See paras. 334, 340-345

[2010] All ER (D) 79 (Jun)

***Vercoe and others v Rutland Fund Management Ltd and others**

[2010] EWHC 424 (Ch)

CHANCERY DIVISION

Sales J

5 March 2010

Contract - Equity - Breach of confidence - Damages - Confidential information - Management buy-in transaction - Claimants identifying business opportunity to acquire companies and releasing confidential information to first defendant under contracts defining duty of confidentiality - First defendant and other defendants using confidential information and proceeding with acquisition of companies without involving claimants - Whether claimants entitled to damages for breach of confidence - Whether claimants entitled to choose between damages assessed by reference to loss of notional transaction to buy release from rights concerning confidential information and damages based on account of profits.

Judgment

APPROVED JUDGEMENT

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.

MR JUSTICE SALES:

Introduction

1. This is a claim brought primarily by Duncan Vercoe ("Mr Vercoe") and John Pratt ("Mr Pratt") in respect of a management buy-in transaction in relation to a company called Harvey and Thompson

Limited ("H & T"), which carries on business as a pawnbroker. Mr Vercoe and Mr Pratt identified an attractive opportunity to purchase H & T and originally proposed that they should be part of the new management of H & T after its acquisition by a venture capital (private equity) company. They marketed this management buy-in opportunity to a range of venture capital companies, and chose the First Defendant ("RFML") as their preferred potential acquirer of H & T. However, in circumstances to be described in this judgment, although RFML and the other Defendants did go on to acquire H & T (and to make substantial profits when they sold H & T later on), neither Mr Vercoe nor Mr Pratt participated in that transaction. They say that RFML proceeded unlawfully without including them.

2. Mr Vercoe and Mr Pratt also say that the Second to Fifth Defendants (together, "the Rutland Funds") wrongfully profited from RFML's exploitation of the business opportunity they had identified, and should account to them for such profits. They make similar claims against the Sixth Defendant ("Mr Cartwright"), who was the partner at RFML with responsibility for handling the acquisition of H & T and who also took a personal equity stake in the transaction.

3. The Third Claimant ("MAS") was a company set up by Mr Vercoe at an early stage as a possible acquisition vehicle but which was not, in the event, used to acquire H & T. It was added as a claimant out of an abundance of caution and it is not necessary to examine its position in any great detail.

4. Mr Vercoe's and Mr Pratt's claims are put forward on three bases: (i) alleged breach by RFML of written confidentiality agreements to which RFML, Mr Vercoe and Mr Pratt were parties dated 11 September 2003 and 12 November 2003 (respectively, "the September contract" and "the November contract"); (ii) alleged breach of confidence in respect of use by RFML, the Rutland Funds and Mr Cartwright of confidential information of Mr Vercoe and Mr Pratt regarding both the identification of H & T as an attractive acquisition target and how its business might be developed after acquisition to increase its profitability and the value of shares in it; and (iii) alleged breach of fiduciary duty by RFML in relation to its use of such confidential information in approaching the parent company of H & T (a US company called Cash America) to acquire H & T - for the purposes of what the Claimants say was to be a joint acquisition of H &T involving Mr Vercoe and Mr Pratt - but then proceeding with the acquisition having excluded Mr Vercoe and Mr Pratt from the transaction.

Management buy-outs and management buy-ins

5. In assessing the evidence and in applying the law, it is relevant to have in mind certain broad features of the venture capital industry, particularly regarding the way in which management buy-in

transactions may be expected to work, contrasting them in particular with management buy-out transactions.

6. In common parlance in the venture capital industry, a management buy-out is a transaction in which the incumbent management in a company is involved in acquiring that company from its owner/parent. Typically, the management will have only limited financial resources, so the acquisition will mainly be funded by a venture capital company (using its own and borrowed monies), which acquires the share capital in the target company from its owner. Some senior managers will be given an opportunity by the venture capital company to acquire shares in the target company (or, more usually, in a company created as an acquisition vehicle to become the target company's new parent) either at the outset, by subscribing cash at that stage, or over a period of time under share option arrangements. This is a way of making senior managers share the risk associated with the venture and of incentivising them to perform their management tasks effectively post-acquisition, so as to maximise the value of their investment and that of the venture capital company. Depending on the transaction, the venture capital company may allow for around 10%-20% of the equity in the acquisition vehicle to be available to be shared between management, on a basis to be agreed with the venture capital company. In addition, managers will have employment contracts.

7. The object for the venture capital company is to examine a target in as much detail as possible before proceeding with an acquisition (in order to obtain a good understanding of its business and financial position, so as to assess whether it is an attractive prospect and, if so, at what price); to acquire the target company at as low a price as possible from its parent; to develop its business in conjunction with management so that it can be made more profitable; and then to sell the company after a few years (e.g. by floating the company on a public exchange, such as the alternative investments market - "AIM") at what is hoped will be a profit. The examination of the target, in a process called carrying out due diligence, involves time, effort and expense for the venture capital company.

8. There are many reasons why a transaction may not proceed: e.g. due diligence might reveal problems which indicate that the target is not, after all, an attractive prospect or the parent company may not be willing to sell at a price regarded as acceptable by the venture capital company. Usually, so far as is possible, the venture capital company will try to protect itself to some degree against such risks by contracting with advisers during the due diligence phase on some form of contingent basis, so that fees are only paid if the acquisition proceeds.

9. If the acquisition does proceed, the venture capital company will put considerable funds at risk by acquiring the majority of the shares in the target company, and accordingly has a strong interest in seeking to minimise and manage such risk. If the value of the acquired company falls below what

the venture capital company paid for it, a loss will be made. An important area in relation to addressing this risk is that the management team put in place post-acquisition should have a good business plan for developing the profitability of the company and should be effective in implementing that plan. Disharmony within the management team is likely to jeopardise its effectiveness. The venture capital company (and the managers involved in the transaction, particularly those who also take an equity stake) have an interest to ensure that good managers are put in place, particularly in senior positions. It is by no means the case that every member of the original incumbent management will necessarily be retained post-acquisition.

10. In a management buy-out, the proposed management team will typically themselves have a good knowledge of the business of the target company and be reasonably confident that they can work effectively and harmoniously together. This provides a venture capital company interested in proceeding with an acquisition on a management buy-out basis with a degree of comfort in relation to the risks it faces in both the pre-acquisition and post-acquisition phases of a transaction. Those aspects will usually be absent in a transaction on a management buy-in basis.

11. In a management buy-in, the broad model is that a venture capital company will acquire the target company with the intention of replacing some or all of the incumbent senior management with new managers drawn from outside the company. Again, typically, the proposed new managers will not have substantial funds of their own to invest, but may be provided with an opportunity to acquire equity for a cash investment at the time the target company is acquired or subsequently under share option arrangements. A management buy-in might be an attractive option if the incumbent management is thought to be ineffective and the venture capital company has access to available managers who are regarded as being of better quality. It might also be attractive if the venture capital company regards the target as a good acquisition prospect, but has not had access to or been able to engage with incumbent management to recruit them to support its acquisition.

12. The potential problems and risks for a venture capital company in relation to a management buy-in will tend to be greater than in relation to a management buy-out. The risk of wasted time, effort and expense during the pre-acquisition phase, if the transaction does not proceed, is likely to be greater because prior to detailed due diligence investigations on the basis of information supplied by the target's parent company (if the parent proves to be interested in proceeding with a sale of the target) the venture capital company and incoming managers will have to rely on limited public information (e.g. in the form of published accounts) and intelligent guesses to inform themselves about the state of the target company's business and the scope for developing and improving that business. The risk post-acquisition may be greater because the incoming managers will not have detailed experience of running the target company's business and may not have an established track record of working well together.

13. Also, in a case (such as the proposed acquisition of H & T by RFML) where it is proposed that incoming managers should be positioned alongside some of the incumbent management team, there will be a risk that disharmony may arise within the post-acquisition management team because of fear and anxiety on the part of incumbent managers (if they are employed at levels inferior to the incoming managers) that they may be vulnerable to removal by the new managers and owners after a period of assessment. Conversely, if new managers are added to the post-acquisition management team in positions inferior to incumbent management, they may feel themselves to be vulnerable to the incumbent management, who might be perceived as having an interest in blocking initiatives by them or even in removing them so as to minimise the potential threat such new managers may pose in future (after acquiring experience in running the business) to the continued retention of the incumbent managers.

14. On the evidence before me, it did not appear that in the venture capital industry the terms "management buy-out" and "management buy-in" have very precise or strict definitions. I have set out above in very broad terms the typical characteristics of such transactions, but there is considerable scope for variation of arrangements within each category and for transactions with mixed buy-in and buy-out elements (e.g. in a transaction in which one or more new managers are to be introduced to a business alongside incumbent management, equity might be made available to be purchased at the outset or under share option arrangements by both incoming and existing managers).

15. In the event, RFML's acquisition of H & T proceeded on the basis of a management team involving a new chairman (Peter Middleton - "Mr Middleton") and existing senior management (in particular, with John Nichols - "Mr Nichols" - the incumbent managing director continuing as Chief Executive Officer, "CEO", of the business). Mr Nichols took a significant equity stake at the time of the acquisition (along with a salary under his employment contract). Mr Middleton chose to take no equity stake, but instead was paid a substantial salary for working part-time for H & T.

16. For reasons relating to the construction of the September contract and the November contract, Mr Newey QC for the Claimants submitted that RFML's acquisition of H & T could not be regarded as a management buy-in, because no incoming manager acquired any equity in H & T's business. I found the debate in relation to this contention to be rather arid. The ultimate transaction clearly had aspects which would be associated with a management buy-in type transaction (the addition of new management, in the form of Mr Middleton and, later on, a new finance director), and I do not think that the fact that Mr Middleton chose not to participate on an equity basis meant that the transaction could not be described as a management buy-in. In other cases, one could imagine transactions which could be described without difficulty as management buy-ins where no incoming manager in fact acquired any equity in the target business (e.g. if new management came in pursuant to share option arrangements and the conditions set to trigger their option rights happened never to be satisfied). I do not consider that the meaning given to the term, "management buy-in", in the venture

capital industry is so precise as to depend on whether, say, just one incoming manager is to acquire a mere ½% or 1% of equity or is such as to exclude such a term being used to describe the transaction with which RFML eventually proceeded. But this is a minor point, and my judgment does not turn on it.

17. In relation to both management buy-outs and management buy-ins the risks of expensive failure for a venture capital company at both the pre-acquisition stage and the post-acquisition stage are such that potential high rates of return on its capital are required before it will become seriously interested in a transaction and proceed with due diligence in relation to and then acquisition of a target company. On the evidence before me, a venture capital company would typically be looking for an internal rate of return (i.e. its hoped for or expected rate of return from a transaction after acquisition then subsequent sale of a target business expressed as the equivalent compound annual rate of interest in relation to its own monies to be invested in the transaction) of the order of 30%-40%. In such transactions, there is a relationship between the risks to be borne and the rewards which are generated. The greatest financial risks are borne by the venture capital company, which takes the majority of the equity in the acquired company, and it is the venture capital company which derives the greatest rewards upon sale of that equity (after repayment of any lending by banks to assist with the funding of the acquisition) if the transaction goes well.

18. As the discussion above indicates, the composition of the post-acquisition management team (both the identities of the people involved and their relative positions within the management structure) is a matter of considerable importance for the venture capital company and for the members of the management team themselves. In the present case, it was obvious (and no attempt was made to hide the fact) that Mr Vercoe and Mr Pratt had little management experience, and none at all in relation to the pawnbroking and related industries. Mr Middleton, on the other hand, had a great deal of successful management experience, including in relation to what was referred to at trial as the "sub-prime" market (i.e. the provision of financial services to persons at the poorer end of the social spectrum, who might tend to find themselves more in need of using the services of a pawnbroker). The involvement of Mr Middleton in the proposed post-acquisition management team was a matter of very great importance to the venture capital companies who were approached by the Claimants, in terms of making their business proposal attractive. On the other hand, it was Mr Pratt and (in particular) Mr Vercoe who had spotted the business opportunity and had worked up the business plan on the basis of which venture capital companies were being invited to become involved. In light of the lack of experience of Mr Vercoe and Mr Pratt, the willingness of at least parts of the incumbent management to participate in the post-acquisition management structure was also bound to be an important consideration in terms of being able to maintain and improve the value of the business.

19. In view of Mr Middleton's strong business experience, there was never any serious doubt that venture capital companies would wish to install him as Chairman in a post-acquisition management

for H & T. The respective positions of Mr Vercoe and Mr Pratt in the post-acquisition management structure were bound to be significant for them (as RFML fully appreciated), both in terms of affording them a role commensurate with their own wishes to be able to act to give effect to their business plan for H & T and providing them with a measure of protection against any incumbent managers who were to be retained (see para. [13] above). This was also a matter which would have an impact upon how incumbent managers might react to them coming into the management structure (particularly if Mr Vercoe and Mr Pratt were positioned above them: see para. [13] above).

20. In general terms, the art of running a successful venture capital company involves being able to manage all these tensions and get everything agreed and in place in a satisfactory way, keeping relevant risks within acceptable bounds, for the acquisition of a target to proceed. As the evidence made clear, many important points may be "up in the air" for a long time as a transaction develops and only fall to be finalised and settled shortly before an acquisition is completed. In particular, I accept the evidence of Mr Cartwright and Mr Middleton (who between them have considerable experience of this type of transaction) that it will often only be shortly before completion of an acquisition that matters such as the detailed employment contracts of the proposed post-acquisition management and the extent and terms of any equity participation for management are finalised. I also accept their evidence, which seems to me to accord with commercial common sense, that it is usual for detailed equity allocations for management to be discussed first with the proposed CEO of the business before being debated more generally with the other proposed managers. This reflects the importance of maintaining the authority of the CEO within the management structure and the weight to be attached to his views about how the business is best organised and run.

The witnesses

21. Mr Vercoe and Mr Pratt made very serious allegations about the behaviour of RFML, acting in particular by Mr Cartwright, in respect of the way in which they were treated by RFML in relation to the acquisition of H & T and (they said) wrongfully excluded by RFML from involvement in that transaction. To assess the validity of these allegations it is necessary to examine the facts in some detail.

22. In doing so, I have in mind that the events about which complaint is made happened several years ago, in 2003 and 2004. Mr Pratt was excluded from the transaction by RFML in early March 2004. Mr Vercoe and RFML fell out, and Mr Vercoe dropped out of the transaction, in late July 2004. RFML, the Rutland Funds, Mr Cartwright and others acquired H & T in September 2004. H & T was then run by a management team including Mr Middleton as Chairman and Mr Nichols as CEO until it was sold by being floated on the AIM in May 2006. It was only after RFML and the Rutland Funds announced the very substantial profits which had been made in relation to the acquisition and disposal of H & T that Mr Vercoe and Mr Pratt commenced the present proceedings

in 2008, although legal action had been threatened much earlier. I do not think it is surprising or objectionable that they should have waited until that time to commence this action. They were entitled to wait to see if there was something sufficiently valuable to argue over and to take time to consider their options before incurring the considerable expense and risk of commencing legal proceedings against well-funded entities such as RFML and the Rutland Funds.

23. However, the passage of time means that memories have dimmed and accordingly I have treated the evidence in the witness statements compiled years after the relevant events and in the oral evidence at trial with circumspection. I have had particular regard to the contemporaneous documentation and to the underlying business context in assessing the probabilities in relation to the history of the transaction.

24. For the Claimants, I heard evidence of fact from Mr Vercoe, Mr Pratt, James Innes ("Mr Innes", who worked for a firm of accountants called Morley & Scott - "M & S" - who were advising Mr Vercoe and Mr Pratt), Helen Eve Hewitt ("Ms Hewitt", who was involved in introducing Mr Vercoe and Mr Pratt to Mr Middleton) and Alistair Sands ("Mr Sands", a friend of Mr Vercoe involved in the pawnbroking industry) and from Sara Fowler FCA of Ernst & Young LLP as an expert witness in relation to the venture capital industry and matters of quantum in relation to remedies claimed by the Claimants. For the Defendants, I heard evidence of fact from Mr Cartwright, Mr Middleton, Mr Nichols and Ben Slatter ("Mr Slatter", an investment manager employed by RFML who was Mr Cartwright's principal assistant in relation to the acquisition of H & T) and from David Ascott ACA of Grant Thornton UK LLP as an expert witness in relation to the venture capital industry and matters of quantum.

25. Mr Vercoe impressed me as an honest witness. There were aspects of his behaviour in relation to the exclusion of Mr Pratt from the acquisition of H&T in early March 2004 which did him no credit, but he was frank about what he had done. However, his long and detailed witness statement seemed to me to involve a good deal of reconstruction, and there were points at which it was difficult to reconcile with the contemporaneous documentation. It was also apparent that Mr Vercoe had spent a good deal of time mulling over what had happened, and I think there was an element of his having persuaded himself on certain points which fitted with his general view of the merits of his case which, in respects set out in the judgment, I found doubtful. Accordingly, I did not accept his evidence without reservation; but for the most part I thought it provided a generally accurate account of the basic events with which Mr Vercoe was personally involved. In the later stages of his involvement in the transaction, when he felt he was being badly treated by RFML and had become suspicious of it and Mr Middleton, Mr Vercoe kept contemporaneous notes of what happened at meetings and in telephone conversations. I find that in doing so he honestly sought to record what had happened, and that these are a reasonably reliable guide to what was said on those occasions.

26. There was also a good deal of comment about and criticism of the behaviour of, in particular, RFML, Mr Middleton and Mr Nichols in Mr Vercoe's witness statement. Quite properly, Mr Jones QC for the Defendants did not cross-examine him on matters of comment. From Mr Vercoe's particular perspective on events, I thought his comments and criticisms were understandable. In certain respects, as I find below, he and Mr Pratt were badly treated by RFML and Mr Middleton, and it was natural that he should have reacted with increasing hostility and suspicion to them as events at the time unfolded and as he learned more about their conduct in the course of these proceedings. However, in other respects I find that his comments and criticisms are misplaced. Suffice it to say at this stage that I do not think that any of this undermines my assessment of Mr Vercoe as an honest and, for the most part, reliable witness of fact.

27. Mr Pratt also impressed me as an honest witness. His witness statement did not strike me as containing significant elements of reconstruction. He did not engage in comments on or criticisms of others in the extensive way which Mr Vercoe did. I found him to be dignified, restrained, straightforward and reliable in his evidence.

28. Mr Innes also provided an extensive and detailed witness statement. I found him, also, to be an honest witness. Like Mr Vercoe, his conduct in relation to the exclusion of Mr Pratt from the transaction could be criticised in certain respects, but he was open and frank about what he did (or did not do) at the time. Like Mr Vercoe, aspects of his witness statement contained elements of reconstruction and criticisms of others which somewhat diminished its reliability. However, I found him generally to be a reliable witness of fact.

29. Ms Hewitt and Mr Sands gave clear and straightforward evidence, which was not subject to significant challenge. Their evidence did not go to the central areas of dispute between the parties.

30. Mr Cartwright is a highly intelligent man. His witness statement was not given to embroidery or significant reconstruction. I reject two major criticisms of him by Mr Vercoe and Mr Innes, to the effect that he manoeuvred in an underhand way to position RFML as the main contracting party and negotiator with Cash America so as to take control of the acquisition of H & T away from Mr Vercoe and then manoeuvred to prevent Mr Vercoe from having any substantial management position after the acquisition. As to the first point, I find that the commercial context was such that Cash America was bound to regard RFML (not Mr Vercoe) as the most credible negotiating partner in relation to the transaction. RFML was the potential purchaser which was putting up the money for the acquisition. This was recognised at the time by everyone involved, and I accept Mr Cartwright's evidence that there was no hidden motive in his arranging for RFML to take on this role. As to the second point, from early March 2004 until late July 2004 I find that, albeit this was not explained in clear terms to Mr Vercoe at the time, Mr Cartwright genuinely and sincerely sought to ensure that Mr Vercoe would have a substantial management role post-acquisition as Commercial

Director of H & T, and was requiring Mr Nichols to accept this position, contrary to Mr Nichols' own argument that Mr Vercoe should have an inferior management role and be treated as being on probation.

31. However, Mr Cartwright's conduct was subject to two further major criticisms by the Claimants, which I find are made out. First, I find that at an early stage Mr Cartwright formed the view that Mr Pratt did not have sufficient managerial quality to warrant his being included in the transaction and also soon formed the view that Mr Vercoe was too young, generally inexperienced as a manager and lacking particular experience of the pawnbroking business and sub-prime sector in which H & T operated to warrant his being appointed as CEO in accordance with the business plan he had introduced to RFML. Yet Mr Cartwright did not inform them of this, but until mid-February 2004 (in the case of Mr Vercoe) and early March 2004 (in the case of Mr Pratt) encouraged them to go on working to promote the acquisition of H & T by RFML on the footing that they could expect to fill the management positions set out for them in the business plan, according to which Mr Vercoe was to be CEO and Mr Pratt was to be Commercial Director. This was shabby and underhand treatment of them by Mr Cartwright.

32. Secondly, I find that Mr Cartwright lied to Mr Vercoe and Mr Pratt about RFML's intentions in a letter of intent dated 12 November 2003 sent by him on behalf of RFML ("the letter of intent"), in that it expressed interest in moving forward with the proposed management team at a stage when Mr Cartwright had already reached the view that there would be no place for Mr Pratt in the transaction: see paras. [116]-[119], [126] and [151]-[153] below. Also, Mr Cartwright was not open and honest in acknowledging this in his evidence, but sought in a most unconvincing way to suggest in his oral evidence that RFML had in fact reserved its judgment about Mr Pratt at that stage.

33. I therefore formed the view that I could not regard Mr Cartwright as a straightforward, reliable and honest witness. Unless otherwise supported by the contemporaneous documents or good indications from my assessment of the overall evidence (as, for example, in paras. [163]-[165] below), where his evidence conflicted with that of Mr Vercoe, Mr Innes and Mr Pratt I found their evidence more believable in each case.

34. Mr Slatter was deeply involved for RFML in the transaction throughout. It is clear that at all stages he discussed with Mr Cartwright all significant aspects of RFML's continuing assessment of the transaction and RFML's strategy in relation to it. He was a party to the shabby and underhand treatment of Mr Vercoe and Mr Pratt (para. [31] above) and was aware of the terms of the letter of intent and must have appreciated that it gave a false picture (para. [32] above). Indeed, one of the clearly truthful aspects of his evidence was the forthright way in which in his first witness statement he emphasised that from the first presentation to RFML by the Claimants on 24 September 2003 RFML formed the view that there was no place for Mr Pratt in the post-acquisition management of

H & T, contrary to the impression given in the letter of intent (albeit in his oral evidence he sought, unconvincingly, to suggest that perhaps RFML might have been persuaded to allow him a place in the transaction after all). He was a party to the suppression of that information from Mr Vercoe and Mr Pratt, thereby encouraging them to continue working to promote an acquisition by RFML. I also find that, contrary to the denial of this by Mr Slatter in his evidence, Mr Innes specifically raised with him on about 24 September 2003 that any uncertainty in relation to Mr Vercoe and Mr Pratt taking senior management positions should be addressed with them immediately, since the proposed acquisition of H & T as set out in the business plan was their project, and that Mr Slatter assured him that they would be given the opportunity to fill the roles identified in the plan: see paras. [121]-[122] below. I did not accept Mr Slatter's assertion that "We [i.e. RFML] were open and honest throughout ...".

35. As with Mr Cartwright, I formed the view that I could not regard Mr Slatter as a straightforward, reliable and honest witness. As with Mr Cartwright, unless otherwise supported by the contemporaneous documents or other good indications in the evidence, where his evidence conflicted with that of Mr Vercoe, Mr Innes and Mr Pratt I found their evidence more believable in each case.

36. Mr Middleton did not impress me as a witness. His recollection of events was less good than that of other witnesses and his evidence was marred by unsustainable side swipes aimed at Mr Vercoe which in my view were designed to prejudice the court in its assessment of his evidence. In his main witness statement Mr Middleton criticised Mr Vercoe for telling people that he (Mr Middleton) would be chairman before he should have done. In cross-examination it emerged that there was no proper basis for that accusation. He also went out of his way in his evidence to criticise the business plan which Mr Vercoe and Mr Pratt had prepared at an early stage to market the business opportunity to venture capital companies, and to suggest that this was not a business plan at all. Neither Mr Cartwright nor Mr Slatter in their evidence suggested that it did not qualify as a business plan, and it is clear from the contemporaneous documents that RFML clearly did regard it as a viable business plan, albeit obviously prepared subject to the inevitable constraints referred to in para. [12] above, both by making use of it internally and by providing it to their supporting bank lenders. Moreover, at the time, Mr Middleton did not object to the business plan, with his name contained prominently in it, being put forward as such to a range of venture capital companies in September 2003. I consider that Mr Middleton's evidence criticising the business plan was deliberately exaggerated.

37. I also find that Mr Middleton's behaviour towards Mr Vercoe and Mr Pratt was, like RFML's, shabby and underhand. He knew that the opportunity to acquire H & T had been identified by Mr Vercoe and Mr Pratt and that they had done all the work to develop the proposal and business plan which was then put to venture capital companies. He knew that the business plan included them (alongside him) in prominent positions in the post-acquisition management team, as CEO and

Commercial Director respectively. He knew that they continued to work on developing the proposals to assist RFML to acquire H & T on the basis of their understanding that they would have these prominent management positions post-acquisition. But from a very early stage, at a meeting with Mr Cartwright and Mr Slatter on 1 October 2003, it was agreed between them that none of them supported a role for Mr Pratt in the post-acquisition management team and it was obvious that he would be excluded from the transaction: see para. [126] below. Mr Middleton did not tell Mr Vercoe and Mr Pratt about this. He was not open and candid with them, even though they were supposed to be a team working together. This absence of candour by Mr Middleton reinforces the wariness with which I approach his evidence.

38. Having said this, there were parts of the evidence of Mr Vercoe regarding conversations with Mr Middleton in relation to which, on my assessment, Mr Middleton's evidence is to be preferred, since it appeared to me to accord better with the underlying business realities and contemporary documents and where in some cases (if Mr Vercoe was right) Mr Middleton would, on any realistic view, have been lying to him: see e.g. paras. [144] and [180]-[182] below. None of these points was central to the case and assessment of the conflicting evidence on them was made more difficult by the fact that Mr Vercoe's evidence on such points was not challenged by Mr Jones, but nor was it suggested by Mr Newey to Mr Middleton that he had lied to Mr Vercoe. It seems to me that these are areas where it is likely that Mr Vercoe has somewhat embroidered matters in his memory, when going over and over events in his mind.

39. Finally, so far as concerns the witnesses of fact, I should comment on the evidence of Mr Nichols. I find that Mr Nichols regarded Mr Vercoe with hostility and a degree of anxiety that he might represent a threat to his own position. As the documents in the case show, that anxiety was not misplaced. In my assessment, Mr Nichols remained hostile to Mr Vercoe in giving his evidence, and this tended to undermine the reliance which I felt able to place upon it. In certain respects, I did not think that Mr Nichols was being completely candid in his evidence. In particular, it emerged during Mr Nichols' cross-examination that he could remember supplying management information for Mr Vercoe to use in exploring a possible acquisition of H & T (para. [96] below), which was a relevant fact which he had omitted to mention in his two witness statements. Also, Mr Nichols did not give a full and forthright account of his meeting on 14 July 2004 with Mr Vercoe, even though I believe he must have remembered it well: paras. [221]-[222] below. Where there were conflicts of evidence between Mr Vercoe and Mr Nichols, I found the evidence of Mr Vercoe more believable.

40. I address the expert evidence in my discussion of remedies at paras. [286] ff below.

The Facts

41. In this section of the judgment I set out an outline of the basic facts in the case and address the main areas of factual dispute between the witnesses.

42. From 1990 to 1998 Mr Vercoe was a successful professional racing driver, beginning when he was eighteen. From 1995 he combined racing with involvement in promoting motor sport sponsorship programmes. He was a director of a public relations company from 1998 to 2001 with particular interest in motor sport activities. In the late 1990s he met Mr Pratt.

43. Mr Pratt had been a professional driver himself until 1988. Since that time he has been involved in the business side of the sports industry. He became involved in coaching and managing high level professional drivers. He met Mr Vercoe when he was training driving instructors, including Mr Vercoe, at Silverstone.

44. Mr Vercoe and Mr Pratt got on well together and found they had a common interest in motor sport and business interests related to motor sport. From about 2000 they began to discuss business opportunities that came up to see if they could find a project on which they could work together.

45. In 2001 the Rockingham Motor Speedway race track opened in Northamptonshire. Mr Vercoe and Mr Pratt drafted a business plan for a motor racing school for members of the public and corporate events to operate at the race track using the name of Johnny Herbert, a successful formula one driver whom Mr Pratt knew. Their motor racing school was to be called the Johnny Herbert Rockingham Experience ("JHRE").

46. The Rockingham race track was operated by a company called Rockingham Motor Speedway Limited ("Rockingham"). Rockingham liked Mr Vercoe's and Mr Pratt's business plan and agreed to establish JHRE as a wholly owned subsidiary. Mr Vercoe and Mr Pratt became the joint managing directors. They negotiated a five-year earn-out deal with Rockingham which, if the business were successful, provided a potential exit payment in excess of £3 million. Mr Vercoe and Mr Pratt found that they worked well together as a team. According to their evidence, Mr Vercoe was good at coming up with broad concepts and at selling those ideas and Mr Pratt's strengths lay on the organisational and implementation side.

47. Rockingham was backed by a well-known financier, Mr Guy Hands. He secured the appointment of Mr Middleton as its chairman. Mr Vercoe and Mr Pratt first had contact with Mr Middleton in connection with Rockingham.

48. JHRE was a success, but the Rockingham race track was not. By early 2003 it seemed unlikely

that Rockingham would be able to afford the earn-out payments for Mr Vercoe and Mr Pratt. Accordingly, they decided to leave JHRE so as to be able to pursue more effectively a possible acquisition of H & T. They negotiated their resignation from JHRE with effect from May 2003. This was a high risk strategy for them, since they were now working without pay from employment and there might be many reasons why the business opportunity to acquire H & T could come to nothing. However, they felt the risk was justified by what they hoped would be substantial financial rewards for them in the form of remuneration as senior managers in the business to be acquired and from equity participation if the opportunity they identified came to fruition.

49. By late 2002 Mr Vercoe had begun to take a considerable interest in the pawnbroking industry as a possible area for investment. The two largest pawnbroking companies in the United Kingdom were H & T and Albemarle and Bond ("A & B"). Of these, H & T was the larger company.

50. Mr Vercoe became interested in the business opportunities that pawnbroking might provide as a result of discussions with his father, Mr Patrick Vercoe ("Patrick Vercoe"), who worked as a public relations consultant for H & T, and Mr Sands (a friend of Mr Vercoe's who owned three pawnbroking outlets of his own). Mr Sands told Mr Vercoe what a good business pawnbroking was to be in and that it also provided scope for developing other financial services to be marketed to the sub-prime sector. Pawnbroking itself provided a form of secured lending which was both safe and generated a good return. Patrick Vercoe also encouraged Mr Vercoe to look into this business sector for business opportunities.

51. Comments by Patrick Vercoe also led Mr Vercoe to identify H & T as a possible target for acquisition. Patrick Vercoe told Mr Vercoe that H & T's parent, Cash America, was not seriously interested in it. Cash America did not see H & T as a core part of its business, which was much bigger in the USA, where its primary area of interest lay. Cash America had an expansion programme which it was implementing there, and its focus was on that expansion. Accordingly, Cash America tended to leave the UK management of H & T to its own devices and provided only limited capital for the development of H & T's business.

52. Mr Vercoe learned that H & T's management was led by the managing director, Mr Nichols, who was a long-standing friend of Patrick Vercoe (they had worked together in the Rank organisation before Mr Nichols joined H & T in 1997). It was through this connection that Patrick Vercoe did consultancy work for H & T.

53. Mr Vercoe carried out research into H & T by obtaining H & T's accounts. On his assessment, H & T was underperforming by comparison with what it was potentially capable of. Mr Vercoe came to the conclusion that there was a significant business opportunity here which might be exploited:

Cash America might be persuaded to sell H & T if offered a good price and then H & T could be managed so as to become more profitable, so increasing the value of its shares above what was paid for them.

