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Case No: HT-2014-000038

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

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

Date: 12 December 2016
(Draft Circulated: 2 December 2016)

Before:

THE HON MR JUSTICE COULSON

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Between:

(1) Harlequin Property (SVG) Limited **(2) Harlequin Hotels and Resorts Limited**	**Claimants**
- and -	
Wilkins Kennedy (a Firm)	**Defendant**

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Mr Nicholas Davidson QC and **Mr Hefin Rees QC**
(instructed by **ELS Legal LLP**) for the **Claimants**
Mr Justin Fenwick QC, Mr George Spalton and **Mr Peter Morcos**
(instructed by **Kennedys Law LLP**) for the **Defendant**

Hearing dates: 14, 15, 16, 20, 21, 22, 23, 27, 28, 29, 30 June;
4, 5, 6, 7, 11, 12, 14, 15, 18, 19, 20, 21, 28 July; 22 and 23 September 2016

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Approved Judgment

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

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MR JUSTICE COULSON

The Hon. Mr Justice Coulson:

1. INTRODUCTION

1. In these proceedings, the claimants claim damages in the sum of approximately US$60 million against the defendant for breaches of contract and/or duty arising in connection with the development of a luxury resort ("the resort") at Buccament Bay, St Vincent and the Grenadines ("SVG"), in the Caribbean.

2. The first claimant, to whom I shall refer as "Harlequin SVG", are the owners of the Buccament Bay site and the developers of the resort. The second claimant, to whom I shall refer as "HHR", is said to operate the resort. Mr David Ames is the principal director of both companies and the man behind the numerous other Harlequin companies, to whom I shall refer (where it does not matter which particular Harlequin company was involved, or impossible to say) as "Harlequin". The defendant, to whom I shall refer as "WK", is a firm of accountants and business advisors. Mr Martin MacDonald, a partner in WK, acted as Harlequin's accountant and business advisor between 2006 and 2010. He was universally referred to as "Mac". The remaining key player in this story, who is not a party to these proceedings, is the contractor who built part of the resort, ICE Group (SVG) Limited, to whom I shall refer as "ICE". This company was owned and controlled by Mr Padraig O'Halloran, often referred to in the documents as "Paudie".

3. It is Harlequin's case that, relying on WK's advice, they had no formal contract with ICE, and instead came to a very loose arrangement with ICE to complete Phase 1 of the resort, which ran completely out of control. Harlequin say that ICE's works were delayed and, in many instances, not built at all, leading to the termination of their arrangement with ICE in June 2010. They blame WK for the delay. Harlequin also say that they paid ICE far too much money for the work that they did, for which they also blame WK. There is also a separate set of allegations arising out of what is said to have been a clear conflict of interest on the part of WK, who were acting for ICE as well as for Harlequin in connection with the construction of the resort.

4. This case does not lack startling features. The following will suffice as examples. There is an ongoing Serious Fraud Office ("SFO") investigation into Harlequin, and putting the words 'Harlequin Property' into any search engine or social media immediately brings down a shower of invective and complaint by their erstwhile investors. There have been significant findings of fraud and dishonesty against Mr O'Halloran, in connection with the construction of the resort, made by the High Court in Dublin. There have been defamation proceedings, resolved by an apology and a payment of money to Mr and Mrs Ames, as a result of a website which published lies about and threats against Harlequin, and which was discovered to be the work of Mr Jeremy Newman, a senior employee of WK, who provided services to Harlequin at the same time as being ICE's chief financial advisor.

5. If those examples were not enough, there are at least four significant features of this case which, in my experience, are unique, and which lie behind much of what went so disastrously wrong with this development.

6. First, the construction works at the resort were funded by deposits made by Harlequin investors who wanted to purchase cabanas (a small bungalow with one or more

bedrooms) or apartments, either at this resort, or other resorts planned by Harlequin round the world. But the deposits were not ring-fenced, so there was no link between an investor's 30% deposit for a property at one of the Harlequin resorts, and the destination of that money. The money might go to any other of the numerous Harlequin developments, or might be used for entirely different purposes altogether, such as the generous commissions paid to Harlequin's sales agents, the large sums paid to the Ames family as directors of the web of related Harlequin companies, or separate enterprises altogether, such as the Harlequin travel agency, and the sponsoring of Port Vale FC.

7. Secondly, despite the limited land purchased by Harlequin at Buccament Bay, and the very obvious physical restraints of the site as a whole, there was no limit to the number of deposits which were taken for the proposed resort there, with the result that there was a huge imbalance between the properties for which a 30% deposit was paid to Harlequin, and the number of properties that had been (or were realistically going to be) built at the Buccament Bay resort. This discrepancy was exacerbated by the fact that, of all the numerous Harlequin projects in the Caribbean and elsewhere, it was/is only the Buccament Bay resort that has ever been built. So, although more than 1,900 deposits were taken for Buccament Bay, and 8,200 overall for all Harlequin developments worldwide, only 195 units have been built at Buccament Bay and none anywhere else. Of those completed units, only about 16-20 are now owned and occupied by the 1,900 investors: the other buildings are used as hotel rooms, with Harlequin, not the investors, receiving the sums paid by the holiday-makers who stay at Buccament Bay. These two elements of the Harlequin business model might be said to bear the hallmarks of a serious and significant scam.

8. The third remarkable feature of this case arises out of the development itself. Harlequin paid ICE, its contractor, around $52 million[1]. They did so, not only without any sort of written contract, but without any detailed agreement as to the scope of the works to be carried out, the monitoring of those works, or their valuation. Although fixed weekly payments were agreed in significant sums, these payments were not in any way tied to interim claims for payment made by ICE, let alone an independent valuation process operated on behalf of Harlequin SVG. ICE received the agreed amount every week, regardless of what, if any, work they had carried out. In the Dublin litigation (***Harlequin Property (SVG) Limited and Harlequin Hotels and Resorts Limited v Padraig O'Halloran and Donal O'Halloran*** [2013] IEHC 362), McGovern J described this situation as "extraordinary". That is, if anything, an under-statement. In my view, for a project of this size, the fact that there were no financial controls whatsoever beggars all belief.

9. Finally, there is the fact that WK acted for both Harlequin and ICE, not only on other projects, but specifically in respect of the Buccament Bay construction works. This unsatisfactory arrangement unravelled in two separate strands of the evidence. First, an unusually close relationship developed between Mr O'Halloran of ICE and Mr MacDonald of WK, who was variously referred to as Harlequin's Chief Financial Officer or Financial Director, and Mr Ames' right hand man. Eventually, Mr O'Halloran offered Mr MacDonald a job, and Mr MacDonald agreed to be his best man, although the lavish stag weekend at the Monte Carlo Grand Prix occurred at just

[1] All references to $ in this Judgment are to US dollars. Where Eastern Caribbean Dollars are referred to, I expressly refer to them as EC$.

the time that the relationship between Harlequin and ICE began its final, inevitable collapse. Since Mr MacDonald reported Harlequin to the SFO in June 2010, with assistance from Mr Newman and Mr O'Halloran, he has invested half a million pounds in a business venture with both men.

10. The second strand of evidence centres on the internal documents emanating from WK in the early part of 2010, which reveal an attempt by WK to protect ICE at all costs and to ensure that Harlequin paid ICE as much as possible (whether it was justified or not) before the inevitable parting of the ways. This was the strategy that was adopted, regardless of the value of the work that ICE were doing (or, by then, not doing). On a project where WK, through Mr MacDonald, was attending meetings on behalf of Harlequin purportedly to argue with ICE about money, it meant that WK were on both sides of what was (and remains) a very bitter dispute.

11. It is important to stress at the outset that, despite the unusual features of the case, WK have not raised the defence of illegality, perhaps because ***Patel v Mirza*** [2016] UKSC 42 is authority for the proposition that a person who pays money for an unlawful purpose is not prevented from recovering it, whilst in ***Fiona Trust & Holding Corporation v Privalov*** [2016] EWHC 2163 it was held that a party who was found to have been dishonest in his commercial dealings and untruthful in his evidence still recovered millions of dollars pursuant to a cross-undertaking. But I accept that these unusual features are relevant to the claims against WK, because one of the issues which I have to decide is the extent of Mr MacDonald's knowledge of, and involvement in, these matters.

12. The structure of this Judgment is as follows. In **Section 2**, I comment on the two principal witnesses of fact, Mr Ames and Mr MacDonald, and make some observations about other witnesses of fact. In **Section 3**, I set out the relevant facts in some detail. In **Section 4**, I arrive at some conclusions about, for want of a better expression, I shall refer to as "the main contract" between Harlequin SVG and ICE. In **Section 5**, I deal with the contract between the claimants and the defendants, and the duties owed by WK to Harlequin. In **Section 6**, I deal with the alleged breaches of the contract and/or other alleged duties as between Harlequin and WK. Thereafter, in **Section 7**, I deal with the issues arising out of various causation arguments and, in **Section 8**, I address the valuation of the work carried out by ICE. In **Section 9**, I address questions of loss, and damage. In **Section 10**, I consider the issue of contributory negligence. In **Section 11**, I consider the position of the investors and the recent news that Harlequin SVG are entering into insolvency proceedings in St Vincent. There is a short summary of my conclusions at **Section 12**.

13. At the outset I should express my gratitude to counsel and solicitors for the efficient way in which the trial was conducted. Of particular note was the way in which, despite the colourful nature of the relevant events and the allegations arising out of them, the lawyers strove manfully to avoid raising the temperature unnecessarily. The Opus Magnum system (which provided the electronic bundle) was effective and saved a good deal of trial time (although it was less reliable thereafter). I should also thank the Attorney General of SVG and all those who ensured that the second week of the trial could take place in Kingstown SVG, so as to encompass both an illuminating site view and the taking of oral evidence from local witnesses.

2. THE WITNESSES OF FACT

14. This is not a case in which, save for one issue about the disclosure of confidential information, the law has loomed large. Instead, it is the court's findings of fact which are of paramount importance. In consequence, it is necessary for me to express, at the outset, my views on the two critical witnesses in this case, Mr Ames of the claimants, and Mr MacDonald of WK. I also make some other observations/rulings on the factual evidence.

15. Mr Ames candidly admitted lying on various occasions during the course of the development of the resort. In addition, I find that, on a number of matters, he was less than candid with the court. I consider that the Harlequin business model was, at least potentially, dishonest from start to finish. On the other hand, I do not consider that Mr Ames lied about everything important in issue in this case: on some matters, he was plainly telling the truth. Moreover, there was at least an element of Mr Ames' dishonesty which was rooted in his stubborn desire to believe that everything would somehow turn out for the best.

16. Mr Ames described himself as a visionary. In my view, that is not an apt description. I consider that he was more of a Walter Mitty-type figure who, through an unhappy mixture of dishonesty, naivety and incompetence, has caused irreparable loss to thousands of people. But I consider that one of the reasons for this disastrous chain of events was that no-one reined him in or explained to him the basic commercial realities of what he was undertaking. The only consultant that he employed who appeared to be involved in every important element of the Harlequin business model was Mr MacDonald of WK. This case centres on the extent (if at all) to which Mr MacDonald should have advised Mr Ames to take a different course.

17. I believe that Mr MacDonald was aware of his vulnerability to that central allegation. In consequence, he was a singularly evasive witness. It you open the transcript of his cross-examination at a random page, the chances are that you will find at least one important question which Mr MacDonald is deliberately failing to answer. Despite the fact that I warned him that his failure to answer the questions was giving the impression that he was being thoroughly evasive, he maintained that stance. To describe him, as WK do at paragraph 88 of their closing submissions, as "fair-minded and thorough" is, with respect, hopelessly unrealistic.

18. I was unsurprised to learn that Mr MacDonald had had witness training. For the same reasons outlined by Flaux J (as he then was) in ***Republic of Djibouti v Boreh and Others*** [2016] EWHC 405 (Comm) at paragraphs 64-67, I consider it to be a practice "to be discouraged since…it tends to reflect badly on the witnesses who…may appear evasive." In my view, the training he received exacerbated Mr MacDonald's natural tendency to avoid answering any difficult question.

19. Mr MacDonald's other defence mechanism was repeatedly to minimise his involvement in any given event. Thus, perfectly straightforward documents, with text (often written by Mr MacDonald himself) which set out what he was doing or saying at any given time, were the subject of agonising attempts by Mr MacDonald either to suggest that he was not really involved or to rewrite the document. Of his 45 overseas trips undertaken on behalf of Harlequin, most of which were to SVG, Mr MacDonald would have the court believe he was there just 'to pass on my business card' or 'to

carry the bags'. Such attempts to distance himself from the relevant events were, at times, almost risible.

20. Mr Taylor, whom I consider to be one of the few entirely credible Harlequin witnesses, gave compelling evidence about Mr MacDonald's nature and attitude. He said that when Mr MacDonald was with Mr O'Halloran (who the documents indicate was a large and imposing presence), Mr MacDonald went from being placid to being a bully, and he would mock the individuals who worked for Harlequin. Mr Taylor said he was "like the kid at school who was quiet and nerdy but then became best friends with the biggest bully. It was then that his ego changed". From what I observed in court, I consider Mr Taylor's description to be accurate.

21. For these reasons, I consider that Mr MacDonald was as unsatisfactory a witness as Mr Ames. Thus the court is in the unenviable position of having to tell the story, and make findings of fact, in circumstances where the evidence of the two critical witnesses was fundamentally flawed. But this can come as no surprise to the parties because I warned them at the end of the factual evidence in July (Day 15, page 52) that neither side's principal witnesses would emerge well from this Judgment.

22. Harlequin called a number of other factual witnesses. In their written submissions, WK made extensive criticisms of each and every one of them. Although sometimes those criticisms were justified, often they were unthinking and unfair. My views in brief are:

22.1 **Mrs Carol Ames:** Mrs Ames was not a particularly good witness, being far too anxious to criticise Mr MacDonald whilst minimising the involvement of both her husband and herself. Her knowledge of Harlequin Management Services (South East) Ltd ("HMSSE"), the important Harlequin company of which she was the director and principal shareholder, was embarrassingly thin, particularly given the large sums it paid out to her and her family, and to other Harlequin companies. She was sometimes evasive. But her understandable emotional reaction to, amongst other things, ICE's wholesale failures, and the subsequent internet attacks on the Ames family, confirmed the extent to which she genuinely felt let down by Mr MacDonald and WK.

22.2 **Mr Michael Withey**: I deal with his evidence at paragraph 32 below.

22.3 **Mr Simon Taylor:** In my view, WK's suggestion that he was not a reliable witness and was focused only on 'pushing the Harlequin line in support of Mr Ames' was completely wide of the mark. Mr Taylor had no reason blindly to support Mr Ames, since he no longer worked for him or had any commercial relationship with him. I can only conclude that WK's attempt to belittle his evidence betrayed the fact that they were aware of the potentially damaging effect of his evidence, particularly about Mr MacDonald's overall role within Harlequin.

22.4 **Mr Sam Commissiong:** I deal with his evidence generally at paragraph 45 below. On matters where he felt professionally exposed – and there were many of them – I find that he was an untruthful and unreliable witness. Some of his evidence on other, more mundane matters, was consistent with the contemporaneous documents and therefore more reliable.

22.5 **Ms Shona Quammie:** I deal with her evidence at **Section 8.6.1** below. She was an honest and compelling witness. Even WK were obliged to accept at paragraph 51 of their submissions that Ms Quammie "was clearly keen to give straight forward honest evidence". In my view, that is precisely what she did.

22.6 **Mr Andrew Smith:** Mr Smith's evidence was of some assistance on the detail, although I accept WK's suggestion that part of it may have been tailored to meet the requirements of the litigation.

22.7 **Mr Sean O'Connor:** My views in relation to Mr O'Connor are similar to those views I formed about Mr Smith.

22.8 **Mr Paul McTaggart:** Mr McTaggart was an honest witness but his recollection of the important schedule which he produced was so vague that I derived little assistance from his oral evidence.

22.9 **Mr David Campion:** Mr Campion's evidence was of variable quality but, as noted below, he provided some assistance to the court on matters of detail.

22.10 **Miss Sarah Tricker:** WK accepts that Miss Tricker had an honest demeanour, which she plainly did. I do not accept the criticism that she was not a wholly reliable witness: I take the view that she was reliable and was always doing her best to assist the court.

22.11 **Mr Royd Smurthwaite:** Mr Smurthwaite was a reasonably reliable witness. It was not suggested that he had any reason to provide untruthful or misleading evidence to support Harlequin.

23. WK called very few factual witnesses in addition to Mr MacDonald, and they failed to call one major witness. Thus:

23.1 **The other witnesses called: Mr Kevin Walmsley** was a relatively straightforward witness, although I felt throughout that he was unwilling to accept points which he should have conceded. Sometimes he suggested that something was only clear in hindsight when I consider that it was (or should have been) painfully clear at the time. **Mr Garside** worked for Mr MacDonald and was relatively helpful although his recollection was, perhaps understandably, poor. **Ms Coia** had little to say that was of any relevance to the issues before me.

23.2 **The witnesses not called:** There were a number of witnesses who WK did not call, but the principal witness in this category was **Mr Jeremy Newman**, who had agreed to provide any evidence required of him by WK, but who was conspicuous from the trial by his absence. He worked for WK, he advised Harlequin, and he was later to describe himself as ICE's Chief Financial Officer ("CFO"). In Harlequin's opening submissions, relying on the case of ***Wisniewski v Central Manchester Health Authority*** [1998] P.I.Q.R. 324, Mr Davidson QC suggested that the court was entitled to infer that any truthful evidence from Mr Newman would have assisted Harlequin, not WK. I agree with that submission, although I consider that many of the contemporaneous documents are so damning of Mr Newman that the inference is hardly necessary.

24. Harlequin served four hearsay notices (in respect of **Paul Jacobs, David Wallerson, Gilbert Aquino and Garrett Ronan**) and four witness statements from witnesses who were not called at trial (**Hayley Byatt, Bernard Punnett, Dan Dalligan, and Stephen Lea**). In respect of the hearsay notices, WK had successfully applied to cross examine those four individuals. They were not subsequently called to give evidence. In consequence, in relation to these eight notices and statements, WK submit that the court should have no regard to them at all and/or to place no weight upon them. In broad terms, I accept that submission. Thus, in the pages that follow, I only refer to or rely on the notices/statements from these eight individuals if they support other evidence which I accept, or unequivocal material in the contemporaneous documents. No element of Harlequin's case can be advanced if the only material that supports it is some part of these eight notices/statements.

3. THE RELEVANT EVENTS

3.1 The Beginnings

25. On 16 December 2005, Harlequin SVG (then called MAM Investments Limited) was incorporated. By the summer of 2006 works was ready to start on the Buccament Bay resort. The appointed contractors were Ridgeview Construction (SVG) Limited ("Ridgeview"). The proposed development covered a long narrow rectangle of land with the short western edge facing the sea, and the two long sides bounded by the Buccament River to the north and a steep cliff to the south. The Apartment was arranged in apartment blocks and cabanas varying in size from 1 to 4 bedrooms. It was also intended that there would be restaurants, bars, swimming pools and other communal facilities. Mr Smurthwaite, a director of Ridgeview, said that, even in the early days, the project proposed by Mr Ames grew from a resort covering 19.1 acres to one covering 70 acres. Of course, only a fraction of that was ever built.

26. Ridgeview began work on or around 1 July 2006. It was said that they were engaged on a 'cost-plus' contract, although the only such document that was produced in evidence was not signed, and there was no cogent evidence that it was ever even agreed. Mr Ames said in evidence that he did not want a contract with Ridgeview because, in the early days, he did not want to be tied down to a particular design, or to a timetable, or to a specific cash-flow. Mr Smurthwaite said that this was an "open book" arrangement whereby representatives from Harlequin – usually Mr MacDonald but sometimes Mr Ames as well – looked at the Ridgeview accounts to see what they had spent. The 'plus' – the profit – was said to be 10%, although the gross percentage mark-up for preliminaries, overheads and profit was said to be 19.5%.

27. In 2006, Mr Martin MacDonald of WK was appointed to act on Harlequin SVG's behalf. The precise nature of WK's retainer, and what they were doing on behalf of Harlequin SVG (and other companies in the Harlequin Group), is a matter of debate. I deal with it separately at **Section 5** below. By the time that the retainer came to an end on 2 June 2010, Harlequin had paid WK around £740,000 for their services, as well as further sums to a related WK company.

28. Mr MacDonald's first trip to SVG was between 28 August and 1 September 2006. As with almost all the trips he made, it was in the company of Mr Ames. Mr MacDonald's notes made clear his detailed involvement in the discussions with Ridgeview, including "reviewing their budget" on a line-by-line basis. I note that the

overall budget at this stage was about £30 million and there was a profit-sharing proposal with Ridgeview if the final cost turned out to be less than that. That is the sort of arrangement I would have expected to see on a project of this kind.

29. As occurred repeatedly in his evidence about all his trips abroad, Mr MacDonald sought to suggest in cross-examination that, on this occasion, he was merely "carrying the bags" and had no detailed input into what was discussed. I reject that evidence: it is contrary to his own notes, contrary to other contemporaneous documentation and contrary to commonsense. To avoid unnecessary repetition, I should say at the outset that I have reached the same conclusion in respect of all his visits to St Vincent and Barbados, and all the contemporaneous notes that were prepared by Mr MacDonald after those visits. In my judgment, his repeated attempts to minimise his involvement in the relevant events only served to highlight the central role he played.

30. In October 2006, Mr McDonald produced a 'Budget Cash-Flow Forecast' for the period between October 2006 and March 2013. This showed a net profit on the Buccament Bay development of £22,031,648. In his oral evidence, Mr McDonald agreed that the figures showed massive funding coming in from the Buccament Bay investors, and that the figures were such that there was no need to utilise cash coming from investors on other projects. To understand the significance of that evidence necessitates a fuller description of the Harlequin business model.

3.2 The Harlequin Business Model

31. The Harlequin business model was operated through HMSSE, a company of which Mrs Carol Ames, the wife of David Ames, was the sole director. It is now in liquidation. HMSSE were WK's first client within the Harlequin Group.

32. HMSSE was engaged in selling the properties at the Buccament Bay resort, as well as all the other resorts in the Caribbean and elsewhere. HMSSE used both its own staff and sub-agents to sell properties. One such sub-agent, Mr Withey, gave evidence. He was a distinctly unimpressive witness: he seemed to have no relevant property experience and little real knowledge of what was going on at Buccament Bay or elsewhere in the Harlequin portfolio. However, despite these deficiencies, he earned a staggering £3 million in commission from HMSSE, that money being taken out of the deposits paid by the investors.

33. The business model worked as follows. Prospective purchasers (called 'investors' in the evidence) were asked to provide a non-refundable reservation fee of £1,000. They then had 28 days (a period which might be extended on request) to provide a deposit which equated to 30% of the selling price of the property. If they needed a loan to cover the 30% deposit, then HMSSE said that they would put them in touch with lenders who would offer a loan to cover the deposit. Importantly, HMSSE promised to pay the interest on those loans on behalf of the prospective purchaser, until completion of the property.

34. The 30% deposit was immediately divided into two by Harlequin. The first half was taken by HMSSE as commission (and if they had used sub-agents, they would pay out of that amount any commission due to the sub-agents). The remaining half was then what was available in HMSSE's bank account for use by any one of the 30 or more

separate Harlequin companies. HMSSE would always make payments as directed by Mr Ames.

35. An investor who paid his 30% deposit (say £60,000) for a cabana at Buccament Bay selling for £175,000 might therefore have been surprised to discover that £30,000 of that deposit went to HMSSE (and was therefore never utilised for construction purposes) and that, whilst the other £30,000 might have gone towards the construction costs at Buccament Bay, it might instead have been spent on a completely different resort, or used at Mr Ames' direction for a different purpose altogether.

36. It was Harlequin's case that this was all made clear in the guidelines for investors. I disagree. Although there is a reference to some monies going to HMSSE by way of commission, there is nothing to suggest that it was anything like as much as half of every deposit. Neither was there any reference in their guidelines to the web of different companies which has allowed Harlequin to put HMSSE into liquidation, whilst continuing to own the Buccament Bay resort in the name of Harlequin SVG, a company with no obvious obligations to the investors and registered abroad. Furthermore, although the guidelines do indicate that the deposit would not necessarily be used to build at the particular resort where the property had been reserved, the clear implication is that the money would at least be used on one of the Harlequin resorts. There was nothing to indicate that, for example, the money could be used to sponsor Port Vale FC. In any event, I also note that these guidelines were dated December 2009,[2] long after Harlequin began selling properties and receiving deposits. For these reasons, it is easy to see why so many investors felt – and continue to feel – that they were misled by Harlequin and why, after HMSSE went into liquidation, a number of them commenced legal proceedings.

37. A final feature of the Harlequin business model was that, as their sales brochure put it, "there would be significant capital appreciation during the construction phase and on completion there would be a 70% loan to value guaranteed mortgage." The document (E/1626/18), a PowerPoint presentation for agents dated September 2007, is an example of that promise. The same material promised that a rental guarantee of 10% would generate an income which would cover any mortgage payments, and indicated a likely 50% increase in the value of the individual properties. There is no evidence that any of these promises or projections were ever fulfilled.

38. An obvious but fundamental question arising out of the Harlequin business model was, if a *maximum* of 15% of the sale price of the property was going to be spent on its construction, how was the rest of the work going to be funded? There were three possibilities: first, Harlequin had to obtain significant financing; second, building costs were so low that each property could be built for just 15% of its overall price; or third, properties would be completed quickly and on a large scale, so that the remainder of the sale price would be recovered and used to finance the building of the next phase or the next resort.

39. On analysis, none of these possibilities was realistic. Harlequin never obtained any financing from anyone. Mr MacDonald agreed that for four years, he failed to obtain any funding on their behalf, and instead allowed the gap to be filled by the deposits of thousands of other investors in properties unrelated to Buccament Bay. Moreover, it

[2] The version looked at in evidence at E/12823 was dated as late as June 2010.

is unsurprising that there was no funding: as the evidence made plain, the absence of a construction contract doomed the search for funding from the start. No reputable lender would fund a major project like this in circumstances where there was not even a contract setting out the parties' rights and obligations at the one location where construction was actually taking place.

40. Unsurprisingly, there was never any suggestion that the building costs were anything like as low as 15% of the value of the completed property. The lowest ever percentage cited in the documents was about 45%. Thus it was an inherent element of the Harlequin business model that the first phase of the works at Buccament Bay (the only resort that has ever been built) would be constructed using money provided by investors in other resorts, or investors in Buccament Bay whose properties were, at best, a line on a drawing, and were to be built on land which had not even been acquired. This was only sustainable if the properties were completed quickly and in large numbers, so that the remaining 70% would be paid on completion and the next Phase could be funded. But after ten years, in which they sold 1,900 properties at the Buccament Bay resort (and took 1,900 30% deposits), Harlequin contrived to build fewer than 200. Speed was not a feature of their operation because they just did not have the money or the management infrastructure to weather any financial or other storm, no matter how predictable it might be.

41. One final element of the business model needs to be identified. Having paid their 30% deposit, prospective purchasers might then be required to pay further percentages on completion of the foundations, walls, roof etc, of their particular cabana or apartment. The evidence from Ms Tricker, who was responsible for HMSSE's accounts department, was that very few (if any) prospective purchasers paid these additional percentages. Instead, they were charged notional interest on these amounts, which was then debited from their accounts on completion. She said that, in the meantime, HMSSE paid this interest on behalf of the prospective purchasers, which was yet another financial burden on HMSSE.

42. What was required for this stage payment element of the arrangement was proof that the particular cabana or apartment had reached a certain stage of completion. This required a photograph, certified by a representative of Harlequin on site. Like everything else on this project, even this simple matter was beset with difficulties. Ms Tricker spent a good deal of her time chasing photographs, often to no avail. Indeed, it is a feature of this case that the photographic evidence of what was done between 2006 and 2010 is sporadic and inconclusive. It is difficult not to conclude that those on site either did not care, or were happy that there was very little evidence of what had actually been constructed. In addition, even the certification part of the photographic process proved problematic. It is typical of this project that, at one point certificates were being issued pursuant to the rubber-stamp signature of an architect who had long since departed the site.

43. It is important not to pull any punches when describing the Harlequin business model. There were elements of it which were similar to what might be called a 'Ponzi' scheme, where the money paid in by gullible investors was not spent as they thought it would be, but the scheme grew by word of mouth and those responsible for it became rich, whilst the investors ended up with nothing. I note that (E/5433/1), Harlequin's then solicitors, DLA Piper, expressed their concern that the Harlequin business model was indeed a 'Ponzi' scheme. Furthermore, at one point in his oral

evidence, in connection with the Harlequin business model, Mr Ames made the revealing remark that "I was not going to build properties that I had not sold". It might be thought that a better long term business plan would have operated the other way round.

3.3 Land Purchases and Planning Permission

44. The evidence as to the land ownership at Buccament Bay, and the extent to which the necessary land had been acquired by Harlequin or Mr Ames, was surprisingly confused. But it mattered, because one of WK's many attacks on the Harlequin business model was that Harlequin had sold properties at Buccament Bay which – if they were built at all – would be built on land which they did not and do not own.

45. Harlequin's difficulties on this topic were exacerbated by the fact that their evidence about land acquisition came principally from Mr Commissiong, their SVG lawyer. On this topic, I find that his evidence was untrue, and probably deliberately so. He had given clear and confident evidence, both written and oral, in the Dublin proceedings, and in the attempt by Mr and Mrs Ames to discharge the world-wide freezing order which had been obtained by a number of the disgruntled investors. Yet when he came to give oral evidence before me in St Vincent, possibly because of the clear and persistent cross-examination to which he may not previously have been exposed, Mr Commissiong resiled from a great many of his previous sworn statements. At one point he even suggested – without justification – that his affidavit in the freezing order proceedings bearing his name "had been tampered with". I have therefore had to piece together the evidence as to site ownership from the other available material. I do not rely on any aspect of Mr Commissiong's evidence on this topic.

46. It appears that Harlequin commenced the development on the assumption that about 26 acres of land at the (western) sea end of the rectangle that formed the proposed resort belonged to the Government of SVG, and they entered into negotiations to buy that land. Subsequently, it became apparent that the Government only owned around 19 acres of that land and a further 7 acres, inconveniently split into three rectangles surrounded by that Government land, had to be purchased from three other parties.

47. Eventually, the 26 acres (the 19 acres owned by the Government and the 7 acres owned by others) were built on by Harlequin SVG. It is the part of the site where, in general terms, the completed cabanas and the waterfront village are now situated. However, even for that part of the site, there were significant delays in the final completion of the land and the completion of the registration procedures required by the SVG Government. It appears that this was due to a combination of a lack of Harlequin money, and a desire to avoid a particular tax (the Alien Landowning Tax) which may not have been payable if Mr Ames became an SVG citizen.

48. Thus, doing my best on the evidence, I find that the 19 acres was the subject of negotiations which started in 2006 but was not registered to Harlequin SVG until 2009 (the document at E/4193/2 shows a delay even at March 2009 due to Harlequin SVG's desire to avoid the tax). The 7 acres was the subject of negotiation in 2009 and was not registered until 2012.

49. The parties' answers to my *Question A1* on this topic demonstrate the confusion and absence of completed conveyances for any other land. I find that it has not been shown that Harlequin own – or are even entitled to build – on any other land. This is obviously a significant problem, because they have built on other areas of land, and have sold hundreds of further properties on land which they plainly do not own. One such area is the land to the south of the cabanas, lying hard up against the cliff face. This land is owned by Mr Punnett and his sister. It is the land (or part of it) on which the large Apartment Blocks, numbering at least six in the original proposals, were to be built. Thus far, Apartment Block 2 has been completed, Apartment Block 1 exists only by way of its foundations, and Apartment Block 3 is a decaying concrete shell.

50. The evidence in relation to the Punnett land is unsatisfactory. Although Mr Commissiong claimed in his affidavit in the freezing injunction proceedings that this land was the subject of a binding agreement on the part of Mr Punnett to sell to Harlequin SVG, it is clear that this was untrue. Although there was a proposed agreement between Mr Punnett and Harlequin in respect of this land (G7/79/6) the document was never executed because Mr Punnett's sister did not (and never did) agree to the sale. As Mr Commissiong rightly said, that meant that "this document could go nowhere…it was useless." Moreover, he advised at the time that Harlequin SVG were paying large sums of money to Mr Punnett for land they did not own (see for example E/1200 1, 2). That rather begged the question as to why he had referred to the unexecuted agreement in his affidavit, without any of these caveats, in support of Harlequin's alleged good title to the land in question[3]. Mr Ames confirmed in cross-examination that the Apartment Blocks were built on land owned by Mr Punnett which his sister had not agreed to sell.

51. The evidence as to precisely how much additional land had been allegedly purchased was very confused. At various times, the additional land beyond the original 26 acres was identified by Mr Commissiong as being a further 5 acres, a further 18 acres, or a further 26 acres. It may not matter for present purposes: what matters is that Harlequin failed to purchase all the land they needed, even for Phase 1 of the Buccament Bay resort.

52. Another area of land which was crucial to the early plans for the Buccament Bay resort, which Harlequin do not own (and have never been able to build on), is an area right in the centre of the proposed site, owned by third parties referred to as "the Rasta farmers". Mr Commissiong confirmed that the Rasta farmers did not want to sell the site to Harlequin and have persistently refused to do so. This was and remains a major difficulty for Harlequin, because all the proposals for the resort between 2006 and 2009 showed a central core area (sometimes called the Back of House, and referred to in this Judgment as "BoH"), being built on that land. This included a large reception building for the entirety of the resort, sub-stations, water treatment plant and other facilities such as restaurants and the like. The ongoing failure to buy this land meant that much of Harlequin's promotional literature relating to Buccament Bay was based on the forlorn hope that the Rasta farmers would change their minds and sell,

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[3] The extensive mis-statements in Mr Commissiong's affidavits and witness statements can be further demonstrated by his affidavit in the insolvency proceedings at G/68/14. Again this suggested that all the land on which prospective purchasers had bought properties belonged to Harlequin; again that was plainly wrong. I can only conclude that Mr Commissiong was prepared to lie in those affidavits to protect himself as the lawyer involved in the purchases.

rather than reflecting the reality, which is that this critical land, in the centre of the proposed resort, was never owned by Harlequin.

53. Similar confusion and difficulties surround the issue of planning permission for the resort. Mr Ames sought to say that detailed planning consent was not required because he had effectively been given blanket planning consent by the SVG Government at the outset of the project. I do not accept that evidence. There is not a single document which supports any such suggestion. The idea that the Government of SVG somehow agreed to grant planning permission for 1,900 properties at a time when the proposals on offer from Harlequin envisaged a resort that was less than a tenth of that size is inherently implausible. It is also contrary to the evidence of Harlequin's own witness, Mr Commissiong, who said that detailed planning permission was required for every element of the development, and who wrote to Harlequin on a number of occasions to point out that planning permission for a particular version of the scheme had not been obtained.

54. By way of example of the uncertainties surrounding planning permission, in September 2009 Mr Ames asked Mr Commissiong to obtain an extension of planning permission for three years. Mr Commissiong suggested that this was applied for and obtained. He was, however, unable to help as to what scheme the extension of planning permission was obtained for, despite the fact that in this email he had been asking for the detailed documents that would show that very information. There are no other documents that provide any assistance as to what the present planning position might be, so I am unable to say whether Harlequin have the necessary permission even for the scheme that has been built. The parties' answers to my *Question A2* did not provide any further clarity on this issue.

3.4 The PKF Reports

55. In 2006 and 2007, PKF, local accountants in SVG, produced at least three survey reports relating to the proposed development. They are useful because they show, first, the changing scope of the development at Buccament Bay, and second, because they cast some light on the extent of the works which might at different times have been proposed but which have never been carried out.

56. The first PKF report dated 7 July 2006 (E/350) stated that the project would cover about 56 acres and would consist of 264 bedrooms. It showed the building cost at £245 per square foot. There was also a reference to a total cost of £32 million. In January 2007, there was a second PKF report (E/1190). This was based on 377 units, with an estimated sales value of $141 million. This report also indicated some of the difficulties with land title set out above. It suggested that completion was scheduled for the end of 2008. In September 2007, there was a third report (E/351). At this point, the proposed number of units had increased to a scarcely credible 655 units. These PKF figures are to be contrasted with the number of units (just less than 200) actually completed at Buccament Bay.

3.5 The Progress and Termination of the Ridgeview Contract

57. Mr MacDonald visited the resort between 9 and 13 October 2006. His notes anticipate that there would be "a weekly valuation of works completed" but, for reasons which were never explained, this did not happen, either then, or at any time

during the next four years. At the same time, he prepared a cash-flow forecast for Harlequin SVG relating to the resort (E/1022), which he said demonstrated a "very positive cash-flow position". On his figures, the projected profit at the resort was large and the projected cash-flow was excellent for the period between October 2006 and March 2013. His third trip was in November 2006. His contemporaneous notes of that third visit (which lasted nine days) reveal his detailed involvement in a whole series of different aspects of the project including meetings with Mr Commissiong, with the Prime Minister of SVG, with the bank, and meetings with PKF. The visit also involved "inspecting the progress to date". Again, for the reasons noted in paragraph 29 above, I reject Mr MacDonald's evidence that he was in some way just an observer on this trip.

58. During the latter part of 2006 and throughout 2007, Ridgeview proceeded with the construction works at the resort. Throughout this period, Mr MacDonald regularly travelled to Barbados and SVG with Mr Ames in connection with the project. Simply by way of example of the sorts of things in which Mr MacDonald was involved, I note that when he visited SVG in late January 2007, he again attended the site to inspect the works. He also had a number of meetings with Mr Commissiong, to discuss "a possible structure of future property ownership on the island". This work plainly related to important elements of the Harlequin business model.

59. Mr MacDonald and Mr Ames visited SVG again in June 2007 (E/1526/1), when the detailed discussions (in which Mr MacDonald either took part or led) related to company status, tax, the terms of the sale contracts and where the profits would be earned. Similar topics were discussed in the next visit, in June 2007. Again I reject Mr MacDonald's attempts to minimise his involvement in these detailed matters. In October 2007, on a further visit, Mr MacDonald's contemporaneous record (E/1638) made clear that, in addition to land purchases, prospective hotel operators, tax rates and the Alien Landowners licence, Mr MacDonald was also looking at the "present state" of the works. Difficulties were noted in respect of Ken Picknell, a director of Ridgeview.

60. Mr MacDonald and Mr Ames visited Buccament Bay again in February 2008. Mr MacDonald's contemporaneous note is at (E/1739/1-4). There were discussions about cash-flow, budgets and "the underlying infrastructure" supporting the Buccament Bay project. Mr MacDonald recorded that it was agreed with Ridgeview "that significant work would be undertaken in the review of the critical areas involved in opening a significant hotel in St Vincent with particular regards to transportation, infrastructure and food supplies". Furthermore, Mr MacDonald was becoming increasingly involved in the actual construction process. Thus, by way of example, his contemporaneous note said:

> "Received up-to-date work in progress tick sheets and trial balance. Tour site and tested the work in progress to the sheets."

In addition, there was the usual discussion about tax matters and land ownership. I note that at this stage there was a significant difficulty with electricity, because the local electricity supplier, Vinlec, said that they were unable to supply electricity to the site.

61. This visit is also dealt with by Mr Commissiong at paragraph 22 of his witness statement. Mr Commissiong there said:

> "On the third day of his visit, he [Mr MacDonald] met with me to discuss the purchase of land, VAT, land ownership, the reclaim of a river, electricity, citizenship, the lease of a factory, the Government, David Mann, and the purchase of an island called Petit Nevis. From the wide ambit of these discussions you can begin to get an idea as to why I thought Mr MacDonald to be Mr Ames' right hand man, and not just an accountant."

I accept that evidence. It is consistent with Mr MacDonald's own notes. Whilst, as I have noted above, Mr Commissiong was an unreliable and untruthful witness on matters where he felt professionally exposed – in particular on land ownership, on which he had given advice – I do not consider that this rather more mundane evidence about what Mr MacDonald was doing on a daily basis was anything other than accurate.

62. One feature of the Ridgeview works, as demonstrated by the contemporaneous documentation, was that funds sometimes came through intermittently from Harlequin. By way of example, the document at E/1000/1 (4 September 2006) sets out Ridgeview's early complaint that Harlequin were slow to pay. When this was put to him in cross-examination, Mr Ames said rather surprisingly that he was concerned that Ridgeview were building faster than he wanted, and he therefore controlled the progress of the works by not paying the amount requested. It was put to Mr Ames that he was controlling the money by not having a fixed contract, and by having a cost plus contract instead. He agreed, saying that this enabled him to control the money that Ridgeview could spend. But he said that he had no input into what contract he wanted because he was not knowledgeable enough. In truth, there was no contract in place with Ridgeview (see paragraph 26 above), and no-one seemed concerned about that.

63. Other examples of Ridgeview raising issues surrounding payment include:

(a) (E/1054/1): in October 2006, Ridgeview said that payment to them by Harlequin was "critically important".

(b) (E/1064/1): in Ridgeview's letter of 25 October 2006, Mr Picknell said that Ridgeview were "critically low on funds". Mr Smurthwaite said in evidence that this was untypical and that funds were provided fairly regularly.

(c) (E/1094/1): in November 2006, Ridgeview were chasing funds and said they had stopped all expenditure. Again Mr Smurthwaite said in evidence this was not typical. Mr Ames, who was asked about the accompanying email (E/1092/1), denied that there was a shortage of cash. He said he did not want the cabana works to get too far ahead, and that he needed to slow down the works to allow the restaurants (which had not yet been designed) to "catch up". He agreed that he was therefore controlling the expenditure. Similarly, by reference (E/1080/2), he agreed he was managing the cash-flow as he went along.

(d) (E/1421/2): in April 2007, Mr Picknell said that the biggest problem that Ridgeview faced was the irregularity of payments. Mr Smurthwaite agreed that Mr Picknell was vexed, but described him as being "quite rambunctious". I have already noted Mr MacDonald's record of the problems being caused by Mr Picknell on site.

(e) (E/1428/2): at the meeting of the Harlequin SVG Board on 17 April 2007, Ridgeview said that the delays were due to unpredictable cash-flows.

(f) (E/1673/2): in November 2007, Mr Picknell said that cash-flow was "a restricting factor", and that the projected completion date at the current rate of income was June 2012. Mr Smurthwaite said that funding came more regularly during 2008.

(g) (E/1762/2): in March 2008 Mr Picknell was noting points about problems with cash-flow. Mr Smurthwaite said in evidence that the money was coming in more regularly but not at the level that Mr Picknell wanted.

64. I find that there was a funding issue from time to time between 2006 and 2008, but it should not be over-stated. Mr Smurthwaite said in general terms that there was sometime a problem with funding by Harlequin but that this did not have a huge impact on progress. He said it may have affected it by a couple of weeks. I accept that evidence. Moreover, such problems affected the progress of the ICE works even less, because (unlike Ridgeview) they had an entitlement to be paid a fixed sum every week.

65. In April 2008 (E/1833), there was a complaint by Ridgeview about the lack of design information relating to the major buildings on site, and the likely delays that this would cause. This was a reference to what would become known as the waterfront village. The complaint was reiterated in Mr Picknell's email of 23 May 2008 (E/1978/1) in which he complained about the absence of bills, specifications and the general absence of any organisation and planning. With masterly understatement, Mr Smurthwaite agreed that there were "certain shortages in the Harlequin set-up". Mr Ames repeated in cross-examination that, at this time, he was not ready to start the waterfront village, which he suggested was going to be the focus of the work for the future. He did not address, at the time or subsequently, the fundamental criticisms of the Harlequin set-up that Mr Picknell was making.

66. It appears that in either April or May 2008, Mr MacDonald met Mr O'Halloran in SVG for the first time. They met because Cellate, an ICE subsidiary company, were acting as a sub-contractor to Ridgeview, carrying out the works to the Apartment Blocks. Within weeks of this first meeting, Ridgeview had been sacked and ICE had replaced them as the main contractor for the works at the resort.

67. By May 2008, there were some concerns about the quality of Ridgeview's work and the charges that they were making to carry it out. Mr Commissiong was one of those who was troubled by Ridgeview's performance. But very little criticism of Ridgeview's work was put in writing. One exception to that is (E/1959/1) a report of May 2008 from a firm of architects called Escarfullery & Associates. It is unclear why Escarfullery & Associates was asked to investigate Ridgeview's works. There is no doubt that his report found defects in the work that had been carried out, although

they do not appear to be especially grave, and the recommendations are all concerned with the need for a proper valuation system rather than anything in the way of significant remedial works[4]. That may explain why Mr Ames maintained in cross-examination that he was reasonably happy with the quality of Ridgeview's work. He said that it was Mr MacDonald who was unhappy with certain aspects of it, in particular the quality of the wooden shutters (a point expressly made by Mr MacDonald at a meeting in SVG when Mr Ames was not present). Mr Ames said that he felt that Mr Smurthwaite of Ridgeview needed to spend more time on the project, particularly as Mr Ames was not impressed with Mr Picknell.

68. On 22 May 2008, there was a meeting between Harlequin and Ridgeview at Mr Commissiong's offices. Mr Ames and Mr Bell attended on behalf of Harlequin: Mr MacDonald was not there. There is a contemporaneous record, not of the meeting, but its aftermath (E/2015/1), was a letter from Ridgeview dated 2 June 2008. This stated:

> "(a) Harlequin raised a number of issues regarding the quality of the workmanship on the project and also made allegations over misappropriation of materials and labour from the site. No detail, evidence or substantiation has been offered or provided to us to support these allegations…
>
> (c) Harlequin advised that a report from the hotel operator, Oasis Hotels, would be delivered to ourselves on Wednesday 28 May 2008, providing details of the alleged defects of the work at Buccament Bay. As of today's date, this report has not been received, nor have we received any written complaints from you regarding alleged quality issues."

This further supports the suggestion that the alleged defects did not loom large in the subsequent decision to sack Ridgeview.

69. The letter from Ridgeview also complained about the non-payment by Harlequin which, it is suggested "crippled our operations." I accept that financial issues – and Harlequin's cash-flow position in particular – played a part in the termination of Ridgeview's contract. Mr Commissiong agreed with that in cross-examination. Given Mr Smurthwaite's oral evidence, I consider that it significantly over-states it to say that such issues 'crippled' Ridgeview's operations.

70. Ms Sarah Tricker, the woman in charge of the accounts at HMSSE, gave evidence in her witness statement at paragraph 51-53 of the sums paid by Harlequin to Ridgeview. The total was put at £11,217,395 (E/880). The money was paid initially to Mr Commissiong in SVG. There were no invoices from Ridgeview: Mr Tricker simply paid what she was told to pay by Mr Ames. I find that this was the amount paid, which translates to just over $22 million at the exchange rates then operable. That is at least broadly consistent with Appendix 23 of Mr Amin's first supplemental report (referred to by Harlequin in answer to my *Question A9*) although confusingly that is put in EC$.

[4] This lack of an ordinary valuation process is perhaps the major issue in the case: see **Section 6.5.4** below.

71. On 27 May 2008, Mr MacDonald flew out again to SVG. Mr Ames was not present. His file note (E/1988) for this visit (which extended to 1 June) contains the following extracts:

> "Day 2
>
> The need was to review the Ridgeview records and ascertain their current position. The manager and the main foreman had been suspended due to the poor quality of work…toured the site and viewed the poor work. It was clear that much of the material used had been inappropriate and the supervision on site had not been adequate.
>
> Day 3
>
> …
>
> Requested James to obtain quotes re prices for the pools, timber and roof provided by the African firm. It was clearly South African roof should not have been used. There was a disclaimer on the invoice which [denied] any liability if installed within 10km of a beachfront. The poll prices appear to be similar to English prices although the quality was poor. The question of transport needs to be considered. The timber prices were difficult to obtain quotes but it was clear the wood was inappropriate and a hardwood could have been purchased locally at a lower cost.
>
> Day 5
>
> ...the site has been returned to the control of Harlequin and a new team is to be installed to control the building and the building standards in the future."

The note also contained details as to the inadequate work done in respect of the river defences, and recorded the fact that all the plant and equipment and other items which Harlequin had paid for belonged to them, not Ridgeview. This plant and equipment was subsequently provided free of charge to ICE, who agreed at the time that it should be the subject of a credit to Harlequin of $6 million.

72. Mr MacDonald was taken through these notes in cross-examination. Although the document makes clear that he had formed adverse views about some aspects of Ridgeview's work, he endeavoured to suggest in his evidence that these were not really his views, and that he had been sent out to SVG "to look for trouble". That of course implied that his whole trip was a dishonest attempt – presumably cooked up by Mr Ames – to justify Ridgeview's removal from site. I do not accept that the views expressed in this note were not those of Mr MacDonald, and I do not accept that he was involved in some shabby trick at Ridgeview's expense. I find that Mr MacDonald expressed the views about supervision and materials recorded in his notes because he had formed those views after a detailed site visit. He accepted that he was participating in all the relevant decisions: indeed, he was often making them, because

he was the most senior Harlequin representative on SVG. His fee note charged for his advising on the termination of the Ridgeview contract.

73. Mr MacDonald's involvement in these events is also evidenced by Mr Commissiong's evidence about the meeting on 30 May 2008, when he said that he had a discussion with Mr MacDonald about the adequacy of the materials used by Ridgeview. Mr Commissiong said that Mr MacDonald told him that he could take a view about construction matters based on his experience of construction projects and competency in this area. Mr Commissiong went on:

> "Mr MacDonald told me he would go to the project site and take measurements, determine what he believed to be the square foot cost of construction and Mr MacDonald's calculations would then determine how the construction project would then be funded and at what cost."

For the same reasons as noted in paragraph 61 above, I accept that evidence.

74. So Mr Ames said in evidence that Mr MacDonald wanted to sack Ridgeview, whilst Mr MacDonald said that it was all Mr Ames' idea. That debate was all too typical of the evidence of both men. I find that they both thought that sacking Ridgeview was the right thing to do at the time for a variety of reasons: the inadequate supervision, the concerns about Mr Picknell, the defects, and – most importantly of all – because it would ease Harlequin's cash-flow at a time when money was tight.

75. Mr Commissiong's email of 23 June 2008 (E/2086) expressed concern about the consequences of sacking Ridgeview, because of what Mr Picknell might make public. He was also concerned about the lack of money to continue with the development. He said in terms that the Harlequin business model was flawed:

> "I happen to know how the project at Buccament was financed…the money came from the selling price of the facilities being built at Buccament, and those yet to be built at Merricks [Barbados], Santo Domingo, et al. One third of £250,000 is a small amount of money to develop Buccament, and you do not have to be a rocket scientist to figure that out. I was reasonably sure that you had to find money, by way of loan, as I was equally sure at all times that if the loan did not materialise the project could be in trouble, temporary or otherwise."

I consider that Mr Commissiong's unusually blunt advice was correct. It was not heeded. The email also records that, when Mr Commissiong asked Mr MacDonald about available finance, Mr MacDonald assured him that a loan would be forthcoming. As noted above, no such loan ever materialised.

76. There was a settlement agreement with Ridgeview dated 10 July 2008, which should have ended Ridgeview's part in the story. But Mr Ames' feud with Mr Picknell (one of a number of very personal animosities engendered by Mr Ames) rumbled on for months, and involved Mr Ames threatening to have Mr Picknell deported, and Mr Picknell's counter-threats to "expose the sins" of Harlequin (E/2918/1). Mr

Commissiong advised against litigation involving Ridgeview because "all issues would be in the open": that suggests that he thought – rightly – that Harlequin had much to hide.

3.6 The Initial Involvement of ICE

77. Mr Commissiong referred in his evidence to Mr O'Halloran in June 2008 as somebody who was already on site, and therefore "well placed to make a bid as the replacement contractor". He said Mr O'Halloran was "a sort of deputy to Ridgeview". This was because Cellate were carrying out significant works at the resort as a sub-contractor to Ridgeview.

78. ICE lost no time in bidding to undertake all the work. On 4 June 2008, over a month before the contract with Ridgeview was terminated, ICE provided a fixed price bid in the sum of $118,992,882. On 30 July 2008 they revised that bid to $119,118,772, a fixed price lump sum offer subsequently verified by Mr Coggle of ICE on 6 August 2008.

79. In cross-examination, Mr Ames said that these and other quotations from ICE were largely irrelevant to him at that time, because he had not completed the design of the waterfront village, so the scope of the works which he wanted to have carried out remained unclear. He said that ICE's immediate task was to finish the cabanas and the apartments. However, from these ICE quotations, Mr Ames said that he had taken note of the quoted rate of $96 per square foot. He knew that this was less than the comparable Ridgeview figure, so this rate which was of interest to him. Beyond that, Mr Ames made plain that he did not accept any of these quotations.

80. On 9 August 2008, Mr Coggle advised Mr Ames that construction work needed to be started immediately and had to be maintained until what he called "the project re-launch" in January 2009. The email went on to propose completion of 70 out of the 81 cabanas for $500,000 and, for an additional monthly fee of $500,000, the completion of Apartment Blocks 2 and 3. Mr Ames' reply of 12 August 2008 indicated (subject to one qualification) that he saw no difficulties in principle with this proposal, although in cross-examination he maintained his position that it was not the workscope which he wanted at that time. The qualification in Mr Ames' reply was that he was concerned (rightly) that he did not have title to the relevant land. The letter also said that Mr Ames had "the money upfront"; in cross-examination, he agreed that this was untrue.

81. Surprisingly, given all the uncertainties with the progress of the construction work, Harlequin had by this time signed a contract with Oasis, who were going to be operating the resort at Buccament Bay (as and when it was completed). That contract had a proposed completion date of 1 July 2010. That is the first time that this date was identified in the contemporaneous documents. Ultimately, Harlequin were not able to complete on this contract and they had to pay Oasis off. Although Mr Ames suggested that he terminated his arrangement with Oasis because he did not feel that they could operate it in the manner that he wanted, I reject that evidence: the failure to complete much of the resort by early 2010 rendered the agreement with Oasis useless.

82. Also at this time Mr Ames and Harlequin were coming under pressure from journalists, who were interested in the Harlequin business model and the potential

problems with it. Unhappily, Mr Ames' way of deflecting their enquiries was to lie. Thus:

(a) E/2122/1: on 15 July 2008, Mr Ames told one journalist that the money on each resort was ring-fenced. Mr Ames agreed in evidence that this was a lie. He had previously said that if the money for each development was ring-fenced he would not have been able to afford to carry out any development at all, an unqualified admission of the flaw in the business model.

(b) E/2151/1: on 21 July 2008, Mr Ames told another journalist that all the money collected for each resort went to the works "at that resort". Mr Ames agreed in his evidence that this too was a lie.

Mr MacDonald does not emerge well from this part of the story either. The lies noted at (a) and (b) above were both copied to him at the time by Mr Ames, but there is nothing to indicate that he ever corrected them, even though he would have known that the statements in them were incorrect. There is also nothing to say that he ever advised Mr Ames to alter what he was saying to the media.

83. The Harlequin untruths did not stop with Mr Ames. His agents repeated these lies: see for example (E/2735/2), in which a Ms Wooller told Cornhill Property Investments that "the funds are ring-fenced between developments". Further, the Harlequin pamphlet (E/4796.2/1, dated February 2009) stated that a City institution had invested over £50 million in the Buccament Bay resort. This was also a lie, as Mr Ames eventually agreed. As he put it, "nobody ever gave me £50 million."

3.7 The Meeting on 1 September 2008

84. On 1 September 2008 there was a meeting at Harlequin's offices in Basildon at which various general agreements were reached between Harlequin and ICE. Present at the meeting were Mr Ames and Mr MacDonald on behalf of Harlequin, and Mr O'Halloran on behalf of ICE. I find that, amongst the agreements reached, were the following:

(a) Harlequin would appoint ICE to replace Ridgeview as the main contractors for the Buccament Bay project;

(b) ICE would undertake the building works at an agreed price of $96 per square foot;

(c) Harlequin would pay ICE weekly payments;

(d) Phase 1 would be completed by March 2010.

85. This was obviously an important series of agreements. However, it should be noted that there was much that could not be agreed at that time: there was no agreed scope of work; no clear agreement as to the makeup of Phase 1; no valuation process; no linkage between the $96 per square foot and the weekly lump sum payments; and no proposed contract. The focus was on continuing with the cabanas and Apartment Block 2: the design of the waterfront village was nowhere near ready. That explains

the earlier reference to the project re-launch not happening until January 2009, by when it was hoped that the waterfront village would have been designed out.

86. Mr Taylor told me that the $96 per square foot was a mantra that was also repeated by both Mr O'Halloran and Mr MacDonald. He said they referred to it "hundreds of times". He described it as "the prevailing rate". He said that Mr MacDonald and Mr O'Halloran gave the impression that nobody could build the resort as cheaply as that, and that Mr O'Halloran, supported by Mr MacDonald, made plain that this was significantly cheaper than any other contractor. Although Mr Taylor could not say whether or not this was true, he said that Mr Ames accepted that advice and believed it to be accurate. The wider evidence in this case persuades me that it was a reasonable rate. Any other contractor would probably have charged more; perhaps even much more. I deal with this topic in detail at paragraphs 585-587 below.

