OUTER HOUSE, COURT OF SESSION

[2015] CSOH 184

CA21/13

OPINION OF LORD DOHERTY

In the cause

JOHN GLARE

Pursuer;

against

CLYDESDALE BANK PLC

Defender:

Pursuer: Mitchell QC, Lindhorst; Balfour + Manson LLP
Defender: Clark QC, J N M MacGregor; CMS Cameron McKenna LLP

31 December 2015

[1] In this commercial action the pursuer seeks damages from the defender on the ground that in February 2008 it provided him with a Tailored Business Loan of £3.95 million on terms which it ought not to have asked him to agree to ("the TBL"). The TBL was a fixed interest rate loan with a 25 year duration. Bank variable interest rates fell below the contractual loan rate in late 2008. They fell further during 2009. The pursuer's business failed. On 21 September 2009 the defender terminated the loan facility as a result of the pursuer's breach of covenants. Receivers were appointed by the defender on 26 April 2010 and on 4 February 2011 a bankruptcy order was made against the pursuer on the application of a third party. The pursuer blames the TBL for the failure of his business and for his

bankruptcy. He maintains that had he not entered into the TBL (i) he would have sought and obtained a variable rate loan; and (ii) his business would not have failed and he would not have been made bankrupt.

[2] The defender accepts that the TBL was not a suitable product for the pursuer. It accepts that it was wrong to conclude a contract of loan with the pursuer which had a fixed rate of interest for 25 years. It also accepts liability to make reparation to the pursuer in respect of such loss and damage (if any) as was caused to the pursuer as a result of him entering into the TBL. However the defender maintains that the pursuer has failed to prove (i) that he would have sought and obtained a variable rate loan; (ii) that his business would have succeeded and that he would not have become bankrupt if he had obtained a variable rate loan. In the event that the pursuer does prove (i) and (ii) the defender maintains that the pursuer's debts to it exceed any damages which would otherwise have been due by it to the pursuer.

[3] The action came before me for proof. It was set down for eight days. Witness statements and expert reports were treated as evidence-in-chief. In some cases this was supplemented by oral evidence. Notwithstanding the time thereby saved in evidence-in-chief, the evidence took eleven days to complete. Thereafter parties prepared written closing submissions and I heard oral submissions over the course of a further day.

The evidence

[4] The witnesses led on behalf of the pursuer were the pursuer; Mrs Fiona Glare (the pursuer's former wife); Mr David Glare (the pursuer's brother); Mrs Diane Hastie (the chairman and a director of Country House Wedding-Venues ("CHWV"); Ms Sally Longworth (a chartered accountant); Mr Keith Hagon (the executive director of Christian

Camping International UK Ltd ("CCI")); Mr Graham Coulter (a chartered surveyor); Mr Craig Ritchie (a chartered surveyor); and Mr Malcolm Latchman (a mortgage broker).

[5] The witnesses led by the defender were Mr David Milne (currently a Credit Director in the defender's Specialist and Acquisition Credit Team, and who in 2009 was a manager in the defender's Strategic Business Team); Mr Douglas Campbell (currently the defender's Head of Corporate Support, and who in 2008 and 2009 was a special adviser to the defender's chief operating officer); Mr Jason Smith (currently a manager in the Commercial Real Estate Group at National Australia Bank, and who from 2009 to 2012 was a manager in the defender's Specialised Business Services Exit team); Mr Michael Rothwell (an independent expert on the hotel and wedding sectors); Ms Elizabeth Gutteridge (a chartered accountant); and Mr Stephen Richardson (a chartered surveyor). In addition, in terms of a joint minute of admissions (no. 53 of process) it was agreed that the witness statement of Mr Tim Perkin (senior director in the Capital Advisers, Loan and Corporate Recovery Team at CBRE, a firm of commercial property consultants) should be treated as his evidence. A number of other matters were also agreed. A large number of documents were produced and many of them were referred to during the proof.

The relevant facts

[6] I set out below the relevant facts. The evidence in relation to most of them was not the subject of much contention. I will make findings on more contentious matters later.

[7] Chantmarle Manor is situated in a remote rural location in West Dorset, in the upper Frome valley near Frome St Quintin and to the north of the village of Cattistock. Access to it from the A37 is along country lanes. The manor house is a historic building and is Grade 1 listed, with Grade 2 listed gardens. Between 1950 and 1995 it was in institutional use as a

police training centre. During that period a large number of rather unattractive and incongruous modern buildings were built within the estate grounds in close proximity to the house and gardens.

[8] After the police training centre closed the property was purchased by a developer with a view to residential development, but planning consent was refused. It was sold on and was used as a business training centre for a time. In 2001 it was sold again. The purchaser renovated the manor house and it became a private dwelling.

[9] The pursuer worked for Amex between 1984 and 1996. Initially he did bank reconciliations for the travel division. He was promoted and became a quality control clerk. In that post he checked the work of other staff. Latterly he worked in the establishment services division, which processed card transactions for shops, hotels and other establishments.

[10] In 1987 the pursuer began to buy terraced houses in Brighton. He built up a buy-to-let portfolio of 42 residential properties. He borrowed money to buy the properties. Some of the loans were fixed rate loans and some were variable rate loans.

[11] In December 2002 the pursuer purchased Chantmarle for £4,500,000. He financed £1,350,000 of the purchase price by remortgaging his property portfolio with his existing lenders and he borrowed the remaining £3,150,000 from The Mortgage Business. After the purchase he carried out some renovation work. In order to finance the work he remortgaged his property portfolio for a second time. He paid off some of the loan to The Mortgage Business. In about 2004 he obtained loans from Lloyds TSB (a business loan of £1,500,000 and a small overdraft facility) and he paid off The Mortgage Business loan.

[12] In August 2005 the pursuer instructed agents to sell his Brighton property portfolio. The sale was completed by February 2006. £300,000 released from the sale was injected into

the Chantmarle business. As a result of the disposal of the portfolio the pursuer incurred a capital gains tax liability of £1,148,000.