54. Mr Vercoe discussed his thoughts with Patrick Vercoe, who offered to introduce him to Mr Nichols. Mr Nichols, Mr Vercoe and Patrick Vercoe had a meeting at a restaurant on 31 October 2002. In his evidence, Mr Nichols said that he could not recall this meeting. Mr Vercoe had a good recollection of it. I accept his evidence about it.

55. Mr Vercoe sought to sound out Mr Nichols about whether he thought Cash America might be willing to sell H & T. Mr Nichols expressed doubt about that. Mr Vercoe explained to Mr Nichols a possible structure of the business if it was acquired from Cash America. Mr Vercoe said that he would expect to take a role as group CEO but that Mr Nichols could run the business as group managing director (it should be emphasised that Mr Vercoe was young and inexperienced at this point, which no doubt affected Mr Nichols' attitude to this approach). Mr Vercoe said that he was looking at Guy Hands as a potential financier for the project. Mr Nichols was defensive but said that he would consider this proposal.

56. Mr Nichols came back a few days later to indicate that he was not interested in pursuing this opportunity. In my view, as became clear later (see para. [214] below), Mr Nichols did not welcome this approach from Mr Vercoe. He was worried that if Mr Vercoe managed to arrange an acquisition of H & T with himself as CEO, that would undermine rather than enhance Mr Nichols' own position in the company. He regarded Mr Vercoe as arrogant and naïve. He did not think that Mr Vercoe would be able to implement his grand plan.

57. Mr Vercoe also researched A & B. He thought there was potential for an amalgamation of H & T and A & B. He felt that, whilst H & T was the bigger company, A & B had an attractive emphasis on more contemporary products better in keeping with the needs of the modern consumer. At the time, A & B was promoting cheque cashing and pay day advance services strongly. Mr Vercoe thought that an amalgamation of the companies could result in substantial savings in administration and so forth.

58. There was, of course, a big impediment to the implementation of Mr Vercoe's idea. He did not have the funding which would enable him to make any kind of approach to Cash America to buy H & T or to acquire A & B. Venture capital companies would have to be approached as potential funders for the project, and he would need assistance to do that effectively. Mr Vercoe appreciated that he would have to prepare a business plan and presentation regarding the business opportunity and that he would need expert business and financial advice to do that well. To that end, he

approached Stuart Cumberland ("Mr Cumberland") of M & S, a firm of chartered accountants and financial advisers. Mr Vercoe knew Mr Cumberland from the time when he had advised him and Mr Pratt in setting up JHRE and in relation to their five-year earn-out deal with Rockingham.

59. Mr Vercoe had an initial meeting with Mr Cumberland on about 15 December 2002. Mr Cumberland was interested in Mr Vercoe's idea of acquiring H & T or H & T and A & B together and then developing their businesses. On 18 December 2002 Mr Cumberland e-mailed Mr Vercoe to propose a contingency fee arrangement for M & S in working on the project. Mr Cumberland proposed charging a token fee of £500 to cover basic set-up costs and then to work on a speculative basis contingent upon whether Mr Vercoe was successful in finding finance for the project. Mr Cumberland proposed that if finance was provided for an acquisition M & S should be paid £50,000 as a minimum, and that if over £50 million were raised for the project M & S should get 1% of that as a fee. Mr Cumberland proposed naming the project "Project Scrooge". Mr Vercoe agreed to these terms.

60. In about January 2003 Mr Vercoe also raised the possible business opportunity of trying to arrange an acquisition in the pawnbroking industry with Mr Pratt and invited Mr Pratt to join him in trying to develop that business opportunity. Mr Pratt's evidence was that he always regarded the basic idea for investment in the pawnbroking industry as Mr Vercoe's. At some stage they had a conversation in which they agreed in broad terms that it would be a joint project, but that Mr Pratt would have a 30% interest in the business opportunity as against 70% for Mr Vercoe.

61. Mr Vercoe, Mr Pratt and M & S commenced work on drawing up a detailed business plan which could be used to sell the project to potential financiers.

62. Mr Vercoe and Mr Pratt carried out more detailed research of the business sector and of developments in sub-prime products appropriate for that sector. They researched the finances and operations of H & T and A & B and other smaller pawnbroking outlet chains. They also worked on ideas for trying to address what they assessed to be the stigma which attached to the pawnbroking sector, which might put off potential customers for other of the sub-prime financial services which could be offered alongside pawnbroking and might also put off potential funders of an acquisition (who might be deterred from investing because of anxiety about possible detrimental impact upon their existing brands or images).

63. Mr Vercoe and Mr Pratt agreed that Mr Vercoe should be the primary point of contact for communications with M & S and later with financiers who were approached. Mr Vercoe would brief Mr Pratt on developments.

64. In the course of Mr Vercoe's and Mr Pratt's more detailed research, they learned that Cash America had another European subsidiary called Svensk Pantbelaning ("SP"), a Swedish pawnbroking company. SP was Sweden's largest pawnbroking chain. Mr Vercoe and Mr Pratt realised that, if Cash America was willing to sell H & T, there was a good chance that Cash America would also wish to divest itself of SP at the same time so as to rid itself of its European operations altogether in order to be able to concentrate on its business in the USA. Therefore, Mr Vercoe and Mr Pratt decided that they would have to build the acquisition of SP into the development of the business opportunity in some way.

65. As Mr Vercoe and Mr Pratt worked on the business plan, they focused increasingly on a strategy involving the acquisition of H & T and SP from Cash America, with less emphasis upon the alternative plan of acquiring H & T and A & B together. A & B was an AIM listed company and they thought that this could make its acquisition more difficult. Instead, they worked on ideas for enlarging H & T's business using what was termed a "buy and build" strategy, involving the acquisition of smaller chains of pawnbrokers and the establishment of new stores.

66. From a very early stage Mr Vercoe and Mr Pratt realised that if they were to have any realistic prospects of attracting investors to back and implement their idea, they would need to be able to demonstrate that there was a credible management structure in place to take over H & T's business immediately on acquisition. Funders would have to be persuaded that the ambitious development ideas they were working on in the business plan could indeed be implemented. Mr Vercoe and Mr Pratt were confident in their own abilities but realistically appreciated that they had a track record of very limited scope in business and had no practical experience of the pawnbroking industry. Mr Vercoe, the proposed CEO, was only thirty-one. They appreciated that by themselves they would not represent a credible management buy-in team who would be likely to be attractive to potential investors, and that they therefore needed to find someone of substantial stature in the business world to join them as a proposed manager for the business to be acquired. In that regard, they identified Mr Middleton (whom they knew a little from Rockingham) as someone to be approached. Mr Middleton was also attractive as a potential chairman for the management buy-in team because he had relevant experience of running a business in the sub-prime sector, which Mr Pratt and Mr Vercoe completely lacked.

67. Mr Middleton had a very distinguished business curriculum vitae and a very good reputation in the City. He had an established record of taking over businesses in difficulty and turning them into profit-making success stories. He had experience of the venture capital business. From 2000 to 2002 he was transaction director for Nomura International's principal finance group, during which time he had had responsibility for the acquisition of a business (rebranded as Brighthouse) selling household goods on credit in the sub-prime sector. He had developed an interest in the business potential for the sub-prime sector at that stage. In 2003 he became executive chairman of GTL Resources Plc ("GTL").

68. On 10 March 2003 Mr Vercoe and Mr Cumberland met Mr Matthew Clark of a venture capital company called Mezzanine Management UK Limited ("Mezzanine"). Mr Cumberland knew Mr Clark well and had set up the meeting on a confidential basis to test out whether Mezzanine might be interested in the project and to get some advice and feedback from someone in the private equity sector regarding the viability of the project. At the meeting Mr Vercoe explained the outlines of the business plan that was being developed. Mr Clark appeared interested. Mr Vercoe explained that it was his intention to approach Mr Middleton to see if he could be recruited to be the chairman for the business. Mr Clark confirmed Mr Vercoe's view that getting such a prestigious figure on board would be important to give private equity houses confidence that someone with recognized City credentials believed in the project and the management team. Both Mr Clark and Mr Cumberland emphasised that the proposed management team of Mr Vercoe and Mr Pratt needed to be strengthened along these lines if the project was to be presented as one which investors would regard as credible.

69. Mr Vercoe decided that the best way to approach Mr Middleton would be through Ms Hewitt. At this time Ms Hewitt was working as sales and marketing director at Rockingham. Mr Vercoe and Mr Pratt knew her well. She had been recruited to Rockingham by Mr Middleton, who had worked with her previously in connection with the Royal Albert Hall. She got on well with Mr Middleton who, by this time, had left Rockingham.

70. Mr Vercoe got in touch with Ms Hewitt. He explained to her in confidence the outline of the business opportunity. He asked whether she would be interested in becoming involved in the project as a possible non-executive director who could bring the benefits of her marketing and sales experience to bear. He also asked whether she would be prepared to approach Mr Middleton to see if he was interested in the project. Ms Hewitt was interested in the project and agreed to be a conduit for approaching Mr Middleton.

71. Mr Vercoe provided Ms Hewitt with a document which he called a "brief helicopter view" of Project Scrooge. In that document he explained that for the previous six months he had been working to put together a proposal to buy and merge two of the biggest pawnbroking companies in the UK. He set out his belief that pawnbroking was a business with the potential for expanding and increased profitability. The "helicopter view" also referred to the possibility of turning the consolidated businesses into a "neighbourhood community finance house/bank" to provide finance facilities for customers in the sub-prime sector. It referred to the combined businesses having some one hundred branches, comparing this with the Co-op Bank with one hundred and ten branches.

72. Ms Hewitt contacted Mr Middleton to check that she could send him a document containing a confidential business proposal. He agreed that she could and that he would treat it as given in confidence. She then sent him a slightly revised version of the "helicopter view". Mr Middleton

read this and told Ms Hewitt that he would be interested to speak more about it.

73. In his evidence Mr Middleton said that the one thing that caught his attention was the idea of investing in the pawnbroking sector - since managing the investment in Brighthouse for Nomura he had been very interested in the sub-prime sector. He said he was not impressed by the other aspects of the plan in the "helicopter view" which was shown to him. In particular, he thought that the reference to the possible creation of a new high street bank demonstrated complete naivety about the level of regulatory control that existed in relation to banks: he did not think that there was any realistic prospect of developing such a bank. Regulation would require very large capital reserves for such a project which would undermine the profitability and commercial viability of an investment in the pawnbroking sector. However, he did not convey any of this to Ms Hewitt, Mr Vercoe and Mr Pratt. He simply indicated his interest in the idea set out in the "helicopter view" and agreed to meet Mr Vercoe.

74. Ms Hewitt organised a meeting between Mr Middleton and Mr Vercoe, which she also attended, at a bar in London on about 23 April 2003. Mr Vercoe brought to that meeting what was by then a developed draft of the business plan for Project Scrooge. He explained to Mr Middleton that the document was confidential and raised the possibility of Mr Middleton signing a non-disclosure agreement. Mr Middleton responded that such a formal agreement was unnecessary because he could be trusted. It is clear that Mr Middleton appreciated that the project they were discussing and the business plan were confidential.

75. The business plan which Mr Vercoe took to this meeting was entitled "Peoples Cash Limited, financing the urban and rural community, pawnbroking, cheque cashing, jewellery, retail, savings accounts, personal and business loan, insurance". It was described as a plan presented by MAS (the acquisition vehicle which Mr Vercoe had in mind at that stage) and was labelled "commercial in confidence". The document referred to the proposed acquisition, merger and development of H & T and A & B as a new business to be called "Peoples Cash". It summarised the fruits of Mr Vercoe's and Mr Pratt's researches. Both businesses were reported to be growing annually by 15% to 20%. It identified that the pawnbroking market was worth £120 million a year and the cheque cashing market some £1.2 billion a year. It set out in broad terms proposals for improving the management of the businesses, possible growth strategies and possible savings. It stated that "the untapped power and revenue potential for Peoples Cash is extraordinary". It referred to the possibility of a combined business with a high street branch chain of over one hundred stores (again comparing this with the 110 branches of the Co-op Bank) and an eventual long-term vision that the new company would be perfectly placed to service the financial needs of its customers in the sub-prime sector as a substantial neighbourhood finance facility. The business plan presented ideas for addressing the stigma attached to pawnbroking by re-branding stores with the name "Peoples Cash" combined with a strategy for building awareness of that brand. It had a section which described the management team as Mr Middleton (chairman), Mr Vercoe ("CEO and founder"), Mr Nichols (managing

director), Mr Pratt (commercial director) and Patrick Vercoe (marketing manager).

76. At the meeting Mr Middleton looked through the business plan. He did not express any substantial reservations about it. He asked Mr Vercoe how he had come up with it and Mr Vercoe mentioned that his father, Patrick Vercoe, worked in the industry and had mentioned that there were good opportunities to buy businesses in it at the time. Mr Middleton said that the idea was interesting and a solid business opportunity. After about an hour and a half of discussion about the project, Mr Vercoe left. Ms Hewitt stayed behind to talk to Mr Middleton about the project and about what he thought of Mr Vercoe's presentation of it. Mr Middleton told her that he thought that it went really well, that he was very happy with moving forward with the idea and wanted another meeting with Mr Vercoe to discuss it further.

77. Ms Hewitt relayed this to Mr Vercoe. Mr Vercoe was overjoyed. This was a big moment for Mr Vercoe and Mr Pratt, since they had successfully recruited a major business figure as prospective chairman who would lend substantial credibility to their proposals.

78. In early May 2003 Mr Middleton called Mr Vercoe. Mr Middleton told Mr Vercoe directly that he was happy to come on board the project as chairman of the business if the acquisition went ahead. Mr Vercoe asked him about formalising the agreement with a letter or a contract but Mr Middleton replied to the effect that Mr Vercoe should trust him and that there was no need for a formal agreement. Mr Middleton told Mr Vercoe that at this stage his involvement would be strictly limited. He did not have time to get involved in preparing the business plan and would not attend any first meeting with prospective investors. He asked them to keep him in the loop and said he would only start getting personally involved once a potential investor had started to show significant interest in the project.

79. Meanwhile, on about 21 April 2003 a new draft of the business plan was produced with assistance from M & S. This rehearsed and amplified the ideas in the previous version of the business plan. This version of the business plan left lots of blanks to be filled in. It identified the proposed management team in similar terms as Mr Middleton (chairman), Mr Vercoe (CEO), Mr Nichols (managing director), Mr Pratt (commercial director), Patrick Vercoe (marketing manager) and set out positions for finance director and other roles without identified people to fill them (save for a Mr John George as non-executive director). The draft business plan set out descriptions of the functions of each of these roles.

80. On 2 May 2003 Mr Vercoe had a further meeting with Mr Nichols to bring him up to date with the progress of the project and once again to discuss his potential involvement with it. Mr Vercoe took a draft non-disclosure confidentiality agreement with him and invited Mr Nichols to sign it. Mr

Nichols refused to sign the agreement. Mr Vercoe got the impression that he felt threatened by what was being proposed in relation to his company. Since he did not sign the confidentiality agreement, Mr Vercoe gave him only a very broad description of his business idea. He told him that there would be a significant upside for Mr Nichols if he joined the proposed management team. Mr Vercoe got the impression that Mr Nichols was more receptive to the idea by the end of the meeting and Mr Vercoe ended the meeting by giving Mr Nichols until 6 May to say whether in principle he was interested in joining the project.

81. Mr Nichols' evidence was that Mr Vercoe was very vague about the opportunity but indicated that it had something to do with A & B. After a few days, Mr Nichols reverted to Mr Vercoe to say that he was not prepared to sign any confidentiality agreement and that in any case his service agreement with Cash America would not allow him to do so. In practice, this meant that Mr Vercoe could not include him as a participant in the development of Project Scrooge. In my view, Mr Nichols was again very unhappy about this approach by Mr Vercoe.

82. On 7 May 2003 Mr Vercoe e-mailed Mr Middleton to update him about the position with Mr Nichols. Mr Vercoe reported that Mr Nichols had been defensive at the meeting. His e-mail included the following:

> "John [Mr Nichols] is potentially a difficult guy, he is currently king of his castle, has a soft little number with the Americans and isn't sure whether he sees this deal as a benefit or a threat. I made it clear that there would be significant upside if he were to join us and that it would ultimately be a win, win situation for him. He was warming up at the end of the meeting and we agreed that I would give him until Tuesday, yesterday, to chew it over in terms of his interest in principle. He has subsequently spoken to me and expressed considerable interest in coming on board but does want to see what is behind the deal and the people involved. I have left it that I will contact him within the next two weeks possibly on your return to meet and talk through in more detail, but obviously he would need to sign some kind of NDA [non-disclosure agreement].
>
> I have had differing reports about John, my father has known him since they worked together in the Rank organisation and he has been known to upset a number of people with his difficult attitude. I am concerned that he could potentially cause problems within the new group and deliberately be difficult to police (he has already said he doesn't like to report to anyone!!!) I believe I can gradually warm him up and become my friend so to speak but is there an argument to wait and see what the industry has to offer as an alternative (pick from the best) or do we nurture him along, as his expertise in the industry, H & T and A & B structure valuable in the early days???"

The e-mail concluded with reference to a forthcoming meeting that Mr Vercoe was to attend with a representative from Mezzanine.

83. Mr Middleton responded by e-mail on 9 May 2003 to say:

> "The project will not work if there are personality difficulties before we even start. See if our financiers are prepared to talk to the Americans. If they are we should tell John that is what is going to happen and see how he reacts."

84. Mr Middleton was there touching on two important features of the proposed transaction. First, it was only likely to be successful if a harmonious and effective management team could be put in place to implement any new management strategy intended to increase the value of the business (see para. [9] above). Secondly, there was an obvious potential tension between the incumbent management (in particular, Mr Nichols as managing director) and any incoming management: incoming managers could threaten the established position of incumbent management (see para. [13] above). Mr Vercoe's own e-mail already showed an awareness of this on his part. But the converse was also true. If incumbent management remained in place in superior positions, incoming managers might find their position to be vulnerable, especially if the incumbent management were hostile to them or felt threatened by them. The incumbent management might seek to exclude them from business decisions or even to expel them from the business. This potential feature of the situation came to the fore for Mr Vercoe after late February 2004, when RFML downgraded his potential post-acquisition role from CEO to Commercial Director, and in particular after about the end of March 2004, when RFML decided that Mr Nichols (who was hostile to Mr Vercoe) should remain as CEO post-acquisition.

85. On 9 May 2003 Mr Vercoe and Mr Cumberland went to meet Mr Clark of Mezzanine again. They informed Mr Clark that Mr Middleton was now on board with the project. It was agreed that the management team should make a formal investment presentation of the business opportunity and business plan to Mezzanine. Mr Vercoe reported to Mr Middleton in an e-mail of 12 May 2003 as follows:

> "...I spoke to them on the matter of John Nichols and they are comfortable either way if he is on board or not. I explained that there will be plenty of expertise of the market in the two companies [i.e. H & T and A & B] to choose from. My thoughts (which I have told finance) are not to go with John and give somebody young and hungry within the organisation the opportunity (Ops Director role??) the last thing I need is somebody I feel I have to keep a close eye on."

Mr Vercoe also said that he would be forwarding a completed business plan to Mezzanine and was meeting with a lawyer from a US law firm called Dorsey & Whitney to discuss the project.

86. Mr Middleton replied that he would pick up a hard copy of the business plan in due course. He was unable to make the presentation meeting, which was then proposed for 29 May.

87. Meanwhile, Mr Vercoe and Mr Pratt continued to work on the business plan to get it into good shape for the presentation to Mezzanine. The presentation to Mezzanine was re-scheduled to 5 June 2003. Mr Vercoe and Mr Pratt felt that Project Scrooge was gaining momentum and, also being aware of the difficulties Rockingham was experiencing, they resigned from JHRE on 20 May 2003.

88. Mezzanine signed a non-disclosure agreement in relation to Project Scrooge. The revised business plan was sent out to those concerned, including Mr Middleton, on 2 June. The business plan now focused more prominently on the acquisition of H & T, with proposals for amalgamation with A & B somewhat downplayed. The first stage in the plan was described as "the management buy-in, buy-out of [H & T]". This reflected the idea that the business should be managed by a combination of incoming and incumbent management post-acquisition. The next stage was identified as "consolidation of the industry by acquiring further complementary business", identifying A & B amongst a number of other possible acquisition targets. The business plan again analysed the possibility of developing H & T's business in the areas of pawnbroking, jewellery sales, cheque cashing and pay day advances. The document now identified the proposed management team as Mr Middleton (chairman), Mr Vercoe (CEO), Mr Pratt (commercial director) and Mr Hughes (the incumbent finance director at H & T, as the proposed post-acquisition finance director). Mr Nichols was not included: this probably reflected Mr Vercoe's assessment, reinforced by Mr Nichols' unwillingness to become wholeheartedly involved in the transaction, that he would be unduly difficult for Mr Vercoe to manage as part of the post-acquisition management team. The financial projections in the business plan were based on a level of funding estimated to be required for the acquisition of both H & T and A & B. The acquisition price of H & T was assumed to be £50m and the acquisition price of A & B was assumed to be about £41m. At this stage the business plan did not refer to an acquisition of SP.

89. The proposed management buy-in team of Mr Middleton, Mr Vercoe and Mr Pratt ("the MBI team") had a meeting on 3 June to prepare for the meeting with Mezzanine on 5 June. Others attended the meeting as well.

90. On 5 June 2003 Mr Vercoe, Mr Pratt and others made a presentation of the business plan to Mezzanine. Mr Middleton did not attend the meeting. Mezzanine asked questions about Mr Middleton's commitment to the project. It was obvious that Mr Middleton's involvement in the

project was an important issue for them. This was unsurprising, in light of the importance of Mr Middleton in lending credibility to the buy-in team. Mezzanine followed up to say that they wanted a further meeting, this time with Mr Middleton present. A meeting was set up for 20 June 2003.

91. Mr Vercoe briefed Mr Middleton by e-mail dated 7 June 2003. This identified the following as one of the points of concern:

> "Management, this was their biggest concern, they are concerned that currently none of the management have run a business in the financial sector or been involved in running a leveraged financed business before. I am ready for a grilling ... and feel particularly aggressive in my answers, whilst I understand their concerns I am not going to have my abilities or character to delivering the concept brought into question. My feeling is that the deal is here on the table for you, do you want it or not, this is not rocket science!!?? I am also concerned that I feel they are eroding away any potential goodwill between us straight away.
>
> One of the reasons they have a current focus on Management team is that a previous investment into a business specialising in the sub-prime market place has turned sour and it turns out that the management have been less than truthful about their experience in the market place. I have already explained that my background is not from the Pawnbroking financial sector and that I am placing the initial expertise in the business into middle management to deliver the business plan. [Mezzanine] are potentially set to lose £30m if the company they invested into goes belly up (so understandable they are covering all the angles)."

92. The further meeting with Mezzanine took place on 20 June at its offices. It was attended by Mr Vercoe, Mr Middleton and Mr Cumberland. The Mezzanine representatives explained that the purpose of the meeting was to ascertain how committed to the business plan Mr Middleton was, what he thought of the sector and the business opportunity and whether he considered that Mr Vercoe and Mr Pratt had the capabilities to perform a demanding job in an unfamiliar business sector. I accept Mr Vercoe's evidence that Mr Middleton responded that he had worked with Mr Vercoe at Rockingham and that he thought that he was capable of implementing the business plan. Mr Middleton said that he liked the sector. His responses appeared to satisfy Mezzanine. In the event, however, Mezzanine decided that it would not offer to provide the main financing for Project Scrooge. It was prepared to consider becoming involved with providing mezzanine finance if the MBI team managed to find other funders.

93. At about this time Ms Hewitt moved jobs and dropped out of involvement with Project Scrooge.

94. Mr Vercoe and Mr Pratt continued to work on developing the business plan. Since Mezzanine was no longer interested in providing the main funding for an acquisition of H & T, Mr Vercoe and Mr Pratt tried to identify other potential providers of funding.

95. In late July 2003 Mr Innes started working for M & S and became the main associate there working on Project Scrooge. Mr Innes and Mr Pratt worked on developing the business plan while Mr Vercoe was away on holiday for the first part of August 2003.

96. On 19 August 2003 Mr Vercoe, Mr Pratt, Mr Cumberland and Mr Innes had a meeting to discuss the continuing development of the business plan. By this stage Mr Vercoe had obtained a set of internal management accounts for H & T for a one-month period. The circumstances in which these management accounts were obtained were somewhat murky. Mr Vercoe's evidence was that Mr Nichols had supplied them to Patrick Vercoe to pass them on to Mr Vercoe. This would perhaps have been surprising at this stage, since Mr Nichols had rebuffed Mr Vercoe's attempts to interest him in becoming part of the management buy-in/management buy-out team. It does not appear that Mr Nichols had any permission from H & T or Cash America to release private financial information in this way. However, in his evidence under cross-examination, Mr Nichols accepted that he probably had provided these management accounts to Patrick Vercoe. So it appears that he was in this limited way providing a degree of assistance to Mr Vercoe for the Project Scrooge idea. There was no suggestion of a different source for the provision of these management accounts to Mr Vercoe. I conclude, therefore, that Mr Nichols did provide this set of management accounts as Mr Vercoe said. I think that by this stage Mr Nichols was probably seeking to hedge his bets, so that if Mr Vercoe's plans for the acquisition of H & T did come to anything Mr Nichols would be able to say that he had helped him.

97. I think there was a consciousness amongst those who saw these management accounts that there might have been something not entirely proper about the way in which this information had come through to the MBI team. Mr Innes was notably uneasy when questioned about the use of this information and referred to its use in the preparation of the business plan as falling within "a grey area". At a later stage, when RFML became involved, Mr Middleton made a point of warning it that it should take care that any information disclosed by it to Cash America should be based on sources independent of this material obtained via Patrick Vercoe, thereby (as it seemed to me) indicating a degree of sensitivity about disclosing that the MBI team had had access to information of this kind. Mr Innes, however, fairly made the point that in due course RFML was aware that information had been obtained from inside H & T in this way and was prepared to make use of these management accounts. At trial there was not a full exploration of the circumstances in which these management accounts were released to the MBI team and whether what was done was in any way improper. It is not necessary for me to say any more about this.

98. At the meeting on 19 August 2003 the information revealed by the H & T management accounts and how that might impact on the business plan was discussed. After the meeting Mr Pratt prepared a list of outstanding action points. One of these was, "research Swedish company". This was a reference to SP. I accept the evidence of Mr Vercoe, Mr Pratt and Mr Innes that they were considering what to do about SP well before they made their approach to RFML.

99. In accordance with the arrangements that had been agreed with Mr Middleton, Mr Vercoe kept him informed from time to time about the progress being made in relation to the development of Project Scrooge and supplied him with copies of the business plan as it was revised. In an e-mail of 21 August 2003 Mr Vercoe informed Mr Middleton that they were planning to approach five private equity houses through M & S to see if they would be interested in supporting the proposed project. One of those identified was RFML.

100. On 28 August 2003 Mr Vercoe and Mr Pratt signed an engagement letter with M & S. This set out in general terms what M & S proposed to do in relation to Project Scrooge, including reviewing the business plan and assisting in raising finance for it. M & S's fee was to be a success fee of 2.5% of total funds raised including debt, equity, mezzanine and working capital facilities. It should be noted that M & S thus had a strong interest in the completion of the acquisition of H & T so that its success fee would become payable. The letter referred to Mr Vercoe "using Newco, a company of which you will be a director", which it was contemplated would act as the acquisition vehicle for the purposes of Project Scrooge. The use of an acquisition vehicle (such as MAS) in this way was simply a matter of the contemplated mechanism to implement the proposed transaction. M & S acknowledged in the letter that it would not release confidential information, including the business plan, to potential investors until they had signed a confidentiality agreement in a form acceptable to Mr Vercoe.

101. The MBI team's business plan and documents relating to the presentations to be made to venture capital companies were close to being finalised in early September 2003. On 5 September Mr Innes sent Mr Middleton a copy of the latest revision of the business plan and management presentation documents, indicating that the financial section for these documents should be completed in the following weeks.

102. On 8 September 2003 Mr Innes got in contact with Mr Slatter at RFML, amongst others, to raise the possibility of an approach by the MBI team. He knew Mr Slatter reasonably well, having previously been a colleague of his at Arthur Andersen. Mr Innes spoke to Mr Slatter on the telephone to say that M & S were acting as intermediaries for an MBI team interested in acquiring a UK sub-prime finance provider and asking whether this was something that RFML would be interested in looking into. According to Mr Slatter's notes of the telephone call, Mr Innes mentioned that Mr Middleton was the proposed chairman and that the proposed CEO (he did not mention Mr

Vercoe by name) had worked with him at Rockingham; that the proposed CEO had no experience in pawnbroking; that there was a business plan which had been prepared; and that there was a need to keep the UK management team on board. This makes it clear that right from the outset Mr Innes made no secret of the fact that the MBI team lacked experience in the pawnbroking business and that they would be dependent on using elements within the incumbent management to implement their business plan. Indeed, I consider that Mr Innes emphasised these points precisely because it was obvious that this was an issue which would have to be addressed up front with any venture capital company and to ensure that such a provider appreciated the nature of the MBI team which was inherent to the business opportunity which was being presented to it. In fact, in an answer by Mr Slatter under cross-examination, he recalled that in this first telephone call Mr Innes said to him that the management team was "not perfect", but had a very credible chairman (Mr Middleton). Mr Slatter indicated that RFML would be interested to review the opportunity.

103. On 9 September 2003 there was e-mail correspondence between Mr Vercoe and M & S. The correspondence included discussion of the position of SP. SP was not included in H & T's accounts and Mr Vercoe referred to the possibility that Cash America might wish to dispose of SP at the same time as it sold H & T. The evidence of Mr Pratt, Mr Vercoe and Mr Innes was that they had a discussion in advance of the presentations made to venture capital companies about how to deal with the issue of SP. They decided that they did not wish to dilute their message in relation to the attractiveness of an acquisition of H & T by referring to SP in the business plan and presentation documents which were to be sent to the venture capital companies. It also seems that they had only limited information at this stage about SP. However, they agreed between themselves that if any of the presentations went well and the venture capital company was expressing interest in Project Scrooge then at that stage in the presentation reference would be made to SP and the possibility that Cash America would require any purchaser of H & T to acquire SP at the same time. I accept their evidence on this point.

104. That Mr Innes, Mr Vercoe and Mr Pratt were alive to this issue at the relevant time is supported by the contemporaneous documents. I also found the evidence that they gave about the approach that they decided to adopt to be compelling in light of the particular commercial situation in which they found themselves at this point. They knew that disposal of SP was likely to be an issue for Cash America and this would inevitably have to be canvassed with any venture capital company which decided to pursue the business opportunity; they did not wish to put off potential funders by complicating the argument for the acquisition of H & T by referring to SP in the documents sent out to attract the attention and interest of venture capital companies in the first instance; on the other hand, if they did not mention SP at all at the outset and it emerged as an issue later (as it was bound to), that could have a detrimental effect in undermining the willingness of a funder to proceed and might undermine the funder's confidence in them. The compromise they came up with was an attempt to reconcile this tension in the presentation of their business case.

105. I also accept their evidence that they followed through this plan when making their presentation to RFML on 24 September 2003. It made good sense for them to do so. After the formal presentation, they made reference to SP and the need to look into the possibility that Cash America would insist upon selling SP at the same time as H & T.

106. On this point I prefer the evidence for the Claimants to that of Mr Cartwright and Mr Slatter for RFML. The evidence of Mr Cartwright and Mr Slatter was that no reference was made to SP at this first meeting. They pointed out that in their report on the meeting for RFML's credit committee no reference was made to the possibility of a need to finance an acquisition of SP. They also referred to a later e-mail from Mr Lyon of M & S (who was assisting Mr Innes) dated 2 October 2003 in which he assumed that SP had not yet been mentioned to RFML as an issue. However, it is clear from their report that what interested Mr Cartwright and Mr Slatter from the meeting was the potential profit to be made from an acquisition of H & T, as to which a full business case had been presented, so it was natural that their report focused on that. Also, at such an early stage in a management buy-in transaction there will inevitably be many imponderables and risks (see para. [12] above) and a short internal report of the form they prepared for use within an experienced venture capital company such as RFML would not be expected to go through them all - so it is plausible to suppose that they regarded the speculative issue of Cash America wishing to sell SP at the same time as H & T as falling into the class of risk which did not need to be canvassed in their report. That view is further supported by the evidence of Mr Vercoe and Mr Pratt that when the issue of SP was raised at the meeting, Mr Cartwright and Mr Slatter replied that if the overall business case made sense that would not be a problem for Rutland. It is also supported by the fact that it does not appear that the later introduction of SP into the transaction as it developed caused any major difficulty for or ructions within RFML. So far as concerns Mr Lyon's e-mail, he had not attended the relevant meeting nor been privy to the agreement between Mr Vercoe, Mr Pratt and Mr Innes about how to deal with the SP issue at the meeting. I find that he made an assumption that SP had not previously been raised as an issue with RFML which was factually incorrect.

