Neutral Citation Number: [2005] EWHC 482 (QB)

Case No: HQ03X02897

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 March 2005

Before:

THE HON. MR JUSTICE GRAY

- -

Between:

Mr Paul Rackham	**Claimant**
- and -	
(1) Mr Nigel Sandy	**Defendants**
(2) Mr Hugh Etheridge	
(3) Mr Steven Hardman	

- -
- -

Mr Richard Rampton QC and Miss Jane Phillips
(instructed by **Peter Carter Ruck & Partners**) for the **Claimant**
Miss Adrienne Page QC and Ms Sara Mansoori
(instructed by **Olswang**) for the **Defendants**

Hearing dates: 9-21 March 2005

- -

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.

.....

THE HON. MR JUSTICE GRAY

Mr Justice Gray:

The parties

1. The Claimant in this libel action is Mr Paul Rackham. In 1983 he founded Waste Recycling Group ("WRG") and was at all material times thereafter a substantial shareholder in the company. Its business, as its name suggests, is waste disposal and recycling. Mr Rackham was Managing Director of WRG until it went public in 1994. He continued as Executive Managing Director and was later Executive Chairman. He ceased to hold executive office in 2001 because he had reached the age of 65 and wanted to reduce his involvement in WRG. He remained on the Board in a non-executive capacity. By 2001 the annual turnover of the company was £600million.

2. There are three Defendants, namely Nigel Sandy, Hugh Etheridge and Steven Hardman. All three joined WRG in 2001: Nigel Sandy as Chief Executive Officer; Hugh Etheridge as Finance Director and Steven Hardman as in-house solicitor. Mr Sandy had previously served as Managing Director of Hanson Waste Management Limited which company was acquired by WRG in January 2001. Mr Sandy was appointed CEO of WRG on the recommendation of Mr Rackham. Mr Sandy instigated the appointments of Mr Etheridge and Mr Hardman.

The libel

3. Mr Rackham's complaint in this action is of a letter dated 20 September 2002 which was admittedly written and/or approved by the three Defendants. The addressee of the letter was Mr James Newman who was at the time the Chairman of WRG. It was copied to Messrs Philip Hudson, John Napier and Sam Wauchope, all of whom were non-executive directors of WRG. The letter was on the notepaper of WRG.

4. The terms of the letter need to be set out in full:

> "Dear James,
>
> I refer to our earlier telephone conversation when you outlined that you had agreed the following with John Napier:
>
> 1. Not to discuss my intended re-organisation at the Board Meeting in Doncaster on Monday 23 September, next week;
>
> 2. Not to discipline and/or dismiss Chris Cox despite legal advice that his actions during the course of last week and this week in contacting the managing and functional directors, urging them to write to me to criticise the re-organisation, and to copy the criticism to my fellow executive directors, undermined my authority and materially breached

several provisions of his service contract, breached his fiduciary duties and justifies summary dismissal;

3. Not to confront Paul Rackham about a catalogue of regulatory, legal and accounting transgressions;

4. To promote an open debate and discussion about my intended re-organisation at an internal conference originally intended to be attended by managing directors and certain functional heads, but now to be attended additionally by the non-executive directors – including Paul Rackham who has been openly critical to date – at which I am asked to defend a re-organisation of the business which you approved, which is not a matter for debate, and which is not appropriate to discuss on a high level with operational management.

The conclusions you have reached and the strategy you are intending to pursue are unacceptable to me and to my executive team, Hugh Etheridge, Steven Hardman, Clive Denning and Peter Wilson.

This strategy should also be unacceptable to you and our fellow directors for the following reasons:

[page 2]

Chris Cox

1. An executive director has:

a) undermined my authority by inciting revolt within the business whilst openly pledging support for my proposals at executive committee level:

b) breached his fiduciary duties to the company and the shareholders in failing to act in the best interests of the business;

c) systematically failed over a substantial period of time to operate within established corporate procedures and practice by working from home, taking regular time off without authorisation from me, not communicating with me or seeking approval from me on issues of standard custom and practice, and not seeking to integrate himself within the executive team;

d) systematically under-performed in his role as commercial director by focussing purely on

business development, keeping no contact with our local authority customers who account for over half of our business, failing to involve himself in the detail of the major tender exercise for Leicester City Council, failing to organise and manage the commercial department effectively with no formal inter-departmental meetings or exchange of information, and no exchange of information with managing directors leading to a complete lack of information in relation to trade prices or market trends.

Paul Rackham

2. A main board director (now non-executive and formerly executive):

a) has a discloseable shareholding in one of the Group's financial advisers which he actively promoted to me and recommended to be involved on current projects which has not been disclosed to or considered by the board, and which has been brought to our attention by our single largest shareholder (aside from Kelda) as a corporate governance concern;

b) appears to be beneficially interested in one of the Group's landfill sites which similarly is a discloseable interest and has not been disclosed to or considered by the board and which I am informed by one of the main board directors at the time was available for acquisition by the Group but diverted for personal gain;

c) convened a meeting of competitors at which prices were discussed opening the Group to a potential fine of up to 10% of Group annual turnover;

d) instructed a senior management employee of one of our competitors interested in building a competing incinerator in Kent to meet with Kent to discredit our own Group's proposed incinerator technology;

e) presided over accounting policies which resulted in an investigation of the 2000 audited accounts by the Financial Reporting Review Panel and which we have spent a year trying to bring into conformity with current practice with significant shareholder value and legal consequences.

It is incumbent upon myself and Hugh as executive directors of a publicly quoted company to draw to your attention and that of our fellow directors the significance of continuing to preside over a Group which contains these two individuals.

In addition to the above, there are numerous other matters involving Paul Rackham where we have direct or hearsay evidence of actions on his part which appear to be against the interests of WRG and may involve secret profits, conflicts of interest and/or failure to disclose his personal interests.

Furthermore we are advised by the company's solicitors, Gouldens, that if proved the matters referred to above concerning Paul Rackham would constitute grave, and possibly criminal, breaches of his duties as a director of WRG. As fellow directors we, the other directors of WRG, would face personal liability (as well as public opprobrium) in the event of these matters coming to our attention and our failing to investigate and deal with the same.

Steve Hardman has brought a number of these issues to your attention in recent months and now that more detail has come to light Gouldens advise that it is incumbent upon the Board to act decisively against Paul Rackham at this stage, failing which we, his fellow directors, expose ourselves as I have indicated.

Neither Hugh nor I, nor indeed for that matter Steve Hardman our in-house lawyer, are prepared to continue managing a major public company where one of the directors would appear to be in flagrant breach of his fiduciary and legal responsibilities with the Board, including the other non-executives, taking no steps to address the situation.

Gouldens have indicated that in the light of recent scandals such as Equitable Life and Enron, they feel obliged, having learnt of the serious issues involved, to apprise all members of the Board as to the potential liabilities involved – as well, of course, as to the potential losses to shareholders should these matters not be addressed and/or should these issues come into the public domain.

Unless Chris Cox is dismissed immediately and I and the appropriate advisors to the company are allowed to present these issues to Paul Rackham with a view to his resignation being tendered, I, Hugh and my senior executive team in Steven Hardman, Clive Denning and

Peter Wilson will have no alternative but to give notice of termination of our employment, and therefore offices, under our respective service contracts which are, for the avoidance of doubt, announcable events.

I require a swift response in view of the advent of Monday's board meeting.

Yours sincerely,

Nigel"

5. It is accepted by the Defendants that this letter referred to Mr Rackham and that it was published not only to Mr Newman but also to Messrs Hudson, Napier and Wauchope.

The issues on liability

6. The defamatory meanings said on behalf of Mr Rackham to be borne by the letter complained of are as follows:

> "4.1 the Claimant had committed a catalogue of regulatory, legal and accounting offences including but not limited to:
>
> 1.1.1 failing to disclose to the Board of WRG a discloseable shareholding in one of WRG's financial advisors whose appointment the Claimant had actively promoted to the Chief Executive of WRG; and
>
> 1.1.2 failing to disclose to the Board of WRG a discloseable beneficial interest in one of WRG's landfill sites which the Claimant improperly diverted from WRG and bought instead for his own personal gain; and
>
> 1.1.3 convening an illegal price-fixing meeting of competitors, exposing WRG to a fine of up to 10% of WRG's annual turnover; and
>
> 1.1.4 wrongfully instructing a competitor to discredit WRG's proposed technology; and
>
> 1.1.5 presiding over improper accounting policies in the year 2000;
>
> 1.2 the Claimant had deliberately and wrongfully acted against the interests of WRG on numerous other matters and there were strong grounds to

suspect he had done so in order to make secret profits for himself;

1.3 in the premises, the Claimant had or there were good grounds to suspect that he had committed serious and flagrant criminal breaches of his legal and fiduciary duties as a director of WRG, on a par with directors involved in recent financial scandals such as Enron and Equitable Life".

Those meanings are denied by the Defendants but there was no argument on the issue of meaning in the course of the hearing.

7. The sole substantive defence is common law qualified privilege. Although it is accepted on behalf of Mr Rackham that the occasion of the publication of the letter was protected by qualified privilege, I should set out the facts relied on by the Defendants as giving rise to the protection of privilege.

"4.1 At the material time the First Defendant was the Chief Executive of WRG, the Second Defendant was the Finance Director of WRG and the Third Defendant was WRG's Legal Director. The Third Defendant was not a Board Director.

4.2 In May 2001 a complaint was made about WRG's 2001 accounts relating to the period when the Claimant was presiding over WRG as Chairman. As a result of the complaint the Financial Review Panel conducted an investigation in WRG. Following the investigation the Financial Review Panel criticised WRG for not disclosing all relevant matters in its accounts.

4.3 On 24 August 2001 the Claimant, then the non-executive Chairman of WRG, sent the First Defendant a memo entitled "Re Impax" enclosing two letters the Claimant had received from Impax Capital Corporation Limited ("Impax") dated 22 August 2001 in which Impax were seeking to act as *"an independent adviser to assist WRG manage the project process for Allington to ensure that the professional team (financial and legal advisers) deliver, as required"*. The Claimant stated in his memo to the First Defendant, *"I have been greatly impressed by Impax and the positive and constructive way in which they have assessed*

this project". The Claimant did not disclose to, or otherwise inform, the First Defendant that he was a shareholder of Impax and had an interest in the said company.

1.4 On 24 September 2001 there was a WRG Board meeting at which the Claimant was the Chairman. It was reported that the Project Finance Team at Impax would monitor and support KPMG on the Allington Incineration Project. On 26 November 2001 there was a WRG Board meeting at which the claimant was the Chairman. During the meeting clarification was given to the Impax fee structures. The Claimant did not disclose to, or otherwise inform, the Board members at these two meetings that he was a shareholder of Impax and had an interest in the said company, despite Impax being specifically discussed by the Board.

1.5 In or about 29 January 2002 the Claimant recommended to the Second Defendant that Impax should be appointed to advise WRG on the valuation of its landfill gas interests. The Claimant did not disclose to, or otherwise inform, the Second Defendant that he was a shareholder of Impax and had an interest in the company.

1.6 On 29 January 2002 there was a WRG Board meeting at which the Claimant was the Chairman. Following a full discussion, the Board agreed to use Impax as independent consultants in relation to WRG's landfill gas interests, The Claimant did not disclose to, or otherwise inform, the Board members at this meeting that he was a shareholder of Impax and had an interest in the said company, despite Impax being specifically discussed by the Board.

1.7 In April 2002 information was received by the Defendants and each of them to the effect that WRG was paying the Claimant royalties from a landfill site at Fornham Park which Anti-Waste Ltd, a wholly owned subsidiary of WRG, was leasing. In May 2002 further information to the same effect was received by the First and Third Defendants and the First Defendant asked the Third Defendant to investigate the matter.