87. Following this meeting, Harlequin made a considerable number of payments to ICE at $125,000 per week. These were subsequently increased to $165,000 per week. In March 2009, the weekly payments increased again to $400,000 per week. There was still no linkage between the amounts of these payments and the value of the work being carried out by ICE, despite the fact that the total paid to ICE between September 2008 and May 2009 was $11 million odd. Mr MacDonald's suggestion that the only work carried out by ICE between September 2008 and May 2009 was maintenance and remedial work was contradicted by the large sums paid by Harlequin SVG to ICE during this period, which was about half of the total paid to Ridgeview for 2 years' work. It was also contradicted by Mr MacDonald's own letter of 22 October 2008 (E/2725) to the potential investors, which talked about the works being "now well underway" and that by the end of December "it is projected that 142 cabanas and one of the apartment blocks will be completed to first fix."

88. Mr MacDonald and Mr Ames went to SVG between 7 and 12 September 2008. Mr MacDonald's contemporaneous notes (E/2457) reveal the following:

(a) On Day 1, Mr MacDonald and Mr Ames separated and Mr MacDonald "met Paudie" alone. They obviously had detailed discussions about the project. This eloquently demonstrates the central role Mr MacDonald was now playing in the Harlequin operation.

(b) On Day 3, when the two men went to the resort to review the progress, Mr MacDonald noted: "Paudie had now committed to build 130 cabanas by the end of December and also to complete the build of two of the apartment blocks".

(c) There were the usual discussions with Mr Commissiong about land and tax matters.

Again, Mr MacDonald's notes indicate that ICE were doing much more than simply works of repair and maintenance.

89. On 15 September 2009 (E/2542) ICE provided a further lump sum quote in the sum of $121,229,630. That excluded around $4 million said to be required for remedial work to the Ridgeview buildings (a figure that was never broken down, explained or agreed). This quote was also based on the $96 per square foot rate for the work in the

cabanas and the apartments. I note that, whilst other rates were quoted for some of the other works, the vast majority of those rates were *less* than $96 per square foot. Mr Ames said that he rejected these quotes for the same reasons as before. He regarded them, he said, as "just figures on a piece of paper". He repeated that he was only interested in the rate per square foot, because he had not yet finished the design of the waterfront village.

90. Mr Ames' attention was drawn to the fact that, if a lump sum contract had been agreed in the terms of the quotation, a mobilisation fee of 15% (or around $12 million), was going to be required. It was suggested to Mr Ames that he would not have been in a position to afford that. Mr Ames countered that by saying that he had met every payment that he had agreed to make to ICE (which was broadly but not entirely true). He said that he did not note the mobilisation figure but he agreed that, at that time (September 2008), he would not have had the money to pay it. He claimed that he could have paid such a mobilisation figure by May 2009. He also said – correctly – that any mobilisation figure would have been less than that suggested because ICE inherited Ridgeview's plant and equipment, a point already noted in paragraph 71 above, and relevant to the final account assessment in **Section 8** below. However, Mr Ames was anxious to point out that none of this explained why he did not enter into a contract. He repeated that, at this time, what he wanted were the cabanas and the apartments, and that this did not change until May 2009, when he said he completed the design of the waterfront village.

3.8 Events Between September 2008 and May 2009

91. During this period, the contemporaneous documents show that both Mr Ames and Mr MacDonald were closely involved in many of the relevant events in respect of the Buccament Bay project. But there continued to be an ongoing concern, which was raised by a variety of people from time to time, about the need for someone to monitor the quality of the work being performed on site, which is usually part and parcel of an ordinary valuation process for construction works. One document that dealt with this possibility was Mr Ames' email to Mr Commissiong of 1 September 2008 (E/2408). However, this idea appeared to fall away, despite the fact that Mr Commissiong recommended Stewart Engineering for the role.

92. In addition, the land issues had not been resolved by the autumn of 2008. Mr Ames complained that he was paying large sums of money to Mr Punnett but that he still did not have a binding agreement with him. The documents show that Mr Punnett was making efforts to sell the land, even though he did not have the title to do so. Thus there are a number of unexecuted agreements in the bundle, (such as those at F/10/15/6 and F/10/15/8 and F/10/15/12). The latter two agreements were plainly drafted by Mr Commissiong because they bear his name and professional address. Although he denied any involvement in their preparation, that was clearly a lie. Further, on 12 September 2008 (E/2477/1) Mr Commissiong produced a document to be shown to investors and other third parties which said:

> "As Solicitors for Harlequin Property SVG Limited, we wish to confirm that all of the land required for the construction of the Buccament Bay Resort has either been purchased, or the terms and conditions of its purchase have been agreed by the landowners and our client. We anticipate that the final

preparation and registration process will be competed within the next few weeks."

93. I expressed my concern about this document to Mr Commissiong during his evidence in SVG because it was plainly untrue: for example, there was no agreement with the Rasta farmers and no agreement with Mr Punnett's sister. Mr Commissiong would have known that the letter was untrue at the time that he signed it. His only answer was to say that the information on which his certificate was based had been provided by others – Mr Ames in particular – and that was what he was repeating. I regard that as an untruthful explanation. The certificate makes no reference to it being based on information provided by others. Indeed, Mr Commissiong knew that it was important that he, rather than Mr Ames, gave this information to the world at large, a fact stressed by Mr Ames himself in his email to Mr Commissiong (E/2506/1).

94. These difficulties with the land ownership did not go away. The following month, in October 2008, as revealed by the documents (E/2810/1 and E/2810/2), Mr Punnett's sister wanted a 10% deposit on the land that she was prepared to sell. The value of that deposit would be EC$3 million. All Harlequin were able to offer was EC$500,000, much less than the 10% apparently considered usual in SVG. A sale was therefore impossible, despite its importance to Mr Ames and the proposed resort. Moreover, contrary to his oral evidence, Mr Commissiong continued to advise for months afterwards that Harlequin SVG were building on land that it did not own and that Mr Punnett was "becoming increasingly difficult to deal with".

95. Mr Ames was unhappy about these events, but his petulant email (E/2810/1) is very revealing. He said that if the matter was not resolved within 7 days he would close the site and he would get the SVG Government to buy the land. This was pure fantasy. The SVG Government could not buy the land unless it was for a public purpose and, as Mr Commissiong had correctly advised him at the time, this was an entirely private venture. Mr Ames' attempted recourse to the potential misuse of Government power is yet another unattractive feature of Harlequin's approach to this project.

96. Mr MacDonald and Mr Ames made a number of trips to SVG in the period between September 2008 and May 2009. Thus in October 2008 Mr MacDonald and Mr Ames met Mr Commissiong in his offices at SVG to discuss the question of land purchase but also the negotiations with Oasis. Mr Commissiong said that the second meeting on 14 October 2008 focused on general project issues such as concepts and construction progress, rather than matters of finance. Mr MacDonald's contemporaneous notes (E/2682) supports the suggestion that there was focus, amongst other things, on construction issues: at one point Mr MacDonald said that he "returned to site to ensure the buildings were ready for inspection" by a large group of interested parties.

97. On 3 October 2008 (E/4359), Davis Langdon & Everest ("DLE"), well known quantity surveyors, produced a report which indicated, amongst other things, that the cost of the proposed works at the Buccament Bay resort would be around $253 million in total. This was far more than ICE had quoted for the previous summer, although it appeared to include for a much greater workscope. Mr MacDonald subsequently advised Harlequin (E/15749) that the report was a desktop study only and was "seriously flawed". Indeed he went further and said that it was so bad that, if

DLE pushed for payment of their fees, they would get no other work from Harlequin. He agreed in evidence that he had carefully studied the report in order to give this advice.

98. By 8 October 2008, Mr Garside of WK noted in writing that there was a fixed price agreement between ICE and Harlequin SVG. Mr MacDonald agreed with that, saying in cross-examination "they [ICE] had agreed to do the work for a fixed price." This document was copied to Mr MacDonald and was relied on by PKF.

99. There were also letters at this time from Mr MacDonald which put a very positive spin on Harlequin's finances. Thus:

(a) In his letter of 8 October 2008 (E/2674/1) to a hedge-fund, Stirling Mortimer Ltd ("SM"), Mr MacDonald told them that he was "very familiar with the overall financial position of the Harlequin Group" and that the 2008 accounts were a true statement of the position of the company, which was "free of debt". The accounts (F29/1/5) were prepared by Mr MacDonald and were signed off so that they could be sent to SM. They referred to the work in progress having been independently valued, which was misleading: the DLE valuation only related to Ridgeview's work, and anyway Mr MacDonald thought it was rubbish. The overall impression deliberately created by the letter was of a healthy financial position, with no mention being made of the absence of any financing: indeed, this is given a positive spin, hence the reference to there being no debt.

(b) In his letter of 22 October, Mr MacDonald said that the financing was coming from "a mixture of shareholders' funds and deposits received from investors". The first statement was untrue. The shareholders' funds were routinely recorded in all the accounts as being £1. All the money for this development was coming from the deposits taken from the prospective purchasers and Mr MacDonald agreed in cross-examination that he knew that.

100. Later in 2008, there were complaints by purchasers of properties at the Harlequin resort at Merricks in Barbados. The relevant documents reveal a similar story to that at Buccament Bay: in fact, in Barbados the position was worse because there was no construction work being carried out at all. Mr Ames was unsympathetic, saying in his response: "These people need to be put in their place" (E/3062/1). Such language gives the lie to Mr Ames' repeated suggestion to me that all he has ever been interested in is protecting the interests of his investors[5].

101. In December 2008 (E/3089/1) Mr Ames received a draft contract from ICE. He said that he gave it to Mr MacDonald and he told Mr MacDonald 'to get the contract sorted'. In the subsequent document (E/3098/1) Mr Ames asked Mr MacDonald where the contract would be signed, although he made it clear that it would not be him who would be signing it. This indicated plainly that Mr Ames was not averse to a contract as a matter of principle. In evidence he said that he always wanted a contract, but he agreed that, at that particular time, he did not want a contract for the

[5] The exchange noted at paragraph 76 of WK's closing submissions is a further (but not as clear-cut) example of this unhappy attitude.

cabanas and the apartments for the reasons already noted, and he did not want a contract for the waterfront village because the design was not complete.

102. At the start of 2009 (E/3366/1), Harlequin's solicitors DLA Piper asked a whole series of detailed questions about the Harlequin business model. It was clear that they were concerned about it. Mr MacDonald responded to their questions on 22 January 2009 (E/3393). In my view, his response demonstrated Mr MacDonald's close involvement with everything that was happening in relation to Harlequin generally and the development of Buccament Bay in particular. Moreover, his replies strongly suggested that he was happy with the Harlequin business model. Mr MacDonald also stated in his letter that Harlequin had sufficient funding for the works for 2009. This was the year in which the vast bulk of the work which ICE was to do would be carried out. Mr MacDonald's assurance was therefore of significance. It was not clear on what his projection was based.

103. On 11 February 2009 (E/3611/1) DLA Piper responded to Mr MacDonald's answers to the questions that they had posed, and addressed other issues which had arisen at a recent meeting. It is clear that they still had grave concerns about the Harlequin business model. They expressly referred to potential misrepresentations as part of the selling process, and the risk of criminal investigation. The letter also said:

> "It seems to us that there are risks in relation to the funding model which relies upon values increasing and developments being completed by the due date. I understand the comment you made in our meeting concerning the spirit of the contract but, as I understand it, if a significant number of investors sought the return of their investment this would, at the very least, have a negative impact on cash-flow but more seriously could cause the company serious financial difficulties…
>
> I would reiterate our view that Harlequin needs to reassess its management team to ensure that it has sufficient resource to deal with matters in an efficient and proper way. Given the nature and size of the business there is a very real risk that problems will arise because management have not been able to quickly deal with matters when they arise and/or have failed to prioritise issues that need immediate attention."

I regard this letter as prescient. It pointed out matters that plainly needed to be addressed. Although it was copied to Mr MacDonald, these issues were not addressed either by Mr Ames or Mr MacDonald.

104. It appears that, despite these concerns, Mr Ames remained of the view that the resort could be financed without any reference to loans or other financing: see for example his email to Mr MacDonald (E/3632.1/1). There was therefore a central tension between Mr Ames (who plainly did not want financing or loans) and Mr MacDonald (who told me that the obtaining of loans was of "paramount importance"). The two men appeared to deal with this critical impasse by never mentioning it: there is not a single piece of paper in which Mr MacDonald ever said that, without loans, the Harlequin business model was doomed – just as DLA Piper had suggested – let alone that it might also be a criminal enterprise.

105. On 12 January 2009 Mr MacDonald attended a meeting at Harlequin's office in Basildon, along with Mr Ames, which was also attended by Mr O'Halloran and Mr Coggle of ICE. He was also present the following month, on 4 February 2009, at meetings at Buccament Bay where there was a detailed discussion about Phase 1. Mr MacDonald's notes (E/3568/3) record the following:

> "At St Vincent then proceeded to the site to discuss with Paudie and his team the proposal to complete Phase 1 and open as a hotel by 30th June 2010. Reviewed all of the plans and defined the area to be included in Phase 1. It was agreed by all parties of this if it was entirely possible from a build point of view. If required the hotel could be open as a smaller size."

Again, the note makes plain Mr MacDonald's involvement in the detailed discussion about the proposed construction works, including the composition of Phase 1.

106. In early March 2009, Mr MacDonald travelled (without Mr Ames) to Barbados, where he stayed at Mr O'Halloran's house on the Sandy Lane estate. In my view, this was an inappropriate arrangement: the developer's principal financial advisor ought not to have stayed at the home of the contractor, the recipient of the developer's money. Moreover, in his file note relating to this trip, it appears that Mr MacDonald discussed with ICE the details as to how Harlequin might finance this and other projects (which included more than just the Buccament Bay resort). That too was inappropriate, particularly as in the conversation Mr MacDonald indicated that the funding would involve payments from the investors in this and other projects. There is no reference in these notes to the need for (let alone the importance of) any loans or financing.

107. On Day 2 of the visit, Mr MacDonald carried out a detailed inspection of the buildings at Buccament Bay and he notified ICE of items to be remedied before the visit of the selling agents. He inspected again "to see progress" the following day. On Day 4 of the visit he was involved in "a review of the entire complex". Mr Ames was not present for any of these inspections. After this visit, the weekly payments by Harlequin to ICE were increased to $400,000 per week. Mr Ames said that, although this was his decision, it was reached in agreement with Mr MacDonald. That is consistent with the detailed work done by Mr MacDonald on the recent trip.

108. On 11 February 2009 (E/3799) Mr Ames had agreed with the architects/designers called TVS Design ("TVS") that they would carry out the design of the waterfront village. Thus it was only from this date on that progress could be made on that critically important element of the design. This design was progressing, but had not been completed by 23 March, as the meeting minutes on that date make clear (E/4836/1, 2, 3).

109. On 2 March 2009 (E/3918/1) ICE sent a payment schedule showing a total of £23 million for Phase 1 to be paid in monthly instalments until March 2010. The following day, Mr Ames emailed Mr MacDonald to say that he did not agree with it (E/3940). He said that he thought that he had already paid for the cabanas, which I take to be a reference to the work to repair, continue and complete the Ridgeview work on the cabanas which ICE had been carrying out (and had been paid for) since September 2008. Further Mr Ames said he wanted Apartment Blocks 1 and 2 to be

built, together with restaurants, landscaping etc. Unsurprisingly, he said he needed a schedule of what was to be built each month "and payment made accordingly". This was Mr Ames' way of saying that he needed something which tied his payments to ICE to the value of the work they were actually carrying out. Mr Ames was unarguably right to want such an arrangement. Mr MacDonald did not reply. No steps were taken to give Mr Ames what he asked for.

110. Mr MacDonald and Mr Ames were back at SVG on 11 March 2009. There are notes of a meeting which both men attended on site (E/15979). This referred to the agreement with ICE to open the first stage of the site in June 2010. That was to be known as Phase 1. It would involve plots 1-157 (cabanas) and 3 Apartment Blocks. The cost would be approximately £23 million (the figure referred to by ICE on 2 March). A grandiose 5 year plan was agreed. At a more mundane level, it was agreed to use "new tick sheet to measure building progress – the level of sheets agreed." Again this was a good idea. There was no explanation as to why this system was not adopted.

111. Mr Ames and Mr MacDonald returned again to SVG in early April. Mr MacDonald's notes of this trip are at (E/4666/1-3). The notes make plain that one of the purposes of the trip was "to agree the overall plan of Phase 1". Again, various topics were addressed including the difficulties of land acquisition. There was a detailed inspection of the site with representatives of Oasis who, Mr MacDonald records, "were very impressed with the progress and the proposal."

112. On 29 April 2009, Mr Coggle of ICE sent a schedule showing ICE's current understanding of what was in Phase 1, namely 450 bedrooms (234 cabanas and 216 apartments in Apartment Blocks 1, 2 and 3). Mr MacDonald concluded that a further Red Book valuation was required and sought a quotation from a company called Ryder Levett Bucknall ("RLB"). They were subsequently engaged, albeit sporadically, and one of the myriad of disputes before me now concerns the events surrounding their engagement, their role and the part they played in Mr Ames' decision to sack ICE in June 2010.

113. In late April 2009 (E/480-2.1/1) Harlequin had plans to sell a further 340 units at the Buccament Bay resort. I find on the evidence that those 340 units were going to be built on land which Harlequin did not at that time own; that it was work for which they did not have planning permission; and that it was work for which they had no concept drawings, let alone any detailed drawings. Although Mr Ames in his cross-examination denied these units were being sold so far ahead of schedule because Harlequin were short of money, it is very difficult to see how or why these units were being sold in this way if Harlequin had sufficient cash reserves. I find that, contrary to Mr Ames' evidence, this was all part of the Harlequin business model: to sell properties years before there was any real prospect of their construction.

3.9 The Meetings and Agreement in May 2009

114. Mr MacDonald's notes of the trip to SVG in May 2009 are (E/5110/1, 2 etc). There were the usual discussions about land ownership and the operation of the hotel. There was a discussion and review of the Phase 1 plan with ICE. A figure of £27 million was indicated as the likely costing of Phase 1. There were discussions with the Prime

Minister about tax and stamp duty. Importantly, there is then this entry for Day 8, Tuesday 19 May:

> "Early trip to site for 8 o'clock meeting with Paudie and Mark [Coggle] to discuss the budget for Buccament Bay. After detailed discussion agreed the overall budget at an exchange rate of two dollars to the pound and a total of £19 million payable by 43 instalments of £450,000 per instalment. There will be 9 periods over the next year when the company could request that no payment be made. There remains outside the budget various items such as marina or entry system etc which remain the expense of Harlequin."

115. Again, as with his notes of his trips the previous year, when he was cross-examined Mr MacDonald was desperate to play down his role in these events, even though his notes make clear that on this lengthy visit to SVG he was having meetings without Mr Ames and making decisions of the kind that one would expect from a financial director. Mr MacDonald's desire to distance himself from the relevant events reached a peak in relation to the critical meeting on 19 May 2009, when the agreement going forward was discussed and agreed between Harlequin SVG and ICE. He repeatedly said that this was a discussion involving Mr O'Halloran and Mr Ames, ignoring the fact that he was there and – as his notes show – he plainly participated in the discussion and the agreement.

116. Mr Ames said that Mr MacDonald and Mr O'Halloran spoke together first, and then told him, in order for the agreed scope of Phase 1 to be completed on time, there would have to be a considerable increase in the weekly payments to ICE. He said that the explanation that he was given was that, to allow materials to be ordered with long lead times, further monies were required for procurement. For the reasons previously noted, I accept that evidence.

117. The upshot was that Mr Ames agreed to pay ICE 43 weekly payments of £450,000 each (a total of £19.35 million, a figure set out in a number of the contemporaneous documents). The instruction to pay in accordance with the agreement was confirmed by Mr Ames on 22 May 2009 (E/5062). I also accept that the best evidence of the agreement that was reached is Mr Ames' email of 26 May 2009 (E/5088). This was sent to a large number of people, including Mr MacDonald and numerous other ICE personnel. No-one ever queried it. I set out the relevant parts as follows:

> "I am writing to confirm the first phase of Buccament Bay, which will open on 1 July 2010, will consist of a 362 room key 5 star resort.
>
> Included in the opening will be the Marina, Dive Shop, Reception, Beach Bar and Restaurant, Galleon Ship, Trader Vic's Restaurant, Steak and Fish Restaurant, Asian Fusion Restaurant, Fine Dining Italian Restaurant and Buffet Restaurant which will offer buffets at lunchtime and in the evening.

> The hotel rooms that will be available on this day for occupancy are as follows:-
>
> [162 bedrooms in suites of various sizes in the apartment blocks]
>
> [186 bedrooms in cabanas of one or two bedrooms]
>
> [14 plantation houses]
>
> Honeymoon/celebrity exclusive plantation house. There is one 4 bedroom plantation house on the beach with its own swimming pool and Jacuzzi in the grounds, which is where weddings and wedding receptions are to be held."

118. Mr Ames' evidence was to the effect that everything that was in the email was to be completed by 1 July 2010. He reiterated that, if it was not in the email but was subsequently required to be carried out by 1 July 2010, then it would be treated as an extra. One example that he gave of a missing item that would have to be carried out as an extra was the landscaping. Mr Ames was adamant that included within the agreed schedule of the 43 weekly payments was all of the building costs for 362 keys (cabanas and Apartment Blocks 1, 2 and 3) and the restaurants and the other elements of the waterfront village noted in the email. He later appeared to suggest in his cross-examination that the restaurants were *excluded*, which rather gave the lie to his confident assertion in re-examination that there was no doubt as to what works were in Phase 1. I address the scope and extent of the May 2009 agreement in **Section 4.3** below.

119. As to the £19.35 million, Mr Ames said that anything additional would be paid for at the end of the Phase 1 works, but that would only be once Mr MacDonald had gone through the costings and had advised that there were extra costs. He said that this never happened. It was put to him that, in addition to the 43 weekly payments, ICE said that a 'bullet payment' was required at the end of that time. Although Mr Ames disputed that, I accept it: the ICE email to Mr MacDonald of 23 May 2009 (E/13189/1) indicated that an extra £5 million would be paid "at a date no longer than 12 months after completion of the project." The ICE email expressly refers to the figure of £24,350,000 as being the £19,350,000 referred to above plus the extra £5 million. Mr MacDonald did not reply to ICE's email or discuss the figures with Mr Ames.

120. The promised weekly payment were made, broadly on time, until March 2010, when the 43rd payment was made. I find that Mr Ames therefore fulfilled his part of the May 2009 agreement. This was despite the fact that there was still no attempt to link these payments to the value of the works actually being carried out by ICE. As at March 2010, the Phase 1 works were far from complete, whichever version of Phase 1 is used as a yardstick. So, when it was put to Mr Ames on more than one occasion that Harlequin always operated financially on a "hand to mouth" basis, he not unreasonably denied it. He agreed that he never had tens of million in the account, he said that, as at May 2009, he had looked at the situation and concluded that he could make these large weekly payments over 43 weeks. He said he met those

commitments: in fact he said that often he paid them earlier. I agree: this is what the evidence broadly showed.

121. Mr Ames was asked about when the design work in the waterfront village was completed, because that was an important element of the Phase 1 works. He said that he did the concept in early 2009 and that TVS had worked it up by May 2009. He said that the design was effectively complete at that stage. He said that there was a separate argument between TVS and MOLA, who were ICE's architects, as to who was to carry out the detailed drawings based on the TVS concept. But Mr Ames maintained that this dispute was nothing to do with him, and asserted that he did not make any further changes after the May 2009 agreement. As noted below, these statements were wishful thinking on Mr Ames' part.

3.10 Events Between May and December 2009

122. In the early summer of 2009, there were debates and difficulties arising out of the state of the design. The evidence showed that there were some changes, but not perhaps as many as WK now assert. By way of example:

(a) (E/5035/1), a document dated 20 May 2009, there was an exchange about the design and work at Trader Vic's, which was at the time going to be part of the waterfront village. This aspect of the interior design work was being carried out by William Baker, who was unsure who was doing the co-ordination of the design. Mr Ames said that TVS and ICE were fighting about who would do things such as the mechanical and electrical design consequential upon the TVS concept. He confirmed that this work was still being designed and said that he was not involved in the detail (which I accept, because detail was not Mr Ames' strong point) and that he was relying on Mr MacDonald (which I reject because, on any view, Mr MacDonald never had any design role).

(b) Although the email at the top of the chain (E/5035/1) suggests that there might be design changes to Apartment Block 1, Mr Ames said that the suggestion that the suites should be made smaller to help sell them did not eventually go ahead.

(c) Mr Ames' inability to resist tinkering with the design can be seen from the document (E/5093.1), dated 26 May 2009. It demonstrated that, less than a week after he had reached his agreement with Mr O'Halloran of ICE, he was proposing changes to Apartment Block 1. Although he maintained that these changes had already been discussed by the time of the meeting on 19 May 2009, it was clear on a fair reading of the contemporaneous documents that these changes only arose on 26 May 2009 and therefore could not have been discussed the week before. However, it again appears that these changes were not in fact followed through, and it is all academic in any event because, even now, Apartment Block 1 does not exist beyond its concrete slab foundations, and ICE never made any attempt to carry out any superstructure work.

(d) There was a meeting on 22 May 2009 (E/5050/1) at the ICE offices in Barbados. There was already discussion about changes to the Phase 1 work and the possibility of adding 44 cabanas. Again Mr Ames said this never happened, so that it was irrelevant, and again that seems to be correct. At the

meeting there was a reference to the fact that £27 million was required over the next ten months, but this figure was said to include the marina (which was never built), the Furniture, Fitting and Equipment ("FF&E") (which ICE did not supply), other items which were also never supplied, and land that still needed to be obtained. Thus the £27 million figure may well have been made up of the £19.35 million, plus the £5 million (paragraph 119 above), plus something for the marina and the FF&E.

(e) There was also a reference in the emails of this period to a restaurant having been moved by Mr Aquino, the architect, to the middle of the site, on Mr Ames' instructions, and then being moved further east, before being moved back again. Mr Ames said that the restaurant was never built. But that was not an answer to the issue here, because the change in the proposed location of the restaurant caused the demolition of some of the cabanas. Mr Ames seemed to accept this. This is dealt with in more detail in **Section 8.4.7** below, as a variation to the ICE works.

123. By May 2009, some investors at Buccament Bay had become concerned about the delays to the works and had threatened or commenced litigation against Harlequin SVG. This was a particular problem because the delays in completion meant that, pursuant to the contracts of sale, Harlequin SVG were obliged immediately to repay the 30% deposit in full, having already given half of that deposit to HMSSE. This problem had been expressly noted by Dan Ames, Mr and Mrs Ames' son, in his email of 30 March 2009 (E/4448/2). It again showed that, if the properties were not completed quickly, the business plan would not work. Now, there was a claim by Mr Massey, for whom judgment was entered against Harlequin SVG as a result of an admission of liability by Mr Commissiong (E/5044/2, 1). There was also a claim by another purchaser, Mr Lennox (E/5835.1/1) and this time there was a dispute between Mr Commissiong and Mr Ames about how to deal with that claim. Money to make these repayments was not available: Mr Ames agreed that, by reference (E/5169/3, an email of 3 June 2009), in which he ordered that the money due was not to be paid. Mr Ames repeated that, by contrast, the weekly payment of £450,000 to ICE was always paid.

124. Another issue that had arisen by May/June 2009 was the concern highlighted by Mr Taylor (amongst others) that Harlequin did not have anyone on site recording the progress and quality of the work being carried out by ICE. In an email to Mr Ames (E/4765.1), Mr Taylor stressed the need for "eyes and ears" in SVG. This echoed Mr Commissiong's advice the previous year to the same effect. Following the May 2009 meeting, and the increase in the weekly lump sum payments to $450,000, the possibility of engaging someone to undertake this task was also raised by DLA Piper. They recommended a man called Ben Roberts as a potential Project Manager. Mr Roberts visited the site on 17-21 May 2009 and made a detailed inspection of the works and the procedures for payment. His grave concerns were set out in two documents.

125. The first document is an internal email from DLA Piper dated 27 May (E/16020). The email reported Mr Roberts as saying:

> "He believes he would find it impossible to control the (rather scary) building contractor who has no written contract, no

> timeline to work to and no liquidated damages penalty upon him in the event of delays in completion. He also apparently has an equity stake in the development. He took a dislike to Ben and said that he could have him kicked off the island if he wished, after he found that Ben had been asking questions about the building contract etcetera.
>
> Ben believes it would be a tall order to complete by next July.
>
> I remain concerned, as do Darren and Ben, about the feasibility of the business and am increasingly of the view that from a reputational point of view we should seek to exit ASAP."

126. The second document was Mr Roberts' own report to Mr Terry one of Harlequin's in-house solicitors, dated 9 June 2009. In this report, amongst other things, Mr Roberts said:

> "Please bear in mind that my notes reflect what I have been told, they are not to be considered as statements of fact and in all regards would need verification.
>
> 1. The lack of a contract with all of its associated protection and lack of normal due processes would make this scheme very difficult to fund/sell should the need ever arise to dispose of it.
>
> 2. Fundamentally the scheme as always and still does require a project manager with overall responsibility for ensuring that all the correct documentation is produced and to oversee the scheme as it is built, drawing upon various professional disciplines such as properly qualified quantity surveyors.
>
> 3. The lack of a contract principally means that there are no warranties, penalties or timescales which impacts on duty of care issues with the investors both in terms of quality and delivery and ongoing maintenance/service charges.
>
> 4. The build cost verbally agreed is $121 million according to ICE.
>
> 5. The specification appears to be continually changing.
>
> 6. No quality control on behalf of the developer – no reason to believe the work is not being done correctly however Harlequin should be insuring this is undertaken on the investors behalf. This is also fundamental for the long term safety of the scheme. For example, what protection do investors have concerning build quality. Without warranties this is difficult to see. If a defect appears of a non insurable nature, who will pay for the repairs?

> 7. There appears to be little cost control, this was an area I was advised not to involve myself in…
>
> 10. Who is going to verify for the developer that the drainage and the water supplies will be adequate? Ditto electricity supply. ICE tell me this is in hand however whilst I have no reason whatsoever to disbelieve them it should still be independently verified for Harlequin as good practice. The last thing that Harlequin want is a scheme that is all ready to go but insufficient electrical capacity for example…
>
> 15. Details of scheme ownership are confused, does ICE have a share?
>
> 16. Dave says Mac is paid by ICE others say Mac is paid by Dave. This matters because Mac advised that he has been undertaking quality control for Harlequin…
>
> 27. Delivery and timing of materials is one of the most important aspects and needs considerable skill.
>
> 28. A highly experienced QS or site manager, locally based, is required to act on Harlequin's behalf in terms of quality control and timing.
>
> 29. A project manager should be appointed to provide the vital expertise for the next schemes to ensure that the developments are built correctly – this can easily be UK based.
>
> Until a detailed specification is produced for the entire scheme, a meaningful program produced and therefore it is impossible to say that the development will be ready by July 2010."

127. Mr Roberts' concerns did not go down well. Mr Ames thought Mr Roberts was out of his depth (see his email of 22 May at E/5063) although he seemed to be principally concerned about Mr Roberts interfering in how Harlequin SVG was paying for the work. Mr Ames' email (which was copied to Mr MacDonald) did not set out any cogent reason for not employing him. Subsequently, however, on 3 July 2009, Mr Ames terminated Mr Roberts' relationship with Harlequin. In his termination letter, Mr Ames said:

> "It was apparent to me as well as my accountant [Mr MacDonald] and the CEO of my construction company [Mr O'Halloran] when you visited the Caribbean that your experience and abilities were not as suited to the intended role as you had led us to believe. Some of the people you spoke to on site took offence at the manner of questioning they faced from you.

> One of the tasks I asked you to undertake while on site was to make note of the stage of development that each construction had reached. Only with this detail would you be in a position to evaluate progress on any further visits. I am unaware of any notes taken on site and cannot help but feel that the trip was a waste of everyone's time and expense."

128. I consider that Mr Roberts was asking the right questions and pointing out the obvious deficiencies he found on site. He was neither a construction professional nor a lawyer, so it was purely common sense that led him to conclude that the absence of a contract and the absence of a cost control/valuation process were fundamental omissions. But he got nowhere because it was not in Mr O'Halloran's interests for the arrangements to be disturbed; Mr McDonald either did not care or positively preferred things the way they were; and Mr Ames seemed happier to pull the metaphorical duvet up over his head rather than confront either of them. As these paragraphs show, it was much easier for Mr Ames simply to bully Mr Roberts out of the picture.

129. In his witness statement, Mr Ames said at paragraphs 60-62 that Mr Roberts had clearly been shaken by his experience in SVG and would not go back because his life had been threatened. Mr Ames also said he was disappointed with this attitude, and that it was for this reason that he decided to have nothing further to do with Mr Roberts. The contemporaneous evidence which I have set out demonstrates that all of that is untrue. There is no mention there of Mr Roberts' feeling that he felt his life was in danger and/or that he had refused to go back to SVG. Indeed, the documents suggest the contrary.

130. What is important was not whether or not Mr Roberts personally was a good fit as project manager, but whether the work which he said was critical, namely regular inspections and the like, should be carried out. Mr Ames said that he felt reasonably comfortable because he had Mr MacDonald to ensure that this was all done. But it is also clear that he thought that regular inspections should be undertaken, and that such work was going to be carried out by what he called (in a contemporaneous email) "a proper company". This was a reference to RLB. I deal with their involvement in greater detail below.

131. Also at the time of Mr Roberts' involvement, there was another third party report which should also have sent alarm bells ringing for all concerned. That was a report by a Mr Prats of Oasis in June 2009 (E/844/4). It is clear that, on any fair reading of that report, basic works such as the provision of water, sewage services, electricity and the like had not been planned for by ICE, let alone carried out. The report is also critical of the standard of ICE's work. This is important because WK now suggest that ICE carried out a good deal of works in connection with these services and they comprise major elements of the dispute about the proper value of ICE's final account.

132. The position in late June 2009 on site was summarised (E/5436/1, 2) by Mr Coggle of ICE, following complaints by the selling agents that little had been done since their last visit. He set out the current position, including how many cabanas had been demolished (9) and what the percentage completions were for the remaining cabanas and Apartment Blocks 2 and 3. In my view, this document showed that, although ICE had now been involved for a year, little real progress had actually been made, despite the large sums which they had been paid.

133. It appears that the initial contact with RLB was made by Mr MacDonald. In July 2009 they produced a report (E/5520/1) addressed to Mr MacDonald at WK's office in Southend. This report valued the work as at 12 August 2009 at $166 million. It valued the resort upon completion at $412 million. In addition, it valued the cost of the works completed at $31.456 million and the cost of outstanding works (obviously far beyond Phase 1) at $146.719 million. It is perhaps unsurprising that, on the basis of these figures, Mr Ames said that Mr MacDonald was touting the report around the office because it demonstrated that "everything was fine".

134. It is clear that, at this time, RLB were expected to have a major role in the project going forward. The document (E/5589/3), which was a site directory, described them as the project manager/QS for the scheme. The minutes of the meeting on 6 July (E/5593/1) also referred to them as the project managers. But they were never appointed to this role. What happened was that RLB offered to perform a monthly monitoring service in respect of ICE's work, and in August they made a further offer to provide those services (E/5946/1). They did not hear from Harlequin and they chased for an answer. This went on for some time (see E/6003/1, E/6053/1, E/6055/1 - a revised quotation - E/6087 and E/6089/1). Eventually, it appears that Mr Ames authorised RLB to carry out some work, but only for one visit. This produced one report, noted in paragraphs 137-139 below.

135. These minutes of the meeting on 6 July are also important because Mr Ames signed off the TVS drawings at that meeting, despite his evidence that he never got involved in the detailed design. When it was put to him that the minutes showed that MOLA and others were requesting further drawings, Mr Ames countered that everybody at that time was happy that the Phase 1 works would be ready for July 2010, and that the detail was not his concern. The minutes also refer to the problems with land titles, but Mr Ames said that was outside Phase 1 (which was only partly true, for the reasons previously noted). The marina was still being designed.

136. I have referred, at paragraph 97 above, to the DLE report of October 2008. The documents of 9 July 2009 (E/5580/1) reveal that some of the content of that report was re-sent to Mr MacDonald in July 2009, by way of its inclusion in a wider report that had been provided to Harlequin by Colliers CRE. Mr MacDonald agreed that the nature of the report, which included a valuation of the construction works and detailed information about financing, meant that it should not have been sent to the contractor. But Mr MacDonald had to accept that that is precisely what he did: he sent the Colliers report to Mr O'Halloran on 9 July 2009. He could not explain his conduct. I find that it was inappropriate for the employer's agent to send confidential information of this kind to the contractor. This is an important element of the story when we come to the alleged conflict of interest, and the allegations that Mr MacDonald was becoming much too close to Mr O'Halloran.

137. Having finally authorised RLB to visit, Mr Ames chased for their report because he wanted the report to check the progress of the work and compare it with the budget. He also said that he wanted the report to deal with quality and timing. The report (E/6464/1) was dated 6 October 2009.

138. The report was prepared by Mr Hoyle who was apparently based in the Caribbean. The report notes that there was no detailed design and construction programme, "without which firm conclusions cannot be made". The report also warned that, in

order to achieve the Phase 1 completion date, "all structures will need to be constructed simultaneously which we believe may not be achievable." A number of other warnings were given in section 2 of the report which made it plain that the author was doubtful that the completion date could be achieved.

139. The scope of Phase 1 is recorded as being Apartment Blocks 1, 2 and 3, Apartment Blocks 4, 5 and 6 (shell and core only), all cabanas, marina sea and river defences, restaurants by the beach, landscaping, a central pool area with restaurant, a reception area, and a sports area. The report expressly said that "we assume some element of Back of House facilities will be required although not mentioned above". The report gives as detailed a record of progress on various areas of the work as was possible in the absence of documents and access to parts of the site. It warned that neither Apartment Blocks 1 or 3 would be completed by the dates promised by ICE. It should also be noted that, beyond a passing reference to ICE's statement that their costs to complete were $65 million, the report contains no other figures at all.

140. Neither this report, nor any of the later RLB reports in 2010, dealt with the quality of the work being carried out by ICE, or included any valuation of their work. RLB never produced a standard quantity surveyors' report, with a nuts and bolts valuation exercise. And yet, as noted in **Section 6.5.4** below, it seems that Mr Ames somehow persuaded himself that this was work that RLB were undertaking.

141. On 26 August, in an email to Mr Taylor, (E/6013.1/1) Mr Ames was putting a very positive spin on the progress of the works. He said that Apartment Blocks 1, 2 and 3 would be finished by Christmas. He said he had been told that by RLB, but not only was there no evidence to support that assertion, but it is contrary to the RLB report itself (paragraph 139 above). It would have been quite impossible for those three Apartment blocks to be completed within four months, and Mr Ames' email demonstrates his enduring ability to ignore reality.

142. An important land-related issue arose again on 23 September 2009 (E/6278), concerning the land owned by the Rasta farmers. Mr Ames was chasing Mr Commissiong, claiming that he had not heard from him about the position with the Rasta farmers, and emphasising that it was "not an option" to build the development without that land. This rightly recognised the importance of that area as the reception point and the BoH. By reference to the document (E/6327/1), Mr Commissiong avoided the issue. Again, in relation to this parcel of land, Mr Ames was threatening to get the Government to compulsorily purchase it. Mr Commissiong again advised that this was not possible because the land was not for a public purpose.

143. At this time there were still design changes to the waterfront village (see for example E/6219 and E6/6232). In answer to questions about these changes in cross-examination, Mr Ames began to suggest that some of this work, such as the BoH area, were outside Phase 1. However, that was his way of avoiding the potential problems caused by his tinkering and, on a proper analysis, he was not right about that. The BoH was an inherent element of the Phase 1 works set out in his email of 26 May 2009: a waste water treatment plant and an electricity sub-station, for example, were always required, since the resort could not properly open without them. In addition, the subsequent documents at E6/6278/1, E/6304/1, E/6322/1, E/7288/1 and E/7504/1 made plain that Mr Ames – and everyone else – assumed that this work was part of

Phase 1. It was for that reason that Mr Ames was urging this work to be carried out, because he knew it was necessary for the opening on 1 July 2010.

144. In October 2009 there was a meeting at the offices of MOLA, the architects employed by ICE, amongst other things to translate the concept designs of TVS into construction drawings. Mr David Campion, who was later to work for Harlequin, was an associate director of MOLA and the meeting in October 2009 was his first involvement with the Buccament Bay project. He recalled that Mr O'Halloran and his girlfriend Ms Suzanne Floyd arrived together with Mr MacDonald. He said that the three of them came in and out of the meeting together. He said he thought that, as a result of this behaviour, Mr MacDonald was working for ICE.

145. Mr Ames was asked about certain delays to the payments being made by Harlequin at this time. Documents (E/6560/1 and E/7312.1/1) were put to him. Mr Ames' response to these (and other similar documents) was to say that, even if one or two payments were delayed, in general terms he was ahead of the agreed weekly payment schedule. He explained that this was why ICE were submitting two weekly invoices rather than one. I find that the agreed payment schedule (Appendix 20 to Mr Large's report) supports Mr Ames' evidence that the 43 payments were largely paid on time.

146. I note that at paragraph 73 of his judgment in the Dublin litigation, McGovern J said that he was satisfied on the evidence before him "that from sometime in the summer of 2009 it was clear to [Mr O'Halloran] that it was unlikely that Phase 1 would be completed by 1 July 2010. The position was abundantly clear by November 2009, from which time [Mr O'Halloran] was making assurances about the delivery date". The evidence before me was different to the evidence in the Dublin case, in particular because the WK documents were not available to McGovern J. However, I have come to exactly the same conclusion. The documents noted below reveal that, from about October 2009 onwards, ICE (and Mr Newman of WK, ICE's CFO) knew that Phase 1 would not be ready by 1 July 2010. ICE lied to protect themselves. The extent to which Mr MacDonald shared that knowledge is an issue I address in **Section 6.6** below.

147. On 2 November 2009 (E/6811) Mr MacDonald sent Mr Ames an email in which he identified various areas where the costs were increasing beyond those budgeted. It is unclear which budget he was referring to. He said that ICE "will need $30 million by instalments". Although that apparently included the FF&E, which were not part of Phase 1, and which ICE were never asked to provide, this was a large figure which bore no relationship to the May 2009 agreement. The complete confusion over budgets and figures was simply not addressed by Mr MacDonald.

148. Between 22-28 November 2009 (E/7063) Mr MacDonald and Mr Ames visited SVG. Mr MacDonald's own notes of his visit to the site at Buccament Bay on the first day make clear that he reviewed the site progress (which he described as "significant"). His notes of the second day revealed that he returned to the site and carried out an inspection "with Paudie, and reviewed the progress particularly Block 2 which is now fully tiled. Overall the standard of the tiling is good and providing the material is onsite I remain confident this can be completed on time." These notes demonstrated that Mr MacDonald was dealing (at least in a general way) with progress, completion and quality of work.

149. Since early November 2009 (E/738), MOLA had been seeking from ICE a critical path programme, with Mr Townsend of MOLA saying that a further meeting to discuss programming and completion was urgent. The meeting took place on 23 and 24 November 2009. Mr Ames said that he wanted all the consultants at the meeting to ensure that the promises that were being made (completion of Phase 1 by 1 July 2010) would be fulfilled. That shows that he was starting to worry about whether the works would be finished on time. It was anticipated that the meeting would (amongst other things) review the construction programme and establish the critical path.

150. The minutes of the meeting are at (E/716): (E/7067/2). Important parts of the minutes recorded the following:

(a) The Central Resort Court Area was considered, including the BoH. It was agreed that this area would be constructed as part of Phase 1 although, if the land issue with the Rasta farmers continued, alternative arrangements would have to be made.

(b) It was agreed that Apartment Blocks 4, 5 and 6 would be constructed to shell and core only.

(c) It was agreed that the waterfront village restaurant buildings would be constructed. A setting out issue was identified which necessitated the demolition of cabana No. 1.

(d) It was agreed that the marina/beach/breakwater areas would be constructed.

(e) There was a review of the project construction programme. It was recorded in the minutes that "overly ambitious dates for completion of elements were discussed along with procurement timelines and it was agreed that some revisions to the programme would be made by ICE."

(f) There was a list of important design items "still to be resolved or signed off at the earliest opportunity following the meeting." These included the Central Court Area/BoH and the expanded beach front retail building.

151. The attendees were concerned about completion even of the reduced scope. Mr Campion, who was at the meeting, said that everybody voiced concerns about how realistic the ICE programme was. He said that the programme itself was presented to a closed audience and that the Harlequin representatives were not there for that part of the meeting. He said that the minutes reflect the fact that a number of the professionals were very concerned about the dates: hence the reference to "overly ambitious dates".

152. Mr Ames continued to raise points when they occurred to him, often a few weeks or months after raising them previously. Thus, in December 2009, there being no further response beyond that noted in paragraph 142 above in respect of the Rasta farmers, Mr Ames emailed the Prime Minister of SVG to say that, if the Rasta land was not acquired by the end of December, then the opening on 1 July 2010 would be delayed. That suggests, first, that the works on the Rasta land – principally the BoH – was necessarily considered to be part of Phase 1 and, secondly, that Mr Ames was ignoring Mr Commissiong's advice that it was not a matter for the Government.

153. On 1 December 2009 (E/7210/3) Mr Hoyle of RLB said that their valuation of the works done up to July 2009 was $31.456 million (a fuller report identifying the same figure was at E/15928/1). Given that that was rather more than what Harlequin had paid to Ridgeview and ICE by that time, it upset both Mr MacDonald and Mr Ames (E/7210/1). Mr MacDonald said he could not understand the calculation and regarded the figure as "confused nonsense". Indeed both men were so upset by it that there was some question of sacking RLB. Although that did not happen, RLB continued to be involved in the project on an unsatisfactory, *ad hoc* basis. It did not apparently occur to Mr MacDonald that the best way to avoid this sort of problem was to have a contractually-binding valuation process.

154. I note that, in addition, Mr Hoyle noted that his valuation figure "includes a figure of US$7 million for plant and machinery which we are advised is the value of goods inherited from the previous Contractor".

155. There was an important postscript to this report. Mr MacDonald was so concerned about the RLB figures that he asked Mr Ames "why do we use them [RLB]?" (E/7210/2). On disclosure it was revealed that Mr MacDonald had already shared his concerns with Mr O'Halloran. His email is set out (E/7132/1) as follows:

> "I understand the London office are dictating how flexible Rob [Hoyle of RLB] can be. They will ultimately force him to present a poor report. Why do we use him. The angle (sic) of darkness has spoken."

156. I find that the clear and obvious inference from this email is that pressure was being put on Mr Hoyle to produce inflated figures for the value of the construction works and that this process was being clamped down on by RLB in London. I deal further with this unusual exchange in **Section 6.8.2** below.

157. On 16 December 2009, there was a conference call with ICE and all their consultants (E/8036/1, 2). The problems with the ownership of the Rasta land were identified, and the potential delays that this might cause to the BoH work. Although the minutes say that the Rasta land was urgent, there was also a reference to problems to the BoH being caused by a workshop owned by Bernard Punnett on his land. This would appear to be the result of the possible re-siting of the BoH away from the Rasta land, to the area to the south of the site which Harlequin did not own at that time but which became the site (amongst other things) of the temporary waste plant. At this point it was also noted that the foundations of Apartment Block 1 were 50% complete.

3.11 January - February 2010

158. In late 2009/early 2010, another important character joins the story, Mr Andrew Smith of Procure It Direct ("PID"). Mr Smith was engaged by Mr Ames to procure the FF&E for the cabanas in Phase 1. Mr Smith said that he was able to do this more cheaply that anyone else because it was sourced through his Chinese office. He said that by 14 December 2009 he had a contract with Harlequin worth around $3 million for the supply of the FF&E. He said that subsequently – within a few weeks – the contract sum increased to $7.3 million to include all the lighting, ceiling, crockery,

quilts, bedding, linen and related items. He said all of this was based on 368 keys.[6] He said that the entirety of this sum was to be paid in advance of delivery.

159. On 13 January 2010 (E/7911/1) Mr Ames made the point to Mr MacDonald that, whilst he had kept his side of the bargain with ICE and had made all the weekly payments, Mr O'Halloran was now away for 6 weeks. He said the "pressure should be on Paudie…he MUST finish on time as planned". Mr Ames said in evidence that this was prompted by Mr O'Halloran and Mr MacDonald indicating to him that ICE would do less than they had originally agreed. I find that this was a broadly fair reflection of the position at the start of 2010. It was the start of the unravelling of Mr Ames' relationships with ICE and WK.

160. Also at a MOLA meeting on 13 January 2010 (E/8161/1) there was a detailed discussion in respect of the electrical works and what needed to be done in order for this work to be carried out. Mr Campion confirmed in his re-examination that, in fact, ICE never did any of this work. Similarly, on the following day (E/8162), there were similar detailed discussions about the work necessary in respect of the water and sewage systems. Again Mr Campion said that this work was never done by ICE.

161. On 15 January 2010, there was another important meeting chaired by MOLA to discuss the Phase 1 works. Representatives were there from the architects and from ICE. Mr MacDonald and his secretary (Ms Hayley Byatt) were there. Mr MacDonald was referred to as the "client representative". No one else from Harlequin was in attendance. Amongst other things, the notes recorded:

(a) The problem with the Rasta land and the need to identify a revised location for the BoH and the central court;

(b) "It was agreed at this meeting that the following elements will be completed by 1 July:

1.2.1 The Waterfront Village to include the 4 Restaurants and associated pools and landscaping; the Marina, swimming pools and Beach Bar

1.2.2 Blocks 1/2/3/4 (with Block 4 to be modified to accommodate BoH storage);

1.2.3 The Cabanas to the west of the Rastafarian site;

1.2.4 The BoH and Utilities Building;

1.2.5 Beach works and river defence work;

1.2.6 All infrastructure and services sufficient for Phase 1;

1.2.7 The Beach Retail area (which is currently being redesigned by all consultants)";

[6] This was an error: the right figure was of course 362 (paragraph 118 above).

(c) ICE confirmed that the cabanas for Phase 1 were practically complete and that, although the programme had slipped by 4 weeks on the waterfront village and Block 1, this time would be made up over the next 5 months.

(d) "ICE stated that it was unclear who was procuring what in terms of furniture and fittings, and that a clear schedule outlining the total procurement process was required."

162. At this meeting therefore, the revised scope of the works within Phase 1, that were to be completed by 1 July 2010, was "agreed". In my view, that agreement could only sensibly have been made on behalf of Harlequin by Mr MacDonald. Although, during his cross-examination, Mr MacDonald suggested that the agreements at this meeting were being reached between ICE and MOLA and they were nothing to do with him, I reject that evidence as nonsensical. MOLA were ICE's architects. MOLA and ICE were, as it were, on the same side and could (and would) have had internal meetings to discuss such matters without Mr MacDonald being in attendance. Indeed, he would have had no right to attend their internal meetings. The purpose of his being at this meeting was to agree matters – such as the reduced scope of Phase 1 - on behalf of Harlequin. I find that that is what he did.

163. There was a workshop on 25-26 January 2010 attended by all interested parties, involving a number of different breakout meetings (E/16017). This time Mr Ames was there, together with Mr O'Halloran, Mr MacDonald, and literally scores of consultants, all of whom were engaged by ICE. Amongst the things which were recorded at the meeting were:

(a) The final scope of works agreed for delivery for July 3 2010 was recorded as:

"Approx. 150 cabanas.

The Waterfront Village Building with 4 Restaurants, Kitchens and Bars.

The Beach Bar.

The Retail Village Building.

All pool areas adjacent the Waterfront Village Building.

The Marina boardwalk and Jetty, breakwater and beach works.

The Marina Reception and Dive Shop Buildings.

The Black Pearl Utility Building and localised 'themed' area.

Apartment Block 1 – Water's Edge – This building will be fully completed externally but left at a shell and core standard internally.

Apartment Block 2 – This building will be fully completed externally but left at a shell and core standard internally.

Apartment Block 3 – This building will be fully completed externally but the internal spaces will be reconfigured accordingly to provide BoH, staff facilities and storage along with the temporary reception area.

'BoH' – Temporary buildings will now be constructed on the sites of future Blocks 4, 5 and 6 to house Laundry, Maintenance, Power Generation areas etc.

Waste Water Treatment Area (Note: a final site for this is still not finally identified – see below).

A Site Entrance Area and all upgrade works and landscaping to service road into resort.

A Gym/Health Club will be temporarily located in Cabana Nos. 160 and 161.

A Temporary Spa will be located in Cabana Nos. 101 and 111.

The building schedule below will be fully fitted out with all internal finishes complete. All built in and loose furnishings will be included. All Restaurant Kitchen and Bars are to be fully operational. Pool areas will have all finishes and landscaping features complete. It is assumed that all services infrastructure to support these areas will be installed and commissioned."

(b) There was references to planning permission and the leasing agreement and permit for the marina development. There were references to electricity, central water and the sewage authority.

(c) The minutes noted that ICE was to produce a revised Project Construction Programme to reflect the new Scope of Work for Phase 1 described above. This programme was to incorporate key milestones for delivery of critical path items. ICE was to issue this programme to all in the immediate period post the meeting.

(d) There was a detailed discussion about procurement and various specific items of equipment including pool pumps.

(e) There was a discussion about outstanding design issues including in particular the BoH.

164. Typically, Mr MacDonald sought in his cross-examination to play down his role at this meeting, saying that he had not attended all the breakout meetings and he could not recall any of the details. He did agree that he was aware that procurement was an immediate and serious issue. He said that he was not aware that, for example, the swimming pool pumps needed to be ordered urgently, but he was aware that Mr O'Halloran had agreed to deliver everything by 1 July 2010. Although Mr MacDonald sought in his evidence to qualify Mr O'Halloran's assurance by saying that this was dependant on finance, that qualification was not in the minutes, nor in any other contemporaneous document. It was one of numerous examples of Mr MacDonald's willingness, even at trial, to argue anything on behalf of Mr O'Halloran, regardless of the true position. Moreover, I note that this was during the 43 weeks when there was no additional financial obligation on the part of Harlequin SVG.

165. Mr Campion dealt with this meeting at paragraphs 16 and 35-40 of his witness statement. Amongst the most startling pieces of that evidence was that, at one point, when he was expressing his concerns about the viability of the 1 July 2010 completion date, he was briefly shown a proper GANTT chart prepared by ICE, which indicated a completion date of April 2011. He said he was shown this programme by Mr Webster of ICE for about 30 seconds. He described it as "a secret glance". He said he was only shown it because he had challenged Mr Webster as to how he could sit in the meeting and say that the works would be finished by 1 July 2010. I accept Mr Campion's evidence about this event: it is clear from other evidence that the Phase 1 works were never realistically going to be complete by 1 July 2010 or anything like it, and I find that, whatever they were saying to Harlequin, ICE were aware of that. The existence of a proper programme showing a completion date of April 2011 is consistent with those findings. Of course it means that ICE was acting in a duplicitous fashion throughout this period, as McGovern J concluded (albeit on different evidence).

166. Mr Campion was cross-examined about other parts of the minutes of the meeting on 25-26 January 2010. He said that the marina, which was discussed here, was never completed by ICE. He said that the coastal works were also not carried out. He said that although some work had been carried out by ICE to the river revetment, it was not completed and, once it was seen by Baird, the marine consultant, it had to be redone.

167. By this time, Phase 1 had been significantly reduced. No Apartment Blocks were going to be completed internally by 1 July 2010, a major reduction from the agreement noted in Mr Ames' email of 26 May 2009. Yet a huge amount of work was still required to be done to meet even that reduced scope. By way of example, although Apartment Block 1 contained 62 of the 368 keys that were the subject of the 43 weekly payments, the document (E/7760/1, 8 January 2010) made clear that the new foundations of that block were only going in then. I find that, as a result, it would have been impossible for that large Apartment Block to be completed inside and out and ready for occupation by 1 July 2010. Accordingly, it is no surprise that ICE subsequently said that the Block could be completed to shell and core only. That was itself a clear reduction in the Phase 1 works. Even that did not happen, and all that was built were the foundations.

168. One of the people who did not attend this meeting was Mr Smith of PID. He said that he was told by Mr Ames that Mr O'Halloran and Mr MacDonald did not want him to be present. He indicated in his evidence that Mr O'Halloran was jealous of the fact that he had obtained the FF&E contract. This seemed to me to be far-fetched. There were, however, two other important elements of Mr Smith's evidence relating to his being on site at the time of this meeting which I do accept.

169. First, Mr Smith said that, on the day before the meeting, when he was walking round site, he met Mr O'Halloran for the first time. He said that, amongst other things, Mr O'Halloran told him that he was not interested in Mr Ames and was going to milk Mr Ames and Harlequin for everything he and it had. Mr O'Halloran told Mr Smith that he thought Mr Ames was a gullible man and should never have given ICE the project in the first place. It was not suggested to Mr Smith that this conversation did not happen. I find that it is more likely than not that it did, particularly as it is entirely in

keeping with the internal WK emails, noted at paragraphs 180-200 below. I find as a fact that Mr O'Halloran's game plan was described to Mr Smith in this way.

170. The second important element of Mr Smith's evidence about this meeting was that, on the basis of his walk around, he had concluded that the site would not be ready by 1 July 2010. He said that when Mr Ames said it was going to be ready at the end of June he had said "which June?" I am in no doubt that this was the view formed by Mr Smith and that it was an accurate summation of the position. Mr Smith was asked whether he had told Mr Ames of his fears in January. He said that he did not (other than his "which June?" comment). When asked why not, given that PID were preparing to deliver furniture and fittings for 368 keys, only a fraction of which would become available, Mr Smith said "he was a businessman".