107. On 10 and 11 September 2003 Mr Innes sent out draft confidentiality agreements to the five venture capital companies to which presentations were to be made, including RFML. They each counter-signed these agreements. The letter to RFML thus became the September contract, the first of the agreements on which the Claimants rely. It was contained in a letter dated 11 September 2003 sent on behalf of the MBI team and was countersigned by Mr Slatter on behalf of RFML on 12 September 2003. The letter was modelled on the standard form confidentiality letter which had been promulgated by the British Venture Capital Association for use in relation to such approaches to venture capital companies to market business ideas. Such a letter is intended to provide for a reasonable compromise between the interests of a person who has a business idea for which he seeks to secure funding and the interests of the venture capital companies he approaches (who, it may transpire, may not be interested in the idea once it is disclosed to them and will wish not to be bound by excessively onerous obligations arising out of the approach to them).

108. The September contract included the following terms:

> "We understand that you wish to investigate the business of Project Scrooge (the "Company") in connection with the possible Management Buy In ("MBI") of the company/companies associated with the Project (the "Permitted Purpose"). Subsequently, that you, your directors and employees, other potential syndicate members or other providers of finance and your financial and professional advisers, in relation to the Permitted Purpose, (together referred to as the "Disclosees"), will need access to certain information relating to the Company (the "Confidential Information"). This includes, without limitation, the business plan and financial model that has been prepared by the proposed MBI team regarding the Permitted Purpose.
>
> 1. In consideration of our agreeing to supply, and so supplying, the Confidential Information to you and agreeing to enter into discussion with you, you hereby represent that you are a person who falls within Article 19 (disregarding paragraph (6) of that Article) or Article 49 (disregarding paragraph 2(e) of that Article) of the Financial Services and Markets Act 2000 (Financial Promotion) Order and undertake and agree as follows:
>
> (a) to hold the Confidential Information in confidence and not to disclose or permit it to be made available to any person, firm or company (except to other Disclosees) without our prior written consent;
>
> (b) only to use the Confidential Information for the Permitted Purpose;
>
> (c) to ensure that each person to whom disclosure of Confidential Information is made by you is fully aware in advance of your obligations under this letter and that, in the case of other potential syndicate members, each such person gives an undertaking in respect of the Confidential Information, in the terms of this letter;
>
> (d) upon written demand from us either to return the Confidential Information and any copies of it or to confirm to us in writing that, save as required by law or regulation, it has been destroyed. You shall not be required to return reports, notes or other material prepared by you or other Disclosees or on your or their behalf incorporate Confidential Information (Secondary Information) provided that the Secondary Information is kept confidential;

(e) to keep confidential and not reveal to any person, firm or company (other than Disclosees) the fact of your investigations into the Company or that discussions or negotiations are taking place or have taken place between us in connection with the proposed transaction or that potential investors are being sought for the Company;

(f) that no person gives any warranty or makes any representation as to the accuracy or otherwise of the Confidential Information, save as may subsequently be agreed.

This paragraph 1 does not exclude liability for, or any remedy in respect of, fraudulent misrepresentation.

2. Nothing in paragraph 1(a) to (f) of this letter shall apply to any information or Confidential Information:

(a) which at the time of its disclosure is in the public domain;

(b) which after disclosure comes into the public domain for any reason except your failure, or failure on the part of any Disclosee, to comply with the terms of this letter;

(c) which is disclosed by us or the Company, its directors, employees or advisers on a non-confidential basis;

(d) which was lawfully in your possession prior to such disclosure;

(e) which is subsequently received by you from a third party without obligations of confidentiality (and, for the avoidance of doubt, you shall not be required to enquire whether there is a duty of confidentiality); or

(f) which you or a Disclosee are required to disclose, retain or maintain by law or any regulatory or government authority.

3. In consideration of the representation and undertakings given by you in this letter, we undertake and agree:

(a) to disclose Confidential Information to you;

(b) to keep confidential and not to reveal to any person, firm or company (other than persons within our group who need to know, our bankers and professional advisers) the fact of your investigation into the Company or that discussions or negotiations are taking place or have taken place between us; and

(c) confirm that any personal information contained or referred to in any of the Confidential Information, has been obtained, maintained and handled and all relevant licences, authorities and consents have been obtained in accordance with all applicable data protection laws, rules and regulations.

4. No term, condition or provision of this letter shall be enforceable under the Contracts (Right of Third Parties) Act 1999 by a person who is not a party to it.

5. (a) This letter shall be governed by and construed in accordance with English law and the parties irrevocably submit to the non-exclusive jurisdiction of the Courts of England and Wales in respect of any claim, dispute or difference arising out of or in connection with this letter.

(b) The obligations in this letter will terminate one year from the date of this letter.

Please indicate your acceptance of the above by signing and returning the enclosed copy of this letter as soon as possible."

109. After receipt of the signed September contract, on 16 September 2003 Mr Innes sent RFML a copy of the final version of the business plan ("the Business Plan"). The Business Plan stated, in the executive summary, that it "centres on the opportunity to consolidate the pawnbroking sector... and leverage off the enlarged customer base to provide ancillary financial services". It was proposed to create a new national high street brand called Peoples Cash. The Business Plan proposed that consolidation should be achieved initially through the acquisition of H & T with a secondary acquisition of A & B to follow or an alternative "buy and build" strategy. It included proposals for re-branding H & T's shops as Peoples Cash outlets in an attempt to get away from the perceived stigma associated with pawnbroking and to attract people who might wish to use other financial

services on offer. It was proposed that Peoples Cash would initially focus on pawnbroking, jewellery retail, cheque cashing and pay day advance. An assessment was given that Cash America was focused on its US expansion and therefore might be willing to consider an offer to acquire H & T. The Business Plan provided broad ideas for improving the profitability of H & T. It provided an analysis of the sub-prime market. This version of the plan did not suggest that the objective was to create some form of bank. The Business Plan identified the proposed management team as Mr Middleton (chairman), Mr Vercoe (CEO) and Mr Pratt (commercial director). This clearly was the "buy-in" element of the proposed management team. The Plan also identified that there would be a finance director (it referred to Mr Hughes as the incumbent finance director and indicated that the incoming management would wish to assess his abilities). It also indicated that there would be a head of operations who was yet to be chosen and who might be appointed from the existing regional managers at H & T or from outside the company. It was not proposed that Mr Nichols should be a part of the management team.

110. A complicated board structure was proposed with three distinct boards with separate responsibility for strategy, shareholder value and audit and financial control. It was proposed that the chairman and CEO would be members of the first two boards. The first of these was described as the "management committee", which was to concentrate on day to day management and overall strategy. The second was described as the "shareholder value board", which was to address the longer-term exit strategy for investors. It was pointed out that membership of each board would be structured so as to avoid conflict of interests ("e.g. a management committee board member with limited equity investment in PC may not be an appropriate member for the shareholder value board"). From this document it would appear that it was the shareholder value board which was to be the board for Companies Act directors.

111. The Business Plan included a set of financial analyses and projections. Inevitably, these were based on the limited information available at that stage (cf para. [12] above). Unsurprisingly, it emerged in the course of the later due diligence process, conducted with the benefit of access to more detailed financial information provided by Cash America, that some of the financial information in the Business Plan was incorrect. In particular, Mr Slatter, in his evidence, was critical of the figures shown for redeemed pledges in each year. However, in my view, the broad picture presented in the Business Plan was reasonably accurate so far as could be achieved at this very early stage. Certainly RFML were sufficiently impressed by the document to send it on to Barclays Bank to see if it would be interested in being involved in Project Scrooge as the provider of senior debt for the acquisition of H & T. The Business Plan made an effective and plausible case identifying H & T as a viable acquisition target, setting out reasonable assessments of how the business of H & T might be developed so as to improve its profitability, providing a good assessment of the market in which it would operate and giving a reasonable broad-brush financial picture as to why the acquisition might be attractive.

112. A presentation of Project Scrooge to RFML was scheduled for 24 September 2003. In advance of the presentation, Mr Slatter drew up a memorandum describing and assessing the Project Scrooge proposals. This was drawn from and summarised information in the Business Plan. The memorandum identified that it was proposed that Mr Middleton be chairman, Mr Vercoe be CEO and Mr Pratt be commercial director. It also indicated that the financial director was to be identified and included this reference: "head operations - identified (currently within H & T and providing information?)". This appears to have been a reference to Mr Nichols, who had provided some limited information as described above; it therefore seems that the possibility of Mr Nichols being involved in the post-acquisition management might not have been ruled out by the MBI team. The memorandum included the observation, "chairman is very heavy hitter" - a clear reference to the attractiveness of Mr Middleton as a member of the MBI team - and concluded, "nothing to lose by hearing presentation".

113. The presentation took place at the offices of M & S. Mr Cartwright and Mr Slatter attended for RFML. Mr Vercoe led the presentation, using Powerpoint slides. Mr Pratt also had a role in the presentation, dealing with development of new products and the new proposed brand. Mr Innes was in charge of presenting the key financial information.

114. The Powerpoint slides used by Mr Vercoe summarised the key points from the Business Plan. They included a statement that current H & T management were aware of an impending offer for the company from Peoples Cash (a reference again, it appears, to Mr Nichols).

115. At the end of the presentation RFML expressed interest in the MBI team's proposal. I find that at that stage reference was made to the possibility that RFML might need to acquire SP at the same time as acquiring H & T: see paras. [103]-[106] above.

116. After the presentation (probably on 24 September, although the document is wrongly dated 23 September) Mr Slatter drew up another memorandum to set out RFML's assessment of Project Scrooge. The document included these comments:

> "Management
>
> Chairman - Peter Middleton: ex-Head of Banking services Midland Bank, ex-CEO Thomas Cook, ex Solomon Brothers, ex-Nomura Principal Finance, currently chairman GTL Resources. Direct experience of sub-prime sector through Nomura acquisition of Crazy George (re-branded Brighthouse). Has confidence in Duncan's abilities as CEO if supported by a very strong operational man. Likes idea, has not been that involved in

> preparation of business plan. Willing to spend 50% of his time in the project in the first 6 months. Role as Chairman of GTL will finish in November.
>
> CEO - Duncan Vercoe: Joint MD Rockingham Experience (corporate driving days). Good sales and people person with drive and motivation.
>
> Commercial Director - John Pratt - Rutland sees no role for JP in the business going forwards
>
> Operations Director - not identified but would be critical. Could possibly come from the existing business. Strong FD [Finance Director] also required."

By this stage there was no suggestion that Mr Nichols would be involved. The document concluded that the market was very interesting, that the proposed "buy and build" strategy was attractive and, again, that "chairman [i.e. Mr Middleton] is very heavy hitter". Under "Next Steps" it said: "we recommend that we support the management team in writing with an approach to the US parent to establish if the business is for sale". The document was recorded as coming from "BSS/PIC", i.e. Mr Slatter and Mr Cartwright.

117. It is clear from the evidence of Mr Cartwright and Mr Slatter that it was the involvement of Mr Middleton that made RFML consider Project Scrooge seriously. Mr Cartwright was doubtful that Mr Vercoe had the experience to take on the role of directing the business post acquisition, and Mr Vercoe had told RFML that the incumbent manager of H & T, Mr Nichols, was ineffective. The involvement of Mr Middleton was therefore crucial.

118. The written evidence of Mr Cartwright and Mr Slatter in their first witness statements was that they were very unimpressed by Mr Pratt at the presentation. Mr Slatter's evidence was that "it was clear to us from the outset that John Pratt was not suitable for a role in H & T if we did acquire it". He also said, "although we had never envisaged a role for John Pratt, we did not need to confront this until Cash America had engaged with us, as it was still wholly uncertain until this point whether there was even a possibility of the deal going ahead". Mr Cartwright's evidence was that "from the outset it was evident to me that if we did ultimately acquire H & T, there could be no role for John Pratt in the management of H & T. I came away from the meeting wondering why he was involved".

119. In his evidence in cross-examination, Mr Cartwright sought to suggest that he thought there

might in fact be some role for Mr Pratt ultimately in the acquisition and that RFML had reserved its judgment about him. It was never explained in any satisfactory manner how this squared with the very clear and firm evidence in his witness statement and that of Mr Slatter that right at the outset RFML had concluded that they did not wish Mr Pratt to be involved. I find that the position as described by both Mr Cartwright and Mr Slatter in their original witness statements was the truth and that at the outset RFML formed the clear view that Mr Pratt should not be involved as part of the post-acquisition management team in relation to H & T. They did not explain this, or RFML's doubts about Mr Vercoe's ability to be CEO, to Mr Pratt and Mr Vercoe.

120. On 29 September 2003 Mr Vercoe reported to Mr Middleton by e-mail in these terms:

> "[M & S] have had an unofficial discussion with Rutland (last week's meeting) over the weekend and they seem interested. They like the sector, like the plan and the opportunity but there is still a question mark over John and I. They acknowledge that we know our stuff and are knowledgeable of the market and what is required but still need propping up a little on us (basically can we implement this). So I believe what will happen, on the assumption that the investment committee meeting goes well today, is that they will want to meet with you on your own for ½ hr to basically discuss why this and why John and I (predominantly me) and what involvement you will have in terms of time. The discussion was positive and seems to be moving in the right direction. ..."

The e-mail also made reference to a meeting which was to take place with another venture capital company, Graphite LLP ("Graphite"), the following day. It recorded that:

> "the biggest issue again with Graphite is management team and your involvement, when they were told that your style of Chairmanship was going to be slightly more hands on they were far more bullish".

This again underlined the significance of Mr Middleton for the transaction in terms of attracting venture capital financing. In view of the general inexperience of Mr Pratt and Mr Vercoe and their lack of practical experience in the pawnbroking sector, none of this came as a surprise to anyone. This was the very reason why Mr Vercoe and Mr Pratt had taken steps to recruit Mr Middleton for the project.

121. Mr Innes's evidence was that following the presentation to RFML he had a conversation with Mr Slatter. Mr Slatter stated that the opportunity was an excellent one and that RFML was interested. Mr Slatter then observed that management buy-ins are intrinsically more risky than

management buy-outs and that he was unsure about the merits of Mr Vercoe and Mr Pratt taking senior positions. Mr Innes replied that any uncertainty in that regard should be dealt with immediately as it was Mr Vercoe's and Mr Pratt's project and if RFML could not proceed on the basis of them taking the positions set out for them in the Business Plan, that was an issue that needed to be addressed. Mr Innes went on, "my issue was not so much whether [RFML] felt that Mr Vercoe and Mr Pratt were up to the job, but that if they did not, then this was going to be a deal breaker and we should be finding another funding partner. Essentially I wanted Rutland to put their cards on the table as quickly as possible and I told Mr Slatter this". Mr Innes said that Mr Slatter assured him that Mr Vercoe and Mr Pratt would be given the opportunity to fill the roles identified for them in the Business Plan and that RFML next wanted to meet Mr Middleton to discuss the business opportunity in general. He also said that RFML would seek reassurance from Mr Middleton that Mr Vercoe and Mr Pratt would be able to deliver in the roles set out for them in the Business Plan.

122. Mr Slatter did not remember such a conversation. However, I find that it did take place. I accept Mr Innes's evidence on this point. In coming to that conclusion I have had regard to the fact that Mr Innes was well aware of the potential weakness in Project Scrooge by reason of the lack of experience of Mr Vercoe and Mr Pratt. It would have been pointless for him to try to conceal that from the venture capital companies which were being approached. It was something that was obvious to everyone. In those circumstances, I think it is likely that Mr Slatter did raise the issue and likely that Mr Innes sought to address it directly in the way that he said he did. Indeed, in a revealing part of Mr Slatter's oral evidence, Mr Slatter said that even in their first conversation Mr Innes had referred to the issue of the weakness of Mr Vercoe and Mr Pratt in the management team. Mr Vercoe and Mr Pratt were Mr Innes's clients and I think it likely that he would have raised this issue in this straightforward way in order to protect their interests at this stage. I also think it is likely that Mr Slatter gave a response on behalf of RFML as Mr Innes recalled. If RFML had not responded in that way, it was obvious that Mr Vercoe and Mr Pratt would have taken their business opportunity elsewhere. At this stage RFML knew that it was in competition with other venture capital companies to attract Mr Vercoe and Mr Pratt to bring it the business opportunity, which it regarded as an attractive one.

123. The position so far as Mr Innes was aware, therefore, was that RFML had reservations about Mr Vercoe and Mr Pratt as senior managers in relation to H & T but that RFML was sufficiently interested in the project and sufficiently reassured by the presence of Mr Middleton that it was prepared to swallow those concerns in order to proceed with the transaction and to encourage Mr Vercoe and Mr Pratt to bring the business opportunity to it rather than some other venture capital company.

124. In accordance with RFML's request, Mr Innes arranged a meeting between RFML and Mr Middleton for 1 October 2003. The e-mail correspondence at the time indicates that it was

originally contemplated that Mr Innes should also attend that meeting, but in the event he did not attend. According to Mr Innes, at the last minute he received a telephone call from RFML (either Mr Cartwright or Mr Slatter, he could not remember which) asking him not to come to the meeting because RFML wished to be able to speak to Mr Middleton alone. Mr Slatter and Mr Cartwright both denied that they had made any such request. RFML sought to suggest that Mr Innes's non-attendance at the meeting between RFML and Mr Middleton was purely a matter of his own choice.

125. On this conflict of evidence I prefer the evidence of Mr Innes. Mr Innes knew that there was an issue about the suitability of Mr Vercoe and Mr Pratt for RFML in relation to their proposed roles as senior managers in H & T. He knew that RFML was going to be asking Mr Middleton questions relevant to that issue. It was an issue which was fundamental for Mr Vercoe and Mr Pratt, his clients, in relation to the transaction. There was no suggestion that he had any other pressing engagement at the time which took priority over attending the scheduled meeting. In my view, it is highly probable that, given the opportunity, he would have wished to attend this meeting dealing with such a sensitive and important matter for his clients. On the other hand, Mr Cartwright and Mr Slatter had a clear interest to try to have a private meeting with Mr Middleton where he could talk entirely freely with them about his views about Mr Vercoe and Mr Pratt. If Mr Innes attended the meeting, representing the interests of Mr Vercoe and Mr Pratt, there was clearly a risk that Mr Middleton might be inhibited in expressing his views. I find that one or other of Mr Cartwright and Mr Slatter told Mr Innes that he should not come to the meeting.

126. At the private meeting between Mr Cartwright, Mr Slatter and Mr Middleton, Mr Cartwright and Mr Middleton got on well together and were impressed by each other. Mr Middleton was not forthcoming in either of his two witness statements about what he said about Mr Vercoe and Mr Pratt at this meeting, but it was clear from Mr Middleton's evidence under cross-examination that he had formed the view that Mr Pratt was not up to a management role in H & T and that he told RFML that. Mr Slatter's evidence in his original witness statement was that Mr Middleton told him and Mr Cartwright "that he did not see a role for Mr Pratt". It is my clear view on all the evidence available to me that this is indeed what Mr Middleton said. I reach this view taking account of Mr Slatter's reference in his supplemental witness statement to his notes from the meeting, which he had then managed to locate, which referred to Mr Middleton not knowing Mr Pratt well: such a note is consistent with Mr Middleton also stating that he did not see a role for Mr Pratt, as Mr Slatter recalled. Mr Middleton, in his supplemental witness statement, said "I never formed any firm view on Mr Pratt until it felt like the deal might actually be going somewhere, there was no point". I do not accept that evidence. I find that he had formed a very firm view about Mr Pratt and that he expressed that view at the meeting with RFML on 1 October. This accorded with RFML's own assessment of Mr Pratt, and from that time on (if not before) there was no prospect that Mr Pratt would be involved in the transaction. None of Mr Middleton, Mr Cartwright and Mr Slatter told Mr Vercoe, Mr Pratt or Mr Innes about this.

127. At the meeting, Mr Middleton reassured RFML about his enthusiasm for the sub-prime sector and about his level of commitment to being involved in management if the acquisition proceeded. He was more enthusiastic about Mr Vercoe's abilities than Mr Pratt's, but said that Mr Vercoe would need a lot of support in a management role. Mr Cartwright was doubtful that Mr Vercoe had the experience to direct the business post-acquisition.

128. After the meeting, Mr Slatter and Mr Cartwright prepared a further memorandum for internal use within RFML, dated 3 October 2003. This again summarised the opportunity presented by Project Scrooge. In the section on management they recorded that Mr Middleton "has confidence in [Mr Vercoe's] abilities as CEO if supported by a very strong operational man". The memorandum included the following:

> "CEO - Duncan Vercoe: Joint MD Rockingham Experience (corporate driving days). Good sales and people person with drive and motivation. Clear weakness that he has not run this type of business before.
>
> Commercial Director - John Pratt - Rutland & PM currently see no role for JP in the business going forwards
>
> Operations Director - not identified but would be critical. Could possibly come from the existing business. Strong FD [Finance Director] also required."

At this stage, despite the use of the word "currently", I am satisfied that there was no realistic prospect whatever that Mr Pratt would be involved as part of the post-acquisition management team for H & T. The document set out similar conclusions as in the earlier memorandum and under "Next Steps" it said:

> "We are in the process of discussing with banks their potential appetite for this type of business. If response is positive enough we would wish to provide a letter of support to the management team to support an approach to the US parent to establish if the business is for sale."

129. RFML sent the Business Plan and the presentation slides from 24 September to Barclays Bank to canvass its support in principle for the acquisition. Barclays Bank was interested. It was reported back to Mr Innes, probably by Mr Slatter, that the meeting with Mr Middleton had gone well. Mr Innes reported back to Mr Vercoe that the meeting had gone well and that RFML was interested in

taking the next step. Mr Slatter also spoke to him and conveyed the same message.

130. Following RFML's expression of interest in proceeding with the project, Mr Vercoe and Mr Pratt supplied it with further information about Project Scrooge and the pawnbroking business sector. This was to enable RFML to make a final decision about whether it was willing to provide the funding for the proposed acquisition of H & T.

131. On 24 October 2003 there was a meeting attended by Mr Vercoe, Mr Middleton, Mr Slatter, Mr Cartwright and Mr Innes to analyse where RFML had got to in preparing its offer of funding for Project Scrooge. The same day Mr Slatter sent Mr Innes a short document entitled "Project Scrooge Rutland Issues/Thoughts". Under the heading "Work to date", the document included this item: "Discussed opportunity internally. No material issues raised at this stage." Under the heading, "Issues", the document included a section on "Management" as follows:

> "...
>
> - Peter Middleton as executive Chairman is essential for the project
>
> - Clarify roles of Duncan/John
>
> - Clearly need for a very strong operations director with direct relevant experience
>
> - FD search to start as soon as we enter discussions with vendor
>
> - Need thorough assessment of current H & T management, particularly 2nd tier operating management. Operations Director and/or FD may come from there?"

The document indicated that RFML had discounted the opportunity of the acquisition of A & B and wished to focus on the "buy and build" strategy. It indicated that RFML's initial impression was that the proposed re-branding of H & T pawnbrokers outlets "seems well thought through and sensible". However, it also made it clear that RFML would not wish to rush into a full re-branding exercise and would proceed more cautiously after testing a suitable pilot scheme. The document proposed that at this stage "Rutland and management team commit to each other". It did not reveal RFML's position in relation to Mr Pratt or its reservations about Mr Vercoe.

132. At this stage there was an exchange of referee details. RFML provided details of referees for itself, and asked for referees for Mr Vercoe, Mr Pratt and Mr Middleton. Mr Innes passed on this request to Mr Vercoe by e-mail on 27 October 2003 as follows:

> "Please can you provide me with details of two referees for both yourself and John. These should be relevant to the opportunity that you are discussing with them. ...
>
> Also we need to concentrate on building the case for John. This needs to be done in the context of how the Board will interact with one another and who will have what responsibilities. We are going to have a discussion with Peter [Middleton] about this next Monday when we discuss which [private equity] house to go with. ..."

133. Mr Innes's evidence, which I accept, was that Mr Slatter telephoned him on a number of occasions to state that RFML was unsure about Mr Pratt (hence the reference to "building the case for John") but was happy with Mr Vercoe and Mr Middleton. Mr Innes knew that RFML had concerns about Mr Pratt (which might well have an impact on any equity and remuneration package which might be offered to him and might ultimately lead to a discussion that he should be excluded from the transaction), but did not know that RFML had already reached the view that there was to be no role for him in the acquisition.

134. Mr Vercoe passed on the request for a referee for Mr Pratt to Ms Hewitt by an e-mail of 28 October 2003 and in a telephone conversation. The e-mail included the following:

> "As per conversation today, the Private Equity House need some convincing that John has skills which stand alone and contribute to a business and this business plan. They have assumed that John and I have skills which cross over, this isn't as yet a huge issue but it is one which needs addressing so our references must reflect that although very effective as a team we are just that because we have different skills which get the job done. ..."

135. Mr Innes was unhappy with the proposed referees for Mr Pratt. There was some difficulty in ensuring that they were relevant to the position that it was proposed he should have as set out in the Business Plan or to demonstrate his skills in working within a large corporate environment. Mr Middleton, for his part, refused to provide referees to RFML on the grounds that he thought them unnecessary.

136. Now that Mr Vercoe and Mr Pratt were getting close to deciding which venture capital company to work with, M & S gave some thought to drafting further agreements. They turned to Dorsey and Whitney for advice on this. On 30 October 2003 Mr Innes sent Mr Cumberland an e-mail on the subject, saying "this will protect our and the management team's position (excl. John)". According to Mr Innes's evidence, this note reflected the discussions in which RFML had indicated it was unsure about Mr Pratt, and Mr Innes wished to protect his position if it eventually transpired that RFML might wish to exclude him.

137. Graphite was also expressing interest in Project Scrooge at this stage. Both RFML and Graphite put forward proposals for the levels of funding they were prepared to commit to Project Scrooge, including the purchase of SP. RFML indicated that it had reached an agreement with Barclays Bank to provide the senior debt finance for Project Scrooge. The amount of the purchase price which RFML and Graphite proposed to fund was important, because if a credible price could not be offered to Cash America the acquisition would not proceed. RFML was prepared to fund the acquisition at a purchase price for H & T of around £45 million to £50 million and to acquire SP as well. Graphite's proposal of the price for H & T which it was prepared to fund was considerably lower, at around £35 million to £40 million. Mr Innes had some correspondence with Graphite to try to encourage them to go higher, since this level of funding was not in line with the financial projections in the Business Plan, but Graphite remained far below the level of funding that was required. In the light of this, it is unsurprising that in early November 2003 Mr Vercoe and Mr Pratt decided to proceed with RFML. On 3 November 2003 Mr Innes called Mr Slatter and informed him that RFML's offer of funding had been accepted.

138. Mr Innes reported back to Mr Vercoe and Mr Middleton that RFML was delighted that they had chosen to work with it, that Mr Innes had run through outline terms and conditions for RFML and RFML had outlined the fees that it would charge and that each side wished to consider the position. According to Mr Innes's evidence, which I accept, when he spoke to Mr Slatter he told him that the basic terms and conditions on which RFML's offer to be involved was accepted included its acceptance of the proposed positions of Mr Vercoe, Mr Pratt and Mr Middleton, that they would maintain its offer at the proposed level, that it understood that it was likely it would also be required to acquire SP and that it would quickly provide details of the remuneration packages to be provided to the management team.

139. Mr Innes's e-mail also referred to matters which should be addressed before the next forthcoming meeting with RFML took place. These included as an item, "Rutland ... to conclude on the Deed to protect management's IPR". This was a reference to Mr Vercoe's and Mr Pratt's intellectual property rights in respect of the information regarding the business opportunity and the Business Plan, as they were now about to formalise the relationship with RFML.

140. On about 5 November 2003 Mr Innes sent a draft agreement (in the form of a document to be executed as a deed) bearing the date 3 November 2003 to RFML. It seems that this draft agreement had been drafted by Dorsey and Whitney. It dealt with the confidentiality of the opportunity and the Business Plan. It also included the following proposed terms:

> "... each of the parties hereto agrees as follows:
>
> (i) to negotiate and enter into a form of indicative offer letter, detailing the principal terms upon which the respective parties will contract with one another in respect of Project Scrooge;
>
> (ii) at all times in good faith, you shall conduct appropriate due diligence, negotiate and (subject to paragraph (iii) below) agree appropriate contracts in respect of Project Scrooge in the manner contemplated in the Business Plan, in each case with the advisers to the Company and/or the Individuals;
>
> (iii) prior to the parties agreeing the contracts and other matters contemplated by paragraph (ii) above, the Individuals shall confirm by majority their acceptance of such terms (if any) of employment and/or engagement with the Company as are offered to them; ..."

141. RFML responded that it was not prepared to sign this draft agreement. Instead, it provided its own letters on 12 November 2003.

142. Mr Jones for RFML made some reference to the draft agreement dated 3 November (and the fact that RFML declined to agree to its terms) as an aid to the construction of the November contract. Mr Newey submitted that reference to the draft agreement for this purpose is not permissible. I agree with him: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 913A-B (the third in the well-known list of principles for construction of contracts set out by Lord Hoffmann) and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 3 WLR 267. However, I think the process leading up to the agreement on the November contract is relevant as indicating that the parties were negotiating with each other at arm's length. This tends to undermine the Claimants' contention that a fiduciary relationship arose between RFML and them.

143. A further meeting was set up with RFML for 6 November 2003. On 5 November Mr Vercoe

and Mr Middleton conferred by e-mail regarding that meeting. Mr Middleton proposed:

> "If they agree to give us protection by signing James' letter, I will talk about the status and remuneration of my involvement and you should do the same for you. I do think we need to make the explicit point that whilst we wish to involve John in the due diligence process where appropriate we shall not offer him an employment contract until the deal is completed and after we have discussed the issue with Rutland."

Mr Vercoe responded to this point with the word, "Fine". In my view, Mr Vercoe appreciated that RFML had Mr Pratt's position under review, and might eventually decide that he should not be involved - but this fell far short of knowing that RFML's position already was that Mr Pratt should not be involved in the project. Mr Vercoe did not wish RFML to be put off a transaction involving him by any doubts it might ultimately have about Mr Pratt.

144. Mr Vercoe, in his witness statement, suggested that he had a meeting alone with Mr Middleton on the morning of 3 November 2003, in which they discussed Mr Pratt's position in a heated manner. Mr Vercoe was not challenged on this evidence, but nor was Mr Middleton asked about it. Mr Vercoe's account of discussing Mr Pratt at that meeting does not sit easily with his e-mail exchange with Mr Middleton referred to above, and I am doubtful that any such debate about Mr Pratt was heated in the manner Mr Vercoe now recalls.

145. On 5 November Mr Innes e-mailed Mr Vercoe and Mr Middleton regarding the forthcoming meeting with RFML. He attached a provisional agenda for the meeting and said to Mr Vercoe, "please note that due to the subject matter this is not a meeting that John should be attending". Mr Innes included this because he was aware that Mr Slatter and Mr Cartwright wanted to see where Mr Pratt fitted into the business opportunity and they wanted to hear Mr Middleton's and Mr Vercoe's views on the issue. Under the heading, "Outline of key management terms in principle", the agenda referred to Mr Middleton, Mr Vercoe and "Other directors/key employees", but not specifically to Mr Pratt. There was no protest from Mr Vercoe at any of this, which supports my view about Mr Vercoe's position in relation to Mr Pratt at this stage at para. [144] above. Neither Mr Vercoe nor Mr Innes took steps to alert Mr Pratt to any concern that his position might be precarious.