1.8 In early September 2002 a large institutional shareholder of WRG drew the First and Second

Defendants' attention to the fact that the Claimant had a shareholding at Impax. The shareholder told the First and Second Defendant that he (the shareholder) had a right to be concerned about this and WRG's non-compliance with the rules on corporate governance.

1.9 As a result of the facts and matters set out in paragraphs 4.2-4.8 above, the Defendants and each of them were concerned about the claimant's business activities and the negative impact of such activities on WRG as a public limited company and upon the reputation of WRG and its board of directors, jointly and individually, in relation to compliance with the principles of good corporate governance and the protection of the interests of its shareholders. These issues were raised on a number of occasions in conversations with James Newman, in his capacity as Chairman of WRG, from about mid-June 2002 onwards and the Third Defendant requested that the Claimant be asked for his comments. James Newman replied that, prior to any approach to the Claimant, the Defendants would need to get evidence to support the issues and then to put them in writing to him.

1.10 In or around early September 2002 the Third Defendant told James Newman that he wanted to instruct Gouldens on behalf of WRG to investigate and advise on the legal position regarding (1) the purchase of the freehold of Fornham Park by Rossfleet; and (2) the Claimant's interest in Impax. James Newman agreed that Gouldens should be instructed to look into the matter on behalf of WRG.

1.11 The First and Third Defendants received Gouldens' written advice relating to Impax on 18 September 2002. Gouldens stated that the legal position was as follows:

(i) As at 11 October 2001, the Claimant was shown as having a shareholding in Impax Group Plc (the holding company) of 0.44%.

(ii) So far as WRG knew, this shareholding had never been disclosed to WRG.

(iii) Under article 134.1 of WRG's Articles of

Association there was a duty to disclose a material interest in any transaction, contract or arrangement with the company. The question of whether the interest of the Claimant in Impax was "material" should be examined by the Board, as if that was the case there would have been a breach of Article 134 of WRG's Articles of Association.

(iv) Under Articles 135.1 and 135.2 of WRG's Articles of Association a director could vote on a resolution concerning a company provided his holding was less than 1%.

(v) Under s 317 Companies Act 1985 it is the duty of a director of a company who is in any way, whether directly or indirectly, interested in any contract (which expression includes any transaction or arrangement whether or not constituting a contract) or proposed contract with the company, to declare the nature of his interest at a meeting of the directors. The declaration has to be made, in the case of a proposed contract, at the first meeting at which the question of entering into the contract is first considered, or in the case of a concluded contract, at the first meeting held after the contract became concluded. Failure to comply constitutes a criminal offence and the penalty is a fine.

(vi) Under s232 of the Companies Act 1985 the audited accounts must include particulars of any transaction or arrangement with the company in which a director had, directly or indirectly, a material interest. An interest is 'material' if it is so in the opinion of the Board. Careful consideration was required as to whether any such interest of the Claimant should have been included in the past accounts of WRG or should be included in future accounts.

1.12 On 19 September 2002 Robert Wheatley, then a freelance consultant on waste matters, informed the First Defendant that in 2001 the Claimant had arranged a meeting with WRG's competitors at which prices were discussed. Contrary to

good practice and corporate governance, the meeting was not minuted and the discussions had taken place without the knowledge and/or authority of the board. On hearing this the First Defendant was concerned about the implications in terms of the obligations of WRG and its board of directors under the Competition Act 1998. Robert Wheatley further informed the First Defendant that in 2001, while he was Group Chief Executive at United Waste, a competitor of WRG, the Claimant had sent him to see David Alexander, who was the head of waste disposal at Kent County Council, to disparage the technology deployed by WRG at the Allington/Kent County Council project.

1.13 The First and Third Defendants received Gouldens' written advice relating to the acquisition of the freehold at Fornham Park on 20 September 2002. Gouldens stated that the legal position was as follows:

(i) Anti-Waste Ltd, a wholly-owned subsidiary of WRG, has a lease of a landfill site at Fornham Park granted on 1 July 1991.

(ii) In 1999, the opportunity arose for WRG or Anti-Waste Ltd to purchase the freehold from the owner. The Claimant was aware of this as a director of WRG, of which he was Executive Chairman, and/or as a director of Anti-Waste. The benefit of the purchase would have been the merger of the freehold and leasehold interest with no future liability to payment of rent or royalties.

(iii) On 8 October 1999 the freehold was purchased by Rossfleet Investments Limited, the shares of which appear likely, by inference from public domain material, to be beneficially owned by the Claimant or his company, Paul Rackham Limited. There was a prima facie case that the Claimant or Paul Rackham Limited is the beneficial owner of the share capital of Rossfleet.

(iv) So far as WRG knows, the Board and shareholders of WRG and Anti-Waste did not approve Rossfleet's acquisition of the

freehold of Fornham Park and the Claimant has never disclosed any interest in the receipt by Rossfleet of royalties from Anti-Waste.

(v) A court would be likely to find that the Claimant had acted in breach of his fiduciary duty and he would be liable to account to WRG for the benefits accruing to him as a result. This could also be a breach of any service contract of his as a director entitling the company to summarily dismiss him and claim damages for the lost business opportunity. There may be a breach of Article 134.1 of WRG's Articles of Association, subject to the Board's view on materiality of the interest. Under Article 135 of WRG's Articles of Association, if the lease between Anti-Waste and Rossfleet had been the subject of a recent board resolution of WRG and if the Claimant had been in attendance at that meeting, the Claimant would have been prohibited from voting or counting in the quorum. The Claimant is likely to have committed a criminal offence under s 317 of Companies Act 1985 and to be liable to a fine. There may be a breach by WRG of s 232 of Companies Act 1985 in not disclosing the interest in the audited accounts.

1.14 Upon receiving the advice the First and Third Defendants were extremely alarmed at the legal and regulatory implications for WRG, the Board of WRG and themselves as officers of WRG of the Claimant's involvement in Fornham Park, as well as Impax and the other matters referred to in paragraph 4.2 and 4.12 above. In accordance with the instruction of James Newman to put any further evidence concerning the Claimant in writing, and as officers of a public company, they were under a duty to, and had an interest in, informing the Chairman and the other board members of the information. Accordingly the First and Third Defendants drafted a letter dated 20 September 2002 to the Chairman which set out their concerns. In order to ensure that the letter was written in terms which would be compliant with their duties as directors of a public limited company and that it accurately set

out the legal advice of Gouldens, it was e-mailed to Gouldens for their comment and approval. Gouldens amended and approved the letter prior to being sent to James Newman and the other publishees. The First and Third Defendants then telephoned the Second Defendant who was in Madeira and, after having explained the background to the matter, read out the letter. The Second Defendant agreed to support the letter.

1.15 The letter was sent by the First and Third Defendants to James Newman by e-mail, fax, post and courier and copied to the other non-executive members of the Board of WRG, Phillip Hudson, John Napier and Sam Wauchope. It was first received by fax by James Newman in the early evening on Friday 20 September 2002. Both James Newman and the Board agreed that the letter raised legitimate concerns that required proper investigation.

1.16 In the premises, the Defendant and each of them, as officers of a public company, WRG, had a legal and/or moral and/or social duty to publish the said letter to James Newman, as Chairman of WRG, and the other members of the Board of WRG, all of whom had a like interest in receiving it. Further or alternatively, the Defendants and each of them had a common and/or corresponding interest in the subject matter of the letter and/or published the letter in the reasonable protection of their own interests and James Newman and the Board members of WRG had a like interest in receiving it."

8. Although I have set them out for the sake of completeness, I should record the fact that it is the case for Mr Rackham that these particulars are neither necessary nor relevant and, save as specifically pleaded to in the Reply, they are accordingly denied. As will be seen, the facts which are relied on by the Defendants in support of their claim to privilege arise also in relation to the contention on behalf of Mr Rackham that, in publishing the letter complained of, the Defendants and each of them was actuated by malice.

9. Since privilege is the sole defence relied on and is admitted by Mr Rackham, it follows that liability in the action will turn on the issue of malice. That being so, I will set out the Particulars of Malice, pleaded in paragraph 5 of the Reply, in their entirety:

5.1 "The Defendants were aware that their own positions at WRG were

under threat.

5.1.1 From 6th December 2001 the Claimant had been consistently and openly critical of the First Defendant's management and the executive team's erosion of shareholder value. The First Defendant and his executive team were aware of these criticisms, many of which were made openly at Board meetings. Moreover, it was the Claimant's openly-stated belief that the whole of the Chipping Sodbury office (at which all three Defendants were based) should be permanently closed. The Defendants worked very closely together, the First Defendant having personally recruited the Second and Third Defendants.

5.1.2 In his letter dated 2nd June 2002 the then Chairman of WRG, Pat Barrett, had recommended that the First Defendant be asked to resign. This was a view shared by the Claimant and other non-executive directors.

5.1.3 Upon his appointment as Chairman on 18th June 2002, James Newman had a meeting with the Defendants and the Executive Team shortly thereafter and made it clear to them that their jobs were under threat unless their performance improved. He informed the Defendants that the members of the Board were very unhappy with their performance and unless improvement became apparent, the Board would be seeking to make significant changes in the Executive Team.

5.1.4 In or about July/August 2002, James Newman instructed Spencer Stuart, specialist recruitment agents, to find a replacement for the First Defendant for a fee of approximately £90,000.

5.1.5 On 19th August 2002, the Claimant received a memorandum from Tim Walsh, the Landfill Director of WRG, (copied to Chris Cox) stating that: "*the whole Chipping Sodbury office needs closure not just NDAS to go. Hugh [Etheridge] has now lied to me directly and when thwarted, gone behind my back – I would find it very difficult to have a working relationship with him in the future.*"

5.1.6 On 26th August 2002, the Claimant received a memorandum from Chris Cox, the Group Commercial Director, stating: "*I have received a copy of Tim Walsh's memo to you of 19th August, regarding the conduct of Hugh Etheridge in particular. This account does not surprise me since it is an example of how the clique in Chipping Sodbury operates. I am experiencing the same marginalisation/undermining and it is one of the prime reasons why there is little trust between myself, Nigel, Hugh and Steve Hardman. I find the clique devious and untrustworthy with its own agenda that does not accord with the group's interests*".

5.1.7 On 28th August 2002, the Claimant sent a memorandum to James Newman which included the following proposals:

5.1.7.1 That the First Defendant be dismissed with immediate effect.

5.1.7.2 That the Chipping Sodbury office should be closed down.

5.1.7.3 That proper control should be exercised over the Second Defendant.

5.1.7.4 That there should be no place for the Legal Director on the Operational Management Board of WRG.

5.1.8 Further, in the week that the letter complained was written, James Newman had further discussions with the First Defendant aimed at improving his performance as Chief Executive.

5.1.9 On 17th September 2002 the Claimant wrote to James Newman referring to the board's "*vote of no confidence*" in the First Defendant and to the Board's instruction to appoint head hunters to seek a replacement. This letter was copied to all the non-executive directors of WRG and to WRG's Secretary, Alan Waterhouse..

5.1.10 Prior to the letter complained of, the First and Second Defendants had on various occasions stated to Chris Cox that they would not be around for much longer. It is to be inferred that they made these comments because they were aware of some or all of the facts and matters pleaded above.

5.1.11 The First Defendant bore the Claimant personal animosity.

5.2 The letter complained of was published as part of a campaign conducted by the Defendants against the Claimant, the illegitimate object of which was to put pressure upon the Claimant to resign (and/or the Board of WRG to require the Claimant to resign) under threat of the Defendants' resigning (and the adverse publicity which would follow) in order to preserve their own positions (which they knew to be under threat).

5.3 The letter complained of was clearly drafted as an ultimatum to the Board of WRG, as evidenced by its penultimate paragraph which called for the immediate dismissal of Chris Cox and the resignation of the Claimant otherwise the First and Second Defendants "*and [their] senior executive team in Steven Hardman, Clive Denning and Peter Wilson will have no alternative but to give notice of termination of our employment, and therefore offices, under our respective service contracts which are, for the avoidance of doubt, announcable events*".