[13] Prior to 2006 the pursuer's loans from Lloyds TSB had been variable rate loans. In June 2006 he fixed the interest rate on his £1,500,000 business loan for a period of two years at 6.96% per annum. The whole of the principal fell to be repaid at the end of the two year period. Between 2004 and 2008 the pursuer's overdraft borrowing from Lloyds TSB increased significantly. As at March 2005 his overdraft limit was £8,000. In August 2005 the limit was increased to £300,000. In March 2006 it was increased to £500,000. In May 2006 it was increased to £760,000. In February 2007 it was increased to £900,000. In November 2007 it was increased to £1,150,000. Interest was due on overdraft borrowing at 2% per annum over the bank's base rate. If the overdraft account was not in credit at some point during a charging period the lowest cleared debit balance of the account was to be treated as hard-core borrowing with interest at an additional 1.5% above the overdraft rate. If the overdraft limit was exceeded the interest rate paid on the excess was 7% over the bank's base rate.

[14] By early 2008 the pursuer's total indebtedness to Lloyds TSB had risen to about £2.76 million. He had exceeded his overdraft limit. Payment of the CGT liability in respect of the 2006 disposal was overdue. In order to raise funds to discharge that liability he decided to increase his borrowing.

[15] On 14 February 2008 the pursuer borrowed £3,950,000 from the defender. The TBL was a fixed rate (7.8% per annum) loan repayable over a period of 25 years. During the first year the repayments were interest only. The terms of the TBL obliged the pursuer to fulfil a number of financial covenants. In the event of his failing to do so the defender had the option to break the TBL. If the loan was broken before the loan expiry date (whether by the

defender exercising an option to break or by the pursuer bringing it to an end prematurely) "mark to market" break payments could arise. If at the time of the break bank lending rates had fallen since the TBL was entered into, a payment might be due by the defender to the pursuer (a break gain). On the other hand, if at the time of the break bank lending rates were lower than the contractual rate the pursuer would require to make a payment to the defender to compensate it (a break cost). In either case the size of the break payment would depend upon the differential between lending rates at the time of the TBL and at the time of the break, and the period which the loan had left to run.

[16] The pursuer used £2,764,868 of the TBL advance to pay off his indebtedness to Lloyds TSB. Most of the remainder of the advance went towards paying off his outstanding capital gains tax liability. The defender also agreed to provide the pursuer with an overdraft facility. The overdraft limit was £50,000.

[17] The pursuer's initial plan had focussed on running a Christian conference centre at Chantmarle. In about the autumn of 2005 he decided to host wedding receptions as well in order to generate additional cash flow. Obtaining planning permission for that use proved problematic. The application met with strenuous local opposition, but the local authority indicated that while a planning application was pending it would not take enforcement action to prevent the holding of wedding receptions. In all, four applications were submitted before planning permission was finally granted on 1 April 2009. Once planning permission was granted it was possible to apply for a civil wedding licence to permit wedding ceremonies to take place on the premises. The licence was granted on 6 July 2009.

[18] From the outset the business experienced financial difficulties. It made losses each year. In 2006 it lost £859,000. In 2007 it lost £332,000. It failed to meet the financial projections the pursuer provided to Lloyds TSB.

[19] At the time of seeking the TBL the pursuer had estimated that the gross income of the business in 2008 would be £1,312,781, and that there would be a surplus for the year of £32,079. The cashflow forecast which he provided showed an expected surplus of £380,620 over the year. He anticipated that turnover could be increased by 20% during 2009. In fact in 2008 the business made a loss of £508,000. Turnover for the first three months of 2009 was only £52,487 (as compared to £172,000 for the same period in 2008). As at 1 January 2009 the business had about £161,000 owing to trade creditors. By June 2009 that figure had risen to about £270,000. By August 2009 it had risen to about £320,000.

[20] In November 2008 the pursuer's elderly uncle, John White, lent him £50,000. The pursuer used that sum to reduce the business's overdraft. Notwithstanding that, by 31 December 2008 the overdraft account had a negative balance of £68,788.27. On 28 January 2009 the pursuer paid into the account £60,000 he had received as a CGT repayment. Nonetheless, as at 29 April 2009 the overdraft had increased to £131,695.69. The overdraft limit, which had been increased to £110,000, had been exceeded.

[21] During late 2008 and the first half of 2009 the pursuer explored engaging third parties - CHWV and its subsidiary Galloping Gourmet ("GG") - to run the wedding side of the business. Both the pursuer and the CHWV companies envisaged the wedding business being carried on by a new separate limited company. With that end in view Chantmarle Manor Weddings Limited was incorporated on 8 April 2009. However, ultimately no agreement was reached between the pursuer and the CHWV companies. So far as CHWV and GG were concerned prerequisites of an agreement would have been that the pursuer paid a fee of £18,000 for services which had been carried out by an architect and that contractors who had become involved at CHWV's request were guaranteed payment;

that substantial refurbishment work at Chantmarle was carried out; and that an Estate Plan was drawn up to ensure that the wedding facilities operated in isolation from the conference facilities. The preconditions were not fulfilled. Discussions relating to the proposal ceased at about the end of June 2009.

[22] During 2009 the defender became increasingly concerned about the performance and viability of the business, and about the pursuer's ability to generate funds to pay creditors and meet his loan obligations. On 29 April 2009 the customer file was passed to the defender's Strategic Business Service because of (i) the business's liquidity difficulties and declining returns; (ii) breach of an interest cover covenant; (iii) the fact there had been a profits downgrade; and (iv) a withdrawal of credit and rising creditors. Possible ways of the pursuer improving performance and viability were canvassed. While during the following few months the defender remained open to persuasion that a turnaround might be possible, it also put in hand steps to facilitate the realisation of its security asset should that prove to be necessary. On 3 July 2009 the defender's Mr Milne and the pursuer agreed that the pursuer should meet with Savills and Knight Frank with a view to Chantmarle being marketed for sale on a voluntary basis. However, thereafter the pursuer did not co-operate with the defender's attempts to arrange for a voluntary sale.

[23] The defender exercised its right to break the contract on the grounds of the pursuer's breach of covenants. On 21 September 2009 it terminated the loan facility. At that time the prevailing bank lending rates were substantially lower than they had been when the TBL had been entered into, and the period the loan had left to run was more than 23 years. Accordingly, the break payment was sizable. In the first instance the defender calculated it to be £783,383. Thereafter it calculated it to be £712,931. The break charge was debited to the pursuer's TBL account. On 5 November 2009 the defender decided to transfer the

pursuer's file to its Specialised Business Services Exit Team. The file was in fact transferred on 1 December 2009.

[24] The pursuer and Fiona Glare married on 27 June 1988. They separated in about 2006. Decree *nisi* was pronounced on 23 April 2008. Decree absolute was pronounced on 10 June 2008. At the time of divorce it appears that the pursuer did not make a financial claim against Mrs Glare.

