claim, he would also be a prosecutor for this purpose.

(b) Did Mr Gubay force the directors of Langstone to bring the Langstone Action?

201. In coming to a conclusion on these factual matters, the court is hampered by the absence of any disclosure from Langstone about the claim. There are no emails before the court sent by Mr Gubay to the directors or among the directors themselves discussing whether it was a good idea to bring the claim. But that is no reason to abandon the test I have held is the right test and to fall back on generalised statements about Mr Gubay's conduct. A great deal of evidence was given at trial about what an intimidating man Mr Gubay could be. Many witnesses referred to the fact that everyone working for the Anglo Group was aware that they must obey any instruction given to them by Mr Gubay and that if they did not they would face what was referred to as a "grade 1 bollocking" and instant dismissal. Some of the descriptions of Mr Gubay given in support of Mr Willers' case are as follows:

a. From Mr Willers:

> "Mr Gubay was a very volatile character. He used his power as a weapon to achieve what he wanted, and he could be extremely intimidating to deal with. On occasion he resorted to physical violence. If someone had done something wrong in his eyes, he would give them a formidable dressing down, which he referred to as "a bollocking" and graded as grade 1, 2 or 3 according to severity. Most would not survive a grade 1: [five named people given as examples]. But all were severe and directed to ensure compliance."

b. From Mr Stowell:

> "He was extraordinarily single-minded and ruthless when it came to business. ... He would dismiss [people] without hesitation, or get others to do it. Sometimes, he would sack people on the spot."
>
> "On one occasion, in around 1992, the managing director AG had appointed, Mr [X], made a fairly innocuous remark about how he thought a transaction should be handled with regards to VAT, which was different from how AG thought it should be handled. This provoked an immediate and dramatic response from AG. He banged the table with both fists and shouted at all present. "There seems to be a misunderstanding around this

> table! You seem to think this is some kind of democracy! Well it isn't! It's a fuc***g dictatorship!". It came as no surprise to me when I was told the couple of weeks later that Mr [X] had left the company."

c. From Mr Herring:

> "His style was to take issue with anyone who he felt was doing the wrong thing and this was usually done at the time and place of the alleged wrong. He was not someone to spare your blushes by taking you to one side to make his point; it was done on the spot. Even if he was roasting someone in his office the glass walls made it painfully obvious to anyone passing what was going on."

d. From Mr Jones:

> "Almost everyone received bollockings and AG well knew how severe they were. In fact, he was proud of them. He would regularly talk about how he had given someone a full "Gubay bollocking". He liked to do these in front of an audience, so that the rest of the staff would see that he was in charge. ... On occasion, AG was violent."

202. Mr Willers gave a slightly more nuanced account of this in his cross-examination.

> "Q. You suggest in your statement that he could be rather intimidating?
>
> A. He was intimidating.
>
> Q. But you don't give any examples of personally experiencing any intimidation applied to you by Mr Gubay. Is that because he didn't intimidate you?
>
> A. Well, I was very -- it was very obvious to me right at the very beginning of our relationship that he was an extremely fiery character who brooked no nonsense from anybody. I was able to deal with his intimidation in a much better way than practically anybody else that worked for him who he had direct contact with. I used to be the -- I suppose I was the absorbing board of problems for people who he had intimidated and had shouted at and had bawled out. He had this phrase, and it is -- you know, it's a system of grading of – of attacks on them, and he would say -- sometimes he'd ring me -- ring me and say, "I've just spoken to so and so and I've had to give him a grade 1, grade 2 or grade 3 or whatever", and the grade 1 ones, of course, were the ones that pretty much people didn't survive. But it had a very -- I found it had a very bad effect on the morale of the people that he was dealing with, and I tried to do my best to ameliorate that .... He didn't intimidate me because I could hold my own with him, if I chose to, and I didn't let his temper get the better of me. And he knew that, because he would then -- it was one of those things, it was a very transitory thing with him. He could

give me a bollocking at 9 o'clock in the morning and at 11 o'clock he'd been on the phone saying, "Oh, Pete I'd like you to do this, I'd like you to do that." It was like once he'd got it out of his system and he'd made his point, then essentially life could be turned back to normal in the relationship. And it continued like that for many years.

Q. So really this notion that people would do what he wanted on pain of instant dismissal, may need some revision, mightn't it

A. No.

Q. -- because the position is that, you know, he would get very cross and then it would just fade away by the afternoon?

A. No, that doesn't -- there's no revision in it at all. Some people couldn't deal with it happening to them again. And they would go, or he would -- he would, if they tried to standing up to him on it, and say that he was wrong, he would say, "Well, then you'd better go". And he would get rid of them. And they would go.

Q. But not you?

A. Well –

Q. Because if you stood up to him you didn't get sacked?

A. Yes, but I didn't stand up to him in a way in which I said, you know, "You're completely wrong there", I just accepted what he said, I stood up to him, I accepted the bollocking and we moved on. That was the way that it was."

203. In general the evidence about Mr Gubay from Mr Willers and his witnesses left one wondering why anyone would work for the man for more than a day, once it had become apparent what he was like. Yet Mr Gubay clearly inspired fierce loyalty and deep respect and affection. All the witnesses whose evidence I have just quoted worked for Mr Gubay and the Anglo Group for many years and some had been prepared to engage in dubious conduct in order to support Mr Gubay and the Group. Many competent people clearly found that the advantages of working for the Group outweighed the disadvantages; they were prepared to withstand whatever bollockings were delivered. I found Mr McDougall's description of Mr Gubay more nuanced and likely to be closer to the truth:

"Q. ... Yes , and he was a very impressive person?

A. He was the most unusual person I've ever met.

Q. In what way?

A. He was a very strange mixture of a person. He was highly intelligent. Very logical. Very tough. But he had a kind side to him and an amazing sense of humour, and I have practised law for a long time and out of all of my clients, Mr Gubay is the most unusual and the most incisive businessman I've ever come across in my career.

Q. And is it this contradiction between his extreme strength and toughness and his generosity that makes him so unusual?

A. I think that what makes him so unusual is that most people, including most of my other wealthy clients, they generate money for their own purposes, and they generate it because they like the esteem, etc. Mr Gubay, for the last many years of his life was just committed to making money for this charity and I think that' s a quite wonderful characteristic and for all of his toughness, he was -- he had a kind side to him, like he was to my mother, which I mentioned in my statement.

Q. I remember that. Is it correct that he had a volatile temper?

A. Yes, he did have a volatile temper.

Q. And he could, from time to time, be a bully?

A. I 've -- well, he could definitely be a bully sometimes, and he has given me some hard times on occasion as well.

Q. But you -- you're one of the people who has the strength to stand up to him?

A. My Lady, there's a reason for that. When I came to act for Mr Gubay in 1989, there were four points that the two of us agreed on. And I can give you the other three, but relevant to the question is that he said to he that he was not prepared to pay for "yes man" advice. So what he was telling me was and what he said to me was that if I had a contrary view to him I must express it otherwise I'm wasting his money, and he's employing me to give him not the advice that he would like to hear, but what my view was. So there were occasions in my career when I had to go back to him and remind him of that point. And that is why I was quite happy to proceed on that basis.

Q. Yes. I think one of the witnesses said that ... he could be giving you what he called a bollocking one moment and then a few minutes later, he'd sit down and have tea with you as though nothing had happened?

A. That's quite correct.

Q. Does that sound right?

A. Yeah, I took a couple of bollockings, well -- I took one in particular , and the next day -- well I took a bollocking and I was on the phone with him the next day and I was unhappy about the bollocking, and I told Mr Gubay my reasons, because he'd given me a bollocking in front of everybody on the teleconference and I wasn't happy with it , and the next day I phoned him back, and I said to him that I was unhappy about it, and I went back to this deal of mine, and he then apologised and life went on. It was just we changed things automatically, and it's a kind of a badge of honour to get an apology out of Mr Gubay.

Q. I can imagine."

204. It was not only advisers who found Mr Gubay a magnetic and attractive personality and who were able to exert some independence of spirit in the face Mr Gubay. Mr Keown

joined the Group in 1998 as an IT assistant and rose to become IT Director. At the end of his cross-examination he accepted that he had had a bollocking from Mr Gubay, like most people on numerous occasions. The following exchange then took place:

> "MRS JUSTICE ROSE: And what would trigger that?
>
> A. Ultimately if I did something wrong, or I messed up, really. Which could on occasion happen.
>
> MRS JUSTICE ROSE: You survived to tell the tale?
>
> A. Indeed.
>
> MRS JUSTICE ROSE: And what did you do, just keep out of his way for a little while after?
>
> A. No, most of the time it would be a case of I would be questioned on something that had failed or I'd done incorrectly, and ultimately have the said bollocking, and then shortly after, it would be a case of we would carry on as normal and make up, and he was happy to proceed and learn from your lesson, basically.
>
> MRS JUSTICE ROSE: Why did you put up with that? I mean, you have apparently very transferable skills. Why didn't you go and work somewhere where you didn't get regularly yelled at?
>
> A. A multitude of reasons. The company was very diverse, certainly in terms of the IT, but also Mr Gubay, it's hard to explain. You almost became a friend of his, when he let you in closely, as the case of -- it made for a very interesting job. I could have gone and worked somewhere else and done just one thing. With Mr Gubay and his ideas and things he wanted to do, it made it an ever-changing job, which made it very interesting.
>
> MRS JUSTICE ROSE: And worth putting up with him for?
>
> A. I wouldn't say worth putting up, I mean the bollockings I had certainly weren't excessive. It was, you know, minor things at the end of the day."

205. On the totality of the evidence I do not accept that everyone adopted the same approach to Mr Gubay as Mr Willers says that he adopted, namely simply to obey instantly any instruction or order without considering whether his professional or other duties to the company called for different conduct. Further, I consider that the directors of Langstone at the time the Langstone Action was launched happen to be people who were prepared, at least sometimes, to stand up to Mr Gubay when their consciences or responsibilities suggested to them that that was the right thing to do.

206. Mr Barr, who was one of the directors of Langstone at the time the Langstone Action was commenced was one of them. Mr Barr's evidence covers two relevant matters. The first is how the decision to bring the claim was made. In his written evidence Mr Barr describes how after the conclusion of the Aqua Litigation he and Ms Twizell's attention turned to Mr Willers and to the professionals "that had got Langstone into such a dreadful position". They sought advice from DWF and from Terence Mowschenson QC and Sebastian Allen of counsel. Since Langstone has not waived privilege all he can say is:

> "From memory, Ms Twizell attended on counsel in conference at least twice, and counsel also advised in writing. In the light of the written advice we then received, Langstone decided to bring a claim against Mr Willers for breach of fiduciary duty while a director and a claim for professional negligence against Wacks Caller and Pannone. Although Mr Gubay was consulted (by 2010, he had been reappointed as director of the more senior Santon Companies, although he was not a director of Langstone), the decision to bring each claim was made by Langstone's own board".

207. In cross-examination Mr Barr was asked about his expectations for the Langstone Action at the start. He said that he knew that Mr Willers had a half share in a valuable house and that the costs of the claim might be "a few hundred thousand pounds". At the beginning he was, "fairly confident that we would prove the claim, and perhaps, along the way, there might be some form of settlement or whatever agreed.". In an important passage Mr Barr was asked who in the Group had a say in the decision:

> "Q. And the person who mattered in the group was Mr Gubay, wasn't it?
>
> A. No, the people who mattered within the group were the directors.
>
> Q. That's you and Mr Carney and Ms Twizell?
>
> A. And Mrs Twizell, yes.
>
> Q. And it was Mr Gubay who really mattered, wasn't it?
>
> A. No, everybody's opinion mattered. I would have also been very keen to have the finance director on side, as I say, I just can't remember offhand who the finance director was at that time.
>
> Q. I'm told it was Mr Styles.
>
> A. Right, yes I'd have been very keen to have the finance director on side, and obviously very keen to have Mr Gubay on side, yes.
>
> Q. Yes, well, Mr Nugent said it would be inconceivable that such a step would be taken without Mr Gubay's approval?
>
> A. Yes, I agree.
>
> Q. Would you agree with that?
>
> A. Yes, I would -- it was a very major step to take.
>
> Q. And Mr Gubay did approve, didn't he?
>
> A. Yes, he did, yes.
>
> Q. In fact, he more than approved. He was keen for it to go ahead, wasn't he?
>
> A. When all the circumstances were explained to him as to what had happened, and when it was explained to him what steps we had taken, I know that there hasn't been a waiving of privilege

> but whenever we explained to him what steps had been taken to put forward the claim, yes, along with the other directors, he was agreeable and keen that the claim be taken, yes.
>
> Q. And Mr Nugent said that he was intimately involved in every stage of the proceedings; would you agree with that?
>
> A. He was involved, he was no more intimately involved than I was, or Mrs Twizell. I would say that basically Mr Gubay, Mrs Twizell, myself and to an extent, to an extent, Mr Carney -- not so much in the later period -- and Mr Styles, actually, and when Mr Wilson joined Mr Wilson as well. It was a very big claim and there was a lot happening in it and there was a lot of discussions in the office about the various steps in the claim."

208. Mr Barr went on to say that as the senior person on the board of Langstone, he was "putting his neck on the line". He rejected Mr Page's suggestions that he had simply done what Mr Gubay had told him to do:

> "Q. And Mr Gubay told you that he wanted Langstone to sue Mr Willers over the Aqua costs, didn't he?
>
> A. No, he wanted that done but the matter was discussed rationally. It wasn't just a case of him saying "do it" and it was done. The matter was discussed.
>
> Q. But he said, "do it" and you discussed it and it was done?
>
> A. No, it was discussed and the consensus was --- Mr Gubay wouldn't understand, or wouldn't have understood how you actually do these things. We would have to discuss it, we would have to look at the downsides, the upsides how you go about it how you bring the action et cetera and put a plan together."

209. I find that the evidence also establishes that Mr Barr and Ms Twizell had a genuine belief that something had gone very wrong with the Aqua Litigation and that their former manager Mr Willers was likely to be responsible for that.

210. The second relevant matter in Mr Barr's evidence shows that he was prepared to take a stand against Mr Gubay. He recounts an incident in 1991 when he sent an anonymous whistleblower letter to the Manx Independent, a newspaper on the Isle of Man, in relation to the planning application made for the Mount Murray development. He said in the letter that Mr Gubay was making a fool out of the planning department because he had applied for permission to develop a leisure village, but his covert plan was to turn it into a straightforward and more profitable housing development. The letter was not published by the newspaper, but Mr Gubay found out about it and that Mr Barr had written it. There was a confrontation and the two men came to blows. Mr Barr said:

> "13.5 This was all a long time ago, and it is not an episode I relate without embarrassment. What I wish to say, however, is that even though Mr Gubay rightly believed I had betrayed him; and was furious with me; and he and I physically fought each other; we made up on the very afternoon of the day when we fought. Mr Gubay did not bear a grudge against me, and I continue to work for the Santon Group".