5.4 As the Defendants reference to *"announcable events"* made (and was intended to make) clear, the ramifications of such wide-scale resignations on a public limited company would be serious and far-reaching, causing considerable damage to WRG.

5.5 Further, the manner in which the letter was presented to the Board made it clear that the Defendants were giving the Board an ultimatum, as set out at paragraph 5.4 above.

5.6 The letter complained of makes extremely grave allegations against the Claimant, including numerous allegations that the Claimant was guilty of or to be suspected of being guilty of serious criminal misconduct.

5.7 The Claimant will rely upon the exaggerated terms in which the said letter was written, accusing the Claimant (amongst other things) of:

5.7.1 "*a catalogue of regulatory, legal and accounting transgressions*";

5.7.2 diverting an acquisition from WRG for his own *"personal gain";*

5.7.3 convening an illegal price-fixing meeting;

5.7.4 instructing a competitor "*to discredit"* WRG's technology;

5.7.5 involvement in numerous other criminal acts involving *"secret profits, conflicts of interest and/or failure to disclose his personal interests";*

5.7.6 involving WRG and the Board of WRG in a scandal on a par with the recent financial scandals of Equitable Life and Enron.

5.8 The letter complained of falsely implied that it was written or sent with the participation or approval of Clive Denning and Peter Wilson, which the Defendants knew to be false. In fact, as the Defendants well knew, they had not discussed the letter complained of with Clive Denning and/or Peter Wilson.

5.9 The letter complained of deliberately misrepresented the advice of the Defendants' own solicitors, Gouldens, and dishonestly put forward Gouldens' advice as justifying or supporting the contents of the letter. In fact, Gouldens had recommended that:

5.9.1 the Claimant should be "*asked to confirm whether or not he or any person connected with him is interested in the share capital of Impax or any of its subsidiaries. Depending on the nature of his reply, enquiries may also have to be made with the relevant company. He could also be asked to confirm that he and persons connected with him have no other undisclosed interests*" (Paragraph 5 of the Advice dated 18th September 2002).

5.9.2 the Claimant should be "*asked to confirm whether or not he or Paul Rackham Limited or any person connected with him is interested in the share capital of Rossfleet. Depending on the nature of his reply, enquiries may also have to be made with the relevant company. He should also be asked to confirm that he and persons connected with him have no other undisclosed interests*" (Paragraph 6 of the Advice dated 20th September 2002).

5.10 As the Defendants well knew, the Defendants had not (contrary to the recommendations set out above) sought comment from the Claimant about any of the allegations contained within the letter complained of.

5.11 The letter complained of falsely stated that Gouldens were WRG's solicitors, which the Defendants knew they were not. The Claimant

repeats Paragraph 4.10 above. Moreover, the lawyer from Gouldens who attended on 23rd September 2002 was asked by John Napier to leave as he had not been appointed by the Board of WRG and no resolution had been passed regarding the appointment of Gouldens.

5.12 The letter complained of falsely stated that James Newman had told the First Defendant that he had agreed with John Napier not to confront the Claimant about a catalogue of regulatory, legal and accounting transgressions. In fact, as the First Defendant well knew, Mr Newman had told the First Defendant no such thing, as made clear in his letter to the First Defendant dated 21st September 2002. Moreover, as the Defendants knew, there was, in fact, no such catalogue of regulatory, legal and accounting transgressions.

5.13 The Defendants falsely implied that the matters raised in the letter complained of were urgent when, in fact the Defendants knew that they were not:

5.13.1 The Goulden's advices of 18 and 20 September 2002 made it quite clear (as set out in paragraph 5.10 above) that the Impax and Rossfleet matters were not urgent and that the proper course was to speak to the Claimant about them.

5.13.2 in any event the Defendants had known about the Rossfleet allegations for at least 4 months. On the Defendants own case, the Third Defendant had been asked to investigate the matters concerning Rossfleet in May 2002;

5.13.3 the Defendants knew that in relation to the requested suspension of Chris Cox that James Newman had told the First Defendant on a number of occasions (and indeed had told the First Defendant and Gouldens the day before the letter was written) that this was an executive issue for the First Defendant and ought to be dealt with under the proper disciplinary procedures and not by the Board;

5.13.4 the First Defendant knew that James Newman had already arranged to see someone from Deloitte and Touche on 26th September 2002 concerning the allegations made by the Defendants against the Claimant and that the matter was therefore in the process of being dealt with.

5.13.5 the First Defendant knew that the allegations allegedly deriving from Robert Wheatley were not urgent as he had not in fact made any such allegations or raised any concerns. The Claimant repeats paragraph 4.12 above.

5.13.6 The Defendants knew that the allegations concerning the 2000 audited accounts had already been dealt with by the Financial Reporting Review Panel.

5.14 The First and Second Defendants knew that the allegation made in Paragraph 1(a) on page 2 of the letter complained of was untrue. The Claimant repeats Paragraph 4.3 above. As the First and Second Defendants well knew, the Claimant had told the First and Second Defendants of his shareholding in Impax as they were the two

executive board members responsible for negotiating the contract with Impax.

5.15 The First, Second and Third Defendants knew that the allegation made in Paragraph 1(b) on page 2 of the letter complained of was untrue. The Claimant repeats Paragraph 4.7 above. As the First, Second and Third Defendants well knew (because they were all present at the said business review meeting) Tim Walsh had not, contrary to the false impression given in the letter complained of, informed the First Defendant at any stage that the Claimant had diverted WRG's purchase of a landfill site for his personal gain. For the avoidance of doubt, neither had Gordon Knott informed the First Defendant that the Claimant had diverted WRG's purchase of a landfill site for his personal gain.

5.16 Further, the First Defendant knew that the allegations made in Paragraphs 1(c) and (d) on page 2 of the letter complained of were untrue. The Claimant repeats Paragraph 4.12 above.

5.17 Further, the First and Second Defendants knew (in their capacities as Chief Executive and Finance Director) that the Claimant did not have any involvement in the decisions or events which led to the review of the audited accounts in 2000 and therefore knew that it was untrue to assert, and/or were reckless in asserting (as set out in 1(e) of the letter complained of) that the Claimant presided over accounting policies which resulted in an investigation of the 2000 audited accounts.

5.18 Further, each of the Defendants knew there was no basis for the allegation in the letter complained of that there were "*numerous other matters involving Paul Rackham where we have direct or hearsay evidence of actions on his part which appear to be against the interests of WRG and may involve secret profits, conflicts of interest, and/or failure to disclose his personal interests*" or did not care whether this allegation was true or not.

5.19 In support of the above, the Claimant will rely upon the following:

5.19.1 Despite being specifically invited by the Investigatory Sub-committee to *"provide examples and more details as to the "numerous other matters involving Paul Rackham" which are referred to in his letter"* the First Defendant deliberately chose not to do so;

5.19.2 the Defendants' failure to cite any matters other than Impax. Rossfleet and Mr Wheatley in support of their defence of qualified privilege;

5.19.3 the Defendants' failure to justify the allegation complained of.

5.20 Each of the Defendants knew from the terms of Gouldens' written Advices dated 18th and 20th September 2002 that there was absolutely no basis for comparing the issues which they alleged arose in relation to the Claimant to the recent scandals involving Equitable Life and Enron, the latter of which involved corporate fraud on a massive scale.

5.21 The Defendants deliberately chose to circulate the letter complained of to all the non-executive directors (apart from the Claimant himself).

On the Defendants' own case, they were only requested by the Chairman, James Newman, to put the matters in writing to him. Indeed, Mr Newman castigated the Defendants in his letter dated 21st September 2002 for publishing the letter complained of in the form and manner that they did, accusing the Defendants of "*put[ting him] on the spot*" and "*trying to exploit*" his relationship with them.

5.22 The Defendants' deliberately timed delivery of the said letter (which was delivered to Mr Newman at 2.30am on Saturday 21st September) to arrive shortly before an important Board meeting which was scheduled to discuss the future of WRG. It is to be inferred from all the facts and matters stated above that the Defendants (wrongly) believed that the question of whether the Defendants should be dismissed and/or asked to resign from their jobs was to be discussed at the Non-Executive Directors' Board meeting on 23rd September 2002.

5.23 In the circumstances, the Defendants knew that the Non-Executive Board of Directors of WRG could not dismiss any of the Defendants or ask them to resign if they had just raised apparently serious concerns about the propriety of the Claimant's behaviour as it would enable the Defendants to claim that their dismissal was unfair and contrary to the provisions of the Public Interest Disclosure Act 1998.

5.24 In the premises the Defendants and each of them published or caused to be published the said words knowing they were false or recklessly, not caring whether they were true or false and/or with the dominant improper motive of injuring the Claimant (whom they did not like) and forcing him to resign from the Board of WRG and/or in an improper attempt to save their own jobs".

As I explain in paragraph 103 below the Claimant's case on malice was to an extent reformulated in the course of the trial.

10. It is possible, I hope without oversimplification, to distill the parties' respective cases on the issue of malice in the following way. The case advanced on behalf of Mr Rackham is that each of the Defendants published the letter knowing the various allegations against Mr Rackham contained in it to be false (or recklessly) and/or with the dominant improper motive of forcing Mr Rackham off the Board of WRG and/or saving their own jobs with the company. As to knowledge of falsity, the case for Mr Rackham focuses on what are said to be the unfounded allegations set out under the name Paul Rackham on page 2 of the letter from (a) to (e) inclusive and on the "numerous other matters involving Paul Rackham" mentioned at the top of the third page of the letter which are said to "appear to be against the interests of WRG" and which "may involve secret profits, conflicts of interest and/or a failure to disclose his personal interests". Although it is not reflected in the pleaded case on malice, Mr Rackham contends that the Defendants had the further improper motive of preventing a take-over of WRG by Candover by procuring the removal from WRG's Board not only of Mr Rackham but also of Mr Christopher Cox, WRG's Commercial Director, both of whom were in favour of Candover acquiring the shares in WRG.

11. The case of the Defendants on malice is that, whilst they were aware of dissatisfaction having been expressed at Board level with the performance and results being achieved by WRG, none of them felt at the date of the publication of the letter complained of that his job at WRG was under threat. The Defendants deny that the reason for writing the letter was to prevent the dismissal of any of them by the Board. They also deny that the letter was prompted by or connected with the recent re-emergence of Candover as a buyer of WRG. Rather it is the Defendants' case that their reason for writing (or in the case of Mr Etheridge approving) the letter was that they had major concerns about the conduct of Mr Cox and, more importantly, about corporate governance issues relating to Mr Rackham. The Defendants' case is that, as at the date of the letter complained of, they had reason to believe that in respect of the matters listed from (a) to (e) on page 2 of the letter they had reason to believe that Mr Rackham had been guilty of serious breaches of duty. The Defendants had for some time been consulting Gouldens who had, according to the Defendants, endorsed their concerns regarding the conduct of Mr Rackham. Their object or motive in writing the letter to Mr Newman, the Chairman of WRG, was to prevail on him as a matter of urgency to take action. The penultimate paragraph was not, say the Defendants, an ultimatum. It was a statement of their intention to resign if action was not taken to address their concerns.

Damages

12. Mr Rackham claims damages including aggravated damages. But I will return to this issue, if it arises, at a later stage in this judgment.

The relevant principles of law

13. It will be convenient if, at this stage of the judgment and before coming to the facts in more detail, I summarised the principles of law applicable in this case. The classic definition of the circumstances under which a publication will be protected by qualified privilege at common law is to be found in *Adam v Ward* [1917] AC 309, per Lord Atkinson at 334:

> "A privileged occasion … is an occasion where the person who makes communication has an interest or duty, legal, social or moral to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential".

