Neutral Citation Number: [2025] EWHC 1305 (Ch)

Claim No: PT-2018-000933

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

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

Date: 27 May 2025

Before:

MR HUGH SIMS KC (sitting as a Deputy Judge of the High Court)

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Between:

BROOKE HOMES (BICESTER LIMITED)	**Claimant**
- and –	
(1) PORTFOLIO PROPERTY PARTNERS LIMITED (In Administration) **(2) P3 ECO (BICESTER) HIMLEY LIMITED (In Administration)** **(3) DESIMAN LIMITED** **(4) DESIMAN 2 LIMITED** **(5) CFJL PROPERTY PARTNERS LIMITED (In Administration)**	**Defendants**

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Mr Ian Clarke KC and Mr Michael Jefferis (instructed by **SPB Law**) for the **Claimants**
Mr Stephen Robins KC and Robert Amey (instructed by **Underwood Solicitors LLP**) for the **Third and Fourth Defendants**

Hearing dates: 28, 29, 30 April and 2 May 2025

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APPROVED JUDGMENT

MR HUGH SIMS KC:

Introduction

1. This is my judgment on the hearing of two applications brought by the Claimant, Brooke Homes (Bicester) Ltd ("**Brooke Homes**" or "**Brooke**") against the Third Defendant, Desiman Limited ("**Desiman**"), and Fourth Defendant, Desiman 2 Limited ("**Desiman 2**"). Desiman 2 is Desiman's subsidiary. According to the context, where the distinction does not matter, I will refer to the Third and Fourth Defendants together as the singular, "**Desiman**".

2. Brooke is a judgment creditor and its security ranks behind that of Desiman, which is also a secured creditor. The relief sought under the two applications is for (i) an equitable account and (ii) application of the equitable doctrine of marshalling. The applications concern a sale by Desiman as mortgagee. The sale and associated agreements also concerned land charged in favour of Brooke. The terms of the sale give rise to points of principle as to how the sale proceeds should be accounted for as between the first ranked mortgagee, Desiman, and those interested in the equity of redemption after them, the first in line being Brooke.

3. The other parties to the underlying action, which are not parties to the applications before me, are the First Defendant, Portfolio Property Partners Limited ("**PPP**"), the Second Defendant P3ECO (Bicester) Himley Limited ("**P3 Eco**") and the Fifth Defendant, CFJL Property Partners Limited ("**CFJL**"). Reference will be made to PPP and P3 Eco as the "**P3 parties**". The P3 parties and CFJL are referred to together as the "**Companies**". In short, the Companies were the borrower.

4. The Companies were previously under the control of their principal shareholders, Messrs Nardelli and Johnson and Brigadier Inshaw. The Companies entered into administration in February 2022, shortly after I granted judgment in favour of Brooke Homes against them for damages totalling £13.4 million, plus interest and costs: see [2021] EWHC 3015 (Ch) ("the **2021 Judgment**"). I dismissed the claim against Desiman. Much of the background to this case is set out in the 2021 Judgment, and the findings I set out there are binding on the parties to these applications.

5. The Companies owned development land at Himley, Bicester in Oxfordshire, also known as Himley Village. On 30 January 2020 a section 106 agreement (under the Town and Country Planning Act 1990) was entered into, and outline planning permission was obtained for development on the land at Himley Village for up to 1,700 residential dwellings, a retirement village, commercial development and social and community facilities. The development site comprised 6 registered titles. Desiman had advanced secured lending to the Companies secured over those titles, or rights held in the name of CFJL to procure those titles.

6. Before the Companies entered into administration, on 10 December 2021, I had granted charging orders in favour of Brooke Homes over three of the titles which formed part of the development land held by them at Himley Village: ON237022 (24.24 acres), ON339684 (9.93 acres) and ON360325 (59.85 acres). The last of those titles was held in the name of Desiman 2, but I held in the 2021 Judgment this was held by way of security, and that the Companies retained an interest in the equity of redemption. I shall refer to the land over which the charging orders were secured as the "**Charging Orders Land**".

7. The security obtained by Brooke Homes over the Charging Orders Land ranked below Desiman, which retained its first ranking security, under fixed and floating charges. Desiman's security was over the Charging Orders Land, as well as over other titles forming part of the development land and certain contractual rights. In broad terms, and subject to the qualifications discussed further below, the Charging Orders Land comprised of land forming part of what has been referred to as "Phase 1" of the development, and the other land formed part of what has been referred to as "Phases 2 and 3". The Phase 1 development concerned residential development of up to 500 dwellings, and certain commercial land, and Phases 2 and 3 concerned the remainder of the 1200 residential dwellings and other related and associated development.

8. When the Companies entered into administration Mr Richardson and Mr Avery-Gee, of CG Recovery Limited ("**CG&Co**" for short), were appointed as joint administrators (hereafter the "**Joint Administrators**" or simply the "**Administrators**"). The appointments were made by Desiman in its capacity as qualifying floating charge holder. Desiman also retained fixed charge security, but chose to place the Companies into administration rather than pursue receiverships.

9. Some of the material events in the administration of the Companies are set out in a further judgment I gave in the context of an application brought by Messrs Nardelli, Johnson and Brigadier Inshaw, as shareholders, to remove the Administrators: see [2024] EWHC 2740 (Ch) (the **"2024 Judgment**"). For short I refer to this application as the "**P3 Removal Application**", to distinguish it from an earlier application brought by a creditor called Cassadian (the "**Cassadian Removal Application**"). The Cassadian Removal Application was brought in late 2022 and was discontinued in 2023. The P3 Removal Application was issued in late 2023 and I dismissed that application in late 2024. In both those applications the Administrators were represented by Brechers & Co solicitors, and their defence to the applications was funded by Desiman. The findings I made in the P3 Removal Application are not binding on the parties to the present applications, but much of the uncontroversial background to the present applications relating to the sale of certain of the land and associated agreements with Cala Management Limited ("**Cala**") is set out in 2024

Judgment. In addition all the evidence which was adduced on those two removal applications was put before me.

10. As explained in further detail in the 2024 Judgment, on 6 January 2023 contracts were exchanged with Cala for the sale of the Phase 1 land for £40m (the "**Cala contract**"), on terms which included deferred consideration, the payment of which was also linked to acquisition in Desiman's name (via CFJL) of the Phase 2 and 3 land (for which £10 million needed to be paid). On the same day a hybrid option and promotion agreement (also termed the "**Hybrid Option Agreement**") was simultaneously entered into with Cala in relation to land forming part of "Phases 2 and 3". The sale facilitated payment under a Conditional Sale Agreement ("**CSA**") which had been entered into between CJFL (also referred to as the "**CFJL Agreement**", and in some other documents as the "**CFJL Contract**") and certain landowners on 31 May 2017 (as subsequently varied) for the acquisition of land to form part of Phases 2 and 3. £10m was required to complete those acquisitions, which have since taken place.

11. The Phase 2 and 3 land is held in the name of Desiman, though the recitals to the relevant agreements recognise the equity of redemption remains in the Companies. The contracts with Cala also gave Desiman interests going beyond those normally associated with a lender, including substantial profit shares, and overage fees, which substantially reduce a likely return to the shareholders. Subject to final planning and successful development, the Phase 2 and 3 developments are projected to yield at least a further £82 million, to the benefit of Desiman, Brooke and those ranking below them.

12. In short, therefore, Desiman's interests in relation to the development were not just in its capacity as secured creditor over the Charging Orders Land, but also in its capacity as first secured creditor over the Phase 2 and 3 lands, and wider stakeholder in relation to profits to be made from those lands.

13. The sale of the Charging Orders Land, under the Cala Contract, was effected by Desiman as mortgagee, albeit the Companies, acting by the Administrators, were also involved in the marketing and realisations, and were parties to the relevant contracts. In these circumstances it is accepted by Desiman that it owed duties to Brooke Homes, and is liable to account to Brooke Homes, as a party interested in the equity of redemption. It is also accepted that the doctrine of marshalling, whereby the second ranked secured creditor may gain the benefit of wider security held by the first ranked secured creditor, may have some application, though it was emphasised by Desiman this could not operate to its detriment, and instead simply offered the prospect to Brooke Homes of certain advantages.

14. On 22 June 2023 the sale of the Phase 1 land to Cala completed and Cala paid some of the completion monies. On that date the terms of the Cala contract were

also varied, including an alteration to the terms and timing of the payment for the remaining consideration.

15. Before this hearing, Brooke Homes applied for interim relief, in anticipation of the final tranche of sale monies of £10 million being paid by Cala on 21 February 2025. On 7 February 2025 I made an interim order, to hold the ring, that the applications would be determined on the basis that the parties would have such arguments in law and equity as they had on 21 February 2025, before any money was paid, and that any payments and distributions would be made without prejudice to the contentions of the parties. On this basis, I ordered that the final £10 million Cala payment to Desiman's solicitors, Underwoods was, upon receipt, to be applied in the following manner: (1) The sum of £3,500,000 be held by Underwoods pending this hearing; (2) £4,200,000 be released to Desiman; (3) £355,000 be held by Underwoods by way of security for the costs of Desiman; (4) £230,000 be held by Underwoods by way of security for Brooke's cross undertaking in damages; (5) the sum of £308,599.81, being the sum required to satisfy the assessed costs of Desiman under the order of 10 December 2021 (when I dismissed Brooke's claim against it), be paid to Desiman; and (6) £2,300,000, less the sums in sub-paragraphs (3), (4) and (5) above, be paid to Brooke.

16. The Cala final tranche monies, bringing the total receipts to £40 million, were duly received on 21 February, and were applied in accordance with the 7 February 2025 order, as set out above. Desiman has since produced an updated redemption statement or "forecast", to 21 February 2025, in which it claims it is due a further £1,734,215.03 to pay off the remaining principal and interest due to it as at that date. It also claims it is liable to pay a further £870,747.14 in fees and costs outstanding. It therefore claims a further £2,604,962.17 from the sum of £3,500,000 held by Underwoods pending this hearing. This is disputed by Brooke. On the applications it claims that all of the £10 million final tranche should have been paid to it, on a proper accounting basis between it and Desiman, and in fact Desiman should have been treated as being redeemed out of earlier receipts from Cala.

The issues – as narrowed

17. The parties agreed 14 issues in the list of issues, but by the conclusion of the hearing those issues had narrowed and the remaining issues may conveniently be disposed of under four main headings: (1) Whether the account should be surcharged so as to require Desiman to account to Brooke for a sum greater than the £40 million receipt, having regard to the negotiations with and terms of sale to Cala (issues 5 and 6); (2) What liabilities were secured in favour of Desiman under what were described as "Facility C" and "Facility D" (issues 11 and 12); (3) What costs and expenses fall to be deducted out of the receipts, and whether the court should direct assessment in relation to some or all of them (issue 8);

and (4) What relief I should grant having regard to the findings I have made under the previous headings.

18. The parties agreed that, on the points remaining, I can make final rulings on the evidence before me, or decide certain points of principle with further directions for their determination, or direct further accounts and enquiries, or a combination of the above.