211. Mr Barr recounts this episode to counter Mr Willers' allegation that Mr Gubay bore a malicious grudge against him. But it is relevant in my judgment to show that Mr Barr was not a person who would blindly obey instructions from Mr Gubay to cause Langstone to issue proceedings against Mr Willers if he did not think that it was the right thing to do according to his independent judgement. I accept that Mr Barr behaved less properly when he persuaded the Land Registrar to place a caveat on Mr Willers' home when I think he appreciated that the basis for doing so was dubious at best. That did not require him to act in breach of any legal duties he owed. In my judgment he was a conscientious lawyer who was aware of his duties as a director and would not have blindly acted in contravention of those.

212. As far as Ms Twizell is concerned, I have already described how she stood up to Mr Gubay and persisted in fulfilling her duty as legal officer of Langstone in explaining to him the state of the Aqua Litigation after her analysis of the files over the weekend in July 2009. Her earlier witness statement in the Langstone Action itself does not of course deal with the question of who decided to bring the action. But the tone of it makes very clear that she was herself very shocked at what had happened in the Aqua Litigation and she considered Mr Willers to be responsible for the state of affairs she uncovered. She also says that:

> "22.2 During my time as Legal Officer of the Group, I never simply followed the instructions of others, as Mr Willers alleges he has done over the 24 years he worked for the Santon Group, nor am I aware that anyone was expecting me to do so. On the contrary, the rest of the Group and its management (which from Mr Willers' departure included Mr Gubay) was plainly relying on me to assess and analyse legal issues using my legal expertise to provide recommendations as to how best to proceed.
>
> 22.3 When I took over the Aqua Litigation from Mr Willers, for example, it was apparent to me that the management team, which at that time included Mr Gubay, did not know how best to proceed and that it was for me (as the one with legal training) to determine how to resolve the situation that Mr Willers had left behind him. I certainly was not simply following instructions as to how to conduct the Aqua Litigation nor, it was clear was it expected that I should do so".

213. There is no reason to believe that Ms Twizell took a more supine approach to the Langstone Action than she took to the Aqua Litigation. I recognise that Ms Twizell does not want her previous evidence to play a part in the present proceedings. In her second witness statement she describes Mr Gubay as keen to pursue the Langstone Action and confirms that any instructions given to the external lawyers would have been agreed by Mr Gubay. She also says that she considered that the Langstone Action was "motivated by a desire for revenge on Mr Willers by Mr Gubay" and that the months following Mr Willers dismissal were "soul destroying". But she says once she felt professionally compromised at a later stage she left the Group. I do not read her evidence as saying that she was bullied or threatened by Mr Gubay into causing Langstone to commence the Langstone Action when she would not otherwise have agreed as a director to do so. She certainly had a better appreciation of her professional and ethical responsibilities as a legal adviser and company director than some of her more senior colleagues.

214. As to Mr Carney, there is no evidence at all about his involvement in the decision to bring the Langstone Action. I am not prepared to assume that he would have been bullied by Mr Gubay into bringing the claim without being able to exercise his independent judgement whether it was the right thing to do. What we know about Mr Carney was that he ran a successful surveying consultancy with Mr Taylor, working for the Anglo Group on different projects over several years. Presumably, like every other witness in this action, he was on the receiving end or at least witnessed others receiving one or more of Mr Gubay's legendary bollockings. Yet he gave up his independent consultancy to move in-house to be a director of a number of the Anglo Group companies. It seems implausible that he would have done so had he found Mr Gubay such an intimidating person that his professional life thereafter would be blighted by being placed in the uncomfortable position of either having to take action which he did not think was right or risk being peremptorily humiliated and dismissed.

215. Having therefore considered the evidence relating to the directors of Langstone, I conclude that they were likely to be properly conscious of their professional and fiduciary duties and would not be prepared to cause the company to bring an action just because they were instructed to do so by Mr Gubay.

216. A further factor I bear in mind is that, as Mr Barr states, the company obtained legal advice from solicitors and leading and junior counsel. Mr Willers' defence to the allegation in the Langstone Action that he failed to obtain advice on the merits of the Aqua Litigation was that there was no point in obtaining that advice. He pleaded (at paragraph 66) of the Defence that Mr Gubay was an experienced businessman well aware of the advantages and disadvantages of litigation and that he wanted to pursue the litigation regardless of the merits or the "commerciality" of the litigation. In the present proceedings Mr Willers' case is that Mr Gubay brought the Langstone Action against him despite knowing that there was no basis for it and despite knowing that he was bound to lose. If that is right, it is difficult to see why the directors of Langstone sought advice on the merits from solicitors and counsel.

217. Finally, it appears that some of the evidence of those who stated that Mr Gubay had given instructions to commence the Langstone Action was actually based on an assumption that they made rather than on any knowledge of the fact. Mr Stowell stated in his written evidence that:

> "AG was the person who gave the instructions for Langstone to commence its action against Peter, he was the person who decided whether it was to be continued and he was the person who decided when it stopped. At the risk of repeating myself, AG made all the decisions, he called all the shots. The board of Langstone never made any decisions. ... No one but AG would have dared to make a decision to bring any piece of litigation without his direction, ..."

218. When he was cross examined about this passage, however, it was apparent that he had no direct knowledge of what had happened in the Langstone board at the time of the action being commenced. Rather his evidence was that he himself had not exercised any independent judgement when he had been a director out of fear of Mr Gubay and just done precisely what he was told to do. He assumed that the same was true of the directors of Langstone at the time. Similarly, Mr Styles' evidence that any claim brought in the name of a company in the Group "would only have come from Mr Gubay" was significantly

diluted in cross-examination when Mr Styles conceded that Mr Gubay paid no attention to large parts of the business and left matters to people he trusted.

219. I accept that Mr Gubay probably expressed his strong view that the Langstone Action should be commenced but I do not accept that the directors did not exercise their independent judgement in coming to the conclusion that it was a proper case to bring. Nor do I accept that they would have decided not to bring the Langstone Action if Mr Gubay had not wanted to do so or that they would have automatically agreed to discontinue if Mr Gubay had said he wanted to stop the action. Mr Gubay was not the prosecutor of the Langstone Action on that basis.

(c) Did Mr Gubay provide misleading information which affected Langstone's decision to bring the Langstone Action?

220. Mr Willers argues in the alternative that the case is similar to *Rees* because Mr Gubay withheld key information from the directors of Langstone and their legal team. That key information is said to be, broadly, that at the time the Aqua Litigation was brought, the directors of Langstone were Mr Willers and Mr Herring and they both acted purely on the instructions of Mr Gubay. Everything that was done in the Aqua Litigation was done with the knowledge and approval or on the orders of Mr Gubay. Mr Page submits that if the Langstone directors had been aware of this at the time they were considering whether to launch the Langstone Action, they would have realised that the claim was bound to fail and would not have issued proceedings.

221. Mr Mitchell submitted that this argument is closely linked with the question whether there was reasonable and probable cause for bringing the Langstone Action – it is only if the information that Mr Gubay withheld would have made a difference to the decision that one can say that the nominal prosecutor's decision to bring the claim was made without it being able to exercise an independent judgement. I therefore turn to that element of the tort.

VIII. WAS THERE REASONABLE AND PROBABLE CAUSE FOR BRINGING THE LANGSTONE ACTION?

222. The following discussion is based on the assumption that Mr Gubay was indeed the prosecutor of the Langstone Action. I also preface this section by emphasising that the negligence claims brought by Mr Haskew and Langstone were strongly defended by their former solicitors and counsel and detailed defences were served rebutting all the allegations of negligence. As I have described, the claims against the lawyers were compromised on terms that certainly did not imply that there had been any fault on the part of the law firms or counsel.

223. The test for lack of reasonable and probable cause was discussed by the Court of Appeal in *Moulton v Chief Constable of the West Midlands* [2010] EWCA Civ 524. The court held that the test has two limbs, a subjective and an objective limb. It requires first an examination of whether the prosecutor had an honest, subjective belief in the guilt of the accused and secondly that objectively there were reasonable grounds for concluding that if the underlying facts were true the person charged was guilty of the imputed crime. The Court of Appeal in *Rees* also considered whether the prosecution had been without reasonable and probable cause. The Court of Appeal referred to the statement of Lord Devlin in *Glinski v McIver* [1962] AC 726, 768 that the question is a double one: did the prosecutor actually believe and did he reasonably believe that he had cause for prosecution? Lord Devlin emphasised in *Glinski* that the prosecutor does not have to believe in the probability of conviction; he is only concerned with the question of whether there is a case for it to be tried. The case law also establishes that the prosecutor does not have to

anticipate defences which might be raised by the defendant. It is the duty of a prosecutor to find out not whether there is a possible defence but whether there is a reasonable and probable cause for prosecution: see Lord Atkin in *Glinski* at page 745.

224. Lord Atkin in *Glinski* also referred to the relevance of legal advice obtained by the prosecutor from competent solicitors or counsel. He held (page 744-745) that in a case where the facts are complicated and a question of law arises, provided that the prosecutor acts in accordance with legal advice then he is not liable for malicious prosecution if the defendant is acquitted either because the advice is wrong or because the information provided to him is wrong or incomplete or because some unexpected defence is revealed. This is, of course, provided that counsel instructed is competent in the relevant area of the law.

225. The pleaded case as to why Mr Gubay (assuming that he was the prosecutor of the Langstone Action) must have known that there was no reasonable and probable cause for accusing Mr Willers of breach of duty is three-fold:

a. Mr Gubay knew that he had been "responsible in fact and in law" for committing Langstone to the Aqua Litigation.

b. Mr Gubay decided to discontinue the Aqua Litigation in order to ensure that Langstone suffered a loss which he could then use as the pretext for suing Mr Willers.

c. Mr Gubay knew that Langstone had not suffered any loss because the liability to Mr Haskew under the indemnity had been met by another company in the Anglo Group not by Langstone.

(a) The relevance of Mr Gubay's involvement as a matter of law

226. There are two ways in which Mr Gubay's knowledge of his own role in the Aqua Litigation might mean that he must also have known that there was no reasonable and probable cause for bringing a claim against Mr Willers. The first is if his involvement provides Mr Willers with a legal defence to the claim and the second is if it provides a defence on the facts.

227. As to the legal position, the starting point is that Mr Gubay was not a de jure director of Langstone and he was not the owner of it. As far as the latter point is concerned, Mr Page accepts that Mr Willers is precluded, because of earlier rulings at the interlocutory stages, from putting forward a case that Mr Gubay was the beneficial owner of the companies in the Group including Langstone and Cashtal (Langstone's owner). Mr Page also accepted that there do not appear to be any cases in which a person has been held to be the directing mind and will of the company when he is not a director, nor a shareholder nor an employee of the company.

228. However, I am prepared to assume without deciding, that Mr Gubay was a de facto or shadow director of Langstone at the time of the Aqua Litigation, alongside Mr Willers and Mr Herring – even that he was the "controlling mind" of the company in a general sense. Where does that lead as a matter of law? I do not agree that it means that Mr Gubay must have known that Langstone had no case against Mr Willers for breach of his fiduciary duties, simply because Mr Willers can say that he was told to pursue the Aqua Litigation by Mr Gubay. To hold that a de jure director can defeat an action brought against him by the company for breach of fiduciary duty by showing that he was unable or unwilling to stand up to a shadow director forcing him to commit the company to a course of conduct which was contrary to the interests of the company would be a novel development of the

law. Langstone certainly did not accept that that legal proposition was correct. Langstone's Reply notes that Mr Willers asserts that his conduct complained of was carried out on the express oral instructions and/or directions and/or with the approval of Mr Gubay. The Reply goes on:

> "However, it is averred that these assertions do not provide the Defendant with a Defence: the duties of the Defendant as director of the Claimant set out in paragraphs 56 and 57 of the Particulars of Claim are imposed by law and it is denied (if it is alleged) that as a matter of law these duties can be avoided or discharged by merely following the instructions or directions of another person."

229. The Reply states that Mr Gubay gave, at most, high level views based on the information and advice given to him by Mr Willers and that:

> "... it is denied (if it is alleged) that any such high level views expressed by the Third Party (or as the Defendant puts it, any instructions or directions from the Third Party) would permit or excuse the Defendant from managing the Aqua Litigation other than in accordance with his duties to the Claimant."

230. It is similarly denied that Mr Gubay was indifferent to the costs of litigation but averred that even if he was, that would not entitle Mr Willers also to be indifferent as to the costs being incurred by Langstone or of the merits or commercial risks incurred.

231. That response to Mr Willers' allegations does not seem to me so obviously wrong as to enable the court to conclude that Mr Gubay had no reasonable and probable cause in bringing the claim to establish that Mr Willers had at least some liability to make good the hole left in Langstone's finances by the Aqua Litigation. It may be that the director sued by the company could bring contribution proceedings against the de facto director, as Mr Willers did here when he joined Mr Gubay as a Part 20 defendant to the Langstone Action. It may be that the contribution of Mr Gubay would ultimately have been assessed at a very high percentage. But I do not see that Mr Gubay's involvement, even if it was as Mr Willers described, means that there is no reasonable and probable cause for bringing an action in the name of Langstone against Mr Willers for breach of his own duties to the company.

232. An alternative legal argument put forward by Mr Page is that Mr Gubay was also the directing mind and will of Cashtal which owned all the shares in Langstone at the material time. Any breaches by Mr Willers of the duties he owed to Langstone were therefore approved or ratified by Cashtal and cannot form the basis of a claim against him by Langstone. Mr Willers relies on the *Duomatic* principle, that is that where the shareholders of a company have lawfully approved the act of a director even on an informal basis, then the adoption of the director's acts makes the acts the act of the company. The company cannot complain of an act which is in law its own act (*Multinational Gas* [1983] 1 Ch 258, per Lawton LJ at 269).

233. Mr Willers again faces the difficulty that Mr Gubay was not a director of Cashtal at the time and was not the owner of it. In fact, the directors were Mr Willers and Mr Herring, the same two men as were the directors of Langstone. None of them was a shareholder in Cashtal. Again assuming without deciding that Mr Gubay was a shadow director of Cashtal, it is not clear to me that Mr Willers and Mr Herring in their capacity as directors of Cashtal were able as a matter of law to cause Cashtal, on the instructions of Mr Gubay,

to approve or ratify their own alleged breaches of duty committed in their capacity as directors of Langstone so as to defeat a claim by Langstone against them for breach of their fiduciary duties towards Langstone. The answer to that knotty company law problem is not so clear as to demonstrate that Mr Gubay in the guise of Langstone had no reasonable and probable cause to bring an action for breach of fiduciary duty against Mr Willers.