14. The present is a case of what was described by the Court of Appeal in *Kearns v General Council of the* Bar [2003] 1 WLR 1357 as a case where there was "an established relationship" between the publishers and the publishees, with the result that the law will more readily attach privilege to a communication between them. I accept that Miss Adrienne Page QC for the Defendants is

right when she says that by the same token the court should be slower to find malice proved in such a case.

15. Where such a relationship exists between the publisher of an alleged libel and those to whom it is published, the policy of the law is to confer immunity from suit on the publisher *unless* the party libelled can show that the publisher was abusing the occasion of the publication in the sense that he was actuated by malice rather than acting pursuant to his interest or duty.

16. It is unnecessary to say more about the issue of privilege because, as I have said, it is conceded that the Defendants and the non-executive directors to whom the letter complained of was published shared a common and legitimate interest in the subject matter of the letter.

17. Were the Defendants – or, more accurately, was any of the Defendants – abusing the occasion in the sense that he was actuated by malice? The burden of proving malice rests on the Claimant, who has to establish his case by evidence of a cogency commensurate with the seriousness of charge. In the context of a defence of qualified privilege, malice may take the form of either a dominant improper motive or an absence of honest belief in the truth of what was published or both. In *Horrocks v Lowe* [1975] AC 135 Lord Diplock said at 149E:

> "… in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit—the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege.
>
> So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. "Express malice" is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless

acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests.

The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.

Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tortologously termed, "honest belief". If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might case doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrive at it may still be "honest", that is, a positive belief that the conclusions they have reached are true. The law demands no more.

Even a positive belief in the truth of what is published on a privileged occasion—which is presumed unless the contrary is proved—may not be sufficient to negative express malice if it can be proved that the defendant misused the occasion for some purpose other than that

> for which the privilege is accorded by the law. The commonest case is where the dominant motive which actuates the defendant is not a desire to perform the relevant duty or to protect the relevant interest, but to give vent to his personal spite or ill will towards the person he defames. If this be proved, then even positive belief in the truth of what is published will not enable the defamer to avail himself of the protection of the privilege to which he would otherwise have been entitled. There may be instances of improper motives which destroy the privilege apart from personal spite. A defendant's dominant motive may have been to obtain some private advantage unconnected with the duty or the interest which constitutes the reason for the privilege. If so, he loses the benefit of the privilege despite his positive belief that what he said or wrote was true.
>
> Judges and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. The motives with which human beings act are mixed. They find it difficult to have the sin but love the sinner. Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that "express malice" can properly be found."

18. Miss Page advances an interesting argument based on the decision of the High Court of Australia in *Roberts v Bass* [2002] HCA 57. In that case Gleeson CJ, with whose judgment the majority agreed, said at paragraphs 77-78:

> "If the defendant knew that the statement was untrue when he or she made it, it is almost invariably conclusive evidence of malice. That is because a defendant who knowingly publishes false and defamatory material almost certainly has some improper motive for doing so, despite the inability of the plaintiff to identify the motive. In *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1

> NSWLR 30 at 51, Hunt J said that "[i]n some of the older authorities, an absence of honest belief on the part of the defendant is treated merely as some evidence of an indirect motive which alone is said to constitute express malice, but the better view, in my opinion, is to treat the two as different kinds of malice". His Honour cited no authority for this novel proposition. Some years later, in *Hanhrahan v Ainsworth* (1990) 22 NSWLR 73 at 102-103, Clarke JA said that, since *Horrocks* "it has been accepted that if it is proved that a person has made a defamatory statement without an honest belief in its truth or for a dominant improper purpose … malice will be made out".
>
> The knowledge and experience of Justice Hunt in defamation matters is well recognised. But with great respect to his Honour and Clarke JA, they erred in asserting that lack of honest belief defeated a defence of qualified privilege. There is no basis in principle or authority for treating knowledge of falsity or lack of honest belief as a separate head of, or equivalent to, malice. In the law of qualified privilege, the common law has always regarded malice as the publishing of defamatory material with an improper motive. Knowledge of falsity is "almost conclusive evidence" that the defendant have some improper motive in publishing the material and that it actuated the publication. That judges have treated knowledge of falsity as almost conclusive evidence of malice is no ground, however, for treating it as a separate head of, or equivalent to, malice. In some circumstances, lack of honest belief in what has been published may also give rise to the inference that the matter was published for a motive or purpose that is foreign to the occasion of qualified privilege. Nothing in Lord Diplock's speech in *Horrocks* supports treating the defendant's knowledge or lack of belief as a separate head of, or equivalent to, malice. Indeed, Lord Diplock expressly said that, if it is proved that the defendant did not believe that what he or she published was true, it was "generally conclusive evidence" of improper motive."

Miss Page submits that malice arises if and only if it can be shown that the defendant was actuated by some improper motive. Knowledge of falsity is not a separate head of malice, still less is recklessness, it is simply a way of establishing an improper motive.

19. I am of course bound by the decision in *Horrocks v Lowe*. But I respectfully agree with Gleeson CJ that there is nothing in Lord Diplock's speech in that case which supports treating the defendant's knowledge of falsity or lack of

belief in truth as being probative, of itself and without more, of malice. It may be said that the point is of limited practical significance since knowledge of falsity will almost always establish the existence of an improper motive. Nevertheless I accept that the question which I have ultimately to decide in this case is whether or not each of the Defendants was actuated by the improper motive of improperly removing Mr Rackham from the Board of WRG or saving his own job with the company or preventing Candover from taking over WRG.

20. It is common ground and I accept that, when it comes to motive, what must be established against the individual defendant is that improper purpose was his dominant motive for publishing, as is apparent from the passage already cited from *Horrocks v Lowe*.

21. I also accept that Miss Page is right to emphasise that a defendant who honestly believes in the truth of what was published is not to be found guilty of malice merely because his belief was unreasonable or was arrived at after inadequate research or investigation. Lack of care in arriving at a belief is not to be equated with malice: see *Telnikoff v Matusevitch* [1991] 1 QB 102; *Gatley* at para 16.17.

Background evidence: a neutral summary

22. As is inevitable in a case of this kind, I have heard a great deal of detailed evidence about the business of WRG and about the activities of various members of its board. Some of that evidence has been contentious and some not. I will start with what is intended to be a neutral narrative summary of the background evidence.

23. I have already described in outline how Mr Rackham founded WRG in 1983 and ran the business until the company was floated on the stock market in 1994. From 1994 until 2002 Mr Rackham led WRG through a period of massive growth of the business and a rapid climb in its share price. That growth was due in part to a policy of mergers and acquisitions on the part of WRG.

24. On 8 October 1999 a company of which Mr Rackham was at the time a director, namely Rossfleet Investments Limited ("Rossfleet") purchased a substantial 260-acre estate called Fornham Park. The estate consisted mainly of woodland and farmland but it also included a landfill site of about 20 acres which had been leased in the early 1990s to Anti Waste Limited which was at the material time a subsidiary of WRG. Rossfleet was at all relevant times beneficially owned by a family trust of Mr Rackham. The consequence of the acquisition of Fornham Park by Rossfleet was that a company of which a family trust of Mr Rackham was the beneficial owner was receiving rent (and also royalties) paid by WRG for the use and occupation of the landfill site at

Fornham Park. I will have to return to this topic later.

25. One merger, which took place in 1999, was with the waste company of Yorkshire Water Plc, subsequently re-named Kelda Plc. In consequence Kelda acquired a 46% shareholding in WRG together with an entitlement to nominate two non-executive directors to the Board of WRG. The Kelda appointees included Mr James Newman and Mr John Napier.

26. In January 2001 WRG acquired a Hanson subsidiary, namely Hanson Waste Management Limited for £185million. Mr Sandy and Mr Hardman were at that time employed by Hanson and they were involved in negotiations with Mr Rackham. The consequence of the acquisition was that the size of WRG's business was almost doubled. As a result of the acquisition WRG took over a project to build and operate for Kent County Council the Allington Incinerator. Planning permission had already been obtained to build the incinerator which was designed to use fluidised bed technology ("FBT"). Impax Capital Corporation Limited ("Impax"), financial consultants, were retained by WRG to advise on the Allington project and other matters.

27. In April 2001 Mr Sandy was appointed Chief Executive Officer of WRG. This coincided with Mr Rackham relinquishing his role as Executive Chairman and becoming Non-Executive Chairman. Later that year, in September 2001, Mr Etheridge was appointed Group Finance Director. In December 2001 Mr Hardman joined WRG as its first in-house legal adviser. He had previously been a solicitor with the London law firm Gouldens. The appointments of Mr Etheridge and Mr Hardman were made on the recommendation of Mr Sandy.

28. The head office of WRG was in Doncaster. However, Mr Sandy had indicated prior to his appointment that he wanted to be based in Chipping Sodbury in Gloucestershire. Mr Rackham agreed to this. Mr Etheridge and Mr Hardman joined Mr Sandy there.

29. In early 2002 a large London private equity house named Candover Partners Limited ("Candover") indicated that it might be prepared to purchase the entire shareholding of WRG at a price of 500p per share. For reasons of confidentiality within WRG the offer was given the code name "Project Warrior" and Candover was referred to as "Channel". This potential bid caused continued tension within the Board of WRG. There was disagreement as to whether it was in WRG's best interest to capitalise at the indicative offer price of 553p per share. The Kelda nominees were in favour of selling the shares which Kelda held in WRG provided that the price was right. Mr Rackham took a broadly similar view. Other members of the Board, including Mr Sandy and Mr Etheridge, considered that the offer should be rejected.

30. Another point of disagreement within WRG at this time related to its accounting policies. This was Mr Etheridge's area of responsibility. On his

arrival at WRG he found that, because of the various mergers and acquisitions in which WRG had engaged over the years, different accounting policies were being operated by various divisions within WRG. It was Mr Etheridge's task to reconcile the accounting policies and to iron out the inconsistencies. As he set about this task Mr Etheridge became concerned that WRG's balance sheet listed assets which in his view ought properly to be written off. One such was the rental due to WRG from Biffa Waste Management Limited but which was not being paid owing to a contractual dispute. Mr Rackham strongly disagreed with Mr Etheridge about the need to write off such items as the payments due from Biffa.

31. In the meantime there was, according to the evidence, concern within the senior management of WRG that the performance of the company was poor. Mr Sam Wauchope, an independent non-executive director of WRG and himself an accountant, described in his evidence the performance of WRG over the period of twelve to fifteen months prior to September 2002 as having been poor in terms of results and actions taken. It appeared to him that the results were likely to get worse in the future and not better. The results over the period of two years preceding 2002 showed overheads increasing from £10million to £18million and profits falling.

32. On 2 June 2002 the then Chairman of WRG, Mr Pat Barrett, wrote to his fellow non-executive directors, about the rapidly developing concerns about the adverse trends in WRG's financial results. He referred in the letter to the poor recent results with disturbing trends and to disintegrating management morale. He wrote with a way forward to address the pressing management problems and Board concerns. One of his proposals was that Mr Sandy be asked to resign and head hunters be appointed to find a new Chief Executive Officer.

33. On the same day Mr Barrett also wrote to Mr Sandy to express his concern about the accelerating cost growth within WRG. He wrote that he, along with other Board colleagues, was awaiting with concern for clear signs of management action to address the dangerous trends apparent in the results. He called upon Mr Sandy for his proposals to address these issues and soon.

34. On 18 June 2002 Mr Wauchope wrote to Mr Rackham and to Mr Newman (who had that day been appointed Chairman of WRG following the resignation of Mr Barrett). He confirmed his willingness to continue as a non-executive director of WRG upon the assurance that they acknowledged that changes were necessary including the overall management and leadership of the operation. In his evidence Mr Wauchope made clear that he was referring amongst others to Mr Sandy.