146. Meanwhile, Mr Innes clarified with Dorsey and Whitney that they were prepared to work on behalf of management on a contingent basis up to the point of management agreeing heads of terms with RFML, "which will begin once the target has shown an interest in selling".

147. The meeting on 6 November 2003 was attended by Mr Innes, Mr Vercoe, Mr Slatter and Mr Cartwright, with Mr Middleton joining by the telephone. According to Mr Innes, whose evidence I accept, the roles that Mr Vercoe and Mr Pratt would take in the business, their salaries and equity stakes were not mentioned; everyone focused on taking matters forward and the next steps. Mr Slatter's evidence, which I also accept, was that the Claimants asked RFML to agree that it would only conduct due diligence, negotiate and agree contracts in respect of the acquisition of H & T once it had agreed post-acquisition terms of employment with Mr Middleton, Mr Vercoe and Mr Pratt, and that RFML said that it would not sign any such letter because that was not the way deals worked (it is likely that the Claimants raised that issue at this stage and likely that RFML responded in this way, having regard to the commercial realities of the situation: cf para. [20] above).

148. According to Mr Cartwright's evidence about this meeting, there may have been discussion about management remuneration in general terms, but it would have been premature to discuss it in any detail since RFML did not know whether the acquisition would go ahead or, if it did, who or how many people would be involved in the management team and in what roles. His best recollection was that he may have explained that RFML liked management to be incentivised and that it generally typically set aside equity for management of between 15% and 20% of the total equity in the business to be split among the management team. He also said that he may have discussed the broad lines of compensation that might typically be paid in this type of business. It was possible that a figure of about £150,000 a year might have been mentioned in relation to a CEO's salary. I think it is likely that there was some such discussion of these matters (since Mr Vercoe was pressing RFML for some idea of what he might expect from his involvement in the transaction), but only at the very general level indicated by Mr Cartwright (since RFML would not have felt able to commit itself in more detail at that stage: cf para. [20] above).

149. In this part of his evidence Mr Cartwright was responding to item 80 in the Claimants' Response to Request for Further Information of the Particulars of Claim dated 22 June 2008, which dealt with the meeting on 6 November 2003 in these terms:

> "As is already clear from paragraph 33 (in particular the words "no final agreement was reached"), no such agreement was reached. As is also clear from paragraph 33, the benefits to be derived by the MBI team (including Mr Vercoe and Mr Pratt) were discussed and it was envisaged (at least, in the case of Mr Cartwright of Rutland, he appeared to envisage) that both Mr Vercoe and Mr Pratt would obtain compensation for the use of the Business Plan and Confidential Information through equity, employment and remuneration. The specific roles discussed were for Mr Vercoe to be Chief Executive Officer at a salary of £150,000 per annum and for Mr Pratt to be Commercial Director at a salary of £100,000 per annum. Both Mr Vercoe and Mr Pratt were to have an equity stake forming part of the total equity stake available to the intended

> management, which was in total between 10% and 20%, depending on performance. The Rutland representatives suggested that the detail of the equity stake in the post-acquisition vehicle by Mr Vercoe and Mr Pratt would be considered in more detail once Rutland had developed an equity model. As pleaded, it was on this basis that the Claimants provisionally consented to the continuing use of the Business Plan and Confidential Information by the Defendants and Mr Middleton."

Mr Vercoe signed a statement that he believed the facts stated in this Response were true. Mr Vercoe, however, did not give a detailed account of this meeting in his witness statement or oral evidence. Mr Innes's evidence about the meeting was inconsistent with this pleading. I do not think that the account of the discussion given in the Response is accurate.

150. On about 7 November 2003 Mr Cartwright sent Mr Innes a draft letter of intent which he proposed to issue in place of the draft agreement dated 3 November proposed by the Claimants.

151. On 12 November 2003 Mr Cartwright sent Mr Vercoe, Mr Middleton and Mr Pratt the signed letter of intent in these terms:

> "Dear Sirs,
>
> Project Scrooge/MAS Corporation Limited ("the Company")
>
> We refer to the letter dated 11th September 2003 ("the Letter of Confidentiality") from yourselves regarding the disclosure of Confidential Information (as defined therein), and the Peoples Cash Business Plan dated September 2003 ("the Business Plan") subsequently forwarded to us on the Company's behalf.
>
> We are aware that [M&S] is instructed by the Company to advise on the potential acquisition by the Company of the business or businesses referred to generally as "Project Scrooge". We are also aware that Peter Middleton, Duncan Vercoe and John Pratt ("the Individuals") are currently promoting the Business Plan on behalf of the Company.
>
> We confirm that we are interested in supporting the Individuals in the pursuit of the acquisition of one of the target companies identified in the Business Plan as a basis for

> Project Scrooge. We also confirm our interest in providing and/or procuring the appropriate funding for Project Scrooge, subject to contract and due diligence.
>
> We look forward to working with you on Project Scrooge."

152. It should be observed that the reference in the letter of intent to matters which were "subject to contract and due diligence" was to the provision of funding for Project Scrooge. In that regard, the letter spelled out what was already obvious to the parties, namely that RFML was not contractually obliged to carry through an acquisition of H & T by providing funding for such acquisition.

153. Mr Newey submitted that this letter contained two lies by Mr Cartwright. First, in writing that "we are interested in supporting the Individuals in the pursuit of the acquisition..." Mr Cartwright lied, in that RFML had already formed the view that they were not interested in supporting Mr Pratt, one of the named "Individuals", in that regard. Secondly, in saying, "we look forward to working with you on Project Scrooge", Mr Newey submitted that Mr Cartwright lied, because he had no intention whatever of working with Mr Pratt on Project Scrooge as it matured into a viable transaction. I accept those submissions. On my assessment of the whole of evidence, I find that Mr Cartwright did lie in those two respects in sending this letter. He regarded the transaction as potentially attractive and did not wish to lose it to any of his venture capital competitors, as he might have done had he honestly informed Mr Vercoe and Mr Pratt at this stage that Mr Pratt was to have no role in the transaction. He calculated that he would be able to deal with Mr Pratt at less risk to RFML by excluding him at a later stage of the development of the transaction, if it transpired that Cash America was seriously interested in dealing with RFML in relation to the sale of H & T.

154. Also on 12 November Mr Cartwright countersigned a letter addressed to him by Mr Vercoe on behalf of the Claimants and Mr Middleton, which accordingly became the November contract. The November agreement included the following terms:

> "Dear Sirs,
>
> We understand that you wish to investigate the business of Peter Middleton, Duncan Vercoe and John Pratt (together the "Individuals") and MAS Corporation Limited (the "Company") in connection with the possible Management Buy In ("MBI") of the company/companies associated with Project Scrooge (the "Permitted Purpose"). Subsequently, that you, your directors and employees, other potential syndicate members or other providers of finance and your respective financial and professional advisers, in relation to the Permitted Purpose, (together referred to as the "Disclosees"),

> will need access to certain information relating to the business, the Individuals and the Company including, without limitation, the business plan and financial model from time to time prepared by the proposed MBI team regarding the Permitted Purpose (together, the "Confidential Information").
>
> 1. In consideration of our agreeing to supply, and so supplying, the Confidential Information to you and agreeing to enter into discussions with you, you hereby represent that you are a person who falls within Article 19 (disregarding paragraph (6) of that Article) or Article 49 (disregarding paragraph 2(e) of that Article) of the Financial Services and Markets Act 2000 (Financial Promotion) Order and undertake and agree as follows:
>
> (a) to hold the Confidential Information in confidence and not to disclose or permit it to be made available to any person, firm or company (except to other Disclosees) without our prior written consent;
>
> (b) only to use the Confidential Information for the Permitted Purpose;...
>
> 2. Nothing in paragraph 1(a) to (f) of this letter shall apply to any information or Confidential information:...
>
> 5...(b) The obligations in this letter will terminate one year from the date of this letter."

This letter was in closely similar terms to the September 2003 Agreement and again appears to have been modelled on the British Venture Capital Association model non-disclosure agreement.

155. It was agreed by Mr Vercoe and Mr Pratt that RFML should be the party to make the approach to the management of Cash America to determine whether it was interested in selling H & T and SP, which RFML then proceeded to try to do using their contacts in PriceWaterhouseCoopers in America to obtain an introduction. Although Mr Vercoe's evidence was that, particularly with hindsight and fuller knowledge, he felt that this was the first step in a process whereby he was moved out by RFML from being in the driving seat in relation to the acquisition of H & T, I do not think that there was anything untoward in the conduct of RFML in this regard. It was obvious that if the approach to Cash America was to be successful, it needed to be a clearly credible approach. To achieve that it was sensible that the approach should be made by the party which would be providing the finance and in relation to which Cash America could carry out commercial checks

which would be likely to be satisfactory. I also think Mr Vercoe's assessment of the situation was unrealistic: it was practically inevitable that RFML, as the party providing by far the greatest part of the funding to acquire H & T and SP, would be the party in the driving seat for any approach to Cash America.

156. Some time elapsed before contact was made with Cash America, in about mid-December 2003. In his witness statement Mr Vercoe complained that the approach to Cash America did not introduce Mr Middleton, Mr Vercoe and Mr Pratt as the members of the management buy-in team in relation to the transaction. Again, however, I do not think that there was anything untoward about this. The management of H & T after it was disposed of by Cash America would be of only secondary importance to Cash America. If it was to dispose of H & T, what was of direct interest to Cash America would be the price it was to receive and whether the party approaching it was likely to be good for the money.

157. RFML kept Mr Vercoe informed about the progress of discussions with Cash America. Cash America's position was that H & T was not actively for sale but that any serious offer would be considered. This bore out the assessment by Mr Vercoe and Mr Pratt in the Business Plan. Cash America also made it clear that it would wish to sell SP at the same time as H & T.

158. Since Cash America was interested in RFML's approach, on 19 January 2004 Mr Innes, Mr Vercoe and Mr Pratt met to review the position and decide on a work programme to address outstanding issues in relation to Project Scrooge. This included continued analysis of H & T's business and the sub-prime market. They also worked on ideas for due diligence questions and a detailed implementation timetable for the Business Plan, including in relation to SP.

159. An e-mail from Mr Innes to Mr Vercoe dated 20 January 2004 referred to a number of points for consideration, including "equity - what you can raise" and "think about proper employment perhaps". This indicates that - not unnaturally - Mr Vercoe, Mr Pratt and Mr Innes were giving some consideration to what might be the form of the package for Mr Vercoe and Mr Pratt if the acquisition proceeded. The e-mail indicates that the consideration at this stage was at a fairly vague and abstract level. This supports my view that there had not been a detailed discussion of these matters on 6 November.

160. In late January 2004 Cash America released some financial information about H & T and SP to RFML. RFML passed on the financial information to Mr Innes, Mr Vercoe and Mr Pratt for them to analyse the implications of that information for the Business Plan. This was work which would be relevant to the price to be offered and the structure of any deal. This was an obvious point, since the amount RFML was prepared to offer for H & T and SP would depend upon its assessment of the

value of the income streams which they represented, as reflected in their capital value, and also taking into account the costs of any transaction (including the amount of equity which RFML would need to set aside for management in the business). But Mr Cartwright had already given a broad indication of the parameters at the meeting on 6 November.

161. Mr Vercoe, in his witness statement, made repeated criticisms of the fact that as time went by Mr Cartwright declined to say what equity would be available for Mr Vercoe in particular. In my view, this reflects a degree of inexperience on the part of Mr Vercoe and the criticism is misplaced. There was little more that Mr Cartwright could usefully say about equity participation at this stage and before close to finalisation of the transaction, because that would depend upon a process of negotiation, not just with Mr Vercoe but with all other managers involved in the transaction (reflecting, amongst other things, their importance and respective contribution to the business moving forward). Mr Cartwright's unwillingness to provide more detail did not, contrary to Mr Vercoe's suspicions, indicate that Mr Cartwright had decided by this stage to exclude Mr Vercoe from the transaction.

162. Mr Vercoe and Mr Pratt passed their impressions about the financial information provided by Cash America and ideas for further questions back to Mr Cartwright, who made use of them in approaches to Cash America for additional information. It was clear to RFML that Mr Vercoe and Mr Pratt were working hard in promoting the transaction at this stage, but still RFML did not tell Mr Pratt that he would have no role in the post-acquisition management.

163. On 5 February 2004 there was a meeting between Mr Innes, Mr Vercoe, Mr Pratt and Mr Slatter to review the position in the light of information provided by Cash America and the work on the figures done by Mr Vercoe and Mr Pratt. According to Mr Vercoe's witness statement, the meeting was also attended by Mr Cartwright and Mr Middleton. So far as Mr Cartwright is concerned, I think this is an error of recollection on Mr Vercoe's part. Mr Cartwright denied that he had been at this meeting and Mr Slatter said that he had not been. An e-mail from Mr Innes to Mr Cartwright and Mr Slatter on 6 February 2004 supports the view that the discussion the previous day had been with Mr Slatter alone and that Mr Cartwright had not attended the meeting. Mr Pratt did not place Mr Cartwright at this meeting. Mr Innes's witness statement about this meeting did not distinctly refer to Mr Cartwright being at the meeting.

164. According to Mr Innes, at the meeting there was discussion about the issue of what equity was on offer to the MBI team. He said that Mr Vercoe, Mr Pratt and he made it clear that before any offer to Cash America was made, the team would require an outline of what model was the basis of the offer being made and therefore what equity RFML envisaged being available to itself and also to the MBI team. Mr Vercoe supported this account, which was disputed by RFML. Mr Pratt did not support this version of events in his witness statement. I do not think that such a conversation

took place at this meeting. I think it unlikely that there would have been any detailed discussion about the offer of equity for the MBI team in the absence of Mr Cartwright. Moreover, I am satisfied that if put to RFML in this way, RFML would have declined to give any such assurance, just as it had declined to sign the draft letter of 3 November 2003.

165. Mr Vercoe in his evidence about this meeting also suggested that in the period before Christmas 2003, after the matter was discussed in November, Mr Cartwright had assured Mr Vercoe that RFML would meet with the MBI team to discuss their packages before any indicative offer was made to Cash America. Mr Cartwright did not accept this. Mr Vercoe's evidence about such a meeting was very imprecise as to when exactly it took place. It was not corroborated by other evidence. Again, in my view, if Mr Cartwright had been asked for an assurance that RFML commit itself in terms of equity participation and remuneration before an indicative offer was sent to Cash America, consistently with the position taken in respect of the draft letter of 3 November, he would have declined to do so. The whole thrust of RFML's position was that these matters could not be agreed at this stage but could only be finalised much later on in the transaction. That was a compelling commercial logic which informed Mr Cartwright's actions and makes it unlikely, in my view, that such a conversation as recalled by Mr Vercoe took place. I think that this is an area where Mr Vercoe built up some anodyne remark by Mr Cartwright in his own mind.

166. On 6 February 2004 Mr Innes e-mailed Mr Cartwright and Mr Slatter with reference to the meeting with Mr Slatter the previous day. He asked them what information they required from himself and management for them to be comfortable presenting numbers to the bank (i.e. Barclays Bank) and getting a structure in place for the deal. He went on:

> "I personally want to make sure that you have as much information as available to be able to price the deal appropriately so that we can give management an idea of the level of equity/returns that they are likely to receive. It is obviously important that you, the bank and management 'buy in' to the numbers and agree an outline to the business strategy to be able to achieve this."

Mr Innes did not maintain that RFML had given an assurance to provide the MBI team with details of the packages to be made available to them before any offer was made to Cash America, which tends to support my assessment above regarding what had happened at the meeting. He pointed out that management were keen to understand how RFML proposed to value the businesses and its tactics regarding the indicative offer to Cash America. He referred to the work that Mr Vercoe and Mr Pratt were doing in relation to SP. He pointed out that Mr Slatter had outlined a timetable for that work at the meeting the previous day but he wanted it reconfirmed "so I can organise Duncan, John and Peter". Again, it is clear that RFML knew that Mr Pratt was working hard on the transaction, but it did not tell him that he would have no role in the post-acquisition management.

167. Mr Vercoe's evidence was that the making of RFML's indicative offer to Cash America would be a decisive point in the transaction and that once such an offer was made, he and Mr Pratt would not be able to exercise any control over the project. This was said to bolster his evidence that firm commitments were sought from RFML at this stage and given by them, regarding confirmation of the packages to be made available to the MBI team. However, for reasons given above, I do not think that the making of the indicative offer had the decisive significance which Mr Vercoe suggested nor that commitments to discuss management packages at this stage were given by RFML.

168. RFML and Barclays came up with a funding valuation for H & T and SP of £53 million. They set the level of the first indicative offer for H & T and SP at £60 million on the basis of provision of debt by Barclays of £45 million combined with funding from RFML.

169. On the evening of 11 February 2004 Mr Middleton telephoned Mr Vercoe. Mr Middleton had had a private discussion with RFML in which RFML had agreed with him that Mr Pratt should now be told that he was to be excluded from the transaction and that Mr Vercoe should be told that he could not be CEO in the post-acquisition management but would have his role downgraded to Commercial Director. It was agreed that Mr Middleton would deliver this news to Mr Vercoe on behalf of RFML. In the telephone conversation between Mr Middleton and Mr Vercoe, Mr Middleton said that he had to see Mr Vercoe as soon as possible. He gave Mr Vercoe no hint of what was in store. Mr Vercoe agreed to make the trip to Beaconsfield, where Mr Middleton lived, to see him.

170. On the morning of 11 February 2004 Mr Slatter e-mailed Mr Innes to indicate that RFML would be circulating a draft offer letter for Cash America by the end of the day. Mr Innes responded promptly to say:

> "Once I receive the offer letter I will call you to arrange a time to meet up.
>
> I am under the impression that Paul [Cartwright] told Duncan [Vercoe] before Christmas that such a conversation would take place before any offer was sent.
>
> I would like to stress that this is important to them and therefore a necessity."

This was a reference to RFML having a conversation with the MBI team regarding proposals for their respective packages in the post-acquisition management. Again, it is significant that Mr Innes

did not assert that anyone for RFML had given any assurance in Mr Innes's presence that such a conversation would be held before an offer was sent; he only referred to something which Mr Vercoe must have said regarding comments he felt had been made to him by Mr Cartwright. This again tends to support my findings at paras. [163]-[164] above.

171. On the morning of Thursday, 12 February 2004 Mr Innes had a telephone conversation with RFML, probably with Mr Cartwright, who said that Mr Middleton was going to see Mr Vercoe regarding the deal to discuss Mr Pratt's role and that that was to happen that evening. Mr Innes formed the conclusion that RFML had decided it did not want to include Mr Pratt in the transaction. Mr Cartwright also mentioned to Mr Innes that the indicative offer letter would contain a paragraph backing the incumbent management team with no mention of the MBI team, but said that this was just the process RFML was going through to get its offer in front of Cash America and it would be explaining this in the covering e-mail (set out below).

172. Later in the morning Mr Cartwright circulated a draft of RFML's indicative offer letter to Mr Vercoe, Mr Middleton and Mr Innes for their comments. The draft offer included a statement of the assumptions on which it was based, which included "the operating management teams of the businesses remain committed", and the following:

> "Intentions for management and the business
>
> It is Rutland's intention to work with senior management in developing the business and to build value through expansion of The Group and improvements in operating performance. It is likely that we would appoint an experienced Chairman to the board.
>
> Rutland attaches considerable importance to maintaining and incentivising management and employees and it is our policy to make equity available to the senior management team."

173. The covering e-mail from Mr Cartwright set out some points by way of background to enable Mr Vercoe, Mr Middleton and Mr Innes to understand how RFML had arrived at the offer and stated:

> "There is a section in the letter referring to our intentions towards incumbent management, where we state that we anticipate that existing management will remain involved and that we would expect to include them in the equity. You will appreciate

> this is a stance we have to adopt at this stage due to the confidential nature of the discussions we are having with Cash America. ...
>
> If you have any comments on the letter please feed back to Ben or myself. We should try and send this letter out this week."

From RFML's point of view, including incumbent management in the transaction and in the equity was desirable to try to encourage them to stay in the business, which was an important factor in maintaining its value. This was a genuine position. Mr Cartwright's e-mail did not mention the possibility of introducing an MBI team, so as not to alarm the incumbent management or Cash America. However, equally, it did not suggest that equity would not be available for Mr Vercoe and Mr Pratt (but, again, Mr Cartwright did not reveal to Mr Pratt that he would have no role in the post-acquisition management).

174. Mr Innes replied to Mr Cartwright's e-mail by an e-mail at 1.45 pm to Mr Middleton, Mr Cartwright, Mr Vercoe and Mr Slatter to say, "Paul, fine with me". Mr Innes's evidence was that by this he meant only that the drafting was fine, particularly in light of Mr Cartwright's explanation for the reasoning for the letter containing the backing of the incumbent management. Mr Innes followed that e-mail immediately with another addressed just to Mr Cartwright saying, "when you are free please could you give me a call... before we send a letter". I think the absence of any suggestion by Mr Innes in his first e-mail that the draft letter should not be sent and the absence of any distinct suggestion by him in the second e-mail that the letter should not be sent before RFML had discussed packages with the MBI team tends to support my assessment of the evidence on that point at paras. [163]-[164] above.

175. Mr Innes discussed his telephone call with Mr Cartwright with Mr Vercoe, to tell him that Mr Middleton wanted to meet up with him to discuss points in relation to the deal, and might discuss Mr Pratt's position. Mr Vercoe said that Mr Middleton had also been in touch with him. According to Mr Innes, Mr Vercoe's attitude was pragmatic: he would listen to what Mr Middleton had to say. Mr Vercoe again asked Mr Innes to press RFML that day for details of his equity stake which, according to him, RFML had promised to provide before any offer letter was sent (it may be that this was why Mr Innes asked Mr Cartwright to call him in the e-mail referred to above).

176. Also on the morning of 12 February, Mr Innes e-mailed Mr Middleton as follows:

> "I believe that you are seeing Duncan tonight to discuss how we are progressing on the above project.

If possible could you give me a call... beforehand as there are a couple of issues that I think that you should be aware of at this stage. Subsequent to this I think that it would be wise for both of us to manage Duncan through the process.

If I don't get to speak to you the key issues are:

1. I am sure you are aware that Rutland may have reservations about whether both Duncan and John are a necessity for this transaction.

I do not think that Rutland dislike either of them or do not believe in their abilities it is just a question of the risk profile associated with the deal. It is an MBI, in a sector that is not well known and is of considerable size. My view is that Rutland will be willing to go with Duncan (with considerable guidance from you) but will not be prepared to back John as well.

I have previously had discussions with Duncan about this and when push comes to shove I am sure that he will be pragmatic. However, I believe that Duncan is under the impression that the worse case scenario is that John has no equity at the outset but takes part in any equity pool that is set up. I have the view that the best case scenario is that John will end up being a salaried employee. There is the very distinct possibility that Rutland will not want him around at all to distract Duncan.

I would be grateful if you could prepare the ground with Duncan for the above possibility. Duncan in turn needs to prepare John so that it is not such a shock when the news is finally delivered.

I reiterated this point to Duncan earlier today but I feel that you should also provide guidance.

2. I am working hard for Rutland to have a discussion with management about the structure of the proposed deal - debt, equity, management share, etc. prior to the offer being sent. This is what Paul agreed to before Christmas and I can see no reason why this should not be possible. However, I do not expect Rutland to provide a detailed offer (either verbally or in writing) due to a number of issues not being clear - the

> operational structure, the final funding structure, etc. This lack of knowledge does not prevent them from showing us on what basis they are working. They have always told us that they only put bids in that they feel they can deliver and therefore the offer must have a basis.
>
> I know that both Duncan and you have had conversations with Rutland regarding the management equity recently and I would welcome your input before I push the issue. We are expecting the offer letter to Cash America to come over before lunchtime today and I will wait for this before ringing Rutland. ..."

177. Mr Innes's evidence, which I accept, was that it was only at this stage, on 12 February, that he understood that RFML's concerns about Mr Pratt were fundamental to the question of his involvement in the transaction. Mr Innes did not seek to inform Mr Pratt about what was going on, even though he was one of his clients. This may have been a point where M & S's own financial interest in having the transaction proceed came into conflict with its responsibilities in relation to Mr Pratt. It also appears from Mr Innes's e-mail to Mr Middleton that he had not explained the position (as now he understood it) fully to Mr Vercoe. In his evidence, Mr Innes said, "I was not part of the MBI team. It was not my place to get too involved with the issue" and went on, "clearly [Mr Pratt] had to be told now that [RFML] did not view him as part of the team", but he was not prepared to do that himself. I have reservations whether this was a proper position for Mr Innes to adopt, but it is unnecessary to comment further.

178. In about the early afternoon on 12 February Mr Innes spoke to Mr Middleton in relation to the e-mail he had sent him. It is likely that Mr Middleton explained RFML's concerns about Mr Pratt. It is unclear whether he also explained that they proposed to downgrade Mr Vercoe's role in the transaction. Shortly after the conversation Mr Innes e-mailed Mr Slatter to say, "Just had a conversation with Peter Middleton. It all begins to make sense. Give me a call if you have a moment."

179. At 16.07 on 12 February Mr Innes e-mailed Mr Cumberland to say "the offer letter is going tonight", and that is what happened. In his evidence Mr Innes sought to suggest that he had understood that the offer letter would only be sent once Mr Vercoe, Mr Pratt and he had given their consent for it. However, I accept the evidence of Mr Cartwright and Mr Slatter that there was no agreement that the offer letter would be held back pending such consent being given or pending discussion about the packages for Mr Vercoe and Mr Pratt in relation to the transaction. I do not find it credible that RFML would have agreed to tie its hands in this way. Moreover - notwithstanding an e-mail of 11 February from Mr Innes to Mr Slatter asking when a meeting should be arranged with Mr Vercoe and Mr Pratt before the offer was sent out - I consider that the evidence of Mr Cartwright and Mr Slatter on this point is supported by the balance of the

contemporaneous documents, as set out above, and by the fact that there was no protest from Mr Innes to RFML after it had sent the offer letter without obtaining such consent or having such a discussion.

180. On the evening of 12 February Mr Vercoe met Mr Middleton at a public house in Beaconsfield. According to Mr Vercoe's witness statement, Mr Middleton said that RFML did not see Mr Pratt as a full member of the senior management team, but that he might possibly participate in the middle management team post-acquisition and that he would have an opportunity to be part of the management pool of equity although not the main equity holding. I do not think that it is likely that Mr Middleton held out such a possibility. According to the evidence of each of Mr Cartwright, Mr Slatter and Mr Middleton, the decision had been taken that Mr Pratt would have no part in the acquisition. Mr Innes had drawn the conclusion for himself that that was their position. Given that Mr Middleton was now delivering the bad news, I think it likely that he would have explained the full position to Mr Vercoe. I think Mr Vercoe's evidence on this point was coloured by his embarrassment at the fact that he went along with the removal of Mr Pratt from the transaction.

181. Mr Middleton also told Mr Vercoe that he would not be CEO but instead would be Commercial Director. According to Mr Vercoe's evidence, Mr Middleton said that Mr Vercoe "may not be considered to be CEO". I do not accept that evidence either. RFML, with the support of Barclays Bank and with the agreement of Mr Middleton, had decided that Mr Vercoe was too inexperienced to be the CEO of H & T. I think it likely that Mr Middleton would have made the position completely clear to Mr Vercoe at this stage. Mr Middleton also told Mr Vercoe that the indicative offer letter had been sent. I find that Mr Vercoe registered a protest at hearing this, because it is clear that he had been hoping for an indication of the details of his employment package and equity allocation before RFML sent out the letter.

182. According to Mr Vercoe, he asked Mr Middleton for assurances that since it was his deal, he must be given the biggest equity stake in the business in terms of management equity regardless of his revised proposed position as Commercial Director; and Mr Middleton replied that he would still be the largest management equity holder as it was recognised by all involved that he had brought the deal "and as such it was seen as mine and that he would ensure that this was the case". I think it is very unlikely that Mr Middleton did say these things. It is quite clear that RFML had not given Mr Middleton any indication that this would be the case and he was well aware from his own experience in the venture capital industry that any agreement on equity allocation would take place after negotiation at the end of the acquisition process. I think that this is one of the points in his evidence where Mr Vercoe exaggerated in his own mind what are likely to have been bland assurances from Mr Middleton that he could expect an equity participation in the transaction.

183. The next day, Mr Middleton reported to RFML about his meeting with Mr Vercoe. It is likely that he would have given RFML an accurate account of what had happened. RFML's note of the conversation, which supports Mr Middleton's evidence about the meeting, was as follows, :

184. On 16 February 2004 Mr Vercoe met with Mr Innes to review the position. Mr Pratt was not invited to this meeting. Neither Mr Innes nor Mr Vercoe had told him what they had been told about his position. Mr Vercoe decided that he was in a difficult position and that he should proceed to cooperate with RFML in relation to the transaction on the basis of the reduced role which had been put to him. He had no job to fall back on. His and Mr Innes's assessment was that there was no realistic prospect of going back into the venture capital market to pursue alternative funding alternatives for the acquisition of H & T at this late stage (it is likely that their assessment was also coloured by the fact that when they had marketed the business opportunity to venture capital companies in September/October 2004, RFML had been willing to support the transaction with much higher funding than anyone else).

185. Mr Innes's evidence was that he felt that Mr Pratt's situation was something that had to be resolved between the MBI team and RFML and that it was really up to Mr Pratt whether he would allow the confidential information to be used without his involvement in the business opportunity. Whatever the rights and wrongs of that view, the fact is that Mr Innes did not seek to get in touch with Mr Pratt and offered no advice about his position in the discussions which followed.

186. In late February 2004 RFML began to prepare for the next stage in the transaction, which would involve the opportunity to meet incumbent management for the first time in the course of a more extensive due diligence exercise. On 26 February Mr Middleton e-mailed Mr Cartwright, Mr Vercoe and Mr Innes in relation to the due diligence exercise:

> "I agree it is imperative that Rutland alone conducts interviews/conversations with parent and local management during the next phase. It is possible that my advice will be that Duncan [Vercoe] and I are locked away until the deal is done. For myself I will only be able to ask the questions that give me a feel for where people and business problems might lie when I have the authority to do so from the position of chairman. Until then people might not think it a serious matter to give half-thought out answers. ..."

187. Mr Vercoe was prepared to accept this view of Mr Middleton. It later transpired that Mr Middleton had in fact attended the interview with Mr Nichols, the incumbent managing director at H & T. Mr Vercoe had not been told about this change of plan and it fed his suspicion that Mr Middleton and RFML had already by late February hatched a scheme to exclude him from the

transaction. I do not think that they had done so. There were good commercial reasons for excluding Mr Vercoe from the aggressive questioning of managers which might be required in the due diligence phase, since after the acquisition went through he would have to form good working relationships with at least some of those managers. Mr Middleton's evidence was that he changed his mind when it became clear that there would be an opportunity to meet Mr Nichols. Up to that point Mr Middleton's sole source of information about Mr Nichols had been Mr Vercoe, who had been dismissive about his abilities. Mr Middleton wanted to see him for himself. In my view, Mr Middleton's decision to participate in the due diligence to the limited extent of meeting Mr Nichols reflected his legitimate commercial interest at this stage rather than any conspiracy between him and RFML to exclude Mr Vercoe from the transaction.

188. I accept Mr Cartwright's evidence that he wished to distance Mr Vercoe from the due diligence process because he did not wish Mr Vercoe, as a forceful character, to influence the incumbent management of H & T in the information that they provided to RFML during due diligence. Mr Cartwright assessed their information would be on the conservative side, which would suit RFML (presumably because it would provide RFML with ammunition in its negotiations with Cash America to keep the price as low as possible). Mr Cartwright did not want Mr Vercoe having an influence on management which might lead them to move their financial projections upwards in line with Mr Vercoe's own assessment. Mr Cartwright was also concerned about the relationship which Patrick Vercoe had with H & T and with Mr Nichols. He did not want to create a situation in which Mr Vercoe might speak to his father about the state of negotiations between RFML and Cash America, creating a risk that Patrick Vercoe might in turn be a conduit for that information to Mr Nichols and H & T's existing management. This was a particular concern for Mr Cartwright prior to heads of terms being signed with Cash America in June 2004, because up to that point RFML had no exclusivity in its negotiations with Cash America and knew that the incumbent management were also considering a possible management buy-out bid for H & T.