[25] In late 2009 and early 2010 the pursuer consulted with insolvency practitioners with a view, *inter alia,* to entering into an Individual Voluntary Arrangement ("IVA") for unsecured creditors. On 13 April 2010 he informed the defender that he had registered an IVA Proposal at Weymouth and Dorchester Combined County Court. The declaration of assets in the Proposal made no mention of any right of the pursuer to make a financial claim against Mrs Glare. The Proposal stated, incorrectly, that the pursuer had been advised by the defender that if he could agree an arrangement with his unsecured creditors the defender would be willing to continue its financial support. The defender indicated that that was not its position, with the result that the IVA did not proceed.

[26] On 26 April 2010 the defender appointed Law of Property Act 1925 receivers. The receivers marketed Chantmarle for sale during 2010 and 2011. In the Autumn of 2011 the property was sold to Mr B for £2,250,000. I am satisfied that that was the highest price which was attainable and that it was the open market value at the time. After costs were deducted the defender received sale proceeds of £2,070,449.91.

[27] On 4 February 2011 at Weymouth County Court a bankruptcy order was made against the pursuer on the application of a third party trade creditor. At that date the pursuer owed £347,846.59 to unsecured creditors other than the defender. On 4 February 2012 the pursuer was discharged from bankruptcy.

[28] On 16 October 2012 the pursuer and Mrs Glare settled the financial aspects of the divorce. Mrs Glare agreed to pay the pursuer £750,000 in instalments over a period of about three and a half years.

[29] John White died testate on 14 March 2011. His will was dated 2 June 2010. He appointed the pursuer and David Glare as his trustees and executors. He left the bulk of his estate to David Glare. The total value of the estate was £655,299.83 comprising Mr White's home (valued at £220,000) and moveable estate of stocks and shares valued at £122,068.59, savings of £282,679.17 in 14 bank and building society accounts, premium bonds and national savings of £28,000, and proceeds of life assurance policies of £2,968. Inheritance tax of £135,095.93 was chargeable on the estate. There was no evidence as to whether or not there was a capital gains tax liability in respect of the stocks and shares. At the proof David Glare indicated that he had gifted to the pursuer £227,335 from his inheritance, and that he would gift him a further £37,609 shortly. He believed that was what Mr White would have wanted him to do; and that but for the pursuer's financial difficulties Mr White would have made equal provision in his will for both of his nephews.

Credibility and reliability

[30] It was plain that the pursuer has a strong sense of grievance against the defender. The two principal sources of that grievance are (i) that the defender ought not to have offered him the TBL; and (ii) that he considers that the defender ought to have provided the further finance which might have enabled an agreement with CHWV and GG to have been reached. As the pursuer recognised, the defender was under no legal obligation to provide that finance.

[31] The second notable aspect of the pursuer's evidence was that many of the material parts of it involved him expressing views as to what he would have done had matters taken a different course. Looking at the evidence as a whole I am left with the very strong impression that in relation to these hypothetical issues the pursuer's evidence has been influenced greatly by hindsight. He suggests that a concatenation of favourable circumstances would have occurred and that the upshot would have been that the business would have survived and prospered.

[32] When assessing whether the suggested concatenation of circumstances would have happened it is important to keep in mind certain verifiable facts. The history of the management and performance of the business up to 2009 does not inspire any confidence that a successful future was likely. It had consistently failed to meet targets and projections. In 2009 it was still struggling to establish itself. It was facing the economic downturn. Moreover, as the pursuer and Ms Longworth recognised, the fact of the matter was that even with a variable rate loan and with the growth which they assumed, the business would not have generated enough income to repay the loan interest. It would have been necessary for there to have been a capital injection of £1.25 million in April 2009, £1 million of which would have been used to repay part of the loan. As I discuss below, there is no reliable indication that a capital injection of that order from Mrs Glare and Mr White was even being contemplated at or around that time.

[33] It is not only hypothetical issues that appear to have been influenced by hindsight. The pursuer's retrospective view of material events appears to me be very different from the way he viewed them at the time. A prime example was his attribution of the fall in Christian conference centre bookings in early 2009 to budgeting cuts which he had to make in 2008 and 2009. As I will discuss later, that attribution is at odds with his view at the time

that the fall was caused by the credit crunch and its effect on the modest resources of inner city church groups.

[34] I found some aspects of the pursuer's evidence to be incredible. I am unable to accept his claim to have forgotten until very shortly before he gave evidence that he had obtained the fixed rate loan from Lloyds TSB. I also consider that some of the statements which he made in the Proposal for an IVA were either not the truth or at least not the whole truth. First, in declaring his assets he made no mention of the fact that he had the right to claim financial provision from Mrs Glare. The Proposal was made two years after his divorce. He must have been aware at that time of his entitlement to make that claim: indeed the ability to make the claim was the backdrop against which he maintained that Mrs Glare would have injected £1 million into the business in April 2009. I reject as unsound - and disingenuous - his explanation that until he actually made a claim he had no asset which required to be disclosed. Second, he declared that following discussions with the defender he had been advised that were he to agree a satisfactory arrangement with his unsecured creditors the defender would be willing to continue its financial support. I am not satisfied that the pursuer believed that was the position at the time the statement was made.

[35] The pursuer's admitted role discussing the contents of, and assisting the preparation of, Mrs Glare's letter of 19 December 2014 is indicative of his being prepared to influence the evidence of others for his own benefit. The evidence of Mrs Glare that the pursuer was involved in the preparation of her witness statement and other correspondence is equally concerning: however, since those latter matters were not raised with Mr Glare when he gave evidence I do not take them into account in assessing his credibility and reliability. They are, however, matters which I shall have regard to when deciding what weight, if any,

to attach to Mrs Glare's evidence of what she would have done if she had been asked to make a capital injection.

[36] The pursuer appeared to have a predilection to blame the business's difficulties on the TBL and to dismiss other seemingly more obvious causes. The attribution by him of business difficulties in 2008 to the TBL was an example of that. Until he realised very shortly before the proof that he would have been no better off during this period had he had a variable rate loan, he had sought to maintain that the TBL was a cause of his difficulties in 2008 (see e.g. the summons, condescendence 17; his witness statement, paras 21-23; his supplementary witness statement, para 6). The reality is that up until the end of 2008 the total interest paid under the TBL was no greater than it would have been under a variable rate loan at 2.25% above LIBOR.