35. Mr Rackham was also expressing his concerns about the poor performance of WRG at this time. He wrote, for example, a memorandum to Mr Sandy saying that he was desperately concerned about the vast increase in the cost

base. He expressed the view that Doncaster was the correct place for the enlarged team base at Chipping Sodbury.

36. The concerns within WRG about the poor performance of the company were exacerbated by what Miss Page described as "the lingering presence" of the potential bid from Candover. Following due diligence a reduced indicative offer was made by Candover at a price of 500p per share. That offer was rejected by WRG on 12 March 2002. Candover sought further information from WRG and WRG agreed to provide it.

37. It was against that background that the non-executive directors of WRG met on 14 June 2002 in order, amongst other things, to discuss the letter from Mr Barrett dated 2 June 2002 referred to in paragraph 32 above and whether to continue to entertain the bid from Candover. Dissatisfaction was expressed at the meeting with the performance of Mr Sandy. Mr Rackham expressed the view that Mr Sandy should be replaced forthwith. Others took a different view for fear of causing Candover to withdraw its bid. The minutes of the meeting record Mr Napier as saying that the share price of WRG would be adversely affected by the removal of Mr Sandy and that time was needed to find a replacement. A majority of those present favoured continuing the negotiations with Candover.

38. On 20 June 2002 Mr Newman, the recently appointed Chairman of WRG, met Mr Sandy and told him about Mr Barrett's letter of 2 June 2002. However, Mr Newman did not show Mr Sandy the letter nor did he inform him of Mr Barrett's view that he (Mr Sandy) should be asked to resign. Mr Newman told Mr Sandy that some of the non-executive directors were unhappy with his performance and that he (Mr Sandy) knew what that might ultimately lead to. As Mr Newman later wrote to Mr Wauchope, he had no doubt that Mr Sandy "took the hint regarding his own position". That letter was copied to Mr Rackham and to Mr Napier. Although Mr Newman told Mr Wauchope on 24 June 2002 that he would start the search for a new Chief Executive Officer that week, he did not in the event do so.

39. Mr Sandy, together with Mr Etheridge and other senior colleagues, attempted to address the concerns felt about WRG's performance. A "Review of Key Business Issues" was first prepared in June 2002. Mr Sandy reported on performance to the Board meeting on 28 June 2002. A manuscript note of the same date prepared by Mr Sandy includes the words: "If NS/HE going to leave – ensure the facts will remain". On the same day Mr Sandy and Mr Etheridge attended a meeting in London with Gouldens. Other WRG Board members were unaware that the meeting was taking place. Shortly thereafter Mr Sandy prepared a document entitled "Project Response" which reviewed recent events. In reference to his meeting with Mr Newman on 20 June 2002, Mr Sandy listed as one of the key points made by Mr Newman "Lack of confidence in senior management (the demise of Nigel Sandy was involved)". The other key points listed by Mr Sandy reflected the dismal state of affairs which existed within WRG. Mr Sandy thereupon set out to address the

problems by proposing organisational changes within the company.

40. On 26 July 2002 WRG received a revised offer from Candover at the reduced price of 470p per share. That offer was discussed at a Board meeting of WRG on 1 August 2002. A majority of those present voted against proceeding with the bid. The majority included Mr Wauchope, Mr Sandy, Mr Etheridge and Mr Cox. The latter explained in his evidence that he voted against proceeding for the reason that for him to have voted in favour of proceeding would have resulted in a tied vote. Mr Rackham and one of the directors nominated by Kelda voted in favour of proceeding with the bid; the others abstained. For the time being therefore Candover appeared no longer to be a suitor.

The provenance of the letter complained of

41. As I have said, I have attempted to give a neutral account of the background to the issues with which this action is concerned. I turn now to matters which are contentious, starting with the provenance of the letter complained of.

42. As indicated in paragraph 39 above, Mr Sandy and Mr Etheridge went to Gouldens' offices in London on 28 June 2002. The solicitors named in WRG's accounts were Mayer, Brown, Rowe & Maw and, secondly, Cunningham John. The question was raised in the course of evidence whether Mr Sandy and Mr Etheridge went to Gouldens in order to obtain advice in their personal capacities or whether, as they claimed, they were consulting Gouldens on behalf of WRG. The partners in Gouldens who gave advice were principally Mr Max Thorneycroft and Mr Martin Piers. Both gave evidence and said that they considered that the client was WRG and not the individual directors. In my view that was a proper view for them to take.

43. In arriving at that conclusion I have in mind the evidence of Mr Hardman (who I found to be a reliable and impressive witness) that he considered that he had authority to select which firm of solicitors to instruct. He had himself worked for several years as a solicitor with Gouldens before being employed by Hanson. It was therefore natural that he should recommend Gouldens as an appropriate firm for Mr Sandy and Mr Etheridge to consult. I do not see anything sinister or objectionable about the choice of Gouldens. WRG later paid for the advice given to Mr Sandy and Mr Etheridge.

44. What matters is what was discussed at the meeting on 28 June. Notes of the meeting were made by Mr Sandy and by Mr Thorneycroft and those notes survive. The note made by the latter is headed "1. Candover. 2. Constructive dismissal. 3. Receipt of rent by Rackham". The first of these headings speaks for itself. As to the second, it is not altogether clear whether the constructive dismissal under discussion was that of Mr Sandy or Mr Cox (the Commercial Director of WRG), who Mr Sandy felt had been undermining his position within WRG. Mr Sandy's note of this part of the discussion has the heading "Resignation". I accept the evidence of Mr Thorneycroft that the topic on

which he was advising was the possible constructive dismissal of Mr Sandy.

45. More important for present purposes is the third topic, namely receipt of rent by Mr Rackham. Mr Thorneycroft's note on this aspect is limited to a single sentence: "Rackham. WRG leases a site from Fornham Park Limited which is owned by a trust". Mr Sandy's note is more expansive: "Disclosure – Secret profits doctrine. Responsibility of a director with the knowledge. Common law – fiduciary duty". It is clear from the notes, as well as from the evidence of those present at the meeting, that Mr Sandy and Mr Etheridge were seeking advice from Mr Thorneycroft as to the position arising from the allegation that Mr Rackham had an interest in the Fornham Park property. I have earlier referred at paragraph 24 to the acquisition of Fornham Park by Rossfleet. Little if anything was said about this by Mr Sandy or Mr Etheridge at the meeting with Gouldens in late June 2002. The advice which was given by Mr Thorneycroft included reassurance that Mr Sandy and Mr Etheridge were acting properly and an indication that they should document any difficulties and prepare detailed Board reports.

46. Following the meeting on 28 June 2002, Mr Sandy sent to Mr Thorneycroft the "Project Response" to which I referred at paragraph 39 above. It mentioned the continuing dissensions within the Board of WRG both in regard to the Candover bid and other matters.

47. Between 28 June and 5 September 2002 no further meeting took place between any of the Defendants and Gouldens. Some letters were exchanged but of no materiality. As I have recorded WRG decided on 2 August not to proceed with the negotiations with Candover. According to the evidence of the Defendants and that of Mr Newman, discussions did take place between them over this period about their concerns regarding Mr Rackham. Various corporate governance issues were raised, including alleged conflicts of interest. According to Mr Sandy, Mr Newman appeared to understand their concerns and to be sympathetic. Mr Newman was later to say of these discussions, in a letter to Mr Sandy dated 21 September, that no hard evidence had been produced to him to substantiate the concerns. Mr Sandy accepts that Mr Newman did ask for evidence to be produced to him. I accept that discussions along the lines indicated by Mr Sandy did take place but I do not think that there was any real urgency about them. Mr Newman was concerned to contain the dissent within the Board.

48. The second largest shareholder in WRG (after Kelda) was ISIS. Mr Sandy, together with Mr Etheridge, attended a meeting with Mr Thompson of ISIS on 4 September. The purpose of the meeting was to discuss the interim results of WRG which had just been announced. According to Mr Sandy, Mr Thompson was angry because the results were so bad that there had been a sharp drop in the share price. During the meeting Mr Etheridge mentioned that WRG were using Impax as one of its advisors in connection with converting waste to energy. The response of Mr Thompson was to ask if they were aware that Mr Rackham was a shareholder in Impax. The evidence of

Mr Sandy was that he and Mr Etheridge were shocked and embarrassed by what Mr Thompson had told them.

49. The conversation was reported to Mr Hardman, who decided that further advice should be obtained from Gouldens. Gouldens in due course confirmed that Mr Rackham was a shareholder in Impax. Mr Hardman instructed Mr Thorneycroft of Gouldens by telephone to advise as to the implications of Mr Rackham having a shareholding in Impax. Mr Hardman attended Gouldens office on 5 September and Mr Thorneycroft agreed to prepare a report which could be shown to the Chairman (Mr Newman) as part of a submission to him that Mr Rackham should be investigated. It was not until about 11 or 12 September that a first draft of the advice came into existence.

50. On 18 September a telephone conference took place between Mr Hardman and Mr Thorneycroft concerning the conduct of Mr Cox, who was thought by Mr Sandy to have been undermining his reorganisation plans. Mr Hardman wanted advice as to whether this constituted misconduct such as would justify the summary dismissal of Mr Cox.

51. On the same day, 18 September, Mr Thorneycroft sent to Mr Hardman the final version of Gouldens' advice regarding Mr Rackham's shareholding in Impax. The advice discussed the issue whether Mr Rackham's shareholding in Impax (0.44%) was sufficiently large for it to be a requirement that it be disclosed. The advice concluded by recommending that Mr Thompson of ISIS should be told that the company's investigations showed Mr Rackham's interest to be 0.44% and that he should be asked whether he has any evidence of the size of the shareholding. Once a reply had been received, the recommended course of action was that Mr Rackham should be told by the Chairman that the issue of his shareholding had been raised by a shareholder. Depending on the nature of his reply enquiries might also have to be made with the relevant company. Mr Thorneycroft further recommended that it should be established if the arrangements with Impax were the subject of a Board resolution and, if so, the minutes should be examined.

52. On 19 September (the day before the letter complained of was drafted and sent out) a meeting took place at Gouldens attended by Mr Thorneycroft, Mr Piers, Mr Hardman and (by telephone) Mr Newman. There was further discussion about the possibility of dismissing Mr Cox for misconduct and the untenable position which Mr Sandy and Mr Etheridge would be in if the Board were to decide to reinstate him. A note made by Mr Thorneycroft records Mr Newman having told him that he was going to talk next week (i.e. the week commencing 23 September) to Deloittes, WRG's auditors, about Mr Rackham.

53. According to the evidence of Mr Sandy, a telephone conversation took place between himself and Mr Newman on the morning of 20 September. Mr Sandy was initially unsure when this conversation had taken place. However, his

evidence was that Mr Newman had told him that he had spoken to Mr Napier and they had agreed that it was not the right time to dismiss or discipline Mr Cox and in addition that he (Mr Newman) was not prepared to confront Mr Rackham about the concerns about his conduct. Mr Newman's evidence was initially that he spoke to Mr Sandy early on 20 September but after Mr Sandy had seen a memorandum which Mr Newman had prepared the previous day. Mr Newman's evidence was that he had discussed the Chris Cox issue with Mr Napier and was not prepared to dismiss him, particularly since they were hoping for a new bid from Candover. According to Mr Newman's evidence, he told Mr Sandy that Mr Napier had not been enthusiastic about confronting the Claimant about the issues the Defendants were raising when he had discussed the matter with him in August. In his supplemental witness statement, Mr Newman gave a somewhat different account: he said the conversation with Mr Sandy took place prior to his receipt of the memorandum of 19 September. This first conversation with Mr Sandy was simply concerned with the Chris Cox issue. As to the issues concerning Mr Rackham, Mr Newman's revised evidence was that he might have referred to the lack of enthusiasm on the part of Mr Napier to engage on those issues but that was in reference to what Mr Napier had said over a meal in Leeds in August.