189. On 2 March 2004 a meeting was held at RFML's offices attended by Mr Vercoe, Mr Middleton, Mr Cartwright, Mr Slatter, Mr Cumberland and Mr Innes. Mr Innes prepared the agenda for the meeting. One of the points in the agenda was, "John Pratt - ex gratia payment - timing". There was a dispute in the evidence about what happened at the meeting. Mr Vercoe and Mr Innes said that Mr Vercoe sought to argue for a figure of £150,000 as a payment to Mr Pratt, but that Mr Middleton jumped in and said that that was too much and that £30,000 would be appropriate. They both got the impression that that was a pre-determined figure which Mr Middleton justified by saying that Mr Pratt had taken a risk in leaving his previous employment and that had been his own decision. They said that Mr Vercoe did his best to argue against this but that eventually RFML said that he should go away and think about a suitable number. Mr Cartwright, Mr Slatter and Mr Middleton did not recall Mr Vercoe arguing for Mr Pratt's interest in this way.

190. Mr Middleton, Mr Slatter and Mr Cartwright were rather summary in their evidence about the

meeting. It is likely that Mr Vercoe was feeling very bad about the exclusion of Mr Pratt, who was his friend. In those circumstances I think it likely that he did seek to present an argument for a greater payment to Mr Pratt, as he and Mr Innes say. Accordingly, I accept their evidence on that issue.

191. At the meeting, it was agreed that Mr Pratt should be ejected from the transaction as quickly as possible, due to the discomfort and difficulties of the position. Mr Cartwright's evidence, which was supported by a short note he made, was that Mr Middleton was given a discretion by RFML to offer Mr Pratt between £25,000 and £30,000 in relation to his exclusion from the transaction. It was agreed that Mr Vercoe would get Mr Pratt to come to London on the pretext that he was to attend a meeting to discuss the continued acquisition, but really so that he could be told that he was being expelled from the transaction. Mr Vercoe and Mr Innes went along with this plan to lie to Mr Pratt.

192. On 3 March Mr Vercoe telephoned Mr Innes to ask whether it would be possible to increase the payment to Mr Pratt. Mr Vercoe also spoke to Mr Cumberland about this. After discussion, it was agreed that Mr Vercoe should not push this issue, since it would give the appearance that he was trying to undermine Mr Middleton's authority.

193. Mr Vercoe's acceptance of this reflected the weakness of his position at this stage. He had given up his job and had no other immediate prospects for earning a livelihood. He had seen the way in which a decision had been made to eject Mr Pratt from the transaction and to decrease his own role. Not unnaturally, he felt vulnerable and at the mercy of RFML and that the only practical option open to him was to seek to remain on the good side of RFML so that he should not suffer the same fate as Mr Pratt. He therefore held his tongue and did not protest further in relation to the issue of the payment to be made to Mr Pratt.

194. The meeting to inform Mr Pratt of his exclusion from the transaction was held on 8 March 2004. Mr Middleton, Mr Cumberland and Mr Innes arrived first. Mr Middleton, who had been deputed to deliver the message, had a good deal of experience of delivering awkward messages to staff. For understandable reasons he was of the view that this should be done quickly and clearly. Mr Vercoe arrived with Mr Pratt. Mr Middleton got quickly to the point. He said that RFML felt that Mr Pratt was too risky for a role in management, had decided that he would not take any further part in the transaction and should be paid £30,000 as compensation. I find that Mr Pratt said nothing at this point other than to say that it was a shock and that he would have to speak to his lawyers. Although there was a suggestion by RFML that Mr Pratt had accepted this offer of payment, that is not borne out by the evidence.

195. At the end of the meeting, Mr Vercoe spent a few minutes with Mr Pratt. He said how sorry he

was. This must have been very cold comfort to Mr Pratt. According to Mr Vercoe, he assured Mr Pratt that he would make sure that he would get a share of any money that Mr Vercoe made from the transaction. Mr Pratt said nothing about this in his evidence. Mr Pratt was pretty much speechless. He did not speak to Mr Vercoe again for many weeks after this. Mr Pratt went away and consulted his lawyers.

196. After 8 March the transaction proceeded in the usual way. On 9 March Mr Vercoe, Mr Cartwright and Mr Slatter went on a tour of branches of H & T which was organised by Mr Vercoe. RFML kept Mr Vercoe informed of progress with Cash America, albeit in a fairly general way. Mr Innes sent through to Mr Slatter the list of due diligence questions which Mr Vercoe and Mr Pratt had drafted for consideration by RFML. Mr Vercoe made further contributions of matters to be explored during due diligence.

197. By this stage in the transaction both Mr Innes and Mr Vercoe had the impression that they were being treated somewhat at arm's length by RFML. They were not deeply involved in the development of the transaction.

198. On 24 March Mr Vercoe met Mr Middleton. From about this time Mr Vercoe started making notes for himself to record what was discussed in meetings and to record his impressions from time to time. Mr Vercoe's note of this meeting records that he discussed some of his concerns with Mr Middleton and pressed him for advice about when he should start discussing his equity holding and salary in the business, since he did not feel that he was getting anywhere with answers from RFML. Mr Vercoe stated that he wished to be earning the most in terms of equity holding and salary bonus as he regarded it as his deal and the opportunity he had identified. According to Mr Vercoe's notes, Mr Middleton said that he understood that he was feeling out on a limb and said that if Mr Vercoe was not part of the deal he would walk away and that if Mr Vercoe was not happy with his package Mr Middleton would walk away as well. Mr Middleton disputed this in his evidence, but in my view the note is accurate. I think that at this stage Mr Middleton was at pains to try to mollify Mr Vercoe in the aftermath of the shock of the removal of Mr Pratt from the transaction.

199. On 30 March 2004 Mr Cartwright and Mr Slatter met Mr Bessant of Cash America and H & T's incumbent management. Mr Middleton also attended the meeting so far as it involved an interview with Mr Nichols. He wanted to make his own assessment of Mr Nichols (see para. [187] above). Mr Middleton was impressed by Mr Nichols at this initial meeting.

200. On 31 March Mr Middleton called Mr Vercoe to debrief him on the sale presentation by Cash America and Mr Nichols the previous day. He reported that Mr Nichols had given a good presentation and that Mr Vercoe had underestimated him. The fact that Mr Middleton did not hide

his contact with Mr Nichols from Mr Vercoe supports the view that (contrary to Mr Vercoe's suspicions) Mr Middleton was not seeking to conspire with RFML in some way to exclude Mr Vercoe from the transaction.

201. In early April 2004 Mr Vercoe learned that Mr Cumberland and Mr Innes were leaving M & S and going to another firm. They joined a firm called Magus Partners ("Magus"). Mr Innes's day-to-day involvement with Project Scrooge ended at this point.

202. On 16 April, having had the benefit of information about H & T and SP provided by Cash America and the opportunity to meet with incumbent management of H & T for due diligence purposes, Mr Cartwright and Mr Slatter prepared a further briefing for RFML's investment committee. The paper again included comments on management. It noted that Mr Vercoe recognised that he could not be CEO and stated, "we now hope to make him commercial director". The paper contained some positive comments about Mr Nichols and referred to him having an appetite to participate in an MBO, although it noted that Mr Cartwright and Mr Slatter had only met him once and that it was too early to form a view on him.

203. The paper also contained an analysis of returns in respect of the transaction. The internal rate of return for RFML was shown at 29% for the base case, 40.4% for an upside case and 13.3% for a "flat" case. The model assumed 15% of equity for management with a value of about £2.4 million on the base case, £4.6 million on the upside case and nil on the flat case. The model presumed an exit (i.e. sale of the business) after three years. On the basis of that model, the recommendation in the paper was as follows:

> "This transaction represents an excellent opportunity to acquire a niche business with strong defensive properties. Whilst the multiple of [relevant earnings] is higher than we would normally be used to paying, we believe it is justified by the degree of asset underpinning, the multiples achieved in the sector and the improving reputation of sub-prime. The business is clearly underperforming its potential in an asset rich, image poor sector. Together with a very strong Chairman we believe that we can make real operating improvements to the core business and take opportunities to grow the business and create a clear, high quality market leader. We recommend that Rutland offers £60.0 million and if it is accepted, move swiftly to a full due diligence process".

204. On 19 April 2004 RFML made a second indicative offer to Cash America, again offering £60 million for H & T and SP.

205. Also on 19 April, Mr Vercoe e-mailed Mr Slatter and Mr Cartwright to comment that he was content with the new RFML indicative offer letter. He said:

> "I know that both of you have continued to reassure me that I am a key part of the forward management team and despite the John [Pratt] saga remain comfortable with this. I would like to know at what stage now it is proposed to ease and introduce me into the process. I obviously understand that it is not appropriate to bring new names into the equation at this stage but am keen to know and hear your thoughts."

I did not see a copy of any reply to this. RFML was not focusing on Mr Vercoe's interests and concerns at this stage.

206. There was then a period of negotiation between RFML and Cash America, during which RFML increased its offer. On about 14 May 2004 Cash America accepted, in principle, an offer of £72 million by RFML to purchase H & T and SP. Thereafter the parties were working towards closing the transaction. There was a further round of due diligence, including meetings with the incumbent management in late May.

207. Mr Vercoe sought guidance from Mr Middleton as to the stance he should be adopting. On 19 May he e-mailed Mr Middleton to say:

> "I am obviously keen to know when I am introduced into the process both from a DD [due diligence] point of view and the creation of what will obviously have to be a new business plan produced and agreed upon by the new team yourself, myself, Rutland, H&T management (John Nichols)? I am also keen to open discussions and establish the backbone to what my role will be. At some point next week I would presume an opening discussion will be had regarding personal terms, have you had any conversation with Paul on this recently and at what point would you envisage the start of these negotiations to take place? I know we are some way off in terms of getting in the door, but I am now starting to look forward to actually making this thing happen and working as a team."

208. Mr Middleton responded the next day, copying his e-mail to Mr Cartwright, explaining his view that it would be a mistake to involve Mr Vercoe in the due diligence process, because that might jeopardise his ability to be accepted by the management team post-acquisition. He urged Mr Vercoe to be patient.

209. By letter dated 19 May 2004 M & S wrote to RFML to inform it that Mr Cumberland was joining Mr Innes at Magus and to confirm that M & S had agreed the transfer of the Project Scrooge assignment to Magus.

210. On 25 May Mr Vercoe had a meeting with Mr Cartwright and Mr Middleton. Mr Vercoe again sought to raise the questions of his being involved in the production of a new business plan and due diligence, but Mr Middleton expressed his view that he thought it was better if Mr Vercoe was left out of this. Mr Vercoe also sought to raise questions regarding his equity and employment package with Mr Cartwright but Mr Cartwright (with Mr Middleton agreeing) said that this was premature.

211. Mr Vercoe's evidence was that he felt bullied out of pressing these points. His feeling was that RFML had no good reason for refusing to indicate what his package might be. I do not accept this criticism. In my view, RFML was entitled to reserve its position on these points until close to the closing of the transaction: see para. [20] above.

212. The next day, Mr Vercoe had a meeting with Mr Middleton alone. Mr Vercoe made a note of this meeting shortly afterwards. Mr Vercoe again raised his concerns that he still did not know what his role, salary or equity holding would be and said that he had thought that he and Mr Middleton were going to push on these matters before RFML agreed heads of agreement with Cash America. Mr Middleton, however, again said that there was no way at this stage that RFML would be able to tell Mr Vercoe what he would be getting and that he should "sit tight". Mr Middleton became impatient that Mr Vercoe was continuing to press on these points.

213. On 9 June 2004 Mr Cartwright e-mailed Mr Middleton regarding points that he should seek to touch on in a meeting he was to have with Mr Nichols, including a review of the existing management team, the role for Mr Vercoe and how Mr Nichols would envisage equity should be allocated between managers.

214. On Friday, 11 June Mr Vercoe attended a meeting with Mr Cartwright and Mr Middleton. Mr Vercoe made a note of this meeting shortly afterwards. Mr Vercoe thought that the meeting had been arranged to talk about his involvement in due diligence and the preparation of a new business plan, but it took a different turn. His note recorded the following points:

> "... Peter [Middleton] took centre stage, with the opening line 'Duncan I don't like surprises' he goes on to say that his meeting with John Nichols was positive and that he had told John Nichols that I was involved in the deal and that it was my deal which I brought to the table. John Nichols response was one of caution where he recounted with Peter the first ever meeting Nichols had with me some two years ago... which he said I

had told him that I would be buying the company and become CEO and that he (Nichols) would possibly be Managing Director and that Guy Hands was on my list of investors. Peter says to me that he is disappointed with me for not telling him about this conversation and that if he knew that Guy Hands was going to be involved at the time when I sold the idea to Peter he would not have agreed to become chairman...

I said to Peter that this meeting did take place as I was trying to get buy in from Nichols at the time to come on board in principle and I needed him to believe that I had some momentum behind the idea...

I said that I had never had the intention to take the idea to Hands just used his name with Nichols as he knew that Hands was involved in Rockingham at that time. I also said that the recollection of the entire conversation is vague as it was so long ago and that I cannot remember the comment 'I will be CEO and you may be MD'. I said what I do remember was that Nichols said he would not be pushed sideways for an insignificant role and I said that would not happen I wanted him in. Peter then goes on to say that Nichols recalled the conversation with no hesitation and therefore Peter had no reason to believe he was lying...

I said I could not believe that I was being told off for a conversation which took place some two years ago and was the catalyst for me to put the deal together...

Peter then goes on to say that Nichols is worried that I am going to be shoved in above him once the deal is done. Peter spent time reassuring him that I was going to report to Nichols (I was concerned at this because it was the first time I had actually been told I would be reporting to Nichols, in the past it was positioned that I would be working with him to execute the business plan). I am then also told that they are talking to Nichols as my role being new business development which again was new to me! To be now told this after Rutland's and Peter's first early meetings with Nichols is wrong. Peter then goes on to say that because of John's reaction based on what I had said some two years ago that I would not be allowed or involved in the creation and delivery of the business plan for H&T moving forward. I reacted angrily saying that if I am to play a significant part in this business and for me to see what my management equity holding would be in the future surely I have to be involved in the creation of the plan. I also go on to say that they were insinuating that what I could contribute to the business and contributed so far was worthless and I couldn't understand why I was being snuffed out, especially as up to this stage I had supplied Rutland with all the information they required to position themselves in a strong bidding position. Cartwright said that this

> was purely a process issue and that the banks would want a business plan which was signed off by the incumbent management which I said fine but that does not stop me from getting involved and having an opinion at this point. He then reiterates that he wants me in the deal and very much sees me as part of it moving forward. Peter then says he has another appointment and the meeting is concluded. (I took from this meeting that I was very much out in the cold and in too deep to start causing problems, they had totally and utterly hijacked my deal)."

It is clear that Mr Vercoe was alarmed and upset by this meeting. He regarded the reference to his role being concerned with new business development as an indication that Mr Middleton and RFML might be preparing to down-grade still further his proposed role in the post-acquisition management team.

215. On Monday, 14 June Mr Cartwright telephoned Mr Vercoe. Mr Vercoe made a note of the conversation. Mr Cartwright was concerned that Mr Vercoe had been angry and disappointed at the meeting the previous Friday. Mr Vercoe said that he was worried he was being left out of due diligence and preparation of the new business plan. Mr Cartwright reassured him that it was just part of the process and that RFML saw Mr Vercoe very much as part of the team. In my view, Mr Cartwright was sincere in this general expression of intention.

216. On 29 June 2004 Mr Middleton telephoned Mr Vercoe. He explained that he had met Mr Nichols again and explained Mr Vercoe's role in the business moving forward, that Mr Vercoe was part of the team and the person responsible for putting the deal together. Mr Middleton had asked Mr Nichols to call Mr Vercoe to arrange a meeting between them.

217. The next day Mr Nichols telephoned Mr Vercoe. At this stage Mr Nichols was being subjected to pressure from RFML and Mr Middleton to accept that Mr Vercoe should be part of the H & T management team post acquisition. I find that Mr Nichols was very hostile to this suggestion. He was concerned that if Mr Vercoe had a prominent role in the post-acquisition management team, he might well pose a threat to Mr Nichols's own position in the management post-acquisition. From Mr Vercoe's point of view, the attitude of Mr Nichols (who by this stage was clearly going to be the CEO of H & T post acquisition) was very important, since as CEO Mr Nichols would have a great deal of practical authority and power over Mr Vercoe and in relation to what he could do within the business. From this point onwards, Mr Nichols's and Mr Vercoe's mutual antagonism and suspicion came to the fore. Mr Cartwright proved ineffectual in trying to mediate between them and reassure both of them.

218. Mr Vercoe made a note of his conversation with Mr Nichols:

> "John Nichols called, very strange conversation and he seemed prickly. He says that Peter [Middleton] has told him to give me a ring but he doesn't know why but Peter says that I am a worried man. I say that I thought we were supposed to be setting up a meeting for next week and his response was curt and aggressive 'no I don't think we will be doing that'. He then says something like 'I am not sure where this is all going yet' basically insinuating that I might not be a part of it. We made small talk for a few moments and then he signs off by saying 'well I might speak to you again we'll have to see how things go'...
>
> I thought it a very strange and disappointing call and spoke to [Patrick Vercoe] and partner about it. I was angry that Peter has said to him that I was a worried man about my involvement and role in the deal which made me even more insecure as to what was happening behind my back."

219. On 6 July Mr Middleton telephoned Mr Vercoe. Mr Vercoe's note of the conversation recorded the following:

> "Duncan, it's Peter. I need to talk to you about John Nichols, do you have 5 mins (I said yes). Peter goes on to say I need to mark your card about something and I want you and John to meet this week and I have told John he must set that up so you need to be aware that he will call. John should have done this last week with you but for some reason he did not. I have met with John again and told him that you are a part of this team. He is concerned that your personality based on that first meeting two years ago does not fit into his team and that you do not have the skills set to contribute to his team. He sees you as a Trojan horse for the investors and says that his management are concerned. You will need to convince John when you meet that you have the skills that will enable you to be part of the senior management team of the business moving forward and that I suggest you view it as a job interview. I said to Peter why is John acting like this and Peter said he obviously sees me as a focussed and driven young man and is nervous of that. I say to Peter that I will see Nichols and basically try to pacify him for the sake of the deal. Peter goes on to say that he has discussed with John about my role in new business or product development. ...
>
> Conversation ends with me saying to Peter that I will not view it as a job interview but make sure Nichols is comfortable with me ...."

Mr Vercoe was concerned about the vagueness of Mr Middleton's comments about his proposed role and was very upset that he was being placed in a position where his fate appeared to rest in Mr Nichols's hands.

220. The meeting between Mr Vercoe and Mr Nichols was scheduled for 14 July at H & T's head office. Before the meeting Mr Cartwright e-mailed Mr Nichols asking for his thoughts on who in the management team should be involved in the allocation of equity and in what amounts. Mr Cartwright continued:

> "On Duncan, the purpose of today's meeting is for you and he to meet and discuss what Duncan feels he has to offer the business and where you feel those skills can best be deployed within the current structure. As I think I suggested, this is somewhat of an interview scenario for Duncan. I would suggest that the meeting is not one that discusses or determines remuneration. I would prefer that after the meeting you, Peter and I discuss where you have got to with Duncan, how you feel he might fit in and what might be his job spec. Then we can consider remuneration. ..."

221. The meeting lasted about an hour and a half. Mr Vercoe described it as involving an "outrageous, unprofessional rant" by Mr Nichols and a "personal attack on himself". Mr Nichols denied that there was anything outrageous or unprofessional about the way in which he conducted himself at the meeting. It is clear, however, that there was acrimony and bitterness on display on both sides. Mr Vercoe made a note of the meeting shortly afterwards which I find is accurate in all its essentials. Mr Nichols used the meeting as an opportunity to assert his dominance over Mr Vercoe. In my view, it is likely that Mr Nichols felt that he was in a position to do this because by this stage he had a sense that RFML needed him quite badly as part of the transaction moving forward. That assessment was borne out by the attractive equity package that Mr Nichols was in the event able to negotiate for himself with RFML, according to which he received 7% of the equity in the transaction.

222. Mr Vercoe's note of the meeting included the following:

> "Nichols opens with the lines I have called you in today to find out why exactly you should be coming on board this company and that I don't think you have the skills or management ability to be part of my management team and at this stage it doesn't look likely that you will be. I want to know what skills you have and I am going to call in 4 of my other Directors for you to tell why you should be coming on board and let me tell you they are pretty pissed off with you. This came as a total shock and surprise to me. ... I said to him that I was not prepared or briefed that I was going to meet the other

> management and therefore I didn't feel it necessary and that I felt he was being aggressive. ...
>
> He went on to say I had 'no humility, I am aggressive, I have no management ability, that Rutland and Peter [Middleton] are starting to question my ability and where I am going to fit in within the business. He then points out that yes I should have a finder's fee for the deal and yes an equity stake but no to being part of the business moving forward and that at this stage 'you aren't in it sonny'. He also says that he has already told Rutland and Peter that there is enough arrogance behind the desk already and that the business does not need any more!! He also says that why should he allow me to come into his business just like that and that there is no way he is going to allow me to come in with new ideas and ruin everything that has been built through pie in the sky ideas. I say to him that any new project would have to be discussed by the management and board so it would be a joint decision so I wouldn't be able to introduce anything without clearance and he returns with 'damn right and if you do come on board, and in all probability you aren't you will be on a 90 day probation period and if you put a foot out of line you'll be out!!... [There was some discussion about Mr Vercoe's role at Rockingham]
>
> He then says that when we met for the first time and that I told him I was looking to buy H&T and then A & B to make a much larger group and that I was going to be CEO and possibly he [Managing Director] ... he came away from the meeting and he nearly fell over himself laughing that I was so naïve and arrogant. I pointed out to him that I must have done something right otherwise why was I sitting in front of him. He also says that I was silly and naïve to think that I would be involved in the DD and business plan for H&T to which I replied why shouldn't I be. I created the opportunity. At this stage he calls in his [Finance Director] John Hughes who was an altogether more professional approach. When Nichols introduced me to him, he said 'obviously you know why Duncan is here I have told him that we are all pretty pissed off with him and that he has been trying to convince me as to what skills he can add to the business but I have to say I'm not convinced. ... [There was then some discussion with Mr Hughes and Mr Nichols about the opportunities that Mr Vercoe saw at H&T. Mr Nichols was dismissive of these ideas.]"

At the end of the meeting Mr Nichols said that he would go away and think about Mr Vercoe's possible role in the company, that he would be in contact with RFML and "that he might be seeing [Mr Vercoe] again."

223. Mr Vercoe left the meeting very angry. He felt that what he regarded as his transaction had been stolen from him by RFML, Mr Middleton and Mr Nichols. He immediately telephoned Mr Cartwright to say that the meeting had gone very badly and that he had been humiliated by Mr Nichols. He said that he felt that this was the last straw for him. He wanted answers from RFML about his position and demanded a meeting with Mr Cartwright the following day.

224. Mr Nichols e-mailed Mr Cartwright to report on his meeting with Mr Vercoe:

> "I have ... just had a couple of hours with Duncan and John [Hughes] joined us for the last half hour. It was interesting but I still feel there needs to be a greater understanding of what Duncan's perception of his role vs ours. Presumably that is one reason you did not want me to discuss remuneration as I have a feeling, not that we discussed it, that he will be expecting a lot more than I outlined in my earlier note; also I got the impression that he is expecting to be part of the senior management team which in our view he is not.
>
> As I said earlier there is a job to be done and he may be able to fit in, although I have reservations, but the level of that job is where I mentioned it is not at a higher level. Whilst there needs to be focus on certain aspects of the business to improve revenues he did not tell us anything we did not know.
>
> In summary this is still an issue of concern and today's meeting did little to change that view. ..."

225. Prior to Mr Vercoe's meeting with Mr Cartwright, Mr Nichols e-mailed Mr Cartwright again. He mentioned that he had had a discussion with Mr Middleton to the effect that H & T should pay Mr Vercoe whatever the relevant job was worth and that he should "like all employees be given a 90 day probation period". Mr Nichols said that the rate he was proposing to pay Mr Vercoe was in the range of £25,000 to £30,000 with a car plus bonus and that he would not have his own desk at head office but would use a "hot desk facility" there. He said, "the job that we have here into which he may fit is that of Marketing and Business Development (identifying new sites mainly)." Mr Nichols was seeking to down-grade Mr Vercoe's proposed role as far as possible and to ensure that he could be expelled promptly from H & T under the probation arrangements if Mr Nichols so chose.

226. Mr Nichols also e-mailed Mr Cartwright with his proposals for the allocation of equity within the existing management team. He did not include any proposal for Mr Vercoe to have any equity.

It may be added that, if Mr Nichols were able to engineer that Mr Vercoe would have to leave H & T under the probation terms or otherwise, it would in any event be probable that Mr Vercoe would lose any equity which was allocated to him, by reason of operation of the terms governing the grant of such equity, which would in all likelihood include provision for surrender of shares in the company by persons leaving the company.

227. On 15 July 2004 Mr Vercoe met Mr Cartwright and gave a detailed account of what had taken place in his meeting with Mr Nichols. Mr Vercoe told Mr Cartwright that he did not stand a chance if Mr Nichols could control his employment and expressed concern that Mr Nichols had shown a deep personal dislike for him based on the fact that he had pulled a deal together while Mr Nichols had not been able to arrange his own management buy-out of the business. Mr Cartwright then explained the importance of Mr Nichols to the transaction. The banks supporting RFML wanted to retain the incumbent managing director. Mr Cartwright said that without Mr Nichols there would be no deal. Mr Vercoe pressed Mr Cartwright for information about his proposed service contract and equity allocation. Mr Cartwright said that he could not say what equity might be available to Mr Vercoe before he had discussed equity allocation with Mr Nichols and before the incumbent management had been brought into the equity pool. Mr Vercoe said that he was concerned that Mr Nichols would make his life hell once the deal was completed, so forcing Mr Vercoe out of the business, or that he would assign him to a role where he could not make an impact on the business, so that he would then be able to say to RFML that Mr Vercoe was no good and then expel him from the company. Mr Cartwright said that that was a concern that he had as well, but he complained to Mr Vercoe that he had not warned them of the difficulties that Mr Nichols would present in Mr Vercoe coming into the business. Mr Vercoe protested at this, saying that this was precisely the reason why Mr Nichols had not been included in the Business Plan presented to RFML and why Mr Vercoe had been put forward as the CEO in that plan. He said that RFML had chosen to back the Business Plan, but Mr Cartwright said words to the effect "Yes, but come on, who else was going to back you?" Mr Cartwright seemed surprised when Mr Vercoe told him that other venture capital companies had been willing to back the Business Plan with him as CEO. Mr Cartwright asked Mr Vercoe what he wanted. Mr Vercoe said that he wanted fair value for the deal as it was his deal. He wanted a role and package which would enable him to make an impact and he complained that he had been pushed from pillar to post, from CEO to Commercial Director to now a business development role which was not good enough. Mr Cartwright said that he would discuss the matter with Mr Middleton and revert to Mr Vercoe the following Monday, 19 July, after he had discussed the equity arrangements with Mr Nichols.

228. In fact, Mr Cartwright brought forward his meeting with Mr Nichols to the following day. Mr Cartwright called Mr Vercoe in the early afternoon on 16 July to report on that meeting. Mr Vercoe noted the conversation as follows:

> "... he has had the meeting with John [Nichols] and that I wouldn't be surprised to know that his version of events was different to mine and that he said the meeting had been firm but fair! But that Cartwright and Peter [Middleton] had already chosen to believe my story before and after the Nichols meeting. Cartwright reiterated to Nichols that I was a part of this team and that Nichols would have to work with that and that they were disappointed as a MD that he had conducted himself that way. Nichols still refused to see that I had the skills that will contribute to the management team and so Peter and Cartwright suggested to Nichols that he meet with me on Monday so I could present to him what I achieved at Rockingham. This I was dismayed at, yet again I was having to prove my abilities where it should be managed in a better way. It is not up to me to prove my abilities to this man. Rutland and Peter are the ones which should support me in this. I expressed my concern that I could not see how another meeting of me presenting what I did at Rockingham could change this man's personal feelings towards me and that what would happen if his opinion was the same after the meeting where would we stand then. Cartwright said that he did not see it unreasonable that a manager that was having to find a place on his team for someone he knows nothing about should see what skills he has. I said fine but that was supposed to happen the first time and I still can't see why I should have to present to him as it was my deal. Cartwright also told me that Nichols has now been given the management pool and he had given Cartwright an idea as to how this was to be split out within the management of H&T and that Nichols knows that I am to form a part of that pool split! I could not believe that Nichols is deciding on my split. Nichols had obviously been given the pool what he will get out of it and to decide who gets what from the surplus. This cannot be right as I am the one that created this and I am not getting first or at least equal rights. Cartwright also says he has Nichols service contract (which I took that I will now know where I stand). Cartwright then says he is awaiting Nichols further views on who and how the existing management fit in and once this is complete I will know where I stand. I felt this was unacceptable. I agreed to attend the meeting Monday but I had come to the end of my tether in terms of never being told the truth and strung along so started to seek legal advice to address the situation and draw some truth from the episode."

This note gives a clear indication of Mr Vercoe's suspicion, anxiety and anger at the time. He was concerned that, despite the obvious danger to him which he had pointed out to Mr Cartwright, Mr Nichols was going to be in a dominant position in relation to him in the post-acquisition management and would be able to exclude him in one way or another from the business.

229. Mr Vercoe attended a further meeting with Mr Nichols on Monday, 19 July. On this occasion Mr Nichols was more amiable. It is likely that this was the consequence of Mr Cartwright pressing him to be pleasant to Mr Vercoe and to find a management role for him. Mr Vercoe made a

presentation about what he had achieved at Rockingham. Mr Vercoe then asked Mr Nichols about the role proposed for him within H & T. Mr Nichols said that there was a market analysis need within H & T. Mr Vercoe asked what he would call the job role and Mr Nichols replied, "filling in the gaps". Mr Vercoe asked whom he would be working with and it appeared from Mr Nichols's answer that Mr Vercoe would not have his own team working for him but would have to collect data himself from other managers within the business. None of this reassured Mr Vercoe.

230. At the end of the meeting Mr Nichols and Mr Vercoe telephoned Mr Cartwright to discuss the position. It was agreed that Mr Nichols would write out a job description and provide it so that Mr Cartwright and Mr Vercoe could discuss it. There was discussion about the completion date for the deal, which was expected to be in early to mid-August. Mr Nichols then left the meeting and Mr Cartwright asked Mr Vercoe how it had gone. Mr Vercoe said that Mr Nichols was far more open to discussion and they had discussed Mr Vercoe's role within the business in some loose detail. Mr Vercoe again expressed his concern that he was unsure that Mr Nichols had really accepted him as part of the management team and that his proposed role seemed to be of little significance and one in which he would not be able to make an impact. Mr Vercoe's note of the conversation continued:

> "I said that I could not see that this one meeting will have changed [Mr Nichols's] thoughts so dramatically from his obvious personal dislike of me and determination to say that I have no skills or ability to contribute to the business which he expressed so firmly in the Wednesday meeting... and that I do not want a job role which will not be able to have a positive impact on the business. John make my life difficult when in the business and three four months down the line he has a meeting with Rutland and Peter [Middleton] saying I told you he wasn't going to fit in and didn't have the right skills he is not adding anything to the business. I want him out and I am out after four months or that life is so tough for me that I decide to walk. Cartwright then said that I was going to be a part of the decision making board which would include the HR Director, FD, Peter and the two market managers and that they have told Nichols that if he has run his business by totalitarian rule and that no others around the table can air their views then this is going to change which Nichols has said he does not. Cartwright then went on to say that he is concerned about my views regarding Nichols potential to oust me after a period of time and that they could not interject on a day to day management basis..."

231. This last point added to Mr Vercoe's concerns, since it indicated that RFML's practical ability to protect him from Mr Nichols in the day-to-day management of H & T would be limited. Mr Cartwright did not discuss Mr Vercoe's proposed equity allocation, contrary to the assurance that he had given Mr Vercoe previously. Mr Vercoe's note concluded, "I did not pursue the package issue again as I am at this stage taking legal advice". His suspicion was that the package he would be offered would not match what he regarded as his value to the transaction in terms of creating and

bringing the deal to RFML and his concern that Mr Cartwright wanted to drag matters out until the very last minute, when it would be too late for Mr Vercoe to cause any problem.