The evidence

19. The parties not only adduced documentary evidence before me but also called witnesses: Mr Holleran and Mr Costello were called to give evidence for Brooke and Mr Fellows was called by Desiman. Mr Holleran and Mr Costello had limited relevant evidence to give, since they were not party to the negotiations with Cala. Their evidence was largely based on advancing the case theory or submissions of Brooke by reference to their interpretation of events or documents relating to events which they were a stranger to, or based on hearsay. Aside from providing clarification of the case of Brooke I did not find this evidence of great utility beyond what the documents told me. Mr Fellows' evidence, for Desiman, was of greater relevance and utility. He was a party, in many instances, to the relevant negotiations with Cala, together with the Administrators and Savills. Savills were the agents jointly appointed by Desiman and the Administrators to assist with the marketing of Phases 1-3. Mr Fellows was also the principal person relied on by Desiman to produce redemption statements, and evidence as to the state of the account. It was readily apparent from Mr Fellows' evidence that the negotiations in relation to the sale to Cala were not viewed by Desiman simply through the prism of what could be obtained for the Phase 1 land alone, but was viewed holistically, looking at what could be obtained overall for Phases 1, 2 and 3. Having made those overall observations, where there are particular points of controversy in relation to the evidence I shall address that where it arises below.

(1) Whether the account should be surcharged so as to require Desiman to account to Brooke for a sum greater than £40 million having regard to the negotiations for and terms of sale to Cala (issues 5 and 6)

20. In Brooke's written opening it was explained that there were two "surcharge" issues. The first identified was whether Brooke should account for a £2 million price chip on the Cala contract price, from £42 million to £40 million (issue 5, or as derived or evolved from that issue). The second identified was the cost or value associated with an extension of the "Spine Road", beyond that required simply to service Phase 1, in the alleged sum of £3 million, which Cala agreed to undertake under and as part of the Cala contract (issue 6, or as derived or evolved from that issue). I was invited to conclude that a surcharge on the account should be given by Desiman in relation to these points in the total sum of £5 million, or that there was a sufficient basis to direct that there should be

an account and enquiry to determine what the surcharge should be. The reason why I was invited to do so was on the basis that Desiman had received non-monetary benefits from the Cala contract which it should account for, or there should be a surcharge to the accounts on a "wilful default" basis.

Legal principles

21. The first logical stage in the accounting exercise is to ascertain what has been received by the mortgagee from the sale in question. The fundamental underlying principle is that "*whatever the mortgagee has received from the mortgaged property is charged against him*" on the account; per Jessel MR in *Union Bank of London v Ingram* [1880] 16 ChD 53. This is a strict duty in equity, that in exercising his powers the mortgagee cannot make a personal profit or reap any personal advantage beyond what is due under the mortgage: see *Snell's Equity* 35th Ed at 39-027; *Cousins: the Law of Mortgages* 4th Ed at 25-21. There are limits to this however; certain "collateral advantages" may be excluded from this: *Snell's Equity* at 39-208. In summary, the following propositions apply:

    (1) where a property has been sold by a mortgagee in possession, the mortgagee must account for the purchase money;
    (2) if any part of the consideration for the sale consists of non-monetary consideration, the mortgagee must account for the value of that too;
    (3) the mortgagee is not, however, obliged to account for purely "collateral advantages".

22. It is, now, common ground that Desiman had properly accounted for the whole of the purchase money from Cala, in the sum of £40 million. It had originally been suggested that there might be £700,000 missing from the account, but it emerged this was based on a misreading of the documents and the point was not pursued before me. There is a £500,000 retention held by Cala in relation to alleged ground contamination, which Mr Fellows said he thought was unjustified by Cala, but which had not been pursued, to date, and the conduct of that dispute with Cala is a matter on which further directions may be sought from me following hand down of this judgment.

23. The focus of the dispute, at least so far as the Spine Road extension issue was concerned, was on propositions 2 and 3: whether part of the consideration consisted of non-monetary consideration derived by Desiman which should be accounted for, or whether it was a collateral advantage which should not be accounted for.

24. The court may also surcharge the account if it was satisfied there was "wilful default" on the part of the mortgagee for what they might have received but for that default. A well-known example of this is the equitable duty of the mortgagee to obtain the best price reasonably obtainable; if such a failure is

made out then the court will require the mortgagee to account for those interested in the equity of redemption for not only what was actually received but for what should have been received: see Lightman J in *Silven Properties Ltd v Royal Bank of Scotland plc* [2004] 1 WLR 997 (CA) at [14] & [19]. Whilst the touchstone of reasonableness might indicate a tortious duty, it was described as a fiduciary duty of care in *Silven Properties* at [29] (see also Lord Templeman in *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536 at 543H-545E).

25. The focus of the dispute, so far as the £2 million price chip was concerned, was on the issue of wilful default, or in any event the absence of a satisfactory explanation in relation to the £2 million price chip, perhaps being indicative of some undisclosed personal advantage to Desiman, leading to the conclusion that further enquiry would be appropriate.

26. Mr Robins KC, leading Mr Amey, for Desiman, referred me to the decision of *White v City of London Brewery Company* (1899) LR 42 Ch D 237 (CA) as a useful illustration of the dividing line between collateral advantages and accounting on the footing of wilful default. This case is cited in *Snell's Equity* at 39-028, as authority for the proposition that "*the mortgagee is not accountable for purely collateral advantages*", and it is also cited in *Fisher & Lightwood's Law of Mortgage* 15th Ed at 29.57 in support of the conclusion that the mortgagee is only liable to account for profits arising from the mortgaged property.

27. The facts of the case can be stated briefly. Mortgagees in possession, who were brewers, let the premises with a restriction that the tenant should take his supply of beer entirely from them – commonly called a "beer tie". The mortgagor contended that the mortgagees should account for the profits which they had made in supplying beer to the tenant. North J held that the mortgagees were not liable to account for the profit which they had made by the sale of beer to the tenant, as this was merely a collateral advantage. However, given that the mortgagees could have achieved a higher rent by letting the premises without any such restriction, the mortgagees were liable to account on the footing of wilful default for such additional rent as they would have made if the premises had been let without restrictions. The Court of Appeal upheld North J's decision.

28. In the Court of Appeal there was discussion as to what might constitute a collateral advantage, which is not to be taken into an account. At p423 Lord Esher, MR, stated the question as being "*Can those profits on beer supplied to the house be said to be profits by and out of the premises?*" He dismissed this being so, on the facts of the case, stating:

"*Such an idea seems to me simply preposterous, and we cannot entertain it. Has anybody ever thought that such profits were to be brought into the account? Mortgages of beer-house premises are of everyday occurrence, and the failure*

of the mortgagee to repay the brewer is a matter of every other day occurrence. Have the publicans who have fallen by the way in such numbers ever thought of raising this question ? Not one. Neither did this man. It is the second mortgagee who thought of this. I suppose somebody has put this experiment into his head, it is an experiment which failed in the Court below, and which fails here."

29. Mr Robins invited me to conclude the argument raised by Brooke was also an experiment which should be rejected in the same terms. Mr Clarke KC, leading Mr Jefferis, invited me to focus my attention on the factual differences from that case. The profit gained here, he submitted, was "by and out of the premises". I will return to this submission below, but it did not appear to me there was any significant difference between the parties as to the relevant principle.

30. In my judgment the principle applied in *White v City of London Brewery Company* is the same fundamental principle as stated by Jessel MR in *Union Bank of London v Ingram*. Account must be given for receipts, benefits or profits from "the mortgaged property" or "by and out of" that property. If they can be so described, or characterised, then they need to be accounted for and in the case of non-monetary consideration, a value put on them. But if they are not to be so characterised then they should be viewed as collateral, and not included.

The Cala negotiations during August 2022 to November 2022

31. By May/June 2022 Savills, on the joint instruction of the Administrators and Desiman, had commenced the marketing of the site. In the sales details issued by them the overall development opportunity at Himley Village was identified and bids were invited in relation to 4 lots: lot 1 being the 500 residential units with infrastructure and services to agreed boundaries for commercial and future phases (equivalent to phase 1 residential), lot 2 being the commercial and other use land along the Middleton Stoney Road, and lots 3 and 4 being 420 and 780 residential units (the latter two being phases 2 and 3 of the residential development). The timeline in the sales details suggested viewings during June and July and proposed buyer/developer interviews in August 2022.

32. A number of different bids were forthcoming; 10 in total. They were not all easy to compare as different bids were made for different lots, and even where some of the bids appeared to be similar they contained different underlying assumptions. Savills recommended further consideration be given to five offers, from St Congar, Cala, Barratt Homes, Crest Nicholson and Vistry Homes. Ultimately Savills recommended that Cala be given preferred bidder status, which advice was accepted and acted on by Desiman and the Administrators. In the Heads of Terms entered into in September 2022 Cala's bid was identified as being for lots 1 and 2. It also stipulated that the judgment debt in favour of Brooke be discharged at completion, from the sale proceeds. In a later letter from Savills dated 7 November 2022 the commercial terms were described as follows:

"It included the following commercial terms:
• Headline price of £48,000,0000
• £5,000 non-refundable deposit to be payable on exchange, on or before the 21st October 2022
• £33,000,000 (68.75%) payable on completion on 21st May 2023
• £10,000,000 (20.83%) payable on the 1st anniversary of completion on 21st May 2024".

33. The same letter went on to recite that:

"In order to select Cala as preferred purchaser, they were asked to amend their red line sale boundary to include the provision of the spine road which would serve the residual 1,200 dwellings upon release of the Grampian condition as detailed at Condition 6 of the Decision Notice (App: 14/021210/0UT). Cala sought to consider this provision and subsequently made an allowance within their appraisal for the cost of this delivery, which they stated to be in region of £2.5- £2.85 Million of costs and agreed to swallow these additional costs within their appraisals. As such, they did not then seek to amend the purchase price to reflect the changes reflected by the land value."

34. The Spine Road to serve Phase 1 (and Lot 1) of the development is identified on the plans as road to run from a point marked as X on Middleton Stoney Road to a point marked M (just to the North of a pond), and the part of it to serve Phases 2 and 3 is identified as running from point M to N (see for example the plan at p3325 of trial bundle 1, though the road is only marked on this plan between M and N).

35. In his evidence Mr Fellows described the extension to the Spine Road, from M to N, as a "sweetener" on the part of Cala, but he questioned whether it would cost as much as £2.5-2.85 million, as stated by them, and noted that they intended to carry out these works in house and so the actual cost may not have been as much. In his oral evidence, under cross examination, he described it as a "sweetener" or a "bonus", and suggested the additional works might only have cost it of the order of £1m.

36. For its part, in its letter of 12 September 2022, Cala described the Spine Road as "*in essence servicing the remaining site (1.200) in terms of access and services capacity*" which they assessed at c. £2.4 million, and accommodated within their appraisal, whilst maintaining the headline offer of £48 million.