234. The third way in which Mr Willers puts his case on why as a matter of law, Mr Gubay's involvement in the decisions about the Aqua Litigation provided a legal defence for Mr Willers was that Mr Gubay acted as agent for TFUK, later Langstone, throughout the period of the building and commissioning of the 23 health clubs in the Total Fitness business. He plainly had, it is submitted, authority to act for Langstone in giving instructions to Mr Willers about the conduct of the Aqua Litigation. There is no document of any kind produced showing the appointment of Mr Gubay as Langstone's agent for this purpose. It strikes me as an unusual proposition to say that someone who has no legal qualification was authorised by the company to act as its agent in giving instructions about the conduct of the litigation to the qualified barrister who is employed to act as the in-house Legal Director. Does it really make legal sense to say that he was so appointed and that as a consequence, Mr Willers is absolved from any liability for breach of his duties to the company if he follows that agent's instructions without exercising any independent judgement and the company suffers a disastrous loss?

235. Again, I do not have to decide whether or not the agency argument would have succeeded for Mr Willers if the matter had gone to trial. But it seems to me impossible to say that it was so clear as a matter of law that Mr Gubay's involvement in the Aqua Litigation absolved Mr Willers of any liability for the alleged breaches of fiduciary duty as to lead to the conclusion that Mr Gubay had no reasonable and probable cause for causing Langstone to bring the Langstone Action against Mr Willers.

(b) The extent of Mr Gubay's involvement as a matter of fact

236. I turn now to consider whether Mr Gubay must have known that Langstone had no reasonable and probable cause to sue Mr Willers for the conduct of the Aqua Litigation because of his knowledge of his own involvement in the conduct of the litigation from start to finish.

237. Before considering the effect of Mr Gubay's involvement on Mr Willers' potential liability in the Langstone Action, it may help to summarise some matters that are incontrovertible:

a. Mr Willers was the only legally qualified director of Langstone at the time of the Aqua Litigation and he was employed as the company's in-house lawyer. Mr Herring was junior to Mr Willers and had no qualifications. Even if Mr Gubay was a de facto or shadow director, he was not legally qualified.

b. Mr Willers was the only lawyer within Langstone who was involved in the day to day conduct of the litigation, liaising closely with Mr Sorrell. Mr Barr's and Ms Twizell's unchallenged evidence was that they were not involved in the Aqua Litigation until Mr Willers left.

c. The judgment debt for which Langstone could prove in the Aqua liquidation had crystallised at £143,539 before the Wrongful Trading Proceedings were commenced.

d. The Wrongful Trading Proceedings and preference claim were launched in August 2005 and dismissed by consent in January 2010 with costs to be paid by Mr Haskew

to the Adamses and recovered by Mr Haskew from Langstone under the indemnity. The reasons for the discontinuance included, according to advice from counsel instructed in 2009, that (a) the claim could not be got ready for the four to five week trial that had been fixed in April 2009 to commence in February 2010 and (b) that the expert evidence prepared on quantum was largely irrelevant and expressed in such partial terms as to be unlikely to be accepted by the trial judge.

e. The liability incurred by Langstone under the indemnity to Mr Haskew was over £1.3 million in respect of Langstone's own costs and a further £650,000 in respect of the Adamses' costs. The value of Mr Haskew's claim against the Adamses, according to the Report produced by Mr Sorrell for the meeting on 27 August 2009 was at the very maximum £939,327 (including interest) even if the court somehow accepted Mr Hine's incorrect method of calculating quantum and accepted in full the whole preference claim.

f. There was no written advice before the court produced by either Mr Willers or Mr Sorrell to Langstone or to Mr Gubay setting out the risks involved in the litigation, explaining the nature of Langstone's interest in the Wrongful Trading Proceedings, or informing him of the costs that had been incurred or were likely to be incurred.

238. Given that, if the Langstone Action had proceeded to trial, those factors were likely to feature prominently in Langstone's opening submissions, how could Mr Gubay's involvement have been deployed by Mr Willers to defeat the claim?

239. There are various factors relied on by Mr Willers:

a. Mr Gubay directed and controlled the conduct of the Aqua Litigation in the same way as he directed and controlled every other aspect of the Anglo Group's business.

b. Mr Gubay was an experienced litigator who fully understood the risks involved in complex litigation of this kind and knew that legal costs can be very high.

c. The Aqua Litigation was not brought or pursued against the Adamses for commercial reasons but because:

i. Mr Gubay was angry with the Adamses in particular because of various insults and improper conduct on their part which he wanted to punish; and/or

ii. Mr Gubay's approach to litigation was to pursue defendants regardless of cost in order to send a message to other suppliers that the Anglo Group was not to be trifled with.

(i) Did Mr Gubay control and direct the Aqua Litigation?

240. Mr Willers was unable to produce to the court any emails from Mr Gubay or attendance notes written by him or by Mr Sorrell following meetings or phone conversations to show that Mr Gubay was directing him or giving him or Mr Sorrell instructions about how to conduct the Aqua Litigation. He relied on more general evidence first that Mr Gubay was intimately involved in many other aspects of the Anglo Group's business and secondly that he was an aggressive litigator. He invited the court to infer that Mr Gubay must have understood every detail of the Aqua Litigation and directed that it should continue along the course it took.

241. There was a good deal of evidence showing how deeply Mr Gubay was involved in, for example, the Group's negotiations and decisions about buying and selling properties or about the specifications for the premises being constructed or the work being carried on at the various building sites. For example, Mr Jones worked as a site foreman at various

development projects building the Total Fitness gyms in Ireland and then on other projects on the Isle of Man. He says that he worked closely with Mr Gubay after he returned to the Isle of Man in 2006 and spent a lot of social time with him at his home at Crogga Mill in the evenings. He describes how Mr Gubay would shout at people on building sites and how he insisted on taking every decision about the specification and quality of the smallest shelves and sink units. Other witnesses talked about Mr Gubay's control over the negotiations conducted over the purchase and sale of properties.

242. All this may well be true. But it does not show that Mr Gubay was in addition deeply involved in the conduct of the Aqua Litigation. Given that there are only so many hours in a day, it makes as much sense for the court to infer from this evidence of Mr Gubay's many other activities and interests, that he could **not** have had the time to give the attention to the Aqua Litigation that Mr Willers suggests. As with the issue of whether Mr Gubay was the prosecutor, it is not possible to jump from general evidence about Mr Gubay's conduct in other parts of the business to an inference as to what happened in a particular instance, particularly where there is contradictory evidence about that particular instance. Ms Bennetts' comment in her witness statement was most perceptive:

> "Mr Gubay liked to show everyone that he had his eye on the ball. He would pick on something bizarre like the use of paper, so people would think he had control over all the stationery. People who didn't know him well could gain the impression that he was in charge of everything because of the way he drilled into certain things".

243. None of the other witnesses is able to support Mr Willers' case that everything he did in the Aqua Litigation was done only after having informed Mr Gubay and having received Mr Gubay's approval. Mr Sorrell's evidence was that he dealt entirely with Mr Willers when dealing with the Aqua Litigation. He only rarely spoke to Mr Gubay about it and then only at a high level of generality. Mr Gough who dealt with the Anglo Group's Isle of Man litigation said in cross-examination that Mr Gubay was not interested in "the minutiae of the legal disputes, the procedures, things like disclosure and matters like that. He would have an eye on the big picture, where it was taking him."

244. Ms Twizell says it never appeared to her during her employment with the Santon Group that Mr Willers was simply following instructions in his role as Legal Officer. She described the Group's legal affairs as "Mr Willers' particular fiefdom":

> "19. ... In particular, whenever I discussed legal matters with Mr Willers over the period that I worked with him:
>
> 19.1 He frequently made immediate decisions on the approach to be taken without reference to anyone.
>
> 19.2 I do not recall ever hearing him say that he would have to check an issue with someone else before making a decision or that an issue could not be decided without taking "instructions" from someone else.
>
> 19.3 He did not suffer people having different views from him and would simply ignore points that were put to him that did not accord with his views.

> 19.4 He gave me the very clear impression that he was the most experienced in dealing with legal issues in litigation and that he was the one in control."

245. Mr Barr's evidence is also very clear that during the majority of his years working closely with Mr Willers in the legal office, he thought it was Mr Willers who managed the business and who was responsible for key decisions relating to the business and the legal affairs of the Group. He says that Mr Willers never mentioned to him over the twenty years that they worked together that he was at all times just following the instructions of Mr Gubay. He says that it was his clear impression over the course of his working relationship with Mr Willers that Mr Willers had full and complete authority to act as he saw fit with regard to any aspect of the business. Mr Nugent's evidence was also that over the many years he dealt with Mr Willers on a myriad of complex transactions, negotiations and restructurings, Mr Willers never said or implied to him that he was only following Mr Gubay's instructions and that he had no independent authority to make substantive decisions.

246. On balance taking both the general and specific evidence about Mr Gubay's conduct, I am not persuaded that Mr Gubay was as closely involved with the running of the Aqua Litigation as Mr Willers now recalls.

(ii) Did Mr Gubay fully understand the risks and costs of the Aqua Litigation?

247. It is important to examine what exactly the complaints were in the Langstone Action about the handling of the Aqua Litigation and what evidence there is that Mr Gubay knew and approved of the manner in which it was being conducted.

248. I have set out the matters pleaded in the Particulars of Claim in the Langstone Action in the Annex to this judgment. These allegations are not met simply by showing that Mr Gubay knew and approved of the issuing of the claim against Aqua or even that he knew and approved of the fact that the Aqua Litigation was being pursued. The simple commencement and pursuit of the claim does not form the basis of the case against Mr Willers. The main complaint is that Langstone/Mr Gubay did not appreciate first that there was such a large disparity between Langstone's provable judgment debt and its potential liability under the indemnity and secondly that he did not know that the costs being incurred were so disproportionate even to Mr Haskew's claim on behalf of all the creditors that it was most unlikely that all the costs spent would be recoverable from the Adamses even if Mr Haskew won a complete victory.

249. Mr Willers' defence is not that he explained both these matters fully himself to Mr Gubay or that he arranged for Mr Sorrell to do so. Rather his case is that both he and Mr Sorrell assumed that Mr Gubay understood this because of his previous litigation experience and that he was happy with the situation. Hence Mr Willers says he was not under any duty to explain it to him. Thus, in his witness statement, Mr Willers says:

> "94. If Mr Gubay had asked me for my opinion on whether to fund the litigation I would have given it, but he did not. Nor could or would I ever have challenged any decision he made, once he had made up his mind. Had he asked me to obtain advice from Mr Sorrell I would have done so, but he did not. He had made up his mind to pursue this claim. And, once he did so, there was no point in his subordinates trying to change it. As he always told me, it was his money and he would spend it how he wanted".

250. In cross-examination Mr Willers said that he was in contact with Mr Gubay every day on the telephone and face-to-face when Mr Gubay was in England. Mr Gubay did not have time for "chit-chatting" so expected explanations to be boiled down to two or three sentences. He said:

> "A. ... I think when giving legal advice, one should be able to give it shortly and succinctly. The fact that there might be lots of ramifications in relation to aspects of it, you might have to explain to people who didn't know. Mr Gubay knew. Mr Gubay was a supremely experienced litigator before I joined him.
>
> Q. So you're saying, then, that because your audience was sophisticated, the reports that you made to him would necessarily assume a great deal of understanding on his part?
>
> A. I know if Mr Gubay wasn't clear on any point he would always ask."

251. Later Mr Willers said:

> "Mr Gubay did what he wanted, when he wanted, how he wanted. He always had enough money to pay if he was wrong. That was his great thing about litigation; it didn't matter to him who he sued, how good or bad the case was. He always had enough money to pay. .... My role was to do – to implement what Mr Gubay wanted done. ... Everything that happened in the organisation happened because he wanted it to, because that was the way he did his business."

252. Elsewhere during his cross-examination Mr Willers described Mr Gubay as "a litigator of significant proportions" who had litigated all round the world. Mr Willers' defence to the Langstone Action is therefore that he did not offer any legal advice to Mr Gubay because Mr Gubay did not ask for it and he assumed that Mr Gubay already knew whatever he needed to know.

253. Mr Sorrell was also cross examined about his failure to advise TFUK about the potential losses it would suffer under the indemnity:

> "Q. And, of course, nowhere do we find any advice to the funder about the extent of these potential losses. It just never crossed your mind to advise Langstone, TFUK as it was, about what could happen here if this all goes wrong?
>
> A. It didn't, and the reason for that was that, as experienced, to put it mildly, litigators, Mr Gubay and Mr Willers were perfectly aware that litigation is an expensive business, and if goes wrong, it is going to cost a lot of money.
>
> Q. Well, Mr Sorrell, let's just unpack that a bit. I mean, some people might say £75,000 is a lot of money. Some people might say, well, £200,000 is a lot of money. Some people might say £2 million is a lot of money, just to use figures that are in the air

> from these cases. "A lot of money" is a meaningless concept. You need to put some numbers on it, don't you?
>
> A. Yes, but on the basis of a very long career of being involved in litigation, Mr Gubay was fully aware of the sort of costs that are involved in taking cases to trial.
>
> Q. Mr Sorrell -- so that's your opinion of what Mr Gubay knew. But from your personal point of view, as the solicitor, nowhere do you write down anything to anybody saying, "As per usual, this one of yours, Albert, where you're throwing indeterminate amounts of money away but, just to confirm, that's what you're all right with doing?"
>
> A. No, I didn't write in those terms because the nature of the relationship was that I was aware of the fact that I was dealing with the most experienced litigation clients that I'd ever come across. I had, by this stage, carried out substantial litigation for them, and they were fully aware of the true costs of litigation. They were also aware of the fact that litigation is not just a one-way bet. It can go wrong. It can be very expensive indeed."

254. Mr Sorrell did not record either having given any advice to Mr Gubay or Mr Gubay having given any instructions. His evidence was that he had only infrequent "fairly random" direct contact with Mr Gubay. For example, the attendance note of a meeting with Mr Willers and Mr Gubay on 22 September 2004 about the Aqua case states only that the purpose of the meeting was to update Mr Gubay and that the meeting took about an hour. Mr Sorrell recalled that once Mr Gubay rang Mr Sorrell and asked him "What's happened to the Adamses? What's happening to the Adamses?". This seems to me not only to confirm that Mr Sorrell was not himself keeping Mr Gubay informed about progress but that neither was Mr Willers. Those are not questions that someone with a very detailed involvement with every step of the case is likely to ask. Mr Sorrell also accepted that he did not personally explain the existence of the indemnities or of the scale of the costs that had been incurred by August 2009 to Mr Gubay.

255. As to what Mr Willers told Mr Gubay about the effect of the liquidation on the prospects for Langstone's claim against Aqua, Mr Willers accepts that at the time both he and Mr Gubay believed that creditors would be paid in full. He told Mr Gubay that he would get his costs back if the claim was successful. Both he and Mr Gubay had in mind the great success that has resulted from the litigation against the Claytons. At no point does Mr Willers say that he or Mr Sorrell explained to Mr Gubay the differences between the Clayton case or the fact that success in one piece of litigation does not necessarily mean that similar litigation will be equally successful.