232. Therefore, on 20 July, having taken legal advice, Mr Vercoe wrote to Mr Cartwright to request again that he provide him with details of his employment and remuneration package and details of the equity share available to management and the others within management who would share in that equity allocation. The letter concluded:

> I believe I have been extremely patient over the past months over why I have not yet been furnished with my package details. However, with the completion of the acquisition only a couple of weeks away, you must now know and indeed have known for some time the precise terms you intend to offer me. Therefore, I look forward to receiving details of the requested terms, including the information above, in accordance with this latest request and in any event no later than close of business on Thursday, 22nd July 2004."

With the completion of the transaction pending, Mr Vercoe was concerned to bring these matters to a head.

233. Also on 20 July, Mr Nichols sent Mr Cartwright a draft job description for Mr Vercoe. This described the position to which he was to be appointed as "Marketing Executive", rather than a director role. It was not a job description which indicated any significant management role for Mr Vercoe. It did not identify any team that he would be leading. It stated that the position-holder would be responsible to the Managing Director (i.e. Mr Nichols).

234. After discussing it with Mr Middleton, Mr Cartwright modified the job description in some respects. He proposed an amendment that the position should be described as "Commercial? Director". He made a few relatively minor additions to the proposed duties and responsibilities. He did not propose that Mr Vercoe should be given leadership of any team within the company. The job description, as modified by Mr Cartwright, concluded:

> "<u>Other tasks</u>
>
> - In addition to the duties and responsibilities listed, the jobholder is required to perform other duties assigned by the Managing Director from time to time."

Mr Cartwright did not send this document to Mr Vercoe.

235. In an e-mail to Mr Middleton, Mr Cartwright proposed that Mr Vercoe should be given salary and benefits at the same level as Mr Hughes (£60,000) and that a 15% equity allocation to management should include 5% for Mr Nichols, 3% for Mr Hughes and 3% for Mr Vercoe. He concluded:

> "As a final point I think we should consider a payment to Duncan on executing the deal in recognition of all his efforts in the last 12 months and the considerably lesser role and package that he is receiving compared to his aspirational position when all this started. I suggest a payment in the order of £[100k] would be appropriate in the context of what Morley Scott/John Pratt have secured."

236. The same day (20 July) Mr Cartwright and Mr Slatter prepared a further paper on the Project Scrooge transaction for the RFML Investment Committee. This rehearsed points in relation to the attractiveness of the transaction and summarised the information that had been gathered during the due diligence phase. It recommended the acquisition of H & T and SP with the proposal that SP should be sold on promptly. The document included a section headed "UK management team "politics"". It commented that RFML's intention was to introduce Mr Vercoe as an equity holding board member of H & T. It continued:

> "John Nichols has been consistently hostile to Duncan's proposed introduction to the board, presumably because he views Duncan as a threat to his own position. ...
>
> This is a situation we intend to monitor closely post completion - a positive factor is that Peter Middleton is going to fill the role of an executive chairman for three days a week in the business during the first year and will be able to keep this potential issue under control."

The document included comments on the proposed management team. This emphasised the importance of Mr Middleton and Mr Nichols for the transaction. In relation to Mr Nichols, the document commented:

> "He clearly has an excellent grasp of the detailed operational issues within H&T. This experience is a valuable asset to our team - we would not back a standalone MBI candidate into a business like this.

> There have been some clues during the DD process that he is perhaps slightly autocratic. Although this could be an issue in terms of Duncan's involvement, we intend to manage this so that it doesn't become a problem."

The document noted possible tension between Mr Vercoe and Mr Nichols and said that RFML intended to manage that tension. It included a review of prospective equity allocation of 15% for management, to include 5% for Mr Nichols and 3% for Mr Vercoe. It contained an analysis of the expected internal rate of return. This analysis indicated an improvement in the expected returns for RFML over what had been expected in the report for RFML's Investment Committee dated 19 April. The attractiveness of the transaction from RFML's point of view had improved in light of the detailed information it had seen during the due diligence process.

237. On 21 July Mr Cartwright replied to Mr Vercoe's letter of 20 July by e-mail:

> "I am pleased Monday's meeting went well. I got positive feedback from John [Nichols].
>
> In terms of all the items you listed in your letter, as I explained when we last met, we are in the process of trying to resolve these matters with John Nichols before setting out the details in respect of your position. I stress again, the equity pool and allocation is not yet settled with the incumbent management and so it would be premature to sit down and discuss it with you.
>
> You are also aware that we are now trying to finalise a job description and package for you with John following Monday's meeting. There is something in circulation now between Peter and myself. However, you know that John is effectively "off-site" this week for a quarterly review with the Cash Am people for 3 days this week so it is difficult to move forward.
>
> We are trying to resolve these matters as soon as practicable and will then set out your proposed position and package for you. It will not be by Thursday, but we are pressing to sort this as quickly as possible."

238. This did not satisfy Mr Vercoe. On 22 July he delivered a letter to Mr Cartwright's office by

hand. In this letter, Mr Vercoe reiterated his concerns about Mr Nichols's continuing animosity towards him. He complained that Mr Nichols had said his role could be described as "filling in the gaps" and expressed concern that Mr Nichols was the person who was writing his job description even though he had previously explained that Mr Vercoe would be subject to a 90 days probation period and that if he put a foot out of line he would be out of the business. Mr Vercoe said:

> "He made it abundantly clear to me that he does not want me on board the business. As Managing Director after completion he has the authority to make life impossible for me and even dismiss me at the first opportunity, as you clearly accepted both the next day and in the meeting on 19th July.
>
> Not only am I now being told that he is in charge of my job description, but also that he is deciding my remuneration and equity, which is unacceptable. ..."

Mr Vercoe protested that this was his deal and that therefore his equity allocation should be decided before that of incumbent management. Mr Vercoe reiterated that he was "concerned and amazed" that he had not been given details of his package previously even though Mr Nichols had been provided with details of the size of the management equity pool and had been given an opportunity to comment about shares in that pool. Mr Vercoe continued:

> "I feel it is now abundantly clear that you have chosen to back the other horse and fob me off with a token gesture. As a result, you have forced me to take legal advice about Rutland's use of the Business Plan and to consider other legal options if it is not possible to reach an agreement on my employment and other terms."

He concluded that his request for information, as set out in his letter of 20 July, remained outstanding with a slightly extended deadline to noon on Friday, 23 July.

239. Also on 22 July, Mr Nichols agreed the proposed amended job description for Mr Vercoe. Mr Nichols's e-mail to Mr Cartwright commented, "you already have my views on the level of the position so I will say no more on that subject". It was clear that Mr Nichols had not changed his mind about the appropriate role for Mr Vercoe. Mr Cartwright replied thanking Mr Nichols for his prompt response and saying, "I appreciate your position on Duncan".

240. At this stage Mr Cartwright and Mr Middleton proposed to Mr Nichols that there should be a "Company Board", comprising Mr Middleton, Mr Nichols, Mr Cartwright and one other (a Mr

Langdon), which would meet approximately six times a year. There would also be a "Management Board", comprising all those plus Mr Vercoe and four other managers in H & T, which would meet monthly and would constitute the operating board running the business and making necessary business decisions. This board structure was along the lines proposed in the Business Plan.

241. The same day, Mr Cartwright attempted to call Mr Vercoe. Mr Vercoe missed the call but sent an e-mail asking for a response in writing to his letters of 20 and 22 July.

242. On 23 July Mr Cartwright responded with a letter sent by e-mail to say:

> "In respect of your letter of 22 July delivered by hand, we are in no position to confirm service contracts or equity participation in the business at this stage as they have not been agreed with any parties and will not be agreed for a while yet."

He concluded by offering a meeting on Monday 26 July.

243. On 26 July Mr Cartwright and Mr Vercoe had their final meeting at RFML's offices. Each of them made notes of the meeting shortly afterwards. These notes broadly corresponded, although there is more detail in Mr Vercoe's note. Mr Cartwright said that he was not prepared to agree to the deadlines set out in Mr Vercoe's letters and objected to the threat of litigation. Mr Vercoe demanded answers to his questions. Mr Cartwright said that no management equity deal had been agreed, no remuneration and service contracts had been agreed and that he was therefore in no position to table proposals with Mr Vercoe. Mr Vercoe complained that Mr Nichols had been given a great deal more information and a greater role in the process than he had. Mr Cartwright said that there was no good reason for Mr Vercoe to have a separate discussion in a negotiation apart from the whole management team. Mr Vercoe objected to this and said that it was "his deal". Mr Cartwright disputed that. Mr Cartwright's note records that he stated "that it was our deal that we were striving to execute and to involve him in a role that exploited his skills and rewarded him accordingly". Mr Cartwright offered Mr Vercoe no reassurance that he would indeed be appointed as Commercial Director or to any directorial position. Mr Vercoe said that he had brought the idea of the transaction to RFML. Mr Cartwright said that he got lots of people coming to RFML with ideas and that, in fact, it was Mr Innes who had brought the idea. Mr Cartwright said that Mr Vercoe's Business Plan formed no part of anything that was being developed as the business plan for H & T at that point. As recorded in Mr Vercoe's note, Mr Cartwright said that RFML had "not used [Mr Vercoe's] business plan at any stage of this acquisition" and so could not be regarded as having stolen it from him. Mr Vercoe complained that he felt that he had been played by RFML with what he described as "the typical private equity card", stealing people's ideas and cutting them out of transactions. Mr Cartwright responded angrily to this, protesting that RFML had been nothing but

honest with him. Mr Vercoe responded to say that if that were really true, why had RFML back in October 2003 not said that they liked the business idea but that there was no way that they could back the transaction with him as CEO, to which Mr Cartwright simply shrugged. Mr Vercoe told Mr Cartwright that he would rather see the deal fail than be involved in "a nothing role" and not receive proper value for bringing the idea forward. He said that unless he was given an undertaking by RFML to respond to the request for information in his letter, then he would act on the advice he had been given by his lawyers.

244. At that point Mr Cartwright snapped his notebook shut and said words to the effect that the meeting was over if Mr Vercoe was getting his lawyers involved. Mr Cartwright said he was not prepared to be threatened in that way and the meeting was over. He stood up to leave. He said that he was happy that RFML had dealt fairly with Mr Vercoe at every stage, had kept him informed and never misled him. If he felt he had been badly advised, then that was an issue for M & S not RFML. Mr Cartwright then returned to his office and Mr Vercoe was left to leave the building.

245. Mr Vercoe's solicitors wrote to RFML by letter dated 28 July 2004. The letter set out what Mr Vercoe maintained were his legal rights in relation to the purchase of H & T. The letter was written on behalf of Mr Vercoe, Mr Pratt and MAS. As Mr Vercoe felt that he was being ill-treated by RFML, he had been discussing the position with Mr Pratt and they had decided to take joint action in relation to the way they had been treated. The letter referred to the September contract and the November contract. It referred to the Business Plan and the confidential information it was said to contain. It also asserted that RFML owed the Claimants fiduciary duties in respect of the purchase of H & T. The letter stated that RFML's failure to make proposals for the involvement of the Claimants in the transaction meant that they did not consent to RFML's use of the confidential information and thus did not consent to the proposed purchase of H & T. The proposed purchase without the Claimants' consent would be a breach of contract and/or a breach of confidence, and the purchase without their participation or consent would be a breach of fiduciary duty. The letter concluded:

> "Our clients remain willing to give their consent to the purchase on appropriate terms. We suggest that you take legal advice in relation to the contents of this letter."

246. RFML's solicitors responded by letter dated 2 August 2004. The letter maintained that RFML had not used or relied on the Business Plan or any other information provided by the Claimants. The letter denied that RFML was in breach of contract or any other legal duty. It denied that RFML owed the Claimants any equitable duty beyond the express contractual obligations. The letter concluded:

> "Further to the meeting held on Monday 26 July 2004 between Paul Cartwright of our client and Duncan Vercoe, our client and Peter Middleton have together concluded that they are unable to offer Mr Vercoe a position in Harvey & Thompson, should the business be acquired. They therefore now consider any discussions with your clients to be closed."

247. Mr Vercoe was out of the transaction and thereafter he had no further dealings with RFML.

248. Mr Cartwright in his evidence suggested that Mr Vercoe had walked away from the transaction. I dismiss that suggestion. It was Mr Cartwright at the meeting on 26 July and the letter dated 2 August 2004 from RFML's solicitors which indicated that Mr Vercoe was expelled from the transaction.

249. RFML acquired H & T and a majority shareholding in SP on 8 September 2004. Mr Middleton took on the role of chairman, with Mr Nichols as managing director of H & T.

250. After the acquisition RFML paid an introduction fee of £490,000 (representing 1% of the price it paid for H & T) to M & S and Magus, to be split between them. RFML also sent Mr Pratt a cheque for £25,000, which he returned.

251. RFML found Mr Nichols to be an effective managing director, but it introduced other changes to the management team at H & T. Someone was brought in as Commercial Director in the role that Mr Cartwright had contemplated might be available for Mr Vercoe.

252. RFML, Mr Middleton and Mr Nichols were successful in securing cost reductions in the business. The business of H & T was developed and changed.

253. H & T tried out two pilots for a new style of shop which would focus on cheque cashing and payday advances rather than on pawnbroking. These were not successful experiments. H & T's marketing research post acquisition suggested that Mr Vercoe's idea of re-branding away from the pawnbroking business would be mistaken. It indicated that H & T's core business was pawnbroking and that this should continue to be emphasised.

254. The business plan that RFML, Mr Nichols and the H & T management worked on before completion of the transaction and then carried into effect after completion was prepared without reference to the Business Plan compiled by Mr Vercoe and Mr Pratt which had been provided to

RFML. Mr Nichols and the incumbent management had their own ideas and plans which they could present to RFML to gain its support.

255. A programme of expanding stores was carried into effect. These were a mixture of new-built stores and acquisitions of existing stores. This programme cannot be regarded as the product of the Business Plan prepared by Mr Vercoe and Mr Pratt. It was natural that the existing management of H & T would wish to expand the business if they could, and with RFML behind it they now had access to funding to enable them to do so.

256. I accept the evidence of Mr Cartwright, Mr Slatter, Mr Nichols and Mr Middleton that the business and value of H & T was developed after its acquisition by RFML not by reference to Mr Vercoe's and Mr Pratt's Business Plan but, as was to be expected, by reference to business ideas that the incumbent management of H & T had already had under consideration. There was no particular magic in these ideas. What made the biggest difference for H & T was that its new owner, RFML, was prepared to provide capital for the business to expand, which Cash America had declined to do. The increase in the value of the business was also due in large part to the successful efforts of Mr Middleton and Mr Nichols to control costs within the business. No doubt there were also other general market factors which affected the value of H & T over time. In particular, Mr Middleton referred to a general increase in the price of gold at the time as a factor which contributed to increasing H & T's profitability.

257. On 11 May 2006 RFML and the Rutland Funds floated H & T on AIM and realised part of their investment. They made large profits from the transaction.

258. On the material provided by the Defendants, the following profits were made by the Rutland Funds on the flotation of H & T: £0.2 million for the Second Defendant, £14.9 million for the Third Defendant, £0.1 million for the Fourth Defendant and £13.9 million for the Fifth Defendant, making a total profit for the Rutland Funds of £29.1m.

259. On 2 August 2007 the Fifth Defendant sold SP, generating a further profit of £2.8m.

260. I now turn to consider the claims made by the Claimants.

(i) The Contract Claim

261. As regards the Claimants' claim in contract, the applicable principles of law in relation to contractual construction were not significantly in dispute: see in particular *International*

Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896. Issues arose regarding the construction of the September and November contracts, whether Mr Vercoe and Mr Pratt had somehow acquiesced in RFML's treatment of them or were estopped from relying on their contract rights and the appropriate remedy to be awarded. I will deal with these issues in turn.

The September contract

262. The September contract did not identify the members of the proposed MBI team other than by description. I do not think that this is significant in terms of the relevant legal analysis. The letter of 11 September 2003 to RFML was clearly intended to set out obligations to be assumed by RFML to "the proposed MBI team" in relation to "the possible Management Buy In ... of the company/companies associated with the Project [i.e. Project Scrooge]", which was defined as "the Permitted Purpose". As the use of the definite article in each of these phrases indicates, the September contract had a specific transaction in contemplation (a management buy-in by the proposed MBI team in relation to a specific target business which would be revealed) and was directed to providing protection for the proposed MBI team in relation to that transaction. The letter looked forward to the provision to RFML of the business plan and financial model which had been prepared by the proposed MBI team, which would disclose who comprised the MBI team and what the acquisition target was. In my judgment, by counter-signing the letter, RFML assumed contractual obligations to the persons who in fact comprised the MBI team who were making the approach to it.

263. The obligations set out in the letter were owed to the members of the MBI team jointly. In my view, this meant that RFML owed such obligations to each member of the MBI team, and in relation to each member would require the consent of that member to vary or abrogate those obligations vis-à-vis him.

264. In some contexts, a management buy-in or management buy-out team may have an agreement between themselves regarding how any dispute between them how to proceed should be managed (e.g. by majority vote within the team), and in such a case it may be possible for members of the team to require a recalcitrant member to give consent to some particular course which the other members of the team wish to follow (even, perhaps, to require that member to consent to be excluded from the transaction, if it appears that the venture capital company will not proceed if they are to be included in the post-acquisition management of the target business). It is also possible that if the venture capital company assumes obligations to the team with notice of that agreement between them, its obligations to the team may be qualified by the terms of that agreement.

265. In the present case, however, there was no such agreement between the members of the MBI

team. Each member of the MBI team had his own interest in being protected in relation to his participation in the project, and there is no basis on which it could be implied that he agreed that he could be removed from participation in the project without his consent.

266. Of necessity - since the MBI team did not wish to disclose details of their business proposal and the fruits of their research to RFML or any other venture capital company before protection was provided in the form of clear, binding legal obligations as to what could be done with the information so disclosed - the September contract imposed obligations upon RFML in relation to information specified in broad terms in respect of a transaction to be identified and in favour of persons to be identified. The details of the proposal and information about it to be revealed to RFML by the MBI team in order to assist RFML in assessing the proposed transaction were defined as "the Confidential Information". By clause 1(b), RFML promised "only to use the Confidential Information for the Permitted Purpose" (i.e. the possible management buy-in transaction known as Project Scrooge). The details of the proposed management buy-in were as set out in the Business Plan prepared by the proposed MBI team which was to be provided to RFML. In my view, there is no conceptual difficulty about RFML contracting to accept obligations owed to persons yet to be specifically identified to it, regarding information yet to be disclosed to it pertaining to a transaction yet to be revealed to it.

267. There were important protections for RFML arising from what was positively said in the contract and from what it did not say. The contract imposed no obligation on RFML to provide funding for and proceed with the proposed transaction. RFML could decide at any stage not to proceed. It was not obliged to accept any risk which it did not wish to accept in proceeding to complete the proposed transaction. Its obligation under clause 1(b) was simply not to use the Confidential Information for any purpose other than the Permitted Purpose. This meant that RFML could not receive information about the MBI team's business idea and then use it for some purpose other than the proposed management buy-in transaction for which it was disclosed. RFML could not, for example, take the information, jettison the proposed MBI team who had provided it, substitute its own preferred management team and then proceed with the acquisition of the proposed target business with that team (rather than the originally proposed MBI team) being put in place as the post-acquisition management of the business. Even that obligation was expressed to terminate after one year (clause 5(b)).

268. Similarly, each member of the MBI team remained entitled to withdraw from the transaction (which they might decide to do, for example, as further information came to light during due diligence). It is not suggested that the members of the MBI team had any contract between themselves or with RFML to prevent them from withdrawing from the transaction if they so chose. Each party to the September contract was therefore accepting a degree of risk in relying on the self-interest of the other parties to take the transaction forward. Mr Vercoe and Mr Pratt, in particular, devoted a great deal of time and effort to promoting the proposed transaction against a

risk that RFML might withdraw for any reason; and, if it was interested in proceeding, RFML would have to devote a great deal of time and effort to investigating the business against a risk that, say, Mr Middleton might withdraw for any reason and hence make the project unattractive.

269. At the time RFML entered into the September contract it knew that it was to be provided with information to enable it to assess a business proposal which was to be set out in a business plan, albeit it did not know the detailed terms of the Business Plan. On an objective approach to construction of the contract, "the possible Management Buy In" referred to in the definition of "the Permitted Purpose" was the transaction set out in "the business plan and financial model that has been prepared by the proposed MBI team regarding the Permitted Purpose" (i.e. the Business Plan). The Business Plan only specified in fairly general terms the business opportunity and the proposed roles post-acquisition for the members of the MBI team. It did not seek to specify their remuneration, the details of any employment contract nor any equity rights which might be made available to them. Those matters were clearly to be left for negotiation if a viable transaction stemming from the Business Plan developed.

270. Further, all parties appreciated that the business plan to be provided to RFML could only provide a very rough external assessment of the financial position of the target company, which would have to be supplemented and modified by reference to fuller and better information becoming available if a viable transaction developed. Therefore, by reason of the very preliminary nature of the proposal to which the September contract related and the wide range of imponderables which existed at that stage which would have to be navigated before a viable transaction could be carried through, it was in my view necessarily implicit in the contract that there should be some flexibility in the features of a transaction which could properly be said to fall within the scope of the "Permitted Purpose" as defined in that contract.

271. In my judgment, the effect of the September contract was as follows:

> i) RFML promised that it would only use the information relating to the business proposal set out in the Business Plan to be provided to it by the MBI team (and which was provided to it after agreement was reached on the terms of the September contract) for the purpose of carrying that proposal into effect.
>
> ii) If RFML decided to proceed with an acquisition of the target revealed to it, it would be obliged to appoint the members of the MBI team to the roles specified for them in the Business Plan or equivalent roles. I have already emphasised the importance attaching to the particular management positions to which members of the management team were to be assigned and to the relationship between those positions (see paras.

[9]-[13] above). I therefore reject the submission for RFML that under the terms of the September contract it was entitled to appoint members of the MBI team to any position it liked, so long as that position could be described as a management position. It could not reasonably be thought that, for example, RFML had the option under the contract to appoint Mr Middleton to some relative lowly management position, perhaps managing a pawnbroking shop, while bringing in a different Chairman and management team above him. The same is true in relation to Mr Vercoe as proposed CEO and Mr Pratt as proposed Commercial Director. I also reject the submission for RFML that it was entitled to treat itself as acting within the scope of the Permitted Purpose so long as at least one member of the original MBI team (Mr Middleton) remained in the transaction: as explained above, the obligations which RFML assumed under the contract related to the whole MBI team and were owed to each of the members of the team. I also do not accept the further submission for RFML, that the September contract was too uncertain to be enforceable as a contract in this respect: if it came to a dispute whether RFML had made a sufficiently good offer of a package to a member of the MBI team to remain within "the Permitted Purpose" for use of the Confidential Information, the Business Plan and general market practice would provide the court with sufficient objective criteria to enable it to produce a sensible and coherent ruling on that question.

iii) If RFML chose to proceed to acquire the target company identified in the Business Plan, then, stemming from the obligation at ii) above, it would be obliged to offer service contracts, remuneration and equity allocation to the members of the MBI team commensurate with the positions identified for them in the Business Plan, having regard to the management structure to be put in place after the acquisition. This obligation would leave RFML with some flexibility regarding the precise terms to be offered, provided that the terms would be appropriate for the particular positions of Chairman, CEO and Commercial Director within the management structure established to run the business. So, for example, RFML could not simply have given Mr Middleton the empty title of "Chairman"; if the acquisition proceeded, it would be obliged to ensure that he was appointed Chairman in substance and as a matter of practical reality, with the pay and other rights and benefits reasonably necessary to ensure that he did in fact (and not merely in name) enjoy the status of Chairman within the organisation.

iv) So long as RFML proposed to proceed with the acquisition on a basis which involved the members of the MBI team in accordance with the Business Plan, no member of the MBI team would be entitled to withhold consent for RFML to use the Confidential Information to proceed with the acquisition. There was no provision in the September contract for the MBI team to have the option to disapply the definition of Permitted Purpose in respect of the Confidential Information, and the term "Permitted

> Purpose" read with the introductory passage in clause 1 expressly indicated that permission was given by the letter for use of the Confidential Information for that purpose. This is the construction to be given to the contract on a reasonable, objective interpretation. The letter of 11 September 2003 was put forward as an invitation to RFML to investigate the proposed opportunity with a view to proceeding with it on the basis of the business plan to be provided, and hence was an invitation to RFML to incur costs of investigation for that purpose. I do not think that on a fair interpretation of the contract it could be thought that the members of the MBI team reserved to themselves a right to turn round at a later stage, regardless of the expenditure incurred by RFML on investigating the transaction, and withdraw their consent for RFML to use the Confidential Information and proceed with the transaction on the basis set out in the Business Plan - i.e. in effect to reserve to themselves a right to hold RFML to ransom just before closing the acquisition, to extract better terms from it. I therefore reject Mr Newey's submission that they had such a right. (A different situation might arise if one member of the MBI team decided, perhaps after seeing additional information acquired during due diligence, that he did not wish to proceed while the others still did: it seems to me that in such circumstances it would then have been open to RFML and the remaining members to agree to proceed with the transaction together, but it is not necessary to consider this situation further for the purposes of this judgment).

272. According to the scheme of rights and obligations contained in the September contract, and the freedoms left to the parties by that contract, if RFML had not been happy to proceed with the business proposal set out in the Business Plan when it was disclosed, or at any stage thereafter (if, e.g., discoveries during due diligence showed that the business of H & T was weaker than had been thought at first, so that RFML did not wish to take the risk of proceeding with inexperienced managers such as Mr Vercoe and Mr Pratt, or at all), it was entitled not to do so. This means that at any stage as the transaction developed RFML was entitled to say that it would not be happy to proceed if Mr Pratt was to be Commercial Director or if Mr Vercoe was to be CEO, but to invite them instead to consent to allow RFML to proceed with them in different, lesser roles (or even with no role) instead. In such a situation, a negotiation could take place. If Mr Pratt and Mr Vercoe refused to consent, RFML would have to decide whether the transaction was so attractive that it was prepared to accept the risks associated with having Mr Pratt as Commercial Director and Mr Vercoe as CEO and proceed notwithstanding their involvement in those roles (the position which Mr Innes originally thought RFML had adopted: see para. [123] above); or whether the risk was simply too great, so that it should walk away from the transaction and not pursue it (at least, until the obligations in the contract became time-expired according to its terms). If that was RFML's choice, then Mr Pratt and Mr Vercoe might well get nothing from the business opportunity they had identified (unless they could find another company interested in backing them to pursue the opportunity), so there would be a strong interest for them to seek to negotiate terms which would

keep RFML interested in proceeding with the transaction and afford them some value in relation to it (either by agreeing to continue in a reduced or different role from that specified in the Business Plan or by agreeing to surrender rights to participate in the transaction in return for a payment of some kind). If RFML had indicated that it would not proceed with the transaction if Mr Pratt remained involved, it would also have been open to Mr Middleton and Mr Vercoe to make a contribution to a payment to persuade him to surrender his rights to allow the transaction to proceed to their benefit.

The November contract

273. In my view, the effect of the November contract was the same as the September contract. The main differences between the two contracts were that the members of the MBI team were now known to RFML and were identified in the contract (in which they were referred to as "the Individuals") and RFML now had the Business Plan and knew the details of the business proposal set out in that plan. Consideration was given for the obligations assumed by RFML in the November contract as the MBI team were encouraged to go on contributing to the development of the deal, and did so contribute. The November contract re-imposed an obligation on RFML only to use the defined Confidential Information for the same Permitted Purpose, to apply for a period of one year from 12 November 2003.

274. RFML submits that, as a matter of construction of the September contract and the November contract, it was entitled to proceed with the acquisition of H & T and SP without involving Mr Pratt and Mr Vercoe in the transaction. I reject that submission. Subject to other defences reviewed below, RFML was in breach of both the September and November contracts in proceeding to acquire H & T without involving Mr Vercoe and Mr Pratt in the transaction.

Acquiescence, waiver, estoppel: Mr Pratt

275. In my view, on the basis of my analysis of the September contract and the November contract set out above, RFML was in repudiatory breach of those contracts in relation to Mr Pratt on 8 March 2004, when Mr Middleton (with RFML's authority) told Mr Pratt that he was out of the deal, while it remained clear that RFML proposed to continue to use the Confidential Information to seek to acquire H & T.

276. RFML submitted that Mr Pratt agreed to accept that he should have no part in the transaction in return for a payment of between £25,000 and £30,000. On the evidence it is clear that Mr Pratt did not agree to this.

277. For his part, Mr Pratt submitted that RFML remained bound by the relevant terms of the September contract and November contract not to proceed with its acquisition of H & T without involving him or obtaining his consent, which he withheld. I do not think this is correct. In my judgment, Mr Pratt accepted RFML's repudiatory breach of the contracts by having nothing to do with the transaction after 8 March 2004, which was in marked contrast to the work he had been carrying out to promote it up to that point in time and to the efforts which he could reasonably have been expected to continue to contribute (or offer to contribute) to ensuring the success of the transaction if the agreements remained on foot as between RFML and him. By about mid-March 2004 it was clear, on an objective view, that the contracts as between Mr Pratt and RFML were at an end (see the discussion in *Chitty on Contracts*, 30th ed., vol. 1, para. 24-013 and the passage from *Vitol SA v Norelf Ltd* [1996] AC 800, 811 cited there). Accordingly, at that stage Mr Pratt's rights in relation to the contracts were secondary rights to claim damages from RFML. Ultimately, however, I do not think that anything turns on this ruling, in light of the approach I adopt to the assessment of damages at paras. [286] ff below.

278. Mr Pratt did nothing to indicate that he waived such rights as he had in relation to the contracts. He did and said nothing amounting to any representation which induced RFML to believe it was entitled to proceed with the acquisition of RFML without involving Mr Pratt, nor did RFML rely on anything said or done by Mr Pratt in deciding to continue to pursue its acquisition of H & T. Accordingly, I dismiss RFML's submissions that it has any defence to the contract claim by Mr Pratt for damages.

Acquiescence, waiver, estoppel: Mr Vercoe

279. On 12 February 2004 Mr Vercoe was told by Mr Middleton (with authority from RFML) that he could not be CEO of H & T, but only Commercial Director. RFML was entitled to decline to proceed with an acquisition of H & T if it was not happy with the level of involvement proposed for Mr Vercoe in the management of the business post acquisition. At this juncture, Mr Vercoe had a choice. He could have refused to accept RFML's proposal that he be involved in the transaction with a role different from that of CEO, as set out in the Business Plan: then RFML would have had to decide whether it would walk away from the transaction (on the footing that to proceed with Mr Vercoe as CEO would present too great a risk for it), or proceed with Mr Vercoe as CEO (i.e. accepting that risk in the interests of securing what it assessed could be a lucrative acquisition) or seek to negotiate some deal with Mr Vercoe whereby he would give up part of his rights under the September and November contracts. Alternatively, Mr Vercoe could accept the proposed change in his role to encourage RFML to continue to proceed with the transaction.

280. Mr Vercoe chose this latter course. In my view, the position might well best be analysed at this stage as a case in which RFML proposed an amendment to the September and November contracts

(to the effect that the "Permitted Purpose" should be redefined as an acquisition of H & T in relation to which Mr Middleton would be Chairman and Mr Vercoe Commercial Director, and Mr Pratt would have no role at all) which Mr Vercoe accepted by continuing to be involved in the transaction on the new basis proposed by RFML.

281. Thereafter, the dispute between Mr Vercoe and RFML could have been formulated by reference to the question whether RFML was in breach of the September and November contracts as amended. RFML might have argued that it was not, because until late July 2004 it continued to press for a transaction in relation to which Mr Vercoe would be involved in the post-acquisition management as Commercial Director; and in response, Mr Vercoe might have argued that RFML repudiated the amended contracts because it did not in fact intend to include him as a Companies Act director in the post-acquisition management (see para. [240] above, albeit such an argument might have run into the difficulty that the position of Commercial Director was not proposed to be a full Companies Act director position in the Business Plan either: see para. [110] above) and because, in the face of indications that his proposed role was to be inferior to that of Commercial Director, RFML did not provide assurances to him that he would indeed be Commercial Director both in name and in fact.