37. In the evidence Mr Richardson gave in the P3 removal application (see his statement of 21 March 2025, at paragraph 125), he referred to the Spine Road extension work as being an additional commercial benefit of the Cala offer in the following terms:

"*Cala had agreed to provide (at an estimated cost of over £2,500,000) a road which would serve the 1,200 Phases 2 and 3 houses. This would be a substantial advantage towards being able to sell Phases 2 and 3 as serviced plots.*"

38. Unfortunately the Cala offer did not remain at £48 million. Following the mini-budget on 23 September 2022 there was a loss in market confidence and interest rates increased. In addition Cala identified that in its assumptions as regards the contributions it would need to make in relation to the section 106 agreement it had omitted to take into account a £3 million contribution in relation to the strategic link road (not to be confused with the Spine Road).

39. On 26 October 2022 Andrew Wagstaff, Managing Regional Director of Cala, telephoned Sarah Fenton of Savills to advise her that whilst Cala remained committed to doing the deal their new proposal was a £40 million purchase price, with a payment structure based on payment and completion in Q4 that year, with a payment of £19 million on completion. Exchange was contemplated as taking place on 18 November 2022 (on the basis the proposal would go through the L&G Board before then) and with a deferred payment of £21 million in May 2025. The proposal also asked for a 10% discount in relation to the Hybrid Option Agreement; it had previously been agreed at 5% (being the discount to Cala on the market value of properties it had promoted within Phase 2 and 3 and opted to purchase). The indication from Mr Wagstaff to Ms Fenton was that there remained some negotiation in what he was offering. Savills' analysis of this revised proposal, as set out in an email of the same date to Desiman (and subsequently sent on to Mr Richardson) was that £3 million of the price chip, from £48 million to £45 million, related to the additional section 106 costs which had been omitted from the original appraisal, and which Cala could not "swallow" in the light of the new market conditions. A further £2 million reduction, from £45 million to £43 million, might be explicable on the basis of the increased cost of borrowing, but she offered the view the reduction to £40 million seemed excessive, a comment she indicated she had already relayed to Cala. She stated the deferment out to May 2025 was unusual. She also offered the view that the 10% discount was reflective of the level of work required by Cala to progress the planning position in relation to Phases 2 and 3 and advised that Desiman stand firm at 5%.

40. The next day, on 26 October 2022, Cala returned with an improved alternative offer, as recorded in an email of 27 October 2022 from Sarah Fenton of Savills to Desiman (again subsequently forwarded to the Administrator). The email refers to attaching email clarification from Mr Wagstaff, though the attachment was not included in evidence before me. In this alternative offer Cala were offering to purchase at £42 million with exchange no later than 18 November 2022, with a £5 million deposit (to be released to the landowners to enable certain of the Phase 2 and 3 land to be acquired), and then a further £18.5 million on completion in December 2023 and a deferred payment of £18.5 million in December 2024. The terms in relation to the Hybrid Option Agreement had

reverted to a 5% discount. Ms Fenton noted "*We appreciate you are frustrated with the process and we share your frustration but we are duty bound to report this to you*." Various options were identified, including revisiting offers from underbidders, and negotiating further with Cala. The difficulty with either option was that market conditions had deteriorated. Ultimately both these options were explored.

41. So far as negotiations with Cala were concerned Desiman sought to secure a higher bid from Cala, via Savills, and negotiations continued into early November. By 2 November 2022 Cala indicated the highest headline figure would be £43 million, subject to sign off from the Chairman, on the basis of a deal structure which contemplated £5 million on exchange of contracts in November 2022, £25 million on completion in December 2023, £6.5 million on year 1 anniversary of completion, and £6.5 million on year 2 (the Hybrid Option Agreement remaining at 5%). At this time it was still contemplated Cala required Brooke to be paid first. By email of 7 November 2022 however Mr Atkinson of Desiman informed Mr Richardson that given the changed parameters then in contemplation Desiman required a higher profit share from the Phase 2 and 3 land, and also noted that Desiman would require to be paid before any other party. On 7 November 2022 Savills noted negotiations were in a fragile state and recommended quick and clear negotiation with Cala whilst continuing to explore options with underbidders.

42. There was a meeting on Tuesday 8 November 2022 attended by Desiman, Cala and Savills – no notes of this meeting were in evidence, but Mr Fellows recalled it being a heated affair and that he walked out of the meeting. Ms Fenton later recorded in an email on 14 November 2022 (commenting in red, within an email from Mr Fellows of the same date) that Cala confirmed they would not be able to reach the amounts Desiman sought (the email refers to not being able to reach £42 million, but it is common ground this must be a drafting error and it seems likely this was intended to be a reference to £45 million). Ms Fenton had discussions with Mr Wagstaff the following day, and on 10 November 2022 she stated she had been asked for Cala to confirm its position on the discussion in terms of payment profile and headline price, and recorded that what had been discussed was £42 million as a headline, with £5 million on exchange (2 weeks from agreeing terms), £15 million on completion in May 2023, £10 million in January 2024, and £12 million in January 2025. She went on to say "*We discussed that this payment profile would work*" for her clients (referred to as the landowners in this email), and that it would be "*sensible to minimise any changes*".

43. Ultimately however whatever may have been discussed between Ms Fenton and Mr Wagstaff on 9 November, as recorded in her email of 10 November, did not hold firm. By email of 16 November 2022 Ms Fenton referred to a conversation with Mr Wagstaff on 15 November 2022 in which "*we discussed the proposal put forward by my clients on email on 10th November*" and he confirmed Cala

was offering a reduced headline price of £40 million "*in order to accommodate those payment terms required by the client*". In relation to the payment profile she recorded this as being £5 million on exchange (exchange being 2 weeks from agreeing terms), £15 million on completion in May 2023, £10 million in January 2024 and £10 million in January 2025. She went on to state that if these details were correct she had been given instruction that this amended commercial position would be accepted on the basis that the contract be exchanged shortly, with no other changes to the commercial terms or contractual points. This email is silent on the issue of whether Brooke was still required to be paid first, though the subsequent terms on which the Cala Contract was drafted show that this was no longer a requirement of Cala.

44. This sequence of communications led Brooke Homes to make three allegations. The first was that the email of 16 November 2022 from Ms Fenton to Andrew Wagstaff shows there must have been a further email on 10 November 2022 in which an offer was made by Desiman at £40 million, since the email from Ms Fenton on 10 November 2022 referred to an offer of £42 million from Cala, and no email had been disclosed evidencing an offer from Desiman. The second was that the reduction in price from £42 million to £40 million occurred at the same time as Cala's requirement that Brooke be paid at completion also disappeared. A third allegation was that maintaining the Hybrid Option Agreement at 5% was at the expense of getting a higher headline price for the Phase 1 sale, such as £42 million, or in any event that an enquiry should take place in relation to this.

Analysis and conclusions on the £2m price chip

45. I accept the evidence of Desiman, and that of Mr Fellows, that Desiman did not make an offer of £40 million on 10 November 2022, and no email was sent by them on that date making such an offer. I conclude this allegation by Brooke is a mis-reading of the emails of Ms Fenton of 10 and 16 November 2022. The latter was referring, in my judgment, to the earlier email of 10 November 2022, which recorded the proposal by Cala. The reference to it being a "proposal put forward by my clients on email on 10 November" is likely a reference to the payment profile which would work for her clients, as referred to in Ms Fenton's email of 10 November. It may also be said to reflect the fact that, in reality, Ms Fenton was trying to force the pace somewhat, and it may be said there was some fluidity as to whether it might be said it was Cala's offer, or an offer from Desiman (at £42 million). The email could have been better worded, but not all of Ms Fenton's emails adopted accurate drafting; another example is the email of 14 November 2022 already referred to in paragraph 42 above. It is also inherently unlikely that Desiman would have sought to underbid itself; it is more likely in my judgment that reductions in the headline figure came from Cala, albeit this may have been in response to Desiman signalling or indicating the commercial terms which were important to it beyond the headline price.

46. The second element of Brooke's case on the price chip is that however this reduced offer came about, it was a quid pro quo for Cala agreeing to drop the requirement that Brooke be paid out first, which was a benefit to Desiman. The requirement for Brooke to be paid first had originally been a stipulation of Cala, who wanted to avoid getting embroiled in any litigation involving Brooke. By the time of the Cala contract it had ceased to become a requirement and appears to have ceased to become a requirement at this time. There are some attractions to this case, as it does appear the requirement for Brooke to be paid out first does drop out at about this time.

47. Mr Robins sought to counter this by drawing out the point that, in relation to certain of the offers Cala had obtained only regional, or full board approval, and ultimately what was required was L&G board approval, and this explains the price chip. In other words there was not really any price chip as the intermediate higher offer of £42 million was not made with full proceedable authority. He invited to me to conclude this was the reason for the reduction from £42 million to £40 million, and the £42 million was never advanced with full approval, including from the L&G board.

48. In my judgment I cannot draw any safe conclusions from Mr Robins' analysis on the documents in this respect. It was not an analysis advanced by Mr Fellows in his evidence. In addition I have not been provided with all the documentation from Cala's side: an example is the missing attachment to the email I referred to at paragraph 40, but I note, more generally, disclosure has not been obtained from Cala, and I have not seen any notes of the 8 November 2022 meeting (if they exist on Cala's side; I understood it to be said they did not on Desiman's side). Nor can I safely conclude simply because an intermediate offer of £42 million (as referred to on 10 November) went back down to £40 million (as reflected in the offer made on 26 October) this is due to a higher board decision causing that reduction to occur, or that the earlier offer would never have been given board approval. The final price, and the reduction (from £42 million to £40 million), was recorded as being in order to accommodate the payment terms required by Desiman, but the payment terms referred to on 10 November are not significantly different (or more favourable) to Desiman than those referred to on 16 November 2022. They are more favourable than the terms offered on 26 October (when a reduction down to £40 million was first mooted), but these were improved on by the next day (on 27 October), and by 10 November (when the offer of £42 million was discussed). I see no reason to conclude the explanation for the subsequent reduction is to do with the level of approval within Cala. On the face of it this reduction was not readily explicable from the payment terms disclosed on the face of the emails, and Mr Fellows could not explain it in his oral evidence. It provides further support to the conclusion that part of the price reduction from £42 million to £40 million may have been linked to Cala agreeing to no longer insist on the requirement Brooke be paid first. Moreover, the absence of any disclosure from Desiman, who should have the

documentation to enable the opposite to be demonstrated, also supports an inference being drawn there was some linkage.

49. However, as Mr Fellows explained in his evidence, and as is shown by the contemporaneous communications, by early November 2022 the figures did not work for Desiman in the same way: see in particular the email of 7 November 2022 from Mr Atkinson, referred to in paragraph 41 above. Whereas, with the offer of £48 million in September 2022, Desiman was willing to agree to Brooke being paid first, it was not willing to with the reduced offers in contemplation in November 2022. Even if, therefore, it may be said this reduction in the price offered from Cala was linked to Cala no longer insisting on this requirement, this is doing no more than restoring the payment waterfall in accordance with the rights Desiman already enjoyed. To put it another way, Brooke could not have insisted it be paid first as part of any assessment of whether Desiman obtained the best price reasonably obtainable, or on a wilful default basis. That being so, even if all or some of the reduction in purchase price on offer, from £42 million to £40 million, was linked to this issue, this did not involve a conferral of a benefit on Desiman which Brooke can complain about in this account.