256. Mr Willers does not say that at any point he warned Mr Gubay that the costs incurred were becoming so disproportionate that even if the Aqua Litigation was successful the recoverable costs might be substantially less than the liability to Mr Haskew. Mr Willers said in cross examination that he would check with Mr Gubay when there was an increase in the solicitors' hourly rates but did not check with him whether he was content to keep funding the litigation:

> "Q Yes, don't you think checking to see what work had been done -- I mean, you know, 400 hours is very different to 200 hours, so one needs to have some idea of how many hours are going to be spent, doesn't one?
>
> A. No, because most litigation is very difficult to -- unless you work on the basis, I don't know, I've never been in a business that was worked on the basis of saying, "Well you can only spend this much on a litigation job". And --
>
> Q. So it was your view then that cost control is simply not possible, was not possible, in litigation as you experienced it?
>
> A. Well, I'm not saying that it's not possible. What I'm saying is it was never something that the papers that I inherited when I joined Mr Gubay, all the live cases which were going on then, had any of that in it. So it wasn't something -- and he never asked me for a budget for anything as regards to litigation, so we didn't do that. ..."

257. To set against this evidence as to Mr Willers' and Mr Sorrell's assumptions about what Mr Gubay knew and understood about the costs position is the evidence of Mr Barr and Ms Twizell about Mr Gubay's reaction when they explained to him the nature of the Wrongful Trading Proceedings and the scale of the costs that had been incurred: see paragraph 101 above. In her more recent witness statement Ms Twizell does not resile from her description of Mr Gubay as confused and shocked though she makes the point that obviously she cannot know what was going through his mind at the time. She says that Mr Gubay's concern in particular at the meeting was that he had not realised that he might not recover the costs that had been spent. Mr Willers' evidence in cross-examination was that the shock that Mr Gubay expressed to Ms Twizell was manufactured and a charade aimed at generating a significant claim against Mr Willers. I reject that evidence as inherently implausible and because there is no reason to suppose that Mr Gubay did realise that there were likely to be substantial irrecoverable costs. There is no evidence that anyone told him that – the evidence is only that he and Mr Willers had in mind the Clayton case in which all the costs had been recovered.

258. I accept that at the trial of the Langstone Action, Mr Gubay's denials that he had any involvement in the conduct of the Aqua Litigation may well have been disproved. For example, I consider it very unlikely that Mr Gubay's evidence in the Langstone Action that he did not know about the indemnity provided to Mr Haskew would have been accepted. But I consider it very unlikely that Mr Willers would have been able to show that any instructions or commands from Mr Gubay negated Mr Willers' and Mr Sorrell's responsibility for the apparently poor state of the Wrongful Trading Proceedings by July 2009. For example:

    a. It may well be that the appointment of Mr Hine to be the expert was discussed with Mr Gubay and approved by him. I accept that his hourly rate may have been approved by Mr Gubay. But it is not the appointment itself that is complained of in the Langstone Action. It cannot be suggested that Mr Willers discussed with Mr Gubay and that Mr Gubay approved the fact that (i) Mr Hine's evidence was directed at the wrong legal test for assessing quantum; (ii) his evidence was expressed in such partial terms that counsel advised that it was almost bound to be

rejected by the judge. Yet those are the concerns that Alaric Watson raised and which prompted the settlement of the proceedings.

b. It may well be that Mr Willers told Mr Gubay that Mr Booth QC had advised that it was worth continuing with the claim and that the settlement offers from the Adamses should be rejected. Mr Gubay may have agreed that the settlement offers should be rejected. That does not meet the point made in the Langstone Action that Mr Booth was advising Mr Haskew who, because of the indemnity from Langstone, was at no risk of having to pay his own legal fees or the Adamses' legal fees or of not recovering his own fees. There was no separate advice to Langstone which bore all the risk of the fact that the costs had already outstripped the value of the whole claim let alone the value of the judgment debt. Mr Willers' response is that there was no reason to believe that the Adamses would not end up paying all Mr Haskew's legal costs. But any experienced litigator would have realised that it would only take a small reduction of the costs incurred on detailed assessment for the unrecovered costs to exceed the fraction of £143,539 actually recoverable in the liquidation.

259. Any trial of the Langstone Action would inevitably have unpacked the very general factual averments on which Mr Willers' defence that Mr Gubay was kept informed and approved of every step taken in the Aqua Litigation was based. Once one considers in detail what Langstone's complaints were in the claim, I find that there was objectively viewed, reasonable and probable cause for bringing the action. I am satisfied that the board of directors of Langstone and Mr Gubay subjectively believed that to be the case. In so far as it is ever possible to foresee what will happen at the outset of litigation, it is impossible to say at the time that the Langstone Action was brought that Mr Willers had a strong defence based on Mr Gubay's detailed knowledge and appreciation of the risks and costs involved in the Aqua Litigation.

(c) Was the Aqua Litigation an uncommercial vendetta pursued by Mr Gubay to punish the Adamses?

260. Another argument put forward by Mr Willers is that Mr Gubay knew that he had instructed Mr Willers to pursue the Wrongful Trading Proceedings against the Adamses even though it could result in a large amount of irrecoverable costs because he was offended or angry with them about certain matters. Mr Gubay wanted to pursue this uncommercial litigation and therefore that his prosecution of the Langstone Action had no reasonable and probable cause.

261. According to Mr Willers the origin of Mr Gubay's desire for revenge against the Adamses was threefold. First, Mr Gubay was upset that the Adamses refused to provide a collateral warranty from Holdings to guarantee the liabilities of Aqua for the work carried out at the Total Fitness premises. Aqua was an insubstantial wholly-owned subsidiary and its continued viability was dependent on Holdings deciding what monies to leave in the company. Aqua was therefore at risk of being denuded of cash if customers like Total Fitness brought claims for defective goods. Secondly Mr Willers says that Mr Gubay was furious when Aqua held up the progress of time critical works on a particular development site until they were paid about £69,000 directly by the Anglo Group for work which they had undertaken as a subcontractor, and for which Anglo had already paid the main contractor. Thirdly Mr Willers says Mr Gubay took offence at a crude remark that Mr Adams made when the two men met on 3 December 1998 to discuss whether Adams Holdings was prepared to guarantee Aqua work.

262. I find that these three matters have loomed much larger in Mr Willers' recollection of events than they could possibly have done in Mr Gubay's mind at the time. Their effect would have been dwarfed by the actual problems with the swimming pools and the swimming pool covers - a straightforward commercial dispute. As far as the crude remark is concerned, several witnesses said how much Mr Gubay loved spending time on the building sites "helping" the construction workers with their manual labour. It seems to me very unlikely that he was so shocked by Mr Adams' mild vulgarity that his disgust would still be driving his conduct so many years later. Mr Willers' evidence in these proceedings about the crude remark is in marked contrast to his evidence in earlier proceedings. Then he described the 3 December meeting as a "full and frank discussion" at which Mr Gubay and Mr Adams appeared to get on well together. That evidence referred to the crude comment but without suggesting that it caused any particular upset. Mr Gubay wrote to Mr Adams on 7 December 1998 saying that the discussions the two men had had were very useful and he was "sure that things will move on from strength to strength".

263. As to the question of the guarantee from Holdings, the contemporary documents show that no guarantee was given by Holdings when the contractual documents were concluded between Aqua and Langstone. Mr Adams unsurprisingly was not prepared retrospectively to cause Holdings to enter into a guarantee which had not been included in the original bargain. I do not see how Mr Gubay as an astute businessman himself could really blame Mr Adams for that. As to the double payment, that was a matter for Total Fitness to sort out with the main contractor to ensure that they got a credit for what they paid Aqua directly. Squabbles with contractors and sub-contractors, irritating though they are, must occur dozens of times over the course of a major development project, and Mr Gubay was involved in very many major projects across the world over very many years. I do not believe that Mr Gubay would have been so successful as a property developer or investor if he had allowed himself to be distracted by a double payment of £69,000 into pursuing a vendetta costing hundreds of thousands of pounds when there was no commercial reason to do so.

264. I described earlier the rather aggressive tactics adopted by Mr Willers against the Adamses in the pre-action period. I have accepted that they may well have been taken with the approval or even on the instruction of Mr Gubay as a cheap way of trying to bring the Adamses into line without the need to resort to court proceedings. It is a wholly different thing to say that Mr Gubay was prepared to spend so much money on litigation in response to these supposed slights.

265. Further, the picture that Mr Sorrell and Mr Willers tried to portray of Mr Gubay's obsessive determination to destroy the Adamses does not fit with the way the Aqua Litigation was conducted from start to finish. For all Mr Sorrell's desire to make life difficult for the Adamses at various points and to make "stinging" applications for payment by the Adamses of money thrown away, no such applications were made. On the contrary, the section 236 application was a failure with the application being dismissed by District Judge Khan and Langstone having to pay the Adamses costs including £15,000 interim payment: see paragraph 81 above. Yet there is no real evidence of Mr Gubay reacting to this in the manner that one would expect if he was closely involved in pushing the case forward himself. I do not accept Mr Willers' explanation of this that Mr Gubay was never concerned with interim failures if there was a good prospect of succeeding in the case at the end.

266. There were many months, if not years, that went past with nothing happening in the Aqua Litigation, leading to the frustration expressed by District Judge Khan about the lack of

progress. Again, I do not see that that would have been allowed to happen if Mr Gubay had been fully involved in waging these proceedings as a vendetta against the Adamses. Mr Sorrell was asked in cross examination about the long delays in the progress of the litigation. He could not remember why there had been such long delays. He had no recollection of Mr Gubay phoning him to find out what was happening or chasing him to make faster progress. There are some references in the documents to "vendetta litigation" by Mr Sorrell after August 2009 when his own conduct had come under critical scrutiny. I regard these as rather self-serving excuses for the uncomfortable situation he found himself in at the time.

(d) Was the Aqua Litigation designed to demonstrate to other suppliers that the Anglo Group was an implacable litigator?

267. Paragraph 46 of the Defence in the Langstone Action pleads that Mr Gubay's object in bringing the Aqua Litigation through Mr Haskew was "not merely to recover money for the Claimant but primarily to deter others from seeking to avoid their obligations to Mr Gubay and the companies and to retain and reinforce his reputation as an aggressive and exhaustive litigator, who was not to be trifled with."

268. Mr Gubay's short answer to this point if the Langstone Action had been pursued would no doubt have been that as an exercise in signalling to suppliers that they should not trifle with Mr Gubay, the Aqua Litigation was a failure. Far from giving the Adamses a bloody nose, it was Langstone that came out much the worse because the case had, according to Mr Watson, not been got ready for trial in time. At no point did Mr Willers say that he alerted Mr Gubay to the risk that the Aqua Litigation was reaching a tipping point after which Mr Gubay was likely to end up paying all the Adamses' costs, sending entirely the wrong message to the market.

(e) The compromise of the Aqua Litigation

269. Mr Willers' view remains that Mr Gubay decided to throw away a perfectly good claim against the Adamses in order to generate a loss for Langstone that would then form the basis of the Langstone Action against Mr Willers or which would discourage Mr Willers from pursuing his counterclaim in the Isle of Man Proceedings. Any suspicions Mr Willers might have had on that score should have been entirely dispelled when he saw the email from Alaric Watson. Anyone reading that email would recognise that the decision to discontinue was the only reasonable response to the position described by Mr Watson.

270. Further, the evidence of Ms Twizell in the Langstone Action was that Mr Willers' allegation that the Aqua Litigation was deliberately abandoned to engineer a claim by Langstone against Mr Willers is entirely untrue. She was closely involved in the settlement and attests that it was compromised on the best possible terms after she had received advice from specialist insolvency counsel and after two months of negotiation with the respondents. She says that Mr Gubay had no role in determining whether the Aqua Litigation should be settled or the terms of the settlement. She firmly refutes the suggestion that Mr Gubay instructed her to deal with the proceedings in any way. I accept that evidence which is consistent with the advice from Mr Watson which I have described.

271. I reject the suggestion that Mr Gubay indirectly caused the collapse of the Aqua Litigation by dismissing Mr Willers so that he would not be prepared to give evidence in the Wrongful Trading Proceedings and by withdrawing instructions from Pannone. Mr Sorrell's references to that as being the problem are again, in my judgment, self-serving; this is not one of the problems highlighted by Mr Watson. Mr Willers' evidence is that no one asked him whether he would still be willing to give evidence for Langstone in the Aqua

Litigation and he said that he would have been. In any event the withdrawal of instructions from Pannone was inevitable once Mr Sorrell had put forward the suggestion of going behind Mr Haskew's back to broker a side deal with the Adamses.

272. The question of what inferences can be drawn from the discontinuance of the Langstone Action is considered later in the context of the claim for abuse of process.

(f) The payment of the indemnity by another company in the Anglo Group

273. Finally, Mr Willers argues that Mr Gubay knew that the Langstone Action was misconceived because the payment made to Mr Haskew pursuant to the indemnity for the Aqua Litigation was made by Anglo International Holdings Ltd and not by Langstone. This was a point that had been made in paragraph 54 of Langstone's Amended Particulars of Claim in the Langstone Action. There it was averred that Mr Willers had arranged for the £1,950,000 liability "to be paid on behalf of Langstone by Anglo International which had lent the monies to the Claimant". It was pleaded that "Repayment has been demanded by Anglo International Holdings Ltd by written demand dated 24 May 2010". The Executors' Defence in the present proceedings states at paragraph 59(c) that Langstone is indebted to Anglo International for the sums and has accordingly suffered a loss.

274. In the Reply in these proceedings, Mr Willers counters that it was Mr Gubay who decided that the liability to Mr Haskew should be met by Anglo International and he goes on:

> "It appears that at about the time the Langstone proceedings were issued the purported inter-company accounting position was changed so that the accounts appeared to show a liability of Langstone to Anglo International Holdings Limited. It will be Mr Willers' case that this was done for the purpose of proceedings against him".

275. I do not accept that this was such a clear point in Mr Willers' favour that it enables the court to conclude that it removed any reasonable and probable cause in bringing the Langstone Action. There is no doubt that Langstone was the counterparty to the indemnity with Mr Haskew. The liability to pay the £1,950,000 was the liability of Langstone. Mr Gubay and Mr Willers were well aware of how intra-group loans work, as shown by their concerns over the funding by Holdings of Aqua. The fact that the money was lent to Langstone by another company in the Group, thereby creating a corresponding liability under the intra-group loan is not an unusual or surprising turn of events. It would be more surprising for Anglo International simply to gift Langstone the money thereby removing any loss suffered by Langstone.

(g) Conclusion on reasonable and probable cause

276. There is no doubt that the Langstone Action, had it proceeded to trial, would have been complicated both legally and factually. This malicious prosecution action is not supposed to be a re-enactment of the battle that might have been, but was not in the event fought between Langstone and Mr Willers. In my judgment, nothing has emerged in the trial before me to show that Mr Willers had a strong answer to the fundamental question raised by the Langstone Action, namely how did it come about that at the time when Mr Willers was in house counsel and a director of Langstone, the company spent £1,950,000 pursuing a debt of at most £143,539? In my judgment there was a clear reasonable and probable cause underlying the Langstone Action.