171. Whilst that answer was understandable in respect of the FF&E contract already agreed, it was at the very least regrettable when considered against the subsequent variation to the PID contract, which increased the amount of FF&E ordered from $3 million to $7.3 million. It is plain that this variation occurred *after* Mr Smith had formed the view that the 368 keys would not be ready. In those circumstances I consider that his obligation to negotiate in good faith required him to tell Mr Ames that any variation should be limited to those cabanas and other rooms that were likely to be complete by 1 July 2010. Take, by way of example, the 76 golf buggies that were ordered for the 368 keys as part of the variation. Phase 1, as envisaged in January 2010, was simply not big enough to require such a large number of buggies. It must have been obvious to Mr Smith that they would never be used. Today they sit rusting in a large field in an unused part of the site.

172. Finally in relation to this part of the story, Mr Smith told me that, as a result of his encounters with Mr O'Halloran and Mr MacDonald in January 2010, he formed a dim view of Mr MacDonald, and thought that he was taking "backhanders" from Mr O'Halloran. This was because he had seen him huddled in a cabana in secret talks with Mr O'Halloran; because Mr O'Halloran had made his "milking" comment only the day before; and because he had been banned from the meeting. I am not persuaded that any of these matters could – either separately or together – have indicated that Mr MacDonald was receiving secret payments from ICE. But I do accept that Mr MacDonald's conduct on site at SVG, and in particular his close, not to say intimate friendship with Mr O'Halloran, inevitably aroused widespread suspicions which only hardened over the next few months.

173. Mr Ames' reaction to what he was told at the various meetings in January was almost schizophrenic. In his email (E/8329/1, 27 January) he was very enthusiastic about the progress, and said "all is looking very exciting". Whereas at almost exactly the same time (E/8517/1, 30 January), he said that he was concerned about Mr O'Halloran and felt unsure about his commitment to the Buccament Bay project. Mr Ames was quite right to be concerned about Mr O'Halloran's approach and attitude. A fair reading of the minutes of the January meetings demonstrates that, even with the reduction in the scope of Phase 1, there was no realistic prospect that these works would actually be completed by 1 July date. Yet this warning was never given to Mr Ames or anyone else at Harlequin. Instead, throughout January, and throughout the period until relationships were severed in late May/June 2010, Mr Ames was continually told by everyone that the project would be ready on time.

174. I should also refer to one other important element of the evidence in respect of the progress of the works in the first months of 2010. Even assuming, contrary to all the indications, that there was an outside possibility that the works could be completed by 1 July 2010, this would have required a major increase in men and materials on site. Not only did that never happen but, as Mr Campion made plain at paragraph 34 of his witness statement:

> "…as evidence by the daily reports and based on my knowledge of the [project], very little progress was made towards completing Phase 1 in the period November 2009 to 11 June 2010."

Although the extent of the non-progress in this period is over-stated, I accept the broad thrust of that evidence. The lack of progress is supported by the documents and the other evidence of the witnesses who gave oral evidence at the trial. It is also supported by the later documents revealed on disclosure by WK and dealt with below.

175. Despite his desire to believe the reassuring comments made by Mr O'Halloran and Mr MacDonald, it is clear that Mr Ames began to suspect that all was not well. In an internal email dated 26 January 2010 (E/8296/2), Mr Ames revealed that Mr MacDonald was "really getting to me. He is basically working for Paudie now and trying to make the resort smaller." As noted in paragraph 172 above, he was not alone in questioning which side Mr MacDonald was on. Mr Ames also said in evidence that by this time he was thinking about kicking ICE off the site. He said he felt uneasy. He said he was paying the agreed 43 weekly payments and was concerned about ICE's failure to perform their part of the bargain.

176. Mr Ames' email to Mr MacDonald of 13 February (E/9125/1) addressed his concerns about ICE. He said:

> "Please remember that when I said I would pay ICE every week I didn't say 500, we said what they needed.
>
> If you're talking guarantees remember his promises not only to me and you but Carol and others that [Apartment Blocks] 1, 2 and 3 would be ready but they **WILL NOT** so please don't come across as if it's all my fault?
>
> ICE is where any problems are here not with me. I think everyone seems to forget that. Their aggression towards Sarah says a lot.
>
> I have the money and they will not do a runner with our money?
>
> Please do NOT discuss this with them inc Jeremy."

This email is important for a number of reasons. It shows Mr Ames' frustration with ICE. It also shows his frustration with Mr MacDonald, who he believed was always taking ICE's side, and therefore always criticising him, when it was ICE's fault that, for example, the promised works were not going to be ready on time. In addition, the

email shows that Mr Ames was becoming concerned that ICE would take him for all he had and then not complete the works, and that he did not want these confidential matters being discussed by Mr MacDonald with Mr Newman, the senior manager at WK who carried out work for Harlequin, but who was also ICE's CFO (an issue to which I refer in **Section 6** below). As noted below, I consider that Mr Ames' concerns on all these matters were justified.

177. I accept at once that not all the difficulties in respect of Phase 1 were of Mr O'Halloran's making. It is clear that the work was being varied even in late January, a point which Mr Smith confirmed in his cross-examination. One example can be found in the email exchanges which suggested that Mr Ames was concentrating on the provision of a children's pirate ship theme park as part of the waterfront village, a topic which, when set against the monumental delay in the provision of the basic Apartment Blocks at Buccament Bay, was an almost laughable distraction. The documents (E/7585 and E/9318) make plain that this was something which was taking up time and money in circumstances where it was simply not a priority. It is a good example of Mr Ames' naivety and impracticality.

178. Another example concerned the marina. At one point, it was agreed that Phase 1 would include a small marina on the extreme southern end of the beach. This was always ambitious, given that the entire waterfront at the site is very narrow and the provision of a beach was the main priority. In any event, Mr Commissiong's email of 9 February (E/8976) made plain that the marina needed planning permission, which was unlikely to be granted. He also confirmed that he was never instructed to draw up a lease for the marina in any location. Accordingly, he said that "proceeding along the present lines is not productive and nothing will be accomplished."

179. Mr Ames did not accept in cross-examination that at this time there were any significant payment difficulties. Although the documents (E/8647 and E/8696) make plain that there were some cash-flow issues, he said (and I accept) that they were minor. (E/8881/1) There was evidence that Mr Ames was making double payments. Moreover, it has not been shown that a failure by Harlequin SVG to pay particular sums precisely on time had any effect on the progress of the works or the ordering of any particular equipment or materials. As the documents show, the procurement failures were because ICE simply did not order the equipment and materials they needed for the Phase 1 works during the 43 weeks.

180. The actual knowledge on the part of WK as to what was happening at Buccament Bay, and the gap between their knowledge and the information that they provided to Mr Ames, can be seen in a startling exchange of internal WK emails at the end of January/beginning of February. On 29 January 2010 [E/8434/1], Mr Newman said to Mr Walmsley, a partner at WK:

> "The position with Harlequin is a mess, so we are trying to get as much protection for ICE in place as we can, and get as much cash up front as possible. The consensus is that Dave [Ames] will try to do the dirty on ICE come the end of July; at the moment, Dave needs ICE and we have to make the most of that while ICE has the whip hand."

Bearing in mind that Mr Ames and Harlequin were longstanding clients of WK, and were at that time paying the £19.35 million in accordance with the May 2009 agreement, the deceit in this email speaks for itself. Mr Newman did not give evidence but the meaning of his email is plain. Mr Walmsley, who did give evidence, told me he was monitoring the situation to ensure that the two clients were not in conflict. But this email demonstrates that they already were, and Mr Walmsley was doing nothing about it.

181. Mr Newman's concern to ensure that, in the forthcoming bust-up, it was ICE that landed on the right side of the fence can also be seen in another email that he sent as part of the same exchanges on 29 January (E/8450). In that email he said:

> "Phase 1 for Buccament has been finalised and, for what its worth, Dave promised not to faff around with it again. The existing cabanas will be finished off, and 3 hotel blocks built. The reception/back office area will be down by the beach, being housed within the area that has the restaurant such as Trader Vic's.
>
> Paudie expects to be able to begin to scale back construction operations within a couple of months as various areas are completed, so the strain on his cash-flow will ease…
>
> Paudie and Mark have re-jigged the budget, and will be working on a week-by-week cash-flow over the next day or so. Dave has agreed to keep making weekly payments to the end of June; there will then have to be a balloon payment to clear a balance of circa US$20 million but this will be dependant on loan finance being available. We're meeting Paudie's lawyers tomorrow afternoon and one of the items we need to get drafted is a formal agreement with Harlequin so that Dave has no wriggle room…
>
> The dodgy Dubai loan has resurfaced – a copy of the revised agreement is attached. This looks (again) simply like advanced fee fraud, but it's only €40k at risk. I'll talk to Mac once he's free about this as Dave is keen for Mac and me to go to Dubai next week to see the lender and his lawyers."

182. In response Mr Walmsley said:

> "Should we advise Paudie to secure his position? To charge his work in Barbados? A floating charge over Merrick's or a fixed charge mortgage? If Paudie is to be owed $20 million at completion in June given recent form Paudie needs to seriously consider his exposure and risk and I would absolutely recommend obtaining security to support legal agreement."

183. Mr Newman responded to say that he was seeing ICE's lawyers this afternoon. He went on: "I'm guessing Paudie's position protected as far as we can is at the top of the agenda."

184. These exchanges are important for a number of reasons. First they show that everyone was aware that Apartment Blocks 1, 2 and 3 were part of Phase 1, despite the fact that Blocks 1 and 3 were only just starting. Secondly, they show that, despite the fact that the works were so far behind, ICE were going to be scaling back their construction operations within a couple of months. Despite the delays to Phase 1, that is exactly what happened. Thirdly, they show that Mr Newman and Mr Walmsley had not the first clue as to any rule relating to client confidentiality. Some of the email is about Harlequin's financial position and WK giving advice about it (such as the so-called "dodgy" Dubai loan); whereas most of it is about doing all they can to protect ICE's position, at the expense of WK's client Harlequin.

185. Finally, there is the reference to the $20 million 'balloon payment'. This was new: it was not part of the May 2009 agreement, where the figure was £5 million. Despite the fact that that agreement was continuing and that Harlequin had broadly made payments in accordance with it, ICE were now requesting more sums of money, in addition to the sums due under the May 2009 agreement. Neither WK nor Mr MacDonald ever asked ICE about these sums or suggested that they may not be due because they were outside the May 2009 agreement. Everyone at WK, including Mr MacDonald, appeared to be operating on the basis that, if ICE asked for a sum of money, Harlequin should pay it. There was no basis for such an assumption.

186. ICE's decision to scale down their site presence at the very moment they needed to accelerate the works to meet the July date explains the later internal email (E/16087) from Mr Terry Wootton, who had been involved on behalf of ICE and who asked Mr O'Halloran: "How do I look them in the eye knowing we intentionally stopped this site on purpose just for our own ends?" That email was forwarded to Mr Newman by Mr O'Halloran. Although it is dated 17 June 2010, in my view it reflects the state of knowledge of and the strategy adopted by Mr O'Halloran and his CFO, Mr Newman, in early 2010.

187. This strategy, to squeeze as much money as possible out of Harlequin whilst scaling back operations, can be seen in two other emails from this period. The first is the email of 3 February from Mr O'Halloran to Mr MacDonald (amongst others) when, in response to Mr Ames' comment that he had paid 41 of the 43 payments and was therefore 8 weeks early, Mr O'Halloran said:

> "Why is he still on about the 43 payments? This has nothing to do with moving forward!"

This was, as Mr MacDonald must have seen or should have realised, an erroneous and typically ICE-centric view, since the May 2009 agreement meant that, save possibly for a final payment, the 43 weekly payments were paid for the completion of Phase 1, which was the only "moving forward" that Mr Ames was interested in.

188. The second email is from Mr Newman dated 4 February 2010, this time to Mr Wallerson at ICE. He said:

> "Paudie's on the phone to Mac at the moment: we have been trying to explain to Harlequin that, without funds this week, ICE can't carry on trying to build."

At this time the agreement as to the 43 weekly payments was still in place and they were still being paid, so this email can only have related to ICE's persistent attempts to obtain yet more money from Mr Ames. Mr MacDonald said he could not recall this conversation, saying that there were a number of such calls at about this time. I find that hard to believe: ICE's failure to finish, despite being paid what had been agreed, was now the critical issue. I also note that on the same day, Mr Newman (on behalf of ICE) was sending Mr MacDonald (on behalf of Harlequin) a draft contract, again showing that ICE knew that the question of a contract with Harlequin was Mr MacDonald's responsibility.

189. There was a meeting on 5 February 2010 (E/11914/1) to discuss the further payments which WK had decided, in conjunction with ICE, they needed to squeeze out of Harlequin to ensure that Mr Ames had no "wriggle room". The attendees were Mr Ames, Mr O'Halloran and Mr Coggle of ICE, and Mr MacDonald and Mr Newman of WK[7]. It is unsurprising perhaps that Mr Ames said in evidence that he felt that there was nobody there to put his side of the case. Certainly nobody ever wondered how and why these new demands were being made at a time when the agreed £450,000 weekly payments were still being made. The notes of the meeting (prepared by WK) go on to say:

> "With regard to the payment schedule, this is to be 6 'double' payments (i.e. £900,000) and 14 single payments. Of the next 9 weeks, 6 of these will be doubles. DA confirmed that the normal level of weekly payments are not a problem but, with payments required to agents, it would not be possible to make doubles every week in the initial period, hence the need to say that only 6 of the 9 payments would be doubles. He has said that if Harlequin can produce more cash, more quickly, then they will pass this over to ICE.
>
> The objective is to get the marina, restaurants and 150 cabanas completed and ready for occupation by the end of June."

What Mr Ames did not know (because he was not told by Mr MacDonald or Mr Newman) was that, even by early February, sub-contractors were beginning to walk off site because they had not been paid by ICE.

190. One of the things that would strike any reader of this chronological correspondence would be to ask: where was Harlequin's money going? If ICE was in receipt of these large weekly payments, and yet were scaling back the operations on the Buccament Bay project whilst their sub-contractors left because they had not been paid, what was the money being spent on?

191. One clue can be found in an email from Mr Newman of December 2009 in which he was making an enquiry on behalf of ICE to buy a Sunseeker yacht. The quoted price for the yacht was $6 million. He noted that ICE could put down a deposit of $1 million in December but that, if the purchase was left until the end of January 2010,

[7] As part of his ongoing attempts to minimise his involvement in anything of significance, Mr MacDonald said that he had little to do with the project in 2010. The evidence of this meeting, and the many others like them, as well as the other communications in which Mr MacDonald was involved, all as noted in paragraphs 85 and 88 of Harlequin's closing submissions, make plain that that was untrue.

ICE could probably find a deposit of $3 million. ICE's only source of such a large sum was Harlequin's weekly payments for the Buccament Bay project. The email plainly demonstrates that Mr Newman was confident that ICE would have an additional $2 million to spend on the yacht by the end of January 2010, doubtless because he knew that this money would be forthcoming from Harlequin, regardless of what ICE did or did not do on site. The $2 million would be almost all the monies paid to ICE during the relevant period. It was unsurprising that their productivity on site was in decline.

192. In addition to the yacht, ICE was also buying aeroplanes out of the money being provided by Harlequin. On 9 February 2010 (E/8963), Mr Gajlewicz, a WK employee, emailed Mr Walmsley to express a concern that ICE had approximately $1.4 million on its balance sheet in respect of aeroplanes. He said:

> "I assume this is being funded using Harlequin's money – could this present a problem if Dave Ames were to get hold of the accounts?"

193. In his reply (E/8969), Mr Walmsley was quick to say that he did not think Mr Ames should have sight of the ICE accounts, indicating that he was aware at the time that the accounts would show that ICE were not acting appropriately. In cross-examination, Mr Walmsley said he was surprised by the content of Mr Gajlewicz's email. But surprise was not a feature of his reply. Instead, he asked for more information about the aircraft and also asked if there had been any developments on the Sunseeker yacht. I find that this demonstrated how aware he was of ICE's potential abuse of their relationship with Harlequin. Mr Walmsley did accept that the original email was a reasonable expression of concern by Mr Gajlewicz.

194. In his reply (E/8969), Mr Gajlewicz agreed that Mr Ames should not see the accounts but then said "but at some point in the not too distant future I assume he will be able to gain access of the company's accounts from public record?" He also said that the figures in the ICE accounts were "a mess" and that nobody in SVG could provide sensible, knowledgeable answers to his questions. He also said that intercompany balances "are a complete nightmare". A few days later, on 12 February 2010 (E/9121), Mr Gajlewicz emailed Mr Walmsley and Mr Newman again. He said that he was getting more and more concerned about what was happening in SVG. He had been speaking to "one of the lads" to gain information, but even then Mr O'Halloran's menace was plain – just as it had been to Mr Roberts – and Mr Gajlewicz asked Mr Walmsley and Mr Newman not to quote any of it to Mr O'Halloran in case his source was identified.

195. In this email, Mr Gajlewicz was primarily concerned about the large amounts of money in the balance sheet relating to ICE purchases in respect of aircraft, other companies and investments in other projects. He went on:

> "My concern is that Paudie is diverting Harlequin funds away from where they are supposed to be used. Harlequin is effectively funding the Barbados company and, according to my source…Bulkley Meadows is an awful project that nobody wanted and Cellate [an ICE company] only got it so they had a legitimate reason to be in Barbados, which makes life much

> easier politically (having that base). My sources are convinced 30 June will not happen – and given what I have seen and heard this looks likely. Which will mean more kicking off between Paudie and Dave A at that point.
>
> When I put it to my source "why doesn't Paudie just concentrate on getting Buccament finished?" he reckoned that Buccament will fail, will go tits up, Paudie knows it so he is rushing to get all his other projects in the pipeline now before the money dries up completely – at which point Paudie, hopefully for him, will no longer need Harlequin…
>
> What is WK's risk in all of this? If all of the above is unethical, if not illegal, I am a bit worried about where we stand in it all."

196. In my view, Mr Gajlewicz was quite right to be worried about the potential illegality of what was happening, and WK's position centre stage in those events. But it appears that he was the only person at WK who was troubled. Certainly Mr Newman was not because, in his reply, he frankly told Mr Gajlewicz that "there is a kernel of truth" in what he had discovered. Mr Davidson asked Mr Walmsley about the concerns that should have arisen as a result of these exchanges. Mr Walmsley suggested that it was all really a question of hindsight, but I do not agree. This was too unusual a situation, too serious from so many perspectives, for it not to have been apparent, then and there, that things were going terribly wrong. That is particularly so in the context of the earlier emails about getting as much money out of Harlequin as possible, and the clear conflict of interest. Now a potential misuse of Harlequin funds was going unremarked and unresolved by the relevant partner in WK.

197. The remainder of Mr Newman's reply is also revealing. He said:

> "…the Buccament project is a fixed-price one and the total amount built thus far is worth circa \$38 million against which Harlequin have paid circa \$32 million. I am not particularly concerned that there have been funds moved from SVG to Barbados. The contract is pretty profitable, and all that is being stripped out is the profits…
>
> All of that said, the last few days have been pretty horrific as regards Harlequin. Once again, having agreed a payment plan, Dave Ames had reneged on it. Whether this is through caprice, cunning or stupidity I don't know. Mac is pretty much at the end of his tether. We're seeing lawyers in London on Tuesday and then I'm going with ICE to Barbados/SVG on Wednesday…Paudie's concern is that Dave has far too many commitments for furniture, linen etc (apparently circa \$12 million due in the next few months) that he cannot afford to pay ICE for the construction. We're putting together a detailed cash-flow this week to demonstrate to Dave Ames what is contractually bound to pay and when. If he commits to that, all

> well and good. If he can't, won't, or says yes and then resiles again, the site won't be delivered on time."

198. A number of fundamental issues arise from this email. To the extent there was a fixed price contract, it was by reference to the 43 weekly payments of £450,000. Those had been paid but, although the Phase 1 works were nowhere near completion, Mr Newman's focus was now on obtaining yet more payments for work which should already have been completed. The contract might have been 'pretty profitable' from ICE's point of view, but it might be said that this was because it was only their entitlements, and not their obligations under the May 2009 agreement, that were ever considered by themselves and WK. Moreover, if it was profitable enough for ICE to pay for aeroplanes and yachts out of the profits, then it was probably a bad bargain for Harlequin SVG, but WK had never said so or advised Harlequin accordingly. In addition, Mr Newman was wrong to say that Mr Ames was contractually bound to make further payments, since at this point the 43 weekly payments had been paid and no other agreement was in place. I also find that it is clear from the email that Mr Newman knew that the project would not be ready on time.

199. Mr Walmsley agreed in his evidence that this situation was "concerning and unacceptable". However, he did not reply to the email and continued to do nothing about it. He did not apparently consider that the situation gave rise to any problem of confidentiality. It was put to him that he should have acted at this point and WK should have resigned their engagement by ICE. Mr Walmsley agreed with that with the benefit of hindsight but said that it did not occur to him at the time. I have already rejected his qualification of hindsight: I think it was clear and obvious at the time that he should have taken decisive action. I find that WK should have resigned from their retainer by ICE.

200. Mr Newman's email is also interesting because Mr Newman even suggested that the way around the problem was for Mr Walmsley to speak to Mr MacDonald. That was an extraordinary suggestion: it was completely contrary to any notion of effective Chinese walls. Mr Walmsley said that that was why he did not contemplate it. But on the face of the email it demonstrated, as Mr Walmsley agreed, that Mr Newman did not have any proper understanding of the rules of confidentiality.

201. Mr MacDonald was asked about the phone records (E/16157/74) which demonstrated that, at this critical time, there was a 15 minute telecon between Mr Newman and himself. The obvious inference is that these vital matters were discussed with him, another clear breach of the confidentiality provisions. Mr MacDonald maintained that he had no conversation on these matters with Mr Newman, but it is very difficult to think of what else he could have been talking about, since this was the critical topic for both ICE and WK at this time. It was unlikely to have been about Harlequin's tax position.

202. In addition, on the subject of phone records, I note that between 1 November 2009 and 12 February 2010 Mr MacDonald spoke to Messrs O'Halloran and Coggle for 824 minutes, compared to the 44 minutes that he spoke to Mr Ames during the same period (although that imbalance will have been partly modified by the fact that Mr Ames and Mr MacDonald were both based in Essex and therefore saw each other face-to-face). Similarly, between early November 2009 and the end of January 2010, Mr O'Halloran made 447 calls to Mr MacDonald. The volume of calls both ways is

surprising. At the very least, it contradicts Mr MacDonald's evidence that, during this period, he had much less to do with the project.

203. There was a further meeting between ICE and Harlequin on 23 February 2010. Again further pressure was put on Mr Ames by Mr O'Halloran for the weekly payments to be increased. Eventually an agreement was reached to make weekly payments of $600,000 per week to be supplemented by additional ad hoc payments. Those were to be agreed by Mr MacDonald to ensure that Phase 1 was delivered on time. Mr Ames said he had no alternative but to agree to this, but was by now so suspicious of ICE that he did not necessarily intend to be bound by these new arrangements.

204. In January and February 2010, RLB prepared progress reports. Those reports indicated that, although ambitious, the 1 July 2010 date might still be achieved. However, I find that that conclusion was so heavily qualified on the face of the reports themselves as to be meaningless. It was a conclusion expressly reached "in the absence of any financial information relating to project cash-flow requirements or procurement programmes". In addition, those reports were expressly based on what was told to RLB on site and, at this stage, and for the next few months, the representatives of ICE and the representatives of WK were all saying that the project would be ready for the opening on 1 July 2010. Thus, to the extent that WK have sought to rely on the RLB reports of January and February 2010 to suggest that the works could still have been finished by 1 July, I reject that submission. The reports were so heavily qualified that they did not amount to an independent conclusion that the works could have been ready by the relevant date. In reaching that conclusion I find that, although my views are based on very different evidence, I am again in agreement with McGovern J, and in particular paragraphs 68-73 of his judgment in the Dublin litigation.

3.12 March - April 2010

205. At the beginning of March 2010 the position was this. Despite their concerns about progress, Harlequin SVG had been repeatedly reassured by Mr O'Halloran that Phase 1 would open on 1 July 2010. In consequence, on 23 February 2010, Mr Ames had agreed to pay ICE $600,000 per week and such payments were made at the end of February and March 2010.

206. On 10 March 2010, RLB issued the February report to which I have previously referred (E/9817). Not only was this expressly qualified in the way noted above, but it went on:

> "Our discussions and observations during the visit have raised concern for the critical coordination required to ensure that the built infrastructure can be usefully occupied. It was clear that the staff are doing their best to address the sequencing problems for delivery of FF&E. It was apparent on the day on the visit that there didn't appear to be adequate emergency backup plans for any failing in the supply chain i.e. alternative supplies with availability and sufficiently short lead-in times to avoid a delay in the opening."

It is clear that Mr Ames was only partially comforted by the reports such as this. As he said in his email to Mr O'Halloran of 18 March 2010 (copied to Mr MacDonald):

> "From my point of view, with the amount of money being invested in this resort and with the amount of interest throughout the world on it, for me to not have any documentation to show that everything is being fitted and that everything has been ordered on time, I have to guess and hope and totally rely on yourselves 100%. So with me giving you so much confidence, the least I feel I should receive from yourselves is some sort of assurance in a letter confirming these issues.
>
> As I stated earlier, I get regular reports from RLB and Gary who are happy with the progress of the works but with so much at stake here and so much money at stake, verbal assurances are not always comforting and I need something in writing."

Needless to say, Mr Ames did not get the written assurances he sought from ICE. The matter was never taken up by Mr MacDonald.

207. ICE continued to put financial pressure on Harlequin, a strategy expressly stated in their internal email of 22 March 2010. Mr O'Halloran continued to confirm (verbally but not in writing) that Phase 1 would be ready on 1 July 2010 (E/10519) although from time to time he indicated that some of the works in (the already reduced) Phase 1 would not now be carried out. Mr Garrett Ronan, one of the team involved in the potential operation of the hotel, provided an email in July 2010 which dealt in detail with the events on 25 March 2010. He said: "Mr O'Halloran openly admitted that several of the restaurants, pools and BoH functions and a number of the cabanas would not be done". In consequence, following frantic phone calls, it appeared that the view was reached that the 1 July 2010 opening was not going to be possible. However, later that same evening, Mr Ronan said that Mr O'Halloran accosted Mr Ames and others in the car park "screaming and shaking his fists while cursing loudly…he appeared out of control and continuously shouting the resort will be fully opened on time and not to listen to [Mr Ronan]."

208. In his cross-examination of Mrs Ames, Mr Fenwick QC suggested that (notwithstanding this startling report) Mr O'Halloran was being clear and straightforward with Mr Ames about the promised completion, and that Mr Ames accepted what he was saying. Mrs Ames disagreed. In my view, she was right to do so. The contemporaneous documents demonstrate that Mr O'Halloran unilaterally reduced the work scope to be completed by 1 July 2010 because he knew, and had known for months, that those works would not and could not be completed by that date. At other times he said everything would be completed on time. This confusion is demonstrated by Mr Ronan's account of 25 March 2010. On any view, Mr O'Halloran was being far from honest with Mr and Mrs Ames. As to the suggestion that Mr Ames continued to believe what Mr O'Halloran said, I have already indicated that Mr Ames' own documents made clear that he was deeply suspicious of the promises being made. In addition, I accept Mrs Ames' evidence that Harlequin had no option but to continue with ICE, which meant agreeing to ICE's increasing

demands. As she put it, "Mr O'Halloran had my husband over a barrel. We had no choice."

209. On 26 March 2010, MOLA, ICE's architects, went into liquidation. This was clearly a significant event and made it even less likely that the 1 July 2010 completion date would be met. But it does not appear that anyone gave any warning to this effect; indeed, two days later, on 28 March 2010 (E/10575), Mr Coggle of ICE was confirming that Phase 1 would be completed by 30 June 2010 and that Harlequin had paid all that had been demanded. Mr O'Halloran said the same thing in an email to Mr Ames dated 26 March 2010 (E/10551). In this latter email, Mr O'Halloran dismissed his erratic behaviour the previous evening (as recorded by Mr Ronan) as "showing only passion." In my view, this email corroborated Mr Ronan's description of Mr O'Halloran's erratic behaviour set out in his July email.

210. On 29 March 2010 there was a meeting at Harlequin's offices at Basildon, attended by Mr Ames, Mr MacDonald, Mr O'Halloran and Mr Coggle. This was designed to deal with Mr and Mrs Ames' increasing concerns that the project would not be ready. Mrs Ames told me that her husband continued to be anxious about whether or not the works would be completed on time. She was reminded that she had described the meeting as "placid". She said that at that late stage, to get another contractor in would have been "disastrous" and that in the circumstances she felt she had no option but to accept the assurances that Mr O'Halloran and Mr MacDonald were giving her and her husband. Mrs Ames' file note referred to the fact that she was "extremely worried" that it would not be ready on time. She also questioned Mr O'Halloran "relentlessly" as to whether the restaurants and swimming pool would be open and he "categorically" stated that they would. On that basis, she said that she felt that Harlequin had no option but for everyone "to pull together with ICE and given them the opportunity of proving they can fulfil their promise".

211. Mr MacDonald's file note of this same meeting (E/10703/1). This contained no reference to the promises made by Mr O'Halloran. All that it said was that "the plan set on the meeting of 31 January 2010 is still applicable". It is not clear what that related to. The rest of the note was about further monies allegedly due to ICE. Mr MacDonald noted:

> "Overall it was noted that there was still some £22 million dollars (sic) outstanding under the contract, some £4 million had been saved with engineering and deferred works leaving approximately £16-18 million outstanding, some £6 million paid since the last date leaving approximately £10 million outstanding to be paid on the next 14 weeks."

The basis for these large sums is not set out in the note. Mr MacDonald could not explain the basis of his figures in cross-examination. Contrary to this note, I consider that no substantial further sums were due and that it was ICE, not Harlequin SVG, who were in breach of the agreement of May 2009. But of perhaps greater significance is the fact that, even within this entirely pro-ICE summary of the position, only $10 million was said to be due to get the entirety of the Phase 1 works finished. Further sums were paid by Harlequin after this date, but still the Phase 1 works never got anywhere near to completion.

212. Despite Mr O'Halloran's direct assurances, Mrs Ames remained concerned about the lack of progress. On 8 April 2010 (E/10907) she emailed him to express concern that no work had been started on the swimming pool and the site did not look much further advanced. She told Mr O'Halloran: "You gave me your assurances that **everything** would be ready at Bucc Bay in time for the opening and you asked me what you could do to reassure me. I told you that you could do nothing as I wouldn't believe it until I saw it finished for myself. Seeing these photos makes me even more worried and I have very, very serious concerns as to whether this will be finished on time."

213. In his email of 16 April 2010 to both Mr O'Halloran and Mr MacDonald, Mr Ames said:

> "My frustration continues.
>
> Paudie and Mac keep telling me everything is going to be ready on time and everything is under control – when clearly it is not.
>
> You also keep talking about coordinating things on time but actions need to be taken. The standard of coordination is well below what I would expect."

There was no response to that. However, Mr MacDonald claimed in his cross-examination that it was untrue that he, Mr MacDonald, had ever given the advice noted. I reject that answer: since Mr Ames recorded it in a contemporaneous document and Mr MacDonald did not challenge it, I consider it more likely than not to be true. It is also confirmed by all the other evidence (going back over months) that Mr MacDonald always supported Mr O'Halloran's stated position.

214. Mr Coggle replied to Mr Ames on 19 April 2010 (E/11221/1) to say that Phase 1 would be ready on time and that ICE were not offering "a reduced opening…We have all of the restaurants and cabanas open that you have asked for and we have agreed with you in November 2009". That was blatantly untrue, although it further supports my conclusion that the restaurants were part of Phase 1 and part of the agreement going back to May 2009.

215. Mr Coggle and Mr O'Halloran continued to pursue the strategy of obtaining as much money as possible from ICE/Harlequin. On 10 April 2010, Mr Coggle alerted Mr MacDonald to a lengthy list of allegedly "critical" payments which, for reasons which were unexplained, ICE had yet to make to sub-contractors and suppliers. Mr MacDonald did not query the list, or ask why ICE had not spent part of the $40 million plus they had already been paid to meet these demands. He failed to do anything about the list at all. He did not even tell Mr Ames about it, despite its obvious significance if, as later events proved it to be, it was true that these payments had not been made.

216. Mr O'Halloran's email of 16 April 2010 (E/11182), referred to a meeting with Mr Ames of 14 April 2010, and an agreement whereby Harlequin SVG would pay a further £600,000 every week for 26 weeks. Mr Ames said that this was for Apartment Blocks 4, 5 and 6 which were not part of Phase 1. That seems to be correct; that was presumably why there was a reference by Mr O'Halloran to completion "by the end of September 2010". Mr Ames was asked about the reference to the residual ICE loan of

$10 million (the same figure identified but not explained by Mr MacDonald in paragraph 211 above). He said that this was not agreed. He denied that there was any agreed further payment for the completion of the Phase 1 works. He agreed that the payments of £600,000 for 26 weeks were based on his cash-flow and would be governed by what he could afford to pay.

217. On 21 April, ICE sent Mr Ames another complaint about payment (E/11327). This referred to an agreement to pay $2 million in addition to the weekly £600,000, a sum not mentioned by Mr O'Halloran the previous week. Mr Ames disputed any agreement to pay $2 million. He agreed however that he was now 'hanging back' in terms of payment, because he was concerned about the progress and whether or not the Phase 1 works were going to be finished by 1 July 2010. He said he was going to give it a period of four weeks to see if things improved and, if they did, he would then make more money available.

218. Relationships between Mr and Mrs Ames and everyone else were plainly close to breaking point. In an email dated 28 April 2010 (E/11588), there was a reference by Mr Coggle to a threat by Mr Ames to sue him personally. Mr Coggle pointed out (amongst other things) that Mr Ames was spending money on things which were not required for Phase 1 and not making what he called the 'core payments'. That was a fair criticism; see my comments about the theme park in paragraph 177 above.

219. Mr MacDonald agreed in cross-examination that, throughout this period (indeed from January 2010 onwards), Mr Ames was making comments and expressing concerns about the progress of the works. He agreed that Mr Ames reached the point where he did not think he could any longer rely on Mr O'Halloran. But Mr MacDonald said that, even then, Mr Ames was not relying on him, Mr MacDonald, to report and advise on progress. Instead, he said, for these matters, Mr Ames was relying on RLB. As I have already noted the RLB reports were sporadic and heavily qualified.

220. On 17 April and again on 22 April (E/11579), Mr O'Halloran sent maudlin emails to Mr Ames which praised Mr MacDonald in lavish terms, saying amongst others things that "Mac has your best interests at heart" and "you have in Mac a true and loyal friend, a friend who will be there for you even in the toughest times". Although Mr Ames was not aware of the arrangement at the time of these emails, Mr MacDonald had agreed to be Mr O'Halloran's best man at his lavish stag weekend in Monaco the following month. These were pretty extraordinary emails; they suggest to me that Mr O'Halloran was only too aware that matters were coming to a head.

221. Throughout April 2010, large sums continued to be paid by Harlequin to ICE, even if they were not all the monies that ICE were demanding. There is no record of where the money went. Mr O'Halloran emailed Harlequin SVG on 30 April 2010 brusquely requiring them "to keep the funding coming". What Harlequin did not know was that Ms Sarah McLaren (an employee of WK Business Solutions who had worked for Harlequin and was now also working for ICE) was at the same time visiting SVG on behalf of ICE and terminating the contracts of 68 ICE staff. These events were consistent with ICE demanding larger and larger amounts without any reference to the progress of the works on site, whilst simultaneously scaling down their commitment to the project.

222. At the end of April 2010 there was a Harlequin event at the Bobby Moore suite at Wembley Stadium, to which prospective investors and agents were invited by Harlequin to learn about Buccament Bay. Mr MacDonald was there, and at his request, Mr Newman attended as well. Although Mr MacDonald in his evidence seemed to suggest that he did nothing at the event, it was quite clear that both WK's representatives were there to help Harlequin sell properties at the resort. They both billed Harlequin SVG for their time in attending the event: Mr Newman's work was described as "assistance". Thus Mr Newman was charging Harlequin fees for helping to sell the resort, whilst at the same time doing his best to ensure that the maximum amount of money was recovered by ICE from Harlequin (whether justified or not), thereby increasing the risk that the resort would never in fact be completed.

223. As previously noted, Mr Campion ceased working for MOLA following its liquidation, and began to work for Harlequin. However, although this formally took place in June 2010, the documents in April/May 2010 reveal a rather more unsatisfactory position. In early April 2010, Mr Campion was seeking payment of the outstanding fees to MOLA from Mr O'Halloran. But he was already in contact with Mr Ames by this time and on 14 April 2010 (E/11116), it appears that an arrangement was made whereby Harlequin paid MOLA the debts owed by ICE, in order to ensure that Mr Campion remained on the project. This was called a "private matter" between Mr Campion and Mr Ames. Mr Campion's email of 27 April 2010 (E/11490) confirmed the existence of this "private arrangement" by which, Mr Campion continued to work for MOLA (and therefore ICE) but with Mr Ames' "interests are very much at the forefront of all my communications on this project". In a case where many of those involved acted in an unprofessional way, and where conflicts of interests seemed to be almost the norm, this was not perhaps the most egregious example of such conduct. But it was wrong for Mr Campion to continue to work ostensibly for ICE, whilst at the same time being paid by Mr Ames and having Mr Ames' "interests at the forefront".

3.13 <u>May - June 2010</u>

224. On 5 May 2010 Mr Ames sent one of numerous messages to Mr Webster of ICE asking "how things are coming along" (E/16076). Mr Webster sent it to Mr O'Halloran, who replied to him and copied in many other people, including Ms McLaren. Mr O'Halloran's reply read:

> "Hi Kevin. Mark will help you respond to this text. Mark run it by Mac, nice and simple along the lines that we are working towards the required deadline. Don't spook him."

Contrary to paragraph 91 of WK's closing submissions, I find that the 'him' is a reference to Mr Ames. Moreover, I consider that Mr O'Halloran's deceit in this message is self-evident. He was anxious that Mr Ames should not be told the truth (that Phase 1 would not be ready by 1 July 2010) because that would 'spook him' and that, instead, the empty promises would continue to be made that Phase 1 would be completed on time. The plan to make sure that Mr MacDonald was happy with the reply suggests that Mr O'Halloran thought that Mr MacDonald was aware of what was going on and was, in some form or another, working for ICE.

225. Mr MacDonald was asked about this. He first said that it would have been breaking confidentiality if he had been shown the reply, but that was not an answer, given that Mr O'Halloran had expressly said that this was what he wanted done. Mr MacDonald was then asked about the reply itself and he said that he had no recollection of that at all. He said he may have spoken to Mr Webster but he did not recall it.

226. On this same topic, Mr Campion's email of 4 May 2010 said that ICE staff were being bullied to say that everything would be ready by 1 July 2010, whilst "the reality on the ground was very different". I accept that evidence. It is consistent with all the other evidence on this topic. Another example was the email Mr Taylor sent himself on 7 May 2010 (E/11829). Although he could not remember why he had done that, it seems a fair inference that Mr Taylor wanted to have a record of an important conclusion which he had reached about the works. His email read as follows:

> "Spoke to Mac re Paudie conversation. I will not tell Dave as this nothing new. No point in worrying him.
>
> Mac says Dave and Paudie must talk.
>
> Do hotel guys know we don't always do what we say re opening July.
>
> Mac suggests we don't bring in guest till late August September. Use ash cloud as excuse we might not be able to get people home.
>
> Wfv is problem the amount added was agreed in July and Dave needs to understand this.
>
> Trust has gone between Dave and Paudie. Mac is fire fighting to stop Paudie closing etc.
>
> Paudie and Dave must meet Thursday to discuss and be honest Mac to call Dave to set up. I tried to remain neutral and listen. I don't want Paudie etc flying off the handle.
>
> Called Mac to use him to calm Paudie."

227. In my view, Mr Taylor's note was an accurate reflection of what was happening. By this stage, Mr Ames no longer trusted Mr O'Halloran. For his part, Mr O'Halloran believed that Mr Ames needed Mr MacDonald because, as Mr Taylor put it, Mr O'Halloran did not believe that Mr Ames had the necessary technical experience, and that Mr MacDonald was essential to the delivery of the project because he did have that experience. Mr Taylor also said that, at around this time, he vividly recalled a discussion with Mr O'Halloran at Mr O'Halloran's offices in Barbados. He said that Mr O'Halloran told him that Mr MacDonald was his best friend and was going to be his best man. He boasted of the fact that he had spoken to Mr MacDonald 330 times in the previous month. He said that to reward Mr MacDonald he was going to give him a Sunseeker yacht as a gift. Mr Taylor was struck by the unusual nature of this conversation, which is why he remembered it. I accept his evidence about the conversation. It is further evidence of the extraordinary closeness between the

developer's principal financial advisor and the contractor who was, at this point, breaking his promise to the developer to complete the works.

228. Another email sent by Mr Taylor to himself, also on 7 May 2010, related to a conversation that he had had with Mr O'Halloran in which Mr O'Halloran had threatened arbitration. The note also recorded Mr O'Halloran as saying that "he had lost interest in the project, he didn't care and wanted paying" and that "Mac will stand with him in court". Although Mr MacDonald said this was nonsense, I find that, for the reasons that I have already given, it was consistent with Mr MacDonald's conduct, and consistent with other contemporaneous documents.

229. On 8 May 2010 (E/11841) Mr Ames sent an internal email in which he said (amongst other things) that Harlequin needed "someone qualified to value the work done up to now by ICE". Of course, he had needed someone to fulfil that role years earlier. Although Mr Ames indicated in evidence that he thought RLB were supposed to be doing this, he also said that Mr MacDonald was dealing with RLB direct. As I pointed out to Mr Ames, in truth no valuation exercise (as one would ordinarily think of it) was being carried out by anyone, certainly not RLB. Mr Ames suggested that he may not have been aware of this at the time.

230. On 10 May 2010, Mr and Mrs Ames and Mr MacDonald went to SVG to inspect the site for themselves. There was a considerable amount of evidence about what happened. Mrs Ames told me that she could not believe how little progress had been made. She said that where the swimming pool should have been there was simply a mound of earth. She said that she had confronted Mr O'Halloran and reminded him that, on her previous visit in November 2008, she had cried because she had seen the resort taking shape. Now she was crying again because it was so far behind. She said that Mr MacDonald barely said anything and seemed embarrassed by the situation on site.

231. On 11 May 2010 (E/11892) Mr O'Halloran emailed Mr MacDonald and Mr Coggle complaining about Mr Ames and the FF&E works. Mr Ames said that Mr O'Halloran was cross about this because he had not secured the contract for this element of the works. But Mr O'Halloran's concluding remark is revealing:

> "But do we care anymore, why should we, it's not our hotel!!...he is going to need 100 million and a lot more!"

In my view this email again demonstrates that Mr O'Halloran, having squeezed as much money as he could out of Harlequin, no longer cared or was interested in completing the resort. What is even more extraordinary is that Mr MacDonald received this email, as part of Mr O'Halloran's 'we', yet he did or said nothing about it. His silence is remarkable, making clear just how close he now was to ICE, and just how far he had removed himself from Harlequin and Mr Ames.

232. This is further confirmed by the fact that, between 14 and 16 May 2010, when the work to complete Phase 1 was (or should have been) at a critical phase, Mr O'Halloran, Mr MacDonald and Mr Newman were all at the Monaco Grand Prix for Mr O'Halloran's stag weekend. On their way back, they attended a meeting at Harlequin's offices in Basildon.

233. The minutes of this meeting on 18 May 2010 are at (E/183/1). Important matters were agreed. All the works were promised to be completed and operational no later than 1 July 2010. These included the Surf 'n' Turf restaurant, the Bay restaurant, the swimming pool, the pool/beach bar, the breakwater, the beach and the river defences, 60 cabanas for guests; and all manner of other things including the BoH, tennis courts, football pitches, planting and landscaping etc. It was recorded that electricity to Apartment Block 2 would not be ready until the middle of June, and that the septic tank for the waste treatment would be used as a temporary measure until the final treatment plant was operational. There were also particular items concerned with the water, roof timbers and windows for Apartment Block 2.

234. The note also records that Mr O'Halloran required $7 million in order to complete by 1 July 2010 and Mr Ames agreed to make weekly payments of $1 million per week for 7 weeks. Subsequently, Mr Ames confirmed that he was not making all of these payments because he was worried that ICE was not going to fulfil their promises (E/12325/3). The $7 million appears to be the equivalent of the $10 million required by ICE some weeks previously, particularly since some further payments had been made in the interim. I find that this was a modest amount when compared to the scale of the Phase 1 work that ICE still had to complete.

235. Mr Taylor said that there was a good deal of technical detail discussed at the meeting, as reflected in the minutes. This showed the extent to which Mr MacDonald was still involved in that aspect of the works. Mr Taylor was shown a version of the minutes in which Mr MacDonald had made manuscript deletions and changes, which suggested that he did not believe that some of the things which Mr O'Halloran was promising would in fact be carried out in time (E/12089/1). Mr Taylor said he did not know why Mr MacDonald had made such changes since these were the matters that had been discussed and agreed. There was no explanation from Mr MacDonald as to why he was (*ex post facto*) endeavouring to reduce the scale of ICE's stated commitments.

236. I find that the minutes evidence yet further promises on the part of Mr O'Halloran to complete the long list of works identified by 1 July 2010. Mr MacDonald claimed in cross-examination that this commitment was qualified by Mr O'Halloran receiving payment, but there was again nothing in the minutes which suggested any such qualification. In addition, Mr Ames gave evidence to the effect that, at the meeting Mr MacDonald also stated that the work would be done by 1 July. Mr MacDonald disagreed, saying he was very quiet at the meeting and said nothing. For the same reasons as I have noted before, I reject that evidence. I find that Mr O'Halloran made the same promises about completion and that Mr MacDonald supported him, or certainly said nothing to disagree with him.

237. On 19 May 2010 (E/900) ICE submitted a price of $79 million in respect of further works. On the same day Harlequin SVG paid ICE $1 million in respect of the ongoing works.

238. On 21 May 2010 RLB visited the resort and subsequently produced their final report following a visit to SVG by Mr Blake (E/15930). For the first time, RLB confirmed expressly to Mr Ames what ICE and WK had known for months: that the Phase 1 works were not going to be complete by 1 July 2010. RLB said:

> "Having gauged the progress on site with the soft opening date in mind for 1st July 2010 we conclude that the soft opening date is not achievable for the 1st July given the lack of functional infrastructure and the current level of works incomplete. During the last report in February there was substantial deployment of plant, labour and materials on the site giving an impression, which if maintained, would/could result in a positive outcome in terms of the target soft opening date.
>
> The levels of resources did not appear to be the same as observed in February. The absence of key materials and labour skills upon the site at this late stage…is of concern. Until these key items are confirmed in terms of orders placed, delivery dates to site, times required to install etc it is not going to be possible to project a revised date for opening with any confidence."

239. Mr Ames said in evidence that, at about the time of this report, Mr Blake of RLB came to see him and warned him of the undue pressure previously put on Mr Hoyle by Mr O'Halloran and Mr MacDonald to produce optimistic reports. This was one of the reasons which Mr Ames gave for terminating his arrangement with ICE. I deal with this in greater detail in **Section 6.8.1** below.

240. Mr MacDonald's notes of his final trip to SVG (23-30 May 2010) are at (E/12224/1). These notes make plain that, even at the end of his involvement, Mr MacDonald was closely involved in the detail, having meetings in Barbados with Mr O'Halloran and other ICE representatives without Mr Ames. Mr MacDonald then travelled to SVG with Mr O'Halloran and other ICE representatives. His notes said that "It was clear that substantial progress had been made but possibly a lack of funding was causing the progress to be less than had been planned. It was generally agreed that 1 July would not now be possible for opening and the 1 August was suggested." No-one else had said that the funding was an issue preventing Mr O'Halloran from fulfilling the promises he had made just 5 days before. Mr Ames said that, on this trip, Mr MacDonald and Mr O'Halloran "did everything they could to prevent me from going round the site." Eventually Mr Ames said he realised there was no point in insisting on walking round: it was clear from what he could see that the resort would not be completed on schedule. Mr Ames thought that the project was now a "disaster". He sent an email to David Campion explaining the position and how badly Mr O'Halloran had let him down. The emails were seen by Mrs Ames who emailed her husband to say:

> "And Paudie had the cheek to nearly walk out of the meeting when I called him a liar! Just wait until Mac comes into the office – I will tell him what I think of him and Paudie. Makes me sick."

Mr Ames replied:

> "Simon Terry is going to get a report on Mac and WK as I will sue his arse!"

241. Mr Ames said that, at the resort, he had deliberately asked both men where the pool pumps were, and he was told that they had just been delivered to Barbados airport. Mr Ames said that he had asked this because he knew that the pumps had a long lead-in time, so their provision mattered for completion purposes. Mr MacDonald did not recall this when he was asked about it.

242. Mr Ames said that, after the abortive site visit, and at Mr MacDonald's insistence, they went back to the airport in order to fly to Trinidad to meet with a bank. Mr MacDonald denied that the trip to Trinidad was in some way designed to be a distraction from the state of progress at the resort. He said that both he and Mr Ames recognised the importance of getting financing from the bank in relation to the Barbados project, because planning permission had just been obtained. Both men agreed that the trip to see the bank was not successful. Mr Ames blamed Mr MacDonald for the failure, saying that he had not properly prepared for it. Mr MacDonald accepted that he did not have any relevant figures for the meetings with the bank; as he put it, we had "no impressive document with us". That rather begged the question as to why this important meeting went ahead at all.

243. When they arrived back at Barbados airport, after the meeting with the bank, Mr Ames told Mr O'Halloran that he wanted to see the pool pumps which Mr O'Halloran had said had just been delivered there. Mr Ames told me that he knew that if, contrary to Mr O'Halloran's promise, the pumps were not there at the airport, the pools would not be finished by 1 July. He said Mr O'Halloran and Mr MacDonald were resistant to his suggestion and Mr MacDonald asked: "Don't you trust me anymore?" Mr Ames told him that he did not and that, what was more, he thought that Mr MacDonald was lying to him. Mr Ames said that he was then told that the pool pumps were not in Barbados because they had not been ordered. Mr Ames said that Mr MacDonald asked him whether he thought that, in the circumstances, he should resign and Mr Ames replied that "perhaps you should". Mr MacDonald then stormed off. The relationship between Harlequin and WK had come to an end.

244. Mr MacDonald denied that these events caused him to resign. Instead he said he was forced to resign for other reasons which, as set out in **Section 6.8.2** below, I reject entirely. I find that the relationship between Harlequin and WK came to an end in the way described by Mr Ames.

245. On 1 June 2010 (E/12460) Mr Ames emailed Mr O'Halloran, Mr MacDonald and others. He pointed out that, even though he had paid the first $1 million as per the oral agreement on 21 May, it was now apparent that Mr O'Halloran was not going to achieve even the reduced opening on 1 July 2010. Mr Ames indicated that, reluctantly, he would move the opening to 1 August but he would not agree a further delay to 13 August, which is what Mr O'Halloran wanted. Mr Ames went on to say that he had now paid ICE approximately $60 million "for a resort that is not as was promised." Mr Ames referred to all the things that had not happened, including the ordering of the pumps for the swimming pools, window frames for the restaurants, beach protection etc. He continued:

> "I feel that I have kept my promises to you but that you've let me down in failing to meet the opening date of 1 July. I do not wish to let this setback affect our efforts to get the resort open but need your personal assurance that you will do everything in

> your power to make sure we do not miss the 1 August deadline. With the delay to 1 August, you have confirmed that you will now have the 3 main restaurants ready as well and we have to agree on a payment structure for this.
>
> One of the reasons I believe that the resort has been delayed is the fact that you have not personally been onsite to ensure that the project is properly controlled. I understand you are in Europe again this week…"

In my view, this was a broadly accurate summation of what had happened.

246. Despite the tone of this email, Mr Ames had now run out of patience. Two days later he terminated ICE's contract. He said that this was because of the delays referred to in the email of the previous paragraph, his concerns about ICE, and the alleged 'confession' to him by Mr Blake about the pressure that had been put on RLB. He said that the last straw occurred on 1 June when the representatives of Desires, the prospective hotel operators who had taken over from Oasis, were refused access to the site by ICE, who blocked the entrances with cranes and lorries.

247. On 2 June 2010, WK wrote to Harlequin saying that they would no longer provide certain services to Harlequin. They made no reference to the events at the airport. They made no reference to Merricks in Barbados (the issue which Mr MacDonald now says caused him to resign). The relevant parts of the letter said:

> "Taxation and accountancy services
>
> We will no longer assist in obtaining the following in relation to the Buccament Bay project in St Vincent
>
> - Tax concessions
> - Planning permission
> - Project finance
> - Liaising with the builder re. construction costs and monitoring of the construction budget
> - Assisting with the preparation of management accounts for audit by BDO
> - Dealing with the audit queries raise by BDO
> - Desktop budget for directors' consideration
>
> …
>
> At this time we have not been involved with:

- Reviewing the detailed building costs for any site except that of Buccament Bay with respect of analysing the overall project profitability."

248. On 4 June 2010, Mr Ames flew out to SVG and sacked ICE. Mr Ames' oral evidence made clear that, in the preceding week he had realised that there was no way of progressing with ICE and that he needed to sort out a different approach. That explained why his email of 7 June 2010 demonstrated that Mr Ames was sounding out a quantity surveyor to carry out quantity surveying services. They were BCQS, who provided amongst others, Mr Amin, Harlequin's expert QS in these proceedings.

249. On 7 June 2010, there was a meeting between Mr Ames, Mr Commissiong and Mr O'Halloran at The Grenadine House Hotel in Kingstown, SVG. To Mr Ames' amazement, Mr MacDonald, who had written the letter terminating his relationship with Harlequin, attended that meeting alongside Mr O'Halloran and Mr Newman. Mr Commissiong's evidence about this meeting was at paragraphs 60-65 of his witness statement. In that he, too, expressed his incredulity that, not only was Mr MacDonald present at the meeting, but that he was sitting with Mr O'Halloran and Mr Newman. When Mr Commissiong said to Mr MacDonald that he was sitting on the wrong side, Mr MacDonald told Mr Commissiong he could no longer work with Mr Ames and that Mr Ames had not paid the ICE group. The meeting did not resolve the disputes between the parties.

250. In my view, Mr MacDonald's conduct in attending this meeting with the ICE representatives was wholly unacceptable. I do not accept that, as he suggested, he was there to try and negotiate a settlement between Harlequin and ICE. If he had been, he would not have sat with the ICE representatives and he would not have spent the entire meeting criticising Mr Ames. In any event, a settlement was impossible, given ICE's deliberate decision in January 2010 at the latest – made with WK's full knowledge and agreement – to run down their resources on site whilst milking Harlequin for all they could before the project "went tits up", as Mr Gajlewicz put it (paragraph 195 above). Instead, I find that, at this meeting, Mr MacDonald finally did openly what he appeared to have been doing covertly for many months: he switched sides.

251. On 11 June 2010, because ICE were still occupying the site and would not leave, Harlequin obtained an injunction in SVG to remove them.

3.14 11 June - 1 August 2010 (Phase 1A)

252. During this short period, Mr Ames and Harlequin were faced with the task of trying to salvage something from the wreckage. When she was giving her evidence, Mrs Ames broke down in tears when she told me about ICE's sabotage of the site (fittings damaged, rubble down the toilets etc). She also indicated that some of the works which it had been assumed had been done and covered up, such as drainage works, had not in fact been carried out at all.

253. In many ways (and despite my general reservations about some of his evidence), the best evidence as to what the site was like came from Mr Smith of PID in his witness statement, starting at paragraph 15. He eloquently referred to the physical and organisational chaos that he saw on 10 June, and how he realised that there was no

chance of opening 368 keys in the short period remaining. He also realised that even the extended date of 13 August 2010 was impossible. Accordingly, he set about undertaking such work as could be done in the time available. In his oral evidence, he called the site "a disaster, the absolute worst I had ever seen", a description I accept.

254. His evidence can be divided into what arrangements were made for the carrying out of the work (which was relevant to Harlequin's claim for damages and WK's case that Harlequin SVG failed to mitigate) and then, at least in general terms, the works undertaken (which was relevant to the dispute about what ICE did and did not do).

255. Mr Smith said that he found about 1,000 people on site, although only 200 of these were carrying out any work. Most of those were sacked. Instead he brought over 40 Czech labourers and they were employed at a flat rate of $150 a day. He said that, subsequently, PID agreed to manage the construction on behalf of Harlequin SVG for a total of $23 million. Although he referred to this as a fixed price lump sum, and subsequently as an 'agreement to manage construction', his oral evidence indicated that, in fact, there were a series of separate sub-contracts between Harlequin and their suppliers, sub-contractors and sub-consultants. I find that there was no overall contract containing the $23 million figure, just a number of agreements with specified sub-contractors. In addition, some of the local labourers were retained and they worked on day sheets.

256. Mr Smith was adamant that the various sub-contracts were all fixed price, so that it was possible to see whether ultimately the contractors or sub-contractors were paid more or less than the fixed price agreement. However, these documents were never provided. Instead the firm impression was given that the works proceeded in the same ad hoc and uncontrolled way as before.