50. There is, in addition, weight in the submission made by Mr Robins that the offers may have involved some testing by Cala of Savills/Desiman, the market having turned more in its favour. I do not therefore believe I can safely conclude, if Desiman was still willing to agree to Brooke being paid first, that this would necessarily have meant that Cala was willing to complete the deal at a figure higher than £40 million on the payment and other commercial terms ultimately agreed. That being so, Brooke cannot show that Desiman failed to obtain the best price reasonably obtainable.

51. A third allegation of Brooke was that maintaining the Hybrid Option Agreement at 5% was at the expense of getting a higher headline price for the Phase 1 sale, such as £42 million, or in any event that an enquiry should take place in relation to this. However the Hybrid Option Agreement was originally set at 5% - when reduced terms were offered by Cala at 10% on 26 October 2022 Ms Fenton advised that Desiman stand firm at 5% and Desiman did so. The allegation that maintaining the pre-existing terms of the Hybrid Option Agreement came at the expense of a higher headline price for Phase 1 is not supported by this sequence of negotiations, nor by any other evidence showing a higher price could and would have been obtained.

52. I should also note here at one stage in his submissions Mr Clarke suggested that in wilful default cases, where the allegation is that the mortgagee failed to obtain the best price reasonably obtainable, common law "but for" causation principles did not apply. This submission was made in order to meet the potential difficulty that no evidence had been adduced to show that Cala would have been willing to offer more. In particular he referred me to a passage of Lord Denning MR in

Standard Chartered Bank Ltd v Walker [1982] 1 WLR 1410 at 1416B where it was stated:

"*If it should appear that the mortgagee or the receiver have not used reasonable care to realise the assets to the best advantage, then the mortgagor, the company, and the guarantor are entitled in equity to an allowance. They should be given credit for the amount which the sale should have realised if reasonable care had been used. Their indebtedness is to be reduced accordingly.*"

53. Emphasis was placed by Mr Clarke on the words "*They should be given credit for the amount which the sale should have been realised*" as showing that the causation analysis applicable at common law is not one which should be applied to a breach of the equitable duty. Lord Dennings says "should" not "would". I do not believe those words bear the weight which Mr Clarke seeks to give them. They are as consistent with the notion that it is not good enough to say something different or additional should have been done if it cannot be shown the something would not have resulted in a higher sale price. Where the complaint is that the best price was not obtained it can reasonably be inferred this is the price that should and would have been obtained from a sale on the open market. In addition the causation issue raised by Mr Clarke was not one which was necessary for determination in *Standard Chartered Bank Ltd v Walker*. In other cases, such as for example in *White v City of London Brewery Company* above, different verbal formulations have been used: that which "*but for his wilful default, he would have received*" per Cotton LJ at 246, and the amount which "*ought to been got*" per Esher MR at 245. In addition such a submission does not fit easily with the observations of the Supreme Court in *AIB v Redler* [2014] UKSC 58, where equitable compensation for breach of trust was found to involve the requirement to show "but for" causation.

54. In my judgment where a person who is interested in the equity of redemption seeks to contend that the mortgagee failed to obtain the best price reasonably obtainable, they will ordinarily need to show that on a "but for" causation basis, to be determined on the balance of probabilities. More often than not this will involve independent valuation evidence being obtained to show what the true market value was. The court may apply certain presumptions, or a "fair wind", in favour of a claimant, where there is a paucity of evidence reasonably available. But the test remains, in my judgment, that in most cases it must be shown a different and more favourable outcome would have been obtained. I say in "most cases" as it is perhaps possible in certain cases the court might be persuaded to adopt a loss of chance analysis, though it was not suggested to me this was such case, and it is not easy to see how that would be so where the enquiry is to ascertain the market value. I need not consider this point further here.

55. In conclusion therefore, on the evidence before me I do not accept that the account should be surcharged by £2 million in favour of Brooke to reflect the

so-called £2 million price chip. The only remaining question is whether or not I conclude Brooke should be entitled to adduce further evidence to explore this issue, perhaps on the basis that further disclosure should be ordered, and to make directions to enable that further enquiry to be undertaken. I am currently minded to conclude that there is no realistic prospect of Brooke adducing further evidence which would enable them show a surcharge figure in a substantial sum. As noted above, its main case theory for the price chip before me was the chip was linked to a change in the terms relating to Brooke being paid first, but I have assumed that this contention is valid for the purposes of my analysis, yet it does not assist Brooke. Brooke has not advanced any general sale at undervalue allegations divorced from the £2 million chip or £3 million Spine Road allegations. It has not pursued the separate allegation that sale of the commercial land, as part of the Cala contract, involved a sale at undervalue (which was issue 7). Nevertheless given the potential argument that there may be some evidential overlap between this issue and the £3 million Spine Road point below I am willing to hear further submissions on this at the consequentials hearing.

Analysis and conclusions on the £3m Spine Road

56. The contention there should be a surcharge in relation to the Spine Road extension was advanced principally on the basis it was a benefit which Desiman should give credit for. Mr Clarke submitted the amount which it should give credit for was the greater of either the cost of building the Spine Road extension, or the value generated from it. However, the basis of the principle is that it is the receipt, benefit or profit from "the mortgaged property" or "by and out of" that property which is to be accounted for, not the cost incurred to generate it. The cost to generate this value may, however, be evidentially relevant to assessing the resulting value or benefit.

57. I accept, however, Mr Clarke's submission that the work which Cala has agreed to do on the Spine Road extension under clause 35 of the Cala contract (as part of the Infrastructure Works) was a benefit "by and out of" the mortgaged property, and the facts of this case are very different from that of *White v City of London Brewery Company*. The benefit here is not one deriving from a "common place" business operated on the land, but it is a benefit coming from work to be done to the mortgaged property, as part of the sale to Cala, and more particularly from a change to the Charging Orders Land. It is value being generated "by and out of" the land. This conclusion is amply demonstrated on the evidence before me. As set out in paragraphs 32-37 above, (i) the original offer from Cala at £48 million did not include the Spine Road extension and the plan was amended to allow for it (this included adding small parts of land to the section of the road marked M to N to allow for the full width of a Spine Road to be built on that section, which was not part of the original plan or tender from Cala) (ii) this was offered or agreed to by Cala, on top of the £48 million, as an additional benefit to secure preferred bidder status (whether it is or was called a

"sweetener" or "bonus" amounts to the same thing in my judgment) and (iii) the result of this work being done on the mortgaged land, the Charging Orders Land, was to generate a substantial benefit to the first ranked secured creditor (Desiman), of the Phase 2 and 3 land, and the residential development planned on those parcels. I was taken through the s106 agreement, and the plans by Mr Robins, who drew my attention to the provisions of the agreement in relation to bus stops, and community infrastructure, but none of that displaces my overall conclusion, from the contemporaneous documents, that the original tender from Cala was amended to include a "sweetener" and this "sweetener" involved works which were intended to generate and generated benefits and value to the Phase 2 and 3 land arising from additional work which Cala contractually agreed to perform. No doubt Cala considered this would ultimately likely be for its long-term benefit too, given the Hybrid Option Agreement. But none of this suggests it was not a non-monetary benefit coming from the mortgaged property which was collateral and should not be accounted for. Indeed the Spine Road could not be built North of point M on the map without the Charging Orders Land. Mr Fellows' evidence was not to argue it was not a benefit coming from the mortgaged property; he simply baulked at Cala's costs estimates, and suspected the true actual cost to Cala was lower. Moreover, he was not considering the benefits deriving from the sale in relation to Phase 1 in isolation. As noted at paragraph 19 above, his objective was to seek to derive as much as value as possible overall, and so an additional benefit for the Phase 2 and 3 land, and work on Phase 1 assisting in unlocking this additional value, was viewed as a positive by him, as it was by the Administrators.

58. Against this Mr Robins argued that the benefit which Desiman received in relation to the Spine Road extension was not qua mortgagee but qua a person with an interest in the land next door. True it is that the benefits to Desiman derive from the fact that it will receive a benefit from the increase in value of the land next door, rather than a further payment for the Charging Orders Land, but the important point is that the value of the land next door is generated by the work being done on the Phase 1 Land, including the Charging Orders Land. It is still the Charging Orders Land which generates that benefit. This was part and parcel of the consideration provided to Desiman under the Cala contract, and a "bonus" or benefit which flowed to Desiman as a result. It was a non-monetary benefit, in the sense it was not a monetary payment, but it was a benefit which may be measured in money's worth and should be accounted for. It could as easily have been expressed as an additional sum which Cala would agree to pay for the Spine Road extension work. It has been pointed out by Desiman that Desiman alone was not the seller, and the Cala contract was also entered into on behalf of two of the Companies (acting by the Administrators), and that the Companies (or some of them) will or may also benefit from the increase in value having regard to the profit share split of 75:25 (in favour of Desiman). It is suggested this should reduce the benefit for which Desiman should account for by 25%. I shall return to address this point in paragraph 63 below.

59. Mr Robins also argued that the court should take note of the fact that as part of the Cala contract it was also agreed to retain certain land, a "Ransom Strip" as defined in that contract, which provided the opportunity for further gain in the future in the event that land beyond the Northern part of the development land owned by the Companies, called the Gammon land, was granted planning permission. It was said that by building the Spine Road all the way up to the Northern boundary, from M to N (ie that part of the Spine Road extension which did not need to built, or not to the same standard), resulted in this additional benefit to this retained land, which Brooke would have security over. It was contended this benefit also needed to be taken into consideration. The difficulty with this submission is two-fold. First, no evidence was before the Court as to what this benefit was worth, or whether it had any substantial value. Secondly, it does not detract from the notion that the Spine Road extension provided Desiman with a substantial non-monetary benefit.

60. Mr Robins also argued that much of what was done in relation to Phase 1 might also be said to be to the benefit of Phases 2 and 3, and it would be wrong to separate out the Spine Road extension. This is correct in the sense that it was undoubtedly recognised that Phase 1 helped to unlock value in Phases 2 and 3. It is also the case that the section 106 scheme required work and co-operation to unlock further residential buildings beyond certain levels, and some of the obligations which Cala also covenanted to do included the school site and playing field, to the North of the site. Again, however, none of this detracts from the notion that the Spine Road extension work was agreed as a variation of what Cala was offering initially, and was an additional non-monetary benefit or advantage, even if it might be thought this was an accidental by-product of Cala's efforts to become preferred bidder. Even if the advantage which derives from the land may be said to be accidental in some way, it is still an advantage or benefit which comes from the land and must be accounted for.

61. A further argument was that in any event Brooke's position was protected by the doctrine of marshalling. If, as Desiman submitted to be the case, Desiman had been repaid its lending secured ahead of Brooke then Brooke could gain the benefit of Desiman's wider package of security. It followed it would also, therefore, benefit from the increase in value of Phases 2 and 3 land. That being so, there is no reason why equity should intervene on the account; indeed it might be better to wait and earn interest at 8%. This has some level of attraction; it highlights that the question of whether or not there should be surcharge for the Spine Road extension of £3 million, or lesser sum, may only be said to be temporary in that if Brooke is paid less now it should be paid more later down the line. However the opposite also is true in the sense that if Desiman is paid less out of the £10 million, by reason of a surcharge on the account, then it should also stand to receive more later. It is also charging interest on its indebtedness. On the unusual facts of this case the Spine Road extension work forming part of the Cala contract may be viewed as a shifting or transfer of value, generated by work contracted to be done on Phase 1 land, for the benefit

of Phase 2 and 3 land. I see no reason why simply because this may result in an increase in value to Brooke, if an adjustment is not made on the account, this militates against the equity of making an adjustment to the account now, so that Brooke gets paid earlier than it might otherwise have done.