[37] In light of my serious reservations about the pursuer's evidence I have attached much more weight to the contemporaneous documents than to the evidence which he gave. I have rejected his testimony where it is inconsistent with documents, or where it does not accord with other evidence which I have accepted.

[38] I also have serious reservations about both the credibility and the reliability of Mrs Glare's evidence. It was plain that it had been formulated to suit what she thought would best assist the pursuer's case. It was clear from her testimony that what she said in correspondence and in her witness statement about a possible capital injection had been influenced by the pursuer. She did not understand parts of those documents - she was unable to explain them when asked to do so. She was vague when pressed. She had no real appreciation of the significance of several of the dates which she mentioned.

[39] For the reasons which I give below, I am unable to accept much of the evidence of Mrs Hastie or Ms Longworth. I am satisfied that Mr Coulter's valuation (on the

assumptions he makes) overstates the value of Chantmarle. I have found Mr Richardson's evidence to be of some assistance; but I have concluded that the value of the property (on Mr Coulter's assumptions) is probably higher than Mr Richardson suggests, but lower than Mr Coulter indicates. I have no reservations about either the credibility or the reliability of the remaining witnesses, all of whom appeared to me to have been doing their best to assist the court. I accept them as credible witnesses whose evidence I find to be reliable on all material matters.

Would the pursuer have sought and obtained a variable rate loan had he not been offered the TBL?

[40] The keystone of the pursuer's case is that if he had not been offered the TBL he would have sought and obtained a variable rate loan of £3,950,000. I am not satisfied that he would have done that.

[41] I do not accept that in February 2008 the pursuer wanted a variable rate loan. On his own account he did not ask the defender for such a loan. I am not persuaded that if the TBL had not been offered to him he would have asked for a variable rate loan. While he suggests now that he would have, if he does indeed believe that I consider his belief has been formed with the benefit of hindsight in light of the drop in interest rates. The Credit Memorandum (which the defender prepared when considering whether to provide the pursuer with a loan) stated clearly that he wanted a fixed rate loan. That is consistent with what the pursuer appears to have said in 2010 when he complained to the Financial Ombudsman Service. I am satisfied on the evidence before me that the pursuer wanted the security that a fixed rate loan would afford the business. He did not want to run the risk of interest rates rising and of his repayment liabilities becoming greater than he thought he could afford. At

the time the TBL was entered into the pursuer was not anticipating a financial crash and an unprecedented period of very low interest rates. Neither was the defender. The pursuer had had experience of fixed rate loans before with his buy-to-let portfolio. With Chantmarle itself his most recent business loan from Lloyds TSB had been a fixed rate loan. It had been less costly for him than the variable rate overdraft lending from that bank had been in the period since that fixed rate loan had been obtained.

[42] I am also clear that the defender would not have been prepared to make a variable rate loan to the pursuer. I accept the evidence of Mr Campbell that the defender required protection against the pursuer becoming unable to service the loan should interest rates rise. It was not prepared to run the risk of that happening. Mr Campbell's evidence accords with the terms of the Credit Memorandum. The defender required interest rate hedging.

[43] I also accept Mr Campbell's evidence that if the TBL had not been proffered the defender was likely to have offered the pursuer a twenty-five year loan with the first five years at a fixed rate. The terms of the loan would have been reviewed after five years. If the business had become successful it was possible that interest rate hedging might no longer have been necessary.

[44] The pursuer had already breached financial covenants with his existing lender, Lloyds TSB. I think it highly unlikely that that lender would have agreed to the substantial extra borrowing which the pursuer needed - irrespective of whether the interest rate was to be fixed or variable. The indications are that the pursuer's existing borrowing was already at the limit of what Lloyds TSB thought was an acceptable loan to value ratio. There is no evidence that the pursuer even attempted to persuade Lloyds TSB to make a further advance to enable him to pay his CGT. Rather, what Lloyds TSB appears to have been prepared to do was restructure the pursuer's existing borrowing. It had offered him a sole trader

business loan of £2,250,000 to be used to repay the existing fixed rate loan and the overdraft borrowing. That would have been a variable rate loan for a period of five years with interest at base rate plus 2.5%. The whole principal would have required to have been repaid in a single instalment at the end of the loan period. In addition it offered him a business loan of £250,000 to repay existing borrowing. That would also have been a variable rate loan for a period of five years with interest at base rate plus 2.5%: but the principal would have required to have been repaid in 60 monthly instalments over the period of the loan. It seems, however, that in order for these advances to be made Lloyds TSB would have required some form of interest rate hedging (see the email from Richard Johnson of 7 January 2008 at 12.13 and the email from Simon Hunter of 23 January 2008 at 08.59).

[45] In my opinion it is probable that the pursuer would have accepted a loan offer on the terms described by Mr Campbell. He did not anticipate that interest rates would fall to the low levels to which they did in 2009. He wanted the security of knowing that his repayment liabilities would not increase. He was desperate to obtain funding to meet his CGT liability. Time was short. Looking for another lender would have involved delay and further expense, both of which he wished to avoid. He perceived that delay would expose him to interest, penalties or even enforcement action by HMRC in respect of his overdue CGT liability.

[46] Since I have found that the pursuer would not have sought a variable rate loan, and that he would have accepted the alternative loan offer which the defender would have made to him, he has failed to establish the starting point of his case. He would not have enjoyed the lower interest rate which he claims he would have from January 2009 onwards.

If the pursuer had obtained a variable rate loan would the business have survived?

The pursuer's assumptions

[47] If, contrary to my view, the pursuer would have sought and obtained a variable rate loan at 2.25% above LIBOR had he not been offered the TBL, I am not satisfied that the business would have survived.

[48] The pursuer's case proceeds on the basis that in order for the business to have survived (i) the Christian conference centre business would have to have become more successful; (ii) contracts would have to have been concluded with CHWV and GG in mid-2009 and the business levels which those companies projected for 2010 and the following years would have to have been achieved; and (iii) the business would have required a capital injection of at least £1.25 million in about April 2009. Those were the assumptions which Ms Longworth made. They formed the foundations of her opinion that the business would have survived and become profitable. I am not persuaded that any of those assumptions are well founded.