282. However, the dispute was not framed in this way. Instead, RFML pleaded that Mr Vercoe was estopped from claiming any breach of contract by his conduct between February and 26 July 2004, or that he acquiesced in RFML's use of the Confidential Information referred to in the September and November contracts in proceeding with the transaction without him or that he waived any rights he had to object to them doing so. Mr Newey, for Mr Vercoe, submitted it would not be fair to Mr Vercoe for the court now to analyse the case as one in which the September and November contracts had been amended as set out above, so that Mr Vercoe was bound to accept that RFML could proceed with the transaction with him in a lesser role: Mr Vercoe had not had a fair opportunity to plead a case to dispute that the contracts had been amended or to the effect that even if the contracts had been amended RFML had breached them in their amended form. There is considerable force in this.

283. I have to consider the case as it was framed and argued before me. It seems to me that the substance of RFML's case is that it acted reasonably after Mr Vercoe was told he would not be CEO in February 2004 in seeking to proceed with the acquisition of H & T on the basis that Mr Vercoe would have a role in the post-acquisition management as Commercial Director; that he encouraged RFML to believe that he accepted it could continue to pursue the acquisition of H & T on that revised basis; that in reliance on that belief it expended considerable time and effort in pursuing that acquisition (and spent money in investigations and negotiations and ultimately invested large sums to acquire H & T and SP); that it genuinely intended and sought to involve Mr Vercoe in the post-acquisition management in the role of Commercial Director (with an appropriate remuneration and equity package); that Mr Vercoe behaved unreasonably in late July 2004 and in effect walked

away from the transaction; and that as a result it would now be inequitable to allow him to seek to enforce rights under the September and November contracts against RFML. In assessing whether it would be inequitable for Mr Vercoe to rely on his rights, there is some overlap with the sort of factors which might have been relevant to any arguments arising from a pleading that the contracts had been amended.

284. In my judgment, Mr Vercoe did not waive his rights under the September and November contracts and is not estopped from relying on them against RFML. It was reasonable for him to seek clarification of his role, remuneration and equity package from RFML in the way that he did in July 2004. He had legitimate concerns that his position in the post-acquisition management of H & T would not be at an appropriate level and that he would be exposed to an unacceptable degree to managerial control by Mr Nichols (who had given evidence of profound personal hostility to him) without sufficient constraints and protections in place from RFML, with the result that any benefits he might receive from the transaction would be unduly vulnerable to action by Mr Nichols and in constant jeopardy. RFML did not give him any or any adequate assurances to meet these concerns. Mr Vercoe was entitled to try to bring these matters to a head with RFML at the time and in the manner he did. Although Mr Cartwright took exception to Mr Vercoe's resort to legal advice and reference to his legal rights in their discussion on 26 July 2004, there was nothing unreasonable in Mr Vercoe's actions in the position in which he found himself. In all the circumstances, it is not inequitable for Mr Vercoe to rely on his contractual rights against RFML.

285. At the meeting between Mr Vercoe and Mr Cartwright on 26 July 2004 it was Mr Cartwright who closed the meeting and in effect invited Mr Vercoe to leave. Mr Vercoe did not walk away from the transaction, as alleged by RFML. The same is true in relation to the correspondence after that meeting. The letter written by Mr Vercoe's solicitors (para. [245] above) was reasonable in the circumstances, and did not indicate that Mr Vercoe was walking away from the transaction. It was the letter dated 2 August 2004 from Eversheds on behalf of RFML which finally terminated Mr Vercoe's involvement in the transaction.

Remedies for breach of contract

286. Since RFML did not plead that there had been any amendment of the September and November contracts, and it would be unfair to Mr Vercoe to analyse the case as if there had been, when it comes to assessment of remedies for breach of contract I think it is appropriate to assess the position by reference to those contracts in unamended form.

287. The relevant breach by RFML of each of the September and November contracts was to continue to make use of the Confidential Information referred to in those contracts for a purpose (its

acquisition of H & T and SP without including Mr Vercoe and Mr Pratt in the transaction) which was not "the Permitted Purpose". The usual approach to assessment of damages for breach of contract is to assess compensation to put the innocent party in the position in which they would have been had there been no breach of contract. Where there are different possible outcomes (depending on circumstances) had a breach of contract been avoided, it may be relevant to analyse the chances of different outcomes occurring: cf *Allied Maples Group Ltd v Simmons and Simmons* [1995] 1 WLR 1602.

288. In this case, RFML could have avoided any breach of contract in relation to Mr Pratt in March 2004 by itself ceasing to pursue the acquisition of H & T and SP (so that it made no further use of the Confidential Information), by agreeing to proceed with the acquisition with Mr Pratt involved as Commercial Director (relying on the managerial talents of Mr Middleton and Mr Vercoe and others to keep the attendant risk associated with the involvement of Mr Pratt within acceptable bounds) or by negotiating with Mr Pratt to vary or buy out his rights under the September and November contracts to prevent the transaction proceeding without such involvement on his part. Similarly, RFML could have avoided any breach of contract in relation to Mr Vercoe in late July or early August 2004 by then ceasing to pursue the acquisition of H & T and SP, by agreeing to proceed with the acquisition with Mr Vercoe involved as CEO (on the footing explained in para. [286] above, or otherwise as Commercial Director) or by negotiating with Mr Vercoe at that stage to vary or buy out his rights under the contracts. A possible approach to the calculation of damages in each case might have involved an assessment of the different values of these different outcomes to Mr Pratt and Mr Vercoe respectively, discounted in light of the differing probabilities that each of them might in fact have occurred.

289. However, in order to limit the complexities of the case and the evidence and argument required to resolve it, the parties ultimately adopted a common position before me to the effect that I should assess damages by reference to what RFML should be taken to have agreed to pay each of Mr Pratt and Mr Vercoe to obtain their consent to RFML using the Confidential Information for a purpose other than the "Permitted Purpose" - i.e. I should apply the approach to assessment of damages for breach of a negative contractual covenant (a promise not to do something) which stems from the well-known decision of Brightman J in *Wrotham Park Estate Co. Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 ("*Wrotham Park*"); and see *A-G v Blake* [2001] 1 AC 268 ("*Blake*"), especially at 282-286 per Lord Nicholls, and *Experience Hendrix LLC v PPX Enterprises Inc.* [2003] EWCA Civ 323; [2003] 1 All ER (Comm) 830 ("*Experience Hendrix*"), especially at [45] per Mance LJ. Accordingly, in the circumstances of this case, I consider that it is right to proceed on that basis.

290. *Wrotham Park* damages are not based on a simple assessment of what the parties to an agreement would in fact have agreed as the price to be paid by the obligor to the obligee to secure release from the negative covenant in question. On the facts in *Wrotham Park* it was found that the obligee having the benefit of a restrictive covenant preventing the development of certain land

would not have agreed to any relaxation of the covenant so as to permit the development of that land which was in fact carried out by the obligor. In assessing damages for breach of the restrictive covenant the court constructed a hypothetical agreement, based on what would have been a reasonable payment to make for relaxation of the covenant in all the circumstances of the case, taking account of the profit which the developer expected to make and also of the fact that the obligee had sat back while the land in question was auctioned as land fit for development: [1974] 1 WLR at 815B-816B.

291. Important recent guidance on the approach to calculation of damages under the *Wrotham Park* approach is given by the Privy Council in *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, at [46]-[54]. In particular, it was emphasised at [49] that both parties to the notional transaction to buy the release of the relevant contractual obligation "are to be assumed to act reasonably", and that the focus should primarily be on how the notional negotiation would have taken place bearing in mind the information available to the parties and the commercial context at the time that notional negotiation should have taken place ([50]-[53]).

292. On my reading of the authorities, where damages are to be awarded on a *Wrotham Park* type basis, what is required from the court is an assessment of a fair price for release or relaxation of the relevant negative covenant having regard to (i) the likely parameters given by ordinary commercial considerations bearing on each of the parties (it would not usually be fair for the court to make an award of damages on this basis by reference to a hypothetical agreement outside the bounds of realistic commercial acceptability assessed on an objective basis with reference to the position in which each party is placed, and see *Pell Frischmann Engineering Ltd* at [53]); (ii) any additional factors particularly affecting the just balance to be struck between the competing interests of the parties (see Brightman J's reference to the conduct of the beneficiary of the restrictive covenant in *Wrotham Park* at 815H-816B as a factor tending to moderate the award of damages in its favour and the reference of the Privy Council in *Pell Frischmann Engineering Ltd* at [54] to the relevance of extraordinary and unexplained delay by the claimant); and (iii) the court's overriding obligation to ensure that an award of damages for breach of contract - which falls to be assessed in light of events which have now moved beyond the time the breach of contract occurred and which may have worked themselves out in a way which affects the balance of justice between the parties - does not provide relief out of proportion to the real extent of the claimant's interest in proper performance judged on an objective basis by reference to the situation which presents itself to the court (see the discussion in *Experience Hendrix* at [27]-[30] of the special nature of the interest of the claimant which justified the award of damages in *Blake* equivalent to the profits which Blake had made in publishing his book about his treachery; the general discussion by Lord Nicholls in *Blake* at 282A-285H; and also compare *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344).

293. Applying that approach to the facts of this case, I first consider the likely commercial parameters for agreement on a fair price to be paid by RFML for release from the negative covenant

in clause 1(b) of each of the September November contracts.

294. In relation to Mr Pratt, in early to mid-March 2004 the parties were in a position where Cash America had shown serious interest in RFML's approach to buy H & T and SP; but it was before detailed due diligence had been conducted. The possibility that a valuable transaction for RFML might result from the approach to Cash America had moved beyond being purely speculative, but there was still a considerable range of possible things (such as adverse information emerging during due diligence, the possibility that other bidders might come forward) which might lead to the transaction being aborted. Also, even if the transaction did proceed, RFML would have invested considerable sums with the risk that it might not be possible to manage H & T and SP more profitably, contrary to its hopes. On the other hand, RFML's assessment at the time, after weighing all the risks, was that this was likely to be a profitable transaction for it, with which it was anxious to proceed.

295. Mr Pratt was in a weak financial position, in that he had given up his employment in May 2003 and had been managing for a considerable time without paid employment, counting on the possible benefits he might receive as a result of involvement in the transaction. He would have been conscious that if it came to a serious dispute with RFML he might well have difficulty in financing litigation against it. However, he would also have been keen to extract as much as he reasonably could in a negotiation with RFML to release it from its obligations to him.

296. In relation to Mr Vercoe, in late July and early August 2004 events had moved on and the transaction looked still more attractive to RFML. RFML had conducted extensive due diligence and liked what it found on review of the detailed financial and management information which had been made available to it; it liked the senior management combination of Mr Middleton and Mr Nichols which was now in place; and it had agreed exclusivity with Cash America and was close to finalising the acquisition of H & T and SP. Most of the uncertainties associated with the pre-acquisition phase of a transaction had been eliminated or contained within satisfactory limits. However, there remained substantial risks for RFML related to how well H & T and SP might do in the post-acquisition phase before RFML realised its investment and sold the companies.

297. Mr Vercoe's position at that time was similar to that of Mr Pratt referred to in para. [295] above.

298. In assessing the likely commercial parameters for an agreement in a *Wrotham Park* type case it may be relevant to take expert evidence into account: see *Experience Hendrix* at [46]. The relevance of expert evidence is likely to be greatest where the notional agreement on a fair price is closely analogous to normal commercial bargains in an established market; it may be much less helpful, or

not relevant at all, in unusual one-off cases where there is nothing equivalent to a going rate for the type of notional transaction under consideration.

299. In this case, as it came to be argued by the parties, the expert evidence adduced on each side was of only limited assistance and in any event the notional agreement to be constructed by the court lay more at the unusual and particular end of the spectrum, where expert evidence is less relevant. For RFML, Mr Ascott expressed his opinion about his understanding of the rights and obligations of the parties under the contracts and more generally, but since there was no pleaded case that there was some customary understanding in the market regarding the meaning and effect of the terms of the contracts, I did not find this of assistance. I thought, rather, that it was appropriate to make my own assessment of the rights and obligations of the parties. So far as concerns the damages to be awarded on a Wrotham Park basis, Mr Ascott's report did not identify the rights of Mr Pratt and Mr Vercoe as I have found them to be, and he did not address the question of what might be paid by a party bound by those rights to secure release from them.

300. For the Claimants, the report of Mrs Fowler was addressed to an assessment of the value of the Confidential Information, in the sense of the price that a willing buyer would have been willing to pay to acquire the information. The date she considered relevant for this assessment was the autumn of 2003 (i.e. when the MBI team made their approach to RFML). She identified three scenarios which in her view represented reasonable proxies for the value of the Confidential Information at that time, and assessed the likelihood that each of them might have occurred. These scenarios were (i) Mr Vercoe becomes CEO and Mr Pratt becomes Commercial Director and are awarded a combined equity stake accordingly (a total stake of 10%: 7% for Mr Vercoe and 3% for Mr Pratt); (ii) Mr Vercoe becomes Commercial Director and Mr Pratt becomes a less senior director and are awarded equity accordingly (7% in total); and (iii) Mr Vercoe becomes Commercial Director and Mr Pratt does not become a director, with allocation of appropriate equity (3% in total, i.e. for Mr Vercoe alone). As the case on remedy ultimately came to be argued, this evidence was of limited assistance because addressed to the wrong date and the wrong issue: she assumed that Mr Vercoe and Mr Pratt, or Mr Vercoe alone, would actually be involved in the transaction, whereas what the court was invited to assess was the price to be paid for them not to be involved in the transaction.

301. Mr Ascott and Mrs Fowler gave oral evidence going to one important issue bearing on the assessment which the court has to make, namely whether RFML would have been likely to seek to buy the release of Mr Pratt's and Mr Vercoe's rights with a cash payment or by allocating equity to them. The Claimants submit that the notional price which RFML would have paid would have taken the form of an agreement to allocate equity to them, rather than pay a sum in cash in March 2004 (to Mr Pratt) or in July or August 2004 (to Mr Vercoe, or - if I am wrong in my conclusion regarding Mr Pratt's acceptance of the repudiatory breach by RFML in March 2004 - to Mr Vercoe and Mr Pratt). Mrs Fowler's evidence supported that case. She pointed out that venture capital companies generally dislike spending money where they can avoid it, and prefer to share the risks associated

with the transactions in which they become involved. Therefore, they tend to negotiate contingency fee arrangements with advisers (as RFML did in this case), so that fees only become payable if a transaction actually proceeds, and incentivise management with equity or options which will only give a return if the business increases in value for them (as, again, RFML did in this case). In her view, it was unlikely that RFML would have sought to buy release from the rights of Mr Vercoe and Mr Pratt in this case by a money payment; rather, it would have sought to have paid a price in the form of allocation of equity in some form, so that they shared the risks which RFML would be bearing in taking the transaction forward and would only receive money if the transaction proved to be profitable for RFML.

302. RFML, by contrast, submitted that it would have been more likely to buy the release of Mr Vercoe's and Mr Pratt's rights for (modest) cash payments rather than by allocation of equity rights. Mr Ascott supported that case, pointing out that venture capital companies generally use the equity pool usually available for allocation to management in management buy-out and buy-in transactions (typically between about 10% and 20%) to incentivise the managers who are actually retained to work in the business, so that they are rewarded for working hard to make the investment a success for them and the venture capital company funding the transaction. As a general point that is undoubtedly correct, but it does not distinctly address what would be likely to have happened in the particular and unusual circumstances of the present case, on the footing that RFML would have had to buy its release from the contractual rights of one set of managers (Mr Vercoe and Mr Pratt) to allow it to proceed with the transaction with another set of managers (in particular, Mr Middleton and Mr Nichols).

303. I am very doubtful that resolution of this issue is greatly assisted by expert evidence, other than in so far as it might provide guidance of the sort of returns from investment which venture capital companies typically seek to achieve and regard as the necessary incentive for accepting the risks associated with the sort of transactions in which they become involved. More naturally, on an issue of this kind, in the course of a trial one might expect the witnesses to be asked how they would have been likely to react to particular situations and the court would then assess their evidence in the light of all the other evidence in the case. Here, however, for reasons I cannot speculate about, none of Mr Vercoe, Mr Pratt, Mr Cartwright and Mr Slatter was asked how he would have reacted to proposals that the rights of Mr Vercoe or Mr Pratt should have been bought out with shares or cash. I therefore look to the wider evidential picture in order to decide what would have been likely to have happened.

304. In my judgment, there are strong reasons to conclude that it would have been very likely that the parties would have agreed that Mr Pratt's and Mr Vercoe's contractual rights should be bought out by RFML granting them an equity allocation in relation to H & T. Five points are of particular relevance to that assessment:

i) RFML reckoned, both in early March 2004 and still more in July/August 2004, that the acquisition of H & T was very attractive, and would have been anxious to find a way to proceed with the transaction at least cost and risk to itself;

ii) In early March 2004 (in Mr Pratt's case) and in late July/early August 2004 (in Mr Vercoe's case) RFML would have been very conscious that it was, as in any venture capital transaction, taking a considerable financial risk. The risk that the proposed transaction might fail would have been greater in March (before full due diligence had been conducted), and at that time I think that for reasons similar to those which caused RFML to seek to negotiate contingency fees with its advisers (so as to avoid RFML having to bear large expenses if the transaction did not proceed) it would have sought to negotiate a highly contingent arrangement with Mr Pratt as well, best achieved by the grant of equity, which would have exposed Mr Pratt to the risk that the transaction might not proceed and to the risk that (if it did proceed) it might not prove to be profitable. Mr Pratt refused a cash offer of £30,000 by RFML at the time, and any agreement on a cash payment would have been likely to have to be very much higher. RFML would not have wished to spend large sums of cash at that stage. The position had changed somewhat by late July 2004 (when Mr Vercoe was excluded from the transaction), in that due diligence had been completed, RFML had exclusivity in its negotiations with Cash Amercia and was confident the transaction would indeed proceed. But it still faced significant financial uncertainty whether the transaction would prove to be profitable which, in my view, it would have been keen to lay off onto Mr Vercoe if it could. RFML would not have wished to pay Mr Vercoe the large sum of cash which he would have been likely to have demanded for loss of his contract rights at that stage;

iii) At those times (and, indeed, probably from the outset: see para. [137] above), Mr Vercoe and Mr Pratt appreciated that there was in practice no other funding party apart from RFML in a position to carry through an acquisition of H & T from Cash America. Accordingly, they would have been realistic in trying to negotiate an arrangement which RFML would find acceptable and allow it to proceed, recognising that that would probably require them to take the risk of some sort of equity arrangement;

iv) Mr Vercoe and Mr Pratt had, by their actions in leaving Rockingham and dedicating themselves to Project Scrooge for a considerable period without paid employment, shown themselves to be risk-takers. They acted in this way because they hoped for a very large payout if the transaction went ahead and was profitable. To be satisfied with a cash payment from RFML, they would have wanted large sums to reflect the high value which they believed the opportunity they had brought RFML to acquire H & T

represented for RFML, and it was very unlikely that RFML would have found the making of such payments to be an attractive way of dealing with the problem. On the other hand, if confronted with a choice between the sort of modest cash pay-off which is all that it is likely RFML would have proposed to them as a cash settlement in March or July 2004 and an allocation of high risk equity, but with the prospect of a high return, I think it is very probable they would have chosen the allocation of equity as their preferred option;

v) According to the evidence of Mr Ascott, the internal rate of return which venture capital companies typically require to be forecast before regarding a transaction as acceptable is of the order of 30%-40%. As RFML's internal investment reports of 16 April 2004 and 20 July 2004 (paras. [202]-[203] and [236] above) indicated, RFML expected as its most realistic estimate (base case) to achieve an internal rate of return on the acquisition and disposal of H & T of 29% then 31.2%-33.4% respectively, in relation to the acquisition of a business which was rather less risky than in many other transactions (para. [203] above). The way in which RFML planned to structure its investment (and hence its return from the transaction) was for there to be a relatively small amount of equity and a much larger investment by way of subordinated loan notes subscribed by RFML carrying a high rate of interest, which would be paid out before returns on equity. I accept Mr Newey's submission that this had the effect of making RFML's overall return from the transaction relatively insensitive to the amount of equity which might be allocated to others (incumbent management or, as necessary, to buy release from the rights of Mr Vercoe and Mr Pratt). This meant that on its own investment calculations RFML had a considerable degree of flexibility to allocate equity to others without taking its own calculated internal rate of return below an acceptable level. Allocation of equity to Mr Pratt and Mr Vercoe at the relevant times would have been a comparatively painless way for RFML to buy release from its obligations. The existence of a degree of flexibility in relation to allocation of equity was in fact demonstrated later on, when RFML increased its offer of equity to Mr Nichols from 5% to 7%, hence increasing the total equity allocation to management from 15% to 17%. It is also relevant here to appreciate that Mr Nichols and the incumbent management had long had an opportunity to try to arrange a management buy-out, but had not managed to do so, and that other good quality external managers could (if necessary) be found by RFML (Mr Middleton in fact at one point had in mind someone specific, other than Mr Nichols, who would have made a good CEO in the post-acquisition management). In my view, RFML's perception was that in proceeding with the transaction it would be providing the incumbent management with a great opportunity to make potentially large gains from their involvement in H & T's business in addition to continuing to earn their ordinary salaries, in circumstances where they had failed to achieve such an opportunity for themselves, and that it would therefore have considered that it was armed with strong arguments to persuade Mr Nichols and

> the other managers that (if it was necessary to do so in order to allow the transaction to proceed) they should be prepared to share the pool of equity available for management with Mr Vercoe and Mr Pratt for the allocation of equity to buy release from their rights.

305. The dispute between the parties on the issue whether the payment to buy release from Mr Vercoe's and Mr Pratt's contractual rights would have taken the form of cash or the allocation of equity (which, in practice, would have involved granting them contractual rights either to receive equity if the transaction proceeded or to receive payments by RFML in future, formulated so as to mimic the commercial effect of being assigned equity rights without actually making them shareholders) has considerable practical significance. This is because of the great success of the venture and the large profits realised for equity holders when H & T and SP were eventually sold. In broad terms, I was told that each 1% in equity in H & T fetched about £344,000 when sold; it is unclear on the information available to the court at present what each 1% of the equity in SP fetched when it was sold. It is very unlikely that RFML would have been prepared to offer Mr Pratt (in March 2004) or Mr Vercoe (in July/August 2004) cash payments of anything like that amount.

306. I conclude that in all probability any commercial deal between RFML, Mr Pratt and Mr Vercoe would have been concluded on the basis of an equity allocation by RFML to each of them. In my view, it is then appropriate to assess the damages payable by RFML by reference to the amount of the equity allocation which would have represented a reasonable price for RFML to buy release from Mr Pratt's then Mr Vercoe's contractual rights at the relevant times. I adopt that approach by application of ordinary principles for the assessment of damages. I would add that it is also an approach powerfully underwritten by the decision of the House of Lords in *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12; [2007] 2 AC 353.

307. I first consider the payment, in terms of allocation of equity, which would have represented a reasonable price at which RFML should be deemed to have bought release from Mr Pratt's contractual rights in early March 2004. Mr Pratt was at that time entitled to say that his contractual right was to be involved in the transaction, if it proceeded, in the position of Commercial Director in the post-acquisition management. He had not impressed RFML or Mr Middleton as a potential manager, and that point could fairly have been made by them in a negotiation with him as tending to reduce the amount which he could reasonably have hoped to gain from the transaction even if he remained involved in it. Also, RFML could fairly have made the points that when his rights were bought out he would not be contributing so effectively to the future success of the business as the post-acquisition managers would; that it was important that reasonable levels of equity be made available to incentivise those managers for the benefit of everyone with an interest in the transaction; and that all this meant that he could not expect the same level of equity allocation as might otherwise be granted to an attractive management candidate at Commercial Director level in

ordinary circumstances, where there was not the complication of part of the equity pool having to be used to buy release from rights of someone who would play no future part in contributing to the profitability of the venture.

308. On the other hand, as Mr Pratt could reasonably have responded, he had had a significant role and had devoted considerable time and effort in developing the business opportunity from which RFML hoped to benefit and the primary way in which post-acquisition management would be rewarded for their contribution to the business would be by way of payment of salary, which he was going to have to forego (although no doubt part of the value of this could have been reflected in an arrangement that Mr Pratt would not have to contribute cash for his equity allocation, and RFML could also have observed that he would not be exposed to the risk of losing his equity rights upon leaving or expulsion from the company in the period after its acquisition until the investment was realised). Mr Pratt could have argued that these factors tended to make his position different from, and in certain respects more valuable than, that of an ordinary manager appointed to a position post acquisition.

309. In my judgment, assessing the whole picture and weighing up such arguments on each side, the reasonable price at which RFML should be taken to have bought release from Mr Pratt's contractual rights is in return for an equity allocation (or equivalent) of 2.5% in the acquisition vehicle in relation to H & T and SP. In reaching this view, I have in mind that RFML were later prepared to offer Mr Vercoe 3% of the equity in the role of Commercial Director and 3% to Mr Hughes as Finance Director. I also have regard to the evidence of Mrs Fowler that an equity allocation of the order of 3% to 5% would have been reasonable, by reference to usual industry expectations, for a person appointed to a position like that of Commercial Director. I have applied a small discount to take account of balance of the principal arguments on both sides set out above.

310. This gives a sum of about £860,000 by way of damages payable to Mr Pratt in respect of H & T plus 2.5% of the realised value of SP upon its sale in July 2007. The basis of assessment I have chosen will affect the period over which interest on those sums should be paid, since he would only have received that money when RFML sold H & T (and received the proceeds of sale on 11 May 2006) and then SP (proceeds of sale received on 2 August 2007). I will look to the parties to seek to agree the appropriate order in light of this judgment.

311. In my view, the assessment that a reasonable price at which RFML should be taken to have agreed to buy release from Mr Pratt's contractual rights would have been in the form of an equity allocation and in an amount of 2.5% of the equity is further supported by reference to considerations of general fairness of the kind to which Brightman J had regard in *Wrotham Park*. It should be assumed that neither party would have sought to extract a ransom price from the other (see *Pell Frischmann Engineering Ltd* at [49]). Further, the plaintiff in *Wrotham Park* had made some

contribution to the situation in which the defendant had developed land in breach of the relevant restrictive covenant by failing to intervene at the time the land was auctioned as land suitable for development and purchased by the defendant, and Brightman J took account of that as a factor which tended to moderate the court's assessment of the hypothetical reasonable price and the amount of damages to be awarded: see [1974] 1 WLR at 815H-816A. In the present case, I have found that RFML contributed to the situation in which Mr Vercoe and Mr Pratt chose it as the venture capital company to pursue the transaction and came to commit themselves (for all practical purposes) irrevocably to RFML over time, by a lack of candour amounting to shabby and underhand treatment and by lies in the letter of intent. In *Wrotham Park* the plaintiff's inaction tended to undermine the defendant's appreciation of the risks it was running, and that was taken to be relevant as a moderating factor in the award of damages; so in this case, RFML's acts and omissions undermined the Claimants' appreciation of the risks they were running in embarking on the venture with RFML and by similar, but converse, reasoning this is a factor which properly underscores the legitimacy of making a comparatively generous assessment of the price in the notional agreement and of the award of damages due to Mr Pratt. I derive comfort from this consideration that my assessment of the damages payable to Mr Pratt is at broadly the right level.

312. I also consider that, stepping back and making a general evaluation, this assessment of the amount of damages payable to Mr Pratt properly and proportionately reflects the true extent of his interest in the transaction as reflected in his contractual rights under the September and November contracts and is reasonable to expect RFML to pay, in light of the profits that the acquisition of H & T and SP brought for it and the Rutland Trusts associated with it. In my view, a damages award on the basis and in the broad amount I have indicated strikes a fair balance between Mr Pratt and RFML, having regard to the contribution of Mr Pratt to the transaction up to 8 March 2004 and the extent of his contractual rights at that time and the commercial risks assumed by RFML and its contribution to securing the deal with Cash America and the contribution of RFML and others to the successful management of H & T and SP after their acquisition.

313. I reject the suggestions by RFML that the proper award of compensation for Mr Pratt should be framed by reference to the £25,000 to £30,000 which RFML was prepared to offer Mr Pratt when it ejected him from the transaction or by some form of modest reasonable payment (analogous to a quantum meruit) assessed by reference to the time spent by Mr Pratt working on the transaction. As to the first, RFML did not come up with that proposed payment in recognition of the need to buy release from Mr Pratt's contractual rights, but as an ex gratia payment - it represented the minimum which RFML thought Mr Pratt might accept to go away quietly. In my view, such a unilateral offer, not made as the result of any process of fair negotiation with Mr Pratt and not based on any recognition of his true contractual rights, provides no useful guidance as to the reasonable price which the court should now assess as the value of Mr Pratt's rights.

314. As to the second suggestion, it does not properly reflect the significance of Mr Pratt's

contractual rights, both for him and for RFML. Mr Pratt had embarked on the venture not to earn some sort of reasonable daily rate of remuneration for his work on the bid, in the manner of a consultant engaged by RFML, but in order to participate in the large hoped-for benefits if the transaction proceeded. Assessment of a reasonable price in terms of an equity participation in the transaction better reflects the true significance and value for Mr Pratt of his rights under the September and November contracts to participate in the transaction if RFML proceeded with it. From RFML's point of view, it was bound to allow Mr Pratt to be involved in the transaction as Commercial Director if it proceeded with it, and it wished to proceed without him being involved in that or any capacity. RFML could not reasonably have expected Mr Pratt to give up the large future benefits which he hoped for under the contracts, so as to free RFML to proceed with the transaction, in return only for a comparatively meagre payment rate for his work in the past up to March 2004; and the value to RFML of being able to free itself from its obligations to him was also far greater than that.

315. Moreover, the information (and the opportunity associated with it) which Mr Vercoe and Mr Pratt provided to RFML was not in the nature of information which any consultant in the market might have provided (such that the value of the information, and of their rights in relation to it, might be assessed by reference to the sort of fee a consultant might have charged - which would be broadly analogous to the sort of quantum meruit fee which RFML submits is appropriate here). On the contrary, it was something special, not generally available in the market, which gave RFML a huge advantage in finding a viable and profitable acquisition target. Therefore, the reasoning of the Court of Appeal in *Seager v Copydex Ltd (No. 2)* [1969] 1 WLR 809, esp. at 813B-F per Lord Denning MR, indicates that a mere quantum meruit payment would not be appropriate. This reinforces my view that an assessment of compensation by reference to an equity participation is appropriate in the circumstances of this case.

316. For completeness I should add that, if I am wrong in my judgment that Mr Pratt accepted RFML's repudiatory breach of contract in March 2004 (so that in fact he retained his primary rights under the September and November contracts in late July and early August 2004 when RFML repudiated those contracts in relation to Mr Vercoe and - on this hypothesis - Mr Pratt as well), I would still have made the same assessment of the quantum of damages. By the later stage, RFML was still more keen to proceed with the transaction (for reasons already set out above), but it could have pointed out that by that stage others had made a greater contribution to the development of a successful bid than had Mr Pratt, who had made no contribution since March 2004. I think the changes in the arguments and counter-arguments regarding a fair price for RFML to buy out Mr Pratt's shares at that later stage would broadly have cancelled each other out, leaving the same hypothetical reasonable price.

317. I turn, then, to consider the allocation of equity which would have represented a reasonable price at which RFML should be deemed to have bought out Mr Vercoe's contractual rights in late

July or early August 2004.

318. At that stage in the transaction, Mr Vercoe was entitled to say that his contractual right was to be involved in the transaction in the position of CEO in the post-acquisition management: see para. [286] above (no amendment of the September or November contracts was pleaded or debated in evidence or argument, so in my view this is the fair basis on which to assess the damages due to Mr Vercoe). Mr Vercoe had impressed RFML and Mr Middleton as a potential dynamic manager, but they did not consider he had sufficient experience to merit entrusting him with the role of CEO. This point could fairly have been made in a negotiation with him as tending to reduce the amount which he could reasonably have hoped to gain from the transaction even if he remained involved in it, since even if he had been appointed as CEO he would have required significant managerial support from Mr Middleton and others to carry out that function, and so could not expect to be rewarded as fully as a CEO who did not have that weakness. Also, as with Mr Pratt, RFML could fairly have made the points that when Mr Vercoe's rights were bought out he would not be contributing to the future success of the business and that the post-acquisition managers would need to be incentivised with equity, so reducing the amount which might be available to buy out his rights. RFML could also reasonably have pressed the point that by that stage the banks supporting the transaction attached considerable weight to the desirability of Mr Nichols being involved in the role of CEO, so that for the transaction to proceed there should be some setting off of the equity Mr Vercoe might hope to extract as the price for releasing RFML from its obligations against that which would need to be allocated to Mr Nichols to retain him as CEO.