62. Given that a developer would likely look to make some profit on the works it carries out, it seems likely to me that if the cost of these works was £2.5-2.85 million then the increase in value to Desiman, in relation to Phase 2 and 3 land, is likely to be more. However for present purposes it is reasonable to conclude, on the equitable account, and absent further and better evidence to the contrary, that a surcharge should be made in favour of Brooke of at least £2.4 million, this being the lowest cost figure referred to by Cala in September 2022. In my judgment Mr Fellows' estimate of £1 million being the true actual costs to Cala of this additional work, provided in oral evidence, is less reliable, in this context, than the range of figures put forward by Cala at the time. It was an off the cuff remark by Mr Fellows, which is not supported by any analysis or documentary evidence. The figures of £2.4-2.85 million were recorded contemporaneously, and considered by Savills, and there is no suggestion by them that they are not being viewed as being a genuine estimate by Cala at the time. They were attributed real value at the time, and I anticipate Mr Fellows' retrospective assessment is likely to be coloured by his more general frustration with the way that the Cala negotiations proceeded. I also remind myself that the evidence of Mr Richardson, the administrator, was to the effect that the Spine Road extension was viewed as providing a substantial benefit to Phase 2 and 3, and it was one of the commercial benefits he identified which made the Cala offer more attractive than other bids. It seems less likely to me it would have gained as much prominence in Mr Richardson's thinking if it was not viewed as being so substantial.

63. Allowing for the possibility that Cala may have wished to emphasise positive numbers, and contributions by it in relation to the Spine Road extension work, I will take the lower end of the range of numbers stated, and, subject to the 75:25 profit split argument (referred to in paragraph 58 above) assess the surcharge sum, on the evidence currently available to me, at £2.4 million. I can see some force in the argument this sum should be reduced to £1.8 million if 25% of the benefit of the increase in value will go to the Companies. I am willing to hear further argument on this at the consequentials hearing but it is not clear to me at present, even if the point of principle is correct (as to which I will hear further argument), that the increase in value will not all first go to Desiman (since, depending on the numbers, Desiman may still stand ahead of the Companies in relation to other sums which it may be entitled to be paid 100% of before any 75:25 split issue arises). I also note that £2.4 million is the sum which I conclude should be adjusted for on a wilful default basis (see paragraphs 64 to 68 below). Accordingly, I am presently minded to conclude £2.4 million is the sum which should be adjusted for out of the final tranche payment which was received on 21 February 2025, subject to what I say in paragraph 69 below.

64. Mr Clarke also submitted in relation to the Spine Road extension, if the Court rejected his primary submission that this was a non-monetary benefit for which Desiman should account, then, in the alternative, a surcharge should also apply on a wilful default basis. Whilst it appears to be unnecessary for me to determine this submission, given my conclusions on Brooke's primary submission in relation to the Spine Road extension (subject to the 25% reduction argument referred to in paragraphs 58 and 63 above), it was fully argued and so I will address it here. The reason for the wilful default submission was because it was contended that Desiman did not obtain the best price reasonably obtainable for the Charging Orders Land, sold as part of Phase 1. The best price would have been obtained, so it was contended, if, instead of the sweetener, or bonus, Desiman had said to Cala, we will agree you do not have to build the Spine Road extension and please now submit an improved price. On this hypothesis, so Brooke submitted, Cala would naturally have offered a higher price. I also accept this alternative submission.

65. Mr Fellows frankly accepted he did not consider, and Desiman did not consider, what Desiman could best obtain for the Phase 1, or Charging Order Land, on its own (see paragraphs 19 and 57 above). In closing submissions Mr Robins suggested that it was not put to Mr Fellows that there would have been any difference in the price obtained if the Spine Road extension was stripped out of the Cala contract, but this was not a question which Mr Fellows could answer: he had not posed that question at the time, and he was not acting for Cala. I do not consider it was a question Mr Clarke needed to put.

66. Nothing I state in this judgment should suggest any conclusion of bad faith on the part of Desiman in this respect (notwithstanding, that, at times, Brooke's evidence suggested Desiman was acting in bad faith), but this is not a case of Desiman addressing its mind to what was the best price which could be obtained for just the Charging Orders Land, or just Phase 1. It cannot be said by Desiman therefore that reasonable care was taken to obtain the best price for the Charging Orders Land parcel alone. The likelihood it did not obtain the best price reasonably obtainable for that land is increased in these circumstances, especially when coupled with the conclusion that the Cala contract, and the Phase 1 land, was viewed as a gateway to wider benefits for Phases 2 and 3. Nor was this outcome of particular concern to Mr Richardson; the Administrators were concerned to try to realise the best value for creditors as a whole, and for shareholders where possible, and he was looking at the whole. Nor was Savills retained on the basis that the best price needed to be obtained for the Charging Orders Land. Nor did Cala make a bid on this basis. Its preferred bidder status was achieved because it offered something of value beyond Phase 1. Further in any event, the marketing process, which shows that the best value was obtained overall, does not answer the question of whether more value was obtained for Phases 2 and 3 by reason of a bonus being added into Phase 1 for the benefit of Phases 2 and 3.

67. The question of what was the best price reasonably obtainable for the Charging Orders Land, in these circumstances, is a hypothetical which must be addressed by the Court having regard to the contemporaneous documents, and doing the best it can by assessing the commercial likelihoods. In this respect the task for me is similar to that which faced North J in *White v City of London Brewery Company* who was required to assess, as best he could, what the likely rent would have been on the assumption there had been no beer tie. Even though this was described by the Court of Appeal as a "guess", this was an estimate which was not disturbed on the appeal.

68. Cala was never required to assess the consideration for the Phase 1, and Charging Orders Land, in isolation. I approach this question on a "but for" basis, having regard to what I have already found to be the correct approach in paragraphs 52-54 above. Whilst it cannot be known for certain whether Cala would have been willing to pay more, if it had been relieved of the Spine Road extension work, it seems likely to me it would have done. On this counterfactual it would have been relieved of its obligations to carry out part of the Infrastructure Work under the Cala contract, and thus a negative figure in its appraisals would have been removed. Likewise, this would have freed up funding in the same amount as the cost to it of doing these works, which were not necessary for unlocking value in the first 500 residential units in Phase 1. The best evidence I have before me is that the additional cost was being calculated by it as being a cost of £2.4-2.85 million. If it did not have to incur this cost then it is logical to conclude that the value to it of Phase 1 should be increased by the same amount. It is no answer to this to say, we can see from the negotiations that it was only willing to go up to £40 million. This is to ignore the fact that it was not just £40 million, but also the cost of the Spine Road extension. This additional part of the Spine Road was specifically identified and provided for as an Infrastructure Work item in clause 35.8 of the Cala contract, and with certain step in provisions in favour of the seller/lender if the work was not carried out. This reinforces the notion the Cala contract was about delivering value beyond what Cala had acquired as part of Phase 1. On the balance of probabilities I see no reason to conclude that if Cala had been relieved of this additional financial burden it would not have increased its headline price by a commensurate sum i.e. by a sum of no less than £2.4 million.

69. At present I am inclined to the view that I should determine the surcharge amount on the Spine Road extension issue, in the sum of £2.4 million, and finally. I do not consider it likely that further directions or enquiries are likely to permit of a more precise determination of the sum involved, or that this would be beneficial on a cost benefit analysis (and bearing in mind that this is not an issue of lost value, but instead likely deferment of value). However I am mindful that the parties may wish to address me further on this issue, and it might be argued that if there is to be disclosure or further direction on this issue then there should also be in relation to the £2 million chip allegation, given the potential

for overlap. In the circumstances I make clear I am open to hearing further argument on this issue at any consequentials hearing.

(2) What liabilities were secured in favour of Desiman under what were described as "Facility C" and "Facility D") (issues 11 and 12)

70. We are now moving to the other side of the account, where credit is given to the mortgagee for principal and interest and other fees and expenses properly chargeable against the land. There is no dispute raised in relation to the lending provided by Desiman under what has been described as Facilities A and B, used to acquire certain of the land at Himley Village by the P3 parties. Brooke has raised a question in relation to what has become known as "Facility C", however, on the basis that the monies advanced by Desiman to acquire the 59 acres of land in the name of CFJL, registered title ON360325, was not the subject of an executed facility.

71. The reason for this was explored in the 2021 Judgment. The transaction which is the subject of this issue was described by me in that judgment as a curious one: see at [38]. Originally it was contemplated that lending would be from Desiman to the P3 parties, and terms were agreed for that, subject to Brooke agreeing to remove its unilateral notice over the relevant parcel of land. Brooke did not agree to the removal of the notice and so the transaction was restructured so that the land was acquired into the name of Desiman 2, with lending being provided by Desiman to Desiman 2. I held at [343]-[345] of the 2021 Judgment that the transaction, notwithstanding its description as an option, should be characterised as a security arrangement, the intention being that Desiman would earn the agreed fees and interest on lending, as had previously been agreed when it was envisaged that the loan would be from Desiman to the P3 parties. Brooke accepts it is bound by these findings. They are sufficient to dispose of the question raised by Brooke, since the amounts claimed by Brooke under what is now termed Facility C represents the same fees and interest as were previously agreed. These are the burdens associated with the benefits to Brooke of recognising the transaction as a security one, and are burdens I found to be applicable.

72. The points raised in relation to Facility D can similarly be resolved in short order. It is not contested, in relation to Facility D, that a document was put in place whereby Desiman agreed to make further advances: it was executed on 7 May 2021. This brought the total facility amount to just over £17 million. The principal purpose of Facility D was to provide the P3 parties with monies to settle the claim which had been brought against Brooke. Some of these monies were in fact used for a different purpose and no settlement was reached. Some was used to pay down monies due under Facilities A and B (£3.5 million) and some were used to pay the P3 parties' legal costs (£827,200) and some was paid to Calder & Co (£675,000), a firm of accountants acting for those parties. Initially Brooke questioned all these sums, though by the time of the hearing

recognised that the use of £3.5 million, to pay down monies under Facilities A and B, was a legitimate use of the facility, but the contest in relation to the sums paid for P3 parties' legal costs and Calder & Co was maintained. However, Desiman could agree to vary or waive the purpose requirements set out in the facility (see clauses 17.1 and 17.2) and I find this is what they did. This is reflected in the email chains of 11 May 2021 and 10 June 2021 respectively, and was confirmed in the evidence of Mr Fellows, which I accept.

73. I should add, for completeness, Desiman provided a facility after the 2021 Judgment, and the charging orders were granted in favour of Brooke, but do not seek to contend they have priority for the same over Brooke (having regard to the terms of the order I made on 10 December 2021). I therefore do not address the same in this judgment.