Conference centre

[49] In 2008 conference turnover had represented the bulk of the business's revenue. However, by 31 December 2008 the business was in difficulty. It had an overdraft of £68,788.27 notwithstanding that a £50,000 loan from Mr White had been injected the previous month. For the third successive year it had made a substantial loss: £508,000 in 2008 instead of the profit of £32,000 which the pursuer had projected. There were outstanding debts to trade creditors of £161,000. The business was not generating enough income to meet its expenditure. Recognising this, the pursuer had had to cut back on expenditure. Over the first 10 months of the TBL there was no significant difference

between the total interest payments made and the total which would have been paid under a variable rate loan at 2.25% over LIBOR. As already discussed, the difficulty which the business experienced in the period up to 31 December 2008 cannot be attributed even in part to the TBL.

[50] Whereas the performance of the business in 2008 was poor, its performance in the first half of 2009 was disastrous. Turnover was only £52,487 during the first quarter (as compared to £172,000 for the same period in 2008). As at 1 January 2009 there was £161,000 owing to trade creditors. By June 2009 that figure had risen to about £270,000. There had been a 70% drop in conference centre bookings. By 29 April 2009 the overdraft had increased to £131,695.69 (even though there had been payment in of the CGT repayment of £60,000 on 28 January 2009).

[51] The pursuer sought to attribute the fall in conference centre business to cuts in maintenance and staffing with the result that the centre did not have the appearance of being well maintained. His explanation was that those visiting with a view to booking were put off.

[52] I do not accept that the real cause of the drop in conference business in 2009 was lack of maintenance, rather than the recession. The pursuer's perception at the time is instructive. At 09.34 on 24 June 2009 in an email to Mrs Hastie he observed:

> "…Last year saw our best year in the resource centre, but due to the infamous 'credit crunch', most of our groups have been unable to book this year, as virtually all of our groups are from low income areas in the inner cities and are more vulnerable to economic pressures such as job losses and reduced working ours (sic) …"

In my opinion the pursuer's perception at the time provides a much more reliable guide to the cause of the drop in conference business than his evidence in the witness box. In the IVA

Proposal of 6 April 2010 he also acknowledged that one of the reasons the business began to encounter financial difficulties was "a steep downturn in bookings due to the credit crunch".

[53] I am not persuaded otherwise by the evidence of Ms Longworth or Mr Hagon.

[54] Mr Hagon's professional experience in the Christian conference sector was recent and post-dated relevant events by several years. He has been Executive Director of CCI since January 2013. CCI is a membership association for those involved in Christian residential activities. Mr Hagon had never visited Chantmarle and he had not seen any of the pursuer's business records. He was not aware of who Chantmarle's conference centre customers had been prior to the downturn. The pursuer had suggested to him possible comparisons for the centre and he had relied upon those comparisons to a significant extent. Mr Hagon's impression was that, generally speaking, the Christian conference market had been less severely affected by the economic downturn which began in 2008 than the commercial conference centre market. He did not suggest that there had been no ill-effects in the sector. He acknowledged that the effects of the downturn had tended to be felt by members in 2009, and that some members were still feeling the effects in 2012-13. Some centres had had a dip from pre-downturn business but had managed to obtain bookings of other sorts to make up for the dip. He made passing reference to three centres with comparable numbers of bedspaces. Two of them - The Hayes and High Leigh - were increasingly aiming for the higher end of the conference market. He thought Ashburnham Place was more similar to Chantmarle. Two other centres which he had not referred to in his letter of 28 July 2015 but which he mentioned during his evidence were The Quinta and Hebron Hall. In his view both of those centres appeared to be fairly close in size to Chantmarle with similar sorts of facilities, and both were looking predominantly for Christian groups. He suggested that their revenue did not drop during the recession.

[55] Ms Longworth relied upon the information provided to her by the pursuer. A premise of her approach was that the conference centre business would have grown in 2009 and in each of the following years. The recession would not have been a setback. In support of that approach she looked at three businesses which the pursuer had suggested were comparable. She stated that she had looked at the accounts of each of them on the Charity Commissioners' website. Accounts published there had only gone back to 2009.
Ms Longworth did not produce any of those accounts. Her evidence was that the earliest Ashburnham Place accounts had been for the year ending 31 March 2009. In those accounts difficulties caused by the recession had been noted. Each of the businesses had grown in the years following 2009. She proceeded on the basis that the pursuer's business could have expected to have done likewise.

[56] I am not satisfied that the business would have done as well during the credit crunch as the comparisons which the pursuer, Ms Longworth and Mr Hagon referred to. Those comparisons may have had similar bedspaces, but they were long established businesses. Two of them looked more to the higher end of the market. By contrast, Chantmarle was a business struggling to establish itself, and the person at the helm was relatively inexperienced in the management of a venture of that kind. It was a business which had looked (for laudable reasons) to the lower end of market. I am unpersuaded that it was, and would have continued to be, unaffected by the recession. Given the pursuer's lack of experience and his track record of managing the concern I have no confidence that he would have been likely to have been able to have adapted quickly to replace lost bookings with alternative revenue sources. Ms Longworth's projections for the growth of this part of the business seem to me to be very optimistic given (a) the state of the economy; (b) the pursuer's experience, skill-set and past performance with the business; and (c) the fact that

the pursuer required to compete with centres which were already well established. Even if (contrary to my view) it is legitimate to proceed on the basis that the pursuer could have expected to have had a similar experience to the comparisons during the recession, Ms Longworth's projections of growth for Chantmarle outstrip growth at the comparisons. Thus, for example, growth at Ashburnham Place was 4% between 2009 and 2010 and 3.5% between 2010 and 2011 whereas Ms Longworth projected growth in conference business at Chantmarle of 5% between 2008 and 2009, 17.5% between 2009 and 2010, and 12.4% between 2010 and 2011 (paragraph 3.2 and Appendix 5 of her report of 6 January 2015).

[57] If the centre was indeed less well maintained than it ought to have been in early 2009 it seems clear that cuts which contributed to that state of affairs were made from autumn 2008 onwards, not just cuts in 2009. Besides, I am very far from satisfied that expenditure on maintenance would have been significantly higher in 2009 had the pursuer had a variable rate loan. As at 1 January 2009 the business had about £161,000 owing to trade creditors. By June 2009 that figure had risen to about £270,000. By August 2009 it had risen to about £320,000. A matter which Ms Longworth had not considered, but which Miss Gutteridge highlighted, was that during 2009 sums due to trade creditors continued to increase, and in fact exceeded the TBL/variable rate loan interest differential. In the first three months of 2009 the extra interest totalled £36,326.17. By the end of June 2009 the total extra interest had been £81,561.33: in the same period trade debtors had increased by about £90,000. By September 2009 the total extra interest had been £129,959.16: in the same period trade debtors had increased by about £160,000. The reality was that none of the extra interest during the first nine months of 2009 was actually paid to the defender: it was simply debited to the overdraft account. On 31 December 2008 the debit balance on the account was £68,854.27. By 14 September 2009 the debit balance was £289,493.87. It had

grown by about £90,000 more than the extra interest of £129,959.16 which had been debited (and would have grown by about £150,000 more than the extra interest had it not been for the £60,000 CGT repayment which was credited in January 2009). I am not persuaded that had the pursuer had a variable rate loan substantially more would have been spent on maintenance in 2009 than was actually spent.