257. In cross-examination Mr Smith accepted that, at least from time to time, there were payment difficulties (E/13755, E/14418.3). He said that he believed that this was due to exchange controls. He said he did not know what money Harlequin had at that stage. He agreed that he was not always paid on time. However, Mr Smith explained that SVG could not get credit on the island because of the non-payment by ICE to their suppliers. His evidence was that Harlequin's financial difficulties were, at least in large part, the legacy of ICE's regime of non-payment. These financial difficulties even extended so far as paying for the white sand that was thought to be necessary for the new beach at the resort. There was other evidence of Harlequin's financial difficulties (see for example, at E/13307/1, E/13426/1, E/13674/1 and E/13799/5, 2). These last exchanges are concerning because it appears that, in order to maintain cash-flow, Harlequin were selling units on behalf of investors who had paid their deposits, and then retaining the sale price. Their legal advisor Mr Terry said that this practice was "overstepping the mark", another serious understatement.

258. One of the sources of Harlequin's financial difficulty was identified by reference to a document (E/13858) called 'Harlequin Group – Financial Status at August 2010'. This demonstrated that, in accordance with their agreements, Harlequin were spending about £10 million a year to pay off the interest incurred by the investors. Whilst that would of course have gone back to Harlequin once the properties were completed, the fact was that completions were nowhere near the levels necessary, or in accordance with that to which Harlequin had committed themselves in their

contracts with the individual investors. Accordingly, the Harlequin business model was, predictably, going from bad to worse.

259. As to the scope of the works to be carried out in this emergency period, Mr Smith said that this was essentially Mr Baker's design and drawings for the waterfront village, together with 68 cabanas, and the revetments (that is to say, the works to the actual waterfront itself). He said there was very little work to be carried out in the Apartment Blocks. These works were broadly labelled Phase 1A. He said they were monitored by BCQS, and that there was a proper construction programme. Copies of the documents which would have confirmed this were not found on disclosure.

260. Two other elements of Mr Smith's evidence should be noted. First, he said that there was a good deal of remedial work that had to be carried out. He said that there was "septic tanks when it should be mains drainage, no infrastructure, no connections". Sockets were in the wrong place; hinges were unsuitable for the climate; tiling had cracked; handles had to be readjusted; patios and terraces had to be resealed and so forth. There were no water heaters in the cabanas. In addition, the cabana roofs were defective and had to be repaired, there being no insulation and no hurricane straps. Of the 38 cabana buildings containing the 68 units within Phase 1A, he said 8 roofs had to be completely redone. Still further, none of the cabana roofs had any fixed guttering and water ingress had already caused damage.

261. He and Mr O'Connor also gave evidence about the sewage treatment plant that they put in as part of Phase 1A. They explained that there should have been a mains drainage system to serve the resort as envisaged by Phase 1. However, that mains drainage system was never installed by ICE. They confirmed that the beachfront cabanas (the resort's flagship properties) had temporary septic tanks, not the mains drainage shown on the plans, and none of the other cabanas had been connected up at all. The analogy is drawn elsewhere to the completed cabanas as being a sort of "Potemkin Village", a sham series of properties with nothing behind (or in this case underneath) them.

262. They therefore had to install a temporary sewage treatment plant which did not arrive until July 2010 and had to be installed quickly. That is the system that remains operational at the resort to this day.

263. Secondly, Mr Smith's witness statement explained that ICE had issued purchase orders, but had then not made payment for the goods supplied. Mr Smith gave evidence about that at paragraph 20 onwards of his witness statement. This evidence was not challenged. It is an element in the proper valuation of the ICE works, dealt with in greater detail in **Section 8** below.

264. Other works carried out in Phase 1A were works that effectively sought to make the best of a bad job, and to convert what was there into other spaces. Thus cabana No.10 (which had already been upgraded to the bridal suite) was converted again, this time to serve as a reception. More significantly perhaps, the access road, which was originally going to come from the eastern end of the site, could not be made ready in time so that, instead, access to the site was via a public road to the northwest corner, on the other side of the Buccament River. A footbridge had to be built across the river to allow access. That bridge was also necessary because restaurants were built

immediately to the north of the river in order to ensure that there were some restaurants when the resort opened.

265. At paragraph 25 of his witness statement, Mr Smith said that, in order to open on 13 August 2010, "it was a monumental effort that I would challenge anyone to repeat". I accept that evidence. The 68 units were completed by 13 August 2010. They were all cabanas. Apartment Block 2 which housed 50 apartments, was not finished until much later: indeed, it has only recently been occupied and it appears to be being used for staff rather than residents, although Mr Smith said it was sometimes used for guest overspill.

266. Similar evidence about what happened between 10 June and 1 August 2010 came from Mr O'Connor. He worked for SVG between 22 June 2010 and September 2012. Paragraph 3 of his witness statement set out what he found on site in June. He told me that in his 37 years in the construction industry he had never seen anything like it. He thought it looked like a 'disused navy base' and was 'derelict'. He became the site manager for Phase 1A, having been appointed by Mr Campion, who formally switched to Harlequin SVG on 22 June 2010.

267. In carrying out this work Mr O'Connor produced or confirmed the accuracy of various documents. In particular, there were some very useful photographs and drawings. Thus (K/19) showed an aerial photograph indicating the state of the works on 21 May 2010. I find on the evidence that this was pretty much as it was when Mr Smith and Mr O'Connor came to site the following month. (K/18) showed the state of completion of the cabanas. And (K/26) was marked with a green line showed what Phase 1 was supposed to be with a blue line showing that which was then carried out as part of Phase 1A. The rest of the work shown as Phase 1A was not all carried out as Phase 1B: see (K/21). I find that the green line was an accurate reflection of the other documents showing Phase 1 and I accept it as indicating that which ICE had repeatedly promised to complete by 1 July.

268. There was some debate with Mr O'Connor in his cross-examination about what works were carried out as part of Phase 1A. By reference (K/29), Mr O'Connor denied that very much of the beach reclamation work had been done by June 2010. He said part of it was underway, but only about 30% maximum of the beach had been reclaimed. He said that in the north and central section of the beach there was a narrow section which had been done but not all and the Phase 1A works extended it. He said that a small section had been reclaimed in the pool area but not the whole area and that the island at the southern end where the pool was, was carried out as part of the Phase 1A works.

269. Another aspect of Mr O'Connor's cross-examination concerned the absence of programmes, critical paths, bills of quantities etc for the Phase 1A or Phase 1B works. These omissions were put to him because he had expressed his surprise that no such documents had existed for the purposes of the ICE contract. Mr O'Connor's response was to say that there had simply not been the time to do this prior to August 2010 but that thereafter these documents did exist. Again, however, they were not produced during the disclosure process.

270. On 1 August 2010 the resort at Buccament Bay opened with 68 cabanas, a restaurant over the footbridge and one or two other basic facilities. It was nothing like the resort

that Mr O'Halloran had repeatedly promised all the way through the first 5 months of 2010.

3.15 Phase 1B and Thereafter

271. After the 'soft' opening was achieved on 13 August 2010, some further works were carried out to some additional cabanas. In his cross-examination Mr Smith confirmed that by December 2010 there were 12 additional cabanas, taking the total to 80. By April 2011 there were another 19 Cabanas, increasing the total to 99. By 1 July 2011 the total was up to 149 cabanas completed. The 50 apartments in Apartment Block 2 completed later would then takes the total maximum Apartment at Buccament Bay to 199 cabanas and apartments.

272. The documents show plans for many more cabanas, including some which had been partly built by Ridgeview and/or ICE and then left to rot. Mr Smith said that these further works were not done because of the problems with the local airline and their reputation for unreliability. He said the decision to stop any further work at the resort until the new international airport was open was taken in 2011. I reject that explanation for the slow progress since August 2010, particularly given that all of the cabanas that have been completed since then existed, at least in shell form, in June 2010. Instead, it seems to me plain that the slow progress and the relatively few cabanas which have come on stream subsequently are a direct result of the lack of money made available by Harlequin SVG for such building works. This is despite the fact that, in late 2010/early 2011, the documents (C5/116/14) show that the Harlequin cash reserves were at their highest-ever level. In view of the fact that the Buccament Bay resort had been sold to 1,900 potential investors who had paid 30% deposits[8], the fact that it took 18 months to increase the number of cabanas and other available apartments from 68 units to 199 units (despite a peak in the cash reserves), tells its own story. In my view, it demonstrates that the Harlequin business model was always fundamentally flawed.

3.16 The Involvement of SOCA and the SFO

273. On 10 June 2010 Mr MacDonald completed a report to the Serious Organised Crime Agency ("SOCA"). The report said:

> "We act as accountants to the main subject [Harlequin companies] and believe that they are involved in a fraud and misleading new and existing companies into an 'investment' that has no realistic chance of realising the asset promised. The main subject trades under the name of Harlequin Property its business is to sell residential property off-plan located in the Caribbean. Typical purchasers (customers) are private individuals and pension funds, attracted by the investment returns offered. The subject is not regulated by FSA although refers to its customers as investors. The associated subject is the property developer for the project."

274. With what I consider to be real insouciance, Mr MacDonald went on to say:

[8] Hundreds of these deposits were taken *after* June 2010.

> "The subject is supposed to be constructing the first phase of 350 units and requires $50 million to fund this. All attempts to secure funding have apparently failed. No properties have yet been physically completed."

Then, having referred to a property in Brazil where the Harlequin vendor did not exist or own the property, Mr MacDonald concluded:

> "We have concluded that this is now akin to a 'Ponzi' type of scheme under which the subject is dependant on obtaining deposits from new customers, in circumstances where those customers are unlikely to receive a completed property or a refund of monies paid over. We have calculated that the subject will require deposits from 12,000 new customers in order to be able to complete properties under existing commitments and, therefore, it is a deception to continue to operate under these conditions. The fact that the subject appears to have obtained funds by a fraudulent sale of properties suggest that matters have now reached a desperate stage and action may be needed to force the closure of the business."

275. Mr MacDonald's motives for writing this report were explored with him in cross-examination and I deal with that topic in **Section 6.8.2** below. One revealing observation was his conclusion that "this is *now* akin to a Ponzi type of scheme under which the subject is dependant on obtaining deposits from new customers" (my emphasis). There was always that suspicion of the Harlequin business model and he knew it: see paragraphs 43 and 102-104 above.

276. It is unsurprising perhaps, given WK's conduct generally, to note that Mr Newman and ICE played an important part in the preparation of this report. Mr MacDonald said he was entitled to rely on Mr Newman's assistance as an employee of WK. I disagree. It was another breach of confidentiality. What is more, even Mr Newman was aware of the ongoing breach, because in his email of 28 June 2010 (E/863), he sent an email to ICE saying "owing to my firm's current purdah, it is essential that you do not forward the original emails or documents I sent you, or indeed this one. Can you please save the attached file [and updated note dealing with the SFO] to your system and then put it in a fresh email from you to the SFO. Paudie is happy for you to go ahead on this."

277. Mr Garside of WK also provided a statement to the SFO. This contains some illuminating information about Mr MacDonald, and I refer to it in **Section 4.3** below. The SOCA/SFO enquiry, now in its seventh year, is still said to be "ongoing": it is not clear when or how it might come to an end.

3.17 The Harlecon Website

278. The Harlecon website was published on the internet at 'www.harlecon.net'. The website made allegations about Harlequin which they considered to be inappropriate and libellous. Mrs Ames told me in evidence that, amongst other things, the website expressed the hope that the Ames family would die in a plane crash. Harlequin

commenced proceeding against WK, Mr MacDonald and Mr Newman personally, on the basis that he was responsible for administrating the website.

279. It appears that Mr Newman initially denied having an involvement in the website but subsequently admitted it to Mr Walmsley. It was therefore Mr Newman, a professional man and a senior employee of WK, who was hiding behind the anonymity of the internet to wish a violent death on the Ames' family. In consequence he belatedly tendered his resignation to WK.

280. Harlequin commenced proceedings based on alleged libel and breach of confidence. WK and Mr MacDonald denied any involvement in the website and denied any responsibility for its publication. Following a mediation, the proceedings were settled, pursuant to which Mr Newman issued a public apology in the form of an agreed statement. That statement noted that WK and Mr MacDonald denied any involvement "in authorising, approving or setting up the website or its content".

3.18 Other Litigation

281. There are numerous sets of proceedings relating to Harlequin and Buccament Bay. It is sensible simply to outline those proceedings and their present status.

282. **The Dublin Litigation:** This was a claim brought by Harlequin against Mr O'Halloran for deceit. The claim was successful and McGovern J criticised Mr O'Halloran and ICE in strong terms in his judgment dated July 2013 (referred to at paragraph 4 and elsewhere above). He awarded damages of around $2 million. That sum has not been paid. I am told that the judgment was appealed by Mr O'Halloran although I do not know on what grounds: the vast bulk of the judge's findings are of fact and therefore - in the usual way - unappealable. Despite the fact that the judgment is now 3 years old, there was no evidence as to the status or viability of any appeal.

283. **The Claims against ICE in SVG:** In 2010, Harlequin brought proceedings against Mr O'Halloran and certain ICE groups in the Eastern Caribbean High Court of Justice. They obtained an injunction preventing ICE from accessing the site and from removing its equipment. In their defence ICE pleaded a fixed price contract and denied any breach. It does not appear that the proceedings have advanced beyond the pleading stage despite the fact that they were commenced some 6 years ago.

284. **The Claims against ICE in Barbados:** Also in 2010, Harlequin brought proceedings against ICE in respect of the Buccament Bay project. Harlequin obtained a freezing injunction in those proceeding but, beyond that, it again appears that those proceedings have not advanced further. In addition, Harlequin commenced proceedings for a freezing injunction in England against Suzanne Floyd, Mr O'Halloran's fiancé and employee of ICE, but those proceedings were discontinued.

285. **The Claims against Mr Ames in SVG:** It appears that criminal proceedings have been brought against Mr Ames and Mr Commissiong in SVG in relation to tax evasion. Those proceedings are relatively recent; indeed, the suggestion in the newspaper cuttings is that Mr Ames left SVG shortly after the site view in this case so as to avoid the forthcoming hearing.

286. **The Claims against Harlequin and/or Mr and Mrs Ames by Investors:** There have been numerous claims against Harlequin brought by unhappy investors. In the lead claim (HQ13X02764) Mr and Mrs Ames settled the proceedings for £1.3 million but have failed to pay that amount. Initially, Mr and Mrs Ames endeavoured to avoid their obligations by suggesting that they entered into the settlement agreement as a result of false representations (see claim number HQ15X03742) but this assertion was rejected by Cox J. Subsequently, it is said that £1 million was paid to investors in about May 2016 but that suggestion was only made on the last day of the trial and no documents have been provided to support it.

287. Other proceedings were started in the Birmingham District Registry (claim no 3BM90120 and claim no 3BM130141). The former was apparently struck out whilst, in the second, Mr and Mrs Ames settled the proceedings but then resiled from payment. A subsequent judgment was handed down in favour of the investors.

3.19 Mr Newman's Resignation

288. As noted above, on 28 August 2012 Mr Walmsley of WK wrote to Mr Newman receiving "with sadness" his resignation. Mr Walmsley was cross-examined about this generosity, given that – by his own admission – Mr Newman had run the defamatory Harlecon website; made the threats to the Ames family that Mrs Ames referred to in her evidence; lied to Mr Walmsley about a whole range of matters; and deleted material (which was plainly adverse to his interests) from his computer, even though he had been told expressly not to do so. It was put to Mr Walmsley that he should have dismissed Mr Newman without notice. Mr Walmsley's answer – that he always took legal advice – is understandable, but rather missed the point. Rather more realistic was his admission that an ordinary member of the public might consider that he should have dismissed Mr Newman without notice. I find that he should have dismissed him in February 2010, following the exchanges of emails recorded at paragraphs 180-200 above.

3.20 The Present Position

289. Although Mr Ames' evidence on this topic was at times deliberately vague, it appears that the present position in respect of Buccament Bay, and the Harlequin developments generally, is as follows.

290. There are about 8,200 investors who have deposited £450 million with various Harlequin companies (mainly HMSSE) to buy properties at various proposed developments around the world. 1,900 of them have paid deposits for properties at Buccament Bay. The only properties that have been built anywhere by Harlequin are the 199 at Buccament Bay, and only between 16-20 of the investors in those properties have been allowed to complete on their properties. Thus even the vast majority of the 199 cabanas and apartments that have been completed at the Buccament Bay resort have not been transferred to the relevant investors, but are being used by Harlequin to generate income on a short-term/hotel basis.

291. Harlequin has been very slow to disclose the up-to-date position. During the disclosure process, the latest version of the HUX database (E/15702N) was dated 2 December 2014. That showed that 1,100 of the 1,900 properties at the Buccament Bay resort had not been allocated to individual purchasers. Mr Ames was unable to

explain why not. In an updated document produced during the trial and purportedly dated March 2016, an allocation process had been carried out in respect of all 1,900 investors at Buccament Bay. No explanation was given as to how this had been done or why it had happened so close to the trial.

292. However, even on its face, the latest version shows that investors have been allocated properties in Apartment Blocks 4-18 inclusive, and Blocks 1-9 in the Pat Cash Tennis Village, and also in the villas to be built on what is called the Spa Island. Much of this proposed new development would be taking place on land, such as that owned by the Rasta farmers and that owned by Mr Punnett, which Harlequin still do not own. Mr Ames accepted that he had not told any of these investors that the properties that they had been allocated (and for which they had paid a large deposit) were to be built on land which he did not own. Although Mr Ames claimed that he did own some land north of the river because he had bought it from Mr de Silva, no completed title document has been provided to support that assertion. Given Mr Ames' other lies about land ownership, I do not accept his evidence on this issue.

293. Plans (K/30 and K/31) were provided, not during the disclosure process, but at the outset of Mr Ames' examination in chief. These also purported to show this massive further proposed development at Buccament Bay. Again there was no proper explanation as to why these plans were not disclosed during the ordinary disclosure process. Mr Ames maintained that these plans dated from 2009/early 2010. They were not themselves dated, and other documentary evidence demonstrated that HSK, who prepared them, were only involved in 2012/2013. This clearly indicated that this was when these concept drawings were asked for and produced. Accordingly, I find that these proposals did not exist at the time when the vast bulk of the investors' money was taken and spent by Harlequin.

294. Mr Ames said that these plans showed the concept for the future development of the resort, although he agreed that they were not "heavily detailed". He agreed there were no supporting documents to explain what the properties consisted of. Accordingly, all there was on the drawing was a simple coloured rectangle numbered, say, 5, on the plan. There was nothing to say whether or not that was an Apartment Block and, if it was, what its size would be. Although Mr Ames said that it was clear from the drawing that the blocks were all the same size, and the same size as the existing Apartment Blocks 2 and 3, a glance at the drawing make plain that that was simply incorrect. The rectangles are clearly different sizes.

295. For the avoidance of doubt, I should make it plain that, in my view, these concept plans of the proposed development at the resort are a complete fantasy. Further development at Buccament Bay will probably never happen at all; if it does, it will not be on anything like this scale. There are a number of reasons for that conclusion.

296. First, the plans assume that development at the western end of the site has already been completed. But that is incorrect. Six years after taking control of this site, Harlequin have made no attempt to build Apartment Block 1 on the existing foundations, and have left the shell and core of Apartment Block 3 to rot in the unforgiving climate of the Caribbean. I doubt if it will ever be capable of being used. Moreover, there are numerous cabanas which reached a certain stage of completion under either Ridgeview or ICE which have also been left to rot. They are fenced off from the rest of the resort. The fact that Harlequin have not had the money to

complete these existing buildings, let alone build new ones, tells its own story. Despite the vast sums which have been taken by Harlequin from prospective purchasers of their developments round the world, the progress towards completion of anything other than a handful of additional properties at Buccament Bay has been glacial. It is impossible to conclude that any significant further development at the resort will ever occur.

297. Secondly, in order for 1,900 investors to be accommodated at Buccament Bay, very large Apartment blocks will need to be shoehorned onto the land (much of which, as I have said, Harlequin SVG does not own). Apartment Blocks containing, say, 70 apartments would have to be as large as or larger than Apartment Block 2 which is presently on site. There is simply not the room to shoehorn 14 or 20 such blocks into this valley, even if further land purchases were made. It would be impossible to fit them all in. And even if it was technically possible, then each would be hard up against the next Block and closely overlooking it. It would no longer be a luxury resort.

298. Thirdly, there is simply not the room on this site to accommodate visitors to 1,900 separate units. That would require a huge increase in restaurants, swimming pools, and other communal facilities. Those are not shown in anything like realistic numbers on (K/30 and K/31).

299. And finally, and most critically of all, there is the effect that such a vast increase in numbers would have on the overall resort. As I have already pointed out, the actual beachfront at Buccament Bay is very small. The notion of 1,900 units (say 4,000 people), on that very small strip of artificial beach is absurd. It is wholly inconsistent with the sort of luxury resort that Mr Ames said that he always had in mind.

300. For these reasons, I am confident that the concept proposals shown in drawings (K/30 and K/31) will never happen. They are utterly unrealistic. No sales should ever have been permitted on such an impractical plan.

301. Why does this matter? It matters because it was established that Harlequin have sold huge numbers of properties to investors, more than half of which were sold <u>after</u> June 2010. That is despite the fact that Mr Ames candidly accepted that, from early 2010 onwards, things were "very difficult financially". They have taken £188 million from the investors at Buccament Bay alone, but only 16-20 of those 1,900 investors have actually been able to complete on their properties.

302. Mr Ames was cross-examined about why so few properties have been offered to investors for completion. He had a variety of excuses, none of which stood up to scrutiny. He suggested that the delays had been a result of the difficulties in obtaining alien land-owning licenses, which was not a point that ever featured in the sales material provided to investors by Harlequin, and not an argument which, as a matter of fact, there is any documentary evidence in support. Then Mr Ames said that it was necessary to get the facilities at the resort together first, but the waterfront village has been there in one shape or form since 2010. Finally, he suggested that it was the fault of the investors for not completing, indicating that it was they who had financial difficulties. I find that this assertion was untrue, particularly in circumstances where Harlequin originally offered mortgages for the remaining 70% of the purchase price, and subsequently offered to assist to obtain such mortgages. There is no documentary

evidence of any purchaser being offered the opportunity to complete and then being unable to do so.

303. The reason for the delays is quite clear from the accounts. Mr Ames needs the money from the holiday lets of the Apartment units to keep the resort open. Accordingly, it is better for Harlequin to run the resort as an all-inclusive hotel (of the sort which Mr Ames originally suggested he did not want), rather than to allow the investors to complete on the properties that they had bought. Mr Ames confirmed that the rent that was obtained from the cabanas was not given back to the investors but went instead to the hotel company (which was not HHR). Mr Ames freely accepted that he could not afford to give the investors the rent that he was getting from the properties on which they had paid their 30% deposit and on which he had promised to complete 6-7 years ago.

304. Whilst, on the one hand, Mr and Mrs Ames were taking millions of pounds out of HMSSE and other Harlequin companies, by way of salaries and dividends, it was the investors, as Mr Ames agreed, who were subsidising the resort. That meant that the investors were subsidising any losses that the resort was making. Mr Ames agreed that this too was not in the investors' guidelines provided by Harlequin. Moreover, those losses are significant. The accounts (F28/9/25) suggest that it cost the resort company $19 million to run the resort in 2011-2012. And in addition to running the resort, the documents showed that the investors were paying for other elements of the Harlequin business that were nothing to do with the resort, such as the purchase of two aeroplanes and the running of the travel agency.

305. Mr Ames agreed that he had carried on selling properties in the Harlequin portfolio until the end of 2012. He said he stopped for a variety of reasons, including the Dublin litigation, and the change to the SIPPS rules. He said that he repaid some of the old cash investors and he mentioned the figure of $16 million, but it was established in cross-examination that this money did not come from Mr Ames or the Harlequin companies but was provided by new investors. Once again this arrangement did not cost Mr Ames or Harlequin anything.

306. Mr Ames agreed that he could never ring-fence the individual developments because otherwise he could not have afforded to carry out any development at all. He was therefore asked, given the disparity between the 8,200 deposits taken and the 200 odd properties actually built, when he realised that he could not fund all of his commitments. Mr Ames said that he never had recognised that failure, and he did not recognise it today. He even indicated that he would be able to make enough money out of the Buccament Bay resort to build the remaining 8,000 units across the world within five years, although he also admitted that it might never be possible. For the reasons that I have given, I consider that Mr Ames' evidence about the future was utterly unrealistic. It again showed that mixture of dishonesty, naivety and stupidity to which I have previously referred.

307. There was a good deal of other evidence to suggest that dishonesty may have occurred and may still be occurring. Neither Buccament Bay Resorts Limited nor Harlequin Developments, two of the key companies within the scheme, have filed accounts that

have been disclosed[9]. Neither do either of those companies have bank accounts. It appears that the money taken from the running of the resort is paid into an account of a Harlequin employee, Mr Bell, in America. Mr Ames also suggested that other members of the Harlequin staff were doing the same in St Vincent. The inescapable inference, that these ad hoc and unusual arrangements might fall foul of the money-laundering regulations, was impossible to avoid.

308. This is particularly so when one undertakes a very brief search for the missing money. The Harlequin documents show that, in respect of Buccament Bay, Harlequin companies received £170 million from investors in Buccament Bay and the related resort at Merricks in Barbados. Even stripping out the commission to HMSSE and the land cost, which would leave a conservative figure of £70 million. In addition, the accounts show that £22 million was borrowed on inter-company loans by Harlequin SVG, £30 million borrowed by Harlequin Developments and £19 million borrowed by HHR. When added to the money paid by the investors, that makes a total of £140 million odd. Of that, £30 million was paid to ICE, £30 million was spent on Phases 1A and 1B, and £10 million paid to Ridgeview. That leaves a residue of around £70 million.

309. Mr Ames was asked where that large sum of money had gone. He purported not to understand the question, although it was relatively straightforward. The figures were gone through again. Regrettably, he was unable to answer the question. It was not his money, and he gave the impression that he did not ultimately care about it. Of course, over half this money, and some of the relevant events, occurred after Harlequin's contract with WK had come to an end. In these proceedings, a critical question for me is the extent to which, before that contract came to an end, Mr MacDonald was aware of and/or involved in all of these inevitable consequences of the Harlequin business model.

4. THE CONTRACT (IF ANY) BETWEEN HARLEQUIN SVG AND ICE

4.1 Overview

310. This issue matters because it is only possible to assess WK's performance of their obligations to Harlequin SVG by reference to the factual background, and in that context, nothing is more important than the contractual arrangements (if any) between Harlequin SVG and ICE.

311. My initial impression was that, not only was there no formal, detailed contract between Harlequin SVG and ICE, but that there was also no contract of any kind, because there was never any agreement as to the scope of work, price or time to complete. It is trite law that the agreement on those matters are the basic requirements for a building contract: see paragraph 2-028 of ***Keating on Construction Contracts***, ***10th edition*** (2016). However, for the reasons noted in **Section 4.3** below, I have concluded on the evidence that, in May 2009, there was agreement on these matters, such that there was a limited contract between Harlequin SVG and ICE.

[9] There was some debate about this on the last day of the trial, with the Harlequin explanation typically both late and incomplete.

312. I consider that the arrangements between Harlequin SVG and ICE fell into three distinct phases. The first operated between September 2008 and May 2009. The second, following the agreement in May 2009, dealt with the period from then until March 2010, when the agreement to pay £19.35 million (£450,000 for 43 weeks) came to an end. The third relevant period was between March 2010 and early June 2010, when Harlequin SVG sacked ICE.

4.2 September 2008 - May 2009

313. It is pleaded by Harlequin that there was a contract between ICE and themselves made on 1 September 2008, albeit that this is set out as being the precursor to the subsequent agreement in May 2009. To the extent that this case was maintained by Harlequin, I reject it. All the ingredients that lead me in **Section 4.3** below to conclude that there was a binding contract in May 2009 were not present in September 2008. Mr Ames denied any such contract at that time.

314. During this period, it was agreed that Harlequin would pay a weekly retainer to ICE. This began at $125,000 per week but, by agreement, it increased over time so that by March 2009, Harlequin were paying ICE $450,000 per week. What were ICE doing in return? Mr MacDonald suggested that all that ICE were doing, in exchange for an amount which totalled $11 million over 7 months, was maintenance and remedial works to the cabanas. I do not accept that: the sums of money being paid were too large for such a small scope of work, and the daily site reports, and other evidence noted in **Section 3.8** above, indicate that a range of other works were also being carried out. I find that the main work being carried out by ICE over this period was works of completion and repair to the cabanas built by Ridgeview, the commencement of other cabanas further east, away for the beach, and work to Apartment Blocks 2 and 3. In addition, as noted in **Section 8** below, ICE also demolished some of the cabanas built by Ridgeview and replaced them with other buildings. They did no work to the waterfront village because that was still being designed.

315. At paragraph 109 above, I referred to Mr Ames' email of 3 March 2009 in which he countered further money claims by ICE by noting that he had "already paid" for the cabanas, an assertion that was not disputed. I consider that this is consistent with my finding that a considerable amount of work on the cabanas – much more than just repairs - was being carried out between September 2008 and May 2009.

4.3 The Agreement of May 2009

316. I have dealt generally with the agreement reached in May 2009 in **Section 3.9** above. It is important to stress that the agreement did not come out of the blue: the exchanges recorded at paragraphs 110, 112 and 114 above all demonstrate that ICE were quoting in the region of £23-27 million for the work comprised in Phase 1. As to the agreement itself, there are four relevant contemporaneous documents:

(a) Mr Ames' email of 26 May 2009, (E/16014) summarised in paragraph 117 above.

(b) Mr MacDonald's diary entry (E/5110) which recorded the agreement in these terms:

> "Early trip to site for 8 o'clock meeting with Paudie and Mark [Coggle] to discuss the budget for Buccament Bay. After detailed discussion agreed the overall budget at an exchange rate of two dollars to the pound and a total of £19 million payable by 43 instalments of £450,000 per instalment. There will be 9 periods over the next year when the company could request that no payment be made. There remains outside the budget various items such as marina or entry system etc which remain the expense of Harlequin."

(c) Mr MacDonald's separate note, entitled 'Agreement with ICE' (E/5112) which said:

> "The original agreement was that ICE would assist with the building of spa villa and the hideaway and delay payment until the units were sold. In reviewing the overall finances for the next year they have agreed to accept £19 million as the payments over the next 12 months leaving a balance of £5 million due to them which they would leave until the project was sold and the mortgages obtained."

(d) The email sent by Mr Coggle to Mr MacDonald dated 23 May 2009 (E/13189), summarised at paragraph 119 above. That document unequivocally acknowledged from ICE's perspective that there was a binding contract in place as a result of the agreement of 19 May 2009.

317. In order to try and distance himself from this agreement, Mr MacDonald purported to suggest that his diary entry – paragraph 316(b) above - recorded an agreement that had been made before the meeting which he attended. However, that is contrary to all the contemporaneous documents, including the terms of the entry itself, and his own contemporaneous note of the agreement. I find therefore that Mr MacDonald participated in all the relevant discussions that gave rise to this agreement.

318. The $96 rate per square foot was at the heart of this agreement: see paragraphs 79, 86 and 89 above. Mr Campion agreed that it was cheap and about half the price that he would have expected: including FF&E, he talked about rates $200-$250 per square foot. I find that ICE knew that this was a cheap rate. I find they proposed it in order to induce Mr Ames to enter into an arrangement with them. Extraordinarily, after the agreement of May 2009, the rate then seemed to become immaterial, because no claim by ICE and no payment by Harlequin was ever made by reference to it.

319. I take the view that the four documents noted above, taken together, evidence an agreement that ICE would carry out and complete the Phase 1 works by 1 July 2010 for the further sum of £19.35 million (that is to say, in addition to that which ICE had been paid thus far), with an additional sum due on or after completion. Both parties were expressing the view that there was such a contract, and it had been independently recorded by Mr MacDonald. There were three potential areas of uncertainty raised during the trial. The first was currency. The second was the scope of the works. The third was the issue as to a further sum due on or after completion. On analysis, none of these issues went anywhere.

320. **Currency**: This was a non-point. The figures set out in the contemporaneous documents were expressed in sterling. The instructions to pay were in sterling. The payments were made in sterling. There was no confusion: the fact that they were later expressed in US$ was simply for accounting purposes.

321. **Scope**: As to the scope of the works, I conclude that the best evidence as to the agreed scope is the content of Mr Ames' email of 26 May 2009 (paragraph 117 above). Nobody disputed that scope at the time. Nobody suggested that it was unclear. It is supported by the subsequent events, recorded in Sections 3.10-3.12 above, whereby additions to and reductions from that basic scope are discussed and sometimes agreed. Accordingly, I find that this was the scope of the works agreed in May 2009 as being the subject of the £19.35 million.

322. WK now argue that, beyond the cabanas and Apartment Blocks, the definition of the works was too unclear to result in a binding contract. But there are a number of reasons why that is untenable. First, that was not the advice that Mr MacDonald gave at the time. On the contrary, he repeatedly said he thought there was a contract between the parties on the basis identified above. Secondly, there were numerous meetings and other exchanges before 19 May 2009 to discuss and agree the scope of Phase 1: see for example paragraphs 105, 111, and 112 above. Both sides therefore knew what the basic scope was. Thirdly, it must be remembered that Mr Ames' email of 26 May 2009 – which listed out the restaurants and the like – was as detailed a description of the proposed works as was ever provided, and ICE never complained about it or suggested that its scope was unclear. Fourthly, as set out in **Section 3** above, there are numerous meeting minutes and emails from both ICE and WK which assume that, in one way or another, the restaurants and other elements of the waterfront village were part of Phase 1. Fifthly, it was a fact of life that the resort could not open without communal restaurant facilities because the cabanas and apartments did not have their own kitchens (in order to qualify for some pension-related benefit under UK law).

323. **Further payment/loan**: as to any further payment on completion, it seems to me plain that everyone assumed that a further sum would be payable on completion. Mr Ames accepted that in cross examination, although he typically admitted to no particular figure. On the basis of the four documents to which I have previously referred, and the later references to a 'balloon payment', the best evidence demonstrates an agreement that an additional £5 million would be paid on or after completion. That is what ICE themselves said in their email to Mr MacDonald (paragraph 119 above): when calculating the lump sum of £24,350,000, they show the £19,350,000 plus the £5 million. Furthermore, I consider that it is the existence of this balloon or balancing payment which explains why Mr Ames accepted in cross-examination that some costings were never finally agreed with ICE: he thought such agreement depended on a final, post-Phase 1 adjustment which never happened.

324. Standing back from the detail, there are two broader reasons why I should conclude that, for this central period, there was a fixed price contract. The first is because that is what many witnesses, including Mr MacDonald himself, repeatedly said; the second is because that is the appropriate application of the law.

325. As to the evidence of a contract, there were regular references by a number of the witnesses to the existence of a fixed price contract. Indeed, Mr MacDonald said that

he thought such a contract existed as early as October 2008, a view shared by Mr Garside (see paragraph 98 above). The contemporaneous documents also use this expression: see for example E/16072 and E/2659/1. Importantly, Mr MacDonald repeatedly said in cross-examination that, by May/June 2009, ICE had agreed to do the work for a fixed price. His own explanation (Day 12/101-102) of the £5/$10 million loan was that ICE "deducted a sum of $10 million from their fixed contract price".

326. As to the law, in circumstances where work has been carried out, the courts will strive to construe the documents so as to find the requisite degree of certainty for a contract to exist. They will endeavour to be the preserver, and not the destroyer, of the bargains made by the parties. A contract can come into existence during performance, even if it cannot be precisely analysed in terms of offer and acceptance, and the fact that the work has been performed makes it unrealistic to argue that the contract was void for vagueness or uncertainty: see ***G. Percy Trentham v Archital Luxfer Ltd*** [1993] 1 Lloyd's Rep 25 (CA); ***Scammell v Dicker*** [2005] 3 All ER 838 (CA); and ***RTS Limited v Molkerei Alois Muller GmbH*** [2010] 1 WLR 753.

327. For all these reasons, therefore, I consider that there was a contract between Harlequin and ICE, in the terms noted above, covering the position down to the beginning of March 2010.

4.4 The Position After Early March 2010

328. The position after early March 2010 was a complete muddle. ICE were asking for increasingly larger sums of money, with no reference to the May 2009 agreement, or what they had done and not done pursuant to that agreement. Their demands were often unconnected to any subsequent agreement with Mr Ames. They were always unconnected to any valuation of their works, either past, present or future; unconnected to any procurement schedule or logistics programme; and unconnected to invoices from suppliers.

329. I find that the financial demands being made by ICE after 10 March 2010 (when the 43rd and final payment was made) were generally unjustified – because they did not relate to the work being done on site - and were entirely the result of their avowed strategy to squeeze as much money out of Harlequin as possible before the project went terminally wrong (paragraphs 180-200 above). Although Mr Ames agreed to (and did) make further large payments to ICE during this period, I find that he was not obliged to do so, so that if on occasion he did not make a payment to which he had orally agreed, he cannot be criticised for so doing. By this stage, Mr Ames was entitled to be deeply suspicious of ICE and their conduct.

330. I find that there was no agreement of any sort which bound the parties during this period. Mr Ames had complied with his part of the May 2009 agreement. ICE had not, because they had failed to carry out enough of the Phase 1 works to be in a position to complete Phase 1 by 1 July 2010. As discussed in greater detail in **Sections 6.3.3** and **6.3.4** below, whilst some minor delays might be attributable to Harlequin, the vast bulk of the delay was plainly the responsibility of ICE.

5. THE CONTRACTS BETWEEN HARLEQUIN AND WK

5.1 The Claim by the Second Claimant

331. I can deal with this shortly. I agree with paragraphs 126 and 127 of WK's closing submissions, to the effect that the elaborate pleading of the basis of a claim by HHR against WK was not supported by any detail in Mr Ames' witness statement. No factual material was presented to suggest that HHR was a company of which Mr MacDonald had any particular knowledge. There was no evidence that he did anything on their behalf. There was no evidence of any contract between HHR and WK. Accordingly, there was nothing to suggest that WK (whether through Mr MacDonald or otherwise) owed this company any contractual or common law duty of care.

332. However, even if that is wrong and he owed them either a contractual or common law duty of care, I am in no doubt that HHR has suffered no loss as a result of any act or omission on the part of Mr MacDonald or WK. HHR was incorporated in the Cayman Islands. The reasons for that are unclear. When Mr Ames was asked in cross-examination what HHR had lost as a result of the alleged acts and omissions of WK, he was unable to identify any such losses. He agreed that HHR had no employees. He would not agree that HHR did not trade, but he could not say where and when it had ever traded.

333. At one point Mr Ames referred to HHR losing a contract with Liverpool FC, but he then said that that was to do with the Harlecon website, and therefore not part of these proceedings. No proposed contract was ever produced. He was reduced to saying that HHR had a claim because WK had "damaged the Harlequin brand". I do not accept that such damage was possible: any damage to the brand was inherent in the Harlequin business model (**Section 3.2** above) and by the stark facts of the present position, for which Mr Ames was principally responsible (**Section 3.20** above). Moreover, Mr Ames has ruthlessly exploited the idea of the limited company in order to set up over 40 different companies, some of which bear the Harlequin name, and some of which bear the Buccament Bay name. None of that was of any benefit to anyone except Mr and Mrs Ames. It is not appropriate for those who set up particular companies to perform particular functions for their own benefit to be heard to say, when it suits them, that somehow there has been damage to the overall brand for which a particular company, with no link to the defendant, can then claim damages.

334. The Particulars of Claim (A/2/51) say that HHR employed staff at the resort and purchased food and beverages. However, Mr Ames was clear in his evidence that that was all done by another company altogether, Buccament Bay Resorts Limited ("BBRL"). When this discrepancy was put to him, he said he could not explain it and did not know the answer. He therefore failed to offer any assistance in support of the pleaded claim by HHR, and there was no other evidence to support it.

335. Accordingly, for all these reasons, I accept paragraphs 125-131 of WK's closing submissions. I reject any claim by the second claimant, HHR, against WK. There was no contract, no duty, no identified breach and manifestly no loss. The HHR claim against WK is dismissed in its entirety.

5.2 The Contract With HMSSE

336. Although this contractual relationship started long before January 2009, it was only then that Mr MacDonald sent HMSSE an engagement letter. Even then the document remained something of a mystery because Mr MacDonald said that the signature on the critical letter of 13 January 2009 was not his. This all went to show that WK were quite prepared to enter into contractual relations with a client without having any written contract at all, much less a contract in particular terms. The proof of that particular pudding is that there was apparently no written contract between ICE and WK either.

337. The engagement letter for HMSSE is at (E/3275). Relevant parts of it are as follows:

> "The purpose of this letter is to set out the basis on which we are to act as auditors and tax agents to Harlequin Management Services (South East) Limited so that both parties are aware of their respective responsibilities and of the areas where directors retain responsibility…
>
> We refer you to Appendix I where we set out our respective responsibilities for all services, which we have agreed to undertake on your behalf.
>
> We provide a wide range of services for a large number of clients and may be in a position where we are providing services to companies which you might regard as giving rise to a conflict of interest. Whilst we have established procedures to identify such situations we cannot be certain that we will identify all of those which exist or may develop, in part because it is difficult for us to anticipate what you might perceive to be a conflict. We request that you notify us of any conflicts affecting this assignment of which you are, or become, aware. Where the above circumstances are identified and we believe that your interests can be properly safeguarded by the implementation of appropriate procedures, we will discuss and agree with you the arrangements, which we will put in place to preserve confidentiality and to ensure that the advice and opinions, which you receive from us, are wholly independent. Just as we will not use information confidential to you for the advantage of a third party, we will not use confidential information obtained from any other party from your advantage…"

Appendix I set out WK's responsibilities, on the one hand, and the responsibilities of the directors, on the other. In Appendix II there was a provision dealing with confidentiality of use of information. There was also a limitation of liability clause in the following terms:

> "For all causes of action accruing in any 12 month period, the first such period commencing on the date of our engagement letter, our total liability should be limited to the lower of the figures produced by the operation of the following two sections…

> Cap
>
> Subject to the provisions to the following section our liability in respect of breach of contract or breach of duty or fault or negligence or otherwise whatsoever arising out of or in connection with this engagement shall be limited to a multiple of 20 times the value of our fee in connection with the engagement on which the claim arises to cover claims of any sort whatsoever, including interest and costs…
>
> Proportionality
>
> Our liability to you in respect of breach of contract or breach of duty or fault or negligence or otherwise whatsoever arising out of or in connection with this engagement shall be limited to that proportion of the loss or damage (including interest and costs) suffered by you, which is ascribed to us by a court of competent jurisdiction allocating proportionate responsibility to us having regard to the contribution to the loss and damage in question of any other person (loss and damage having the same meaning as in the Civil Liability (Contribution) Act 1978)…"

338. In respect of the passage about a potential conflict of interest, Mr MacDonald agreed in evidence that clients had to be told about this. He was asked whether he would expect any arrangements to avoid a conflict of interest within the office to be documented and then sent to the client. He agreed that the arrangements would be documented, but said that circumstances dictated how the client was told. That answer simply makes no sense: plainly, any record of a potential conflict of interest is extremely important and needs to be set out in writing so that the client understood what was happening. As I find in **Section 6.7** below, that did not happen here when WK started acting for ICE.

339. Mr MacDonald was also asked about the limitation of liability and the cap (20 times the fee). He said these were standard terms. He said he could not have explained them all. He said he had no specific knowledge of the cap or why it was a multiplier of 20 times the fee. He said he was not aware of WK's insurance indemnity limit. He said he had read the proportionality provisions in the past and said he would have explained it to a client as being "proportionate to the blame between ourselves and yourselves".

340. Mr MacDonald was also asked whether he thought that Mr Ames was capable of choosing the accounting policy of the Harlequin companies, and/or whether Mrs Ames could choose the accounting policies of HMSSE, the company of which she was a director. He said he thought they could. In particular, he said that he thought that Mr Ames could because he had run a business before. I find that neither of them were so capable: they simply did not have the qualifications, training or the expertise, and Mr MacDonald knew it.

341. Also in connection with WK's letter of 13 January 2009, dealing with audit work, Mr MacDonald confirmed that he was the member of the WK staff who was "involved

closely" with HMSSE, as referred to in the letter, and that, also as referred to in the letter, he was the person who was "on loan" to them.

5.3 The Contract With Harlequin SVG

342. For this purpose, I am concerned solely with whether or not there was a contract between WK and Harlequin SVG and/or whether or not WK, through Mr MacDonald, owed duties of care at common law to Harlequin SVG. I am in no doubt that the answer to both questions is Yes.

343. Mr MacDonald carried out work for and on behalf of Harlequin SVG between 2006 and 2010. His detailed involvement in the relevant events has already been set out in **Section 3** above. In the factual circumstances set out there, it cannot sensibly be argued that there was no contract between Harlequin SVG and WK or, if there was no contract, that WK did not owe a duty of care to Harlequin SVG.

344. It is certainly right that any contract was not in writing. However, I have already noted that WK did not generally require a written contract before taking on contractual duties: see paragraph 336 above. In addition, a clear explanation for the absence of a written contract with Harlequin SVG can be found in the evidence of Mr Garside to the SFO. He told them that Mr MacDonald often worked for people and tried to find solutions to their problems without ensuring that the paperwork kept pace. Mr Garside said:

> "The ad hoc work with the other Harlequin companies and Dave Ames was managed by Martin MacDonald (Mac), for which we were not instructed to prepare a separate letter of engagement. In that context my involvement was limited to assisting Mac with a provision of information…it was part of Mac's nature to assist a client with a problem without necessarily thinking should they be doing this rather it would be a case of we'll take this burden off you and come up with something. With the benefit of hindsight HMSSE should have had some of this capability in-house."

345. Thus, the mere fact that there was no written contract between Harlequin SVG and WK was a function of both WK's and Mr MacDonald's relaxed attitude to paperwork rather than any reflection of the reality. On the basis of the detailed history set out in **Section 3** above, I find that there was a contract between Harlequin SVG and WK.

346. It was WK's case that, to the extent that they were engaged by Harlequin SVG or any other Harlequin company, the terms set out in the letter of 13 January 2009 (paragraph 337 above) would also have applied to their contracts with those other Harlequin companies. No tenable basis for such an assertion has been made out. As before, I note that WK had been working for HMSSE for the best part of three years before they even got round to sending these terms to HMSSE. That militates strongly against any suggestion that WK never acted for anyone, save on these express terms. Furthermore, there was no evidence that Mr MacDonald or anybody else at WK said to Mr Ames, or anyone else within the Harlequin group, that any of the work that they carried out for those companies (other than HMSSE) would be subject to these terms.

347. Accordingly, I find that these terms were of no relevance to the contractual relationship between Harlequin SVG and WK.

348. I should add this. WK argued for the inclusion of these terms because they wanted to rely on the limitation of liability provision. At paragraph 336 of their closing submissions, WK invited me to limit damages in interest and cost in accordance with that provision "to a multiple of 20x WK's fee *for the year in which any breach or loss arose*" (my emphasis).

349. In my view, this attempt to limit the operation of the provision is misconceived. There is no reference in the provision itself to limiting the fee used as the multiplicand in the calculation of the cap to the fee paid in "the year in which any breach or loss arose". The reference to the 12 month period in the terms is a reference to when the cause of action accrued, which is a different thing. WK's interpretation would also make no allowance for a continuing breach, as occurred here. No basis for importing such a qualification to the fee calculation was made out in WK's closing submissions. In my view, given the fact that WK were acting for Harlequin over a period of years, this provision could only have been sensibly utilised (had it been relevant at all) by using the multiple of 20 applied to the total fees paid by Harlequin to WK. I find that, excluding the separate sums paid to WK Business Solutions, that was approximately £740,000. That would therefore have given rise to a limit of liability of 20 x £740,000, namely £14.8 million. As noted in **Section 11** below, for what it is worth, I calculate WK's liability at less than that figure.

350. For these reasons, I find that the contract did not include the terms and conditions that were belatedly applied by WK to their contract with HMSSE. That then leaves the question as to what the terms of the contract were between WK and Harlequin SVG.

351. Various alleged implied terms of the contract are pleaded at paragraph 23 of the Particulars of Claim. They are drafted in very detailed terms, presumably to facilitate the subsequent pleading of the alleged breaches of those terms. I do not consider that all the detailed terms alleged would have been implied into the contract: on the contrary, I consider that most of them would fail the test of necessity. They are not required in order to make the contract work: see ***Liverpool City Council v Irwin*** [1977] AC 239.

352. Instead I prefer to find that WK, through Mr McDonald, was obliged to exercise reasonable skill and care in undertaking the functions which they performed on behalf of Harlequin. The critical question of course is to identify what it was that WK/Mr McDonald was doing for Harlequin. I deal with that in **Section 6** below. In addition, I reject the idea that WK owed any sort of fiduciary duty to Harlequin, an allegation which seems to have been made solely to provide a hook for the claims relating to confidential information. Instead I find that this was a straightforward agreement for professional services.

353. If I am wrong to conclude that there was a contract between Harlequin SVG and WK, then I consider that they owed Harlequin a freestanding duty of care. On the basis of the facts set out in **Section 3** above, I find that the three ingredients set out in ***Caparo Industries PLC v Dickman*** [1991] 2 AC 605 have been made out. There was the necessary proximity; there was the necessary foreseeability of damage; and it is reasonable in the circumstances to impose a duty of care on WK/Mr MacDonald.

354. As to the scope of the duty, it mirrors the broad term which I have found in paragraph 352 above. Thus, if there was no contract between Harlequin SVG and WK, then I consider that WK owed Harlequin SVG an equivalent duty of care.

6. THE ALLEGED BREACHES OF CONTRACT BY THE DEFENDANTS

6.1 Introduction

355. At paragraph 108 of the Particulars of Claim, there are 20 alleged breaches of contract/duty by WK, which contain multiple sub-categories. At paragraph 109, there are 3 breaches of fiduciary duty, each of which is also sub-divided. This 'shopping list' approach to pleaded breaches is to be deprecated. However, it is unnecessary to go through each allegation because, as was evident from the closing submissions of both Harlequin and WK, the alleged breaches fall conveniently into three broad categories.

356. First, there are the various allegations to the effect that WK (and for this purpose that means Mr MacDonald) should have advised Harlequin SVG to enter into a contract with ICE. It is said that, because Mr MacDonald was Harlequin's *de facto* Chief Financial Officer (CFO) or Finance Director (FD), and was giving wide-ranging financial and business advice, he should have advised that it was only with such a contract that Harlequin SVG's interests could properly be protected.

357. Secondly, it is said that, in fulfilling the same role, Mr MacDonald should have advised Harlequin that, contrary to Mr O'Halloran's repeated promises, ICE were never going to complete Phase 1 by the agreed date of 1 July 2010. The third category of allegation is rather different. It is alleged that WK should never have accepted the subsequent instructions from ICE because there was a clear and obvious conflict of interest from the start, and that, once WK realised that ICE were misappropriating the money that Harlequin were paying them and/or mismanaging the works generally, they should have advised Harlequin of this, and disclosed to Harlequin the relevant information/documentation, even though that was confidential to ICE.

358. I deal with these allegations in this way. In **Section 6.2**, I identify the general evidence about Mr MacDonald's role with Harlequin and, in **Section 6.3**, by cross-referencing some of the events noted in **Section 3** above, I identify particular documents or events which, in my judgment, confirmed the nature, scope and extent of Mr MacDonald's role. At **Section 6.4** I summarise my conclusions on that topic. All of this matters because an analysis of what advice Mr MacDonald gave or should have given can only be undertaken by reference to the role that he was carrying out and the services that he was providing[10]. Thereafter, in the light of those findings, I address at **Sections 6.5-6.7** each of the three liability allegations which I have summarised above. At **Section 6.8**, for the reasons explained there, I deal with two other issues which were said by the parties to have a general bearing on the alleged breaches, namely the involvement of RLB and the circumstances in which WK

[10] At paragraph 189 and following of their closing submissions, WK give the impression that whether or not Mr MacDonald was the CFO/FD was a peripheral or "amorphous" issue. It was not: an accountant who merely audits the company's accounts would not ordinarily be expected to give advice on contractual issues; a business advisor involved in and every aspect of that company's commercial strategy as *de facto* CFO/FD would be.

terminated their retainer. There is a short summary of my conclusions on liability at **Section 6.9**.

6.2 The Evidence About Mr MacDonald's Role

6.2.1 Mr MacDonald's Own Evidence

359. On the basis of Mr MacDonald's oral evidence, I conclude that he was the *de facto* CFO or FD of Harlequin, and in particular of Harlequin SVG. The particular evidence which demonstrated that is set out below.

360. Mr MacDonald said that he had had previous experience with a number of construction companies. They were all smaller than Harlequin. He described them as typical United Kingdom builders who obtained financing for their projects. They did not obtain funding through properties being sold. Despite this lack of direct experience, it was clear that, from the beginning, Mr MacDonald embraced the Harlequin operation. As early as August 2006 (E/971), his colleague Mr Garside said frankly: "I am a little worried at the goings on at Harlequin." This was in my view unsurprising, given the nature of the Harlequin business model. But Mr MacDonald said in evidence that he addressed and answered those concerns, presumably because he believed in the business model and wanted it to work.

361. Another early document, Mr MacDonald's note of his meeting with Mr Ames of 4 August 2006 (E/966/1), identified a selling cost at about £245 million per square foot and a building cost of £180 million per square foot. Mr MacDonald described the figures as "reasonable". On the face of it that was a comment about those figures and the reasonableness of both the building cost and the selling rates, which suggested his detailed involvement in both calculations. In cross-examination he claimed that all he was saying was that the profit of £65 million was reasonable, but that is not what the document says. Moreover, it hardly needed a qualified accountant to say that a profit of £65 million was "reasonable".

362. In connection with the same document, Mr MacDonald was asked about the huge scale of the project and whether he thought that Mr Ames was capable of doing all that was required satisfactorily. Mr MacDonald was evasive in dealing with that question, and in the end the best he could offer was that Mr Ames "seemed competent". It was clear to me that Mr Ames could not possibly have managed the project without the detailed input of Mr MacDonald. During his cross-examination, Mr MacDonald accepted that the Buccament Bay resort was an ambitious project and it needed a good structure and an appropriate chief financial officer who would need to be an accountant. I find that the only person able and qualified to fulfil that role was Mr MacDonald, and he knew it.

363. I have already referred to Mr MacDonald's letter to Stirling Mortimer Limited of 8 October 2008 (paragraph 99 above). In that letter, Mr MacDonald stressed the financial health of Harlequin SVG, saying:

> "We would like to draw attention to the fact that this company is in effect free of debt and holds significant assets. The creditors referred to are mainly deposits received from the clients upon signing the initial contract.

> One of the most important assets held by this company is the site at Buccament Bay in St Vincent which has recently been given a Red Book valuation by Colliers on the basis of "fire sale, as is" of more than £200 million. There are no debts secured against this asset.
>
> The nature of Harlequin group's business model – which is applied in Harlequin Property SVG is such that development are substantially built on the funds received before construction. As such companies are able to trade effectively without resorting to debt. In the present circumstances, this puts Harlequin Property SVG and the Harlequin Group in general in a very secure position."

364. This letter was important for a number of reasons. First, it showed that Mr MacDonald was familiar with the detailed operations, not only of HMSSE, but also of Harlequin Properties SVG and other companies in the Harlequin group. That gives the lie to Mr MacDonald's repeated attempts to make out that he was no more than a bag carrier for these companies. Secondly, it demonstrated Mr MacDonald's clear familiarity with the Harlequin business model. Thirdly, it made plain that, as far as Mr MacDonald was concerned, Harlequin SVG could be portrayed as a successful company *as a result of* this business model. Fourthly, and perhaps most important of all, the letter highlighted the key ingredient of this success: that developments were built using funds received before construction. The letter stated that those funds were received from investors. There is no mention in this letter about the need for, or the importance of, any loan arrangements.

365. Mr MacDonald said, in connection with this letter, that he was aware that 50% of the deposit was taken by HMSSE by way of commission and that the balance was put into what he described as "an effective client account" for the overseas Harlequin companies. He said the direction of that account was for Mr Ames. Again he sought to distance himself from the operation, saying that he did not prepare accounts for those overseas companies. However, he was obliged to accept that he prepared accounts for HMSSE, and it was a risk to HMSSE if that client account was abused, so it was, therefore, a matter with which he was directly concerned. This was one of numerous questions where, because the honest answer was adverse to Mr MacDonald's stance, he was very reluctant to answer.

366. A later overall budget cash-flow for the whole group of companies was prepared by Mr MacDonald in February 2009 (E/3588). The document again demonstrated Mr MacDonald's detailed involvement in and knowledge of the figures. Here the build cost was said to be 40% of the total selling value. Of course, as already noted, Harlequin only had 15% of that value to spend. Hence a loan was required or, other investors' money had to be used, which made this a potentially questionable scheme. In cross-examination, Mr MacDonald seemed incapable of appreciating that simple conclusion; I find that this was due to his own involvement in the detail and his concern not to incriminate himself.