74. Whilst there were originally some arguments in relation to the period for which interest should apply, by the end of the hearing I did not understand there to be any remaining significant point of principle between the parties. Brooke had moved to the position that the redemption statements or forecasts provided by Desiman to date did not enable the question of whether there had been a proper application of the terms in relation principal and interest (which Desiman claimed priority over before Brooke). Mr Clarke submitted that what was required was for Desiman to produce a chronological cash account identifying the advances by date, the interest charges, arrangement fees, and third party fees and costs applied, together with the receipt entries on each of the relevant dates, so that the computation was clearer and the calculations could be checked for errors or omissions. In fairness to Mr Fellows he appears to have recognised that there would be some sort of checking or audit process to be undertaken in relation to his statements. It had not happened with the Administrators, and understandably so; they might reasonably expect Brooke, the party next in line, would be best placed to do so. I am inclined to accept Mr Clarke's submission that the preparation of a further detailed chronological cash account document is a sensible course to adopt, and I did not understand Mr Robins to argue the contrary. Such a document in a Scott schedule type format, which would enable Brooke to add any counter points which might arise on its scrutiny, with space for a reply from Desiman, is likely to assist identify the remaining differences and allow for more rigorous checks to be performed by Brooke. I will, if necessary, hear further submissions on the same at the consequentials hearing, but I now need to address the third party costs and expenses issues.

(3) What costs and expenses fall to be deduced out of the receipts, and whether the court should direct assessment in relation to some or all of them (issue 8)

The contractual provisions and principles

75. As set out in clauses 5.1, 6.2, 6.1 of the amendment and restatement agreements between the Companies (or one of them) (as Borrower) and Desiman (as Lender) dated 16 October 2018, 8 March 2019 and 4 July 2019/3 October 2019/7 May 2021 respectively:

"*The Borrower shall promptly on demand pay the Lender the amount of all costs and expenses (including legal fees) reasonably incurred by it in connection with the negotiation, preparation, printing and execution of this Agreement and any other documents referred to in this agreement*".

76. As set out in clauses 9.3, 9.4, and 9.6/9.7 of the facility agreements between each of the Companies (or one of them) (as Borrower) and Desiman (as Lender) dated 16 October 2018, 8 March 2019 and 4 July 2019/3 October 2019/7 May 2021 respectively:

"*The Borrower shall pay, on demand, all reasonable costs and expenses (together with any value added tax on them) that the Lender incurs in connection with the negotiation and preparation, execution, amendment, extension, alteration, preservation and enforcement of the Loan and/or the Finance Documents and in respect of providing redemption statements, redeeming the Loan and evidencing the discharge of the Security Document …*"

77. As set out in clauses 16 and 20 of the legal charges dated 7 March 2018/6 January 2020 and 23 October 2020 respectively there is a provision as follows:

"*1. **Costs**. The Chargor shall promptly pay to, or reimburse, the Lender and any Receiver, on a full indemnity basis, all costs, charges, expenses, taxes and liabilities of any kind (including, without limitation, legal, printing and out-of-pocket expenses) reasonably incurred by the Lender, any Receiver or any Delegate in connection with: (a) this deed; (b) taking, holding, protecting, perfecting, preserving or enforcing (or attempting to do so) any of the Lender's, a Receiver's or a Delegate's rights under this deed; or (c) taking proceedings for, or recovering, any of the Secured Liabilities, together with interest, which shall accrue and be payable (without the need for any demand for payment being made) from the date on which the relevant cost, charge, expense, tax or liability arose until full discharge of that cost, charge, expense, tax or liability … at the rate and in the manner specified in the Facility Agreement.*

*2. **Indemnity** … The Chargor shall indemnify the Lender, each Receiver and each Delegate, and their respective employees and agents against all liabilities, costs, expenses, damages and losses (including but not limited to any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal costs (calculated on a full indemnity basis) and all other professional costs and expenses) suffered or reasonably incurred by any of them arising out of or in connection with: (i) the exercise or purported exercise of any of the rights, powers, authorities or discretions vested in them under this*

deed or by law in respect of the Charged Assets; (ii) taking, holding, protecting, perfecting, preserving or enforcing (or attempting to do so) the security constituted by this deed; or (iii) any default or delay by the Chargor in performing any of its obligations under this deed".

78. Each of the relevant security documents secures payment of the "Secured Liabilities". This is a term defined to include all sums payable under the facility agreements or the security documents. Accordingly, anything payable under any of the provisions mentioned above is a Secured Liability which is secured by Desiman first-ranking security.

79. It can be seen that the widest provisions in relation to costs are those contained in the charge documentation, with the Lender being entitled to be paid or reimbursed on a full indemnity basis under sub clause 1 for "*all costs, charges, expenses, taxes and liabilities of any kind*" but they still have to have been reasonably incurred by the Lender in connection with the specific identified categories falling within (a) to (c), most notable of which, for present purposes are the activities within (b) of "*taking, holding, protecting, perfecting, preserving or enforcing (or attempting to do so) any of the Lender's, a Receiver's or a Delegate's rights*".

80. Under sub clause 2, within the charge provisions, there is also an indemnity for "*all liabilities, costs, expenses, damages and losses*" that are "*suffered or reasonably incurred by any of them"* and that are *"arising out of or in connection with"* the identified categories of activity in (i) to (iii), which contemplates similarly wide activities as identified above under (ii) and also involving any default or delay on the part of the Borrower/Chargor (i.e. the Companies).

81. Even where costs are assessed on an indemnity basis, they must be reasonably incurred and reasonable in amount; see *Goomba Holdings (UK) Ltd v Minories Finance Limited (No 2)* [1993] Ch 171 and the discussion in *Fisher & Lightwood* at 55.15.

82. In addition CPR 44.5(1) provides that (subject to paragraphs (2) and (3), where the court assesses costs which are payable by the paying party to the receiving party under the terms of a contract, the costs payable under those terms are, unless the contract expressly provides otherwise, presumed to be costs which have been reasonably incurred and are reasonable in amount and the court will assess them accordingly.

The issues and overall approach

83. For the purposes of identifying the issues between the parties a summary schedule was prepared for the hearing before me (at CB/1283-1284 & TB1/6747-6748) and the parties invited me to determine as a matter of principle

(i) whether or not the third party fee or cost was an activity which fell or was capable of falling within the relevant contractual provisions, (ii) whether the fee or cost was reasonably incurred and (iii) whether it was reasonable in amount.

84. In general terms Mr Clarke submitted that the exercise I was being asked to embark on was whether I should direct an account in relation to the items claimed so that in relation to the items the entitlement or amount could be challenged. He submitted, in general terms, that the court should be predisposed to order an account across the board, or across broad categories, having regard to the fact that it was apparent the redemption statements or forecasts produced by Mr Fellows were numerous, were not all statements of the standing of an account at any particular time (some were estimates or projections), they had not been the subject of any detailed audit or checking process, there were obvious areas of concern or potential overlap, and the court can be satisfied that there would be great utility or at least some utility in that exercise.

85. For his part Mr Robins invited me to determine matters of principle as far as I felt I could, or were appropriate, and invited me to reject the need for any account, on at least some of the items in question, or going beyond questions of quantum, but he accepted in closing submissions (as explained further below) if certain items were recoverable in principle it would be appropriate for an account to be taken in relation to at least some of them to assess their reasonableness. Having regard to the overriding objective, and the matters set out in CPR 1.1, I consider it appropriate for me to determine as much I can on matters of principle. I also have in mind when doing so Mr Clarke's overarching points as summarised in paragraph 84 above, as well as individual submissions on each different item.

86. I propose to take each of the items by reference to the headings in the summary schedule I have referred to in paragraph 83 above and by reference to the three questions of (i) whether the item was or was potentially within contractual scope, (ii) whether it was reasonably incurred and (iii) reasonable in amount. I shall record where I understood there to be common ground on these points, and where the points were disputed I shall give my ruling on them, and reasons for the same. Given the number of points I will set out my reasons in brief terms, but if any of the parties wish me to amplify, I am willing to consider doing so at the consequentials hearing. That also applies if any of the parties consider I have omitted to address an item they wished me to address and determine.

(1) Savills plc

87. The first item on the list is Savills' Cala Sale commission fee, made up of 6 entries with 5 corresponding invoices, incurred in the sum of £487,831.78. Subject to checking against a final cash account (and a potential minor difference – it is not immediately clear why more than £480k would be justified

as the agreement was 1% of realisations) I did not understand this sum to be disputed by Brooke.

(2) CG&Co

88. The second item are the Administrators' fees, involving 9 different invoices and totalling the sum of £480k. Originally these were agreed, but by the time of the hearing they were challenged by Brooke. Desiman did not take a point about the lack of any amended pleading in this respect.

89. The basis for the challenge was that whilst the Administrators had sought and agreed to be paid on a percentage basis – 1% - in relation to distributions to creditors overall, this basis for charging did not and should not apply to the fees which should be charged to the realisation of the Charging Orders Land.

90. In response to this Desiman did not contend that what was agreed with creditors overall was relied on. Instead they adduced evidence from Mr Fellows who confirmed that at the outset he discussed with CG&Co what they were proposing to charge, and it was agreed with Mr Richardson of CG&Co that they would charge 1% on realisations. Desiman submit that Administrators' fees incurred in the connection with the sale of a charged asset are payable from the proceeds of sale in priority to secured creditors. They submit these were costs reasonably incurred in the preservation and realisation of the property, and in the circumstances are recoverable, drawing my attention to the unreported decision of Registrar Simmonds in *Townsend v Biscoe* (unreported 10 August 2010) cited in *Lightman & Moss on the Law of Administrators and Receivers of Companies* 6th Ed at 20.042.

91. In *Townsend v Biscoe,* the administrators had incurred costs in connection with the sale of charged property. It was contended that the only permissible deductions were the "*estate agents' charges and solicitor's charges for actually selling the properties in question*" (at [10]). The court rejected this argument and applied *Berkeley Applegate (Investment Consultants) Ltd (No 1)* [1989] Ch 32 to hold that the administrators' costs and expenses were properly deductible from the proceeds in priority to the claims of the secured creditor. It was observed that remuneration of LPA receivers would have been properly deductible, and that the administrators were essentially performing the same role.

92. Desiman rely on the wide terms of sub-clause 2 in the charge documentation, which provides for an indemnity for "*all other professional costs and expenses) suffered or reasonably incurred by any of them arising out of or in connection"* with " *(i) the exercise or purported exercise of any of the rights, powers, authorities or discretions vested in them under this deed or by law in respect of the Charged Assets* [including the power to appoint administrators] [and/or] *(ii) taking, holding, protecting, perfecting, preserving or enforcing (or attempting*

to do so) the security constituted by this deed … or (iii) any default or delay by the Chargor in performing any of its obligations under this deed". They submit these were professional costs reasonably incurred in connection with activities (i) and/or (ii) and/or (iii).