277. I now return to the unanswered question in the previous section of this judgment about whether Mr Gubay was the prosecutor of the Langstone Action because he withheld from the nominal prosecutor key information that would have affected their decision. I find that that part of Mr Willers' case is not made out. Even if Mr Gubay had laid his cards on the table and set out a version of events similar to that described in Mr Willers' evidence I consider that Langstone would still have brought the Langstone Action. The company's pleaded case was that Mr Willers' fiduciary duties towards Langstone were not fulfilled by Mr Willers simply implementing the instructions or demands of a third party without considering whether the company derived any benefit from the course of conduct Mr Gubay wanted to pursue. Langstone may well have concluded that they were entitled to expect Mr Willers to make good at least some of the loss suffered, even if the Part 20 claim was successful too.

IX. MALICE

278. It is clear on the authorities that malice is a separate element from absence of reasonable and probable cause though the two are linked. The requirement of malice in the tort of malicious prosecution was considered by the Privy Council in *Williamson v The Attorney General of Trinidad and Tobago* [2014] UKPC 29. Lord Kerr, delivering the judgment of the Council said that a good working definition of what is required for proof of malice in the criminal context is to be found in *A v NSW* [2007] HCA 10, 230 CLR 500 at [91]. To constitute malice, the dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law – an illegitimate or oblique motive. That improper purpose must be the sole or dominant purpose actuating the prosecutor. Lord Kerr said at [12]: (omitting citation of authorities)

> "An improper and wrongful motive lies at the heart of the tort, therefore. It must be the driving force behind the prosecution. In other words it has to be shown that the prosecutor's motive is for a purpose other than bringing a person to justice: ... The wrongful motive involves an intention to manipulate or abuse the legal system ... Proving malice is a "high hurdle" for the claimant to pass. ..."

279. Lord Kerr also stated that malice can be inferred from a lack of reasonable and probable cause, but a finding of malice is always dependent on the facts of the individual case. It is for the tribunal of fact to make the finding according to its assessment of the evidence. In *Willers UKSC* Lord Toulson noted that no argument had been addressed to the Court on the issue of malice and his comments on the requirement were obiter. He stated that it is well established that the requirements of absence of reasonable and probable cause and malice are separate requirements though they may be entwined: [54]. As applied to malicious prosecution "it requires the claimant to prove that the defendant deliberately misused the process of the court.":

> "The most obvious case is where the claimant can prove that the defendant brought the proceedings in the knowledge that they were without foundation (...). But the authorities show that there may be other instances of abuse. A person, for example, may be indifferent whether the allegation is supportable and may bring the proceedings, not for the bona fide purpose of trying that issue, but to secure some extraneous benefit to which he has no colour of a right. The critical feature which has to be proved is

> that the proceedings instituted by the defendant were not a bona fide use of the court's process. In the *Crawford* case [*sc. Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2014] AC 366] Mr Delessio knew that there was no proper basis for making allegations of fraud against Mr Paterson, but he did so in order to destroy Mr Paterson's business and reputation.

280. It is difficult to transpose the element of malice or improper motive from the criminal case law to the civil context. Criminal prosecutions are brought in the public interest by an impartial Government agency which has no private interest in the outcome of the proceedings. In contrast, a claimant in a civil action does not need to show any reason why he is bringing the claim other than the desire to recover money to which he is entitled as a matter of law. The court does not generally inquire into whether the motive of a claimant bringing an action is proper or improper. Every judge of the Business & Property Courts has experience of presiding over cases arising out of the unreasoning hatred that is generated when former close friends and business partners fall out. Indeed, part of the function of the judicial process is to provide a non-violent course through which such bitter enmity can be channelled and, one hopes, resolved to some extent by the cathartic process of the trial and judgment. Another difference is that the CPS has only a limited discretion not to pursue a prosecution where there is a good prospect of a conviction. An individual claimant in a civil case (subject to any fiduciary duties as a director, liquidator or executor) has an unfettered discretion to forbear from pursuing a valuable civil claim if he does not want to upset a continuing good relationship with the potential defendant or simply if he does not want the hassle of court proceedings.

281. In the present case, the evidence undoubtedly shows that in the aftermath of Mr Willers' dismissal, Mr Gubay did become obsessed with what he saw as Mr Willers' betrayal of him. He suspected that Mr Willers and Mr Sorrell had been in cahoots to steal from him, possibly by inflating the invoices for legal fees paid during the Aqua Litigation. Mr Gubay then saw all the questions raised about the CAV invoices and the fate of the £139,941 through the prism of that suspicion. Mr Gubay resorted to several underhand and reprehensible methods of attacking Mr Willers without any justification. During the course of the trial many examples were relied on by Mr Willers and were not seriously disputed by the Executors. These included Mr Barr's success in placing caveats on the Willers' home in the Isle of Man, Mr Gubay' instigation of attempts to prevent the payment of Mr Willers' pension, steps taken, ultimately successful, to obtain the bank statements relating to Mr Willers' private account with Celtic Bank and engaging a private detective who probably used unlawful methods to obtain Mr Willers' phone records.

282. Mr Styles also gives evidence tending to support Mr Willers' case that Mr Gubay had become obsessed with achieving revenge against him. He describes his first meeting with Mr Gubay ostensibly to interview Mr Styles for the role of Chief Financial Officer in December 2009. During that interview Mr Styles says that Mr Gubay discussed in detail the works carried out on Mr Willers' home and complained about the supposedly extravagant nature of those works. He says that Mr Gubay asked him to investigate the payments made to Wacks Caller and Pannone LLP to see if any money had been extracted and shared between Mr Sorrell and Mr Willers. Mr Styles was also provided with the records of Mr Willers' personal account at Celtic Bank for the period 2000 to 2009 to check for any unusual or unauthorised payments. Mr Styles says that he never found anything to

show that Mr Willers had acted dishonestly despite Mr Gubay's conviction that Mr Willers had deceived him.

283. Ms Twizell describes Mr Gubay's desire for revenge against Mr Willers and says that a major reason for her resigning in April 2010 was that she no longer wished to be "used as the instrument through which Mr Gubay brought the Langstone Action against Mr Willers". She describes Mr Gubay as being preoccupied with the legal cases against Mr Willers to the extent that she felt professionally compromised and dreaded going into the office.

284. Mr Page accepted, rightly in my view, that spite and hatred on the part of Mr Gubay towards Mr Willers was not enough to constitute malice for this purpose. No extraneous motivation for the bringing of the Langstone Action has really been put forward convincingly. The pleaded case in the Particulars of Claim states that Mr Willers relies on the following factors to establish malice:

a. the lack of reasonable and probable cause;

b. that Mr Gubay appears to have lied to his own legal advisers in relation to his own role in controlling the Anglo Group and directing the Langstone Action;

c. Mr Gubay's propensity to try to destroy anyone with whom he fell out;

d. Mr Gubay's mistaken belief that he had been defrauded by Mr Willers a trusted subordinate for 23 years;

e. the actions taken by Mr Gubay against Mr Willers after his dismissal demonstrate that Mr Gubay had developed a paranoid obsession with Mr Willers.

285. I have already concluded that there was reasonable and probable cause underlying the Langstone Action. As regards Mr Gubay's alleged lies to his legal team, the evidence of Ms Twizell and Mr Barr is that they were dealing directly with the external legal advisers for the Langstone Action. Although they were not privy to conversations between Mr Willers and Mr Gubay, they had both worked in the Anglo Group for some years. They were able to describe to those advisers Mr Gubay's role in the Group if that had been thought relevant. I accept that on occasions Mr Gubay pursued vendettas against people with whom he fell out; though as I have described, many recipients of bollockings remained close friends and colleagues.

286. In closing argument there was a suggestion that the motivation for bringing the Langstone Action was to dissuade Mr Willers from pursuing his Counterclaim against Mr Gubay in the Isle of Man Proceedings. The Defence and Counterclaim in the Isle of Man Proceedings was issued on 13 November 2009 and the letter before action in the Langstone Action was sent to Mr Willers on 17 February 2010. Neither Ms Twizell nor Mr Barr refers to this as being the motivation behind the bringing of the claim and since there has been no disclosure from Langstone there is no evidence to support this theory.

287. I have found that Mr Gubay did strongly suspect, wrongly, that Mr Willers had been cheating him and set in train a range of spiteful actions which must have been very distressing and infuriating for Mr and Mrs Willers. My conclusion on the issue of malice is that the question of what constitutes a proper or improper motive for the bringing of an unsuccessful civil claim is a question that the Supreme Court's decision in *Willers UKSC* raises but does not answer. It is perhaps even more entwined with the issue of lack of reasonable and probable cause where the earlier prosecution is of a civil claim than where it is of a criminal case. As I have found that Mr Gubay was not in fact the prosecutor of the Langstone Action and that there was reasonable and probable cause for that claim, I

will leave to a future case the question whether Mr Gubay's conduct amounts to malice for the purpose of this tort.

X. ABUSE OF PROCESS

288. It was common ground between the parties that the elements of the tort of abuse of process are set out in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17. Lord Wilson JSC said at [62] to [63] that what distinguishes the tort of abuse of process from that of malicious prosecution is that abuse of process does not require that the action should have been brought without reasonable cause nor that it was terminated in favour of the claimant. It does require 'a purpose not within the scope of the action', that is a 'collateral' or 'improper' purpose. Lord Wilson cited a helpful metaphor suggested by Isaacs J in the High Court of Australia in *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35, 91 where he said:

> "If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim on which the court is asked to adjudicate they are regarded as an abuse of process for this purpose."

289. Lord Wilson went on:

> "The metaphor aids resolution of the conundrum raised by the example of a claimant who intends that the result of the action will be the economic downfall of the defendant who may be a business rival or just an enemy. If the claimant's intention is that the result of victory in the action will be the defendant's downfall, then his purpose is not improper: for it is nothing other than to achieve victory in the action, with all such consequences as may flow from it. If, on the other hand, his intention is to secure the defendant's downfall – or some other disadvantage to the defendant or advantage to himself – by use of the proceedings otherwise than for the purpose for which they are designed, then his purpose is improper. ...
>
> 64. But the settlement of an action is often reached upon terms which, had it proceeded, the court could not have ordered; and not infrequently claimants reasonably initiate actions in the hope that some such settlement might eventuate. *In Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 Bridge LJ neatly allowed for this possibility in suggesting, at p 503, that "when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance". Then, however, he proceeded to notice what he described as "a difficult area", namely whether a claimant was guilty of abuse if behind his action lay two purposes – one legitimate and one improper. He had "very much doubt" whether such would be an abuse."

290. Mr Willers argues that bringing proceedings to impose a burden on the defendant is an abuse and it follows from this that if the court concludes that Mr Gubay never intended the

Langstone Action to go to trial, and brought it to impose a financial burden on Mr Willers, then he is liable for the tort. One must be careful about drawing the line between legitimate and illegitimate civil litigation tactics. It cannot be the case that every wish on the part of a claimant to impose a financial burden on a defendant can be regarded as improper – otherwise all litigation would be subject to attack. A claim form may be issued in the civil courts by a claimant who believes he has a good case and hopes that the issuance of proceedings will prompt the defendant to pay the debt or at least come to the negotiating table. The claimant may realise that he cannot afford the time or money involved in pursuing the case to trial if service of the claim form does not itself quickly do the trick. To issue a civil claim in that situation is generally not regarded as reprehensible behaviour on the part of the claimant, nor would it be improper for a professional adviser to suggest such a course of action, provided of course that there is an arguable claim. Is there anything more that Mr Willers can point to here?

(a) Mr Gubay's unwillingness to give evidence in the Isle of Man Proceedings

291. In his closing submissions Mr Willers puts forward a number of factors as showing that Mr Gubay never intended the Langstone Action to come to trial. The first is that Mr Gubay showed in the Isle of Man Proceedings that he was not prepared to submit to cross-examination. This submission is made on the basis that Mr Willers is convinced that Mr Gubay's assertions before Deemster Corlett that he was too ill to attend were a charade. I have read the judgment of Deemster Corlett which forms part of the transcript of proceedings held on 15 September 2014 in the Douglas Court. Mr Wannenburgh, appearing for Mr Willers did not suggest that Mr Gubay's symptoms were a sham or a charade. The issue before Deemster Corlett was whether the medical evidence showed that Mr Gubay was at risk of physical deterioration as a result of giving evidence and whether there was anything more wrong with Mr Gubay than heightened anxiety and emotional upset caused by the proceedings. The Deemster concluded that there was not. There is nothing in that judgment to suggest that Mr Gubay was exaggerating his symptoms or pretending to have more memory loss than he in fact had. On the contrary, the Deemster said that during the short cross examination that did take place, Mr Gubay had remembered certain things. Mr Gubay never submitted in the Isle of Man Proceedings that his inability to give evidence should halt the claim itself.

292. The issue about Mr Gubay giving evidence in the Isle of Man arose in April 2014, several years after the Langstone Action was commenced in May 2010. It is implausible to suggest that Mr Gubay planned in May 2010 that he would resist giving evidence four years later in the Isle of Man Proceedings. I do not consider that what happened in the Isle of Man Proceedings has any relevance to the purpose in bringing the Langstone Action.

(b) The fear of an HMRC investigation into the tax status of the Anglo Group

293. The second factor on which Mr Willers relies to show that Mr Gubay never intended to bring the Langstone Action to trial was that Mr Gubay would be too concerned that the trial would reveal tax evasion by the Anglo Group on a massive scale. This was because it was Mr Willers' case that Mr Gubay had continued to direct the business of the Isle of Man resident companies in the Anglo Group throughout the period when Mr Gubay was himself resident in Ireland and England between 1996 and 2006. Mr Willers contends that the management and control of the Isle of Man companies was in fact Ireland or England making them subject to Irish or UK tax.

294. In my judgment Mr Willers has consistently overestimated the power of this weapon he has tried to deploy against Mr Gubay and then against the Executors since he was first

dismissed in the summer of 2009. Mr Willers raised the issue of the tax residence of the Anglo Group companies in early March 2011. By that date the Isle of Man Proceedings were well underway with Mr Willers having served his Counterclaim seeking payment of sums he alleged Mr Gubay had promised to him. The Langstone Action had also been started by this time and Mr Willers had, in August 2010 brought his Part 20 proceedings against Mr Gubay.