Wedding business

[58] I turn next to Ms Longworth's projections for the wedding business. These were based on the assumption that the pursuer would have concluded contracts with CHWV and GG and that the upshot would have been 50 weddings in the first year of operation (2010) and 75 weddings in 2011 and in each of the following years.

[59] Even if the pursuer's loan had been a variable rate loan, I am not satisfied that contracts with CHWV and GG would have been concluded. Any deal was dependent upon the pre-requisites already mentioned, none of which were met. The defender was not prepared to provide additional finance. Even if it had been, it is far from clear that agreement would have been reached because the pursuer wished the conference centre and the wedding business to share kitchen facilities, but that was not acceptable to GG.

[60] If, contrary to my findings, contracts would have been concluded and finance for the refurbishment work would have been obtained, I think it improbable that the work would have been completed by the beginning of 2010. By mid-2009 time was short. The construction period was 80 days. Before construction commenced funding would have to have been secured, contracts concluded, and contractors selected (possibly by a tender process).

[61] The "base case" business levels projected by Mrs Hastie appear to me to have been very optimistic, for all of the reasons given by Mr Rothwell. I agree with him that they significantly overstate the likely performance of the wedding business. I accept that Mr Rothwell is well qualified to give expert evidence in this field. He impressed me as a witness who was fair and objective, and who was doing his best to assist the court. On the other hand, while Mrs Hastie did have experience of running her wedding business, her evidence lacked detachment and objectivity. At times it was adversarial. She had an axe to grind. She was aggrieved that the defender had not agreed to provide further financial support to the business. She considered that her companies had been "led up the garden path" by the defender. The base case scenario had been the medium case which her company had provided to the pursuer. She had an obvious professional interest to defend its attainability. It is also clear that much of the detail of the base care had been prepared not by her, but by her son, and that she could not assist in explaining parts of it.

[62] Mrs Hastie did not explain how the mid-week bed and breakfast projections in the base case had been arrived at; nor was it apparent from her evidence that she was qualified to speak to them. She was certainly not as well qualified to do so as Mr Rothwell. I have no hesitation in accepting Mr Rothwell's evidence that these projections were also highly optimistic and that they overstated the likely income from this aspect of the business. This was also a matter which plainly fell within his area of expertise.

Capital injection?

[63] Ms Longworth's projections assumed that at least £1.25 million would have been injected into the business on about 1 April 2009. She assumed that £1 million would have come from Mrs Glare and £250,000 would have been injected by John White.

[64] In around April 2009 the pursuer suggested to the defender the possibility of Mrs Glare making £270,000 or £300,000 available to the business: but it seems that he would not have been prepared to have her do that unless the defender indicated that it was prepared to continue to support the business.

[65] There is no contemporaneous indication (i) that the pursuer contemplated asking his wife to provide £1 million to be used in the business; or (ii) that Mrs Glare would have been prepared to provide such a sum. The evidence of the pursuer and of Mrs Glare has not satisfied me that the pursuer would have asked her to do that; or that if asked she would have done so.

[66] Mrs Glare's letters of 19 December 2014 (Joint Bundle 213), 15 April 2015 (Joint Bundle 218), 15 June 2015 (Joint Bundle 220), her witness statement, and her oral evidence at the proof all addressed this hypothetical situation. These various accounts contained numerous inconsistencies and contradictions. It was plain that Mrs Glare had been influenced by the pursuer. It was also clear that Mrs Glare did not understand parts of the documents referred to above and was unable to explain them. She was vague when pressed. She seemed to have no real comprehension of why dates she mentioned had been referred to. In my opinion her evidence on this matter does not provide a reliable indication of what she would have done.

[67] It is also clear to me that it would have been very imprudent for Mrs Glare to have provided a capital injection of £1 million. It would have involved her giving up most of her assets. She owned a buy-to-let portfolio of 9 residential properties in Brighton. As at 1 April 2009 they were worth £2.225 million on the assumption of vacant possession. The property market was struggling at that time. If a quick sale was required the portfolio would have been worth 10% less, namely £2,002,500. One of the properties had little equity and would

have been likely to have been retained. The remaining eight properties could have realised equity of £1.4 million before sale expenses and CGT if the sales were marketed normally, and £1.2 million of equity before sale expenses and CGT if they were marketed for quick sales. If Mrs Glare had remortgaged the eight properties on 1 April 2009 she could have raised £878,544.67 less any redemption penalties.

[68] The suggestion in the correspondence from Mrs Glare that she would have injected £1.5 million in total does not stand up to scrutiny. Nor does the suggestion that she would have injected £1 million. In April 2009 the pursuer's total net equity (including the equity in her home) was likely to have been less than £1.5 million once CGT liability was taken into account. £1 million represented between 70% and 80% of the equity value of Mrs Glare's buy-to-let portfolio before making any allowance for sales expenses, loan penalties or CGT. Sale of 70-80% of her portfolio would have drastically reduced her assets and her income. Remortgaging would not have raised £1 million and it would have materially reduced her net income because of the increased loan obligations which she would have had to undertake.

[69] Both parties would have been likely to have been very aware in the spring of 2009 that one or other of them might become entitled to financial provision from the other as a result of their divorce. But it seems highly unlikely that, properly advised as to the value of her assets, Mrs Glare would have expected to have to pay the pursuer £1 million. If there was positive equity in the pursuer's business at that time then it might have been anticipated that the maximum sum that the pursuer was likely to recover from her would be less than half of her capital. If there was no equity in the business then he might have had a claim for up to half of her capital.