93. I accept Desiman's submissions in relation to this item. The administrators were performing a role similar to that of a receiver in relation to the charged property. Their functions were wider than that too, and thus some of their activities may be said to relate to matters which are not connected with the charged assets. However Mr Fellows clarified and confirmed in his evidence that he had reached an agreement with Mr Richardson that the charge would be 1% of realisations, and the invoices raised by CG&Co were on account of what had been agreed in this respect. This evidence emerged late in the day and was informal (no written document was produced), but Brooke cannot complain about that as originally they were not challenging this item. I accept the evidence of Mr Fellows that this is what he agreed with Mr Richardson orally and this was a professional cost and expense reasonably incurred and falling within sub-clause 2.

94. That just leaves the question of whether the amount was reasonable. Desiman relied on 3 pieces of evidence in this respect. The first was that 1% was a percentage agreed with creditors overall, and a percentage approach is specifically provided for in the Insolvency Rules and is not objectionable per se. Secondly, the fact that creditors had agreed 1% provided support this was a reasonable percentage (but did not suggest what was agreed with the creditors covered the position – instead they relied on what was agreed between Mr Fellows and Mr Richardson). Thirdly, Savills also agreed a 1% figure.

95. I accept that this evidence supports the conclusion that the amount claimed is a reasonable amount. I do not consider it is likely to be productive for there to be any further enquiry or directions in relation to this item.

(3) Glanville, (4) MDT Receivers, (5) Tracing Fees, (6) Stephen Rodrigues and (7) Cherwell DC

96. In closing submissions Mr Clarke indicated these items were no longer being challenged, for a mixture of principled and pragmatic reasons, and so I say nothing more about them here, other than to confirm they can be included in the account.

(8) Underwoods

97. Underwoods were the solicitors retained by Desiman and have carried out various items of work for Desiman which have been grouped under 7 different sub-headings. Mr Clarke made an overall submission in relation to these items that part of the difficulty was that not all the invoices applied exclusively to each

category. He emphasised that whilst he was submitting there were clear areas where an assessment was required, given the nature of the overlap it would be better if the court directed an assessment of all of them, assuming they were within scope and also reasonably incurred in principle. I bear those submission in mind and will now consider each sub-category.

(i) Property/property finance advice

98. The first sub-category were invoices which related, at least predominantly, to work done by Underwoods in relation to the property which is subject to the security. There was no contest that this was within scope, and it was reasonable to incur these costs. The only point taken was that this sub-category, which totalled £165,980.32, should be the subject of an assessment. The work spans a period from 2021 to 2025 and includes the costs of negotiating and agreement of various facilities and security documents, and time taken up with the proposed sale of the Phase 1 land to Countryside, which ultimately fell through. I strongly suspect that there is likely to be limited scope for challenge in relation to these items, but I bear in mind the overview submissions made by Mr Clarke and that these costs have not been assessed. Given I have concluded other items of Underwoods should be assessed, and the risk of overlap, I direct that these shall be the subject of an assessment too. I anticipate Desiman may also be able to request some of these costs be assessed on a client and solicitor basis too, but that is a matter for it.

(ii) Original Litigation

99. This sub-category, which totals £160,657.50, relates to the original litigation which came before me for trial in 2021. I did not understand there was any significant dispute that this cost was within scope and reasonably incurred, but the main objection taken in relation to it was that it included, or overlapped, with the costs of Desiman which had already been subject to a cost order on the standard basis. I questioned whether an indemnity costs assessment would make any difference, given that any reduction for proportionality reasons would be likely to be low given the value of the claim. I was informed in closing that the costs were assessed at a high percentage – at 86% - and therefore Desiman would not be contending that these costs would likely benefit from being assessed on an indemnity basis. I would have been inclined to order that if they did wish them to be assessed again they would have to bear the costs of that exercise as it would be wasteful to have two assessments (cf. the decision and observations made in *Gomba* to the effect that whilst a party who has a contractual indemnity may not be precluded from relying on that indemnity if costs have already been awarded and assessed on a standard basis, there may be adverse cost implications for that party if they failed to consider and raise the point before the standard assessment occurred).

100. In the circumstances most of the invoices (the first, second, third and sixth) in this category fall away – in the sense they do not need to be assessed – though my understanding was that it was still thought two of the invoices (fourth and fifth) involved costs of the P3 parties which Desiman had born and which it was said were still recoverable. It is not immediately clear to me why the fifth invoice – which has a date of 2 March 2022 – should have been paid by Desiman having regard to when the Companies went into administration, and the fact that Desiman is not claiming priority for further advances after 10 December 2021 (or should not be). It is possible the fourth invoice, dated 23 November 2021, may fall into a different category, though the overlap also needs consideration. Subject to the point of principle in relation to the fifth invoice being checked, I direct that the fourth and fifth invoice be assessed.

(iii) Dekra Litigation

101. This is for a relatively small sum of money - £3,948 - and concerned a consultation by Desiman in relation to the litigation brought by Dekra to check whether or not those proceedings might adversely affect the position of Desiman in relation to its security. In broad terms it seems to me this is within scope, and it was reasonable to incur the relatively modest fees which were incurred. I see no utility in ordering an assessment, and given the small sum involved I consider this would be disproportionate.

(iv) Brooke Enforcement

102. The total invoices are £213,163.78. They cover the detailed cost assessment pursued by Desiman against Brooke, together with other items. This falls into a similar category to the Original Litigation. To the extent these are costs incurred in an assessment process I see no reason why they should be assessed again, and did not understand Desiman to suggest they should. To the extent costs were incurred in that assessment and are payable in favour of Desiman the same applies. I understand therefore that the vast bulk of these invoices have already been addressed, but to the extent they have not then they should be the subject of an assessment.

(v) Brooke Winding Up

103. This sub-category comprises of invoices totalling £146,760.09. The costs incurred by Desiman in relation to its winding up petition against Brooke have already been the subject of consideration and a judgment of Andrew Twigger KC sitting as a Deputy High Court Judge: [2024] EWHC 357 (Ch). This recites much of the relevant background and history to the winding up petition, which was dismissed. The winding up petition, and another application for a stay, came on for a hearing before me on 27 June 2023. I did not decide the matter finally on that occasion but I was satisfied that there was a real prospect that Brooke might establish that the winding up petition was an abuse of process for two

reasons: because there was no obviously useful purpose in it being made, and because a, if not the, motivation for the petition being brought was Desiman's frustration with Brooke's attitude and concern it would bring further litigation. In other words there was a real prospect of showing the main reason for the petition being presented was to try to stop Brooke from bringing further applications or litigation before the Court. Ultimately the winding up petition was compromised on the basis that Brooke gave an undertaking in relation to the receipts due to be paid to it from the Cala sale proceeds. As noted in paragraph 15 above, this provided some security for the sum of £308,599.81, being the sum required to satisfy the assessed costs of Desiman under the order of 10 December 2021. The matter came on before Andrew Twigger KC to determine the costs of the petition and the stay application. He concluded Brooke was the successful party and ordered Desiman to pay 80% of the costs. Having regard to the reasons he set out in his judgment, and my own observations as regards these proceedings, I have considerable doubts as to whether these costs, even assuming they are within scope, were reasonably incurred, or reasonable in amount. I shall direct that there be an account and enquiry in relation to these costs and Desiman will need to show that it was reasonable to incur the costs of a petition at all and if they manage to show that, that it was reasonable to continue to incur them, and that they are reasonable in amount. As part of that enquiry Desiman will need to explain its motivations for presenting the petition and taking the stance it did in circumstances where the undertakings did not advance its position significantly beyond what the position would have been if it had waited for the monies to come in from Cala.

(vi) P3 Enforcement

104. This item of cost totals £159,096.38 and mainly concerns the costs of enforcing personal guarantees provided by Mr Nardelli and Mr Johnson. The personal guarantees were part of Desiman's security for the debt and so in principle this cost item is potentially within scope (either as a matter of contract or on the basis of application of the principle referred to in *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26 at 33 per Nourse LJ), but there remain the questions of whether or not the costs were reasonably incurred and reasonable in amount. Mr Fellows' oral evidence was that initially these proceedings were not considered, and it was only when Mr Richardson questioned why they had not been that Desiman considered it may be appropriate to pursue them. The enforcement proceedings were pursued and bankruptcy orders have subsequently been made against Mr Nardelli and Mr Johnson, though I understand permission has been given to appeal against those orders and an appeal is pending. Mr Fellows' evidence was that he understood one of Mr Nardelli or Mr Johnson might have assets and it was said that generally speaking a creditor is left with a choice of how and who they pursue as part of their security net. Whilst this is undoubtedly true it does not provide the secured creditor with immunity from consideration of the question of whether the costs were reasonably incurred or reasonable in amount. I am far

from satisfied that any reasonable cost benefit analysis was undertaken in relation to this item or that the sum incurred is reasonable. It seems likely to me on the information I have seen that a substantial reason if not the main reason for this litigation was to try to shut down Mr Nardelli and Mr Johnson from pursuing litigation which annoyed Desiman, in a similar way to that in relation to Brooke in relation to the winding up petition. I shall direct that there be an account and enquiry in relation to these costs and Desiman will need to show that it was reasonable to incur the costs at all and if they manage to show that, that they are reasonable in amount.

(vii) Other Litigation

105. This relates to further invoices totalling £21,552.00. This includes the costs incurred by Desiman with Underwoods in relation to the Cassadian Removal Application, and also in relation to Cassadian's attempts to prevent the sale of the land in Phases 2 and 3. Ultimately Cassadian discontinued its removal application in 2023. There are also separate costs incurred by the Administrators with another firm of solicitors, Brechers, in relation to that application, which Desiman paid. I will consider that separately below.

106. So far as the costs were incurred by Desiman with Underwoods in order to assess and protect its position in relation to the Cassadian Removal Application, and the position in relation to the Cala sale, I consider this is potentially within scope, as a cost of enforcing or attempting to enforce the security, which the sale to Cala was part of. It was reasonable to incur some legal costs in relation to this by Desiman, though I have my doubts as to whether the amounts are justified and so I direct there be an assessment of the same.

(9) Brechers

107. Brechers were the solicitors retained by the Administrators. There are three sub-categories and fees/costs under consideration.

(i) Cassadian Removal Application

108. I have already explained the outlines of the Cassadian Removal Application above. The Administrators incurred costs totalling £335,474.47 in relation to this removal application. They also included a further £887,124.24 with Brechers in relation to the P3 Removal Application. They also incurred a further £200,000 with Weil, Gotshal & Manges (London) LLP on the P3 Removal Application when a potential conflict issue involving Brechers and/or counsel was identified on the P3 Removal Application. The grand total is £1,422,598.71 (including VAT). Brooke submitted this was an extraordinary sum for a secured creditor to agree to pay or otherwise make available to administrators to contest their removal. It was submitted the amount in question, irrespective of other

arguments advanced, was sufficient to demand an account and justification in more detail than has been proffered so far. I agree.