295. In a letter dated 4 March 2011 to Mr Barr, then managing director of Derwent Holdings, Mr Willers referred to his detailed knowledge of Mr Gubay's business operations over more than 20 years. He wrote that he had "serious cause for concern" that the companies of which he had been a director might not properly have complied with their taxation obligations throughout that period. He said that it was appropriate for his concerns to be raised with the relevant tax authorities in England and Ireland for their consideration. He suggested that Mr Nugent arrange meetings with the relevant tax authorities, failing which he reserved the right to draw the letter to the attention of the English and Irish tax authorities if appropriate. The response to this letter came the same day from Mr Styles, the Finance Director of Anglo International Holdings. He assured Mr Willers that he and his fellow directors took Mr Willers' concerns very seriously, particularly if Mr Willers was suggesting there had been deliberate underreporting of profits. Mr Styles said that the matter had been reported to the Group's advisers and they wanted to meet Mr Willers to understand what aspects of the companies' tax affairs had not been dealt with correctly and who was responsible for the failure. He invited Mr Willers to come to a meeting at Anglo's offices within the following two weeks. Mr Willers did not respond by arranging such a meeting but wrote to Mr Styles on 27 March 2011 saying that during the 23 years he worked for Mr Gubay, "Mr Gubay had and exercised full mind and management control over all the companies of which [he] was director". Mr Styles wrote again asking Mr Willers to provide whatever information he had about the companies' failures or past shortfalls in compliance. Again, he invited Mr Willers to give dates when he was available to meet. Mr Willers wrote on 31 March 2011 saying that he was not prepared to meet or to provide any information.

296. Mr Willers never provided any information or went to a meeting to raise his concerns. My understanding is that Mr Willers has never taken the matter up with HMRC either in 2011 or since then. It is not difficult to see why. In cross-examination, Mr Mitchell took Mr Willers through the many occasions on which he had, in his capacity as director of the relevant companies, given written assurances to various people that the management and control of the Isle of Man companies was in the Isle of Man. For example, in January 2002, Mr Nugent wrote to Mr Willers and Mr Peers saying that he was submitting UK tax returns for a number of companies including Anglo International Holdings Ltd. He told them that it was "important to be very clear" about the management and control of the Anglo Group companies for tax purposes. It was therefore vital, Mr Nugent said, that Mr Willers let him know as a matter of urgency if he thought that any of the companies may be managed and controlled in the UK; if Mr Willers thought that it was necessary for Mr Nugent to check this with other directors of the companies; or if Mr Willers was not sure or felt that he did not have a proper understanding of the concept of management and control for tax purposes. Mr Willers wrote back to Mr Nugent on 31 January 2002 saying:

> "The only companies that are managed and controlled in the UK are those that have been incorporated in the UK. I confirm that all of the companies you list are not resident in the UK and they never have been.

> I confirm that I have a proper understanding of the concept of management and control for both UK and/or Irish tax purposes and the only companies that fall within those jurisdictions are those that are actually incorporated in those jurisdictions.
>
> ... all of the companies continued to be managed and controlled only by the resident directors (i.e. Peter Willers and Christopher S Barr)"

297. When he was taken to this email in cross-examination, Mr Willers had no recollection of having written it though I find he certainly did.

298. Similarly in June 2004, Mr Nugent wrote to Mr Willers about a query that had been raised by Deloittes who were carrying out due diligence for a potential purchaser of the Total Fitness group. The question concerned a company called Centre Operators Ltd which managed the fitness centres in Ireland but was said to be tax resident in the Isle of Man. Deloittes sought reassurance that the company was indeed tax resident in the Isle of Man. Mr Nugent sent Mr Willers a response he had sent to Deloitte following telephone discussions with Mr Willers and Mr Herring. He asked Mr Willers to confirm whether he thought Mr Nugent may have got anything wrong in the letter. That letter sent from Mr Nugent to Deloitte said that having spoken to the directors of the company (that is Mr Willers and Mr Herring) they were quite clear that they believed that COL had not been managed and controlled in the UK. The only place that it could have been managed and controlled from was the Isle of Man. Mr Willers did nothing to contradict this conclusion and did not raise the allegation he now makes that since Mr Gubay was at this time resident in the UK and always controlled every decision in the Group, the information being given to Deloitte was false.

299. I am not considering here whether Mr Willers was knowingly providing false information in 2002 and 2004 and was telling the truth in the witness box or whether the information he gave in 2002 and 2004 was true and his evidence now about the extent of Mr Gubay's control over the businesses now is untrue or at least exaggerated. The point here is rather that if Mr Willers had tried to interest HMRC in launching an investigation to unravel several years' of tax returns submitted by a very large complex business empire he could have presented only his unsubstantiated assertion that Mr Gubay had been managing and controlling the business from the UK. That assertion was contradicted by his own clear statements to the contrary at the relevant time. He would I am sure have been challenged with whether his change of position now had more to do with the bitterness arising from his dismissal from the Anglo Group than from any justified criticism of the tax returns lodged by the Anglo Group companies over the years.

300. When Mr Willers first raised this point in March 2011, Mr Styles called his bluff and Mr Willers backed down. There is no evidence that the worry about Mr Willers contacting HMRC and triggering a tax investigation ever influenced the behaviour of Mr Gubay. Whether this was because Mr Gubay had confidence in the arrangements that Mr Nugent had put in place to withstand any such scrutiny, or because he thought that there was likely to be an investigation at some stage whatever happened, is not clear. This concern did not cause Mr Gubay to concede any part of Mr Willers' claims in the Isle of Man Proceedings, it did not stop him from pursuing the Langstone Action (assuming he did) and it has not stopped the Executors from vigorously defending this action. I do not see any basis for concluding that this fear meant that Mr Gubay never intended the Langstone Action to proceed to trial.

(c) The discontinuance of the Langstone Action

301. The final factor on which Mr Willers relies to establish improper motive is the discontinuance of the Langstone Action. Given that there has been no disclosure by Langstone or any waiver of privilege there is very little evidence about the reasons for Langstone discontinuing the action against Mr Willers. The Executors served under a Civil Evidence Act notice a witness statement of Andrew Whalley lodged in the Langstone Action. Mr Whalley was a solicitor at DWF acting for Langstone. He made his Fourth Witness Statement in response to Mr Willers' application that Langstone pay Mr Willers' costs on the indemnity basis. Mr Whalley describes the unsuccessful mediation that took place in Manchester on 21 March 2013 and a subsequent pre-trial review before Vos J on 27 March 2013. That had resulted in a rather awkward compromise whereby several sections of the witness statements of Mr Sorrell and Mr Grindey were not struck out but ordered to be moved to a separate schedule where they would not be read by the trial judge but would be available if Mr Willers decided he wanted to argue that it had become relevant. Mr Whalley said that this raised "the very real potential for a further lengthy and costly dispute between the parties at trial" concerning the relevance of that evidence.

302. Mr Whalley says therefore that the decision to serve a notice of discontinuance was based on a commercial assessment of Langstone's position as at 28 March 2013 and the impending costs of trial which had crystallised or were about to crystallise. In addition to the failed mediation and the debacle over the sections of the witness statements, Mr Willers had served a witness statement saying that he had no assets from which to satisfy any judgment or order for costs. Mr Whalley states that the decision to discontinue had nothing to do with a reassessment of the merits of the claim. He points out that Mr De Cruz's assertion that Langstone's claim was bound to fail "is directly contradicted by the 100% success fee provided for" in the CFA.

303. Mr Willers argues in the present proceedings that Mr Whalley's assertion that his impecuniosity caused Langstone to discontinue must be untrue. His financial position did not change between the date that the claim was launched and the date of discontinuance. However, everyone in Langstone was aware that Mr Willers had a half share in a substantial residence on the Isle of Man even if he did not have cash from which to pay the damages. The decision to discontinue can equally well be explained by Mr Gubay and the Langstone directors deciding that they did not after all wish to pursue Mr Willers to bankruptcy or force him to sell his home. It is not possible to infer from the discontinuance that there was some improper motive behind the bringing of the Langstone Action.

304. I cannot see any evidence of collateral or improper motive behind the bringing of the Langstone Action. I therefore hold that the abuse of process claim also fails.

XI. LOSS AND DAMAGE

305. As I have found that the facts do not support Mr Willers' claim in either malicious prosecution or abuse of process, I do not need to deal at any length with the many issues between the parties as to the recoverable loss that Mr Willers has suffered. The Particulars of Claim aver that Mr Willers is entitled to (a) damages, including aggravated damages for distress, injury to health and injury to reputation; (b) loss of earnings; and (c) the difference between his liability for costs of the Langstone Action and those costs he received from Langstone following the detailed assessment by Master O'Hare.

(a) Health problems

306. Mr Willers complained of atrial fibrillation which he said had been caused by the distress and prolonged anxiety arising from the length and process of the Langstone Action and the prospect of personal financial ruin. Both sides called medical evidence to give an opinion on Mr Willers' heart condition and whether his symptoms were caused or aggravated by the stress from the Langstone Action. Mr Willers' medical expert was Dr Duncan Dymond MD FRCP FACC FESC Consultant Cardiologist at St Bartholomew's Hospital a position he has held since January 1987. The Executors' medical expert was Professor Roger J C Hall who is Professor of Clinical Cardiology at University of East Anglia, Norwich and Visiting Professor of Cardiology at Imperial College London. Both experts produced reports and then attended a joint meeting on 17 April 2018.

307. As the experts were in substantial agreement as to Mr Willers' condition, neither was called for cross examination. They agreed as follows:

a. Mr Willers has underlying sinus node disease unrelated to the Langstone Action and that he would have developed atrial fibrillation at some time in the future, regardless of the Langstone Action.

b. the fast and irregular heartbeat suffered by Mr Willers probably predated the Langstone Action and was due to the sinus node disease.

c. episodes of atrial fibrillation can be triggered by psychological stress, but they can also occur spontaneously. When there is more than one source of stress then the sources will summate.

d. the episode of atrial fibrillation in May 2010 of which Mr Willers complained could have been either a triggered episode or a spontaneous episode. If it was triggered there were a number of issues which could have triggered it, financial pressures, the breakdown of his relationship with Mr Gubay and litigation including the Langstone Action. They are not able to make a judgment as to the respective contribution to these factors. The most they can say is that the Langstone Action was one of the factors present which was likely to lead to severe psychological stress and to have contributed to the overall stressful situation.

e. even without any stresses present Mr Willers was likely to have developed atrial fibrillation within 6 to 18 months of the episode in May 2010.

f. he would have had episodes of atrial fibrillation and atrial tachycardia because of his underlying sinus node disease even in the absence of the Langstone Action.

g. the implantation of a pacemaker in 2011 was an appropriate treatment for Mr Willers' sinus node disease.

308. In answer to the question whether there any causative link between the Langstone Action and the recurrence of Mr Willers heart problems in 2015, 2017 and 2018 the experts said:

> "... This is a complex matter. They agree that if it was shown that he continued to have significant psychological upset, as a result of the Langstone Action, in 2015, 2017 and 2018, which were 2, 4 and 5 years respectively following the discontinuation of the Langstone Action, then, on the balance of probabilities, it would have played a part as a psychological stressor along with any other stresses present at the time. It is a matter for psychiatric expertise as to whether or not he was suffering significant

> anxiety as a result of the Langstone Action for a significant period after the action was discontinued. If the Court were to find that this was the case then they agreed that the Langstone Action would, on the balance of probabilities, have been a contributor at this stage."

309. Mr Page submitted that to succeed in establishing a claim to injury to health, Mr Willers only has to show that the Langstone Action was a contributing factor not the sole factor in his health problems. But a difficulty which is not mentioned in that passage quoted is that Mr Willers' counterclaim in the Isle of Man Proceedings was running in parallel to the Langstone Action. Mr Willers served his Defence and Counterclaim against Mr Gubay in the Isle of Man Proceedings in November 2009 and the trial took place with 15 days of evidence in March and April 2014. There was then the long pause whilst the question of Mr Gubay continuing to give evidence was resolved. However, according to the chronology attached to the judgment of Deemster Corlett, the case was active throughout 2015 with, for example, the Appeal Division dismissing Mr Willers' application to reopen appeals in April 2015 and medical reports on Mr Gubay's health being ordered and provided. During 2017 the Appeal Division dismissed an appeal brought against a judgment given in November 2016, closing submissions in the case heard in June 2017 and Deemster Corlett's judgment dismissing all Mr Willers' claims in December 2017. The Langstone Action was discontinued in March 2013 and the costs assessment concluded in September 2015. It may well be difficult for a psychiatric expert to say that the episodes some years after those dates were still due to that action rather than due to the stress of the problematic and largely unsuccessful Isle of Man Proceedings Counterclaim.

(b) Loss of earnings

310. Mr Willers' pleaded case is that it was impossible for him to find alternative employment while Langstone's claims against him for breach of duty were unresolved. In his Particulars he claimed loss of earnings for the period from 27 August 2009 to 28 March 2013 of £500,000. He later increased that claim in his Schedule of Loss to a claim for £500,000 per year from May 2010 and continuing.

311. Mr Willers' expert on his employment prospects was Andrew Nicoll of Keith Carter & Associates who are employment consultants. He was asked to address the impact of the Langstone Action on Mr Willers' prospects of finding new employment, whether it was likely that Mr Willers would have found alternative work and what kind of salary he would have been able to expect.

312. Mr Nicoll found that the effect of the Langstone Action on Mr Willers' employment prospects in 2009 to 2013 was twofold. First, defending the Langstone Action required a great deal of time and physical and emotional energy from Mr Willers and therefore limited his ability and inclination to be available for full-time employment. Secondly he considered whether the existence of the Langstone Action alleging serious breaches of fiduciary and contractual duties and dishonesty would have dissuaded any prospective employer from engaging Mr Willers.

313. Mr Nicoll made the obvious point that in so far as Mr Willers' time was taken up by dealing with the interlocutory stages of the Langstone Action he had less time to devote to finding employment and then fulfilling responsibilities of that employment. However, it emerged during his cross-examination that he was not aware that over much of the period 2009 to 2013 Mr Willers was also involved in the very substantial counterclaim he brought against Mr Gubay in the Isle of Man Proceedings. He had to accept therefore that the

Langstone Action might not be entirely to blame for Mr Willers' inability to attend to the matter of finding a new job.

314. As to the likely attitude of prospective employers to the pending Langstone Action, Mr Nicoll's opinion was that being involved in a legal dispute with a former employer is not a bar to finding new employment, but that an alternative employer may regard someone pursuing an acrimonious dispute with caution.

315. Mr Nicoll then considered what kind of work would have been available to Mr Willers if he been able to look for a new position in July 2009. He recounts in some detail how Mr Willers described his responsibilities over the years at Anglo Group when interviewed by Mr Nicoll for the purpose of these proceedings. Mr Nicoll says Mr Willers told him that Mr Gubay generally "set out the big picture" leaving Mr Willers to achieve the outcome and work out how to accomplish and execute the details. Mr Willers told Mr Nicoll that he was a director of many of the companies in the Anglo Group and was a signatory on their bank accounts. He described his experience as ranging across the full range of property development from identifying and acquiring the original opportunity, structuring the means of bringing the venture to life, engaging in working with construction professionals to ensure the project was completed on time to specification and to budget and realising the value through profitable disposal. Mr Willers told Mr Nicoll that had he "not been consistently successful, then he is sure that Mr Gubay would not have continue to employ him or place the level of responsibility in his hands that he did".