[70] In 16 October 2012 a consent order was made at Bournemouth and Poole County Court settling the parties' financial affairs. In terms of that order Mrs Glare agreed to pay the pursuer £750,000 payable by instalments (£50,000 on or before 31 October 2012, £200,000 on or before 31 March 2013, £250,000 on or before 31 March 2014 and £250,000 on or before 31 March 2016). The asset summary appended to the order listed Mrs Glare's assets as the nine buy-to-let properties, the house she lived in, and £150,000 in cash. The gross value of the eight buy-to-let properties other than 20 Viaduct Road was £2,232,500. The gross value attributed to the nine buy-to-let properties was £2,512,500 and the gross value of her home was a further £250,000. The total CGT allowed for on disposal of the nine buy-to-let properties was £449,130. Her total net equity (in all 10 properties and in cash) was stated as being £1,461,854. The agreed £750,000 was approximately half of her net equity but with payment spread over three and a half years. In fact since the order of 16 October 2012 the dates for payment have been varied by agreement. Only £188,000 was paid by 1 February 2015. The pursuer indicated that at the date of the proof he had been paid "about 50% of it [the £750,000] so far ".

[71] Accordingly, in the real world in late 2012 the parties agreed that Mrs Glare should pay the pursuer £750,000 by instalments. It took Mrs Glare more than two years to reach a payment total of £188,000; and after almost three years only about a total of 50% of £750,000 had been paid.

[72] In the whole circumstances I find it implausible (i) that the pursuer would have wished his former wife to commit most of her capital to the business in the knowledge that it might be lost; or, (ii) that, if asked, Mrs Glare would have agreed to do so. Whether the loan to the business was fixed rate or variable rate, on any objective view the business was a risky venture to provide further funds to, particularly so given the credit crunch and the

collapse in property values. I do not think it likely that the pursuer would have asked Mrs Glare to undertake such a risk. If the pursuer had asked her to, I think it unlikely that she would have agreed. If Mrs Glare would have agreed to pay the pursuer a sum in satisfaction of his right to claim financial provision on divorce, it would have been substantially less than £1 million. At best for the pursuer, Mrs Glare might have concluded that he might have a claim for, at most, about half of her net equity (if his own assets were worthless). That is likely to have been a claim for between £500,000 and £700,000 once allowance was made for CGT. If Mrs Glare had been asked to pay over such a sum I think it unlikely that she would have agreed to (or been in a position to) pay it over in a single lump sum on about 1 April 2009. It is far more likely that it would have been paid by instalments over an extended period - as in fact happened after the consent order. I also doubt whether the pursuer would have wanted to risk his financial provision on divorce in the venture.

[73] The pursuer does not suggest that he ever asked his uncle to provide £250,000 to the business. I am not persuaded that he would have asked him to do that had he had a variable rate loan instead of the TBL. I do not think it likely that the pursuer would have asked him to peril such a large part of his assets on the future success of the business. Nor am I satisfied that if asked Mr White would have agreed to provide a cash injection of anything like that order. Mr White was an elderly man. The evidence was that he was cautious with money. I do not doubt that, but for the pursuer's financial difficulties, it may have been Mr White's wish that after his death his two nephews should share the bulk of his estate equally between them. The fact that he appears to have changed his will once he became aware of the pursuer's financial difficulties suggests to me that he would not have been agreeable to exposing £250,000 to a relatively high risk of loss. If the pursuer had sought an injection of £250,000 from him so soon after the loan of £50,000 it would have been

likely to trigger alarm bells. Mr White is unlikely to have considered it to be in either his interest or in the pursuer's long term interest to provide such an injection.

The pursuer's damages claim

[74] Since I have found that the pursuer would not have sought and obtained a variable rate loan, and that if he had the business would still have failed, no question of awarding damages arises. Nonetheless, I think it right to set out briefly my views on the evidence and submissions relating to damages.

[75] The pursuer claimed that the way to assess damages in this case was (i) to calculate the value which the business would have had as at 30 December 2014; (ii) to deduct from that value the proceeds of sale; (iii) to add a sum in respect of the pursuer's trouble and inconvenience.

[76] For the first stage of the exercise the pursuer relied upon the evidence of Mr Coulter. Mr Coulter valued Chantemarle as a freehold going concern. He assumed that the business was operating in line with the projections which Ms Longworth had produced; that the relevant refurbishment works had been carried out; that the buildings were in good condition; and that the pursuer had obtained a variable rate loan rather than the TBL. He adopted what he described as a "build up" valuation. He was instructed on the basis that he was to produce a report which did not exhibit data on comparable transactions and valuations. He valued the land and buildings at £4.7 million as at 30 December 2014, to which he added £794,500 as representing the value of goodwill, trade fixtures and fittings on the assumed fulfilment of the trade projections for 2014. The £794,500 had been arrived at by applying a multiplier of 1.75 to Ms Longworth's projected operating profit of £454,000 for 2014. He rounded up his resultant valuation to £5,500,000.

[77] Mr Richardson did not visit the property. He was instructed by the defender to prepare a critique of Mr Coulter's report. His clear view was that the appropriate method for valuing a going concern business was the income capitalisation method (formerly known as the profits method). If that method was employed here and the projected operating profit of £454,000 used as the multiplicand, an appropriate multiplier for a business of this sort would be six, giving a value of £2.73 million. Stepping back and looking at all the other evidence (including the sale in 2011 for £2.25 million and the fact the subjects were now on the market with a guide price of £4 million) a value of the order of £3 million on 30 December 2014 did not look out of place. Mr Coulter's valuation of £5.5 million would represent a multiplier of 12.11 times income, i.e. a yield of 8.25%. That multiplier was too high and that yield was too low for this sort of property.

[78] I have very considerable reservations as to whether 30 December 2014 is the appropriate date at which to assess damages. While I can see that this is a case where it does not seem apt to assess damages at the date of the breach/fault, it is difficult to see why 30 December 2014 should be the appropriate date. The date of the break being exercised or the date of the sale of Chantmarle both seem to me to be more likely contenders.