54. The case for Mr Rackham is that this conversation did not take place or, if it did, that Mr Newman did not tell Mr Sandy that he was not prepared to confront the Claimant about the Defendants' concerns. The significance of this issue is that it is the Defendants' case that it was this conversation with Mr Newman which triggered the sending of the letter complained of. Mr Rampton on behalf of Mr Rackham points out correctly that no mention is made in the detailed particulars of the matters relied on in support of the defence of qualified privilege to that telephone conversation having triggered the publication of the letter complained of. To the contrary, the particulars assert that it was the receipt of Gouldens' advice much later in the day (to which I shall refer later) which triggered the publication of the letter. For reasons which I will have to discuss in more detail at a later stage, I did not find Mr Sandy to be a reliable witness. I cannot accept that Mr Newman told Mr Sandy that he was not prepared to confront Mr Rackham about the concerns. On this point I prefer the evidence of Mr Newman. It appears to me that it would have been inconsistent for Mr Newman on the one hand to tell Mr Sandy that he was not prepared to confront Mr Rackham and on the other hand indicating (for example in his conversation with Mr Thorneycroft as noted by him) that he was going to talk to Deloittes about Mr Rackham.

55. I referred earlier to a memorandum prepared by Mr Newman on 19 September. It contained a reference to "weak executive management". Mr Sandy's evidence was that in a separate telephone conversation later on 20 September, he challenged Mr Newman about this sentence. According to Mr Sandy Mr Newman's response was to the effect "you know this is what some of the executives think". In a letter to Mr Newman, to which his copy of the letter complained of was attached, Mr Sandy records that in their telephone conversation that afternoon Mr Newman had commented that the Board were "after me anyway". Mr Sandy in paragraph 164 of his witness statement says

he took that reference to mean some of the non-executive directors. I cannot accept that evidence: it was plainly a reference to the Board being after Mr Sandy.

56. Mr Sandy and Mr Hardman discussed the position which had arisen. (Mr Etheridge was on holiday in Madeira at this time). Mr Sandy had a meeting the previous day (19 September) with Mr Robert Wheatley when, according to Mr Sandy, Mr Wheatley provided information which caused him further concern about the conduct of Mr Rackham. In the course of this discussion Mr Hardman told Mr Sandy that he had asked Gouldens to prepare a further report in relation to Fornham Park. Mr Hardman told Mr Sandy he would start drafting a letter to Mr Newman setting out all of their concerns. At 14.41 on 20 September Mr Hardman sent his first draft of the letter to Mr Newman to Mr Thorneycroft for his comments. The text included a note "MJP/MBT [i.e. Mr Piers/Mr Thorneycroft] to insert legal liability wording as appropriate". A number of amendments were made by Mr Thorneycroft to Mr Hardman's draft and Mr Piers drafted an additional section which was ultimately to appear on the third page of the letter as sent at the second to sixth paragraphs on that page.

57. At 17.09 Gouldens faxed to Mr Hardman their advice in relation to Fornham Park. The material parts are as follows:

> "In 1999, the opportunity arose for WRG or Anti-Waste to purchase the freehold of Fornham Park from the landlord. We understand that Mr Rackham was aware of the opportunity in his capacity as a director of WRG and/or Anti-Waste. He was the Executive Chairman of WRG and a director of Anti-Waste. The benefit of the purchase would have been the merger of the freehold and leasehold interest with no future liability to payment or royalties".

The advice then sets out the reasons for assuming for the purposes of the note that there is a prima facia case that Mr Rackham or Paul Rackham Limited is the beneficial owner of the share capital of Rossfleet. Dealing with the fiduciary duties of a director, the advice continues:

> "Therefore if Mr Rackham became aware of the opportunity to buy Fornham Park freehold whilst acting in his capacity as a director of WRG (irrespective of whether this information was confidential), and if he used this information for the benefit of a company in which he was interested, and if he ultimately profited from this transaction by virtue of an interest in Rossfleet, then, without having obtained shareholder approval for this transaction, a court would be likely to find Mr Rackham had acted in breach of his fiduciary duty and he would be liable to account to WRG for the

benefits accruing to him as a result".

The note concluded with a recommended course of action:

> "Given the above, it is recommended that Mr Rackham should be asked to confirm whether or not he or Paul Rackham Limited or any person connected with him is interested in the share capital of Rossfleet. Depending on the nature of his reply enquiries may also have to be made with the relevant company. He should also be asked to confirm that he and persons connected with him have no other undisclosed interests".

58. Mr Sandy had left a message at Mr Etheridge's hotel in Madeira. Mr Etheridge returned the call at about 5.30pm and Mr Sandy and Mr Hardman went through the proposed letter to Mr Newman. Mr Etheridge, having discussed the position with Mr Sandy, approved the letter and agreed to join Mr Sandy and Mr Hardman in resigning if their demands were not met. The letter, as has been seen, refers also in its concluding paragraph to Clive Denning and Peter Wilson resigning if those demands were not met. Mr Sandy accepted in cross-examination that the letter was incorrect in suggesting that they had agreed to resign.

59. The letter was sent by fax to Mr Newman at about 7pm on Friday 20 September, that is, about two hours after Gouldens' advice about Fornham Park had been received. Copies went by fax and by courier to Messrs Etheridge, Hudson, Newman and Wauchope but not to Mr Rackham (or Mr Cox).

The claim that the Defendants knew the contents of the letter to be untrue

60. I shall in due course have to consider the question what motivated each of the Defendants to publish the letter. I will first address the issue whether the Defendants knew the contents of the letter to be false or were reckless. That is an important part of Mr Rackham's case on malice (see paragraph 5.6 onwards of the Particulars of Malice set out at paragraph 9 above).

61. The cross-examination of the Defendants appropriately concentrated on the allegations directed at Mr Rackham which are set out from (a) to (e) on page 2 of the letter. Those allegations may conveniently be referred to under the heads (a) Impax; (b) Fornham Park; (c) the competitors' meeting; (d) the Allington project and (e) accounting policies. I will come to each of those in due course.

62. But it is also part of Mr Rackham's case on malice that the Defendants and each of them must have know that there were false or at least grossly

exaggerated assertions elsewhere in the letter. Of these the most important is whether it was true that, as stated at paragraph 3 on the first page of the letter, Mr Newman had earlier on 20 September told Mr Sandy that he and Mr Napier had agreed "not to confront Paul Rackham about a catalogue of regulatory, legal and accounting transgressions".

63. As to that, I have summarised Mr Newman's evidence at paragraph 53 above. It has to be said that there is a distinct change of emphasis, to put it no higher, between Mr Newman's first and his supplemental witness statement. Mr Sandy also said that the reason why Mr Newman had called him was to discuss Mr Newman's memorandum of the previous day. But that memorandum had been concerned with the issue of dismissing Mr Cox and did not mention any transgression on the part of Mr Rackham. The note made by Mr Thorneycroft of Gouldens (3/699) is similarly silent on the topic of Mr Rackham's alleged transgressions. It was further pointed out to Mr Sandy in cross-examination that, whereas his evidence was that the publication of the letter complained of was triggered by Mr Newman telling him in that telephone conversation that he and Mr Napier had agreed not to confront Mr Rackham, in the Defence at paragraph 4.14 (see paragraph 7 above) a different case is advanced, namely that it was the receipt of Gouldens' advice which prompted Mr Sandy and Mr Hardman to draft the letter.

64. Mr Napier's evidence on the point was that, when he was told by Mr Newman of the investigation into Mr Rackham's alleged misconduct and was asked by him to agree to Mr Rackham being asked to stand down, his (Mr Napier's) response was that the Board should consider the matter and give Mr Rackham the opportunity to defend himself. According to Mr Napier there was no agreement between him and Mr Newman that Mr Rackham should not be confronted.

65. Mr Newman provided a written witness statement to the Defendants but, in the unfortunate circumstances described below, did not give oral evidence and was not cross-examined. His evidence as to the conversation with Mr Sandy on 20 September was that he did tell him that Mr Napier had not been enthusiastic about confronting Mr Rackham but that was a reference back to what Mr Napier had said some time before in August. Mr Newman did not accept that he had told Mr Sandy on 20 September that he and Mr Napier had agreed not to confront Mr Rackham. The next day Mr Newman wrote to Mr Sandy making clear that it was untrue that he had told Mr Sandy of an agreement between himself and Mr Napier not to confront Mr Rackham. The position, according to Mr Newman, was that, as Mr Sandy was aware, he (Mr Newman) had arranged to see Deloittes about some of the allegations against Mr Rackham on 26 September. Furthermore, Mr Newman had already instructed head-hunters to find a replacement for Mr Sandy as Chief Executive Officer.

66. I prefer the evidence of Mr Newman as to what was said by him to Mr Sandy in the course of the telephone conversation on the morning of 20 September. I

do not accept that Mr Newman said that he and Mr Napier had agreed not to confront Mr Rackham. I do not believe that any such agreement had been made between the two of them.

67. Reverting to the letter complained of, there are other passages which call for comment. I have already referred to the admittedly incorrect suggestion implicit in the penultimate paragraph that Messrs Denning and Wilson had agreed to resign; they had not. The second paragraph on page 3 of the letter refers to "numerous other matters where we have direct or hearsay evidence" of misconduct on the part of Mr Rackham. A number of such matters were canvassed in the evidence. But it did not appear to me that in the case of any of them it could be said that there was direct evidence of impropriety. When Mr Sandy and Mr Hardman appeared before the Investigatory Sub-Committee set up within WRG to investigate the allegations against Mr Rackham, they accepted that the "other matters" were all based on hearsay and rumour. There is a reference in the fourth paragraph on page 3 of the letter of 20 September to Gouldens' advice which appears to me to misrepresent what Gouldens had said. Gouldens had not advised that it was incumbent upon the Board to act decisively against Mr Rackham at that stage. The advice actually given was materially different: see paragraph 57 above. I do not overlook that fact that the paragraph in question was drafted by Mr Piers of Gouldens but the Defendants accepted responsibility for what he had written.

Impax

68. I now return to the allegations directed against Mr Rackham which I have set out at paragraph 61 above, starting with Impax. I have referred briefly at paragraph 26 above to the appointment of Impax to act as financial consultants in relation to the Allington project. The evidence as to how that came about was that on 24 August 2001 Mr Rackham sent a memorandum to Mr Sandy:

> "I enclose copies of two letters received from Impax both dated 22 August… Ultimately it is your decision which advisors you appoint but I have to say I have been greatly impressed by Impax and the positive and instructive way in which they have assessed this project".

The fee payable to Impax was £5,000 per month plus a success fee of £50,000.

69. Mr Rackham had previously bought 157,000 shares in Impax at a total cost of about £50,000. In consequence Mr Rackham became the owner of 0.44% of the shares of Impax. Mr Sandy and Mr Etheridge say that they learned of the shareholding from Mr Thompson of ISIS in the circumstances described in paragraph 48 above. Mr Rackham claims to have made informal disclosure of his holding at a Board meeting on 26 November 2001. There is no reference to that effect in the minutes. I accept the evidence of Mr Sandy and Mr

Etheridge that they were shocked to be told of the holding by Mr Thompson in August 2002. I think Mr Rackham is in error when he says that he made informal disclosure the previous Autumn. Miss Page may well be right that Mr Rackham is confusing his disclosure of Impax having bought shares in WRG with his purchase of shares in Impax.