367. One of the most important meetings was on 19 May 2009, which led to the agreement between Harlequin SVG and ICE noted in **Section 4.3** above. Mr MacDonald eventually agreed that he played an active part in that agreement, having previously

suggested that it was some sort of prior agreement between Mr O'Halloran and Mr Ames reached without his involvement. Both in relation to that agreement, and in respect of his role generally in May 2009, Mr MacDonald, although denying being the CFO or FD of Harlequin SVG, expressly accepted that he was often doing the job that a FD would do. It was put to him that that job could only have been done by an experienced accountant. Mr MacDonald typically havered and said that a qualified accountant was certainly necessary to take on the role of FD. He was asked whether he had ever thought that an FD needed to be appointed. He said it was not a discussion he had; he said it did not cross his mind.

368. Accordingly, it was put to him that this was because of the role that he himself was playing: that he was the FD. Mr MacDonald evaded that question. In the end, he appeared to suggest that the arrangements at Harlequin SVG were satisfactory, provided that financing could be obtained. It was pointed out to him that financing was never obtained, so he was again asked whether, in those circumstances, the state of financial control at Harlequin SVG was satisfactory. Again he evaded the question. Eventually, he conceded that Harlequin SVG would have benefitted from an FD from about May 2009 onwards. Because, on his case, there was no such person fulfilling that role, he was asked whether he was content that there was no such appointment. He said: "it did not occur to me".

369. In my view, these exchanges made plain that, despite his numerous evasions, Mr MacDonald knew that he was the *de facto* CFO or FD: that was why he did not consider that anyone else was needed.

370. Although there were no funds or loans by the summer of 2009, the projected costs of building at Buccament Bay was increasing, if only because the scale of the proposed project was increasing. However, there was no suggestion from Mr MacDonald in the contemporaneous documents that the absence of funds or loans meant that the project was not viable. Mr MacDonald said that he thought that there had been discussion between Mr Ames and ICE about the possibility of a loan from ICE, but he was very vague about this. He said that he was aware of the agreement to pay $450,000 per week, but when he was asked where that money would come from, he said that loans were being sought and there was a possibility of finance on the Barbados scheme. When pushed as to how and why he was so vague as to where this large sum of money was going to come from every week, Mr MacDonald said he did not address it because, so he claimed, he was not the CFO of Harlequin. In the light of the other evidence and the absence of anyone else who could have fulfilled that role, I reject that answer.

371. Mr MacDonald also accepted that by this stage (the summer of 2009), the scale of the risk to Harlequin was now greater than ever, because deposits were being taken from investors in other schemes, and then used to pay ICE at Buccament Bay. He agreed that, if he had a concern about that, he would have raised it: he would have said that he did not like it. It was put to him that he must therefore have regarded it as acceptable. He agreed with that, saying that it was acceptable "in the context of the other things happening at the time". That was an important answer because it again demonstrated that, even at this critical time, Mr MacDonald was closely involved in, and prepared to endorse, the Harlequin business model without any qualification as to financing.

372. Although the evidence made plain that, as a matter of routine and practice, payments had to be authorised by Mr Ames, there was evidence of Mr MacDonald authorising certain payments. Two documents were put to him (E/2807 and E/4857). He accepted in evidence that both involved him authorising payments for services provided.

373. Mr MacDonald also accepted in cross-examination that he had a duty to report to his client if he was aware of any wrong doing. He also agreed that if an accountant had certified a set of accounts then the public would rely on that certification.

6.2.2 The Claimants' Evidence

374. I consider that the general effect of the Harlequin evidence called at trial also demonstrated that Mr MacDonald was the *de facto* CFO/FD. I summarise the salient elements of that evidence below.

375. Despite my general doubts about him, Mr Withey, as a selling agent, was in a position to say that Mr MacDonald "was widely considered to be Mr Ames' right-hand-man and business advisor" and that he had formed the impression that Mr MacDonald "was involved in all aspects of the business". He said that when he first met Mr MacDonald in 2008 Mr Ames introduced Mr Withey and his wife to Mr MacDonald as "his 'right hand man'."

376. Mr Ames said that Mr MacDonald's role was to oversee the whole project: as he put it, "he was my man." Mr Ames made it plain that, although he consulted other people, Mr MacDonald was the main person to whom he turned for advice on all aspects of the development of Buccament Bay (except the ever-changing nature of the design). I accept that evidence. It is entirely consistent with the contemporaneous evidence set out in **Section 3** above. There was also this telling passage early on in Mr Ames cross-examination:

> "Q. Did you tell Mr MacDonald that you were selling hundreds of units on land which you had not yet bought on this end of the resort, for which there were no plans?
>
> A. Of course he knew.
>
> Q. He knew that, did he?
>
> A. Of course he did.
>
> Q. How did he know that?
>
> A. From 2006 when the business evolved I never realised when we -- when I kick-started this in early 2006 – how the business would develop as it is. The idea was just to build a few villas on the beachfront, maybe put a restaurant in there and we will see how it goes. When I realised that more and more people were interested in investing with me to take this business forward, I realised I could not rely on just myself and the local accountant I

> had at that time. I also realised that I needed professional people to advise me on what I needed to do. As I said, people call me an entrepreneur, a visionary, whatever it is. You know, I believe, as I proved at Buccament Bay, I have designed and built and made a fantastic resort. And so in 2006 I had to ensure that I had the interests of my investors -- because the investors at the end of the day are the most important people out of all this. It's not about me, this is about looking after my 1,000 investors, and so I went out there and I looked for the best lawyers at that time, Sidley Austin, who are professional people in hotels. We then -- I had a local accountant. I realised he wasn't going to be able to look after us, our interests, so we started to look for a professional accountancy firm and what happened was we were talking around and what happened was that I was away at the time, some people came in -- or I think at least one person came in for an interview and Carol, my wife, was surprised to see it was Mac and obviously she knew him and he was a bit of a personal friend at that time and what happened then when I met him two weeks later, from what he told me and what I knew from the work he did at Patten Pools where my wife worked, Carol, was that he was an expert -- although he was an accountant, he was an expert in this type of thing. He also told me some other companies he worked for in the local area, one called Betterview Windows, who were a big building firm in the area, so I realised he obviously had the knowledge and expertise in that and he said "I will be the perfect person to help you to put this together" and so he got involved then and it got to a stage as well where we actually -- you know, we offered him an office at the end and we gave him a mobile phone and he was part of the family, if you like, so he was part of the business."

377. Mrs Ames' statement is littered with references to Mr MacDonald's involvement in the detail of this project. For example, paragraphs 11-17 spell out in detail the extent to which Mr MacDonald was closely involved in just about every aspect of the Harlequin business. Mrs Ames explains there why, in her view, Mr MacDonald was doing more than a CFO would have done. None of these passages were directly challenged in cross-examination. In her oral evidence she described him as "the answer to my prayers" because of the range of services he was going to provide. She concluded: "we trusted him implicitly".

378. There can be no doubt that both Mr and Mrs Ames had every reason to maximise Mr MacDonald's involvement: the project has proved a disaster for large numbers of people (in particular the investors) and Mr and Mrs Ames manifestly wanted to blame him for everything that had gone wrong. That was, for instance, apparent in some of Mrs Ames' answers to Mr Fenwick's cross-examination when, instead of answering the questions, she was anxious to ensure that the court understood her case that Mr

MacDonald had been equally involved in whatever aspect of the business Mr Fenwick was asking her about. This made some of her evidence unreliable. But, despite that, I accept the general thrust of the Ames' oral evidence that Mr MacDonald was closely involved in all aspects of the Harlequin business.

379. Mr Taylor gave compelling (and objective) evidence about the scope and extent of Mr MacDonald's activities on behalf of Harlequin. He said that Mr MacDonald represented himself "as having fairly significant building knowledge to me and to others and he had been intimately involved in the project…he did a multitude of different things". Mr Taylor also gave evidence about Mr O'Halloran and Mr MacDonald's dislike of those (like Mr Ronan) who Mr Ames had brought in to advise about the running of the hotel. He said bluntly that "they hated them". The incident noted at paragraphs 207 and 209 above appears to bear that out. This supported the view that Mr MacDonald was in charge and wanted to keep it that way.

380. Mr Commissiong gave a good deal of detailed evidence in his statement about Mr MacDonald's involvement in the detail. I am naturally wary of any part of his evidence: see paragraphs 22.4 and 45 above. But his evidence that Mr Ames told him that Mr MacDonald was "indispensible" was entirely consistent with the other evidence, as was his comment that "I could see that Mr Ames placed great reliance on him and trusted him, his input and advice implicitly. In simple terms, Mr Ames asked questions and Mr MacDonald provided answers."

381. In addition, at paragraph 7 of his witness statement Mr Commissiong said that he had originally been concerned that Mr Ames would not be able to generate enough money by way of the deposits to finance the project. He said that:

> "…Mr MacDonald assured me in my office, where we would almost always meet, that the way he had structured sales within Harlequin meant that the project would be fully funded at Buccament Bay. At first, I actually drafted a sales contract for Harlequin investors but Mr MacDonald explained to me that the contract would not work as Harlequin needed to sell, collect a percentage then increase the sale price of property as sales continued to ensure the project was viable. Mr MacDonald told me there was no ring fencing of monies and if the Buccament Bay project was properly managed cash-flow would be good and the model would work. It was clear from the meetings I had with Mr MacDonald in St Vincent that he was heavily involved in the business and development of the business plan."

382. Mr Commissiong was not cross-examined on this passage. More importantly, I consider that it was consistent with what others said and what the contemporaneous documents showed. Thus, despite the fact that I have found that much of what Mr Commissiong said was untrue, I accept this element of his evidence.

383. At paragraph 10 of his witness statement, Mr Smith said that he thought, by 2010, that Mr MacDonald was 'pulling [the] strings' and, at paragraph 13 that, for various reasons, he naturally viewed Mr MacDonald as Mr Ames' right hand man and CFO. He went on to say:

> "It was only some months later that I found out that Mac didn't work as an employee for Harlequin and instead was a partner at an accountancy firm Wilkins Kennedy. Given what I explained in St Vincent, this came as a surprise to me as it was clear Mac wasn't acting in Harlequin's best interests."

Despite my reservations about some aspects of his evidence, I accept Mr Smith's description of Mr MacDonald's role: it was consistent with the contemporaneous documents and the evidence of others.

384. Finally, there is the evidence of Ms Sarah Tricker, whose important comments about Mr MacDonald's role were at paragraphs 18-41 of her witness statement. Although, as Mr Fenwick demonstrated in cross-examination, a good deal of this material did not add up to very much, I regard some of it as significant, particularly as Ms Tricker was in a very good position to observe the working relationship between Mr Ames and Mr MacDonald.

385. Thus I accept her evidence that Mr MacDonald's role involved non-accountancy meetings; that Mr Ames placed considerable reliance on Mr MacDonald's professional judgment and trusted him completely; that Mr MacDonald was involved in all aspects of the Harlequin business and that he did not act in a strict accountancy capacity after the first few weeks of her employment; that "there can be absolutely no dispute from anybody that spent time with Mr Ames and Mr MacDonald that Mr MacDonald was Mr Ames' right arm (never mind right hand) man".

386. Ms Tricker also said that, if she ever asked Mr Ames a question, he would say that she needed to run it past Mr MacDonald. She said they acted as a team. Ms Tricker gave examples of the matters of detail which Mr MacDonald promised to sort out, such as the difficulty with getting photographic evidence of what was being built. His role carried a broad range of subjects, she said, and appeared to be increasingly involved in decision making.

387. I also accept Ms Tricker's evidence in cross-examination, by reference to the documents (E/15837 and E/3720/1, 2) that, in general terms, payment instructions were always given by Mr Ames, not Mr MacDonald. The evidence established that, whether or not a particular payment was made at a particular time, was a matter that rested entirely with Mr Ames.

388. It is convenient to deal with a particular point involving Ms Tricker at this point. It was suggested in Mr MacDonald's witness statement – although not put directly to her – that she was in some way, the CFO of Harlequin. She refuted that at paragraph 41 of her witness statement, and she was not challenged on it. In my view it was an absurd suggestion, and one which identified the difficulties that the defendants had in trying to argue for any limitations on Mr MacDonald's wide-ranging role.

389. Mr MacDonald said in cross-examination that Ms Tricker was recruited to do the books and was very competent. He agreed that her job description or role did not change; she was just given more work to do. That seemed to me to be a clear admission that it could not feasibly be said that Ms Tricker, who was not a qualified accountant and was not involved in any financial planning, somehow became the CFO. Despite that, Mr MacDonald then said he stuck by his statement in the SFO

investigation (E/15565/15) that she was the CFO. I reject that as a groundless assertion. I consider that the fact that Mr MacDonald felt able even to make it, whilst distancing himself from his own detailed involvement in the Harlequin business model, was a regrettable feature of WK's defence in this case.

390. Finally on this topic, I note that, at paragraphs 2.2.1 to 2.2.31, paragraph 5.3, and table 5.1, all of his first report, Mr Dearman, Harlequin's expert accountant, expresses the view that, on the material he had seen, Mr MacDonald was acting in a way akin to a Finance Director or CFO as defined by the Institute of Directors. Whilst the matter is ultimately for me to decide, as a matter of fact, this does seem to me to be important supporting evidence, the basis of which was not challenged in cross-examination, and was not the subject of much adverse comment by Mr Indge, WK's expert accountant. I therefore accept Mr Dearman's evidence.

6.3 Cross-References to Section 3 and Other Documents

391. I have set out Mr MacDonald's detailed role in this story in some detail in **Section 3** above. So as to avoid repetition**,** I simply highlight some of the particular events/documents recounted there which, in my view, also demonstrate Mr MacDonald's role as Harlequin's *de facto* CFO/FD.

392. Mr MacDonald went on 45 trips abroad on behalf of Harlequin. The majority of those were to the Caribbean in connection with the development at Buccament Bay. It would have been quite unnecessary for Mr MacDonald to make so many trips if, as he claimed, he had been some kind of 'backroom accountant' or observer. Instead, these trips put him front and centre in the Harlequin operation.

393. Moreover, the notes which Mr MacDonald made of those trips demonstrated that there was no aspect of the Buccament Bay development in which he was not involved at one time or another. It is certainly right that the majority of his work involved financial matters, but there are repeated references to a range of other matters such as checking progress onsite, dealing with quality issues and the like: see for example paragraphs 28-29, 57-61, 71-73 (sacking Ridgview), 88, 96, 106-107, 110-111, 114-121, 148, 230, and 240-244 in **Section 3** above.

394. He was also closely involved in numerous other meetings, with developers, architects, lawyers and banks, discussing and agreeing things on behalf of Harlequin: see for example paragraphs 105, 161-162 (when he agreed the scope of works to be completed by 1 July 2010), 163-164, 210-211, and 233-236 in **Section 3** above.

395. He produced numerous budgets, cash-flows, projections, sales strategies and the like. In so doing, Mr MacDonald played a crucial role in Harlequin's business, and was himself a crucial part of the Harlequin business plan. From the contemporaneous documents, I take four short examples of this, although **Section 3** contains many more.

396. First, the evidence shows that he helped to shape the business plan and then defended it robustly, even against criticisms by the Harlequin solicitors, DLA Piper: see paragraphs 102, 104, and 106 above.

397. Second, by reference to his early cash-flow forecast, referred to in paragraph 30 above, Mr McDonald agreed that there was massive funding coming in from the investors; that there was no need to utilise cash from other development sites; the profit was very large; the cash-flow was excellent; there should not be a significant difficulty in relating Harlequin's cash to its obligations towards the contractor; and it looked to be a sound project. He also agreed that it needed control of costs and it needed the funds to come in as predicted from the purchasing parties. The document and his answers revealed Mr McDonald's keen appreciation of the integral parts of the Harlequin business model.

398. Third, Mr MacDonald's letters to the hedge fund and to potential investors in 2008 both stressed that the money for the construction costs was coming from the deposits of prospective purchasers and that Harlequin was debt-free (paragraph 99 above). This was also entirely in accordance with the business model.

399. Fourth, there was the May 2009 agreement (paragraphs 114-121 above). Mr MacDonald was plainly satisfied that the £450,000 per week could or would be found: he never suggested otherwise and his financial forecasts from around this period were very optimistic. This money would come from other investors, again something that Mr MacDonald well knew. Indeed, Mr MacDonald was asked whether he was aware that the only means of raising money (other than a loan) was from deposits paid on other properties, and he expressly accepted that he was aware of that. He was even asked whether he approved of such an arrangement. He said it was not for him to approve or disapprove. He agreed that, if there was no prospect of a loan, then he would have advised Harlequin to consider their position, and he "would have had to have said something". However, as we know, over four years (2006-2010) no loan was ever negotiated and yet Mr MacDonald never gave that critical advice.

400. At paragraph 10 of their closing submissions, Harlequin invited me to ask why, having criticised the Harlequin business model throughout the trial, WK were associated with it at all, without criticising it and without exploring the risks that it posed. In my view, those are valid questions. The answer to each is the same: Mr McDonald, like Mr Ames, was swept away with the potential advantages of the business model, and never properly thought about its obvious risks. Mr McDonald's failures were thrown into stark contrast by the expert evidence of Mr Indge, WK's expert accountant, who accepted in cross-examination the considerable risks posed for everyone, particularly the investors, as a result of the Harlequin business model.

401. Finally, the material set out in **Section 3** showed that Mr MacDonald was central to all of Harlequin's arrangements with ICE, and that both sides knew it. It is telling that ICE themselves always dealt with Mr MacDonald (sometimes without reference to Mr Ames), on the basis that he was the principal representative of Harlequin and responsible for all relevant issues. So, for example, ICE always wrote to MacDonald, and never to Mr Ames, in connection with the written contract which they periodically suggested that they wanted to enter into with Harlequin (see for example paragraphs 119 and 188 above).

402. Paragraphs 44 and 45 of Harlequin's closing submissions refer to and rely on Mr McDonald's fee notes in order to make good their case on the wide range of services he provided. It is unnecessary to set out those fee notes here. Suffice to say that I

accept that the range of services which Mr McDonald provided as the *de facto* CFO/FD is evidenced by the range of services identified in his fee notes.

403. Finally, there are the terms of Mr MacDonald's termination letter (parts of which are set out at paragraph 247 above). That evidenced in detail all the services which he was "no longer" going to provide. The only sensible reading of the letter, therefore is that, prior to 2 June 2010, these were services that he was providing. They included numerous financial, commercial and accounting services including liaising with ICE on construction costs, monitoring ICE's budget, and reviewing the detailed building costs.

404. In this way, the events in **Section 3** above and the contemporaneous documents confirm the oral evidence from both sides about the nature, scope and extent of Mr MacDonald's role at Harlequin.

6.4 Conclusions as to Mr MacDonald's Role

405. For the reasons set out in **Sections 6.2** and **Section 6.3** above, I find that Mr MacDonald played a crucial and detailed role on behalf of Harlequin throughout the development at Buccament Bay. He was, with the exception of Mr Ames, the single most important representative of Harlequin, both in the UK and abroad. I find that, in consequence of that evidence, Mr MacDonald was the *de facto* CFO or FD of Harlequin SVG. To that extent he fulfilled the promise made on the WK website: that WK's work for Harlequin SVG was "as important to you as a Financial Director."

406. He was the only person qualified to fulfil the role of CFO/FD (see paragraphs 362 and 367-372 above). He gave every impression that he was fulfilling that role. There was nobody else who was qualified to fulfil it. He never asked himself if Harlequin needed someone else in that role or, if they did, who it might be, because he was just getting on with undertaking that role himself[11]. In his role as *de facto* CFO/FD, and on the evidence noted above, I find that Mr MacDonald was aware of and supported all the significant elements of the Harlequin business model. Furthermore, I consider that his evidence noted in paragraphs 362 and 367-372 above came as close to an admission of these findings as Mr MacDonald was ever going to provide.

407. I accept that Mr MacDonald was not able generally to authorise payments, at least not before such payments had been authorised by Mr Ames. But I reject WK's submissions that, in some way, this meant that he was not the CFO. In other organisations, a CFO may well have that authority but the mere fact Mr MacDonald did not have the authority to authorise payments without Mr Ames' say-so did not mean that he was not, in effect, the CFO.

408. Having made that finding as to the scope and nature of Mr McDonald's role, I turn to deal with the three areas of breach noted in paragraphs 356-357 above.

6.5 Should Mr MacDonald have advised on the need for a Contract and, if so, what should he have said?

6.5.1 What Advice Did Mr MacDonald Give?

[11] I therefore accept paragraph 15 of the Particulars of Claim, paragraph 61 of Harlequin's Closing Submissions, and paragraph 5.3.8 of Mr Dearman's report.

409. Mr Ames' evidence was plain. In his witness statement, he said that Mr MacDonald had advised him that it was better for Harlequin not to have a formal contract with ICE. That remained his evidence throughout his cross-examination; indeed, it did not appear to be challenged that this had been Mr MacDonald's advice. Instead, the main point taken by Mr Fenwick was that this advice suited Mr Ames because he could not have afforded such a contract. I return to that issue at **Section 7.2** below.

410. In Mr Commissiong's witness statement at paragraphs 38-39 he gave detailed evidence to the effect that he was surprised that there was no written contract and that he thought a contract was required. He said that Mr MacDonald told him that he did not think that such a contract was necessary because "a written contract would not provide the flexibility he thought was necessary in such a development". That Mr Commissiong thought at the time that there should be a contract with the builder is beyond doubt: see for example Mr MacDonald's note of the Board meeting on 18 January 2008 (E1629) and Mr Commissiong's email of 6 November 2009.

411. In his note of the Board meeting, Mr MacDonald is recorded as saying that there was no building contract in place and that "while not ideal, this was the only way the project could proceed". In the email of 6 November 2009, Mr Commissiong said that the Buccament Bay resort "started in haste, without a standard written building contract" and that long after commencement, "I pleaded with Ken Picknell to prepare a contract". In cross-examination on these documents, Mr Commissiong said that he thought "it was madness not to have a contract". He said that Mr MacDonald told him that it was simpler to work without a contract and that working without a contract made everything much more flexible. Mr Commissiong said that he did not agree with that explanation. Despite my rejection of Mr Commissiong's oral evidence about land acquisition (which was flatly contradicted by the contemporaneous documents), I accept his evidence about the need for a contract with ICE, and Mr MacDonald's positive advice not to have such a contract (because it was supported by the contemporaneous documents, such as the Board meeting minute of 18 January noted above, and was also consistent with other evidence).

412. When Mr MacDonald was asked in cross-examination whether or not he had advised Harlequin SVG not to have a contract with ICE, he did not deny it: he merely said that he could not remember. Similarly, when it was put to him that Mr Commissiong had said that this was what Mr MacDonald had told him, Mr MacDonald again said that he could not recall the conversation. That was the extent of his evidence on this critical point.

413. Thus two witnesses said that Mr MacDonald had positively advised them not to have a contract, and their evidence is supported by the contemporaneous documentation, whilst Mr MacDonald could not recall one way or the other. Accordingly, I find that, on the balance of probabilities, Mr MacDonald positively advised that Harlequin should not enter into a contract with ICE. He expressly said, as noted in the Board minutes, that not having a contract "was the only way the project could proceed".

414. This evidence also demonstrated that Mr MacDonald was expressly advising Harlequin on contractual matters, which was precisely the sort of financial/business issue that I would expect a CFO/FD to be concerned with. That is a view also

expressed by Mr Dearman at paragraph 5.3.6 of his report[12]. But if I am wrong about that, and Mr MacDonald simply said nothing about whether or not a contract was required, it is still necessary to analyse whether that failure to advise was negligent.

6.5.2 Was Mr MacDonald's Advice Negligent?

415. In my view, Mr MacDonald's advice to Harlequin not to have a contract with ICE was negligent. As *de facto* CFO/FD, Mr MacDonald should have known and should have advised that not having a contract regulating the work being undertaken was ridiculously risky. If he said nothing, he was also negligent: this was not some nice question of law, but a fundamental matter of commercial and financial security. He should also have advised about the sort of arrangement which would have best suited Harlequin, given the undoubted constraints which they were under[13]. There are many reasons for these conclusions.

416. First, the size of the project, as set out in **Section 3**. This was a large undertaking and could not possibly have been attempted without Mr MacDonald, a qualified CFO/FD who was involved with every commercial aspect of the project on behalf of Harlequin. In undertaking that role on such an ambitious project, nothing should have been more important to him than putting in place a contract which regulated how the resort would be built, when and at what cost. The necessity of a proper contract with ICE should have been apparent to Mr MacDonald from the start.

417. Secondly, a contract with ICE represented the minimum commercial security that Harlequin (and therefore their thousands of investors) required. They were paying out large sums of money to a new contractor with no track-record or financial credentials. Again, the very least they needed was the security of knowing what work they were getting, when, and for how much. A contract was the only way that could be achieved, and Mr MacDonald should have advised to that effect.

418. Thirdly, Mr MacDonald repeatedly said that he was aware of the importance of raising loans to finance the construction project. He was also aware, or should have been aware, that as a matter of commercial common sense, the absence of any sort of contract with the builder was going to make it very difficult, if not impossible, to raise such loans. Who was going to invest in a project that was so uncertain from a financial and practical point of view?

419. If there had been any doubt about this, I note that DLA Piper advised (E/5555/1) that the absence of a building contract was a problem because a lender would require such a contract to be in place. Mr MacDonald said in evidence that he understood and agreed with that advice, although he added cryptically 'it might depend on the lender'. Given that Mr MacDonald's evidence throughout was that the obtaining of finance from lending institutions was of paramount importance, it follows that he also knew that having a written contract with ICE was also of paramount importance. Thus it was put to him that he could have advised Harlequin at any time that they were wasting time trying to get loans when they did not have a building contract. This was

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[12] At paragraph 70 of their closing submissions, Harlequin stress that they are not advancing the proposition that *any* accountant should tell *any* client to have a written contract; the argument is that on *these* facts *this* accountant should have advised *this* client of the need for a contract *in these circumstances*. I agree with and accept that distinction.

[13] See previous footnote.

one of the many questions that Mr MacDonald evaded, saying instead: "that conversation never took place". I find that the fact that it did not take place was Mr MacDonald's fault. It plainly should have done. He failed to 'join up' his advice about having no contract with his advice about the importance of loans.

420. I should say in parenthesis that, in my view, the question of financing was at the heart of many of Mr MacDonald's difficulties when giving oral evidence. Although he maintained that Harlequin SVG needed financing in order to achieve their aims, saying that this need was "paramount", he did not make that vital qualification to Mr Ames, or set it out in the letters that were sent out to the potential investors, or the other similarly reassuring documents for which he was responsible during the course of his time at Harlequin. If the Harlequin business model required financing, because otherwise it simply would not work, I would have expected Mr MacDonald to emphasise that, orally and in writing, both to Harlequin and to all relevant third parties, on a monthly or even a weekly basis. There is no evidence that he did any such thing. Even WK's closing submissions, at paragraph 89, which is seeking to defend this aspect of his involvement, fails to identify any attempts to obtain financing between 2008 and May 2010.

421. Fourthly, I consider that it was negligent to advise against a contract with ICE because Mr MacDonald knew that both Harlequin and ICE had expressed (both to him and to each other) a positive desire for a contract. Thus, by way of example:

(a) (E/1416/1): Mr Ames wanted a contract and was asking for Mr MacDonald's advice. Mr MacDonald said by reference to this, and the response (E/1430/1), that Mr Ames was willing in principle to have a contract at this stage. That is consistent with my findings at paragraph 101 in **Section 3**.

(b) (E/391/1; E/2202/1; E/2542/1): These were the ICE bids, already referred to at paragraphs 78, 80 and 89 above. Mr MacDonald was asked whether a fixed price contract could have been entered into on these terms. He said it could not have been entered into on the terms proposed by ICE and there would have had to have been a negotiation. When asked what it was in particular that would have required negotiation, he said it was the upfront payment. He was reminded that he had indicated that ICE were prepared to make a loan in respect of that and he agreed, although he thought that might have been later. He was also reminded that he had said that, at this point, Harlequin were in a "very secure position" and that in those circumstances, it could not be said to be unrealistic for Harlequin to enter into a contract in these terms. Mr MacDonald agreed that the parties could have probably negotiated something that was acceptable to both sides. That seemed to undermine entirely the argument that no contract would have been agreed because of the absence of a mobilisation payment.

(c) (E/5075/1, 2): The terms of the May 2009 agreement were recorded by Mr Coggle of ICE in an email to Mr MacDonald (paragraph 119 above). The email was sent to Mr MacDonald because, of course, he was central to the Harlequin business. It was recording what had been agreed and asking for this record to be signed and returned. Mr MacDonald was pushed as to what his view was or would have been about it. He was reminded that he had said that he thought there was a fixed price agreement and he said that it was this – the

agreement recorded in this document – which he thought had been agreed by both parties. But he did not properly answer these questions, and he did not reply to the ICE email, although he agreed that Mr Coggle had operated on the basis set out in the ICE email (E/16072).

421A Finally I note that at paragraph 5.3.10(e) of his report, Mr Dearman concludes that, if (as I have found) Mr MacDonald advised Harlequin not to have a contract, it fell below the expected standard, and explains why. At paragraph 5.3.11 of his report, Mr Dearman reaches the same conclusion if (contrary to my findings of fact) Mr MacDonald had remained silent on the subject. For the reasons noted above, I agree with and accept those passages.

422. So given this overwhelming evidence, why was it that Mr MacDonald positively advised against a contract altogether? The rationale for that advice was hard to discern. It was put to both Mr Ames and Mr Commissiong in cross-examination that Mr MacDonald explained to them that there could not be a contract because of the uncertainty of Harlequin's financial position. They denied receiving any such explanation. More importantly, in my view, if such an explanation had been given by Mr MacDonald, it would have been refuted as nonsensical: if Harlequin's uncertain financial position somehow precluded them from entering into a formal contract, then *a fortiori* it precluded the yet more inflexible arrangement whereby Harlequin were obliged to pay out a large sum of money every week, regardless of the work done on site.

423. This was the major *non sequitur* at the heart of WK's case. Assume that there were concerns about Harlequin's ability to meet all of their future commitments under a formal, detailed building contract. They would not have been the first – or the last – property developer in that position, but it does not usually stop the developer entering into the necessary contract (in order to generate financing, if nothing else). Optimism is usually the order of the day. Harlequin were in no different position and indeed, as Mr MacDonald himself was saying at the time, in a much stronger position than many.

424. So instead of a formal, detailed contract which would have protected Harlequin's position in so many ways, Mr MacDonald was part of the discussions between the parties which saw Harlequin enter into an arrangement which obliged them to pay out large sums (£450,000) every single week (which no formal contract would ever have required) with no link to the volume or quality of work actually being carried out on site (which no contract would have contemplated). If Mr MacDonald had good reason to warn against a formal, detailed contract, he should have objected even more vociferously to the May 2009 agreement.

425. At paragraphs 154-158 of WK's closing submissions, it is submitted that this was not a matter for Mr McDonald and that there were lawyers engaged by Harlequin who could and should have given this advice if appropriate. Although others may have been able to give similar advice, I do not accept the submission that this somehow meant that it was not a matter for Mr MacDonald. First, as I have said, this was not a matter of law but a commercial matter for him as the *de facto* CFO/ FD. In any event the evidence as to the centrality of Mr McDonald's role makes plain that he took responsibility for just about everything on this project (with the exception of design and, as explored later, detailed programming), so the question of whether or not to

have a contract was a matter he should have dealt with (and on my findings, did specifically address).

425A Another attempt at justifying the absence of a contract relied on the changes to the design. One of many unsatisfactory elements of Mr MacDonald's evidence in this respect was that he was very anxious to make plain to the court that the scope of Phase 1 changed within two days of the email setting out the May 2009 agreement, as if somehow this undermined everything that had gone before. In my view, this willingness on the part of Mr MacDonald to criticise Mr Ames, whether it was relevant or not, demonstrated a number of things. First, it showed that Mr MacDonald was now willing to take any point against his erstwhile client, even if he did not take it at the time. Secondly, it showed that at the time he was completely on top of the detail, and he knew about the changes (which of themselves were quite minor) that Mr Ames was proposing. Thirdly, the repeated tinkering with the design concept by Mr Ames should have emphasised to a reasonably competent CFO/FD that, in order to avoid the sort of uncertainty that such changes of mind can engender, the scope of Phase 1 needed to be nailed down without further ado, so that any changes of mind could be measured against that clear and unequivocal record of what was agreed to be in Phase 1. Again, Mr MacDonald did none of those things.

426. Because Mr MacDonald had said on a number of occasions that there was a problem with the scope of the work continually changing, he was asked whether he appreciated that, if the contract identified the basic work to be done, then if there were changes of mind, then the contract was open to variations. He said he did not understand contractual matters to that extent. I do not accept that. It is common sense, and you do not need to be a lawyer to know, that although it is always better to identify at the outset the scope of the works to be carried out, changes can always be accommodated, even if that comes at a cost. Perhaps because of the paucity of his earlier answer, Mr MacDonald said, when a similar point was put to him subsequently, that he was not consulted on the issue.

427. Finally, in order to address all possible arguments on this topic, I note that, very late in the day, on 7 May 2010 (E/11822), Mr O'Halloran sought to justify the absence of even a simple contract, saying "if ICE had gone down the route of monthly valuations, there was a fear that Harlequin might not have had the funds available to meet the valuations" (E/11822/1). In my view, to the extent that WK now seek to rely on the letter, it is contradictory, self-serving and wrong.

428. First, the letter was contrary to Mr O'Halloran's repeated statement that there was a fixed price contract. Secondly, as I have said, if there was a problem for Harlequin in tying them to a payment structure that linked payment to valuation, then a structure which required a large weekly payment regardless of value was even more inflexible, and therefore even more damaging to Harlequin. Thirdly, even if in some way the weekly payment schedule was a good idea for Harlequin, that did not mean that the specification of the work to be carried out should not have been properly documented. Neither did it mean that the works should not be valued so as to ensure that a fair payment was made for work properly carried out.

429. Time and time again in these proceedings, WK have equated not having a formal, detailed contract with not having a methodology for identifying the works to be carried out, and/or a proper valuation process for those works. This quantum leap is

simply unjustified. Even if there were reasons for there not being a formal, detailed contract, there was never a reason not to document the workscope to be carried out and to ascribe a proper value to those works. I address this issue in greater detail in **Section 6.5.4** below.

6.5.3 Summary

430. For the reasons that I have given, I find that Mr MacDonald/WK were in breach of contract and/or negligent in advising Harlequin not to enter into a formal, detailed contract with ICE.

431. I deal in **Section 7** below with causation. But it is convenient to acknowledge that WK have a powerful case on many aspects of causation arising out of the negligent advice not to have a contract and/or the failure to advise Harlequin to enter into a formal, detailed contract with ICE. Accordingly, it is necessary for me to go on to make one specific finding in relation to the contractual advice that Mr MacDonald should have furnished.

6.5.4 The Absence of a Binding Valuation Process

432. In my view, whatever else Mr MacDonald should have done/not done when advising about a contract between Harlequin and ICE, I consider that, at the very least, as the only third party advisor aware of Harlequin's financial position, he should have advised Harlequin that they needed to ensure that they were getting value for money from ICE. At the very least, Mr MacDonald should have pointed out that Harlequin needed to know that the large sums that they were paying ICE related to the value of the works being carried out on site. I therefore expressly accept the pleading to that effect at paragraph 108.1.6 of the Particulars of Claim.

433. The reasons for this specific conclusion are broadly those already set out in **Section 6.5.2** above. But the point can perhaps best be illustrated by reference to the May 2009 agreement (**Section 4.3** above). I have found that Mr MacDonald participated in the relevant discussions that led up to that agreement and was fully conversant with how it was going to work. He ought to have said to Harlequin that they would need to ensure that these large weekly payments (£450,000 for 43 weeks) were being made for works properly carried out; that, in other words, the money was not just being paid to ICE and then disappearing into a Caribbean black hole. That was a basic requirement which should have been obvious to an experienced business advisor like Mr MacDonald.

434. Thus, if I am wrong to conclude that Mr MacDonald should have advised that a formal, detailed building contract needed to be agreed with ICE, he should have advised that, at the very least, Harlequin would require a contractually-binding system of valuation so as to be sure what the agreed scope of works was, and also to be sure that the payments which they were making tallied with the value of the work being carried out on site. The workscope could have easily been set out in a bill or specification; the valuation required the ordinary construction process of application, valuation and payment.

435. I consider that Mr MacDonald's specific failure to advise on the need for a binding valuation process is also illustrated by reference to the evidence about the importance

of valuation generally, both in **Section 3** above, and by reference to certain later documents. The need for a system of valuation was regarded by both Mr Ames and Mr MacDonald – at different times – as important, and yet the latter never advised the former that he had to have these basic contractual tools in order to provide Harlequin with the necessary commercial protection.

436. Escarfullery & Associates had advised early on about the need for such a system: see paragraph 67 above. So did Mr Roberts: see paragraph 126 above. Mr Ames wanted (and at least one stage thought he had) a valuation arrangement: see paragraphs 109 and 140 above. Later he appeared to realise he may not have had such a system but knew he needed it: see paragraph 229 above. Mr McDonald appeared at all times to know and understand the importance of a basic valuation process, but he failed to ensure that such a system was provided. He often failed to address valuation issues at all, even when they arose so starkly: see for example paragraphs 147 and 153 above.

437. The documents produced later in the story also highlighted the deficiencies in Mr MacDonald's whole approach to valuation issues. So, by way of example, Mr MacDonald's email to Mr Ames of 12 February 2010 (E/16043/1), confirmed by his oral evidence, assumed – without any attempt to check - that Mr O'Halloran was entitled to the money claimed by ICE, whether he was or not. Similarly, Mr MacDonald's file note of 1 April 2010 (E/10703/1) is a detailed calculation showing large sums due to ICE. Since it was Mr MacDonald's document he was asked about it, but he said he did not know what these sums were, and it was all nothing to do with him. This was completely contrary to Mr MacDonald's suggestion that he was in some way fighting Mr Ames' corner on matters of valuation.

438. Likewise, on 10 April 2010 (E/11041/1), Mr MacDonald was sent a schedule of allegedly critical materials by ICE which he agreed that he considered. In it, ICE were saying that they owed $12 million to their suppliers, with $6 million identified as being the most urgent. It was put to Mr Macdonald that he should have asked himself: Why are these materials critical? Why have these payments not already been made out of the large sums agreed in May 2009? Mr MacDonald agreed that those were questions that he could have asked but he did not do so. All he said was that he knew Harlequin could not pay them, which was not an answer to the question.

439. He then suggested that this was a matter for RLB, but he subsequently agreed that it was *not* RLB's function to check what was due to ICE. He was therefore asked whose function it was. He admitted that he did not know. These were large figures on the ICE spreadsheet: if they were not paid, there was a risk that the contractor was in serious financial difficulty. He was asked for his reaction. He did not deny the existence of the risk, so it was put to him that he should have asked why Mr O'Halloran had been unable to make these critical payments. He replied that this was not his role within Harlequin at the time, and that it was not part of his job to tell Mr Ames what he thought of the schedule, despite being sent it by ICE and despite having considered it. I reject that evasive evidence. It was plainly part of his job as *de facto* CFO/FD, and his failure to grasp the importance of this sort of exchange confirms his failure to ever think about how he could ensure that Harlequin received value for money.

440. On valuation generally, it was put to Mr Ames during his cross-examination that Mr MacDonald never said or gave advice as to whether the works were being done well

or badly, and that he knew that Mr MacDonald was not doing valuations. Mr Ames disagreed on both counts. He said that he thought that Mr MacDonald was responsible for valuations; that was why Mr MacDonald had got RLB involved. Mr Ames said that it was Mr MacDonald who was "making sure that the money I spent was being spent correctly". When the same point was put to Mrs Ames, and it was suggested that Mr MacDonald did not hold himself out as having valuation expertise, she replied: "Well, he told us he could deal with that". This and other evidence suggested that Mr and Mrs Ames were relying generally on Mr MacDonald in respect of valuation matters, even though Mr MacDonald was ignoring that aspect of the project because he believed "it was not my job".

441. The document (E/12909/2) reveals that Mr Ames may have thought that RLB were performing a valuation role. But that was, on analysis, wishful thinking: how could they be, when Mr Ames never saw a RLB valuation report on the ICE work, and he was paying ICE the lump sums regardless? This again highlights Mr Ames' mixture of incompetence and genuine trust in Mr MacDonald: he failed to give the subject any detailed thought, whilst generally assuming that Mr MacDonald was protecting his position as to valuation, because that was the impression Mr MacDonald had given him.

442. Thus, even if I am wrong to find that Mr MacDonald was negligent for not advising Harlequin to have a formal, detailed contract with ICE, he was on any view at fault for not advising them to have a contractually binding valuation mechanism which ensured that ICE were only paid for the work that they actually carried out.

6.6 Should Mr MacDonald Have Advised That The Phase 1 Works Would Not Be Completed by 1 July 2010?

6.6.1 The Delays To Phase 1 Completion

443. I have set out relevant chronology in **Sections 3.10** – **3.13** above. In my view it was plain from the autumn of 2009 that the Phase 1 works would not be complete by 1 July 2010. As Mr Campion noted, ICE's own programme, which was not shared with Harlequin, showed a completion date in 2011 (paragraph 165 above). Moreover, I find, again as Mr Campion said, that from November 2009 onwards, ICE were making no significant attempts to be ready by the 1 July date, a view confirmed by the WK emails at paragraphs 180-184 above; the "How do I look them in the eye" email from Mr Wootton (paragraph 186 above); and the RLB report (paragraph 206 above).

444. I conclude that these delays were primarily the responsibility of ICE. They did not programme the works properly. They did not work out what the critical path was which they had to adopt in order to be ready by the agreed date. They did not plan any sort of procurement or logistics programme. They simply made oral promises that they could meet the due date, long after it was apparent that they could not do so. Then, early in 2010, they gave up substantially progressing the Phase 1 works.

445. During the trial, WK suggested that the delays in this period were the responsibility of Harlequin, either because of non-payment of sums due, or because of the design changes. This was similar to the case they advanced in respect of the Ridgeview works, which I rejected (paragraphs 63-64 and 69 above). Similarly, in respect of

ICE, I find that there is nothing of substance in either point. Any delays caused by Harlequin were insignificant.

446. There is no evidence that Harlequin's payments to ICE were generally late. They met their obligations under the critical May 2009 agreement, and there is no persuasive evidence that any other allegedly late payments affected ICE's ability to continue with the works. The documents (E/6091/1, E/7243.1/1 and E/1107/1) were not, in my view, typical. I refer to Appendix 20 of Mr Large's report which compares the payments that should have been made by Harlequin pursuant to their various agreements with ICE with the payments actually made. It will be seen from that, that Harlequin generally paid on time.

447. I readily accept that, on the basis of the evidence of Ms Tricker, there were a few late payments by Harlequin. She accepted that money was tight in the period from about March to June 2010. That is supported, *inter alia*, by the documents at (E/13307 and E/13674). However, I have found that, by then, ICE were simply attempting to maximise their recovery from this project and had no intention of carrying out any further significant works. The agreement of May 2009 had ceased, and no over-arching agreement had taken its place. Thus the alleged non-payments by Harlequin, as and when they arose in these last weeks, were not a breach of any contract and were, in any event, of negligible impact on the progress of the works.

448. There was, as Ms Tricker confirmed, an element of Harlequin living hand-to-mouth at this time (E/10548/2). In addition, I do not exonerate Harlequin from their practice of pretending that payment had been made and then not making them (E/10145/1) or saying that the delay was explicable because they were waiting for money to clear, a lie which Mr Ames described at the time as a "great delaying tactic" (E/10313/1). All of that reflects poorly on Mr Ames and Harlequin generally, but it did not significantly affect the progress of the works.

449. Moreover, bad behaviour was not all on one side. Ms Tricker's evidence was that ICE regularly attempted to bully monies out of Harlequin. She said there were times when Mr O'Halloran was very rude[14]. I conclude that Mr O'Halloran was prepared to say anything at any time to anybody if he thought it advanced his interests. All of the emails from ICE about alleged late payments has to be seen against that background.

450. As to the design changes, I accept that Mr Ames' tinkering with the design must have had a modest delaying effect. But the evidence showed that it was of little account. Mr Ames did not alter the design of Apartment Blocks 1, 2 and 3 after the autumn of 2009, yet none of them were anywhere near ready in early June 2010 when ICE were sacked. The same can be said of the numerous unfinished cabanas.

451. For these reasons, I conclude that ICE were responsible for the vast bulk of the delays and therefore the wholesale failure to complete Phase 1 by 1 July 2010.

6.6.2 Mr MacDonald's Conduct

[14] I note that, in some of these exchanges, Mr O'Halloran was saying that there was a fixed price contract, the complete opposite of what he said subsequently.

452. I find that, in the latter part of 2009 and the first half of 2010, Mr MacDonald appeared to adopt an attitude of serene unconcern about the progress of the works. He heard Mr O'Halloran say repeatedly that Phase 1 would be ready on time, yet he never seemed to ask himself how that was possibly going to be achieved. He gave the impression of being completely passive and just accepted what they said at face value. Moreover, this attitude was compounded by his oral evidence, which repeatedly took the ICE side of any argument, often in the face of overwhelming evidence to the contrary.

453. Thus he said that he was aware, no later than January 2010, that there would be a reduced opening on 1 July 2010 and that it would not be a full opening. He was correct: see paragraph 167 above. But Mr MacDonald never seemed to wonder why ICE were not doing what they said they would in May 2009, or why, after the January 2010 reduction, they still failed to complete even the reduced workscope. He never linked the reduction in workscope to the monies being paid to ICE, which did not reduce. I consider that Mr MacDonald's evidence about the reduction in scope generally was an admission that he was aware of the risk that ICE would not meet even their reduced promises, and was trying to minimise the effect. In addition, Mr MacDonald sought to say that, as the pressure on ICE ramped up in late 2009-2010 in terms of progress, everything was "slightly crazy". This was a curious statement: in my judgment, it reflected the fact that ICE and Harlequin SVG were on converging tramlines and that, deep down, Mr MacDonald knew it.

454. The examples of Mr McDonald's *laissez-faire* attitude towards the promised completion date can be found in **Section 3** above. I take just two examples out of many: paragraph 206, when in March 2010, Mr Ames was desperately seeking written confirmation that the works would be finished as promised and Mr McDonald did nothing about it; and paragraph 213, when Mr Ames expressly said to Mr McDonald that he kept telling him that everything was going to be ready on time "when clearly it is not", and Mr McDonald again ignored the communication.

455. For these reasons, I do not consider that Mr MacDonald's conduct in respect of progress at the critical time was appropriate or professional.

6.6.3 Analysis and Summary

456. Despite the evidence summarised in **Section 6.6.2** above, I have concluded that Mr MacDonald was not in breach of contract/negligent in failing to advise that the works would not be complete by 1 July 2010. There are a number of reasons for this.

457. First, Mr MacDonald was an accountant and business advisor, not a quantity surveyor or a programmer. Whilst his positive advice to Harlequin not to have a contract with ICE, alternatively his failure to advise about the need for such a contract, arose directly out of his role as *de facto* CFO/FD (because it was directly linked to Harlequin's financial position and the balance between commercial security and protection, on the one hand, and cash-flow, on the other), I consider that questions as to when the Phase 1 building works might be completed fell outside his remit.

458. Secondly, although **Section 3** demonstrates that Mr MacDonald did, from time to time, involve himself with general matters of progress, the same passages demonstrate that he was not doing so in any sort of detailed way. He could compare progress

between one trip and the next, but he simply did not have the skills or qualifications to work out, for example, what the critical path was and what events might cause delay to the works and what events would not.

459. Thirdly, it is quite clear from the documents that Mr Ames did not rely on Mr MacDonald in terms of advice as to completion. Mr Ames said in 2009 (paragraph 130 above) that he was going to get a construction professional ("a proper company") to give advice as to progress. He instructed RLB. They provided a number of reports which dealt with progress. I have already made the point (paragraphs 204 and 206 above) that those reports were heavily qualified. But that was the principal source of any advice that Mr Ames had as to whether or not the ICE promises were likely to be fulfilled. That advice did not come from Mr MacDonald.

460. On this point it is worth reiterating that Mr Ames took issue with Mr Roberts (paragraph 127 above) about his unsuitability for the role of monitor because he did not have the appropriate "experience and abilities" (i.e. he was not a construction professional). That only confirms my view that, for the same reason, Mr Ames could not have been relying on Mr MacDonald to advise about progress. He was not a construction professional either[15].

461. Finally, I consider that it is in any event unrealistic to suggest that it would have made any difference if Mr MacDonald had expressed reservations about Mr O'Halloran's ability to keep his promises. I accept that this is more properly a matter of causation, and I return to it in **Section 7** below. But it is sensible to record now that, given the ingrained suspicion that Mr and Mrs Ames had that ICE would not complete on time, but their reluctant acceptance of the reality that they had no alternative but to continue with ICE, I cannot see how on the evidence any more pessimistic advice from Mr MacDonald about completion would ultimately have made any difference at all.

6.7 Confidentiality and the Alleged Conflict of Interest

6.7.1 The Involvement of WK's Egham Office and Mr Newman

462. Mr MacDonald was based at Southend. Mr Newman, who worked for Harlequin giving them advice on tax matters, including in respect of Buccament Bay, was based at Egham. In the autumn of 2009, WK's Egham office accepted the appointment to act as financial advisors to ICE. Mr Newman then became the Chief Financial Officer of ICE Group, with a clear and obvious imperative to get as much money as he could out of Harlequin, his own clients. How on earth did that extraordinary situation come about?

463. In my view, it arose because WK were completely blind to the clear and obvious conflict of interest inherent in ICE's request to appoint them as their accountants. It is a sad but true fact of life that an employer and a building contractor must make their arrangements on the basis that they are likely to be on opposite sides in any dispute

[15] Numerous other detailed construction obligations on the part of Mr MacDonald were pleaded by Harlequin. It is unnecessary to deal with them in detail because no separate loss was said to flow from them. But I regard them as hopeless for the same reasons noted above in respect of programming, and I therefore broadly accept section F of WK's closing submissions. I do however reject the repeated assumption made there that, because ICE had engaged construction professionals, Mr MacDonald/Harlequin were somehow entitled to rely on them: that is just the sort of muddle of responsibilities which created so many of the problems on this site.

that arises. No amount of mission statements and professions of eternal friendship at the beginning of a project can mask the fact that a building contract takes a long time to perform and, whilst it is being performed, the employer generally wants the work to go faster and to be less expensive, whilst the contractor has at least an interest in achieving the opposite. No professional firm of advisors, if they thought about it sensibly for more than a second, could sit down and conclude that they could legitimately act for both an employer and a contractor on opposite sides of a building contract.

464. I am aware that the ICAEW Code of Ethics at section 197 suggests that, as a matter of principle, a firm of accountants can act for two parties in situations where there may be a conflict of interest. I am quite sure that, as a matter of general principle, that is right. But such general principles are always susceptible to the particular facts of any given case. Here, in circumstances where one contractor had already been sacked; where there was no contract beyond the May 2009 agreement; and where the works were going on thousands of miles from the United Kingdom (where both Harlequin and WK were based), the alarm bells ought to have been deafening enough for Mr Walmsley at WK to conclude that ICE's request for assistance must be politely declined.

465. Now let us assume that I am wrong about that, and WK were entitled, at least in principle, to act for both Harlequin and ICE. If they were, then it is common ground that they needed to obtain informed consent from Mr Ames, and they needed to ensure that proper Chinese walls were in place to prevent any breaches of confidentiality. It is quite plain to me that, in this case, informed consent was never sought (and would have been refused if it had been) and never obtained, and proper Chinese walls were not set up (and if they were, they were repeatedly breached).

6.7.2 Chinese Walls and Informed Consent

466. Mr MacDonald said that WK could work for both parties because there was a 'wall' between the Southend office (where he worked) and the Egham office (where Mr Newman worked). He said that this was on the basis that Egham was dealing with the work in the Caribbean, whilst Southend was only dealing with accounts in England. That was a false basis of distinction, given the amount of work that he (and others at WK) did for Harlequin SVG (a Caribbean company).

467. It is self-evident that Mr Newman should not have been allowed to work for ICE. Mr Newman's witness statement in the Dublin proceedings showed that he had twice visited Buccament Bay, at Harlequin's expense; he had had meetings with Harlequin's lawyers; and he had provided training sessions for Harlequin's agents. In addition, Mr MacDonald accepted that Mr Newman's subsequent work for ICE meant that they might have had dealings which affected both ICE and Harlequin. He accepted that he and Mr Newman might have had an interest in obtaining information about the other. He was asked whether there was any protocol in place to prevent this. He could not identify such a protocol and there did not appear to be one. His answer was to suggest that Mr Newman would not have had any knowledge of Harlequin's financial position. That of course was also wrong as a matter of fact, given Mr Newman's involvement with Harlequin's tax affairs.

468. In addition, Mr MacDonald said in cross-examination that any information held by WK would be regarded as confidential, but he failed to work out – then or in his evidence – the ramifications of this. For example, he accepted that Mr Newman worked for Harlequin providing tax advice, so that he, as a consultant employed by Harlequin, had to give information to Mr Newman about Harlequin's affairs, but only in respect of their tax position and not otherwise. How any such distinction could possibly be policed effectively or at all was never addressed.

469. Mr MacDonald went on to claim that Mr Ames was happy with this, and was even happy for Mr Newman to discuss with ICE how to handle Harlequin, even if that meant ICE putting pressure on Harlequin to pay large sums of money. He also said that Mr Ames was happy for someone to advise him on part of his business, whilst at the same time advising his biggest trading partner.

470. There was not a shred of evidence to support any of this. In answer to the simple proposition, that it would have been appropriate to set out the potential conflict in a letter to Mr Ames and obtain his informed consent, Mr MacDonald havered. He said Mr Ames knew about Mr Newman's position, an answer he repeated on a number of occasions. Eventually, Mr MacDonald accepted that it would have been better for all this to have been written out and accepted in writing. In my judgment, not only would it have been "better", but it was the minimum requirement for any proper professional relationship, in order that Mr Ames could then have given informed consent.

471. This did not happen. The two documents relied on by Mr MacDonald as allegedly evidencing Mr Ames' informed consent, do no such thing. (E/6591/1) was an email from Mr Ames to Ms Tricker of 16 October 2009 asking her to send ICE a list of the payments Harlequin had made because "Jeremy from WK is in Barbados sorting as we feel some payments have not arrived". That could not possibly amount to consent by Mr Ames that Mr Newman could be involved in discussions with ICE about Harlequin's financial affairs; it was just addressing missing payments. The email from Mr MacDonald of 20 October 2009 (E/6631/1) is even more anodyne, simply informing Mr Ames that ICE had suffered potentially $80,000 of loss as a result of employee fraud discovered by WK (a sum of money which, as far as I can tell, Harlequin would have paid to ICE).

472. Mr Ames was cross-examined about consent. It was put to Mr Ames that he was content for this to be carried out because it would then sort out the ICE accounts. Mr Ames disagreed with that. He said that he was not happy about it, even though Mr MacDonald reassured him that it would all be fine.

473. Neither the documents referred to in paragraph 471, nor those additional documents set out in paragraph 214 of WK's closing submissions, demonstrate any sort of informed consent on the part of Mr Ames. The most they do is show that Mr Ames resigned himself to a *fait accompli*. In his evidence, Mr Ames maintained throughout that he was never happy with this situation and I find that he would have objected vehemently had he been told even a part of what it was that Mr Newman was doing. I accept Mr Ames' evidence on that issue: the other evidence in this case demonstrated that Mr Ames was not an easy man, and very quick to find fault or take offence. I find that he would therefore be instinctively unhappy at the idea that somebody from WK was working on behalf of ICE.

474. Accordingly, I find that proper Chinese walls were not in place between the two offices because Mr Newman was working for both Harlequin and ICE, and proper and informed consent from Mr Ames was never properly sought, let alone given.

6.7.3 Breaches of Confidentiality

475. The absence of effective Chinese walls was further demonstrated by the evidence as to what actually happened between 2009 and 2010. In particular, the evidence made plain that during 2009 and into 2010 Mr MacDonald became far too close to Mr O'Halloran, and his sense of professional loyalty to Harlequin was lost in the process. As a result, information that was confidential to Harlequin was disclosed to ICE. Often, but not always, these breaches of confidentiality also involved Mr Newman.

476. The general closeness of the dealings between Mr MacDonald and Mr O'Halloran is evidenced by the general perception that Mr Macdonald was working for ICE: see paragraphs 144, 172, 175, 224, 227 and 228 above. This was also reflected in the documents: the document (E/7489/1) described Mr MacDonald as an advisor to ICE. There was also the sheer volume of the telephone calls between Mr O'Halloran and Mr MacDonald: see paragraphs 202 and 227 above.

477. As to the direct breaches of confidentiality by Mr MacDonald, there were at least four. First there was the event noted in paragraph 136 above, when Mr MacDonald sent Mr O'Halloran confidential valuation information which Mr MacDonald agreed in evidence should not have gone to the contractor. Second there was the 'angle of darkness' email noted at paragraphs 153-156 above and the discussion with Mr O'Halloran about RLB's valuation. Third there was the involvement of Mr Newman and ICE in the report to SOCA (paragraph 276 above).