319. On the other hand, Mr Vercoe could reasonably have responded (as he did in fact press upon RFML) that he was the key figure in identifying and developing the business opportunity and had devoted considerable time and effort to doing so, for the benefit of RFML, Mr Nichols and the incumbent management. Mr Vercoe could reasonably have pointed out that a consequence of having his rights bought out by RFML would be that he was not rewarded by payment of a high salary as CEO and that he lost the opportunity to develop his business career and profile in that position which had been part of the benefits he had reasonably expected to receive by bringing the business opportunity to RFML. These would have been powerful arguments for Mr Vercoe in the hypothetical negotiation, and RFML (if acting reasonably) would have had to acknowledge their force.

320. Assessing the overall picture and weighing up such arguments, I conclude that the reasonable price at which RFML should be taken to have bought out Mr Vercoe's contractual rights is for an equity allocation (or equivalent) of 5% in the acquisition vehicle in relation to H & T and SP. In reaching this view, I have in mind that RFML was at about this stage prepared to offer Mr Nichols 5% of the equity as its opening offer to him in the role of CEO, which tends to support the view that the reasonable allocation for someone in that position would have been at about that level. I again also have regard to the evidence of Mrs Fowler, which was to the effect that in relation to a CEO an

equity allocation of the order of 5% to 7% would have been reasonable, by reference to usual industry expectations. I have taken a figure at the lower end of that scale to take account of the principal arguments on both sides as set out above.

321. On the basis of an assumed allocation of equity of 5%, the damages due to Mr Vercoe will be about £1.72 million in respect of H & T plus 5% of the realised value of SP upon its sale in July 2007. My assessment of damages on this basis is also supported by a similar process of reasoning as is set out at paras. [311]-[315] above in relation to Mr Pratt. For similar reasons to those set out in para. [313] above, the fact that in July 2004 RFML was considering making a unilateral payment of £100,000 to Mr Vercoe in recognition of the importance of his role in introducing the transaction to it is not an appropriate guide to the amount of the reasonable price to be assessed by the court; it is, rather, a matter which in my view tends to show that RFML (unsurprisingly) felt constrained to acknowledge the significance Mr Vercoe's role in introducing the transaction to RFML, and hence tends to support my conclusion that in the hypothetical negotiation analysed above it would have agreed a grant of significant equity to Mr Vercoe as the reasonable price for buying release from his contractual rights.

322. Finally, to avoid any doubt on the point, I should add that RFML's payment of a fee to M & S and Magus has no bearing on the extent of its obligations to Mr Vercoe and Mr Pratt. That fee was not requested on their behalf nor received for their benefit.

(ii) Confidential Information

323. The information which the Claimants supplied to RFML in September 2003 identifying H & T as a serious and attractive potential target for an acquisition by a venture capital company was confidential information. It was not generally known in the market that Cash America might be open to an offer to buy H & T from it, and Mr Vercoe and Mr Pratt had conducted their own research and analysis to identify objective grounds to support such a thesis and to present it in coherent form to the venture capital companies which they approached. This information was of commercial value. It had the necessary quality of confidence about it, was imparted to RFML in circumstances importing an obligation of confidence (which was the subject of and was confirmed and defined by the bargain between the parties set out in the September contract and then again in the November contract) and RFML made use of it for purposes which were not authorised (i.e. to carry forward the transaction and then acquire H & T and SP without involving Mr Pratt and Mr Vercoe - which were purposes different from "the Permitted Purpose"): *Coco v A. N. Clark (Engineers) Ltd* [1968] FSR 415, 419-421.

324. The confidential information identifying the business opportunity was the product of ideas and

work by Mr Vercoe and Mr Pratt. Mr Middleton did not contribute to it; he simply agreed to allow his name to be used in the Business Plan as proposed Chairman.

325. In my view, the confidential information supplied by the Claimants to RFML was not confined to the identification of the business opportunity. Mr Vercoe and Mr Pratt had analysed the sub-prime market and, so far as was practicable by reference to publicly available material, the business of H & T. They had also devoted considerable thought to producing a business plan setting out ideas how the business of H & T might be developed and improved. The fruits of this research and thinking were set out in the Business Plan and were also of commercial value. RFML found the business ideas deployed in the Business Plan to be a useful outline of a plan to improve the profitability of H & T, and made use of it (and the presentation slides which summarised it) by forwarding it on to the banks from whom RFML was seeking to attract funding support for the acquisition. The business ideas for the development of H & T's business contained in the Business Plan constituted "information of commercial or industrial value ... given on a business-like basis ... with some avowed common object in mind" (*Coco v Clark* at 421), namely the potential acquisition and management of the business of H & T with a view to selling it at a profit, and RFML was bound by an obligation of confidence in relation to it.

326. As regards the identification of the business opportunity to acquire H & T and SP, RFML made use of that confidential information to acquire those companies. It also passed on that information to the Rutland Funds, who made use of it by participating in the acquisition of those companies. The Rutland Funds learned about the opportunity through Mr Cartwright, who fully appreciated that the information was information in relation to which obligations of confidence existed limiting the use to which it could be put. Mr Cartwright was also a member of the organs which made decisions for the various Rutland Funds regarding their participation in the acquisition of H & T and SP. His knowledge of the transaction, of the information relating to it provided by the Claimants and of the circumstances giving rise to obligations of confidence in relation to it is to be attributed to the Rutland Funds. Those Funds accordingly were bound by the same obligations of confidence in relation to the information as were RFML and Mr Cartwright personally. The Rutland Funds and Mr Cartwright made use of the confidential information identifying the business opportunity when they invested to acquire H & T and SP.

327. So far as concerns the confidential information in the form of preliminary business ideas for the development of H & T's business set out in the Business Plan, RFML made use of that in deploying it to attract the interest of supporting banks. However, after RFML conducted full due diligence in relation to H & T and SP, the preliminary ideas in the Business Plan were superseded by work on a new business plan carried out by the proposed post-acquisition management excluding Mr Vercoe and Mr Pratt and without significant reference to their Business Plan. Once H & T had been acquired, it was the ideas contained in that new business plan (drawn in large part from the incumbent management, who now had access to better capital resources to put their ideas into

practice) and developed in the light of practical experience which were put into effect and which resulted in the successful development of H & T's business.

328. In my view, these aspects of the case tend to confirm the validity of my assessment of the compensation due to Mr Vercoe and Mr Pratt for breach of contract, set out above. They also support the analysis below as to the proper basis on which they should be compensated for the unauthorised use by RFML, Mr Cartwright and the Rutland Funds of the confidential information supplied to them in the Business Plan. Mr Vercoe and Mr Pratt had brought RFML the idea for what proved to be a very profitable business opportunity which RFML would not have identified for itself, but RFML and other managers were responsible for making that idea into a reality and for the effective management of the business to create additional value in it. The appropriate notional price for RFML to buy release from Mr Vercoe's and Mr Pratt's contractual rights is the price to allow RFML to be in a position to take forward the business opportunity for itself, without requiring that notional price to be increased as a result of according significant additional value to RFML having the right to use Mr Vercoe's and Mr Pratt's preliminary ideas about how the business of H & T might be developed.

329. Turning to the Claimants' claim for relief based on breach of obligations of confidence, four matters call for comment. First, each of RFML, the Rutland Funds and Mr Cartwright acquired the confidential information in the Business Plan (including, in particular, the information regarding the identity of H & T as a viable and attractive target for acquisition) in circumstances in which an obligation of confidentiality arose in relation to them. The obligations owed by RFML in relation to the confidential information provided to it were confirmed and defined by the September contract and the November contract, and merge with the obligations of RFML under those contracts. Where parties to a contract have negotiated and agreed the terms governing how confidential information may be used, their respective rights and obligations are then governed by the contract and in the ordinary case there is no wider set of obligations imposed by the general law of confidence: see e.g. *Coco v Clark* at 419. In my view, that is the position here as between the Claimants and RFML.

330. Mr Cartwright and the Rutland Funds were not party to the September and November contracts. However, Mr Cartwright and (through him) the Rutland Funds were aware of the scope of the obligations set out in those contracts defining the uses to which the confidential information could (and could not) be put. This was part of the circumstances in which they came to have the confidential information and colours the extent of the obligation of confidence properly to be found to have arisen in respect of each of them. As with RFML, I consider that the obligations of Mr Cartwright and the Rutland Funds in relation to the confidential information in their hands are to be taken as defined by the September and November contracts. Specifically, Mr Cartwright and the Rutland Funds were entitled to make use of the confidential information, but only for "the Permitted Purpose" of an acquisition of H & T and SP involving Mr Vercoe and Mr Pratt. Moreover, since RFML was the contracting party which assumed the primary obligations of confidence in relation to

the confidential information, and in effect represented the interests of the Rutland Funds and acted by Mr Cartwright throughout, there is no good reason to impose any wider obligation of confidence or to allow any more extensive remedies against the Rutland Funds and Mr Cartwright than are available against RFML.

331. Second, each of RFML, Mr Cartwright and the Rutland Funds made unauthorised use of that confidential information by proceeding to participate in the acquisition of H & T and SP without including Mr Vercoe and Mr Pratt, and so each of them is liable to the Claimants for breach of such obligation of confidentiality.

332. Third, it is necessary to address an important submission by Mr Newey to the effect that the appropriate remedy for the breach of confidence in this case is that the Defendants should be obliged to account to the Claimants for the profits they made from their acquisition and later sale of H & T and SP (after some appropriate allowance in relation to their own time and effort in carrying through the acquisition and sale successfully). This is of great practical significance, because of the large profits made by the Defendants. If an account of profits is to be ordered, Mr Vercoe and Mr Pratt would receive very much more money than the sums payable as damages for breach of contract referred to above.

333. Mr Newey submitted that in relation to the Claimants' claim based on breach of obligations of confidentiality they had a complete discretion to choose between claiming compensation assessed by reference to the loss of the notional transaction to buy release from their rights analysed above and claiming an account of profits. He relied in particular upon *Peter Pan Manufacturing Corporation v Corsets Silhouette Ltd* [1964] 1 WLR 96, 106 per Pennycuick J (in a case where the claimant had supplied the defendant with confidential information regarding the design of a brassiere and the defendant made unauthorised use of that information to manufacture and sell brassieres according to that design, the judge said that the claimant had the right to elect to claim either damages or an account of profits) and *Siddell v Vickers* [1892] RPC 152, CA (a claimant in a breach of patent case has a right to elect to take damages or an account of profits: 162 per Lindley LJ). In the alternative, if the court has power to control the choice between those forms of relief, he submitted that in this case an account of profits was appropriate and should be ordered.

334. I do not accept either of these submissions. As to Mr Newey's primary submission, I consider that it has long been recognised that in relation to a claim based on breach of confidence there are circumstances in which the claimant will not be allowed to choose a remedy in the form of an account of profits, and may be confined to an award of damages (which will often be assessed by reference to the value of a notional reasonable agreement to buy release from the claimant's rights, as in relation to the breach of contract claim in this case). Recent developments in the law and wider considerations of justice tend to reinforce this approach.

335. The first obstacle for Mr Newey is the decision of the Court of Appeal in *Seager v Copydex Ltd* [1967] 1 WLR 923. In that case the claimant had come up with an idea for a design for a new type of carpet grip and had provided the defendant with confidential information about that design in the course of negotiations for the defendant to market his grip; the negotiations came to nothing, but a little later the defendant started to manufacture and sell its own new carpet grip, which the court found had been designed by the defendant by making unauthorised use of the claimant's confidential information without appreciating that it was breaching its obligations to him. The claimant claimed "an inquiry as to damages by reason of the defendants' breaches of confidence ... or alternatively an account of profits" (see p. 924F), and thus appears to have been claiming the right to elect between those two remedies. The Court of Appeal found there had been a breach of confidence by the defendant, but that the appropriate remedy was for damages to be awarded, not an account of profits: see in particular 931H-932A per Lord Denning MR:

> "[The recipient of confidential information] should not get a start over others by using the information which he received in confidence. At any rate, he should not get a start without paying for it. It may not be a case for injunction or even an account, but only for damages, depending on the worth of the confidential information to him in saving him time and trouble;"

he then analysed the frame of mind of the defendant and gave judgment for damages to be assessed.

336. Mr Newey submitted that the court in that case did not actually decide that the claimant should be confined to an award of damages. I do not agree. In my view it is clear from the way in which the claimant had pleaded his case for a remedy in the form of an award of damages or an account of profits, from the terms of what Lord Denning said at p. 932 and from the order the court made that the court positively decided the claimant should be limited to that remedy, even though he had asked for what might well have been a far more valuable remedy of an account. The court did not give the claimant an opportunity to elect between these different remedies. This is the way in which the case has been interpreted by a range of commentators, correctly in my view: see Goff & Jones, *The Law of Restitution*, 7th ed., para. 34-021, Burrows, *The Law of Restitution*, 2nd ed., 506-507; Virgo, *The Principles of the Law of Restitution*, 2nd ed., 525-527; Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property*, 214-215. *Seager v Copydex* therefore shows that there are cases involving a claim for breach of confidence where the claimant will not be afforded a right of election to choose the remedy of an account of profits, but will be confined to an award of damages.

337. This conclusion is also supported by later case law. *Blake* is of great importance in the development of the law in this area. In the leading speech in that case, Lord Nicholls confirmed that the court always had a discretion regarding the grant of the remedy of an account of profits (p.

279G), explained that in relation to other discretionary remedies in relation to breach of contract, such as specific performance and injunctive relief, they might be refused if to grant them would be oppressive (p. 282H) and then used the analogy with such remedies as the foundation for his analysis that in certain exceptional cases the remedy of an account of profits will be available in respect of breach of contract (pp. 284H-285H). As he said at 284H-285A:

> "Remedies are the law's response to a wrong (or, more precisely, to a cause of action). When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract. In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract."

338. Lord Nicholls also identified certain remedial differences between equity and common law in relation to infringement of rights of property as being the product of mere accidents of history rather than any valid underlying principle (p. 280D) and rejected the sophistry involved in saying that the remedy of an account of profits may be available for breach of confidence but not for breach of contract, where the equitable and contractual obligations are in substance the same (p. 285C-E).

339. In my view, Lord Nicholls' speech in *Blake* has opened the way to a more principled examination of the circumstances in which an account of profits will be ordered by the courts and where it will not. His reasoning at p. 285C-E, comparing remedies available in contract and for breach of confidence in relation to the same underlying facts, flows in both directions. It both opens up the possibility of an award of an account of profits in relation to breach of contract relating to confidential information and also opens up the possibility for a more principled debate about when an account of profits should be refused in relation to a breach of confidence, and a damages award (typically assessed by reference to a notional reasonable price to buy release from the claimant's rights, similar to the award made in *Wrotham Park* and *Seager v Copydex*) made instead. Both in cases of breach of contract and in cases of breach of confidence, the question (at a high level of generality) is, what is the just response to the wrong in question (cf Lord Nicholls at p. 284H, set out above)? In both cases, to adapt Lord Nicholls' formulation at p. 285A, the test is whether the claimant's interest in performance of the obligation in question (whether regarded as an equitable obligation or a contractual obligation) makes it just and equitable that the defendant should retain no benefit from his breach of that obligation. Again, I think that there is a broad parallel with the way in which the courts will, as in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, control the amount of damages to be awarded in a contract case by reference to the strength of the claimant's interest in performance of a contractual obligation, judged on an objective basis and

weighing that against countervailing legitimate interests of the defendant, to ensure that the remedy awarded is not oppressive and is properly proportionate to the wrong done to the claimant.

340. Although in a certain sense the courts' decisions about these matters might be described as discretionary, in truth I think the courts are now seeking to articulate underlying principles which will govern the choices to be made as to the remedy or remedies available in any given case. In some situations, where the rights of the claimant are of a particularly powerful kind and his interest in full performance is recognised as being particularly strong, there may well be a tendency to recognise that the claimant should be entitled to a choice of remedy (both as between damages and an account of profits, and also possibly as between different bases of calculation of damages, such as by reference to loss actually suffered or by reference to a notional reasonable agreement to buy release from his rights). There are indications in the authorities that this may more readily be found to be appropriate in cases involving infringement of property rights (see, for an historic example, *Siddell v Vickers*, and also *Blake* at 278D-280F and *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086; [2009] Ch 390, at [75] and [155], cf [144]). This may reflect the particular importance usually attached to property rights and the extent of protection they are to be afforded in law - although one might think that in relation to ordinary rights in relation to property of a kind which is regularly bought and sold in a market, damages assessed by reference to a notional buy-out fee may often represent an appropriate and fair remedy, and it is possible that the law may develop in that way. By contrast, it may be more appropriate to award an account of profits where the right in question is of a kind where it would never be reasonable to expect that it could be bought out for some reasonable fee, so that it is accordingly deserving of a particularly high level of protection (such as the promise to keep state secrets which was in issue in *Blake*, which was classified as an exceptional case meriting such an award, and rights to protection under established fiduciary relationships, where trust between the parties rather than a purely commercial relationship is regarded as central to the obligations in question).

341. Cases will frequently arise where a significant choice falls to be made between damages calculated by reference to a notional reasonable buy out fee and an account of profits. Then in my judgment, in the light of *Blake*, where one is not dealing with infringement of a right which is clearly proprietary in nature (such as intellectual property in the form of a patent, as in *Siddell v Vickers*) and there is nothing exceptional to indicate that the defendant should never have been entitled to adopt a commercial approach in deciding how to behave in relation to that right, the appropriate remedy is likely to be an award of damages assessed by reference to a reasonable buy out fee rather than an account of profits. The law will control the choice between these remedies, having regard to the need to strike a fair balance between the interests of the parties at the remedial stage, rather than leaving it to the discretion of the claimant. The significance of *Seager v Copydex* is that it shows that, even in relation to confidential information closely akin to a patent (such as a secret manufacturing design or process), the law will not necessarily afford protection to the claimant extending to an account of profits. Still more strongly will that be the case as one moves

further away from confidential information in a form resembling classic intellectual property rights towards forms of obligation in respect of confidential information more akin to purely personal obligations in contract and tort.

342. This approach is, I think, supported by the judgments in the Court of Appeal in *Experience Hendrix*. In that case the defendant licensed masters of recordings of certain music in breach of its agreement with the claimant that they should should not be licensed, and thereby made a profit. The claimant's claim for an account of profits arising from the breach of the agreement was dismissed, even though the breach was deliberate, because the case was not exceptional (there was no special interest of the claimant in having its rights protected, unlike in *Blake*) but rather arose in a commercial context, and the defendant was not in the position of a fiduciary or any position analogous to that. The claimant was instead awarded a payment equivalent to the reasonable notional royalties which would have been paid by the defendant to buy release from its obligations so as to be able to license the masters as it did: see in particular [37] and [43]-[45] (Mance LJ) and [55] (Peter Gibson LJ).

343. The approach which I adopt also, in my view, produces a coherent picture regarding the extent of protection afforded by the law, moving from lesser protection in relation to an ordinary commercial context to greater protection where there is a fiduciary relationship, rather than too readily equiparating the two. In a commercial context, as reflected in *Experience Hendrix*, a degree of self-seeking and ruthless behaviour is expected and accepted to a degree. In a fiduciary relationship, by contrast, self-seeking behaviour is required to be reined in on the grounds that special obligations of trust have been assumed by the fiduciary to the other party. It seems natural that the law governing the extent of the remedies available in these different contexts should reflect the strength of the interest which the law recognises in each case as deserving protection and the increased importance of deterring abusive behaviour in a fiduciary relationship. As observed by James Edelman (*Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* at 214), it is not obvious why the remedies for breach of confidence should necessarily be the same as for breach of fiduciary duty, so as to allow an account of profits; nor is it obvious why they should be more than the remedy available for, say, the tort of deceit.

344. The law relating to breach of confidence covers a very wide range of different factual situations, and it is unsurprising that the strength of the arguments in favour of any particular remedy or set of remedies in respect of a particular breach of confidence varies across that range. Sometimes the nature of the obligation of confidence may be closely similar to a fiduciary obligation (as in the special context of obligations imposed on officers of the Secret Intelligence Service in *Blake*), in which case it may be appropriate for remedies to be available similar to those in respect of a breach of fiduciary duty; sometimes the nature of the obligation may be closely similar to the obligations which protect forms of intellectual property (as in *Corsets Silhouette* and *Seager v Copydex*), in which case it may be appropriate for remedies to be fashioned equivalent to

those available in that context; sometimes (as observed by Lord Nicholls in *Blake*) the obligation may spring from a contract, or arise in circumstances closely similar to a contractual relationship, in which case the appropriate remedy (in the absence of exceptional circumstances) is likely to be similar to those available for breach of contract; in yet other cases, e.g. where the law of confidence is used to address use of private information obtained by a stranger, a relevant analogy may be drawn from the law of tort.

345. In the present case, I consider that an award of an account of the profits made by the defendants would not be an appropriate remedy in relation to the Claimants' breach of confidence claim. For reasons given below, there was no fiduciary relationship between RFML and the Claimants. Nor did the Claimants provide RFML with information about a secret design or process analogous to other forms of intellectual property. The relationship between them was founded upon a contractual relationship, in which each side bargained at arm's length to define the obligations to be accepted by RFML in respect of the business idea or opportunity which Mr Vercoe and Mr Pratt had identified. The negative covenant given by RFML as to use of the confidential information was broadly equivalent to the restrictive covenant in *Wrotham Park*, and a remedy fashioned by reference to the same kind of notional reasonable transaction to buy release from the claimant's rights as was considered in that case seems eminently suitable in this case. There are the same sufficient means of determining the notional fair or reasonable price appropriate for this case as there were in that case.

346. The fourth point to be made in relation to this aspect of the Claimants' claims is that since RFML, the Rutland Funds and Mr Cartwight all acted together to make use of the relevant confidential information for their mutual benefit and (to act lawfully) they would all have needed to buy release from the rights of Mr Vercoe and Mr Pratt regarding protection of that confidential information, and since the extent of their liability is not measured by the extent of the profits made by each of them but by the reasonable price to buy release from Mr Vercoe's and Mr Pratt's rights, the fair outcome is that they should each be jointly and severally liable to Mr Vercoe and Mr Pratt for the damages representing that price.

(iii) Breach of Fiduciary Duty

347. I turn finally to consider the Claimants' claim that RFML acted in breach of a fiduciary duty owed to them when it used the confidential information to acquire H & T and SP. In particular, the Claimants contend that RFML acted in a fiduciary capacity on behalf of itself and the Claimants when it was deputed to approach Cash America to make an offer to purchase H & T and SP and continued to do so as it negotiated the acquisition of those companies from Cash America.

348. Plainly, when RFML approached Cash America it did so at least in part to further its own interests. On this part of the case, Mr Newey's first submission was that it is possible for a fiduciary duty to arise even if the fiduciary may legitimately have regard to some degree to his own interests when deciding what to do. He relied upon a summary of the legal position proposed by Professor Finn in these terms:

> "A person will be a fiduciary in his relationship with another when and in so far as that other is entitled to expect that he will act in that other's interests or (as in a partnership) in their joint interests, to the exclusion of his own several interest" (in Ewan McKendrick (ed.), *Commercial Aspects of Trusts and Fiduciary Obligations*, 1992, p. 9).

349. There is further authority which supports this submission: *Hospital Products Ltd v United States Surgical Corporation* (1984) 55 ALR 417 (High Court of Australia), at 456 per Mason J (also referring to the example of partnership), and the note on it by R.P. Austin, "Commerce and Equity - Fiduciary Duty and Constructive Trust" (1986) 6 OJLS 444, at 446-447.

350. I accept this submission of Mr Newey. In my view, there is no rigid rule that a fiduciary relationship can only ever arise in circumstances where the fiduciary is required to have no regard to his own interests in deciding what to do. There may be circumstances in which a fiduciary obligation may arise in a context in which the alleged fiduciary is entitled to have regard in some degree to his own interests, but is also required to have specific regard to the interests of the claimant in deciding how to proceed.

351. I do not, however, accept the next submission of Mr Newey, to the effect that a fiduciary obligation arose in this case as between RFML and Mr Vercoe and Mr Pratt regarding the approach to Cash America and the acquisition of H & T and SP. In my view, although it is possible for a fiduciary obligation to be assumed in relation to a joint venture, it is highly relevant that there exists a well recognised form of relationship (in the form of partnership) which parties can choose to adopt as the basis for their legal relationship where they wish to be bound by, and have the benefit of, fiduciary obligations. Where parties do not choose to enter into a partnership to pursue a joint venture, but purport to regulate their relationship on the basis of contract without any explicit acceptance that fiduciary obligations are to be assumed under that contract, I consider that it will only be in special circumstances that equity will intervene to impose additional fiduciary obligations on top of the ordinary contractual rights and obligations which the parties have negotiated and agreed.

352. This view is supported by the general reluctance of equity to overlay fiduciary obligations

upon ordinary commercial relationships: see e.g. In re *Goldcorp Exchange Ltd* [1995] 1 AC 74, 98 (PC); P. J. Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214; Lord Neuberger, "The Stuffing of Minvera's Owl? Taxonomy and Taxidermy in Equity" [2009] CLJ 537, esp. at 543. In ordinary commercial relationships, such obligations have not been bargained for and agreed, and create rights and remedies going well beyond the ordinary contractual rights and remedies which have been recognised and worked out over the years by the common law to strike the appropriate balance between the competing interests of parties to such relationships.

353. In the present case, the Claimants and RFML did not agree to enter into a partnership and did not explicitly agree that either side would be bound by fiduciary obligations owed to the other. There were no special circumstances giving rise to any such obligations on the part of RFML in favour of the Claimants. On the contrary, RFML plainly did not regard itself as bound by any such obligations, it had done no act to indicate that it assumed any such obligations and it could legitimately and reasonably understand that its relationship with the Claimants was regulated by the September and November contracts and hence governed by the ordinary law of contract.

354. Fiduciary obligations may be owed by an agent to his principal, stemming from the assumption of responsibility by the agent to act on his principal's behalf in relation to a transaction. But in this case RFML did not purport to act as agent for the Claimants in approaching Cash America. It made the approach and negotiated the acquisition on its own behalf (and for the benefit of the Rutland Funds). The Claimants' rights in relation to the transaction derived simply from their contracts with RFML.

355. In support of the Claimants' contention that RFML owed them a fiduciary duty, Mr Newey sought in particular to rely upon the judgment of Etherton J at first instance in *Murad v Al-Saraj* [2004] EWHC 1235 (Ch) (the case went on appeal, but there was no challenge to the finding at first instance that a fiduciary relationship had existed (see [2005] EWCA Civ 959; [2005] WTLR 1573, at [4]). In that case, the defendant persuaded the claimants to enter into a joint venture whereby they would each invest substantial sums in the acquisition of a hotel and agree to share the profits from the venture; the defendant negotiated the acquisition of the hotel and instructed professionals in relation to the acquisition acting on his own behalf and as agent for the claimants. Etherton J treated the case as one equivalent to an informal arrangement to assume a partnership relationship (see *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, at 12 per Mason, Brennan and Deane JJ), with the additional elements that the defendant acted as the claimants' agent in important respects and the claimants (who had no experience of acquiring or running a hotel) entrusted the defendant with extensive discretion to act in relation to matters affecting the claimants' interests; in Etherton J's assessment, the reality was (as the defendant was well aware) that the claimants were wholly dependent on him for his advice and recommendation in relation to the acquisition, for the negotiations with the vendor and the instruction of professionals on behalf of the claimants and the relationship could be regarded as "a classic one in which the claimants reposed

trust and confidence in the [the defendant] by virtue of their relative and respective positions": [325]-[332].

356. I do not consider that *Murad v Al-Saraj* assists the Claimants in the very different context of the present case. RFML did not act as agent for Mr Vercoe and Mr Pratt in approaching Cash America. At the time RFML approached Cash America and conducted negotiations with it there had been no discussion (let alone agreement) regarding any sums which Mr Vercoe and Mr Pratt might invest in order to acquire an equity interest in the company which was to be the acquisition and holding vehicle for H & T and SP. They engaged with RFML in the hope that they might be offered an equity participation at the end of the day (which might or might not involve them having to put up money), but knew that any such participation would have to be a matter of negotiation with RFML at some point. There was no informal partnership arrangement between them. Mr Vercoe and Mr Pratt had made their own assessment of the business opportunity. They had their own professional advisers to advise them in relation to that opportunity and in relation to their negotiations with RFML and others. They were careful to define their mutual rights and obligations in contracts negotiated at arm's length with RFML. Accordingly, it cannot be said that Mr Vercoe and Mr Pratt reposed trust and confidence in RFML in the full fiduciary sense that the claimants reposed trust and confidence in the defendant in *Murad v Al-Saraj*.

357. In a certain sense, Mr Vercoe and Mr Pratt put faith in RFML to respect the terms of the September and November contracts (as a party to any commercial contract generally puts faith in the other party to act in accordance with the contract), and that trust was not repaid. But this falls well short of establishing that a fiduciary duty arose on the part of RFML - the observations of the Privy Council in *In re Goldcorp Exchange Ltd* [1995] 1 AC 74, 98 in that regard seem to me to be apt to cover the present case.

358. In some circumstances, equity may intervene to give effective relief where property has been acquired by one person as a result of an explicit agreement with another that, in return for him not seeking to acquire the property himself, it will be held after acquisition for the benefit of both of them: *Pallant v Morgan* [1953] Ch 43 is a classic example. In such a situation, a constructive trust may be imposed to give effect to the agreement. Equity sees as done that which ought to be done. But this, again, is a long way from the facts of this case. Mr Vercoe and Mr Pratt were not in a position to make any bid themselves to acquire H & T and SP, and made no agreement with RFML to step aside so that RFML should make the acquisition on behalf of them all. RFML had the benefit of being able to pursue the business opportunity which Mr Vercoe and Mr Pratt had identified as a result of the contracts it made with the Claimants, and their interests were protected by the negative covenants in those contracts, not by any agreement as to joint ownership of the target companies once they were acquired.

359. RFML and the Rutland Funds took by far the greatest financial risks in relation to the transaction. It is fair and appropriate that they should be regarded as having done so on their own account, and not for the benefit of the Claimants.

360. I therefore reject the Claimants' claims based on alleged breach of fiduciary duty by RFML.

Conclusions

361. For the reasons I have given I conclude:

i) RFML breached the September and November contracts in relation to each of Mr Vercoe and Mr Pratt by proceeding with the acquisition of H & T and SP without including them in the transaction;

ii) RFML, the Rutland Funds and Mr Cartwright made use of information about the business opportunity (to acquire those companies without involving Mr Vercoe and Mr Pratt) in breach of obligations of confidence owed by each of them to Mr Vercoe and Mr Pratt. The extent of those obligations was the same as the extent of the relevant contractual obligations of RFML in relation to use of the information as set out in the September and November contracts;

iii) The appropriate remedy in relation to breach of contract (as against RFML) and in relation to breach of confidence (as against RFML, the Rutland Funds and Mr Cartwright) is the same: an award of damages assessed by reference to the notional reasonable price which the Defendants should have paid to buy release from the rights of each of Mr Pratt and Mr Vercoe under the contracts and in respect of the relevant confidential information, so as to enable the Defendants to proceed with the acquisition of H & T and SP without involving the Mr Pratt and Mr Vercoe. The damages are to be assessed on the basis that Mr Pratt's rights would have been bought out in return for a grant of rights equivalent to 2.5% of the equity in the target companies and that Mr Vercoe's rights would have been bought out in return for a grant of rights equivalent to 5% of the equity in the target companies. The parties should seek to agree the appropriate figures to be included in the order to be made by the court;

iv) I dismiss the claims that RFML acted in breach of fiduciary duty and that RFML and the other Defendants are obliged to account to the Claimants for the profits which

they made from the acquisition and later sale of H & T and SP.