70. Judging by Gouldens' contemporaneous advice, it is not altogether clear whether Mr Rackham's shareholding in Impax was a "material" interest such as to require disclosure in WRG's accounts. I proceed on the basis that it did require to be disclosed in WRG's accounts and that the Defendants believed that there had been a breach of duty on the part of Mr Rackham. I am bound to add, however, that the breach, whilst regrettable, does not appear to me to be at all sinister. The shareholding was a small one. The financial gain to Mr Rackham through his shares from a consultancy on the Allington project, which was not particularly rewarding, would have been trivial. I think that Mr Sandy seriously overstated the position when he wrote that Mr Rackham had "actively promoted" Impax to him. I do not accept that Mr Rackham recommended Impax in order to obtain some pecuniary advantage for himself.

Fornham Park

71. I have briefly described at paragraph 24 above how it was that a company in which Mr Rackham was interested through a family trust acquired ownership of Fornham Park in October 1999. The evidence of Mr Rackham in his witness statement as to the circumstances of that acquisition was that he discussed the purchase with two of WRG's executive board directors, namely Mr Huntington and Mr Trendell. The three of them took the view at the time that WRG was only interested in the landfill interests and not interested in purchasing an agricultural estate and only the whole was available. I readily accept that there were others on the Board who did not know of the purchase. Mr Rackham said that WRG shareholders would have considered a waste management company barmy to be purchasing agricultural investments, like the Fornham Park estate. There was absolutely no potential in any further landfill on the remaining 240 acres of the estate. Mr Rackham said that he was therefore satisfied that WRG had no interest in buying the estate. He expressed himself as being sure that it would be in the best interests of WRG if his family interest purchased the estate. The family trust gave WRG a 10% discount on royalty payments and WRG also had the benefit of having a benign landlord. Mr Rackham confirmed that account in his oral evidence, adding that what he did was in the best interests of WRG. He did consider that Fornham Park had investment potential, for example for use as a golf course, but that was not something which WRG, a waste disposal company, would have been interested in. WRG's bankers would not have permitted the company to divert into leisure.

72. It is common ground that formal disclosure was not made of Mr Rackham's indirect interest in the acquisition of Fornham Park. I am in no doubt that such formal disclosure should have been made in order to comply with the

relevant Companies Act legislation, as Gouldens were later to advise. That said, I accept the evidence of Mr Rackham that the acquisition was known of and approved within WRG at the time. Amongst those who knew in 1999 of Mr Rackham's interest were Mr Ed Bastow (then the General Manager of the South East division of WRG); Mr John Huntington (then group Managing Director); Mr Gordon Knott (then financial controller); Mr Tim Walsh (then the landfill director and on the main Board of WRG) and Mr Wauchope (then a non-executive director).

73. To the extent therefore that the letter complained of alleged that Mr Rackham had failed to disclose a disclosable interest, the Defendants and each of them had good grounds for believing the allegation to be true. In view of the extent to which the circumstances of the acquisition of Fornham Park were known within WRG at the time, the allegation of breach of duty was a somewhat technical one but the fact remains that formal disclosure should have been made and it was not.

74. But the letter of 20 September did not confine itself to non-disclosure in relation to Fornham Park; it added the further charge, to my mind a great deal more serious, that Fornham Park "at the time was available for acquisition by the Group but diverted for [Mr Rackham's] personal gain". The source of the allegation is said in the letter to have been one of the main board directors at the time. The clear meaning of this section of the letter complained of is that WRG would have been interested in purchasing Fornham Park for itself but was prevented from doing so because, for his own pecuniary motives, Mr Rackham diverted the property to his own use. In other words, Mr Rackham filched Fornham Park from WRG. That appears to me to be a charge of serious and probably criminal breach of duty on the part of Mr Rackham.

75. On what grounds do the Defendants say that they had reason to believe that this allegation of diverting or filching property was true? The Defendants' answer (or more precisely the answer of Mr Sandy and Mr Hardman) to that question is that they were told by Mr Walsh at Doncaster on 8 May 2002 that an opportunity had arisen for WRG to purchase the freehold of Fornham Park in 1999 but that Mr Rackham "had somehow engineered this situation through the estate agent in order to purchase the freehold interest himself". The evidence of Mr Sandy was that Mr Walsh told him this, whereupon he asked Mr Hardman, who was outside, to come into the room and Mr Walsh repeated what he had previously said.

76. Mr Walsh gave evidence for Mr Rackham. He accepts that he told Mr Sandy and Mr Hardman that Mr Rackham was directly or indirectly the owner of Fornham Park. He was, however, adamant that he did not tell or imply to either of them that WRG had been interested in buying the estate itself or that Mr Rackham had "engineered" a situation whereby he could buy the property for himself.

77. For several reasons, it appears to me that the evidence of Mr Walsh as to this crucial conversation is to be preferred to that of Mr Sandy and Mr Hardman. In the first place I accept that, for the reasons given by Mr Rackham (see paragraph 71 above), WRG would not have been interested in buying the estate. Mr Rackham's evidence on that point was supported by amongst others Mr Wauchope, who struck me as an impressive and reliable witness. Mr Walsh was equally clear in his evidence that the estate would not have been of interest to WRG: he said he would not have given house room to the idea of WRG buying Fornham Park. I see no realistic possibility of WRG buying the entire site and then selling off all except the landfill site, as Mr Hardman suggested. I see considerable force in the question asked forensically by Mr Rampton: why should Mr Walsh (who is, I accept, a long-standing and trusted friend of Mr Rackham) tell, firstly, Mr Sandy and then Mr Hardman that which he knew to be untrue, namely that WRG was interested in buying Fornham Park? I do not overlook the fact that in his memorandum of 2 May 2003 Mr Walsh says that WRG "looked at buying the site" but he goes on to say that the estate would have been of no interest to WRG.

78. If Mr Walsh had told Mr Sandy and Mr Hardman what they claim, one would have expected them to take immediate action since the allegation of diverting property was such a serious one. No contemporaneous record was made of what, according to Mr Sandy and Mr Hardman, Mr Walsh had told them. I accept that Mr Hardman did set in train enquiries into the identity of the new owners of Fornham Park. But there does not appear to have been much of a sense of urgency about it: carrying out a company search of Rossfleet and Paul Rackham Limited should not have taken long. Besides, one would have expected, in the light of what Mr Walsh had said about Fornham Park being diverted, that the investigation would have focussed on the question whether or not in 1999 WRG had been interested in buying the estate and, if not, why not. There were those who in 2002 could have assisted on this question but they were not asked.

79. Remarkably there is no mention in paragraph 4.7 of the Defence or in the Further Information about that paragraph to the information now said by the Defendants to have been imparted to them by Mr Walsh to the effect that Mr Rackham had diverted Fornham Park for personal gain. I do, however, bear in mind that the question whether Mr Rackham diverted the property was canvassed before the Investigatory Sub-Committee.

80. Finally on this aspect of the case, I should record the evidence given by Mr Hardman as to what he believed Fornham Park consisted of. His evidence was that, according to his understanding, Fornham Park consisted solely of the landfill site. He said he was unaware that the landfill site was no more than a small part of a much larger agricultural estate. I confess that I found this evidence somewhat surprising. I nevertheless believe that Mr Hardman was telling the truth. As I have already said, I found him to be a reliable witness. The misapprehension under which Mr Hardman was labouring suggests to me

that it is more likely than not that he misunderstood what Mr Walsh was saying in their brief meeting. Because Mr Hardman thought wrongly that Fornham Park consisted only of a landfill site, he wrongly assumed that WRG would have been bound to be interested in acquiring it.

The competitors' meeting

81. At 9.00am on 19 September 2002 (the day before the letter complained of was drafted and sent out) Mr Sandy had a meeting with Mr Robert Wheatley, formerly Managing Director of a waste company called SITA Group Waste Management but by then an independent consultant to the waste industry. The meeting had been convened for Mr Sandy to obtain the assistance of Mr Wheatley with the Allington project.

82. In the course of the meeting Mr Wheatley told Mr Sandy of an occasion in about November 2001 when he had had lunch with Mr Rackham either at the Ritz or the Savoy Grill restaurant in London. Also present was Mr Hellings, the Managing Director of another waste company called Viridor. Mr Sandy took the trouble, on what must for him have been a busy day, to compile a lengthy memorandum setting out what he says Mr Wheatley told him about the lunch. Mr Sandy records Mr Wheatley as having said that he was "summoned" to the lunch by Mr Rackham, who had instructed his "guests" (Mr Sandy's quotation marks) to put their prices up, telling them they should be ashamed of themselves for not raising prices. Mr Sandy's memorandum concluded: "There is a concern that this meeting could have infringed our obligations under the Competition Act. In the worst case fines of up to 10% of turnover can be levied". Mr Sandy gave evidence that the account of the lunch given in his memorandum was an accurate one.

83. Mr Rackham's evidence was that he would often lunch with Mr Wheatley, who said he would like to meet Mr Hellings. So Mr Hellings came to the lunch as well. It was, according to Mr Rackham, a purely social lunch. Mr Rackham said that he probably did sound off about landfill space being sold too cheaply and that waste companies should not sell to each other at prices lower than £10 per tonne. The evidence of Mr Wheatley was to like effect: he said that Mr Rackham was speaking in a tongue-in-cheek way when he spoke about prices. He and Mr Hellings regarded it as "a bit of fun". He emphasised that he had not intended to convey to Mr Sandy that Mr Rackham had done anything improper.

84. The accounts given by Mr Rackham and Mr Wheatley of the lunch had the ring of truth about them. In my judgment Mr Sandy materially misrepresented what he had been told by Mr Wheatley both in his memorandum (which has the appearance of being prepared to support a case of misconduct against Mr Rackham) and in the letter complained of. I do not think that Mr Wheatley was "summoned" to a lunch "meeting", nor do I think that it is a fair representation to say that Mr Rackham "convened" a "meeting". There

clearly was a reference to prices but I am satisfied that it was light-hearted. The claim that Mr Rackham's remarks opened WRG to a potential fine of up to ten per cent of Group annual turnover strikes me as fanciful. Mr Wheatley described it as "ridiculous". Mr Sandy must have known that he was seriously misrepresenting what Mr Wheatley had said about the lunch in what he wrote in the letter of 20 September.

The Allington project

85. Sub-paragraph (d) on page 2 of the letter complained of also derives from Mr Wheatley. In the same memorandum of 19 September, Mr Sandy records Mr Wheatley has having told him:

> "Bob Wheatley outlined an event that also took place around November 2001. (The background to this is that Paul Rackham has consistently raised his objection to the use of fluidised bed grate technology in the Allington incinerator. As a footnote we are contractually bound by Kent County Council to provide this technology as part of a waste disposal contract). Bob reported a conversation with Paul Rackham telling SITA that fluidised bed will not work. The outcome of this conversation is that Bob agreed to be "sent" to see David Alexander, who is head of waste disposal at Kent County Council, to convey the fluidised bed story. Apparently David Alexander said in outline 'If you are coming to tell me that you have been sent by Paul Rackham to tell me that the fluidised bed will not work – you are wasting your time'."

That account was expressed by Mr Sandy in the letter complained of in these words:

> "[Mr Rackham] instructed a senior management employee of one of our competitors interested in building a competing incinerator in Kent to meet with Kent to discredit our own group's proposed incinerator technology".

86. Mr Rackham's evidence was that Mr Sandy has completely distorted the true facts. He said that he had approached Mr Wheatley in his capacity as Managing Director of SITA to see if they might be interested in becoming a joint-venturer with WRG on the Allington project. That was a project to construct an incinerator for Kent County Council. The problem was that the contract with Kent required that FBT be used. In the opinion of Mr Rackham this technology was flawed and had caused great problems throughout Europe when it was used. Mr Wheatley's response to the overture from Mr Rackham was that SITA would not be interested unless the technology could be

changed.

87. It was in those circumstances that, according to the evidence of both Mr Rackham and Mr Wheatley, Mr Rackham suggested that Mr Wheatley should approach Mr Alexander of Kent County Council to see if he would agree to changing from FBT. Mr Wheatley agreed to do so and Mr Rackham provided him with the necessary information to explain the position to Mr Alexander. The meeting took place. SITA decided against joining the venture.