478. In addition, there was (E/16130/1) a confidential draft of a resolution which was sent by Harlequin to Mr MacDonald. The covering email expressly said that it was confidential and should not be discussed with ICE. At (E/16103/1), Mr MacDonald promptly sent it to Mr Coggle of ICE. That was in direct breach of the express instruction that he had been given not to do so. Mr MacDonald's explanation was contradictory and therefore unsatisfactory. His original answer was that he sent it to Mr Coggle so that Mr Coggle could print it off because only he had access to a printer. However, that was different to his defence in the defamation proceedings (E/16104/1) which purported to say that the document was always intended for Mr Coggle and had been sent to Mr MacDonald in error. That explanation was contrary to the document itself. And Mr MacDonald's witness statement also continued to suggest that the document was always intended to be seen by Mr Coggle.

479. Mr MacDonald was by this stage so confused that in the end he did not know which of his explanations might be right. But, as was typical of much of his evidence, he considered the best way of defending himself was to attack Harlequin. Thus he said that the problem arose because Mr Terry – the lawyer who had sent him the email saying that the resolution should not be discussed with the builders – "did not understand the relationship between Mr Coggle and Mr Ames". That was part of Mr

MacDonald's case that somehow Mr Coggle of ICE had become Harlequin's "agent"[16], an assertion I reject as fanciful. The breach of confidentiality was clear.

480. There were also separate breaches of confidentiality arising out of the three-way involvement with Mr Newman[17]. So, for example, I consider that the MacDonald/O'Halloran/Newman round-robin emails of January 2010 (E/7470/1 and E/7488/1) should never have happened. They suggest that Mr MacDonald was discussing cash-flow with Mr Newman in order that 'we' (which in this context meant ICE) could work out how much they would get every week. As a result of that arrangement, Mr MacDonald could then go to Mr Ames to get the money. Mr MacDonald said he did not remember these discussions but, in my view, the documents make clear that Mr MacDonald was providing information about figures to ICE which was confidential to Harlequin, one of many breaches by WK of Harlequin's confidentiality.

481. The further discussions recorded in Mr Newman's records of 2 and 3 February 2010 also demonstrate that he and Mr MacDonald were discussing Harlequin cash-flow. These led to the meeting on 5 February 2010 (paragraph 189 above). Again the documents strongly suggest that Mr MacDonald was passing on information to Mr Newman that he should not have been. Mr MacDonald again said he could not recall those discussions. He did not deny that they had taken place. In addition, Mr Newman was at the meeting of 5 February 2010 with Mr Ames, having advised him on certain financial matters, whilst at the same time he was trying to squeeze as much money out of Mr Ames as possible on behalf of ICE. Mr MacDonald was asked about that and his answers were again evasive and inconclusive.

482. Although Mr Newman continued to act for Harlequin, it appears that at around this time, he attended a meeting with lawyers discussing the possibility of ICE terminating their contract with Harlequin. Mr Indge, WK's accounting expert, agreed that this was a potential conflict of interest. And Mr Newman himself seemed to have no idea about confidentiality or the need for Chinese walls: see paragraph 200 above. In addition, as noted at paragraph 222 above, Mr Newman was still charging Harlequin for his assistance in trying to sell the resort to investors whilst at the same time he was trying to squeeze as much as he could from them on behalf of ICE.

483. The increasing closeness between Mr MacDonald and ICE – which in my view explained (at least in part) why Mr MacDonald was apparently operating on the basis that, if ICE claimed a sum, then it must automatically be due – can also be seen in the documents from the last period that ICE were on site. There was Mr O'Halloran's claim that Mr MacDonald was his best friend (paragraph 227 above). There was also, on 28 April 2010 (E/11579/1), Mr O'Halloran's advice to Mr Ames that Mr MacDonald was "a true friend" of Harlequin (which, on my findings, was incorrect) and which was contradicted by Mr Taylor's note of 7 May (E/11826, paragraph 228 above), which recorded Mr O'Halloran saying that Mr MacDonald would stand with him (Mr O'Halloran), not Harlequin, in court. Although Mr MacDonald denied this, it was not suggested to Mr Taylor that he had manufactured his account of the

[16] Paragraph 226 of WK's closing submissions.

[17] It should be noted that Mr Ames was aware that Mr Newman's involvement risked the confidentiality of his exchanges with WK. At paragraph 176 above, I refer to his pathetic plea to Mr MacDonald not to "talk about this with Jeremy".

conversation with Mr O'Halloran, and its sentiment was entirely consistent with the other documents to which I have already referred. I therefore conclude that Mr MacDonald did promise his support to Mr O'Halloran if matters ever came to court, a promise which he has fulfilled in these proceedings.

484. Then there was the "don't spook him" email: paragraph 224 above. Both this and the response (E/16077/1) assumed that ICE's response to Harlequin/Mr Ames would be approved by Mr MacDonald. The document was also sent to Ms McLaren at WK (someone else who had previously worked for Harlequin). Mr MacDonald said he did not recall the document, and I accept paragraph 91 of WK's closing submissions: it cannot itself prove any dishonesty on his part. But what it does show is that everyone else at WK and ICE (none of whom came to give evidence) were operating on the basis that Mr MacDonald was so closely involved with *them* that he would approve a duplicitous response to Mr Ames.

485. The document (E/8522/1) made clear that Mr O'Halloran had made offers to Mr MacDonald to leave WK and to become ICE's strategic advisor. Although Mr MacDonald said he had no intention of doing that at that time (and I accept that evidence), the fact that Mr O'Halloran felt comfortable enough to be making the offer in the first place demonstrates an inappropriate closeness. That was exacerbated by the fact that, at this time, Mr MacDonald agreed to be Mr O'Halloran's best man at his wedding later that year. That was not something that he told Mr Ames at the time when he agreed to do it. Mr MacDonald attended Mr O'Halloran's stag weekend in Monaco between 14 and 17 May 2010 (E/9597/2), and the following month he attended the meeting in SVG when he sat with Mr O'Halloran and ICE on the other side of the table from Mr Ames.

486. Even after the Buccament Bay project ended in such ignominy, Mr MacDonald has had a continuing relationship with Mr O'Halloran. Mr O'Halloran felt close enough to him to ask for a loan of £66,000 within a very short time after the failure of the Buccament Bay project. Even Mr MacDonald agreed that that was 'striking'. Thereafter, Mr MacDonald lent Mr O'Halloran and Mr Newman and their company Kelltek, around £500,000 of his own money. These payments were made to these two individuals and then subsequently to Kelltek. This loan is not the subject of any written agreement. By reference to the terms of the draft agreement, Kelltek have defaulted and Mr MacDonald said that he had had to waive interest for a number of years. It is hard to think of anything that is more demonstrative of the close relationship between Mr MacDonald, Mr O'Halloran and Mr Newman than the fact that Mr MacDonald was prepared to lend the other two men £500,000[18].

487. For completeness, I should add that Mr Dearman, Harlequin's expert accountant, provided examples of what he considered to be Mr Newman's breaches of the Chinese walls at table 5.3 of his first report and Mr MacDonald's breaches of the Chinese walls at table 5.4 of the same report. I did not understand Mr Indge (WK's expert accountant) to disagree with these analyses; in any event, for the reasons noted, I accept Mr Dearman's evidence as consistent with my own conclusions.

[18] That is in addition to the fact that WK themselves allowed ICE to incur bills of £800,000 for their professional services and only required payment of less than £100,000. The reasons for such leniency (Mr Davidson not unreasonably describes it as "bizarre" at paragraph 22 of his closing submissions) have not been disclosed.

488. I therefore find, for all the reasons set out above, that WK acted in breach of contract by accepting the retainer from ICE when they were already engaged by Harlequin and when they had not obtained Mr Ames' informed consent. I find that, subsequently, there were breaches of confidentiality because Mr MacDonald passed on confidential matters to ICE and/or discussed confidential matters with Mr Newman. These breaches demonstrated the absence of effective Chinese walls.

6.7.4 The Failure to Provide to Harlequin Information Confidential to ICE

489. However, as Mr Fenwick correctly pointed out on behalf of WK, there is no pleaded case that Harlequin suffered any loss and damage as a result of WK's breaches of the Chinese walls as a result of which information confidential to Harlequin was passed to ICE. That evidence was relevant only to the issue of whether or not the Chinese walls set up by WK were adequate.

490. Harlequin's substantive case on this aspect of the dispute was very different: it was that, as their business advisors, WK should have passed on to them information that was confidential to ICE. In particular, it was said that WK was in possession of information from late 2009 or early 2010 which demonstrated that Mr O'Halloran was misappropriating funds to spend on yachts, aeroplanes and the like. Harlequin said that, by March 2010 at the latest, WK should have alerted them to this information.

491. The starting point for this aspect of the case on liability is to consider what WK's obligations were. It was on this point that there was the only significant disagreement on the law. Mr Davidson argued that the law obliged WK to provide this confidential information to Harlequin. Mr Fenwick maintained that, in these circumstances, there could be no such obligation. I have concluded that, on this topic, Mr Fenwick's submissions are to be preferred.

492. The principal authorities to which I was referred were:

(a) ***Kelly v Cooper*** [1993] AC 206: the defendants were estate agents selling two adjoining houses, one owned by the claimant, the other by A. They showed both houses to a prospective purchaser, who offered to purchase A's house and then later offered to purchase the claimant's house. The defendants did not inform the claimant of the agreement to buy A's house. He subsequently brought proceedings for breach of their duty to disclose that material information. Although the judge awarded the claimant damages, the decision was overturned on appeal and the further appeal was dismissed by the judicial committee of the House of Lords. It was held that, since the claimant knew that the defendants would be acting for other vendors of comparable properties and would receive confidential information from them, their contract with the claimant could not have included terms requiring them to disclose that confidential information to the claimant or precluded them from acting for rival vendors.

(b) ***Hilton v Barker, Booth & Eastwood*** [2005] UKHL 8: [2005] 1 WLR 567: the claimant was advised by the defendant solicitors in respect of a property development contract involving B, who had previous convictions for fraudulent trading and was an undischarged bankrupt. The defendants were aware of B's history but did not tell the claimant. When the claimant's

business collapsed because the contract was not fulfilled by B, he issued proceedings against the defendants. Both the judge and the Court of Appeal found that the defendants' breach of duty to the claimant lay in their continuing to act for him, not in failing to pass on the information. On that basis, the claimant was entitled to be placed in the position he would have been in if he had instructed an independent solicitor and, as it was not claimed that such a solicitor would have been aware of B's conviction and history, the claimant had suffered no loss. However the House of Lords overturned that decision, saying that it was professionally improper for the defendants to have acted for both the claimant and B, and that they had been under a duty, not only to inform the claimant that they could not act for him, and not only to advise that he should seek legal advice from other solicitors, but that also, because the defendants had put themselves in a position of having two irreconcilable duties, they had to perform both conflicting duties as best they could, and that that might involve performing one duty to the letter of the obligation and paying compensation for their failure to perform the other. The failure to disclose to the claimant the facts about B's past was a serious breach of duty which had caused the claimant actionable loss.

(c) ***Sasea Finance Limited v KPMG*** [2000] 1 All ER 676: the Court of Appeal had held that, where a company's auditors discovered that a senior employee had been defrauding the company on a massive scale, and that employee was in a position to continue doing so, the auditors would normally have a duty to report the discovery to the management immediately, not merely when rendering the report. Moreover, if the auditors suspected that the management might be involved in, or was condoning fraud or other irregularities, the duty to report overrode the duty of confidentiality, and the auditors would have to report directly to a third party without the managements' knowledge or consent.

493. In reliance on those principal decisions, Mr Davidson argued that WK had gained, and then kept to themselves, knowledge of facts demonstrating that ICE was, or was probably, a commercially unsuitable counterparty for Harlequin and that, in those circumstances, it would be extraordinary if the professional was not under "a duty to tell his client".[19] In response, Mr Fenwick said that ***Hilton*** was a case about solicitors' duties in a specific context and that the position of auditors was very different, (a point expressly made by Lord Millet in his speech in ***Prince Jefri Bolkiah v KPMG*** [1999] 2 WLR 2015). He said there was no authority for the proposition that an accountant in the position of WK had a duty to disclose information confidential to one client to another client.[20]

494. My analysis is as follows:

(a) ***Hilton v Barker Booth*** is a case about a solicitors' duty of single-minded loyalty to his client. It was also a situation, unlike the present case, where the professional was in possession of the relevant information at the outset; he did not acquire it during his work for his client.

[19] The arguments are set out more fully between paragraphs 158 and 168 of the Claimants' written submissions.
[20] The arguments are set out more fully between paragraphs 208 and 212 of the Defendants' written submissions.

(b) In my view, a solicitor acts in a different professional, regulatory and ethical context to an accountant, as is clear from the references in this case to the professional guidance for accountants, and Lord Millet's speech in ***Prince Jefri Bolkiah.***

(c) To that extent, I consider that an accountant is in a situation more akin to that of the estate agent in ***Kelly v Cooper***, which is authority for the proposition that a professional is not required to relay confidential information relating to one principal to another, so there could be no liability for his failure so to do.

(d) There is no authority for the proposition that an accountant who finds himself with a conflict of interest, has a duty to disclose to client A (who engaged him first) information confidential to client B (who engaged him subsequently). I consider that such a principle offends against common sense. The argument has more than a whiff about it of two wrongs somehow making a right.

(e) Even if I assume that the information which WK had about ICE's dealings was suggestive or even highly suggestive of fraud, that would not affect my conclusions. Neither would it make any difference if, as I have found, WK should not have accepted the second engagement by ICE. If the information suggested fraud on the part of ICE, WK should immediately have resigned their retainer by ICE, and they should have reported ICE to the SFO. Mr Walmsley admitted the former in evidence; ***Sasea*** is authority for the latter. But either way, they owed no duty to pass on the confidential information to Harlequin.

(f) Neither is my conclusion at odds with the view expressed in ***Conflicts of Interest, 5th Edition,*** paragraph 6-016, where the learned authors say: "If a professional takes on two conflicting retainers, he cannot pray in aid one retainer as a defence to performance of his retainer in the other". I respectfully agree with that, but I consider the situation where a professional has acquired confidential information because of his second retainer is rather different. I do not consider that, in these circumstances, WK had a positive obligation to disclose to Harlequin information confidential to ICE, so they are not praying in aid one retainer as a defence to a failure to perform the other.

495. It appeared from the accountancy experts' Second Joint Statement that Mr Dearman and Mr Indge agreed that, in general terms, WK was not obliged or permitted to disclose information confidential to ICE, and that if – as Mr Walmsley admitted they should have – WK had resigned from their retainer by ICE, Mr McDonald could have informed Mr Ames of the fact of the resignation, without disclosing the reasons why. There is force in WK's criticism (at paragraphs 205-207 of their closing submissions) that Mr Dearman's oral evidence in support of Harlequin's case comprised an attempt on his part to resile from that agreement. I also agree that there was no support for this change of position in any of the relevant professional guidance. Mr Indge did not accept it and, in the circumstances, I prefer Mr Indge's evidence. For those reasons, therefore, this claim fails as a matter of liability.

6.8 Other Matters Relevant to Liability

6.8.1 Introduction

496. As noted above, I have dealt with the three breaches of contract on the part of WK: the failure to advise that a contract was required (which I have upheld); the failure to advise that the works would not be completed by 1 July 2010 (which I have rejected, despite my criticisms of Mr MacDonald); and the failure to provide Harlequin with the information confidential to ICE (which I have rejected, again despite my criticisms of Mr MacDonald and WK). But although they are not directly relevant to those three issues, it is convenient to deal here with two further matters which were the subject of extensive evidence during the trial. One concerns RLB; the other concerns the circumstances in which WK terminated their contract with Harlequin. At different stages of the trial the parties were relying on these events, for different purposes, because it was said that they reflected on the wider case as to liability.

497. For the reasons set out below, I consider that Mr MacDonald's unsatisfactory conduct extended to both his dealings with RLB (although I reject the suggestion of a widespread conspiracy involving them), and the circumstances in which he terminated his engagement with Harlequin. My conclusions on these matters, although not directly related to my findings on the three areas of liability, are consistent with those findings.

6.8.2 Dealings with RLB

498. It was Harlequin's case – as advanced principally by Mr Ames, in a series of innuendos and hints – that there was some sort of conspiracy between Mr MacDonald and RLB which was designed positively to mislead him and to benefit ICE. I cannot find on the evidence that there was a conspiracy of the sort suggested. But I do find that Mr MacDonald's involvement with RLB demonstrated his tendency to ensure that it was ICE's position, not Harlequin's, that was protected. In this instance it mattered even more, because of Mr Ames' belief that the all-important issue of valuation was being somehow addressed by Mr MacDonald and RLB.

499. By reference (E/16123/1), Mr MacDonald agreed that there was a close relationship between RLB and ICE. RLB sometimes sent information to Mr MacDonald (on behalf of Harlequin) but also to Mr O'Halloran, as the contractor. So, for example, on 26 November 2009 (E/7111.1/1) Mr Newman, ICE's CFO, was liaising with Mr Hoyle, whose only involvement was as a consultant to Harlequin, in respect of RLB's detailed figures. It is unclear why this was happening. Mr MacDonald was asked in cross-examination why this information was being passed on to ICE, but he could not explain it.

500. Although Mr MacDonald agreed that the sort of RLB report noted at paragraphs 153-156 above would not normally be sent to or discussed with the contractor, his email (E/7132/1, paragraph 155 above) indicates that it was. Mr MacDonald could not explain why he was discussing RLB's confidential valuation of the work up to July 2009 with ICE, or why he was asking Mr O'Halloran why "we" are continuing to use RLB. He was asked what he meant about 'flexibility' and he sought (incomprehensibly) to relate that back to methodology. He agreed that, if he had concerns, he should have raised them with RLB in London or with Mr Hoyle and Mr Ames: the one person he should not have raised it with was Mr O'Halloran. Mr MacDonald agreed with that, and accepted that this was not Mr O'Halloran's business. All he could say was that ICE and RLB were working closely together: indeed the documents show that ICE were paying RLB, and it is wholly unclear why

or for what. In the end, Mr MacDonald was driven to say that he sent it to Mr O'Halloran because RLB had been removed from site and Mr O'Halloran needed to know why. This was factually incorrect: RLB had not been removed from site. In any event, Mr O'Halloran could have been told that straight out, without being sent these confidential valuation figures.

501. Mr MacDonald was also asked why he had referred to the 'angle of darkness'. He said that referred to him because he was a bringer of bad news and that was his nickname. He was therefore asked what the bad news was for Mr O'Halloran as a result of RLB's alleged lack of flexibility. He said he could not say. He confirmed that his own close relationship with RLB continued and that there was a private dinner shortly thereafter in London involving Mr MacDonald, Mr Williams and Mr Blake of RLB.

502. In short, I found Mr Macdonald's implausible evidence about this email almost embarrassing. What I would venture to suggest was the obvious interpretation of this document (paragraph 156 above) was put to him: Mr O'Halloran had a problem because, although Mr Hoyle was being flexible (and as far as they were concerned that meant that he was valuing the works that ICE had carried out in a way that ICE considered to be helpful), the London office would not let him continue to act in this way. That was the restriction to which Mr MacDonald referred. It was a poor report from Mr O'Halloran's point of view because of the resulting valuation of the work up to July 2009. And Mr MacDonald was living up to his nickname as the 'Angel of Darkness' because he was bringing Mr O'Halloran that bad news, breaching confidentiality as he did so.

503. In a case where allegations of conspiracy, corruption, and conflict of interest were ubiquitous, I do not accept Mr Ames' evidence about the wholesale subversion of RLB and Mr Blake's subsequent confession of it to him. Other than the fact that sums were paid by ICE to RLB which have not been explained, there was no corroborative evidence of either, and Mr Ames was too unreliable a witness for me to rely on his say-so without more. Mr Blake was conspicuous by his absence at trial and Mr Williamson's email of 16 June 2010 (E/13042) suggests the opposite. In any event this was the only valuation RLB produced, and it did not cover the bulk of ICE's works (because it only went up to July 2009). But, in view of my other findings noted above, I consider that, in his general dealings with RLB, Mr MacDonald again had ICE's best interests in mind, rather than those of Harlequin.

6.8.3 Circumstances of Termination

504. I have set out the final breakdown in the relationship between Mr Ames and Mr MacDonald in **Section 3.13** above. I find that this was how, when and why Harlequin's contract with WK came to an end. Moreover, I consider that this conclusion to be broadly consistent with Mr MacDonald's own notes of the events (E/12224/3).

505. In my view, the relationship had come to an end in precisely the way that Mr Newman had predicted many months before. I consider that Mr MacDonald resigned because he knew, and had known for months, that the project had gone badly wrong and that he was heavily implicated in the failure. For Mr MacDonald now to suggest that some other, different project was the reason for his abandonment of the

Buccament Bay resort is untrue. That false explanation reflects badly on him and his general credibility.

506. In his oral evidence, Mr MacDonald said that he did not realise that Harlequin was a fraudulent operation until May 2010, when he discovered that the properties at the Merricks site in Barbados were being sold for less than it would cost to build them. There was no contemporaneous evidence that this was the reason for Mr MacDonald's termination of his relationship with Harlequin. There was not a shred of evidence to indicate how or why the selling prices in Barbados were less than the costs. Furthermore, given that there was never any attempt to work out what the actual final cost might be of any property at Buccament Bay, precisely the same uncertainty would always have been apparent for this resort too, and Mr MacDonald did not choose to resign for that reason, despite being aware of it for four years.

507. Mr MacDonald also said that the future of the Buccament Bay resort depended on obtaining planning permission in Barbados, which was again not something he had ever said to anyone before, let alone when he was trying to drum up Harlequin business or loans. He was asked what was going to happen if that planning permission in Barbados was not forthcoming. Mr MacDonald said: "I was not asked to consider that eventuality." If (as he now claims) this was a crucial issue, then as *de facto* CFO/FD, Mr MacDonald was obliged to consider it, and not wait to be asked.

508. There was no reference to the Barbados project in Mr MacDonald's own notes (E/12224/3). Indeed, those notes appeared to demonstrate that the Barbados deal was still viable. It was put to him in cross-examination that his notes on their face demonstrated no basis at all for resigning. Although his answer purported to explain by reference to other figures (not in the notes) how and why Barbados was doomed, he had no explanation for the central point that, if that were right, it would have said so in these notes.

509. I therefore reject the suggestion that his termination was anything to do with Barbados.

510. There was also a suggestion that Mr MacDonald resigned in late May/June 2010 because of what he had learned about Harlequin's Brazil resort. That too is not supported by the evidence. The document (E/5050/1) showed that the Brazil project was on hold. In evidence, Mr MacDonald agreed that the Brazil project was to be ignored until the conditions changed, which they never did. He agreed that, at that time, the Brazil project was not at the forefront of anyone's thinking. Accordingly, I reject absolutely the suggestion that Mr MacDonald resigned because of some feature of the Brazil project. There is no evidence to support it.

511. Further, and in any event, I consider that there are two other reasons why either the Brazil or the Barbados justification is entirely implausible. First, it would mean that Mr MacDonald's belated surge of conscience in respect of one or both of these projects was a complete coincidence, which just happened to take place at a time when Mr Ames had belatedly realised the enormity of the problems at Buccament Bay. I consider that to be most unlikely. And secondly, it would mean that Mr MacDonald was troubled about the investors in Barbados or Brazil (who were being sold properties in respect of which Harlequin did not own the land or where the project would be funded by other investors) in circumstances where he had no such

similar qualms about the investors in Buccament Bay (the vast majority of whom were also buying properties that were to be built on land which Harlequin did not own, and who were funding the construction with little or no prospect of their own properties being built).

512. In my view, Mr MacDonald's decision to report Harlequin to the SFO (**Section 3.16** above) was – like so much of his evidence - entirely self-serving. I find that he had learnt nothing in the months leading up to that report of which he had not been aware for months or years previously. In my judgment, Mr MacDonald reported Harlequin to the SFO because he realised that he was deeply implicated in the Harlequin business model and, now that Mr Ames had sacked him at Barbados airport, he needed to protect his own position.

513. During Mr MacDonald's cross-examination, he was (not unreasonably) asked when it had occurred to him that he had to notify the SFO: when he, as the one professional intimately involved in all of this for four years on behalf of Harlequin, first had the suspicion that the whole enterprise was fraudulent. He repeatedly said it was when Harlequin failed to get planning permission in Barbados, an explanation I have rejected for the reasons set out above.

514. But even if Mr MacDonald was right, this was not a satisfactory answer as to when he became suspicious about the project at Buccament Bay, and when in particular he thought that the fraud had occurred there. Mr MacDonald was extremely evasive on this point, referring to both the Barbados project, and subsequently one in the Dominican Republic: anywhere, it seemed, other than Buccament Bay.

515. His difficulty was that, in respect of Buccament Bay, he knew and had always known that other investors' deposits were being used to fund the construction cost because of the absence of any financing or loans. There were never any loans in respect of St Vincent. He expressly accepted that he knew that Harlequin SVG had borrowed from the depositors on other sites to build the Buccament Bay resort. On that basis, therefore, the scheme was potentially fraudulent from the outset, and Mr MacDonald said and did nothing about it. Mr MacDonald tried to excuse this by saying that, if the resort had been delivered on time, then payments would have been obtained and Phase 1 would have been profitable, an incorrect answer (the scope of Phase 1 was far too small compared to the number of properties sold) which also showed his continuing faith in the Harlequin business model.

516. The breaches of confidentiality to which I have referred above even extended to Mr MacDonald's report to the SFO (paragraph 276 above). The contemporaneous documents show that Mr Newman, ICE's CFO, helped Mr MacDonald with the drafting of that report. The document (E/12696/1) was recorded by WK as having been "dictated by Mr Newman and Mr MacDonald". Mr MacDonald agreed that Mr Newman was helping him in compiling that report. Again, that simply should not have happened. It was put to Mr MacDonald that, given that Mr Newman acted for ICE, Mr MacDonald should not have shared his reasons for leaving Harlequin with Mr Newman. Mr MacDonald even resisted that proposition, apparently alleging that he was entitled to use Mr Newman's services "as an employee of WK". In my view, it was obviously a breach of confidentiality to involve Mr Newman at all.

517. (E/12519/1): Mr Newman records Mr MacDonald as saying that, unless there was an agreement between Harlequin and ICE, he (Mr MacDonald) was not prepared to do anything further for Harlequin. That confidential information should never have been passed to Mr Newman. Mr MacDonald said it was nothing to do with him and he knew nothing about the email, but the information in it can only have come from him.

518. The final event relating to Mr MacDonald's termination that should not have happened occurred in June 2010 when Mr Newman and Mr MacDonald, at ICE's expense, flew back to SVG to attend the meeting at The Grenadine House Hotel to discuss the position with Harlequin. Mr MacDonald agreed that it would have been questionable for him to have received a briefing from ICE beforehand. The document (E/12660/1) suggests that that is precisely what happened. Mr MacDonald said he could not recall the document.

519. Mr MacDonald agreed that Mr O'Halloran had asked him to go and had paid his airfare. He was repeatedly asked whether that was appropriate. He repeatedly failed to answer the question, saying again and again that he had not considered it at the time. He denied being part of the ICE team. On this issue, I prefer the evidence of Mr Ames and Mr Commissiong (set out at paragraph 249 above). It is common sense: Mr MacDonald was there as part of the ICE team because he could have had no other role. His alleged concern for the investors was untrue.

520. I have been critical of Mr MacDonald in numerous ways in this part of my Judgment. In my view, the untruths, the evasions and the egregious breaches of confidentiality, which were the hallmarks of his termination of Harlequin's retainer, reflected his wider performance throughout the Buccament Bay project.

6.9 Summary

521. For the reasons set out above, I have concluded that WK were in breach of contract/breach of duty for failing to give proper advice as to the need to enter into a contract with ICE. I have concluded that although Mr MacDonald was much too passive in respect of Mr O'Halloran and ICE, he did not have the necessary qualifications or expertise to give meaningful advice as to progress, nor was he relied on to give such advice. And I consider that WK should never have taken ICE on as a client because there was a clear and obvious conflict of interest from the start which no amount of Chinese walls was ever going to protect. The fact that there were breaches of confidentiality throughout the course of the project, once ICE had engaged WK, was therefore entirely unsurprising. However, as a matter of law, I do not consider that WK were obliged to pass on to Harlequin confidential information that they obtained as part of their duties towards ICE. WK should have said that they no longer were prepared to act for ICE and should have told Harlequin, but they were under no obligation in law to give Harlequin the confidential information that they had obtained.

7. CAUSATION

7.1 Overview

522. WK complain that Harlequin's case on causation is an unsophisticated attempt to blame WK for everything that went wrong with the Buccament Bay resort, such that

WK's professional indemnity insurance becomes a kind of guarantee to enable Harlequin to recover all they lost on this ill-fated project. In my view, there is considerable force in this criticism. Harlequin's pleaded case assumes that, but for the breaches of contract/negligence of WK, nothing would have gone wrong on this project. Such an approach is, with respect, fanciful.

523. The main problem for much (but not all) of the case on causation is the lack of any real alternatives available to Harlequin. At certain points in the Particulars of Claim, Harlequin say that, had they had the right advice about this or that from Mr MacDonald, they would have renegotiated with ICE, or alternatively they would have terminated their contract with ICE and engaged other contractors. The difficulty with such a case is that there is no evidence that ICE would have been prepared to contract with Harlequin in radically different terms to those which had been agreed, and no evidence whatsoever that, if Harlequin had terminated their arrangements with ICE, they would have found other contractors willing and able to carry out this work at the same or less than ICE's rates.

524. The difficulties with much of Harlequin's case on causation do not end there. Although I address quantity surveying and valuation matters in **Section 8** below, one of the findings which I must make is that, if there had been other contractors, they would have probably charged Harlequin more than ICE to carry out this work. Underlying the arrangements between Harlequin and ICE was the $96 per square foot, a rate which Mr Ames considered to be reasonable and a rate which, on the evidence, would probably have been unmatched by any other contractor. Thus, any case that Harlequin would have contracted with other contractors has to acknowledge the uncomfortable truth that such a contract would have been more expensive for Harlequin.

525. As the analysis set out in the remainder of this **Section 7** makes plain, there is only one aspect of the liability case against WK – albeit an important one - which survives a proper consideration of causation.

7.2 The Consequences of the Failure to Advise that a Contract was Required

7.2.1 The Wider Contract Case

526. Harlequin's full pleaded case is that, if WK had given proper advice about a contract, then Harlequin would have entered into a formal, detailed contract with ICE and been fully protected; or alternatively, if ICE had not renegotiated, they would have entered into a similar contract but with another contractor. In my view, neither counter-factual has been made out on the evidence.

527. First, I reject the suggestion that, if – as he should have done – Mr MacDonald had advised that a formal, detailed contract should have been entered into with ICE, Mr Ames would have followed that advice.

528. Mr Ames was cross-examined on the basis that he did not want a formal contract himself for a fixed price or detailed terms because that would not allow him the flexibility or control to which reference have been made. At one point, Mr Ames disagreed. He said he had had a contract with Ridgeview (although there was no evidence of it) and therefore was quite prepared to have a contract with ICE. He

reiterated that he stuck to his side of the bargain of May 2009, and did not see the written contract that ICE was sending to Mr MacDonald until disclosure in these proceedings.

529. However, towards the end of his cross-examination, albeit first in connection with Ridgeview, Mr Ames agreed that he did not want a detailed contract with Ridgeview, or subsequently ICE, because he did not want to be tied down either to the design or to a timetable or to the cash-flow. This was typical of Mr Ames' oral evidence: diametrically opposed answers to the same question were commonplace. But I have concluded that, on this aspect, the latter answers were correct; he would not ultimately have signed up to a formal, detailed contract with ICE. Thus, although Mr MacDonald should have given the relevant advice, I find that Mr Ames would not have followed it.

530. Secondly, the best evidence that Mr Ames would not have entered into a formal, detailed contract with ICE can be demonstrated by what happened at Buccament Bay both before and after the arrangements with ICE. On analysis, there was never a formal contract with Ridgeview and Mr Ames said in cross-examination that he did not want such a contract. More significantly, even after the ICE work had come to such an ignominious end, still Harlequin did not enter into a formal contract for Phase 1A or Phase 1B (paragraph 255 above).

531. Thirdly, there is no evidence that ICE would have entered into a formal contract with Harlequin on terms which Mr Ames was prepared to accept or which he could afford. I have set out at above the various proposals which ICE made for a formal contract. In 2008 there were proposed lump sum contracts and all were in excess of $100 million. I am satisfied that Mr Ames could not have afforded that and would not have entered into such a contract with ICE. Mr Indge's analysis of cash inflow and outflow made that plain; indeed, the only inroads which Harlequin could make into that analysis were based on changes to the factual assumptions so as to incorporate utterly unrealistic 'sensitivities', like increasing the deposits to 50%. I therefore reject paragraphs 203-208 of Harlequin's closing submissions, to the effect that they would and should have taken even more money from the investors, and I accept paragraphs 285-292 of WK's closing submissions. It was because of this underlying difficulty with Harlequin's cash-flow that Mr Dearman agreed in cross-examination that no reasonable accountant could have advised them to enter into a formal, detailed contract in 2009.

532. Fourthly, it is alleged in the alternative that, if Harlequin had not been able to negotiate a formal contract with ICE, they would have engaged another contractor. What other contractor? On what basis would such a contractor have gone ahead? What might it have cost? There was no evidence before the court about the availability of any other such contractor. There was nothing to say in what terms this putative contractor might have gone ahead with the works. The only certainty was that any such contractor would have been more expensive than ICE, both because it was only ICE who offered the $96 rate and because the (very limited) evidence of market rates (see **Section 8.2** below) showed that, on the balance of probabilities, nobody would have been cheaper than ICE.

533. For all these reasons, therefore, I reject the allegation that the failure to advise on entering into a formal, detailed contract with ICE had any effect or caused any loss

and damage. The consequences of such a failure have simply not been addressed in the evidence. Accordingly, although I have upheld the allegation of liability, it fails for reasons of causation.

7.2.2 The Valuation Process Case

534. As already noted, there is one critical exception to the causation analysis set out above. Once the scope of the work in Phase 1 was agreed in May 2009, and the commitment to the £19.35 million had been made, I have found in **Section 6.5.4** that Mr MacDonald should have advised that the scope of the works should have been formally recorded. Moreover, whatever the position in terms of Harlequin's cash-flow, I have found that Mr MacDonald should have advised that there be a contractually-binding valuation process, pursuant to which works be valued on a weekly or monthly basis in the ordinary way, so as to ensure that Harlequin were only paying for works properly carried out.

535. When considering what loss, if any, flowed from this specific allegation of breach[21], it is convenient to focus on the simple contract which I have found, namely that of May 2009 (**Section 4.3** above). I have held that Mr MacDonald should have advised that, in exchange for the substantial weekly payments, being made every week for 43 weeks, Harlequin should have required a valuation system so as to ensure that the money was being paid to ICE for works which had been properly carried out. What would have happened if that advice had been given?

536. On the balance of probabilities, I find that ICE would have agreed to such a requirement. Indeed, in my view, they would have had no option but to agree. Such a requirement is entirely normal in any construction contract. It is fundamental to the bargain between the parties. It is an essential feature of the various written contracts which, from time to time between 2008 and 2010, ICE themselves suggested to Mr MacDonald. Indeed, I hope it is not entirely irrelevant to note that, after 20 years at the construction bar and over 12 years as a TCC judge, I have never before seen a building contract – let alone one of this size - which did not include a valuation process of some sort.

537. Moreover, if ICE had indicated any opposition to such a basic requirement, that would have been tantamount to saying that they wanted to be paid £19.35 million but were not prepared to agree that they would carry out the work necessary to justify that sum, or any part of it. No contractor, not even Mr O'Halloran, could have dressed up such a position in an acceptable way.

538. In addition, none of the elements of WK's causation case, set out *in extenso* at paragraphs 161–164 (pages 79-90) of WK's closing submissions, are of any relevance or application to this aspect of the case. There would have been no need for extra funding, because there was no need for extra funding under the May 2009 Agreement, and none was obtained. Land ownership did not become relevant under the May 2009 Agreement and would not have done so under this variation of it. To the extent that there was a requirement for design flexibility, again the agreement of a binding valuation process would have left that unaffected.

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[21] Para 108.1.6 of the Particulars of Claim

539. Thus I find that, if Mr MacDonald had given this advice to Harlequin at the time of entering into the May 2009 agreement, then ICE would, on the balance of probabilities, have agreed to it. The arrangement would then have operated on the basis that Harlequin would have been entitled to make deductions from the agreed weekly payments if the value of the work being undertaken by ICE did not justify such amounts.

540. Potentially, therefore, Mr MacDonald's failure to give the necessary advice may have caused Harlequin a loss. But that will depend on a proper valuation of the work carried out by ICE. That was doubtless why the parties invested so much time in that valuation exercise. If, broadly speaking, the value of the works carried out by ICE matched the sums that they were paid by Harlequin, then this breach of contract/duty on the part of Mr MacDonald would also have caused no loss. On the other hand, if there was a more than insignificant discrepancy between what was paid to ICE pursuant to the contract, and what in fact the ICE works were worth, then that loss – that over-payment – can be said to have resulted from Mr MacDonald's failure to advise Harlequin that they required a binding contractual valuation process which linked payment to the worth of the work done.

541. Three further points need to be made about the valuation exercise in **Section 8** below, designed to see whether or not Harlequin in fact suffered a loss as a result of this failure by Mr MacDonald. The first is that, for the reasons set out in **Section 8.4.1** below, that valuation must be carried out by reference to what the quantity surveyors have described as the ICE rates. It would make a nonsense of any calculation of loss if other, higher rates than those offered by ICE were then used to value the works which ICE carried out. Moreover, as we shall see, what were called the ICE rates were, for a variety of reasons, generous to ICE.

542. The second point to note is that Harlequin's pleaded claim ignores the fact that, if Mr MacDonald had given the proper advice about payment and value, Harlequin would have needed to have had an internal system whereby the relevant valuation process could have been performed on a weekly or monthly basis. They did not have any in-house capability, so such a system would have had to have been operated by a third party adviser, like RLB[22], and would have cost Harlequin money. Accordingly, when assessing the loss and damage that flowed from this failure, it is important that a proper credit is allowed to reflect the cost to Harlequin of operating a payment / value system. I return to that point in **Section 9** below.

542A Finally, there is the point raised by Mr Fenwick in his oral closing submissions, to the effect that the overpayment causation case does not allow for the sums paid to ICE before the May 2009 agreement, which on one view would not be caught by any valuation process agreed at that date. In my view there was no merit in this. The sums paid before May were a fraction of what was paid afterwards, so the point is peripheral on the facts. More importantly, since the lump sum was agreed to *complete* Phase 1, both the works carried out prior to the agreement in May 2009, and the payments made for that prior work, would have been part of a contractual valuation process designed to regulate and value the whole of the Phase 1 works.

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[22] I have found that (save for the valuation up to July 2009) this was not a task that RLB in fact performed, despite Mr Ames' belief to the contrary.

7.3 The Consequences of the Failure to Advise in Respect of Progress

543. I have found that, although Mr MacDonald was much too passive and much too willing to accept Mr O'Halloran's empty promises without challenge, it is not possible to say that he was in breach of contract/duty for failing to advise that ICE would not complete by 1 July 2010.

544. For the purposes of this analysis of causation, let us assume that I am wrong about that, and that Mr MacDonald should have given that advice. What were the consequences? In my view, the consequences of any failure on his part to advise on progress would have been negligible and, on the evidence, would certainly not have caused any sustainable loss. There are a number of reasons for that.

545. First, if Mr MacDonald had expressed doubt about ICE's ability to complete, those doubts would doubtless have been put to Mr O'Halloran, and he would have repeated his promises that he would complete. In the end, it was for Mr Ames to decide whether or not he believed what Mr O'Halloran was telling him, and that would have remained the position, regardless of what Mr MacDonald had said.

546. Further, both Mr and Mrs Ames already had severe doubts about ICE's ability to complete Phase 1. That is unsurprising: they had been warned as early as June 2009 that completion of Phase 1 by July 2010 was a tall order: see paragraph 125 above. That was followed up by RLB's cautious advice in October 2009: see paragraph 139 above. Their doubts would have increased during the first part of 2010. They were expressly warned by Mr Smith that completion would not be achieved by the due date: see paragraph 170 above. Thus, if Mr MacDonald had joined in with those doubts, that would have been a further source of concern to Mr and Mrs Ames, but it could not be said to have been in any way decisive or determinative.

547. So, even if Mr MacDonald had expressed concerns about ICE's progress, Mr and Mrs Ames would still have been in precisely the same position as they found themselves during those months, namely that, notwithstanding their doubts, they had to continue to back ICE. Mrs Ames rightly said that ICE had Harlequin "over a barrel". That is why they continued with ICE for so long. There would have been no less "over a barrel" if Mr MacDonald had been less passive and more challenging of Mr O'Halloran's position.

548. In any event, even if that analysis was wrong, no loss can be identified as flowing from this breach. Assume that Mr MacDonald should have given the relevant advice about progress, and assume that, because of that advice, Harlequin had decided to terminate ICE's contract earlier than they did. All that would have happened was that they would have engaged another contractor to carry out more of the post-ICE works, and on the evidence before the court, that would have cost them more than the monies they were paying ICE. So it is impossible to say that an earlier termination gave rise to any loss on the part of Harlequin; indeed, the evidence suggests that, notwithstanding the other difficulties inherent in retaining ICE for so long, it remained a potentially cheaper way of completing as much of the work as possible[23].

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[23] Provided – of course – that ICE actually carried out the work that they had agreed to do and there was a proper valuation process.

549. For these reasons, I find that, even if (contrary to my analysis) Mr MacDonald should have given advice in late 2009 or 2010 to the effect that ICE would not complete by 1 July, that failure was irrelevant and caused no loss.

7.4 The Consequence of the Failure to Provide Harlequin with Confidential Information

550. I have found that WK were not in breach of contract/duty for failing to provide Harlequin with information that they acquired as a result of their retainer with WK. The most they should have done was to cease to act for ICE and to inform Harlequin of that.

551. However, assuming again that I am wrong about that, and such information confidential to ICE should have been provided by WK to Harlequin, then, however the position is analysed, I do not consider that any loss can be identified or, alternatively, I do not consider that any loss in addition to that identified in **Section 7.2** can be shown.

552. Harlequin's primary case is that, if they had had the relevant confidential information, they would have sacked ICE.

553. The first issue concerns timing. In my view, WK could only have reasonably have become aware of ICE's potential misappropriations in late January/early February 2010 (see paragraphs 180-204 above). Although it is submitted at paragraphs 25 and following of the claimants' closing submissions that September 2009 is the starting point of the enquiry, I do not accept that there was anything that could have led WK to suspect potential wrongdoing until late January/early February the following year. They would then have had to have taken legal advice to work out what to do. If, contrary to my view, that advice had been to the effect that the confidential information should be disclosed to Harlequin, then it is not realistic to suggest that that could have happened at any time before March 2010. Indeed, I note that that is the date expressly pleaded by Harlequin in the Particulars of Claim, so no earlier date is open to them in any event.

554. Thus, assuming for this purpose that Harlequin would then have sacked ICE immediately they obtained the confidential information in March, that means that there was a period of just over 2 months when ICE were carrying out works (and being paid) when, on this analysis, they should not have been. But that of course does not immediately translate into loss. First, for the reasons noted in **Section 8.4** below, any other contractor would have been likely to charge more than ICE for carrying out the work, so it does not follow that terminating ICE's contract earlier would have caused a loss.

555. Secondly, any analysis of the loss flowing in consequence of this breach could only focus on the period between March and May. That would require a comparison between the sums paid during that period and the work done during that period. Only then could it be said that a loss had been suffered as a result of continuing with ICE for that period. There is no such analysis and the court does not have the tools in order to carry out that analysis itself.

556. Now assume that I am wrong about that as well, and that there was a loss as a result of continuing with ICE from March to May 2010. That loss can only be represented by the difference between the sums paid to ICE during that period, and the value of the work done by ICE during that period. But that of course is part of the same loss (if any) that results from what I have called the valuation process case, analysed in **Section 7.2.2** above.

557. In other words, if I am wrong about breach and if I am also wrong that no loss can be shown in relation to confidential information, then the only loss that could be recoverable is a part of the same type of loss that is recoverable under **Section 7.2.2** above. At most, therefore, it is an alternative claim, something foreshadowed in the pleadings at paragraph 110.2 of the Particulars of Claim and accepted by Mr Davidson in his closing submissions. I am entirely satisfied that no separate head of loss can be or has been identified as recoverable in consequence of the breach in respect of confidential information.

7.5 Conclusions on Causation

558. On the evidence before the court I do not consider that the claimants have established any case on causation in respect of the formal detailed contract which they say Mr MacDonald should have advised. However, I conclude that they have identified a potential head of loss in consequence of the failure to advise Harlequin that they needed a simple contract with a system that linked payment and evaluation. Whether or not a loss was caused as a result of that breach depends on the valuation of the ICE work at ICE rates, but will require a credit to reflect the cost to Harlequin of setting up and running such a valuation process.

559. I have rejected the case on liability in respect of the advice about progress and the failure to pass on confidential information. But if I am wrong about one or both of those conclusions, I find that Harlequin have failed to identify any head of loss flowing from either such breach. The very most they have been able to do is to show that any loss flowing from the failure to provide the confidential information would form a (small) part of the same loss arising in consequence of the valuation case. No separate or additional head of loss has been identified.

8. THE VALUATION OF THE ICE WORKS

8.1 General

560. Was what Harlequin paid to ICE a reasonable amount for the work carried out? If it was, then any failure on the part of WK to advise that the simple contract of May 2009 required a system which linked payment to value cannot be causative of loss because, whether by luck or judgment, ICE will have received a fair payment for the work that they did.

561. Conversely, if ICE were paid significantly too much for the work, then that was because there was no proper method of regulating or valuing the amounts paid by Harlequin to ICE. That was a matter on which there ought to have been proper advice by Mr MacDonald. For the reasons which I have set out in **Section 6.5.4** above, I have found that he failed to give that advice and was in breach of contract/negligent as a result. Thus, if ICE were significantly overpaid for the works, then *prima facie*

the overpayment was caused by Mr MacDonald's failure to advise on a method of prevention, and was therefore WK's responsibility (**Section 7.2.2** above).

562. It seems to me that the value of the works performed by ICE can be assessed in two ways: from the bottom up, or from the top down. The principal way of valuing the ICE work must be from the bottom up: working through the factual evidence and the evidence of the experts, item-by-item, identifying the relevant scope of work and then valuing what ICE did by reference to the experts' assessment. I undertake that exercise in stages at **Section 8.2** (expert evidence generally), **Section 8.3** (my overall impression), **Section 8.4** (detailed valuation) and **Section 8.5** (summary) below.

563. But there are two other ways of valuing what ICE did, which start by taking the position overall. These top-down alternatives can act as a reality check against the reasonableness of the valuation produced by the first method.

564. The first reality check involves looking to see what ICE were actually paid by Harlequin, and then deducting from that the sums which ICE spent on items – like yachts and aeroplanes – which were nothing to do with the Buccament Bay resort. Everyone was agreed that the only significant source of income for ICE was the money that Harlequin were paying them for carrying out the works at Buccament Bay. If ICE spent significant sums out of that money which were not properly connected to Buccament Bay, and which cannot sensibly be described as coming out of a reasonable profit margin, then that would suggest that they were being paid too much. Those sums would have to be deducted from the monies paid to ICE when trying to arrive at a fair valuation of ICE's work at Buccament Bay. It is in relation to this first alternative methodology that the evidence of Ms Shona Quammie and others (**Section 8.6** below) becomes important.

565. The second reality check is provided by a consideration of the agreement reached between Harlequin SVG and ICE in May 2009. For the reasons set out in **Section 4** above, I have concluded that, on their own case, ICE agreed to complete the Phase 1 works for a maximum of £24.35 million (£19.35 plus £5 million), which was about $50 million at the exchange rate then operable. That of course was for Phase 1 in its entirety, although Harlequin SVG did not obtain from ICE anything like the whole of Phase 1. So what does that tell us about the true value of the works ICE actually carried out?

566. I address each of these two reality checks in **Section 8.7** below.

8.2 The Expert Evidence Generally

567. The expert quantity surveyors, Mr Sanjay Amin (the director of BCQS, the quantity surveyors engaged by the claimants in 2010), and Mr Danny Large for the defendant, had a thankless task. They were essentially being asked to do what the parties had wholly failed to undertake at the time, namely the preparation of an agreed scope of work for Phase 1 and an attempt properly to value the work carried out by ICE. Because the parties had failed to undertake any of those tasks, there was a near-total absence of any contemporaneous records which might have provided some assistance.

568. The significance of this cannot be underestimated. It is a failing which, in the first instance, falls squarely at the door of ICE. As a contractor I would have expected at

the very least a record of what ICE thought they were undertaking on site; what they were paying out to their sub-contractors and suppliers; a weekly or at least monthly budgeting exercise, demonstrating what was being spent every week/month; and a sensible procurement spreadsheet demonstrating what was going to be spent and when. But, as Ms Quammie confirmed, there were no documents of this kind. ICE simply had no records that clearly demonstrated what they were paying out and why. They had no valuation documents relating to their arrangement with Harlequin SVG, because, as I have already noted, their entitlement to payment was not in any way linked to the value of the work they carried out. They therefore did not complete any interim valuation documentation.

569. This wholesale failure to keep proper records also reflects poorly on WK, for two separate reasons. First, because Mr MacDonald should have advised that ICE were only to be paid for work they had done, so he should have required ICE to provide proper records to justify their claims for payment. Secondly, WK's Mr Newman was ICE's CFO. His appointment was justified by WK, notwithstanding the fact that he also worked for Harlequin, on the grounds that ICE's records and accounts needed to be put in order. They were not. So he, and WK, were responsible for the wholesale failure to achieve this simple goal.

570. The expert quantity surveyors, therefore, had to work extremely hard in order to ensure that they were able to provide the court with as much assistance as possible. I am very grateful to both of them. However, their respective styles could not have been more different. More widely, many of the debates between them about percentage completions came down to different approaches to the contemporaneous documentation, and in particular, the extent of the works shown in the photographs. That was ultimately a matter of impression/argument/submission: it was not primarily a matter of quantity surveying expertise.

571. **Mr Amin** had been involved in the project since June 2010. But that involvement was at a relatively high level and did not involve more than a dozen relatively brief visits to the resort at Buccament Bay over the six year period since his firm were involved. Two junior quantity surveyors at BCQS, Mr Amin's firm, did the bulk of the detailed work for Harlequin SVG in respect of Phases 1A and 1B. Surprisingly, the cross-examination of Mr Amin revealed that, although they are not credited, they in fact undertook some of the work which then went into Mr Amin's numerous expert's reports. Mr Amin had not generally spot-checked their work. Often he did not know how they had arrived at their completion percentages or their other calculations. He was obliged to make assumptions as to what they had done and had himself no real involvement in any of the detail.

572. Although Mr Fenwick complained, not without some justification, that the absence of better records of what work had been carried out/completed by ICE in June 2010 had been caused by Harlequin and/or their advisors (including BCQS), it was difficult to see where the point ultimately went. The failure to produce what would have been the best evidence of the state of completion might be regrettable now, but that cannot mean as a matter of law that Harlequin are precluded from relying on less good evidence in support of their case. The court simply has to do its best with what it has been given, mindful of the caution urged at paragraph 124 of WK's closing submissions.

573. The same is true of the related suggestion, that Mr Amin himself failed to ensure that there were detailed records of the extent of the work as at June 2010 or thereafter. It may be that a certain amount of criticism can be made of his failure to undertake that exercise at the time. But I accept that, at that time, the priority was to get the work done, not to create extensive records that may or may not be helpful in any subsequent litigation. In any event, it could not be said that this failure (if that is what it was) was deliberate, or part of a concentrated effort to deprive the court of the best evidence of the state of the completed works. For completeness, I should say that I regard the other criticisms of Mr Amin advanced by Mr Fenwick in his closing submissions at paragraphs 99-106 as over-blown, because they failed to recognise Mr Amin's inexperience as an expert and the unique difficulties created by the absence of records in this case.

574. **Mr Large** is an experienced expert witness. He produced reports which endeavoured to take into account a wide range of material, and he was sometimes able to explain his percentages and assumptions in a way that Mr Amin could not. For that reason, where there was an issue between the experts about percentage completions, and there was little or no contemporaneous material either way on which I could form a view as to which competing valuation was more likely to be right, I generally preferred the evidence of Mr Large. Unhappily perhaps, such instances were relatively few.

575. My principal reservation about Mr Large was that I thought his approach to valuation in his reports was unfailingly generous to ICE (and thus, for these purposes, WK). First, the figures which he used were figures which came from ICE, but which had never been justified, let alone agreed by Harlequin at the time of the works (see **Section 8.4.1** below). Secondly, his written approach to the valuation of the work done sometimes ascribed very generous percentage completion percentages without any evidential basis. To his credit, this was something which, on a number of occasions, Mr Large quite properly accepted in cross-examination.

576. For these reasons, it has not been possible for me to accept one expert's evidence over that of the other across the board, and I have had to adopt an item-by-item approach to the valuation of ICE's final account.

8.3 My General Impression and the Aerial Photographs

577. It is I think instructive, before descending into the detail of the valuation of the ICE Final Account, to record my general impression about the ICE works. In general terms, based on the contemporaneous documents, I have concluded that ICE did remarkably little work over the two year period that they were on site at Buccament Bay. Having received $52 million for that work, my general impression is that they were significantly overpaid, itself a result of the absence of any valuation process.

578. It is instructive to compare the ICE works with the Ridgeview works. Ridgeview built approximately 96 cabanas to different stages of completion which the parties agree amounted to 177 keys. They also built the foundations and some of the substructure works for Apartment Block 2. They did some work to the foundations to Apartment Block 1 although those were subsequently taken up. Their work has been valued at ICE rates at just under $9 million (see **Section 8.4.9** below).

579. ICE carried out some remedial works to the Ridgeview cabanas. They began work on most of the further cabanas envisaged by the May 2009 agreement, and also a further 14 that replaced cabanas built by Ridgeview. But not one of the additional cabanas were completed by June 2010 and most were barely started. ICE completed most of Apartment Block 2 (in many ways their one significant achievement), and built part of the shell of Apartment Block 3. They put in larger foundations for Apartment Block 1. They also did some works at the waterfront village but were far from completing any of the buildings there. On that basis, it is possible to see how ICE carried out, say, twice the workscope of Ridgeview, maybe a little more, but impossible to see how ICE were entitled to be paid *five times* the value of the Ridgeview works at comparable rates[24].

580. There are two aerial photographs which assist this comparison. One was taken at the time that the Ridgeview contract came to an end in 2008, and the other taken at the time that the ICE contract came to an end in the early summer of 2010. If one subtracts the work done by Ridgeview (shown in the first photograph) from the works done by the time ICE left site (shown in the second photograph) then, with the exception of some additional cabanas, Apartment Block 2 to a certain stage and the shell of Apartment Block 3, nothing else has changed. It is impossible, on that simple analysis, to support the contention that ICE carried out four or five times the workscope performed by Ridgeview. Even allowing for the alleged remedial works, demolitions and rebuilding that took place in some limited areas of the Ridgeview work, the figures simply do not stack up.

581. This general impression is confirmed by the fact that, even adopting round figures generous to ICE, together with completion percentages which he accepted were also generous to ICE, Mr Large was unable to value the ICE works at ICE rates higher than $41 million odd (see the experts' Schedule B). Accordingly, given that ICE were paid $52 million, that means that, even accepting Mr Large's evidence in full, ICE were overpaid.

8.4 The Detailed Valuation of the ICE Works

8.4.1 The Applicable Rates

582. Mr Large used what he called ICE rates, and although Mr Rees sought to attack those rates in his closing submissions, I was obliged to point out that those same rates were agreed by Mr Amin. Realistically, therefore, no matter how generous to ICE any analysis based upon them might be, Harlequin's room for manoeuvre was very limited. In consequence, I was unhappy with Harlequin's belated attempts to argue that all the ICE rates should, for various reasons, be reduced, some of which I considered to be an illegitimate attempt to resile from figures which Mr Amin had previously agreed with Mr Large.

583. The agreed ICE rates come from a two page document prepared by ICE in February 2010, which puts the work into various categories and gives a round figure for the cost of carrying out the work in that category. There is no breakdown of any of these round figures; neither are there any drawings or other documents which would indicate the detail of the work that was included within these figures. They were

[24] Ridgeview works are valued at about $9 million but ICE were paid $52 million.

never agreed by Harlequin SVG. They were produced at a time when, for the reasons noted above, ICE were seeking to maximise their recovery from Harlequin, so they were certainly not going to be under-estimates. There is good evidence that some of them were obviously inflated; I accept generally what is said on this issue at paragraph 308 of Harlequin's closing submissions. All of these features mean that, on any view, the so-called ICE rates are generous to ICE, and therefore generous to WK in these proceedings. On the other hand, the only fair inference is that they were based on the agreed rate, where applicable, of $96 per square foot.

584. In the circumstances, I have taken the ICE figures as an appropriate starting point in my analysis of the value of ICE's work. That was plainly the agreed position as between Mr Amin and Mr Large, and it would be unjust now to deprive WK of the benefit of the agreements reached between the experts.

585. In the alternative, Mr Large had also undertaken an exercise to value the work carried out by ICE at what were called "market rates". But that too was something of a misnomer. Mr Large's approach was to use three different sets of references as a possible source of alternative rates. In other words, he had not calculated any market rates himself: he had simply taken those existing documents and extrapolated rates from them, assuming that they were relevant and applicable.