[79] If it is indeed correct to assess damages as at 30 December 2014 I think some assistance may be obtained from both the income capitalisation method and the build-up method. However, I am not satisfied that Mr Coulter's valuation of £4.7 million for the land and buildings is one upon which I can rely. Mr Coulter did not produce any analysis of comparisons which might have assisted in determining whether this element of his valuation is correct. On the face of things it seems too high. The subjects were sold in 2011 for £2.25 million and they were for sale with a guide price of £4 million at the time Mr Richardson gave evidence (18 September 2015). As Mr Coulter observed in his report

(para 18.3), since the pursuer bought Chantmarle there has been a major overriding change to the market. The fallout from the banking crisis was a recession, depressed property prices and curtailed bank lending. In the whole circumstances I do not accept that the value of the subjects more than doubled between the sale in Autumn 2011 and 30 December 2014. I do not overlook the fact that Mr Coulter's valuation assumes that the subjects are in good repair (which was not the actual position at the time of the sale or at present): but his evidence was that expenditure of the order of £250,000 would be sufficient to put them into that condition. Doing the best I can on the basis of the evidence available to me I conclude that the market value of the land, buildings and business (as projected) as at 30 December 2014 would have been about £4 million. On an income capitalisation approach that equates to a multiplier of about 8.44 (the multiplicand being £454,000) which I consider to be more appropriate than either Mr Richardson's multiplier of 6 or the multiplier of 12.11 implicit in Mr Coulter's valuation. Had the pursuer proved that the business failure and his bankruptcy had been caused through the defender's breach/fault he would also have been entitled to damages for the trouble and inconvenience caused thereby. However, in my opinion the figure suggested by Mr Mitchell - £75,000 - grossly exceeds the sort of relatively nominal award which might have been appropriate under that head.

[80] It was common ground that in calculating damages there falls to be deducted the £2.25 million sale proceeds. Ultimately Mr Mitchell accepted that account also required to be taken of the balance of the pursuer's outstanding loan accounts with the defender. That balance is £2.49 million. That figure takes account of the sale proceeds of £2.25 million, and it excludes the break costs and the extra interest levied during 2009 before the TBL was broken. The total of £2.49 million and £2.25 million - £4.74 million - exceeds (by a considerable margin) the value the business would have had at 30 December 2014 and the

value of any award which might be made for trouble and inconvenience. Whether one deducts the £2.49 million when assessing damages, or whether one assesses damages but then allows the defender to set off its debt against the damages claim (i.e. by virtue of set off, compensation, or balancing of accounts in bankruptcy), or whether a combination of those approaches is appropriate, the end result is that the pursuer is not entitled to any payment from the defender.

[81] While preparing this opinion it occurred to me that if the suggested capital injections had been made by Mrs Glare and John White, the pursuer would have been unlikely to have received (i) the financial settlement since agreed with Mrs Glare; and (ii) the payments from David White. The pursuer has taken no account of his receipt/entitlement to receive those sums when formulating his claim against the defender. Had it been critical to my decision I would have put the case out by order to hear submissions on the point. Since it is not critical to my decision it is unnecessary and inappropriate to have parties incur the further expense that that course would involve.

[82] During the course of closing submissions Mr Mitchell sought to advance for the first time a fall-back case that the pursuer had lost the chance of obtaining a variable rate loan product and that he should be awarded damages:

> "in respect of the loss of the opportunity to have obtained such a loan and to have prevented the failure of the business."

Moreover, if the court was satisfied that the pursuer had proved on the balance of probabilities that he would have obtained the alternative variable rate loan but was not satisfied that he had proved that the business would have survived, it was submitted that the pursuer had been deprived of the opportunity of the business surviving. No reference to

a loss of a chance claim had been made in the pleadings. Mr Mitchell submitted that an appropriate award would be 20% of the full value of the claim.

[83] In my opinion the loss of a chance case does not get off the ground. The starting point for such claim would require the pursuer to prove on the balance of probabilities that he wanted a variable rate loan; that he would have sought one; and that he would have accepted it if offered. I am not satisfied on any of those matters. It is not appropriate therefore to assess the chance of the pursuer having been offered a variable rate loan if he had sought it. In any case, I am clear that the business would not have survived even with a variable rate loan. Even if it would have survived, the pursuer has not satisfied me that he would have been entitled to receive any payment from the defender.

Authorities

[84] During the course of submissions the principal authorities which were referred to were: *Allan* v *Barclay* (1864) 2 M 873; *Admiralty Commissioners* v *Owners of SS Volute* [1922] AC 129; *Monarch Steamship* v *Karlshams* 1949 SC(HL) 1; *Caparo* v *Dickman* [1990] 2 AC 607; *South Australia Asset Corporation* v *York Montague Ltd* [1997] AC 191; *Anthony* v *Brabbs* 1998 SC 894; *Webster* v *Cramond Iron Co.* (1875) 2 R 752; *Wilkie* v *Brown* 2003 SC 573; *Johnston* v *Agnew* [1980] AC 367; *Kyle* v *P & J Stormonth Darling* 1992 SC 533; *Allied Maples Group Ltd* v *Simmons & Simmons* [1995] 1 WLR 1602; *McCrindle Group Limited* v *Maclay Murray & Spens* [2013] CSOH 72; *Wellesley Partners LLP* v *Withers LLP* [2014] PNLR 22; *Watson* v *Student Loans Co Ltd* [2005] CSOH 134; *Luminar Lava Ignite Ltd* v *Mama Group* 2010 SC 310; *Farstad Supply AS* v *Enverico* 2013 SC 302; the Compensation Act 1592; *Law Society* v *Shah* [2009] Ch 223; *Michael Marcus Young* v *Accountant in Bankruptcy* 2010 SLT (Sh Ct) 37; *Inveresk plc* v *Tullis Russell Papermakers Ltd* 2010 SC(UKSC) 106; *Highland Council* v *Construction Centre*

Group Ltd 2004 SC 480; *Integrated Building Services* v *PIHL* (2010) BLR 622; *Powdrill* v *Murrayhead Ltd* 1997 SLT 1223; *Secretary of State for Trade and Industry* v *Frid* [2004] 2 AC 506; *Mill* v *Paul* (1825) 4 S 219; *Re MS Fashions Ltd* (1993) BCLC 1200; *Stein* v *Blake* [1996] 2 AC 243.

Further submissions

[85] I wish to record that the following submissions were also made by Mr Clark. He argued that since it was clear on the evidence that a separate limited company was to carry on the wedding business should CHWV have become involved, profits that company would have made ought not to be treated as if they would have been profits of the pursuer. That was *a fortiori* the case because the pursuer sues as the assignee of his trustees in bankruptcy. On no view could it be said that the trustees had had any claim to profits which the company may have made. Nor was it legitimate to assume that the trustees could have advanced a claim against the defender which depended upon the hypothesis that capital injections into the business would have been made by third parties; or that he could have advanced a claim based on the hypothetical value of the business as at 30 December 2014. As I heard limited argument in relation to these issues, and since resolving them is not essential to my decision, I prefer to reserve my opinion on them.

Disposal

[86] As requested by the parties I shall put the case out by order to discuss the terms of an appropriate interlocutor to give effect to my decision.