109. Turning back to the Cassadian Removal Application, Desiman contend these were costs, charges or expenses suffered or reasonably incurred by Desiman in respect of the sale of the Phase 1 land to Cala and as such fall within scope. If they were "suffered" then reasonableness did not come into it, but in any event it was submitted they were reasonably incurred. Brooke contend the removal costs applications were not "suffered" but incurred, that they do not fall within scope, and were not reasonably incurred. Mr Clarke pointed out that Desiman was not made a party to the removal applications – the relief sought was limited to removal of the Administrators and this was a cost for them to bear, not the secured creditor to bear. He submitted there was no realistic prospect of the court making an order on the application which would impact or prevent the Cala sale from proceeding as neither Cala nor Desiman were party to the application. There is much force in these submissions and I was initially attracted to the submission that these costs were not within scope or reasonably incurred as a category.

110. However the picture in relation to the removal applications is more complicated. It is undoubtedly the case that Cassadian's ultimate objective in removing the Administrators was to try to prevent the sale to Cala proceeding. The application was issued before the Cala contract was exchanged and was hanging over the Administrators when exchange took place. There was concern about whether or not steps needed to be taken to preserve the position in relation to planning by 30 January 2023, and a new reserved matters application of some sort would likely need to be submitted by that date (even if of a more limited nature than originally advised by counsel). Cassadian had written directly to Cala to try to stop the sale. In reaction to this Cala's solicitors, Wedlake Bell, insisted on a contractual term being included in the Cala contract requiring Desiman to "*use all reasonable endeavours and take all necessary steps to defend any proceedings which may be brought to replace the Administrators*". Desiman state they had no choice but to agree to this provision. This is overstating the position as they did have a choice, but I consider it was reasonable for them to agree to this provision in the context of the threat from Cala, and given that the Administrators otherwise did not have resources from the estate to defend the removal application. Clause 41 in the Cala contract provided:

"*The Lender and the Administrators shall use all reasonable endeavours and take all necessary steps to defend any proceedings which may be brought to replace the Administrators as joint administrators of PPP, P3eco and CFJL and shall keep the Buyer informed generally as to progress in relation in relation to any proceedings and have due regard to any representations made by the Buyer in this regard.*"

111. The obligation was to use all reasonable endeavours and take all necessary steps to defend. Whilst it might be argued this did not require lawyers to be instructed by the Administrators, I can see it is arguable the nature of the allegations required this and as the Administrators did not have the funding to pay for these lawyers it might be said that Desiman was under an obligation to use its resources to pay them. As the Administrators had not made any realisations Desiman paid the invoices of Brechers. Mr Fellows considered it had to in order to ensure it was complying with the contractual obligations owed to Cala, and to protect and preserve the sale and its security. As a result it was contended that these were costs which the Companies were obliged to indemnify Desiman for under sub-clause 2 in the charge as they were liabilities suffered or reasonably incurred arising out of or connection with (i) the exercise or purported exercise of its rights, including the power to appoint administrators, and (ii) preserving or enforcing or attempting to enforce the security.

112. I do not accept the submission the legal costs of the Administrators were "suffered" – they were incurred voluntarily. However, bearing in mind this context, and the fact that the words "in connection with" are of wide effect, and (i) to (iii) are also wide in scope, I accept the broad thrust of Mr Fellows' evidence on this point. I am ultimately persuaded that this category of costs were potentially reasonably incurred by Desiman, though I consider that there should in any event be an assessment as to the amount. I also consider, however, it should be considered whether the insurers of the Administrators could reasonably be expected to have assisted in funding the costs of defending the removal application. It is not clear to me from the evidence this was considered, whether this question was asked, and if had been what the response would have been. This may also call into question whether it was reasonable for Desiman to incur these costs or all of them. I believe this issue should also form part of the account and enquiry.

(ii) P3 Removal Application

113. The P3 Removal Application was made in September 2023 and was determined by October 2024. For similar reasons to those identified in relation to the Cassadian Removal Application I was initially minded to conclude this item was not within scope or reasonably incurred. However for reasons substantially the same as those set out in relation to the P3 Removal Application I am satisfied that it was potentially reasonable to incur some of these costs, though I question whether all of them, or their amount needed to be incurred, and again I am not persuaded the amount is reasonable and this should be assessed.

114. Mr Clarke made the additional submission that any contractual obligation to Cala was effectively spent by the time of the P3 Removal Application, such that irrespective of any contractual wording, the contractual obligation to defend any proceedings to remove cannot be interpreted as including the P3 Removal

Application. He took me to certain pre-contractual exchanges in emails which he said supported the conclusion that the contractual provision was focussed on the Cassadian Removal Application. Mr Robins objected to this as being inadmissible negotiation evidence (citing *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101) and also submitted this evidence did not support the limitation contended for. Neither the background material, if admissible, or the wording of the relevant clause, shows any time limitation or application limitation. The words used are "any proceedings which may be brought to replace" and not just the removal proceedings brough by Cassadian. The Cassadian application might have been the trigger for the inclusion of this clause but it contemplated a wider scope, indeed it contemplated it applying to "any proceedings". Nor does the presence of the clause, however, mean that it was automatically reasonable to incur costs in assisting in the defence of a removal application, and Desiman was only obliged to use all reasonable endeavours. This was also an obligation on the Administrators.

115. It is useful to stand back from this exercise because the wording in the Cala contract cannot automatically determine whether or not the costs were within scope or reasonably incurred by Desiman under the charge provisions. Much depends in this respect on context and the nature of the allegations made in the removal application. In my judgment some reasonable incurring of costs was justified on this removal application, given that it clearly did form part of the rationale behind the P3 Removal Application to try to stop the final tranche/s of the Phase 2 and 3 land being acquired, and removal of the Joint Administrators was part of that overall objective. However, the sums are far too high. I bear in mind that the Administrators largely recycled the evidence that was prepared on the Cassadian Removal Application in the P3 Removal Application. Whilst the P3 Removal Application was fought, and came on for trial, a complicating factor in it was at some point Brechers or counsel identified a potential conflict and there was some doubt as to whether or not the Administrators would be ready for the hearing of the P3 Removal Application. New leading counsel was instructed and an additional firm of solicitors were retained. I see no reason why the incurring of those costs formed part of reasonable endeavours, or why those additional costs were reasonably required or reasonably incurred. I am inclined to the conclusion that any potential conflict would be for the solicitors and/or counsel to resolve. It is difficult to see, on the information currently available to me, why the client should be made to bear the cost of that. Ultimately therefore in relation to the P3 Removal Application I anticipate that certain invoices may be said to be invoices which were not reasonably incurred, or certain aspects of them, even if as a generic item it may be said the incurring of some costs by Desiman on the P3 Removal Application was justified. I also consider, however, the question of whether or not it was reasonable for Desiman to have incurred these costs needs to be reviewed having regard to whether or not the Administrators' insurers might reasonably be expected to have funded any defence costs. That information was not before me.

(iii) Other Matters

116. This item of costs in relation to Brechers totals £149,483.84 and a number of different invoices. The invoices span from April 2022 to September 2024. This was said to relate to, amongst other things, the costs of claims by the Companies in administration against the former directors, seeking to make recoveries. Mr Clarke objected on the basis this was nothing to do with the Phase 1 land and a separate matter between the Companies and the directors. Accordingly he submitted this was outside scope and not reasonably incurred. In response Mr Robins submitted that these misfeasance claims were claims which fell within the definition of book debts over which Desiman had security and therefore they had an interest in them and their recoveries. I am persuaded that the costs of these proceedings are within scope, though I am not persuaded that they were necessarily reasonably incurred or reasonable in amount and both those matters should form part of an account and enquiry. No cost benefit analysis evidence has been presented to show why it was thought these costs were reasonable to incur, or to continue to incur in the sums indicated. The amounts also justify enquiry. On this point and more generally it was pointed out by Mr Clarke that Brechers invoices are (save for one invoice) uninformative as to their content (supporting detail or schedules not being provided) and this is another reason why there needs to be an account and an assessment. I accept that submission.

(10) Weil, Gotshal & Manges (London) LLP

117. I have already briefly mentioned these costs – they were incurred in September 2024 in the context of the P3 Removal Application. The sum invoiced is £200,000. Mr Clarke took objection to this invoice on the same basis as he took objection to the Brechers' removal costs application, and he also raised the additional objection that there was no good reason for Desiman to agree to incur these additional costs irrespective of whether or not a potential conflict was identified by Brechers. I tend to agree. Mr Robins sought to defend this invoice on the basis that in relation to this item it was a cost or liability which was suffered and therefore the question of whether it was reasonably incurred does not arise. I disagree – Desiman did not have to agree to pay these costs or pay them. It was not a liability suffered within the meaning of sub-clause 2. Mr Fellows expressed his own consternation about these fees and the amounts charged but in my judgment he did not need to agree to pay them. My current view is it was not reasonable to incur these costs on top of the Brechers costs, and any remedy for recovery of these costs by Desiman should lie elsewhere. Subject to further argument at the consequentials hearing as to why this view might be displaced on further enquiry I am minded to so order on a final basis.

118. I should add that if I had been persuaded this item was within scope and reasonably incurred (or I am persuaded at a consequentials hearing there should be a further enquiry to permit Desiman to show this), I would have directed an

assessment and I would have ordered that any assessment should be carried out on the basis that the burden lay on Desiman to show why it was reasonable to incur these costs and the amount, given the context in which these costs were incurred.

(4) What relief I should grant having regard to the findings I have made under the previous headings

119. For the reasons set out above I will make an order for further accounts and enquiries. Subject to further argument I propose that the account will include the surcharge of £2.4 million in relation to the Spine Road extension costs, or at least this item should be written into the account pending further enquiry and further argument on the amount. I will hear further submissions on the form of the account and the precise directions to make. I have indicated in the body of this judgment my conclusions or preliminary views, subject to further argument, as to the appropriate directions on each of the points identified in relation to the facilities, third party fees and costs. As already noted should there be any remaining matters which require further clarification or ruling on I will deal with them at the hearing. I also record here it became clear at the hearing that, in relation to certain overage provisions, it was recognised Brooke may have the benefit of the doctrine of marshalling, and it would be appropriate for this to be suitably recorded, at least as a recital to any order, even if a declaration is not necessary. The parties are to work on a form of wording for me to approve.

120. I should also conclude by noting here that I raised with the parties during the course of the hearing whether or not they had engaged in any ADR or mediation on the applications before me. They confirmed they had not. I consider this is unfortunate as it appeared to me there were a number of matters which would have benefited from further dialogue between the parties, and if such dialogue had occurred this would or should have resulted in resolution of the issue or a narrowing of the issues before the hearing. Resolution or a narrowing occurred on many points during the course of the hearing. I would be inclined to order some form of mandatory mediation between the parties to assist them in resolving any remaining disputes, should a voluntary mediation not now take place, as there are still a number of points between them, and to be worked through, on the account. I consider the amount of costs which have already been incurred on the applications are likely to have the unfortunate effect of further reducing the return likely to be made to those who rank below Desiman and Brooke, assuming both of them are ultimately paid in full. Indeed one of the final deductions identified on Mr Fellows' most recent redemption statement included further fees of some £870,7474.14. Some of these costs appear to overlap with cost items referred to already above, but some appear to be further costs incurred on these applications. Who should pay those costs and the amounts remain at large. Overall, I have gained the impression that greater dialogue is required, even if no love is lost.