316. The Executors' expert witness on employment matters was Barry Haylett a recruitment consultant with North Gate Executive Search. Mr Haylett was an enthusiastic and engaging witness. His expertise was more practical than Mr Nicoll's and he was able to draw on substantial experience over many years of what makes a candidate for a senior executive role attractive or unattractive to an employer. His evidence focused on the hurdles which Mr Willers would have to overcome if Mr Willers had come to Mr Haylett in 2009 asking for help in finding a job. The primary obstacle in Mr Haylett's view was the very severe recession in the construction industry starting at the end of 2008 and continuing until quite recently. His evidence was that it was hard to exaggerate the difficulties facing the industry at that time. There were many senior executives out of work and desperate to find work, many recruitment agents desperate to place candidates and all chasing a much smaller number of vacancies. In such a difficult environment he thought that Mr Willers would fare badly in competition with much more attractive candidates. A further serious hurdle was Mr Willers' age. If he looked for a job outside the Isle of Man, a prospective employer would worry that he would not settle in a new home and might leave after a few months. Mr Willers had no professional qualifications as a chartered surveyor, engineer or accountant so could not be put in charge of a team of people who did have those professional qualifications. Mr Haylett was very firmly of the view that Mr Willers could not hope to be put forward for a mainboard position in a blue-chip company commanding a salary of £500,000 per year. He thought Mr Willers would need to lower his expectations very considerably from that. His advice would be for Mr Willers to focus on consultancy roles with a more substantial legal content and hope, once established in a company, to move into the more property focused sector. My understanding was that the position he arrived at was that Mr Willers' earning potential in 2009 – 2013 was certainly less than £100,000 per year.

317. Mr Haylett also records the description that Mr Willers gave him of his relationship with Mr Gubay. Mr Willers told him that Mr Gubay "was the main decision-maker but wasn't afraid to take on others' ideas if he deemed them to be better than his. Mr Gubay was

appreciative of other perspectives, and encouraged his staff to participate in this way". Mr Haylett, unlike Mr Nicoll, appreciated that Mr Willers in other aspects of this litigation maintained that he took no decisions himself but merely acted as someone there to execute Mr Gubay's instructions. Mr Haylett concludes from this that Mr Willers was not really fitted for a job in which he was required to run a property business or manage a development project if a new employer expected Mr Willers to attend real board meetings and take important decisions himself. He diplomatically describes Mr Willers' property development experience as "relatively peripheral and bespoke to [Anglo Group's] corporate culture, unique reporting structure and the limits on what he says he was permitted to do".

318. The disconnect between Mr Willers' description of his responsibilities when interviewed by Mr Nicoll and Mr Haylett and his description for the purpose of establishing Mr Gubay's autocratic control for other aspects of the case was discussed by Mr Nicoll and Mr Haylett at the joint meeting of the experts. Mr Nicoll made it clear in their discussion that he based his report on the assumption that there was nothing out of the ordinary in Mr Willers' range of responsibilities as a senior executive and board member, albeit that he recognised that Mr Gubay was a powerful personality. What Mr Willers actually did during his employment by the Anglo Group was a question of fact not of expert opinion.

319. There is, in my judgment, a fundamental problem with the quantification of loss of earnings damages in this case which was not really addressed by counsel. If quantification were a live issue, that would be on the basis that I had accepted Mr Willers' evidence that although he had appeared to the outside world as an experienced executive director and in-house counsel for a multi-million pound property development business in fact he had taken few decisions himself; he had signed important returns to HMRC saying that he was exercising management and control of the companies when he knew that to be false; he had committed the company of which he was a director to an open ended indemnity to fund litigation pursued against a supplier as a personal vendetta by a third person. This raises the question of whether the court should, when assessing the likelihood of Mr Willers gaining employment, and the salary he would have been able to command, assume that he would have presented an honest picture of himself to any future employer or that he would have presented himself as having performed for many years the normal functions of a main board director of a large corporate group.

320. On the basis that his employment prospects should be assessed in accordance with the evidence Mr Willers himself gave of his role in the Anglo Group, I would hold that any claim for loss of earnings, in the difficult employment climate prevailing at the time, was speculative and should be quantified at a very modest sum.

(c) Excess costs in the Langstone Action

321. In *Willers UKSC* Lord Toulson considered the claim for the excess of legal expenses over the amount awarded and paid pursuant to Newey J's decision to award costs on the standard rather than the indemnity basis. He said that Newey J's decision was readily understandable:

> "On the other hand, the notion that the costs order made has necessarily made good the injury caused by Mr Gubay's prosecution of the claim is almost certainly a fiction, and the court should try if possible to avoid fictions, especially where they result in substantial injustice. A trial of Mr Willers' claim will of course take up further court time, but that is not a good

> reason for him to have to accept a loss which he puts at over £2m in legal expenses. Expenditure of court time is sometimes the public price of justice. If Langstone's action against Mr Willers had gone to a full trial, and if at the end the judge had refused an application for indemnity costs because he judged that the claim had not been conducted improperly, then to attempt to secure a more favourable costs outcome by bringing an action for malicious prosecution would itself have been objectionable as an abuse of the process of the court, because it would have amounted to a collateral attack on the judge's decision. But those are not the circumstances and I do not regard Mr Willers' claim to recover his excess costs as an abuse of process."

322. Mr Willers' pleaded case claims the difference between the liability for costs incurred by Mr Willers in the Langstone Action and those received on assessment on the basis that the action should never have been prosecuted in the first place and/or that such costs are a foreseeable result of commencing litigation. I have described the outcome of the detailed assessment carried out by Master O'Hare: see paragraph 183, above.

323. It is not possible to arrive at a decision on how much of the excess costs Mr Willers should recover as damages. If the issue were a live one, there would need to be a further hearing to address the legal and factual issues that still arise. Given the analysis of Master O'Hare, it would not be right to assume that Mr Willers can recover everything he has to pay his solicitors De Cruz and his counsel.

324. First, Mr Willers asserts that he is still liable to pay his legal team the success fee at the rate agreed in the CFA rather than the lower uplift allowed by the Master. In explaining how he arrived at the figure of 43%, Master O'Hare emphasised the wide definition of 'success' in the CFA which provided that any partial win triggered the uplift. He concluded that the prospect of success including a part win was 70% which corresponded to a success fee of 43%.

325. Secondly, Master O'Hare dealt with the issue of proportionality in a judgment of 25 November 2014. He held that the costs claimed appeared to him to be disproportionate even having regard to the heavyweight nature of the litigation being conducted. He referred in particular to the costs of £444,000 claimed in respect of witness expenditure. He referred to Mr Willers' original witness statement as having been a massive document of 832 paragraphs. He described it as 'unfit for purpose'. Mr Sorrell's witness statement in the Langstone Action was 1102 paragraphs long, covering 429 pages. Master O'Hare disallowed any costs or counsel's fees which were incurred in drafting Mr Willers' witness statement after the first pre-trial review in February 2013 and also reduced the costs incurred in polishing the original draft. He regarded those as 'costs of putting right mistakes which were made earlier'. However, he did allow the costs of revising Mr Sorrell's witness statement. He disallowed some of counsel's fees. I would need to hear further argument as to whether these sums disallowed by the Master should be recoverable as damages in a malicious prosecution action.

326. Thirdly I would need to hear legal argument on the impact on this head of damage of the fact that Mr Willers accepted a Part 36 offer on costs made by Langstone.

XII. CONCLUSION

327. In conclusion Mr Willers' claim against Mr Gubay's estate fails for the following reasons:

a. Mr Gubay was not the prosecutor of the Langstone Action. Assuming for this purpose that he was the "controlling mind" and/or "directing mind and will" and/or a shadow director of Langstone and other companies in the Anglo Group in respect of some aspects of the business of the company, that is not enough to establish that he was the prosecutor of a civil claim brought by Langstone. The evidence establishes that the directors of Langstone from the time the Langstone Action was brought until it was discontinued were neither forced nor instructed nor misled by Mr Gubay into bringing the action. They formed their independent view about the wisdom of bringing the claim.

b. Langstone and/or Mr Gubay had a genuine and reasonable belief that there was reasonable and probable cause for bringing the Langstone Action. The allegation that Mr Gubay was the controlling mind, etc of Langstone or of Cashtal or of the Group as a whole did not provide a clear defence either as a matter of law or on the facts to the allegations of breach of fiduciary duty by Mr Willers.

328. In the light of those findings, the issues about whether the evidence of Mr Gubay's unjustified enmity towards Mr Willers amounts to malice for the purposes of the tort of malicious prosecution when there is no evidence of collateral purpose does not need to be resolved.

329. The claim in abuse of process also fails as there is no evidence to support an improper motive for the Langstone Action of the kind required according to the applicable case law.

330. In the event the difficult issues about quantification of loss do not arise.

PETER WILLERS

- and –

(1) ELENA JOYCE
(2) JOHN NUGENT
(in substitution for and in their capacity as executors of Albert Gubay, deceased)

ANNEX TO JUDGMENT
ANALYSIS OF STATEMENTS OF CASE IN THE LANGSTONE ACTION

(1) Amended Particulars of Claim dated 8 February 2013 (original dated 26 May 2010)

Section headed Background: paragraphs 2 to 55

1. This section describes the parties and the factual dispute concerning the refusal by Aqua to arrange for its parent company Holdings to guarantee Aqua's contractual obligations to Langstone. It is alleged at [6] that the dispute was conducted on behalf of Langstone by Mr Willers as "in-house" legal Counsel for the Group. The instruction of Mr Sorrell is described but it is alleged that although Mr Sorrell provided external litigation assistance, Mr Willers "coordinated and was integral to the conduct of the litigation".

2. The insolvency of Aqua is pleaded [10] – [15] and the production of the statement of affairs by Mr Haskew. At paragraph [13] it is pleaded that the total sum owed by Aqua to Langstone was assessed as £143,903.52, that being the judgment debt. At paragraph 14 it is pleaded: (the Claimant is Langstone and the Defendant is Mr Willers)

> "In the premises, the total sum that the Claimant was owed by Aqua and, therefore, the maximum amount that it could claim in the insolvency of Aqua even if it could achieve a dividend from Aqua of 100p in the pound was the £143,903.52 Judgment Debt. However, the Defendant knew or ought reasonably to have known that even this sort of recovery was inherently unlikely given that when the Judgment Debt was added to the total unsecured creditors of Aqua identified in the Liquidator's Statement of Affairs, estimated recoveries for unsecured creditors dropped to 22p in the pound (and was still subject to successful recoveries against trade debtors and the costs of the liquidation) – i.e. a recovery for the Claimant of at most £31,510 of the Judgment Debt."

3. The Particulars of Claim state that despite this very limited financial interest in the liquidation of Aqua, Mr Willers made it clear to Mr Sorrell that Langstone was prepared to fund any investigations that Mr Haskew carried out and any litigation against Shaun and David Adams and any of their businesses.

4. The Particulars then plead at [16] to [19] that Mr Willers and Mr Sorrell continued to seek to persuade Mr Haskew to take action against the Adamses. It is pleaded that on 12 February 2002 Mr Haskew wrote to all the creditors informing them that recoveries from trade debtors had been less than had been expected – only £177,961 gross rather than £335,342 as estimated. The balance of funds available was therefore £16,788 all of which

was accountable to the debenture holder HSBC Bank plc. It is alleged in the pleading that thereafter Mr Willers and Mr Sorrell continued to push Mr Haskew to pursue the Adamses making it clear that if he failed to do so, Langstone would take steps to have him removed. It recounts how Mr Haskew obtained advice from Counsel that it was reasonable for Mr Haskew to pursue a section 236 application "especially with a proper indemnity from a major creditor": [17.5].

5. There is then a passage in the Particulars [20] – [24] describing the "serious position of potential conflict of interest" in which Wacks Caller was placed acting for both Mr Haskew and Langstone. It describes how Mr Haskew had raised concerns about this but that he was "met with hostility" from Mr Willers and Mr Sorrell and repeatedly threatened with removal as the office holder: [24.2]. This meant that Mr Sorrell was not in any position to provide independent advice as to the merits of Langstone pursuing the Adamses and he did not do so.

6. The Particulars plead the conclusion of the indemnity and the start of the Wrongful Trading Proceedings, [25] – [35]. They describe the engagement of Mr Hine as the expert accountant and his preliminary analysis in April 2003. The pleading avers that the costs incurred by Bentley Jennison as at 16 April 2003 were £6,885 and anticipated further costs for the next stage of the work were between £6,000 and £6,500. At this stage, it is alleged, Mr Willers had caused or procured Langstone to incur costs vastly exceeding any expected recovery and that if the claims were pursued, they would involve "long and complex litigation [which] would quickly escalate to many more tens (of not hundreds) of thousands of pounds": [29.3].

7. The Particulars then describe Mr Hine's analysis of the potential quantum of the Wrongful Trading Proceedings. They gave a very broad range of possible outcomes of between £252,000 and £425,000 plus a possible unfair preference claim of £96,968: [32].

8. Paragraph 33 of the Particulars of Claim then introduces the potential claim against Aqua brought by Bournemouth Borough Council for £710,000 plus interest. If this had been accepted, it would have had the effect of more than doubling the unsecured creditors of Aqua to around £1.4 million. Paragraph 34 alleges that Mr Willers caused or procured Langstone to indemnify Mr Haskew for all remuneration, expenses and costs including any adverse costs orders made against him in consideration for him agreeing to issue the Wrongful Trading Proceedings. It is alleged that Mr Willers "did not raise the matter of the 2005 Indemnity with the Claimant's Board of Directors and did not have the Board's sanction to the Claimant entering into the 2005 Indemnity.": 34. It is alleged that Mr Willers caused or procured Langstone to enter into the indemnity despite the fact that as he knew or ought reasonably to have known there had been no advice as to whether the Wrongful Trading Proceedings would be of any benefit at all to Langstone. There had been no assessment made of the potential further costs exposure including the fact that even if proceedings were successful a significant level of costs for which Langstone would be liable would be irrecoverable. Even if the recoveries for Aqua from the Wrongful Trading Proceedings were as Mr Haskew claimed it would still translate into a recovery by Langstone in the liquidation of between £71,740 and £107,304, even excluding the Bournemouth claim. This, it was pleaded, was in the context of costs already incurred of about £310,000. The Particulars of Claim went on:

> "35.5 The Defendant as a qualified barrister and experienced businessman who had had experience of a number of pieces of litigation for the Group, knew or ought reasonably to have known that:

> (1) litigation (particularly of the complexity of the Wrongful Trading Proceedings) involved inherent risks both in relation to succeeding in the merits and in relation to recovering costs of that litigation even if successful;
>
> (2) the sort of litigation being contemplated against the Respondents was likely to be long and complicated and would inevitably require considerably greater costs to be incurred in order to take the matter forward which would not all be recoverable even if the proceedings were successful."