586. I was not persuaded that these three alternative methodologies produced legitimate or reliable figures. Alternative 1 was based on a BCQS document of November 2012 which was not produced as a means of measuring the value of ICE's work. Moreover, it was dated long after ICE were doing the works, being produced more than 4 years after ICE started work. Alternative 3 was the same exercise overlaid with references to the evidence of an architect, Mr Campion, who was not a quantity surveyor and could not assist on the topic of market rates. As to alternative 2, that was based on the DLE report (paragraph 97 above). The difficulty with that report was that Mr McDonald himself described it as "seriously flawed", and it was a desktop study only. I agree that it suffers from all the defects noted in paragraphs 316-324 of Harlequin's closing submissions.

587. Mr Amin produced a separate calculation of market rates which produced much lower figures. It was difficult to discern the basis of his calculation. It did not appear to me to be very reliable, being largely the work of others. It however produced a figure that was about $10 million higher (about 30%) than his assessment of the work at the ICE rates. Mr Large's three alternatives also produced figures that were higher than the valuation at ICE rates, in about the same proportion to his calculation at ICE rates. Thus the one thing that the Court can be confident about is that any calculation of 'market rates' produced a figure that was higher than the total calculated at ICE rates. That is why I have been prepared to assume throughout that, if Harlequin had engaged other contractors, it would have cost them more.

588. WK have argued that the principal method of calculation of the ICE final account should not be by way of the ICE rates but instead as a *quantum meruit* valuation by reference to one of Mr Large's market rates. In my judgment, that submission fails at every level. First and foremost, it ignores the fact that there was a binding contract between Harlequin SVG and ICE which utilised agreed rates and figures emanating from ICE: see **Section 4.3** above.

589. But even if I was wrong about the existence of a contract, a proper *quantum meruit* claim in these circumstances would also be based on the ICE rates. By reference to paragraph 250 of Harlequin's closing submissions and paragraphs 4-031-4-035 of ***Keating on Construction Contracts***, 10th edition; and by reference to paragraphs 148-149 of WK's closing submissions and paragraph 1-089 of ***Hudson's Building Contracts***, 12th edition, I conclude that:

(a) This is *not* a case where there were inconclusive negotiations, and *not* a case where particular remuneration was not specified;

(b) On the contrary, the particular remuneration was discussed and agreed;

(c) The utilisation of any rates other than the ICE rates would unreasonably deprive Harlequin of the benefits of the $96 per square foot rate, which, as recorded above, was the "mantra" repeated by Mr O'Halloran and Mr McDonald, and the reason why Mr Ames placed the contract with ICE in the first place;

(d) In all the circumstances, ICE 'deserve' to be remunerated by reference to their own rates, particularly as, for the reasons previously noted, they are generous to ICE;

(e) Moreover, any other approach would replace known figures that emanated from ICE with figures which are, on any view, unreliable and unconnected to ICE: see paragraphs 585-587 above.

For all these reasons, therefore, I consider that the only appropriate rates to use for the purposes of the valuation are the agreed ICE rates. That is doubtless why both parties focussed on the ICE rates in the cross-examination of the respective experts.

590. It also follows from all this that neither expert quantity surveyor undertook any independent exercise in building up or putting forward rates for labour or materials. I do not think I have ever tried a case with expert quantity surveyors when they have not undertaken such a task. But for the reasons which I have already given, I make no criticism of Mr Amin or Mr Large in consequence: they were obliged to do their best with the very poor hands that they had been dealt, and I repeat my gratitude to them for corralling the relevant material into an easily digestible form. No valuation of the ICE works would have been possible without their work.

591. Three final matters by way of introduction to the valuation exercise:

(a) Because of the dearth of proper records, the experts have had to value the entirety of the works on site, and then, in order to arrive at a valuation of the ICE works, have taken off from that overall figure the value of the Ridgeview works. They have also had to make other adjustments. This has made for an unwieldy and occasionally artificial exercise. However, in the circumstances, it is impossible to see another way of doing it.

(b) At one stage, Harlequin sought to argue that the figures should be reduced because of alleged tax concessions. The evidence called on that topic was

incomprehensible and contradictory. They failed to make out any such case. I accept paragraphs 305-311 of WK's closing submissions.

(c) All figures below are in US$.

8.4.2 Category 1: The Cabanas

592. At ICE rates, calculated by reference to the February 2010 figures, the differences between the experts are as follows:

Cabana Type	Mr Amin's Figure in USD	Mr Large's Figure in USD
Type A	5,155,407	5,319,483
Type B	4,307,966	4,674,276
Type C	2,578,349	2,720,125
Type D	981,573	976,786
Type F	874,174	896,343
TOTAL	**13,897,469**	**14,587,013**

593. Mr Large has an alternative set of (higher) figures on the basis that the ICE value excluded the work in respect of M&E connections. I reject that alternative case as a matter of fact. ICE quoted $96 per square foot for the cabanas. That was plainly intended to be an all-inclusive rate. It was not qualified in any way, and was used in numerous ICE offers to Harlequin SVG. I therefore find that it included (and was intended to include) the mechanical and electrical element of the works in the cabanas. There is therefore no basis for increasing the rate.

594. The remainder of the dispute between the experts concerned percentage completions. On analysis, there was broad agreement on the percentage completions for almost all of the cabanas with the exception of cabana type A, where Mr Amin suggested 62% completion and Mr Large suggested 73% completion. It is unnecessary to go into that difference in any great detail. Mr Amin's percentages were based on the work done by his colleagues, whilst Mr Large's percentages were based on his own consideration of the available information, and in particular the site reports, the photographs and the contemporaneous report of Mr Aquino, the architect. In this instance, therefore, this is one of those items which I should decide by reference to my overall preference for Mr Large's approach (paragraph 574 above).

595. There was a suggestion that there was also a dispute about the types of cabanas that were completed. However, this did not translate into separate figures. To the extent that it mattered, I preferred Mr Large's assessment, and for the same reasons as before. Accordingly, I find that the right figure in respect of the cabanas was the total of **$14,587,013**, as per Mr Large's assessment noted in the table above.

8.4.3 Category 2: The Apartment Blocks

596. The value of the works to the Apartment Blocks were agreed as follows:

Apartment Block	Value
Apartment Block 2	4,670,340
Apartment Block 3	2,179,914
Apartment Block 1	1,264,110
TOTAL	**$8,114,364**

8.4.4 Category 3: The Waterfront Village

(a) Trader Vic's

597. The ICE figure which was taken as a starting point by both experts was $2.4 million. Mr Amin suggested a completion percentage of 32%, giving rise to a valuation of $771,600. Mr Large indicated a completion percentage of 46%, giving rise to a figure of $1,104,000.

598. The difference between the experts as to the percentage completion cannot be dealt with on the basis that Mr Amin did not expressly consider the percentage completion of the Trader Vic's restaurant: contrary to WK's closing submissions, I find from his oral evidence that he did just that. What is more, Mr Amin has increased the percentage that he originally placed on this element of the work from 23% to 32%. He explained that was because he had studied the photographs which showed the state of the works when ICE left site.

599. During the cross-examination of the two experts, it became apparent that the main difference between them was the completion percentage to be assigned to the roof element. Mr Large was suggesting that 50% of the roof had been constructed, whilst

Mr Amin said it was much less than that. This evaluation exercise could only be undertaken by reference to the photographs. In my view, having studied the photographs carefully, it cannot be said that the roof was anything like 50% complete. Although the sides of the roof had been completed, the main part of the complex roof structure had barely started. I think Mr Amin was right to believe that the two trusses at either end of the roof were templates, designed to show how the roof was to be constructed, and were not permanently installed. In any event, no other trusses or any other element of the main roof had been started.

600. I conclude that a large amount of work remained to be done to the roof. I find that it was much more than 50%. In those circumstances, I consider that Mr Amin's overall completion percentage of 32% was more realistic than Mr Large's percentage of 46%. In additional support of Mr Amin's lower figure, I note that Mr Spencer (ICE's expert in the Irish proceedings) thought that the correct completion percentage for Trader Vic's was just 30%.

601. WK's closing submissions on this item (Annex A, 17-23) do not assist on the central issue of overall completion, and are largely taken up with an unjustified attack on Mr Amin's credibility.

602. Accordingly, I conclude that the correct figure for the Trader Vic's restaurant is that put forward by Mr Amin of $771,600. For the reasons already given, I consider that to be a maximum figure, based as it is on an ICE figure which does not appear to have taken account of the reduction in the overall size of the restaurant (paragraph 360 of Harlequin's closing submissions). Indeed, my view that these figures are generous to ICE (and therefore to WK) has a particular resonance in respect of the Trader Vic's restaurant because (E/8792) there is a document, also emanating from ICE, which suggests that the maximum value for the completed restaurant was just $1.152 million. For all those reasons, I find that the correct figure for this item is **$771,600**.

(b) Beach Terrace Bar

603. The experts are agreed that this work was 2% complete with a value of **$9,504**.

(c) Beach Steak Restaurant

604. The experts are agreed that this work was 2% complete with a value of **$52,800**.

(d) Asian Fusion Restaurant

(e) Italian Restaurant

605. These two restaurants have been taken together. Mr Amin's figure is $470,400; Mr Large's figure is $518,400. The difference is explained by a 1% difference between the two experts in terms of completion: Mr Amin thinks that both of the restaurants were 10% complete whereas Mr Large thinks they were 11% complete.

606. It seems to me that, in the absence of any other evidence, I ought to decide this dispute in favour of Mr Large because of my preference for his overall approach in this situation (see paragraph 574 above). That would give a figure of **$518,400**. Again I consider this figure is generous to ICE and WK, because it is based on ICE's

potentially exaggerated rates and takes no account of the reductions in the square footage of the Italian restaurant: paragraphs 371 and 372 of Harlequin's closing submissions.

(f) Surf 'n' Turf Restaurant/Jack's

607. Mr Amin suggested 26% completion, which gives a figure of $633,600. Mr Large indicated 31% completion, which gives a figure of $750,000. In his evidence, Mr Amin fairly said that this was a reasonable difference between the experts, rather than a situation in which he was saying that Mr Large was wrong, and he also suggested that he had been moving towards Mr Large's position on this item. Given my preference for Mr Large's overall approach, in the absence of any specific evidence that is decisive either way, I should prefer Mr Large's approach on this item too. I therefore prefer his figure of **$750,000**.

(g) Coffee/Pastry Shop

608. The experts are agreed that this was 8% complete and that therefore the relevant figure is **$10,800**.

(h) Retail Units

609. Mr Amin is at 8% completion which gives a figure of $32,400. Mr Large is at 11% completion which gives a figure of $46,656. Again, on the same basis as above, I conclude that **$46,656** is the appropriate figure in all the circumstances.

(i) Pools

610. Mr Amin's completion percentage is 12% for both pools at the seafront, giving a figure of $76,050. Mr Large is at 20%, which gives a figure of $151,600 for one pool and $64,000 for the other.

611. This was a sub-category of work that was explored in some detail in the evidence. For the reasons noted below, I consider that this is not an item in which my general preference for Mr Large's approach is appropriate: on the contrary, here I conclude that, on the specific evidence put before the court, Mr Amin was right to identify a much lower completion percentage of 12%. There are a number of reasons for that.

612. First, there are the photographs, particularly those (G10/111/1; F19/136/21, 32; F19/137/9 and C9/186/22) which make clear that a relatively modest amount of work had been done on the smaller pool, and next to nothing had been done on the larger pool. When these matters were put to Mr Large in cross-examination he had no real answer to this obvious proposition. Indeed, he properly accepted that the photographs showed that very little work had been completed at the relevant time. He also stressed how difficult it was accurately to assess the percentage completion of these areas.

613. It had been suggested to Mr Amin in cross-examination that he had allowed nothing for the larger pool whereas it was clear that at least some work had been done on that element of the work. Mr Amin disagreed and explained that he had included a modest allowance for this work within his $76,050 figure. It seems plain from his workings

that that is exactly what he did, and that this dovetailed with the modest amount of work carried out.

614. In all the circumstances, I conclude from the photographs showing the work in this area that Mr Amin's percentage is more likely to be right than Mr large's higher percentage. I therefore allow **$76,050** in respect of this item.

(j) Marina

615. Mr Amin has allowed $35,000 in respect of this item. Mr Large has calculated almost four times that amount, in the sum of $125,000. I am in no doubt that the particular evidence again supports Mr Amin's approach to the valuation of this element of the work.

616. First, there is no marina at Buccament Bay: see paragraph 178 above. The evidence shows that it was an idea on a drawing which was discussed at meetings in January 2010 but almost immediately shelved because, amongst other things, planning permission was not going to be obtained. Moreover, the works were clearly going to be expensive and, in the circumstances that pertained in early 2010, Harlequin SVG had other priorities. On that basis, it might be thought that nothing should be allowed for this item at all. Indeed, I note that (C9/186/27) Mr Large originally allowed nothing for this item.

617. However, I accept that the photographs show that some preparatory work may have been undertaken in respect of the proposed marina, including those at (F19/39/1, 14 and F19/49/22). But they show that these works were limited to the drilling of a handful of boreholes and the presence, at one point, of a barge in the area of the marina doing some offshore works, although quite what the barge was doing (and why) remained unclear.

618. It was suggested that the barge may have been drilling a test pile, although it is difficult to see why that was being undertaken at all, given the uncertainties surrounding every aspect of the proposed marina works. Mr Amin said that a contractor does not ordinarily undertake any sort of test piling unless he had carried out detailed borehole work first. He could not see the purpose or point of the test piling in these circumstances. I agree with that and, to the extent that this evidence is now criticised by WK as "partisan" (Annex A, page 33), I refute that criticism. Mr Large properly accepted that there was only "very sketchy information" available to both experts to assist with the valuation exercise.

619. Accordingly, the maximum amount of work done in respect of the marina comprised a handful of boreholes and the possible drilling of a test pile. On any view, that was minor work.

620. In those circumstances, it seems to me to be appropriate to assume that something should be allowed for this item, but to prefer Mr Amin's lower figure of $35,000. That is more than his original estimate of nil, and makes full allowance for what was, on any view, the small amount of work done. Accordingly, in respect of this item, I find that the value is **$35,000**.

8.4.5 Category 4: Spa Island and River Diversion

(a) Spa Island

621. Mr Amin assessed this at $112,500; Mr Large assessed it as $225,000. They both took as their starting-point the ICE figure of $750,000. For the reasons noted below, I consider that Mr Amin's figure is generous to ICE (and therefore WK).

622. Some of the more grandiose concept designs produced by Harlequin SVG showed the digging of a channel in the central part of the site where the river bends northwards. The idea was to create what was called a Spa Island in the loop of the river. This work was not and was never said to be part of the Phase 1 works. Accordingly, it is impossible to see how or why ICE carried out any work in this area.

623. Furthermore, the ICE figure of $750,000 appears very high and, as with all the ICE figures, there is not a shred of evidence to back it up, so it is not possible to say what work it includes. It must be an estimate prepared at a time when nothing had been done at all.

624. Mr O'Connor said that any actual works in this area amounted to no more than 2.5% of the total. There was no factual evidence to contradict that: there was certainly nothing discernible on the site view. Mr Large identified two references in site reports of 25 March and 26 April 2010, but these again seemed to demonstrate that whatever work was done was of an extremely narrow compass. He also agreed that whatever work was done cannot now be identified on site, and that trying to put any figure on this item was very speculative and "based on very, very little information".

625. For all those reasons, I reiterate my view that Mr Amin's assessment at **$112,500** is generous. I therefore prefer it to Mr Large's figure of $225,000, which I consider to be unjustifiable.

(b) Back of House/Clearance

626. This item is not based on a separate ICE figure, which suggests that an allowance for this work is somewhere else within the ICE breakdown of February 2010, and that therefore a separate allowance for this item, in addition to the other figures, may amount to double counting. Despite that, Mr Amin assessed it as $40,000 whilst Mr Large assessed it as $250,000. On the particular evidence adduced, I am bound to prefer Mr Amin's figure.

627. Some levelling work was carried out to the east of Apartment Block 3, in the area where, after ICE had been sacked, Harlequin SVG installed the temporary waste water treatment plant. The levelling was carried out in the last few weeks of ICE's time on site and can be seen in photographs and site reports (C9/186/48, F19/120/32, F19/124/4, F19/128/17-18, F19/129/5, F19/135/11, and F19/138/5). This reflected the obvious need for some BoH work to accompany the proposed opening of Phase 1 on 1 July 2010.

628. Mr Large agreed that it was difficult to identify the precise area of work from these photographs and he accepted that, by reference to that evidence, his own assessment of $250,000 was indeed "a lot of money". In his cross-examination, he suggested for the first time that his figure was based on a proportion of the figure allowed by ICE for the substructure of Apartment Block 4. That that is an inappropriate analogy: as he

accepted, this was not substructure work. Neither was this anything to do with Apartment Block 4 which, on the new plans for the site, was not going in this location at all. This was a specific element of work undertaken – very belatedly – to accommodate the waste water treatment plant and other BoH elements. On any view of the photographs it is plain that, as Mr Large came close to agreeing, the $250,000 is much too high for the work shown on the photographs.

629. As noted above, I think it is arguable that nothing additional should be allowed for this item. But Mr Amin put forward a figure and it would be wrong to depart from that. So, for all those reasons, I value this item of work at Mr Amin's figure of **$40,000**.

8.4.6 Category 5: Infrastructure

(a) Landscaping

630. The ICE figure for landscaping was $1,800,000. Of that, Mr Amin allowed $630,000. Mr Large has allowed $900,000, or 50%. For the reasons set out below, I prefer Mr Amin's figure.

631. First, it was common ground that the ICE figure of $1,800,000 was based on proposed landscaping works for a proposed site of around 40 acres. In fact, the areas of work even partially completed by ICE covered no more than half that area, or around 20 acres. On that basis alone, Mr Large's figure of $900,000 is too high, because it suggests that the landscaping was complete in the areas where ICE were working in May 2010. The photographs vehemently contradict any such conclusion.

632. Secondly, those photographs show that, even in the areas where ICE were working at the time of termination, very little landscaping work had actually been carried out by the time ICE left site. I refer, for example, to photographs (F19/84/26, F19/84/27-28, and F19/135/29). The photographs taken by BCQS in June 2010 reiterate the same point (F24/84/1, F/24/146/1, F24/206/1, F24/239/1, F24/352/1, F24/354/1, F24/369/1 and F24/455/1).

633. Thirdly, in an attempt to bolster what I consider to be the untenable position that half the entire ICE figure for landscaping was appropriate, Mr Large suggested that he had also taken into account the nursery. That is not explained in his reports, and no separate figure is offered for it. In addition, there was a debate about whether the work at the nursery was actually carried out by ICE, the suggestion being that it was not done until after ICE had left site. But even assuming that this work was done by ICE (and there was no compelling evidence of that), the incontrovertible evidence as to the dearth of landscaping elsewhere means that, on any view, a valuation figure of $900,000 was simply too high.

634. I acknowledge that there is nothing to show how Mr Amin's figure of $630,000 has been made up. But for the reasons that I have given, I consider it a more realistic figure than that put forward by Mr Large. I therefore assess this item at **$630,000**.

(b) Maintenance Gatehouse

635. The experts are agreed that this work was never undertaken and so there should be no allowance for it.

(c) Lake Construction

636. Mr Amin put this at $432,000; Mr Large put it at $480,000. The argument between them was very limited because they agreed that 12 ponds were constructed. The dispute is whether or not those 12 ponds were fully completed.

637. Mr Large took the view that, from the photographs, the construction of the ponds (as opposed to the installation of filter equipment which was a completely separate item) could be shown to be completed. In cross-examination, he was shown photographs (F19/129/16, F24/202/1 and F24/223/1), and it was suggested that they demonstrated that the pond construction was not complete. Mr Large rejected that and explained, by reference to those photographs, how in his view the actual construction of the ponds was complete.

638. I accept Mr Large's evidence. The 12 ponds in the photographs look complete. Nothing was identified as being outstanding or incomplete. Accordingly, Mr Large's figure of **$480,000** is to be preferred to the lower figure suggested by Mr Amin.

(d) Lake Filter Equipment

639. The experts are agreed that nothing should be allowed in respect of this item.

(e) Extension of Existing Access Road

640. The valuation of this item was something of a muddle. The ICE figure which the experts have taken as their starting point was $800,000. But it is wholly unclear what work that figure was supposed to cover. The work actually carried out by ICE was limited: the existing rough cliff road to Mr Punnett's house was extended to the beach, in a short stretch behind Apartment Block 1 and the waterfront village. The dispute therefore concerned the extent of the relevant work.

641. There are a number of reasons why I consider that this work should have a modest value. This work was done after February 2010, and therefore may well not relate to the ICE figure of $800,000 at all. If it did, the ICE figure of $800,000 must have been for an entirely new road in this area. On that basis, as Mr Large accepted in cross-examination, the figure would have included for hard core, asphalt, kerbs, drainage and the potential need for a retaining wall at the side of the cliff. None of those things were commenced, let alone carried out, showing how little advanced these works were when ICE left site. All that had been done was a certain amount of excavation work, although I accept that the excavation work involved some digging into the side of the cliff. The relevant photographs show very little work; see for example F19/53/13 and F19/19/138/29. Mr O'Connor's witness statement at paragraph 10 made the same point.

642. One other difficulty is that Mr Large said that he had no information as to what was there before, and Mr Amin did not appear to know either. Of course, in such circumstances, it is impossible to value accurately any works of extension: if you do not know what was there already, you cannot accurately value what was added to it.

643. For this item, Mr Amin's figure was $160,000, whilst Mr Large's figure was $320,000. On the face of it, the figure of $320,000 was unreasonably high for this modest amount of excavation work. That amounts to 40% of the overall ICE figure, and excavation alone will never usually amount to 40% of the total work for a road, in circumstances where all the building up of the road (the hard core, the asphalt, the drainage etc) had not begun. Contrary to WK's closing submissions (Annex A, pages 46-47) I was not persuaded to change these views by Mr Large's answers in re-examination. In all the circumstances, it seems to me that Mr Amin's figure of **$160,000** is more realistic and more reflective of the work that was done by ICE. That is the figure I find for this item.

(f) On-Resort Roads

644. The experts are agreed that this should be valued in the sum of **$52,000**.

(g) Off-Resort Roads

645. The ICE figure for the whole of this work is $850,000. That relates to the road that already existed as a rough track, but which was going to become the main access road, leading up to the main road at the eastern end of the site. That was part of the Phase 1 works.

646. Mr Amin values the work that was done at $170,000. Mr Spencer, ICE's consultant in the Irish proceedings, valued it at $265,000. Mr Large explained that his figure of $212,500 was simply the midpoint between the figures produced by Mr Amin and Mr Spencer. When he was cross-examined, he was unable to assist further.

647. Whilst Mr Large's approach might be regarded as pragmatic, I do not consider that it is appropriate for this item because, in my view, the existing track that leads out of the site has not visibly been the subject of any work *at all*. There was no evidence of hard core, asphalt, drainage or kerbs. In those circumstances, it is impossible to say that anything of significance was done, a finding that again chimes with an unchallenged passage in Mr O'Connor's witness statement.

648. For those reasons, I think Mr Amin was right to value the works at less than Mr Spencer. I accept his figure of **$170,000**. I decline Harlequin's invitation, at paragraph 427 of their closing submissions, to value the work at a lower figure: that would be contrary to the evidence.[25]

(h) Pathways

649. The ICE figure for completing this item was $170,000. Mr Amin valued the work that was done at $68,000; Mr Large valued it at $102,000.

650. The original scope was apparently based on 2,100 feet of pathway. That means that Mr Large's figure assumes that about 60% of the pathways had been completed. He justified that figure by reference to the photographs. It was put to Mr Large that some of the pathways had been done by Ridgeview (a point demonstrated by the photographs taken in 2008) and some of the pathways had to be dug up after June

[25] This is one of a number of items where in their closing submissions, Harlequin sought a figure that was less than the one they had advanced in evidence. I regard that approach as misconceived.

2010 because of the defects in the ICE works. But both of these factors are reflected in his valuation (albeit in other places), either by reference to the valuation of the Ridgeview works, or by reference to the valuation of the ICE defects. Either way, therefore, no deduction falls to be made here in respect of those two elements.

651. That therefore leaves the court with Mr Large's explanation that, by reference to the photographs, 60% of the pathways were completed. That specific evidence was not contradicted by Mr Amin. Accordingly, this is an item on which, in the absence of any specific evidence to the contrary, I should follow my general preference for Mr Large's overall approach. In any event I consider that the photographs, conveniently listed at paragraph 433 of Harlequin's closing submissions, indicate that more work was done than was valued by Mr Amin. For all these reasons, I therefore value this item in the sum of **$102,000**.

(i) Works to Beach

652. This is agreed by the experts in the sum of **$1,260,000**. However, although the item is agreed, the experts do not necessarily agree what works are covered in this category. That dispute becomes evident when considering the next item, sea defences.

(j) Sea Defences
(k) River Defences

653. I take these two items together: the principal point taken by Harlequin was that both the sea and river defence work carried out by ICE was of negligible value because very little work was done and much of that was not properly carried out. That is the main explanation for the difference between the experts. Mr Amin values the sea defences at $44,444 and the river defences at $100,000. Mr Large values the sea defences at $533,333 and the river defences at $600,000.

654. There is no doubt that ICE carried out some work to the sea defences and some work to the river defences. On the evidence before the court, I find that the work to the sea defences was not extensive and was also defective. The position in respect of the river defences was not so clear cut.

655. I accept at once Mr Fenwick's criticism that much of the evidence relating both to the amount of work completed and the defects emerged late and, as far as WK were concerned, in an unsatisfactory way. That is principally because the material was gathered very late in the day by Mr Amin and was the subject of his witness statement dated 14 June 2016. But I have to set against that the fact that Mr Amin was recounting (and attached to his statement) an account of what had happened produced by Baird Consulting. They were the engineers who were employed by ICE to design the sea and river defences before June 2010, and then retained by Harlequin thereafter. Thus, if anyone knew what ICE had done and not done, it was Baird.

656. The key information from Baird comes in two emails. The first, dated 6 June 2016 is general. The relevant person at Baird, Mr David Turner, stated:

> "If you mean actual construction work by Cellate, very little or no coastal or river works were completed during our contract period with them, which ended around April 2010. River works such as Gabion

> Systems, an extension of the revetment at the river mouth, were undertaken by Cellate but were not part of our design"

Three days later, on 9 June 2016, Mr Turner provided a fuller description of the work, and included some general layout plans. This indicated that ICE "only constructed the beach sub-grade system". It went on to say that the remainder of the beach defences were constructed by Harlequin "generally to our design, after ICE were gone".

657. Thus, on any fair reading of the information provided by Baird, ICE carried out very little by way of **sea defence work**. I consider that that is consistent with the Baird documents produced at the time, including site memo 001 dated 2 August 2010 (E/13802.2/1). In addition, these conclusions were supported by the evidence of Mr O'Connor (see paragraph 268 above). The photographs of the southern breakwater (F19/126/20), and the daily records (F/19/126/20), also suggest that little work was done there; indeed, the southern breakwater itself is described as 'temporary' (F19/135/3). Accordingly, I find that the value of the ICE works must reflect the fact that this work was not significant.

658. It was put to Mr Amin during cross-examination that the work that was carried out at the southern end of the beach was in accordance with the drawing (C7/142.17/1, 2 and C11/2253/1). It was therefore suggested that ICE were entitled to be paid for this work. The difficulty with that argument was that the drawing of the sea defences showed the breakwater coming out at an acute angle into the sea, whilst the breakwater that was constructed by ICE, shown in the photographs but no longer there, was different, because it was at right angles to the beach[26]. On that basis, I find that the temporary breakwater (or part of it) that was built by ICE was not in accordance with the Baird drawing. Furthermore, the breakwater is no longer there because it was washed away, and the Baird memo indicated that this was because it was defective: it referred to the sub-grade area placed by ICE, the inspection of which "indicates a shortfall of sub-grade materials – either never placed or eroded in the past 4 months by wave action". There seems little reason to doubt that conclusion.

659. In addition, I consider that the photograph (C7/142.12/13) suggests that much of the work done at the southern end of the beach was part of the beach reclamation, and is therefore included in the previous item. That may well explain why the breakwater was at right angles to the beach; it was designed to act as the southern side of the reclaimed area, and not as part of the sea defences themselves.

660. As to the northern breakwater, I agree and accept paragraph 440 of Harlequin's closing submissions: very little work was done in that area. Again it appears that what was done was largely part of the beach reclamation work rather than anything else; again it is not apparent from the photographs that any extensive work was carried out at the northern end of the beach.

661. As to valuation, it was put to Mr Large in cross-examination that his figure of $533,333 was unjustifiable because the photographs merely showed some rocks which had been placed into the sea, and not the more elaborate works one might have

[26] Mr Amin, who pointed this out, is accused in WK's closing submissions of making "partisan remarks" (page 81 of Annex A), which I regard as another example of WK's misplaced attacks on the evidence of every Harlequin witness.

expected if this was to protect the beach from erosion. He confirmed that he had assumed – without considering the issue more closely – that this work was part of the sea defence work, rather than the beach reclamation work, and that, if he was wrong about that, his assessment would have to change and his valuation would have to reduce.

662. In addition, Mr Large accepted that the southern works were a temporary breakwater, and that the photographs demonstrated that no plant was used and that not all the proposed work had been done. For these reasons, I am in no doubt that the $533,333 advanced by Mr Large is much too high, because it makes an incorrect assumption as to what the work was; it includes for work that was defective and of no value; and it includes for other works that have already been allowed for in the large sum ($1.26 million) allowed for the reclamation works to the beach.

663. This dispute as to the valuation of ICE's contribution to the sea defences work is the first item where I have concluded that neither expert has arrived at the right figure. Because I think some work was done at both the southern and northern breakwaters that can properly be regarded as sea defence work, I conclude that Mr Amin's figure of $44,444 must be too low. I have already explained why Mr Large's figure is too high.

664. Accordingly, it falls to me to arrive at a valuation for this item based on all the evidence. I consider that a fair valuation lies between the two figures and, for the reasons already noted above, should be closer to Mr Amin's figure than that of Mr Large. I therefore value this item of work, taking into account all the matters set out above, in the sum of **$200,000**.

665. Turning to the **river defences**, I think that Harlequin are in a weaker position. The evidence suggested that at least some of the gabion units put in by ICE at the mouth of the Buccament River, to which this item relates, were defective. But, in contrast to the criticisms of the sea defences work, this point does not emerge obviously from the Baird information noted above. Moreover, it appears to be common ground that, to the extent that there were defective gabions, they were incorporated into an access road (as evidenced by F19/118/31 and F19/120/5).

666. In my view, a significant value can be attached to this work, in particular because the gabions were incorporated into the final works. Both experts offered very general figures for the river defences work: $100,000 allowed by Mr Amin, and $600,000 allowed by Mr Large, being 60% of the river defence figure of $1 million put forward by ICE. Again, I consider that the former is too low (because it ignores the real value of what ICE did) and too unreliable (see WK's closing submissions, at Annex A, pages 72-73). But I also think that the latter is too high: the work done, even had it been free of defects, could not amount to anything like 60% of the total work planned, given the length of the river even within the proposed site of Phase 1 and the comments by Baird. I consider that, in all the circumstances, I should use the ICE figure as a starting point (as I have done before), and that an apportionment of 30% is appropriate. That produces a figure of $300,000.

667. Thus these two items – sea defences and river defences – are valued at $200,000 and $300,000, making a total of **$500,000**.

(l) Utility Connections

668. This relates to the connection of a water supply and power to the cabanas. Mr Large assesses the figure in the sum of $61,950. Mr Amin assesses at 10% of the ICE figure, namely $41,300. The difference is therefore modest and both men recognise that the work was far from complete: it appeared from the evidence that there were connections, but they were of a temporary nature.

669. The important thing, however, is that there were connections, as WK stress in their closing submissions (Annex A, page 54). Although there were complaints about the lack of connection to mains or storm water drainage (a point to which I shall come in a moment), the lack of water or power was not a matter about which Mr Campion or Mr and Mrs Ames complained once they had taken possession of the site on 10 June 2010.

670. Neither the photographs – nor anything else – offer any help on this item. For the reason set out at paragraph 574 above, I therefore accept Mr Large's assessment of this item in the sum of **$61,950**.

(m) Mechanical Services Connections to Cabanas

671. The total figure quoted by ICE was $2,600,000. Mr Amin has allowed 10% of that, namely $260,000. Mr Large has allowed $1,410,000 or, based on an alternative rate, $1,300,000. The main difference is based on a huge variation in the percentage completions. Mr Amin considered that this work was 10% complete, whilst Mr Large considered that it was 50% complete.

672. First, it is necessary to identify precisely what work is being talked about here. It is the mains drainage system in and out of the cabanas (because, leaving aside the Apartment Blocks, which is the next item, no mains drainage system was, on any view, constructed in respect of any other buildings by June 2010).

673. On the basis of the evidence about the state of completion of this work, I am in no doubt that Mr Large's 50% cannot be justified. These works were always very behind: see paragraphs 131 and 160 above. There was no permanent mains drainage system in place. There was no waste water treatment plant on site as at 10 June 2010, or even the beginnings of one, which was why a temporary treatment plant had to be installed afterwards. There was no site drainage distribution system either.

674. Some photographs were examined at trial (including F19/51/16, F19/31/15, F19/52/23, F24/21/1 and F24/32/1). It is difficult to say that these or any of the other photographs available to the court demonstrate any sort of proper site sewage system. The best that can be said is that some drains may have been laid in a few places. The same conclusion can be drawn from the photographs referred to at paragraph 455 of Harlequin's closing submissions. Many of these were not looked at during the trial, but they generally show the same haphazard and sporadic drainage work. Although WK argue that there were much more extensive works which were covered up (see for example, their closing submissions at Annex A, page 56), there was no cogent evidence of it.

675. More importantly, there was unchallenged factual evidence that, when Harlequin took over the site, there was next to no mains drainage. There was evidence that the beachfront cabanas, which were the ones which had been tested before hand for mains drainage, were hooked up to separate temporary septic tanks, rather than into a mains drainage system[27]. That was because there was no waste water treatment plant to which the sewage could be taken. That therefore supports the general impression that the mains drainage system was not generally in place as at 10 June 2010.

676. To his credit, Mr Large was very clear in his cross-examination that his assessment was based on "very little information". After dealing with a number of questions from Mr Rees, he candidly accepted that his figure was too high. In my view, taking all those matters in the round, I consider that, despite the rather unsatisfactory way in which he calculated his figures (as noted by WK in their closing submissions at Annex A, pages 56-58), Mr Amin's assessment was more likely to be accurate. It reflected the points made in the previous paragraphs. Accordingly, I allow this item in the sum of **$260,000**. In my view, the fairness of that figure in the round is confirmed by the fact that the $2,600,000 figure was itself likely to be inflated, for the reasons set out at paragraph 308(d) of Harlequin's closing submissions, and also accepted by Mr Large in cross-examination.

(n) Mechanical Services Connections to Apartment Blocks

677. Mr Amin did not allow anything separately for this work, saying it was included in his $260,000. Mr Large separately identified this in the sum of $390,000, an assessment based on his view that the work in Apartment Block 2 was 60% complete.

678. On analysis, there is much more force in Mr Large's case on this item than on the previous one. The first reason for that conclusion is common sense. Apartment Block 2 was largely complete as at 10 June 2010. When a large block of flats like this is built, the mechanical services connections are inevitably built at the same time: not to make them integral would be ridiculous, and there was no evidence to that effect. Of course, works much beyond Apartment Block 2 may not have been carried out (because of the absence of a waste water treatment plant amongst other things), but that seems to me to be covered by Mr Large's allowance of 60%.

679. Furthermore, although I have noted that the evidence was plain that little, if any, mechanical services connection work had been carried out to the cabanas as at June 2010, there was no similar evidence in relation to Apartment Block 2. I agree with Mr Large that, if this major work had not been carried out, I would have expected to see clear and unequivocal evidence about this major omission in the contemporaneous documents generated by Harlequin after they took over the site on 10 June 2010. There was no such evidence.

680. Accordingly, I consider that Mr Amin has failed to value this item in circumstances where he should have done so. There is no evidence to suggest that Mr Large's figure is excessive. My general preference at paragraph 574 applies to this item. Accordingly, for all these reasons, I allow **$390,000** for this item.

(o) Electrical Services Connections to Cabanas

[27] See paragraphs 261-262 above.

681. The February 2010 ICE figure for this work was $4 million. Mr Amin has ignored it and allowed $200,000 for this item whilst Mr Large has allowed, as an upper figure, $1,725,000. This huge difference is based upon a significant difference between the experts, not so much about what was done, but what this item was meant to cover. Mr Amin has approached this item on the basis that it excluded the electrical work within the cabanas themselves (because that was in the cabana rate), and only included the electrical distribution work. Mr Large's figure included both. If this item was limited to the electrical distribution works, then Mr Large's figure reduces significantly to $600,000.

682. I am in no doubt that this item did not include the electrical work within the cabanas. I am confident that that work was within the agreed rate of $96 per square foot, which was not qualified or said to exclude any elements of cabana construction. Mr Large agreed that, unless there was clear agreement to the contrary, the normal practice would be to include M and E works within the unit price. Thus I conclude that this item was limited to connecting the electrical works within the cabanas to the wider system and therefore related to the electrical distribution works only.

683. In addition, even if that were wrong, the evidence shows that the $4 million figure cannot be a reliable starting point. That is because:

(a) As Harlequin note at paragraph 308(f) of their closing submissions, the contemporaneous documents show that ICE priced this work in May 2009 at $1,500,000 and reduced it subsequently to $750,000.

(b) The $4 million must be taken to relate to all the cabanas that were part of Phase 1. Of course, ICE only got close to completing a handful of those cabanas. Thus, even leaving aside the amount of electrical work that was not carried out by ICE, the fact that the number of cabanas approaching completion in June 2010 was so much less than had been anticipated also means that Mr Large's figure of $1,725,000 (based as it is on a percentage of the $4 million figure), cannot be justified. Again, he appeared to accept in cross-examination that this point again meant that his figure was too high.

684. For these reasons, I find that the relevant dispute was between the figures of $200,000 (Amin) and $600,000 (Large) for the electrical work outside the cabanas.

685. In many ways, the same points that I have made in respect of the mechanical services connections to the cabanas, at paragraphs 671-676 above, apply to this item too. Any connections work was very limited, because when ICE left site, there was no proper site electricity network; neither was there any electrical substation. Mr Large accepted there was no cabling from the individual cabanas to any such substation. At most there was a temporary electricity supply. Again the WK case relied on large amounts of work having been carried out and covered up (Annex A, page 66) but there is again no cogent evidence of that; indeed, the evidence was the other way (see for example paragraph 160 above).

686. Moreover, there was repeated references in the evidence to the persistent problems that ICE had with the local electricity provider, Vinlec, and it was plain that for most of the time when ICE were on site, little or no work could be done to the distribution

system, because the situation in respect of electricity supply was so uncertain. I refer, by way of example, to paragraphs 60 and 131 in **Section 3** above.

687. That said, I consider that Mr Amin's figure was too low. The photographs, even those referred to at paragraph 466 of Harlequin's closing submissions, show that some work was carried out. But it was limited, such that I also think that Mr Large's figure of \$600,000 was too high (in part because it was still based on the flawed \$4 million figure). In the circumstances, in the absence of any other evidence, I should take a figure between the two offered. I therefore assess this item at **\$400,000**.

(p) Electrical Services Connections to Apartment Blocks

688. The arguments in respect of this item are similar to that in respect of the mechanical services connections to the Apartment Blocks, at paragraphs 677-680 above. On the same basis, therefore, I accept Mr Large's figure for this item of **\$500,000**.

(q) Lifts to Apartments

689. This has been agreed by the experts in the sum of **\$254,821**. It falls to be deducted at paragraphs 795 and 796 below because the work was done by Ridgeview, not ICE.

(r) Site Drainage Including Storm Water

690. Mr Amin considered that the work was 20% complete as at June 2010. Mr Large considered it was 50% complete. This difference then translated into a significant financial dispute: based on the ICE figure of \$2 million, Mr Amin assessed the value at \$400,000 whilst Mr Large assessed it at \$1 million.

691. For the reasons noted below, I consider that Mr Amin's assessment at \$400,000 was much more realistic for the work actually done. First, the ICE figure of \$2 million covered the whole site of 40 acres. On any view, only a small part of the site was the subject of any storm water drainage works. Given that only about 20 acres has ever been developed, Mr Large's 50% assessment assumed that all the site drainage for that half of the site had been completed by June 2010. But it plainly had not been completed to anything like that extent.

692. Instead, the photographs again demonstrated that very little work was carried out in respect of site drainage. In addition, Mr Amin gave evidence that, for a proper site drainage system, he would have expected to see gutters, gullies, manholes and underground drains taking the storm water out into either the river or the sea. There was simply no evidence of anything other than a very small amount of such work on site in June 2010.

693. Amongst the photographs that were considered were F24/89/1 and F24/95/1. These were put to Mr Amin in cross-examination to demonstrate that some work had been carried out in respect of site drainage, but in truth they seemed to me to demonstrate just how little work had actually been done. Mr Large said that he did not know what storm water work had been done away from the beach area. That meant he could not say if any such work had been done at all. I find on the balance of probabilities that such work had not been carried out away from the beach area. As Mr Large properly accepted, this was an issue which depended entirely on the consideration of the

photographs and, having considered them, I consider that only a fraction of the site drainage works included in ICE's $2 million figure were completed by ICE.

694. In addition, I reject WK's submission, which crops up in different guises throughout Annex A of their closing submissions, that Harlequin's failure to show precisely what was done after June 2010 meant that the Court should not accept Mr Amin's assessment of the work done before that date[28]. In my view, that would make Harlequin liable for ICE/WK's failure to keep records of the ICE work before June 2010, and penalise them again for prioritising the works themselves (rather than record-keeping) thereafter. In any event, both Mr Smith and Mr O'Connor said that surface water drainage works were carried out by Harlequin after June 2010. For all these reasons, I allow the figure of **$400,000** put forward by Mr Amin for this item.

8.4.7 Category 6: Materials etc

(a) Materials on Site

695. Mr Amin assessed the material on site at $250,000. Mr Large assessed the materials on site at $1,950,000. There is therefore a huge difference between the experts.

696. This is a troubling item. The contemporaneous evidence demonstrates that, because they were not paying their suppliers, ICE were perennially short of materials. The daily reports and the other emails emanating from ICE on site make clear these shortages were an ongoing difficulty. That evidence therefore undermines any suggestion that ICE left behind almost $2 million worth of unused material at the Buccament Bay resort.

697. Against that, it must be noted that there was a clear and detailed inventory, prepared by ICE, setting out the materials (F39/8/1) that they claimed to have left on site. What is more, no challenge has been made to that inventory, although it has been in existence since 2010, despite the fact that the same inventory featured in the Dublin litigation. At no time has Harlequin SVG set out a contrary case or sought to demonstrate that some of the items in the inventory were exaggerated or erroneous.

698. Although Mr Amin assessed this item as $250,000, there is no breakdown of or justification for that figure: it is simply a rounded estimate. Moreover, it was not an estimate that Mr Amin himself produced. Indeed, Mr Amin's evidence on this item was very unsatisfactory because he could not deny that, taking an item in the inventory at random by way of example, Mr Large's figure for the ceiling fans at $55,892 was of itself reasonable. He was reduced to saying that the list was fictitious, even though it had not been the subject of spot checks or any other sort of investigation by either Mr Amin or anyone else at BCQS.

699. In Mr Amin's re-examination there was an attempt to demonstrate by reference to the photographs at C8/146/208 and F24/398/1 that the materials were, in some way, in poor condition and not present in the quantities now suggested. But it is quite impossible for the court to reach that conclusion, given the existence of the clear inventory on the one hand, and the failure on the part of Mr Amin and his team to do any checks or to take any detailed points about that inventory, on the other.

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[28] Annex A, page 86.

700. In those circumstances, although I am no doubt that this produces a figure that is generous to both ICE and WK, I cannot do anything other than value this item at **$1,950,000**. This is an item where the caution to which I have referred at paragraph 572 above, stemming from the absence of best evidence in June 2010, operates in favour of WK and against Harlequin.

(b) Professional Fees

701. Mr Large has added to his valuation of the ICE work the sum of $3,010,754 by way of professional fees. That figure appears to be more than ICE actually paid out (the figure paid being $2,727,486.80).

702. I am in no doubt that, in valuing the work carried out by ICE, no separate allowance can be made for professional fees. The reason for that is straightforward.

703. As I have already noted, the experts' figures are all based on the ICE figures of February 2010. Because of the nature of ICE's approach to this project, and the time that the document was produced, I consider that the figures within it are potentially exaggerated. Thus, by using those figures, as the experts have done, they have arrived at figures which are, in my judgment, generous to both ICE and therefore WK.

704. But one thing about these figures which is clear is that they include professional fees. That is why there was no separate item in the ICE document for professional fees. ICE rightly regarded the figures set out there as all-inclusive. They included for overheads, profit and preliminaries, including the professional fees for which ICE were responsible. Thus, having used those all-inclusive figures to value each element of the ICE final account, it is inappropriate then to add in an extra item which was never in the ICE schedule.

705. Moreover, that could hardly be said to be a radical approach. This was, to the extent it was a contract at all, a design and build arrangement whereby ICE were responsible for the professional fees of their own consultant. For example, MOLA were their chosen (Irish) architects, and they paid them accordingly. Accordingly, as in any design and build contract, ICE were paying their own consultants out of the rates that they charged the developer.

706. For those reasons, no separate item can be allowed in respect of professional fees. I agree with Mr Amin's approach which was to value this item at nil.

(c) Plant and Equipment

707. There is again a huge difference between the experts. Mr Amin has valued this item at $629,629 whilst Mr Large has valued it at $4,950,000. The plant in question is listed (E/13255.1/1-5). In my view, the inclusion by WK of this item in full is misconceived. It is based on the false assumption that all of the plant and equipment on site belonged to ICE. That is incorrect for a number of reasons.

708. First, when ICE took over from Ridgeview, the evidence is clear that they took over, free of charge, the plant and equipment that was already on site. That plant and equipment had been given by Ridgeview to Harlequin as part of the settlement

between the two companies. It therefore belonged to Harlequin and was used by ICE. It did not become ICE's property at any time. ICE never paid for it.

709. What is more, this arrangement was reflected in the documents produced by ICE themselves. For example, (C8/146/211), one of the many estimate/budget documents produced by ICE, they showed a *deduction* from the sums otherwise due to them of $6 million to reflect the plant and equipment provided by Harlequin SVG. Similarly, Mr Hoyle noted a figure of $7 million for the value of the plant and equipment "inherited from the previous Contractor": see paragraph 154 above. These were clear contemporaneous acknowledgments that a credit had to be made in favour of Harlequin to reflect the plant and equipment which belonged to Harlequin but which ICE were using on site. On that basis, it might be argued that no allowance for plant and equipment in favour of ICE should now be made.

710. Furthermore, there is no evidence that the plant and equipment retained on site in June 2010 belonged to ICE. Individual claims of ownership have never been asserted by ICE (or by WK), let alone proved. Ownership was not suggested by ICE in the Dublin litigation.

711. It seems to me that the best possible evidence that this plant and equipment did not belong to ICE was that at no time did ICE ever seek to recover it from site. Although it is correct that Harlequin obtained an injunction in SVG preventing ICE from going on site in June 2010, that injunction did not and could not in law prevent ICE from seeking the delivery up of any property that was rightfully theirs. Given the animosity demonstrated by Mr O'Halloran after June 2010, and his direct involvement in the reporting of Harlequin to the SFO, as well as his ongoing "interest" in both the Dublin litigation and these proceedings, I conclude that, if ICE had had such a claim, they would have made it by now. So the fact that there has been no such claim by ICE at any time over the last six years further supports the proposition that this plant and equipment did not belong to them.

712. Finally, I note that at no time did the ICE schedule of February 2010 (the rates from which has formed the basis of the experts' valuation) seek to recover any sums by way of plant and equipment. Indeed, as already noted, other documents which they produced demonstrated an allowance in favour of Harlequin in the sum of $6 million.

713. I accept that, in all likelihood, some items of plant and equipment may have belonged to ICE because they were brought to site after Ridgeview left, or brought in specifically. But I find that such additional plant and equipment was not extensive, given that ICE only spent money on the Buccament Bay resort when they had to, and were busily engaged in spending the monies they did receive on items (such aeroplanes and yachts) which had nothing to do with the works.

714. In all those circumstances, I find that Mr Amin's assessment in the sum of $629,629 is much more likely to be an accurate assessment of any residual plant and equipment belonging to ICE than Mr Large's figure of $4,950,000 (which is based on the major mis-assumption that it all belonged to ICE). I also note that none of the points set out in the previous paragraphs are addressed in WK's closing submissions. I therefore value this item at **$629,629**.

715. For completeness, I note that, leaving aside questions of ownership, the plant and equipment on site was valued by Mr Fawcett in the sum of $2 million odd. Mr Fawcett's report is at (E/15923/1). Mr Fawcett is an expert in the valuation of plant and equipment. Although there was some suggestion that his report was incomplete, I find that it was a more accurate valuation of the plant and equipment than that produced by Mr Large. Thus, if I was wrong on the ownership question, such that the figure of $629,629 was too low, I would not value this item at more than $2 million odd in accordance with Mr Fawcett's report.

8.4.8 Category 7: Variations

(a) Introduction

716. There was a list of variations, which had first emerged in the Dublin litigation, but was not the subject of any specific evidence there. The experts were not in a position to agree whether or not this list of variations had actually been carried out. The parties did not address it in their original witness statements. Thus the list of variations emerged very unsatisfactorily, by reference to further witness evidence from Mr Campion, pursuant to an application made during the trial. Again, however, it seemed to me that the court just had to do its best to value the items that emerged as a result of this unhappy process.

717. I deal with each of the variations by reference to the numbering on what became known as the Variations Schedule.

(b) VO1: Works to Sports Ground

718. Mr Campion gave evidence about this at paragraphs 4-9 of his witness statement of 27 June 2016. In summary, he said that that only a minimal amount of work was done by ICE prior to 11 June 2010 in relation to the sports facilities, and was limited to ground preparation works and some drainage work. They did nothing in respect of the main football pitch because that work was not carried out until later. They did some work in connection with the Astroturf football pitch and tennis courts but this was minimal and in any event it had to be redone.

719. In cross-examination, Mr Campion said that the ground preparation work which Harlequin had carried out was sub-standard and their consultants, ACI, said it had to be redone. It was redone after ICE had left site. He said it would be the subject of photographs and reports. He repeated that no significant drainage works were done by ICE in the area of the football pitch, a point he previously made in his witness statement. By reference to various photographs dated June 2010, he maintained that position. He said that the remedial work that was done in respect of the ICE work was very different because it had been decided to lay a grid of pipework to avoid the flood risk.

720. The only relevant factual evidence came from Mr Campion, although the small amount of work that was carried out was also the subject of the photographs. These showed some works being carried out right at the end of ICE's time on site (F19/129/24), but they again suggest that only a small allowance should be made for this item. The same is true of (F19/136/32). Mr Large's evidence (set out in WK's closing submissions, Annex A, page 102) did not alter that impression. Thus, I find

that nothing other than minimal work was carried out in respect of Variation 1, and only a modest sum should therefore be added to the ICE account.

721. Mr Amin valued this item at $25,000. Mr Large valued it at $75,000. For the reasons that I have given, I prefer Mr Amin's lower valuation in the sum of **$25,000**.

(c) VO2 and VO3: Demolition of Cabanas

722. These relate to the demolition of 9 type A cabanas (VO2) and the demolition of an additional 4 type A cabanas (VO3). It should be noted that the item here is just for the demolition of the cabanas, valued by Mr Large in the sum of $140,000 and (in a rather opaque fashion) by Mr Amin at $30,000.

723. Mr Campion dealt with VO2 at paragraphs 10-13 of his witness statement and VO3 at paragraphs 14-16. His evidence can be summarised by saying that, following his involvement in November 2009, he saw no such demolition and reconstruction. One of the answers to that, which was demonstrated from the contemporaneous emails and the photographs put in cross-examination, was that much of the demolition and reconstruction had happened before his involvement, whilst other demolition had happened later, and he had forgotten about it.

724. VO2 involves the demolition and rebuilding of cabanas close to the gap between Apartment Blocks 2 and 3. The photographs demonstrate that at some point some cabanas were demolished in this area and that certainly some cabanas were rebuilt in March/April 2010. Mr Campion agreed in cross-examination that his memory had been faulty and that this work was done during the period on which he was on site.

725. However, the real issue is why this work had been carried out. Was it a variation instructed by Mr Ames? The evidence about that was not very clear, but the contemporaneous material showed that Mr Ames changed his mind on more than one occasion and ordered the demolition of existing cabanas to 'improve' the resort: see for example paragraph 122(e) above. The assumption must be that the instruction emanated from him, and that therefore Harlequin are liable for this item.

726. In addition, it appears from paragraph 513 of Harlequin's closing submissions that it accepts that the relevant instruction was given by Mr MacDonald. As Harlequin SVG's *de facto* CFO/FD, he could bind them and make them liable to ICE for this work.

727. The evidence in relation to VO3, the 4 additional cabanas, was similar. I summarise it as follows.

728. The Plans show that in the middle of 2009, it was proposed that three cabanas which had already been built of type C and D should be taken down in order that a restaurant could be built in the same place. The remaining land freed up could then be the site of three type A (smaller) cabanas. There was an exchange of emails [E/5434/1]. It is plain from the emails that these three cabanas were demolished. Both emails talked about "the space that we took down for the cabanas/buffet restaurant". That evidence establishes the fact that these cabanas were demolished.

729. The question is again whether Mr Ames/Harlequin gave the instructions for this work to happen. Mr Ames maintained that he was not sure that it had happened and that he had not told them to do it. I reject both elements of his evidence. First, as I have said, it is quite clear that the demolition happened because Mr Ames' own email said that it did. As for the instruction, the fact that he was involved in these emails makes it plain that he knew and acquiesced in that decision.

730. Mr Ames was always quick to stress that he was a visionary, the man with the concept, and he left the details to others. That is all very well, but if you change the concept of a design to replace Apartment with a restaurant, then that has consequences on the ground and it is impossible for the person who made the change, whether visionary or otherwise, to absolve themselves of responsibility for the consequences of the change.

731. Accordingly, I find that on the balance of probabilities, VO3 has been made out. This was work instructed by Mr Ames. It is therefore work that needs to be taken into account in the final account valuation.

732. As to valuation, it appears that Mr Large has used a figure of around $10,000 for the demolition of each cabana. I accept that valuation. Thus, I have found that these cabanas were demolished on Harlequin's instructions and therefore **$140,000** is due in respect of these variations.

(d) VO4: Demolition of Cabana 1

733. There was a certain amount of evidence about this in the early part of the trial. The suggestion was that this was as a result of a setting out error by ICE.

734. At paragraphs 17 and 18 of his witness statement, Mr Campion reiterated this work being necessary as a result of incorrect survey information having been provided by ICE to MOLA.

735. In cross-examination, Mr Campion was shown document (E/7175/11) which was an ICE document in which they sought to blame TVS for the setting out error. On the basis that TVS were instructed by Harlequin, this was therefore at odds with Mr Campion's earlier evidence. The question then became who was responsible for that error.

736. On the balance of probabilities, I find that this setting out error was the responsibility of Harlequin. That was what the contemporaneous documents suggested. That would also be consistent with Harlequin's responsibility for the similar problems referred to under VO2 and VO3. The value of this work is included in the $140,000 to which I have previously referred.

(e) VO5: Reclamation of Additional Beach

737. Mr Campion dealt with this at paragraphs 19-21 of his witness statement. He said that there was a huge amount of work done to the beach after ICE had left site and so he could not explain how ICE could possibly claim $200,000 in respect of additional work. He said he was not aware of any additional beach works either instructed or carried out by ICE. He was cross-examined by reference to the photograph

(C7/142.12/21) which was dated 3 June 2010. That shows the extent of the work on the beach reclamation carried out by ICE, so it is an important photograph. Mr Campion said he thought that the works shown in that photograph was all part of the original agreement. He said it was obvious that such work was always necessary.

738. Mr O'Connor was also cross-examined about the beach reclamation work; it is these passages which form the basis of WK's closing submissions on this item, at Annex A, pages 109-110. But all these show is that ICE did some beach reclamation work, and that is not in issue: that has already been allowed for in paragraph 652 above, in the sum of $1,260,000.

739. On all the evidence, I do not accept that any element of this work was in some way a variation. There was no evidence to support any additional instruction.

740. The cross-examination of Mr Large also revealed the unsustainable basis for this item. Mr Large accepted that the evidence in the Dublin litigation of Mr McConaghy of ICE, on which this claim was based, was very vague. That evidence is at (G1-18)[29]. Mr Large eventually accepted that it was not a basis for claiming $200,000. Since I have already allowed a relatively large sum in the account for the beach works in any event, for the reasons noted above, I decline to allow anything else for this item.

(f) VO6 and VO7: Digging Out the Spa Island

741. Mr Campion said that he was not aware of this work having been undertaken by ICE (paragraph 22 of his witness statement). If digging out and filling in had taken place, that was not pointed out on the site visit. In cross-examination Mr Campion confirmed that he had seen no signs of activity on the Spa Island and he was therefore not aware of any work there.