9. The Particulars of Claim then turned to the financial position of the Adamses alleging that no assessment had been made as to whether they would be able to meet any judgment plus costs if the Wrongful Trading Proceedings were successful: [35.6].

10. The next section of the Particulars of Claim described the section 236 application [36] – [39] quoting from a letter of Mr Sorrell dated 18 October 2005 to Mr Willers that the extensive new documentation disclosed by the Adamses might mean that Mr Hine would have to rewrite his report with "horrendous financial consequences". By this time Mr Hine's costs were nearly £75,000 and his estimate of the work required to revise his expert report to take into account the new documentation would be a further £35,000-£40,000.

11. The next section, [40] – [47] of the Particulars of Claim, describes the offers of settlement that were made by the Adamses in April and August 2006 and the handling of the Bournemouth claim against Aqua. It quotes from the advice provided by Mr Casement QC to Mr Haskew in which it makes clear that he was not able to give a view on the financial worth of the Adamses and advises that a status enquiry should be commissioned to assess their assets.

12. At [48], the Particulars of Claim allege that it emerged in around May 2008 that the quantum of the Wrongful Trading Proceedings had been calculated on an incorrect basis, because Mr Hine had not followed the decision in *Re Continental Assurance*. It is alleged that the quantum when measured by Mr Hine using the alternative correct approach fell substantially. It is alleged that District Judge Khan determined in February 2008 that the attempt by Mr Haskew to provide particulars of quantum was so inadequate that it constituted a breach of the previous unless order. This decision was however overturned on appeal in April 2009.

13. At [51] the pleading refers to the dismissal of Mr Willers stating "It was only after the departure of the Defendant that the role of the Claimant in the Wrongful Trading Proceedings was properly analysed". It then refers to the revelation of the alleged typographical error in the audit letter response from Pannone as to the potential adverse costs liability.

14. Langstone then pleads that once the claim was analysed after Mr Willers' departure from the Group, "it was concluded that there was no commercial sense in prosecuting the Wrongful Trading Proceedings to trial": [51.3]. It is then pleaded that the Wrongful Trading Proceedings were dismissed by consent orders dated 7 January 2010 and 10 February 2010 in which Mr Haskew agreed to pay the Adamses' costs. It is alleged that Langstone ultimately incurred in excess of £1.3 million inclusive of VAT in respect of its own costs and a further £650,000 (subject to detailed assessment) in respect of the Adamses' costs. The Particulars of Claim then state:

> "53. The Claimant incurred a total costs liability in respect of the Wrongful Trading Proceedings of approximately £1,950,000 in order to recover a sum that could not even theoretically exceed the £143,903.52 Judgment Debt and which was in all likelihood going to be significantly less than this figure.
>
> 54. The Defendant arranged for these costs to be paid on behalf of the Claimant by Anglo International Holdings Ltd, which is another company within the Group, and which lent the monies to the Claimant. Repayment of which has been demanded by Anglo International Holdings limited by written demand dated 24 May 2010.
>
> 55. As a result, it is the Claimant that is ultimately liable for the costs that have been incurred by the Defendant in pursuing and funding the Wrongful Trading Proceedings."

Section headed "Duties owed by the Defendant"

15. In [56] and [57], the Particulars of Claim set out the duties which Mr Willers owed to Langstone as a director including to take reasonable care in supervising and controlling Langstone's affairs, to exercise independent judgement and to take reasonable steps to procure adequate advice for Langstone and in considering any such advice.

Section headed "Breaches of Duties by the Defendant"

16. The Particulars then turn to the allegations of breach of duty by Mr Willers.

17. The first alleged breach is committing Langstone to the Wrongful Trading Proceedings and the indemnity "in circumstances where the likely costs to be expended would be wholly disproportionate to any return likely to be derived by the Claimant".

18. The particulars for that breach allege Mr Willers' failure to seek advice about what was in the best interests of Langstone, or the likely benefit to Langstone given that any recoveries to Aqua fell to benefit all the creditors of Aqua even if funded exclusively by Langstone. The Particulars repeat the comparison between the likely recovery, that is some percentage of £143,903 and the likely irrecoverable costs being many multiples of that sum. It is therefore alleged that Mr Willers:

    a. failed to consider the merits of Langstone pursuing and/or funding the Wrongful Trading Proceedings;

    b. failed to obtain any advice on the merits separate from the advice given from this perspective of Mr Haskew;

    c. failed to consider or obtain advice about the recoveries likely to result from the Wrongful Trading Proceedings;

    d. failed to engage professional advisers to make those assessments;

    e. failed to consider sufficiently or at all or to seek advice about whether the Adamses had sufficient finances to be able to fund any successful award;

    f. failed even after the Mr Haskew produced a list of documents for disclosure running to some 40,000 followed by additional lists running to some 61 pages to reassess the practicalities and merits of proceeding.

19. Further breaches are alleged arising from the failure to seek independent advice instead of relying on Mr Sorrell who was also acting for Mr Haskew and therefore was in a position a very serious potential conflict of interest. The conflict of interest was particularly acute in the context of agreeing the terms of the indemnity "in relation to which the interests of the Liquidator and the Claimant were entirely opposed and yet Mr Sorrell purported to act for both sides": [61.3].

20. It is also alleged that Mr Willers was in breach of his duties by:

    a. causing or procuring Langstone to agree to the indemnity in light of the disparity between the likely liability under that indemnity and the much lower total value of likely recoveries: [63].

    b. failing to discuss any of these matters with the Langstone board of directors or seeking their opinion: [66].

    c. failing to take steps to consult with the other creditors of Aqua in order to reach an agreement in relation to the sharing of the costs of pursuing the litigation for the benefit of all creditors and/or for Langstone to receive preferential returns out of any recoveries from the Wrongful Trading Proceedings given that it was bearing the entire cost and risk of those proceedings: [67 – 68].

21. The second main breach of duties alleged is continuing to commit Langstone to pursuing and funding the Wrongful Trading Proceedings. In other words, the pleaded case is that even if it was not a breach of duty for Mr Willers to cause Langstone to start funding the proceedings, it became a breach of duty for him to continue that commitment by failing to keep the progress of the Wrongful Trading Proceedings under review. Paragraphs [69] – [71] plead Mr Willers' alleged failure to have kept under regular review the progress of the Wrongful Trading Proceedings and the benefits and risks for Langstone from those proceedings in the light particularly of the emergence of the Bournemouth claim; the offers to settle; the mounting expense and complexity of the proceedings with extensive requests for disclosure and further information and other interlocutory hearings and appeals over a number of years; and the realisation that the way Mr Hine had calculated the quantum was wrong because he had been wrongly instructed as to the test to be applied and his reports needed to be rewritten at considerable expense.

Section headed "Loss and Damage to the Claimant"

22. Finally, the loss and damage pleaded in the Particulars of Claim is for

    a. the costs incurred under the indemnity of about £1,950,000 if the claim succeeds on the allegation that the commencement of the Proceedings was a breach of duty; or

    b. some lesser sum if the breach established is in the subsequent continued pursuit of the proceedings after they had been started.

(2) Re-Re-Amended Defence dated 15 February 2013 (original served on 10 August 2010)

23. The first section of the Defence describes the Santon Trust alleging that it was "a defeasible trust which allowed Mr Gubay total effective control over the trust property". It was further alleged that the directors of all the companies were accustomed to act in accordance with Mr Gubay's instructions and that save for Celtic Bank the boards of those companies never discussed and voted on any decisions, they simply executed Mr Gubay's instructions. It was alleged that Mr Willers' function "was simply to put into effect Mr Gubay's instructions so that the companies did exactly what Mr Gubay wanted in accordance with Mr Gubay's objectives": [8]. Examples are given of the kinds of decisions which Mr Gubay

took personally between 1986 and 2009. It is asserted therefore that he was at all material times a shadow director and controlling mind of and agent for Cashtal (the parent company of Langstone) and/or Langstone itself and/or Derwent Holdings and that all the companies including Cashtal and Langstone "were bound by instructions given to Mr Willers by Mr Gubay": [11].

24. Mr Gubay was then described in [12] as exceptionally litigious and examples are given of cases brought "under the direct orders of Mr Gubay" to deter others from seeking to avoid their obligations to Mr Gubay and his companies and to retain and reinforce his reputation as an aggressive and exhaustive litigator who was not to be trifled with.

25. Mr Willers denied that he was appointed managing director but admits that after the sale of the Total Fitness business of July 2004 "he represented the public face" of Langstone. Mr Willers put Langstone to proof that he was the director of all the companies in the Central Group although he admits and avers that he was a de jure director of many of them. It is pleaded that Mr Willers conducted its affairs and business strictly in accordance with Mr Gubay's instructions. As far as litigation was concerned it is alleged that:

> " ... if a substantive legal issue arose, which affected the Claimant's external business affairs or contractual arrangements, his role was limited to providing initial comments to Mr Gubay regarding the matter and, subsequently, to engaging and liaising with suitable external lawyers in accordance with Mr Gubay's instructions. ..." [14].

26. The Defence then sets out the history of the relationship between Mr Gubay and Aqua. It is alleged that after Mr Gubay's move to England, he supervised the site acquisitions and construction of about 20 health and fitness centres and "in addition, ran the rest of the Empire by issuing instructions to the Defendant on the Isle of Man". The Defence describes the dispute which arose about the absence of a parent company guarantee and the double payment of Aqua for some work done in Liverpool which it is alleged made Mr Gubay "extremely upset". The Defence pleads:

> "24. When a problem arose with Aqua's "Hydrodeck" system, Mr Gubay ordered the Defendant to get proceedings underway as soon as possible, which he did. All major steps taken in those proceedings were on the express oral instructions of Mr Gubay. In particular, Mr Gubay instructed the Defendant to require the liquidator to take proceedings against the directors of Aqua, and Mr David Adams as "shadow director", for wrongful trading. Mr Gubay, as a very able and experienced businessman, was well aware of the potential disadvantages of such an action (in particular the potential cost set against the fact that any returns other than costs would be for the creditors generally) but was determined to pursue it and insisted on the Defendant pursuing it. Mr Gubay was indifferent to the cost of the litigation."

27. It is alleged at a number of points that Mr Willers coordinated the conduct of litigation saying that "in any event the Defendant never gave any substantial instructions in any litigation save on the orders of and with the approval of Mr Gubay". It is also alleged that Mr Gubay told Mr Willers that he was prepared to fund any investigation and litigation required. As regards all the allegations made against Mr Willers in the Particulars of Claim, the Defence pleads that the steps taken were "in accordance with Mr Gubay's instructions",

and it was Mr Gubay who caused or procured Langstone to enter into the indemnity and commence and continue the Wrongful Trading Proceedings.

28. A key paragraph in the Defence is [37] which responds to the allegation that Mr Willers failed to obtain advice on the merits before Langstone entered into the 2002 Indemnity in relation to the breach of contract claim against Aqua. He pleads that it was unnecessary for Langstone, Mr Willers or Mr Sorrell to seek advice or undertake any analysis, first because the likelihood that the liability under the indemnity would far exceed any potential recovery for Langstone in the liquidation "must have been obvious to Mr Gubay", and secondly because Mr Gubay wanted to pursue the Adamses "irrespective of the immediate financial benefit" to Langstone of the proceedings:

> "It is the Defendant's case that it was a reasonable and proper decision to bring and pursue the wrongful trading proceedings given that (a) it was in the Claimant's interest to deter contractors from seeking to avoid their obligations and (b) the Claimant's experience of such actions was very good. Until 2010 all such actions brought by the Claimant had been successful and costs had been recovered."

29. As regards other allegations:

    a. in response to the allegation that Wacks Caller had a conflict of interest, it is denied that there was any conflict, alternatively averred that Mr Gubay did not care and/or it was up to Wacks Caller to determine whether they were conflicted or not: see e.g. [70].

    b. it is denied in each instance that Mr Willers conducted and controlled the litigation and asserted that Mr Gubay did. Any instructions which it is alleged in the Particulars that Mr Willers gave are averred to be in accordance with the directions of or on the orders of Mr Gubay: see e.g. [74].

    c. in response to the alleged failure to obtain advice on the merits of the Aqua Litigation it is averred that "it was not necessary to advise the Claimant as to the merits of the investigations because Mr Gubay was capable of making up his own mind as to the merits and had done so": see e.g. [41] and [66].

    d. in response to the alleged failures to assess the wisdom of pursing the claim, given the disparity between the likely costs and the low recovery it is averred that

        i. this was irrelevant because "Mr Gubay's object in bringing the proceedings through the Liquidator was not merely to recover money for the Claimant but primarily to deter others from seeking to avoid their obligations to Mr Gubay and the companies and to retain and reinforce his reputation as an aggressive and exhaustive litigator, who was not to be trifled with": [46] and [65] and [66].

        ii. Mr Gubay was well aware, having pursued contentious litigation in many jurisdictions over at least 40 years, of both the costs and the risks of such litigation: see e.g, [67].

    e. as to the allegation that he failed to take steps to ascertain the Adamses' financial position, it is pleaded that David Adams "was well known to be a wealthy and successful businessman and there were no reasons to doubt their ability to meet the claims.": [50].

f. as to the Bournemouth claim, it is averred simply that it was not admitted to proof by Mr Haskew: [53].

g. it is denied that the Wrongful Trading Proceedings made no commercial sense at the time they were discontinued. Mr Willers asserts that "it plainly made commercial sense for the Claimant to proceed to trial. Pannone had advised that there was a strong case, and if successful the Claimant would have recovered its costs and some of its judgment debt": 58. Further it is asserted that it is not clear to Mr Willers why the Wrongful Trading Proceedings were abandoned and that the loss suffered by Langstone was the result of Mr Gubay's decision to refuse the offer of £250,000 in July 2006 and "wholly unreasonably abandoning the litigation in January 2010": [73].

h. as to the allegation that Mr Willers should have negotiated a costs sharing arrangement with the other creditors, the Defence avers that Mr Gubay insisted on sole control of the litigation and would not have agreed to any form of cooperation with other creditors: [75].

30. No admissions are made about the duties owed by Mr Willers to Langstone: [63]. In response to the alleged breach of duty in committing Langstone to the pursuit and funding of the Wrongful Trading Proceedings, Mr Willers says it was Mr Gubay, as agent, controller and/or shadow director of Langstone and its parent company, not Mr Willers, who caused or procured the actions complained of:

> "He did so for the purpose or primary purpose of deterrence ... and in the knowledge of the risks to the Claimant attendant upon such acts and their consequences. The Defendant, as a director of the Claimant at all times exercised reasonable care, skill and diligence in the exercise of his functions as a director and carried out the instructions of Mr Gubay, a shadow director and the controlling mind of the Claimant and its parent company, to the fullest extent as required by him until he was required by Mr Gubay to cease working on 17th July 2009".