742. The report (F20/12/1) of February 2009, which is an ICE document, refers to the excavation. However, since that is an ICE document which no witness gave any evidence to support, its accuracy cannot be confirmed. Moreover, Mr MacDonald said that, during this period, no active work was carried out and the site was just the subject of maintenance and repair, which would suggest that no excavation work was being carried out, let alone an exercise that then involved, for unexplained reasons, the filling in of that same excavation.

743. For these reasons I find that VO6 and VO7 have not been made out. Further and in any event I note that I have already allowed $112,500 for the other work at the Spa Island, which (for the reasons previously explained) I consider to be generous. It may be that there is a muddle between the two categories. That only supports the view that nothing further can be due on respect of this item. The parties (eventually) reached the same conclusion.

(g) VO8 and VO9: Changes to Apartment Block 1

744. Mr Campion dealt with VO 8 at paragraphs 23-26 of his witness statement. He said he was not aware of changes to the foundations of Apartment Block 1. However, in

[29] There was a suggestion that the reference to Mr McConaghy's evidence was to evidence he gave in the Barbados litigation. That was not my understanding of what Mr Large said, but if I was wrong about that, I find that the evidence in question (at G9/22/8) was also vague and unhelpful.

cross-examination, it became clear that changes had occurred. By comparing the photographs (F19/32/17) with the earlier photograph (F38/178/1) Mr Campion agreed that it demonstrated that the original foundations had been removed and replaced. Thus the changed work was carried out. The next question is whether or not this work was a variation.

745. On the balance of probabilities, I consider that this was a variation. In particular, there was evidence set out in **Section 3** above that Mr Ames had instigated a number of changes to the size and shape of Apartment Block 1. Set against that, it was unlikely that these changes had been made by ICE of their own accord.

746. Mr Amin has allowed nothing for this item on the basis that he had seen no evidence of it. However, with regard to costs, he had said that if there was a variation, the figure would be in the region of $25,000. He was unable to assist further.

747. Mr Large allowed a figure of $150,000. This was on the basis that the photographs showed that the foundations laid by Ridgeview had to be dug out and that the larger foundations required cutting into the adjacent high ground. Various photographs were referred to including those at (F19/27, F19/32, F19/37, F19/52, F19/55, F19/57 and F19/62).

748. On the basis of the photographs, I accept Mr Large's valuation in the sum of **$150,000**. That is 10% of the ICE figure of $1.5 million and seems to me to be a reasonable allowance for the work actually undertaken.

749. VO9 related to the works to the beach road. I have already allowed for that in the valuation of the final account under Category 5 above. There is therefore nothing further to be added for this item.

(h) VO10: Additional Work to Pond 1

750. Mr Campion was not aware of this work and could not establish if it had been carried out from the relevant drawings. The cross-examination of Mr Large demonstrated that there was no evidence that any further work to Pond 1 had ever been carried out. Accordingly, I allow nothing in respect of this item.

(i) VO11: Gazebo and Bridge

751. Mr Campion confirmed that this work was carried out but had no way of knowing whether or not it was a variation.

752. I consider it a fair inference from all the evidence that this work was a variation. It was not shown on any original drawings but it was plainly carried out and it was significant enough for me to conclude that it was not carried out by accident. On the contrary, I find on the evidence that this was one of Mr Ames' pet projects, at least for a few days, like the pirate ship.

753. There is a dispute as to the appropriate valuation. Mr Large originally allowed $80,000 for this item which seemed a huge amount, almost equivalent to the cost of a whole new cabana (despite the fact that there were no walls, proper roof, toilet and bathroom, air-conditioning etc). Mr Amin indicated that, if it was a variation, the

right figure was $35,000. When he was cross-examined, Mr Large indicated that Mr Amin's figure "is probably realistic". I agree and accept that evidence. I therefore allow **$35,000** for this variation.

(j) VO12: Modifications to Cabana 10

754. Cabana 10 is the one that is now used as a reception with a much larger private swimming pool. At paragraph 29 of his witness statement Mr Campion identified the work carried out to bring about the change to a reception, carried out after ICE had left site.

755. But he said nothing about the modification work previously carried out by ICE to this cabana. This was a significant omission, because the claimed variation was not the changing of the cabana into a reception area but the earlier change, which made this cabana into a wedding suite. It was in consequence of that modification that, for example, the pool was significantly enlarged.

756. In my view, that work was a variation and should be valued as such. The emails made clear that this work was specifically instructed by Mr Ames. It was an express instruction and requirement, noted in his 26 May 2009 email.

757. The experts were $10,000 apart, because Mr Large had valued this at $30,000 and Mr Amin valued it as $20,000. Looking at the photographs I consider that this work was not insubstantial (particularly the enlargement of the pool) and therefore I conclude that Mr Large's valuation is to be preferred. I therefore value this item at **$30,000**.

(k) VO13: Other Cabana Modifications

758. Again, this work has been done and is visible on site. Mr Campion said at paragraph 30 of his witness statement that this work was done after ICE had left site. However, he accepted in cross-examination that ICE had done some of this work and that the original claim of $5,000 was a reasonable allowance to reflect that work.

759. Mr Large had claimed $10,000 for this item. Harlequin's closing submissions offer to split the difference between the $5,000 on the basis of Mr Campion's evidence, and the $10,000. I therefore assess this at the middle figure of **$7,500**.

(l) VO14: Vanity Units and Wardrobes

760. At paragraph 33 of his witness statement, Mr Campion said he had no involvement in this work. Mr Large fairly said when he was cross-examined that he could find no reference to this work in any of the documents. There was a suggestion that it was based on a schedule produced by ICE's Mr McConaghy, who did not give evidence. Accordingly, I consider that this item was not shown to be a variation and I make no allowance in respect of it.

(m) VO15: IT Ducting

761. In his witness statement at paragraph 34 Mr Campion said that, when Harlequin developments took over, all infrastructure duct work had to be installed and that therefore that this claimed variation work did not take place.

762. When he was cross-examined, he accepted that there was some IT/electrical duct work in place but it all had to be replaced because it was either damaged or incomplete. He made the point that it was impossible to say that this was a "variation" when the work itself was incomplete or had been condemned. He said that this would be reflected in the documents.

763. Mr Large said that he had seen some duct work coming out of the ground and he had thought that that might have been for IT cabling. He was not able to put the basis for the claim any higher than that. He could not comment on who had actually carried out the work and its state of completion. In addition, there was no evidence from either side of any variation instruction emanating from anyone.

764. In the light of the evidence, I consider that the suggested variation has not been made out. Furthermore, Mr Large's assessment of $150,000 was, on the basis of Mr Campion's evidence, excessive, given that it was based on an ICE total figure and so many cabanas were not built. Indeed, even if liability had been established, it is impossible to arrive at any proper valuation for this item given the state of the evidence. For both these reasons, I therefore allow nil in respect of this item.

(n) 15% Uplift

765. Mr Large suggested that an uplift of 15% was required in respect of these variations for overheads and profit. He calculated this at $130,500 although, of course, the amount is entirely dependent on the net sum allowed for variations.

766. The wider point was that, as Mr Amin noted, there was no indication of any such uplift in the ICE schedule of February 2010, or any other similar document produced by ICE. He said therefore that all of these figures should be deemed to be inclusive of any such uplift.

767. I agree with Mr Amin. Indeed, it seems to me that the contrary is unarguable. The experts have used the ICE rates. I consider that that is a basis of assessment which is generous to ICE and WK. The rates must be considered to be inclusive of everything, including any uplift for overheads and profit. Accordingly, nothing further falls to be due in respect of this item.

768. The variations allowed in paragraphs 717-768 above total **$387,500**.

8.4.9 Category 8: Adjustments/Deductions

769. Both sides' experts sought to make adjustments/deductions to the ICE final account in what was a more-or-less naked attempt to reduce the value (Mr Amin) or enhance it (Mr Large). I reject all four adjustments/deductions for the reasons set out below, starting with Mr Amin's two deductions and then going on to Mr Large's two enhancements.

(a) The Remedial Works Carried Out by Harlequin

770. A deduction from the overall value of the ICE account of $1,211,150 has been made by Mr Amin to reflect alleged defects in ICE's works. For the reasons set out below, I do not accept this item.

771. Although there can be no doubt that, as at June 2010, the ICE works were defective, this was inevitable because the ICE works were stopped before they were completed. Harlequin did not terminate their arrangement with ICE because of alleged defects in the works. It is a risk that an employer takes, if he brings a contract to an end prematurely, that the works will not be in an ideal state.

772. In any event, the valuation of ICE's works, set out above, has taken into account defects in their works. There is a real risk that a separate adjustment would lead to double counting. For these reasons, I conclude that Harlequin SVG are not entitled in principle to raise this cross-claim.

773. Furthermore, I am not happy about the calculation of this item. Although Mr Amin's explanation is at paragraphs 10.1-10.3 of the Third Joint Statement, I consider that WK's complaint, that this calculation is very rough and ready, is justified. On this item, because it is an item of positive cross-claim, Harlequin ought to have been in a position to provide a much better record of the actual cost of the remedial work. On this issue, therefore, I accept the criticisms of the calculation set out at paragraphs 110-112 of Annex A of WK's closing submissions.

774. Thus I find that there should be no additional deduction from the final account in respect of this item.

(b) Additional Work Carried Out by Harlequin

775. This is valued at $500,000, said to be the cost of additional works that had to be carried out because ICE failed to finish the Phase 1 works on time. This too is a flawed claim in principle.

776. The works in question were those items put in hand by Harlequin SVG between June and August 2010 in order to achieve the soft opening of Phase 1A. They included the construction of a car park and the footbridge leading from it over the river, the conversion of the wedding cabana into the reception, and the conversion of an existing building into a restaurant. These works were doubtless sensible. But the cost of them is not to be reflected as a deduction from the ICE final account. There are three separate reasons for this.

777. First, this was not work that ICE were ever obliged to perform. So it is difficult to see how it could ever be allowed for in a measurement of the value of ICE's works.

778. Secondly, these works were not the foreseeable consequence of ICE's delays. This was work which Harlequin decided unilaterally to carry out in order to improve the resort in time for opening. I find there was insufficient causal connection between this work and the failure to complete by ICE, and therefore any failure to advise by WK (a case on liability which I have of course rejected in any event).

779. Thirdly, and perhaps most important of all, Harlequin SVG have had full value for the money they spent on these works. The car park and the footbridge remain the principal way of getting onto the site, all these years later. The reception cabana has fulfilled that function for over 6 years. It would be wrong in principle to make ICE pay for work which they were never obliged to carry out and from which Harlequin SVG continue to obtain value.

780. For these reasons, nothing falls to be deducted from the ICE account in respect of these works. In addition, there are similar problems with the valuation as with the previous item: see paragraphs 113-114 of Annex A to WK's closing submissions.

(c) Contractors' Risk

781. Mr Large has sought to increase the value of the ICE final account by allowing a contingency sum, which varies from $2,686,812 to $3,099,686 as a 5% risk allowance. In my view this allowance is misconceived. What the court is doing is calculating the value of the works that ICE actually carried out on site so that can be compared with what ICE were paid, in order to see whether the absence of a contractually-binding valuation process caused Harlequin any loss. The court is not embarking on an exercise to see what an ICE lump sum bid might have looked like. Accordingly, this item is inapplicable.

(d) Maintaining Site Presence

782. Mr Large allows an item of $2,000,000 from maintaining a site presence. Again this item is misconceived: see the previous paragraph. In any event, there was always work for ICE to do on site and they were paid what they agreed with Mr Ames. There was no question of ICE being on site doing nothing. The claim is an unjustified attempt to increase the value of the ICE account, and I note that it was not included in Mr Large's original calculation.

783. The artificiality of both these items is enhanced by the fact that they only appear in the so-called "market rates" version of the experts' schedule. In this way, not only do WK seek to deprive Harlequin of the rates agreed with ICE, but they also seek to inflate the ICE final account by items which bear no relation to what actually happened on site.

8.4.10 Category 9: Ridgeview Works

(a) Overall Valuation

784. In their closing submissions, Harlequin argued that the Ridgeview works should not be valued at ICE rates but at Mr Amin's version of market rates. This significantly increased the figure for the Ridgeview works which, because this item then becomes a deduction from the overall total to arrive at a valuation for ICE's works, would reduce the value of ICE's works, increase the amount of any overpayment, and thus increase the amount of the claim against WK[30]. I do not agree with this course: it would mix together two different approaches and cause muddle and potential unfairness. Mr Amin accepted in cross-examination that the same rates should be used for both. It would also mean going to rates – whether those of Mr Amin or of Mr Large – which I do not consider to be reliable, for the reasons noted in paragraphs 579 and 580 above. Thus I conclude that this item, which is a deduction, should be calculated at the same rates as every other element of this valuation exercise.

785. The valuation of the Ridgeview works, assuming that they were defect free, is the subject of a small difference between the experts. At ICE rates, Mr Amin valued it at

[30] The same result would occur, but at lower figures, if any one of Mr Large's three alternative market rates are used.

$11,647,738, whilst Mr Large valued the Ridgeview works at $10,853,294. The difference of $800,000 odd is made up of three separate disputes: (i) a difference between $10,588,000 (Amin) and $10,040,000 (Large) in respect of the cabanas; (ii) a claim by Mr Amin that Ridgeview carried out $171,444 worth of work in respect of the foundations to Apartment Block 1; and (iii) a claim by Mr Amin that Ridgeview carried out $105,000 worth of work to the beach. Two other items, for Block 2 and the pathways, are agreed.

786. As to (i), the evidence demonstrates that Ridgeview completed 139,129 square feet of cabana (E/391/1 and E/2203/1). Even at ICE's rate of $96 per square foot, which all the evidence suggested was low, that would produce a valuation of the Ridgeview works of $13,356,384, which might suggest that Mr Amin's assessment of $10,588,000 may be more realistic. But the problem is that that he has only used aerial photographs to assess the level of works, whilst Mr Large has used the schedule prepared by the architect, Mr Aquino (E/788). This is a detailed and contemporaneous record. It is much the best evidence of the state of the cabanas. For those reasons, I take Mr Large's figure of $10,040,000 as the proper valuation for Ridgeview's work to the cabanas.

787. As to (ii), it is not clear precisely what works Ridgeview carried out to the foundations to Apartment Block 1, and it is also not clear whether or not it was separately charged. I do not think that a separate claim has been made out. As to (iii), there is no evidence that Ridgeview did any work to the beach, so no allowance should therefore be made for this item.

788. On that basis, I prefer Mr Large's total figure of **$10,853,294**.

(b) Defects

789. Because of the laborious exercise which the experts have been obliged to carry out, the valuation of the ICE works not only includes a *reduction* for the value of the Ridgeview works, but also adds back an *additional item* for the remedial works carried out by ICE to the Ridgeview works. There is a significant difference between the experts on this item. Mr Amin valued the remedial works carried out by ICE in the sum of $1,468,000. Mr Large valued it at $4 million. For the reasons noted below, I consider that Mr Amin's figure is to be preferred.

790. First, the evidence of defects in the Ridgeview works is limited. There were essentially three potential sources of information:

(a) The report from Escarfullery & Associates, noted in paragraph 67 above. I repeat my finding there that, although his report found defects in the work, they do not appear to be especially grave.

(b) A report produced by the architect, Mr Aquino, apparently dated 9 June 2008, which was part of his evidence in the Dublin litigation. On the face of the report itself, there are very few defects noticed in the cabanas. Mr Aquino did not give oral evidence at this trial but the content of his report was corroborated, in general terms, by Escarfullery & Associates. Moreover, Mr Large himself relied on the accuracy of this report: see paragraph 786 above.

(c) An unsigned report dated 30 June 2008 which is unsigned but which may have been prepared by a Mr McConaghy of ICE (his name has been written in manuscript on the first page). This sets out more extensive defects in the cabanas than the two reports noted above. The remedial works suggested do not, however, appear to be particularly extensive. The difficulty with this document is that at least parts of it paint a different picture to those produced by Harlequin's professional advisors involved at the time. It is also contrary to the general factual evidence relating to Ridgeview summarised in **Section 3** above, and no evidence was given in support of its methodology and findings. I did not hear evidence from Mr McConaghy, and Mr Large agreed that Mr McConaghy's evidence on another issue in the Dublin proceedings was vague and unreliable: see paragraph 740 above.

(d) For these reasons, I conclude that the documents at (a) and (b) above are more likely to be reliable than (c).

791. I have already pointed out in **Section 2** above that the reasons for sacking Ridgeview were many and varied, and that, although the existence of defects in their work was a factor, it was a relatively minor one. I find that this was not a case where the contemporaneous documents, taken as a whole, revealed that there were wholesale defects in the works that Ridgeview had carried out.

792. Mr Large's figure of $4 million was said to be ICE's original provisional sum figure for remedial works noted in 2008. The figure itself was not substantiated in any way, as Mr Large properly acknowledged. Neither was it ever accepted by Harlequin or Mr MacDonald. It may be that it was linked to the McConaghy report noted above, the accuracy of which I have rejected. Even more importantly, that $4 million figure was apparently ICE's estimate for carrying out all the remedial work which they said was necessary as a result of the defects in the work carried out by Ridgeview. On any view, because of the numerous Ridgeview cabanas on which ICE did no or little work, only a part of the planned remedial work could actually have been done, another point fairly conceded by Mr Large. The documents (E/54/1 and E/16144/1) made clear that ICE did not carry out remedial works to all the cabanas built by Ridgeview. Indeed, that can be seen on site to this day: there are many Ridgeview cabanas amongst those which have never been the subject of any further work, either by ICE or by Harlequin SVG, and which are likely never to be completed. That is a further and separate reason why the $4 million provisional sum is an unsound basis for the calculation of the remedial works carried out by ICE to the work done by Ridgeview.

793. This same point can be demonstrated in another way. The ACI structural reports of July and August 2010 set out the details of the defects in the cabanas after ICE left site. This dovetails with the oral evidence of Mr Smith and Mr O'Connor. The existence of such outstanding items indicates that ICE did not carry out extensive remedial works to the cabanas: if they had done, the cabanas would not have been left in that state in June 2010. I accept the point made by Mr Rees in his oral closing submissions that there was a close correlation between the Escafullery report in 2008 and the ACI reports two years later.

794. Still further, a reduction of $4 million would leave a net value of the Ridgeview works of around $6-7 million. On all the evidence, that would be unrealistically low. No-

one (and certainly not Mr MacDonald in 2008 when he was closely involved) ever suggested at the time that the value of the Ridgeview works was so low.

795. Mr Amin's assessment at $1,468,000 is free of all these uncertainties and difficulties. I consider that it is a reasonable assessment of the works undertaken by ICE. It seems to me properly to reflect the remedial works that ICE actually carried out (and leaves out of the account all the uncertainties of the work that they did not do and/or did not need to do). It also reflects the relatively modest nature of the defects as shown in the documents recorded in paragraph 790 above. I do not accept the fairness of the criticisms of Mr Amin made at paragraphs 118-123 of Annex A of the WK closing submissions. Accordingly, for all those reasons, I prefer Mr Amin's assessment at **$1,468,000**.

(c) Demolition Works

796. Again because of the laborious nature of the valuation exercise, there requires to be a reduction in the value of the Ridgeview works that were demolished (but only of course to the extent that that demolition was instructed by Harlequin). I have already found in relation to VO2 and VO3 that cabanas were demolished for reasons that were Harlequin's fault.

797. Mr Large valued the demolition in the sum of **$711,000**. There was no alternative figure from Mr Amin, and the cross-examination of Mr Large on this point, set out at paragraph 272 of Harlequin's closing submissions, did not lead me to conclude that Mr Large's figure was excessive. I therefore adopt it.

(d) Lift Works

798. The documents identified the sum of $254,000 in respect of an order placed by Ridgeview for the lifts. Mr Large agreed in cross-examination that this sum had to be credited to Ridgeview in the valuation of their account. Thus, there is an additional sum of **$254,000** to be credited to the Ridgeview account, which then falls to be deducted from the total to arrive at a proper valuation of ICE's works. To this extent, I accept paragraphs 302 and 303 of Harlequin's closing submissions.

799. That gives rise to an overall deduction to reflect Ridgeview's work of **$8,928,294**, being $10,853,294 (sub-section (a) above) less $1,468,000 (sub-section (b) above), less $711,000 (sub-section (c) above, plus $254,000 (sub-section (d) above).

8.5 Summary

800.

Item	Paragraph Number	Amount
1 Cabanas	592-595	14,587,013
2 Apartment Blocks	596	8,114,364

3(a) Trader Vic's	597-602	771,600
3(b) Beach Bar	603	9,504
3(c) Steak Restaurant	604	52,800
3(d)+(e)Asian Fusion / Italian	605-606	518,400
3(f) Jack's	607	750,000
3(g) Pastry Shop	608	10,800
3(h) Retail Units	609	46,656
3(i) Pools	610-614	76,050
3(j) Marina	615-620	35,000
4(a) Spa Island	621-625	112,500
4(b) BoH	626-629	40,000
5(a) Landscaping	630-634	630,000
5(b) Maintenance: Gatehouse	635	-
5(c) Lake Construction	636-638	480,000
5(d) Filler Egypt	639	-
5(e) Access Road	640-643	160,000

5(f) On-Resort Roads	644	52,000
5(g) Off-Resort Roads	645-648	170,000
5(h) Pathways	649-651	102,000
5(i) Works to Beach	652	1,260,000
5(j)+(k) Sea/River Defences	653-667	500,000
5(l) Utility Contracts	668-670	61,950
5(m) Mechanical Service Contracts / Cabanas	671-676	260,000
5(n) Mechanical Service Contracts / Blocks	677-680	390,000
5(o) Electrical Service Contracts / Cabanas	681-687	400,000
5(p) Electrical Service Contracts / Blocks	688	500,000
5(q) Lifts	689	254,821
5(r) Site Drainage	690-694	400,000
6(a) Materials on Site	695-700	1,950,000

6(b) Professional Fees	701-706	-
6(c) Plant & Equipment	707-715	629,629
7. Variations	716-768	387,500
8(a) Deduction for Remedial Work	769-774	-
8(b) Deduction for Incomplete Work	775-780	-
8(c) Enhancement for Contractor's Risk	781	-
8(d) Enhancement for Maintaining Site Presence	782-783	-
9 Deduction for Value of Ridgeview Works	784-799	(8,928,294)
TOTAL		**$24,784,293**

8.6 The Factual Evidence

8.6.1 The Evidence of Ms Shona Quammie

801. Ms Quammie had worked in the accounts department for ICE prior to 16 June 2010, before embarking straight away on a similar role for Harlequin. She was a clear, direct and impressive witness who was a meticulous keeper of records. The clarity and directness of her evidence contrasted favourably with the evidence of many of the other witnesses of fact on both sides.

802. The centrepiece of Ms Quammie's evidence was the schedule which she produced (E/15856), dealt with in paragraph 20 of her witness statement. The information in the schedule was information which she prepared during her work for ICE. The

record, which was generated by the account system QuickBooks, was kept up to date by Ms Quammie on a daily basis. She said she ran the report each day. She made a copy for herself shortly before she left ICE's employ. When she went to work for Harlequin and became involved in the various strands of litigation she said that she discovered that they had copies too. She verified that Harlequin's copy was the same as the copy that she had.

803. Accordingly, all the information in the schedule was contemporaneous, with one exception. The important element which Ms Quammie added for the purposes of this (and other) litigation was to give it a designation: that is to say, to identify what the transaction was and in what category it should be put. She said that she undertook that work in 2013 and that the exercise was based on emails or instructions which she had.

804. Each transaction was therefore put into one of three categories which she had created and explained at paragraph 20 of her witness statement. Category 1 related to the Buccament Bay resort. Category 2 related to payments, costs or transfers to the related company, Cellate, who was based in Barbados. Category 3 was for other payments unrelated to either Categories 1 or 2 and therefore nothing whatsoever to do with Buccament Bay.

805. Unsurprisingly, Mr Fenwick asked Ms Quammie why she had retained this information at a time when she was working with ICE. Ms Quammie's response was clear. She said that, when she worked for ICE, she was concerned that they were not paying their bills, whilst at the same time funds were being directed outside the project. She found the whole situation "strange and unusual". In consequence, she decided to keep this record.

806. In my judgment, Ms Quammie's schedule demonstrates that the open-ended payment system to which Harlequin had agreed, on the advice of Mr MacDonald, was being thoroughly abused by Mr O'Halloran and ICE. To use the vernacular, Harlequin were being systematically "ripped off" by ICE, and Ms Quammie's schedule demonstrates, at least in general terms, the extent of the losses they suffered.

807. Paragraph 21 of Ms Quammie's witness statement summarised the schedule. On the basis of her analysis, only 54% of the total payments made by ICE related to Buccament Bay. 24% of the total payments made were in relation to Cellate costs or were transferred to Cellate and did not relate to Buccament Bay. In addition, approximately 20% of the total payments were wholly unconnected with the Buccament Bay project.

808. I find that the schedule is a broadly accurate representation of the payments made by ICE out of the monies paid to it by Harlequin. I therefore accept paragraph 21 of Ms Quammie's witness statement (on which she was not separately cross-examined in any event). I therefore find that only just half the money paid by ICE was spent on the Buccament Bay project. That of itself demonstrates that ICE was significantly overpaid. Only just over half the $52 million which they received was spent on the Buccament Bay project, say $27 million.

809. In those circumstances it is unnecessary for me to spend too long on the individual elements of the payments or other matters demonstrated by the schedule. However, I

identify below particular features, either because they were egregious examples of the abuse, or because they were matters on which Ms Quammie was specifically cross-examined.

810. In respect of certain payments to RLB, in cross-examination Ms Quammie was clear that these fell into her third Category (wholly unrelated to Buccament Bay) because they related to RLB's work on other projects, particularly in relation to Romania and Brazil. I accept that evidence and find that those payments were nothing whatsoever to do with Buccament Bay and therefore should not have been made out of money paid for the work at Buccament Bay.

811. Paragraph 23 deals with huge sums of money paid to Suzanne Floyd. She was Mr O'Halloran's fiancée. It is unclear whether she had any official role at ICE at all, but she certainly had no involvement in the carrying out of the works at Buccament Bay.

812. Paragraph 24 of Ms Quammie's witness statement refers to payments totalling EC$4 million made personally to Mr O'Halloran. There has been no attempt in these proceedings to justify those payments, although that would be a very difficult task for WK, as a third party. I am aware of course that the making of direct payments to Mr O'Halloran was one of the reasons for the findings of deceit in the Dublin litigation.

813. Ms Quammie was asked about the document (E/54/53/1) which related to "payments for Irish operations". Ms Quammie said she did not know what they were and she asked her line manager, Mr David Wallerson. He said that the payments should be posted to operations in Ireland and an inter-company account was used for this purpose. There was no evidence that these payments had anything to do with Buccament Bay or indeed with any legitimate ICE business. At paragraphs 51-68 of her statement, Ms Quammie dealt with further payments to accounts in Ireland. Large sums were being paid there. I find on the balance of probabilities that his was an attempt to divert money away from the Buccament Bay project and again demonstrated that ICE were able to keep the works at Buccament Bay going whilst diverting these large sums away.

814. At paragraph 41 of her witness statement, Ms Quammie noted that, as money came in, it was then spent, "but it was not against a project line or cost for Buccament Bay, but very much on an unstructured and ad hoc fashion. As far as I know nobody was keeping a project cost log." In her oral evidence, Ms Quammie said that there was no budget for the project which the works could then be compared against. It was "just a list of payables". The financial statements were based on the QuickBook programme so that, when an order was made, an invoice was generated and it was entered. She said that money was coming in from Harlequin but she saw no documents as to what was anticipated by way of payments in the future. She also saw nothing which demonstrated any sort of anticipated profit margin.

815. This evidence, taken as a whole, confirms the view that ICE failed to plan the project or the expenditure in any sort of sensible way, with the result that they repeatedly asked Mr Ames for more money, and he obliged. That conclusion was of course borne out by the Gajlewicz emails noted at paragraphs 180-200 above, including an earlier one dated 25 October 2009 (E/6662) not previously referred to, which showed the disastrous state of the ICE accounts.

816. At paragraph 43, Ms Quammie set out details of essential suppliers who were not being paid by ICE. She was not cross-examined about that. I find that not only were these essential suppliers not being paid, but that this failure was the responsibility of ICE, not Harlequin. Harlequin made payments more or less as agreed between 2008 and 2010. They were never at any point significantly outside or beyond the onerous payment obligation that they had accepted. Thus the failure to pay critical suppliers was ICE's responsibility, and I find it was a result of their decision to spend Buccament Bay money on other things.

817. One example of this was the supplier of the air-conditioning and other electrical equipment, SG DeFreitas (dealt with by Ms Quammie at paragraph 49 of her statement). She was asked about the document (E/11693) which showed that ICE owed DeFreitas EC$700,000 and that this was causing great distress and that DeFreitas were going to stop work. The document (E/12219/1) demonstrated that, in consequence, this aspect of the works was halted. Again I find that this was ICE's responsibility.

818. At paragraphs 69-79, Ms Quammie dealt with the large sums of money spent by ICE on buying an aeroplane. During her cross-examination it was suggested that this might somehow relate to Buccament Bay. Ms Quammie was clear: she was told to make the payments for the aeroplane, and did so, but she said that there was "no activity of ICE that involved using aeroplanes".

819. At paragraph 80 she dealt with the large sums of money paid to Hertz St Lucia. She said that this fell within her Category 3 because Hertz was not an ICE operation. There was a suggestion that ICE might have been trying to buy Hertz St Lucia. It was not explained how that could have had anything to do with the Buccament Bay resort.

820. At paragraphs 103-104 of her statement, Ms Quammie dealt with the payments ICE made to buy a quarry on SVG. There are two issues here. The first is that Ms Quammie has recorded the payments for the quarry within Category 1 (i.e. as being a Buccament Bay resort expenditure). Thus the payments themselves are not part of her evidence about overpayments to ICE. In my view this interpretation is rather generous to ICE: given that the cabanas are block-work, it is very difficult to see why the purchase of a quarry was necessary. But I accept that it could be classified as a reasonable business decision, so I accept Ms Quammie's approach.

821. But the real concerns about the quarry can be identified in the document (E/782), which comprised instructions from Mr Wallerson to Ms Quammie as to how the payments for the quarry were to be recorded. The documents made plain that the payments being made to a Mr Walker for his car and his house were being hidden as payments for the quarry.

822. Also in her cross-examination Ms Quammie said that sometimes there were delays in payment by Harlequin which could effect what ICE could spend. Of course, she was not privy to the agreed payment schedule so she would not know whether or not in fact Harlequin were in delay: she would only know what she was told. She said that Mr O'Halloran would issue instructions as to what ICE should pay and what not.

823. Ms Quammie also gave important evidence about the average cost of the payroll, that is to say the labourers actually carrying out the work. She said that on average the

payroll cost was about EC$1.1 million per month. That appeared to come as a surprise to Mr Fenwick during cross-examination because he had thought that that was the amount per week. The reason for his surprise is obvious. At that rate, the weekly payroll was less than EC$300,000 which equates to about US$75,000. That was a fraction of the weekly payments being made by Harlequin SVG to ICE, yet another way of demonstrating that, even allowing for materials, management costs and the like, Harlequin were overpaying ICE for the works they were carrying out.

824. Ms Quammie said that she stopped working for ICE on Friday 16 June 2010 and on the Monday started work for Harlequin. She said that in the meantime somebody had taken away the ICE files and the ICE server was no longer available. However, as noted above, she had a copy of the schedule in any event. She then had the monumental task of sorting out the Harlequin accounts, which were all over the place (E/13456/1). She said that she reconciled every single penny. I accept that evidence.

8.6.2 Other Factual Evidence

825. There was other evidence which supported Ms Quammie's view that ICE did not run this project properly or efficiently, and that large sums of money were being spent by ICE on items which were nothing to do with Buccament Bay. So what she said from an accountant's point of view was supported by other evidence from a project management perspective.

826. Thus Mr Campion, at paragraphs 17-23 of his witness statement, and paragraph 41-43, dealt with the way in which ICE ran the project and, in particular, the absence of a proper programme, the absence of a proper procurement schedule, the failure to maintain plant and equipment. This supported what Ms Quammie was saying about the way in which the accounts were managed. It made clear that, *prima facie*, Harlequin were not getting value for money from ICE. The cross-examination on these matters of Mr Campion was very limited and did not alter my view that it broadly supported Ms Quammie's evidence.

827. There was evidence from Ms Tricker of the amounts paid to ICE. That is set out at paragraph 54-63 of her witness statement. The schedule is at (E/15840). It is in the sum of $51,914,078.13. Her evidence on this was not challenged in cross-examination, perhaps because it was close to the figure calculated by Mr Large. Ms Tricker said that the sum was paid by reference to invoices (E/15843). Following the provision of this Judgment in draft, and yet more argument between the parties, they eventually agreed the figure paid to ICE at £50,524,663.

828. There was also evidence from Mr Ames about the other things that ICE spent their money on. He said, by reference to the document (E/9958/2) that he was very concerned when he discovered Mr O'Halloran's unusual expenditure items: as he asked himself, "why the hell is he buying airlines?" Mr Ames said that Mr MacDonald told him that this sort of expenditure was from the ICE profits. Mr Ames said that he objected to this expenditure if it prevented Mr O'Halloran from completing Buccament Bay on time. He also said that he was concerned that Mr O'Halloran was focused on this sort of expenditure rather than on completing the works at Buccament Bay.

829. Accordingly, I find that the factual evidence from Ms Quammie and others strongly supports the conclusion that ICE were paid much too much for the work they actually carried out at Buccament Bay.

8.7 The Two Cross-Checks (Paragraphs 563-565 above)

(a) By Reference to ICE's Expenditure

830. Mr Large calculates the sum paid to ICE at $51,708,638.68, whilst Mr Amin calculates it at $52,471, 642. There were then minor disputes between them which either increased or reduced the figure, depending on which side they were on (see the answers to my *Question A4*). The fact that the parties were not able even agree an ordinary issue like the sum paid to the contractor, and expect the court to do it instead, is deeply regrettable. Only after having had the draft Judgment for a week were the parties able to agree a (new) figure, which then necessitated changes to the subsequent mathematics. Of that amount, Ms Quammie's evidence, dealt with at **Section 8.6.1** above, demonstrates that only about 54% of it, or around $27 million, was referable to Buccament Bay. That assessment is generally supported by the other factual evidence at **Section 8.6.2** above. When proper allowance is made for defects, inefficiencies and the $96 per square foot rate, that figure compares very closely with the value of the work actually carried out, which I have calculated in **Section 8.5** above, in the sum of $25 million odd.

(b) By Reference to the May 2009 Agreement

831. The experts have not utilised the basic agreement of May 2009 between ICE and Harlequin SVG, as noted in **Section 5** above, in order to value the ICE works. There was no real explanation for that. I regard that as unfortunate; it seems to me that it would have been a much better and more reliable basis for valuing the ICE works. But I consider that the May 2009 agreement is relevant as a cross-check to the valuation which I have carried on the basis of the expert evidence.

832. I have found that the May 2009 agreement amounted to a lump sum agreement for £19.35 million, plus an amount of £5 million on or after completion, making a lump sum of £24.35 million. That is roughly $50 million at the exchange rates then operable. In addition to that is the approximately $11 million paid to ICE prior to May 2009. That therefore suggests a valuation of approximately $60 million for the entirety of the Phase 1 works as agreed in May 2009. Since more than half of those Phase 1 were not completed (one partially-completed Apartment Block and a shell, instead of 3 completed Apartment Blocks; no completed cabanas such that only 68 were ready for August; none of the waterfront village to any extent), that again broadly compares to my valuation of the work actually done at $25 million.

(c) Summary

833. Thus, on this basis, the bottom up, item-by-item valuation of the ICE final account produces a figure of approximately $25 million (see **Section 8.5** above). A valuation produced by reference to the factual evidence as to what was spent on the works produces a similar figure of $27 million, and a valuation by reference to the May 2008 agreement also produces a comparable figure, when allowance is made for all the Phase 1 works not done. These two cross-checks support my assessment that a proper

valuation of the ICE works at ICE rates was the figure of $25 million set out in **Section 8.5** above.

9. LOSS AND DAMAGE

9.1 Overview

834. There are two principal claims for loss and damage against WK. Claim 1 is for $31,696,127. This is said to be the difference between the pleaded sum of $54,097,193 paid by Harlequin to ICE and the pleaded value of those works at $22,401,066. The former figure is too high; see paragraph 830 above. The latter figure was higher than the $17 million odd figure contended for at trial by Mr Amin.

835. In the alternative, Harlequin claim at Claim 2 $13,245,333 which is said to represent the amount of ICE's "misappropriations", namely the money spent on aeroplanes and the like. As pleaded, this amount is said to arise from a report by Mr Jacobs who, although he gave evidence in the Irish proceedings, was not a witness in these proceedings.

836. There are then a series of further claims. Claim 3.1 is for $9,634,374, being 25% of $48,171,874, the amount paid by Harlequin to others following the sacking of ICE. It is said that the $9 million figure, being 25% of the $48 million, represents the additional cost caused as a result of the emergency nature of the works. Claim 3.2 and 3.3 are for $560,817 (emergency procurement costs) and $372,940 (demurrage). There is also an unquantified claim for storage charges. These are all claims consequent upon delay.

837. Claim 4 is for £6,187,537, the extraordinarily large sum spent on the legal proceedings in Ireland. Claim 5 is for security measures at £939,321 said to be necessitated by the circumstances in which ICE were removed from site. Claim 6 is for £510,302, the total amount of fees paid to WK.

9.2 Claim 1: $31,696,127 (Overpayment)

838. As noted above, the amount paid to ICE is $50,524,663. From that falls to be deducted the sum which I have found equates to a proper value of their final account, namely $24,784,293 (paragraph 800 above). Thus the amount of the overpayment is the first figure less the second, which gives a total overpayment of $25,740,370.

839. However, there is a further deduction to be made, as foreshadowed in paragraph 542 above. If I am right, and Mr McDonald should have given advice about the fundamental requirement of a valuation process, and if Harlequin had accepted that advice, that would have cost them money. They would have needed to engage RLB, or somebody like them, to carry out a basic quantity surveying role. A deduction therefore has to be made for those services in any consideration of loss and damage, because it would not be appropriate for WK to be liable for something which, on this analysis, would have been paid for by Harlequin.

840. There was no evidence as to what this would have cost, although the need to make an adjustment for it in principle was part of WK's closing submissions. In my view, based on my knowledge of the construction industry, such a valuation process would

not have cost Harlequin more than 10% of the value of the works; indeed, I consider that 10% is a generous estimate. Accordingly, an allowance of 10% of the final account value of $24,784,293 ($2,478,429) needs to be made. That would reduce the overpayment of $25,740,370 to **$23,261,941**.

841. For these reasons, I consider that the loss that flows from the failure to advise about the need for a simple valuation process was the difference between the value of the work done and the amount that was actually paid to ICE, less an allowance for the cost of that valuation process itself. That produces a figure of **$23,261,941**.

9.3 Claim 2: $13,245,333 (Misappropriations)

842. This claim would appear to be parasitic upon allegations of fraud against ICE which were not fully argued before me, and on which the evidence was incomplete. Ms Quammie's evidence certainly makes out a *prima facie* case of fraud, but I would be reluctant to make findings of fraud against ICE/Mr O'Halloran in circumstances where they have not been heard[31]. In my view, the main relevance of the alleged misappropriations in these proceedings has been to confirm my overall valuation of ICE's final account.

843. Further and in any event, the claim against WK for this Claim depends on the allegation that they should have passed on to Harlequin the confidential information they had obtained when acting for ICE. I have rejected that allegation so Claim 2 falls with it.

844. It is difficult, if not impossible, for me to identify an accurate and costed list of misappropriations because the calculation is based on an exercise produced for the Dublin proceedings which was not tested before me. I agree with paragraphs 317.3-317.4 of WK's closing submissions, to the effect that Mr Dearman's evidence could not be said to be a clear endorsement that any particular items could be classified as misappropriations. Still further, any claim in damages would be limited to a much smaller sum, because (for the reasons previously identified) it could only relate to the alleged misappropriations in April and May 2010. The payments made during this period were themselves modest and it is difficult to see any part thereof that related to any specific misappropriations.

845. In any event, this item is not a separate head of loss: it is pleaded in the alternative. It therefore forms a (small) part of the figure of $24 million-odd overpayment noted under Claim 1 above. For all those reasons, I make no separate finding or award in respect of the alternative Claim 2.

9.4 Claim 3.1: $9,634,374 (Acceleration)

846. It is said that Harlequin paid $48,171,874 for the works within Phases 1A and 1B. The submission is that 25% of that represents the equivalent of an acceleration payment: in other words, but for WK's breaches, this work could have properly organised and carried out in a logical sequence. It therefore would have cost 25% less.

[31] In this context, there was a good deal of argument about the validity or otherwise of Mr Newman's purported Director's Loan Account. The evidence suggested that it was an unreliable document. But in the light of my other findings, I expressly decline to deal further with this essentially peripheral issue.

Because of the circumstances and the need to achieve a soft opening in August 2010, it is said that the works therefore cost more than they should have done.

847. The first point to make is that this claim appears to be parasitic upon the delay claim against WK which I have rejected both as a matter of liability and as a matter of causation. Nothing therefore falls to be recovered under this head. In addition, if it were necessary, I should also say that, for the reasons noted below, this claim has not been proved in any event.

848. First, there was no evidence of any acceleration measures. The works progressed in the same way as they had done under ICE; it is not unfair to describe that as "haphazard", as WK do at paragraph 313.1 of their closing submissions.

849. Second, the claim itself turns on two elements: the $48,171,874 figure, and the reasonableness or otherwise of the 25% estimation. Neither stand up to scrutiny.

(a) The $48,171,874 Figure

850. This figure was the subject of evidence of Paul McTaggart, an employee of Harlequin from 2011. He prepared the schedule, and its detailed backup, for the purposes of the Dublin litigation. He explained during the hearing of those proceedings (Day 31, pages 102-104) how he had calculated the payments made by ICE in respect of Buccament Bay.

851. In cross-examination in this case, Mr McTaggart said that he relied on the people who were in SVG at the time and who provided him with much of the backup. He said that the schedule, and the much more detailed spreadsheet that lay behind it, had been prepared by him on the basis of the information with which he had been provided. At the time that he prepared it he had checked every item and he said he was content that the schedule was accurate.

852. In cross-examination numerous individual items were put to him. He was unable to remember the individual items: what they were for, why they had been allocated in the way that they had been; and what the backup had been to support the individual items. His repeated answer was that although he did not now recall the item under review, he was happy at the time that the schedule was put together that the individual items had been incurred. The passage noted in paragraph 313.8 of WK's closing submissions are entirely typical of his inability to answer detailed questions on the schedule.

853. In my view, Mr McTaggart was an honest witness and I accept his evidence that the schedule that he put together was, on the basis of the information available to him at the time, an accurate representation of the sums paid by Harlequin SVG, and had been allocated on a fair and reasonable basis. The three particular problems with the exercise, outlined below, were no fault of Mr McTaggart.

854. The first difficulty was that the schedule reflected the state of the Harlequin SVG records. Those records did not make it possible to identify a sum of money paid for, say, air-conditioning, pursuant to an obviously discernable sub-contract. The records did not appear to make such a task possible. The worrying thing about that was that Mr Campion, who was involved in undertaking the works in Phase 1A and Phase 1B

and appointed Mr O'Connor as project manager for those works, said in clear terms in his cross-examination that there were such records. He maintained that it was quite possible to identify the relevant sub-contract and the payments made pursuant to it. That of course begged the question as to why, if such records were available, they had not been made available so as to allow the accounting to be done in that more simple and straightforward way.

855. The second difficulty flows from Mr McTaggart's evidence in cross-examination. He simply could not support any single entry in the schedule, making proper cross-examination and testing impossible. That may be because of the passage of time, it may be due to the inadequacy of the Harlequin records, but the fact remained that the figures were incapable of being proved in any normal sense.

856. The third difficulty was that this exercise could and should have been dealt with by Mr Amin. It was not: Mr Amin made clear that the $48 million was simply "a figure that someone has given me". So he could not help at all.

(b) The 25% Estimate

857. This seemed to be an entirely random percentage. It was unclear who had calculated it or on what basis. As I have already noted, there was no evidence of any particular activity which could be instantly recognised as an activity designed to accelerate the works. In such circumstances, it seems to me that the 25% was nothing more than a 'finger in the air' exercise. I decline to accept it for the same reasons noted above.

858. Accordingly, Claim 3.1 for acceleration fails at every level. I have rejected the relevant liability; I have rejected the relevant causation; I have rejected it on the facts; and I have rejected the quantum claimed.

9.5 <u>Claims 3.2, 3.3 and 3.4 (Other Delay Claims)</u>

859. As already noted, I have rejected the allegations in respect of delay against WK. I therefore reject these items of loss, since they arise under that head of claim. I have also rejected the causation case in respect of these items. As to quantum, I agree with Mr Indge that the basis for the calculations is unclear.

860. Again, I would not be happy to sanction the underlying factual assumptions of any of these claims. There was no compelling evidence of emergency procurement costs: in many ways the procurement after early June 2010 was just as haphazard as the procurement before that date: see paragraph 851 above. The demurrage and storage charges in respect of the FF&E were not the subject of any evidence. Responsibility for any such costs could be laid at the door of Mr Smith because he knew that the site was simply not going to be ready to receive them. No link to WK has been made out.

861. For these reasons, these additional delay claims are rejected.

9.6 <u>Claim 4: £6,187,537 (Costs)</u>

862. In my view these claims fail as a result of my earlier findings. The only breach of contract on the part of WK which survives the liability and causation arguments is in respect of the absence of a valuation process, which I have quantified in **Section 9.2**

above. The costs incurred in the Dublin litigation are nothing to do with Mr McDonald's failure to advise about the need for a contractually-binding valuation process; in the alternative, I find that these costs were not the natural consequences of such breach so as to be recoverable under the first limb of ***Hadley v Baxendale.***

863. Moreover, I consider that there was a complete break in the chain of causation in relation to these costs. These costs were incurred in seeking to recover moneys from Mr O'Halloran which, so it was argued in Dublin, were obtained through deceit. They cannot suddenly become recoverable against WK. Further and in any event, since Harlequin were successful in the proceedings in Dublin, they would have ordinarily been entitled to their (reasonable) costs against Mr O'Halloran in those proceedings. I am doubtful as to whether I have the jurisdiction to award costs incurred in the Dublin litigation against a different party in these proceedings, even as damages, particularly as the Dublin litigation has not yet come to an end.

864. At one point it was suggested, by reference to paragraph 9-005 of ***McGregor on Damages, 19th edition*** that Harlequin were entitled to recover these costs as damages because they represented a reasonable attempt to mitigate their losses. However, the mere fact that a party seeks to mitigate its loss does not automatically mean that the sum spent on the mitigation measures become recoverable as damages. Moreover, the figures here would suggest that this may have been the most ill-advised mitigation exercise in history: Harlequin have apparently spent over £6million on the costs of the Dublin litigation, and have yet to recover a penny piece of the damages of just £1.5 million awarded against Mr O'Halloran. As mitigation exercises go, it could be described as something of a flop.

865. For all these reasons, this Claim fails.

9.7 Claim 5: £939,321 (Security Measures)

866. This claim arises out of the sacking of ICE. ICE was sacked principally because they had failed to keep their promise to complete by 1 July 2010. That is not a part of the case which has been made out against WK as a matter of liability and, even if it had, I have rejected the case against them on causation grounds too. Claim 5 does not therefore arise for consideration.

867. Further and in any event, I heard no evidence about the £939,321. I heard no evidence about any potential risks posed by Mr O'Halloran and/or his staff in the days, and weeks, after ICE were sacked. Mr Ames cannot have been at all bothered by Mr O'Halloran; after all, he rejected out of hand similar suggestions of physical menace when they arose in connection with Mr Roberts. I find that Claim 5 is therefore unproved in any event.

9.8 Claim 6: £510,302 (Fees paid to WK)

868. The figures are wrong: I have found that Harlequin paid WK around £740,000. But the basis for this claim, that there was a complete failure of consideration, is rejected.

869. The conventional approach to claims against professionals is to recognise that the professional is entitled to his or her fees, less any cross-claim for damages. It is a rare case where the professional is held liable for the cross-claim and is also found not to

be entitled to any fees. It only happens where the professional's performance is so bad that the failure goes to the heart of the engagement and leads to the conclusion that no fees at all should be payable.

870. In my view, this case is a long way from that situation. True it is that I have been very critical of Mr McDonald's performance. But on the other hand, the fact that, back in 2008 and 2009, this project had even some hope of being realised was due to Mr McDonald. As the evidence demonstrated, Mr and Mrs Ames were wholly unequipped to take on such an ambitious project. Mr McDonald's central role was vital. It would therefore be contrary to the evidence to suggest that in some way he was not now entitled to be paid any fees for the work that he did.

871. In addition to the claim in respect of the WK fees, there are a group of other claims which were and remain entirely unquantified. None of them have been made out in principle and I dismiss them all.

9.9 Summary

872. For the reasons set out above, I allow Claim 1 in the sum of **$23,261,941**. I reject every other claim for loss and damage.

10. CONTRIBUTORY NEGLIGENCE

873. WK's submissions on contributory negligence are set out at paragraphs 322-328 of their closing submissions. This deals with both contributory negligence and mitigation. As for contributory negligence, WK say that Mr Ames' management failures pervade every aspect of the case and that, in particular, he and/or Harlequin failed to take any or any appropriate steps to protect Harlequin Property SVG by ensuring that it entered into proper and full written contracts with Ridgeview or ICE. They seek a 75% reduction in any damages awarded against them.

874. In their closing submissions, Harlequin deal with contributory negligence very briefly (paragraphs 220-225). Essentially two points are taken: contributory negligence cannot succeed as a defence to the substantive breach of fiduciary duty allegations; and the allegation does not take on board the fact that the Harlequin business was reliant on the services of others who were engaged to do what was needed. It is argued that WK cannot complain that Harlequin were at fault for failing to spot what neither they, nor anyone else, identified as a problem.

875. The fiduciary duty point does not arise. I have rejected the existence of such a duty. Even if there was a duty, it can only have been relevant to the confidential information claim, which failed anyway. The claim arising out of WK's failure to give proper advice as to a valuation process arose under the straightforward contractual obligations owed by WK to Harlequin, and is therefore susceptible to an allegation of contributory negligence.

876. Furthermore, I have concluded that Harlequin's second submission, namely that Harlequin cannot be responsible for the failures of their other consultants, does not address the real issue. I accept at once that there can be no reduction for contributory negligence if, in the present case, Harlequin had received no advice from anyone as to the need for a valuation process. Then, the fact that others, such as the lawyers, might

also have given that advice, but failed so to do, could not be the responsibility of Mr Ames or Harlequin, so could not amount to contributory negligence.

877. The difficulty for Harlequin is that that is not this case on the facts. On the contrary, the evidence is that Mr Ames received advice about the importance of a valuation process from a number of different sources. Examples include Escarfullery & Associates (paragraph 67 above); Mr Commissiong (paragraph 91 above); and Mr Roberts (paragraph 126 above). What is more, Mr Ames appeared to understand the need for payments to reflect what had actually been done (see paragraph 109 above and the detailed discussion at **Section 6.5.4** above) but did not check that this was happening. I have found that his belief that somehow RLB were doing it and/or he could leave it all to Mr MacDonald was wishful thinking. So the failure to ensure that there was a contractually-binding valuation process was, at least in part, his responsibility too.

878. Moreover, it should not be thought that the advice from others noted in the previous paragraph was peripheral. Take the Escarfullery & Associates report, which raised the absence of a valuation process in connection with Ridgeview. Mr Ames should have looked at that carefully. Had he done so, he would have seen that Ridgeview had been paid $22 million (see paragraph 70 above) for work which, at ICE rates, was worth only $9 million (see **Section 8.4.9** above). Even allowing for the fact that the Ridgeview rates may well have been higher than the ICE rates, he should – at the very least – have thought that he did not want the same thing to happen with ICE. But he does not appear to have given it a moment's thought.

879. For these reasons, on the evidence, I accept the submissions as to contributory negligence advanced by WK. As noted, they contend that an appropriate finding would be 75%. I consider that to be too high. It ignores Mr McDonald's central role, as explained in **Section 6** above. No percentage figure was offered by Harlequin.

880. On the evidence, balancing Mr McDonald's key role with the other advice that Mr Ames received as to valuation, and his own understanding of the importance of it, I conclude that the right deduction for contributory negligence in this case is 50%. In a much broader way, that also reflects my generally adverse views of the conduct and evidence of both Mr McDonald and Mr Ames: I consider that there is complete justice in a result which makes them equally to blame for this major cause of loss to the investors.

881. Accordingly, my finding as to contributory negligence means that the damages recovered by the claimants must be reduced from $23,261,941 to **$11,630,970.50**.

882. As regards Harlequin's alleged failure to mitigate, two allegations are made. First it is said that Harlequin should have continued with ICE in June 2010, and therefore avoided the costs of retaining a completion contractor. Secondly it is said that they failed to pursue the litigation in other places on a reasonable basis.

883. On a proper analysis neither of these points now arise. I have not awarded Harlequin any completion costs. But I should also say that, to the extent that it is a point pursued by WK, I do not consider that Harlequin were obliged to continue to employ ICE after early June 2010. They acted reasonably in terminating their arrangement with ICE, for all the reasons already set out in this (over-long) Judgment.

884. The failure to mitigate in respect of litigation costs is immaterial because I have not allowed that item of claim in any event. I accept that this is a much stronger case than ***Hermann v Withers LLP*** [2012] P.N.L.R. 28 where Newey J held that a decision to bring expensive litigation was a failure to mitigate because it was foreseeable that the claimants "could find themselves unable to recover costs of upwards of £25,000 even if ultimately successful in such litigation". The irrecoverable costs in the Dublin litigation are on another scale altogether.

11. THE PROTECTION OF THE INVESTORS IN THE INSOLVENCY OF HARLEQUIN SVG

885. The evidence in this case was completed just before the start of the long vacation. When considering various aspects of this case during that period, and prior to the final submissions in late September, I became concerned that, if I did award any damages to the claimants, the sums ordered should be paid to the investors, rather than to the company, much less to Mr and Mrs Ames.

886. In the light of that, I concluded that the appropriate course might be to order that the $11,630,970.50 should be paid into some form of escrow account, in order that the position as between the investors and Harlequin SVG could be properly resolved. That seemed to me to be the fairest way of ensuring that those who have lost the most in this case, namely the investors, had at least some prospect of recovering some of their money from this Judgment.

887. Any doubt that I had about that as the correct course was dispelled by the letter sent to me on 6 October 2016, after the final oral submissions, by the claimants' solicitors. They informed me that on 3 October 2016, Harlequin Property SVG had filed a Notice of Intention to Make a Proposal under s29(1) of the Bankruptcy and Insolvency Act in SVG. It is no coincidence that Harlequin have taken this step immediately after the conclusion of these proceedings. It makes me even more certain that this court needs to take all legitimate steps it can to ensure the protection of the investors.

888. Accordingly, when this Judgment is handed down, I would like to be addressed by both parties as to the best means of achieving that protection.

12. CONCLUSIONS

889. For the reasons set out in **Section 6** above, I accept the liability claim against WK arising out of the failure to advise Harlequin to enter into a contract with ICE. I reject the other two alleged liabilities, in respect of ICE's delay and the failure to pass on to Harlequin information confidential to ICE.

890. For the reasons set out in **Section 7** above, I find that, with one exception, WK's liability for failing to advise as to the necessity of a contract between ICE and Harlequin caused no loss. In addition, if I had been wrong on either of the allegations concerning delay and confidential information, I find they would also have failed on causation grounds.

891. The exception is my finding that, if Mr McDonald had given proper advice as to the necessity of a contractually-binding, straightforward valuation process, the agreement

between Harlequin and ICE would have incorporated such a process and would have ensured that ICE were only paid a reasonable amount for the work that they did in accordance with their own rates.

892. In addition, I found that if, contrary to my conclusions, WK should have provided to Harlequin information confidential to ICE, and if (again contrary to my conclusions) this caused any loss, then it would have been the same as a small part of any loss that flowed from the failure to give advice as to the valuation process. In other words, if I was wrong and the confidential information claim was sound in law and as a matter of causation, there was no separate loss arising.

893. For the reasons set out in **Section 8** above, I have concluded that ICE was significantly overpaid and that, as against the $50,524,663 that they were paid, the proper valuation of their work was no more than $24,784,293.

894. For the reasons set out in **Section 9** above, I have concluded that Harlequin were *prima facie* entitled to loss and damage in the sum of **$23,261,941** pursuant to Claim 1, being the amount of the overpayment to ICE less an allowance for the cost of the valuation process. I have rejected every other claim.

895. For the reasons set out in **Section 10** above, I have reduced by 50% the sum I would otherwise have awarded to reflect Harlequin's contributory negligence. Hence the amount recoverable by Harlequin against WK is **$11,630,970.50**.

896. For the reasons set out in **Section 11** above, I would not want that sum paid direct to Harlequin Property SVG, at least at this stage. My proposal is to have it paid into some sort of escrow account whilst the competing interests of the company, the liquidators (if they have been appointed) and, in particular, the investors are resolved. I would hope that this – or something like it – can be done by way of agreement.

897. All other matters, such as interest and the like, can be dealt with at the handing down of this Judgment.