88. I accept the evidence of Mr Wheatley that Mr Sandy "seriously twisted" this event in his letter of 20 September. In arriving at that conclusion I make every allowance for the fact that Mr Sandy did not have access to all material documents. Even so, it must have been apparent to Mr Sandy that Mr Rackham did not "instruct" Mr Wheatley to "discredit" WRG's incinerator technology. It was misleading in the context to describe Mr Wheatley as a senior management employee of one of WRG's competitors. Rather, Mr Wheatley was a senior employee of a prospective joint-venturer. I have no doubt that Mr Rackham acted as he did because he was fearful of the consequences for WRG if FBT was employed at Allington and major problems resulted. Why should Mr Rackham want to discredit the technology if not because he considered it to be in WRG's best interests not to employ it at that site?

Accounting policies

89. Mr Rackham takes objection to the passage in the letter of 20 September which has him "presiding over" WRG's accounting policies. He points out that he is not an accountant and was at no stage a member of WRG's Audit committee. On his behalf Mr Rampton submits that it is a misnomer to describe what the Financial Reporting Review Panel did as an "investigation". The evidence is that the Panel wrote to WRG seeking an explanation of its policy of providing for long-term after-care of exhausted landfill sites and enquiring what provision for these costs had been made in WRG's accounts. WRG provided an explanation. The Panel found that accounting requirements had not been complied with by WRG and was critical on that account but concluded that no investigation was necessary.

90. Whilst I accept that Mr Rackham was not qualified in accountancy matters, the evidence reveals that he regularly and, I have no doubt trenchantly, expressed his views on accountancy matters, such as writing off and providing for exceptional items. He was a hands-on Chairman and Chief Executive. In that sense it was not inappropriate in my view to describe him as having "presided over" accounting policies. Whilst the Panel did not as such investigate WRG, criticism was expressed. In my judgment there was material on which the Defendants could base an honest belief – and on the basis of the evidence of Mr Etheridge did believe – that a year had to be spent trying to bring WRG's accounting policies into conformity with current

practice.

Knowledge of falsity – the state of mind of the individual defendants

91. I have set out above my findings as to the extent to which, if at all, the allegations concerning Mr Rackham contained in the letter of 20 September were well-founded. What matters from the point of view of malice is whether the Defendants had knowledge of that falsity or were guilty of recklessness. It is necessary to consider the case of each defendant separately.

92. I start with Mr Sandy. He did not himself draft the letter but he requested Mr Hardman to do so. He was closely involved in the preparation of the letter and he signed it. As I have already said (see paragraph 66) I do not accept that Mr Newman had told Mr Sandy on the morning of 20 September that he and Mr Napier had agreed not to confront Mr Rackham. Mr Sandy cannot have believed the position to have been as he stated it in paragraph 3 on the first page of the letter.

93. As to the truth or falsity of the allegations against Mr Rackham set out at (a) to (e) on page 2 of the letter, my conclusions run from paragraph 68 to 90 of this judgment. I accept that Mr Sandy had reason to believe that allegation (e) relating to WRG's accounting policies was well founded. I cannot say the same of the other allegations. In my view the most serious of the charges against Mr Rackham was that he diverted Fornham Park for personal gain. It follows from my finding about the conversation between Mr Sandy and Mr Walsh that Mr Sandy had no reason to believe that Mr Rackham had diverted the property. In relation to Impax, I accept that Mr Sandy had reason to believe that Mr Rackham had been guilty of non-disclosure. But he must have known that his claim that Mr Rackham "actively promoted" Impax to him was unjustified exaggeration. The allegations against Mr Rackham based on what Mr Wheatley told Mr Sandy on 19 September 2002, namely (c) and (d), misrepresented and twisted what Mr Wheatley had recounted, as I have found at paragraphs 84 and 88 above. That must have been apparent to Mr Sandy at the time when the letter was drafted.

94. I cannot avoid the conclusion that Mr Sandy knew that the majority of the allegations contained in the letter of 20 September were either unfounded or at least greatly exaggerated. The specific allegations were followed by references to "other matters", in relation to some of which it was said that there was direct evidence of breach of duty on the part of Mr Rackham. The letter describes the allegations against Mr Rackham, if proved, as grave and possibly criminal. It is claimed that Gouldens had advised the Board to act decisively against Mr Rackham. Reference is made to scandals such as Enron and Equitable Life. The claim is made that Mr Denning and Mr Wilson had agreed to resign. I have dealt earlier in the judgment with most of these passages. The cumulative effect of them was in my judgment deliberately to exaggerate and misrepresent the case against Mr Rackham. I bear in mind that

Gouldens, in the person of Mr Piers, drafted much of this section of the letter but he was of course reliant on the factual information which had been provided to him by the Defendants.

95. Mr Etheridge stands in my opinion in a rather different position. I accept that he and Mr Sandy were both members of the so-called clique at Chipping Sodbury. They worked closely together, they were both concerned about the activities of Mr Cox and I have no doubt they discussed Mr Rackham and his criticisms of the performance of WRG under the leadership of Mr Sandy.

96. However, there appear to me to be significant differences between Mr Sandy and Mr Etheridge when it comes to the contents of the letter of 20 September. In regard to Fornham Park, Mr Etheridge did not speak to Mr Walsh; he was reliant on Mr Sandy and possibly Mr Hardman for his knowledge of the evidence supporting the claim that Mr Rackham had diverted the property for personal gain. The evidence did not reveal that Mr Etheridge had played any part in the subsequent investigation into Fornham Park. Unlike Mr Sandy, Mr Etheridge did not speak to Mr Wheatley about the lunch at the Ritz/Savoy Grill or about the Allington project. It is true that Mr Etheridge was present when Mr Thompson of ISIS told him and Mr Sandy about Mr Rackham's interest in Impax. But it was to Mr Sandy, rather than Mr Etheridge, that Mr Rackham wrote commending Impax. There is no reason to assume that Mr Etheridge knew how actively Mr Rackham had promoted Impax.

97. I have also to bear in mind that Mr Etheridge played no part in the drafting of the letter because he was on holiday in Madeira at the time. Mr Etheridge accepted responsibility for the terms of the letter, which was read to him over the telephone before it was sent. That telephone conversation was said to have lasted about twenty minutes. That allows little time for detailed consideration of the evidence to support the allegations against Mr Rackham. Mr Etheridge cannot, however, evade responsibility for the hyperbole at page 3 of the letter. Nonetheless it appears to me that it is to a very limited extent that it can be said against Mr Etheridge that he knew the contents of the letter complained of to be false or exaggerated.

98. I come finally to Mr Hardman. As the in-house solicitor, he had been involved in the various discussions with Gouldens and had himself undertaken a significant part of the investigations into the concerns about Mr Rackham's conduct. He was the draftsman of most of the letter of 20 September. That said, his knowledge of the Ritz/Savoy Grill lunch and of Mr Wheatley's involvement in the Allington project derived from Mr Sandy, as did his knowledge of the extent to which Mr Rackham had promoted Impax. Mr Hardman had no direct knowledge of the information given to Mr Sandy by Mr Wheatley. On the other hand, Mr Hardman did give evidence that Mr Walsh told him that Mr Rackham had bought Fornham Park even though WRG were at the same time interested in buying the site. I have expressed my view of the conflict of evidence between Mr Walsh and Mr Hardman at

paragraph 80 above.

99. My conclusion in relation to Mr Hardman is that his involvement into the investigation into Mr Rackham had been such that he must have known at the time when the letter was being finalised that in certain respects the available evidence did not justify the terminology employed in the letter.

Motive – the nature of the Claimant's case

100. I have set out at paragraph 9 above the Particulars of Malice. As is invariably the case, those particulars are directed mainly to the falsity of the words complained of and the reasons relied on for the contention that the Defendants had knowledge of their falsity or were reckless. The Particulars include detailed reasons why it is alleged that the Defendants knew that their jobs were under threat: see paragraph 5.1 of the Reply. The dominant motive pleaded at paragraph 5.24 is that of "injuring the Claimant (whom [the Defendants] did not like) and forcing him to resign from the Board of WRG and/or in an improper attempt to save their own jobs".

101. A great deal of evidence was led in the course of the case on topic of Candover's continuing interest in acquiring WRG. One question which was canvassed was whether at the date of the publication of the letter complained of a further offer by Candover was, to the knowledge of Mr Sandy, imminent. Mr Sandy gave evidence that he had attended a meeting with Candover on 11 September but that was to up-date them on WRG's half-year results. He said he did not know that a renewed negotiation was in the wind. Mr Sandy's evidence was that he had not attended a subsequent meeting with Candover on 18 September. That evidence was strongly challenged by Mr Rampton in cross-examination: he put to Mr Sandy two documents which suggested that Mr Sandy had indeed been present at the meeting on 18 September when there was discussion of further due diligence by Candover. One of those documents was a letter from Candover dated 20 September 2002 which contained an indicative offer by Candover for the entire shareholding of WRG (albeit, as Mr Wauchope pointed out, an offer which was subject to various conditions). Mr Sandy insisted he had not been present. His evidence was supported by a letter from Mr Newman saying that Mr Sandy had not been present at the meeting on the 18th.

102. I have to say that I found Mr Sandy's answers on this point wholly unconvincing. I was therefore not surprised to be told that, having had sight of Candover's signing-in book, Mr Sandy accepted that he had been present at the meeting with Candover on 18 September after all. At the same time Mr Newman retracted what he had said in his letter, but added that the meeting on 18 September had been concerned with "reviewing past processes and setting out impediments that stood in the way of future bids".

103. Promoted no doubt by that evidence, the Defendants' solicitors sought

clarification from Mr Rackham's legal advisors what was now being said to be his case on malice and in particular how the Candover meeting was said to fit in. The answer was as follows:

> "1. The purpose of the letter was to secure the removal of Cox and Rackham;
>
> 2. The reason for this was that the hostility of Cox and Rackham and other members of the Board to the first and second Defendants, based on a perception of their failure to manage of the company's affairs satisfactorily was apparent to the first and second Defendants to the extent that by the middle of September 2002 they realised that their positions were becoming 'untenable' (to quote the words of your leading counsel in her cross-examination of Cox);
>
> 3. Moreover, the first and second Defendants were well aware that the management action plan of June 2002, which Rackham was vigorously promoting, would result in the closure of the Chipping Sodbury office and the 'demise' of at least the first Defendant and probably the second Defendant as well'
>
> 4. That your clients feared that the Board meeting on 23 September might be the occasion on which the problems they were facing with other members of the Board crystallised in a decision to dismiss at least the first and second Defendants;
>
> 5. That the first Defendant's appreciation, borne of his meeting at Candover on the afternoon of 18 September, that the Candover interest had revived and that a renewed indicative offer was expected, would make the Board very sensitive to the Defendants' demands and difficult for it not to accede to them without placing Candover's renewed interest in jeopardy".

104. Miss Page protested that this was a departure from the pleaded case on malice. She was at one stage inclined to require a formal amendment to the Reply and an affidavit explaining why the Candover meeting came to be relied on so late in the day. But Miss Page ultimately accepted, in my view sensibly, that to insist on this course being followed would result in considerable delay. I therefore approach the issue of malice on the basis that it includes, but is not limited to, the particulars provided by way of clarification and set out in paragraph 103 above.

Finding as to motivation

105. For the reasons explained in paragraphs 17-20 above, the issue whether the Defendants or any of them was actuated by some dominant improper motive is crucial. But that does not mean that the evidence bearing on the question whether the Defendants or any of them had actual or constructive knowledge of the falsity of the words complained of is to be ignored. Far from it. Knowledge that the words are false will in most cases provide powerful support for the conclusion that the defendant was actuated by an improper motive. I have already expressed my opinion as to the extent to which each of the Defendants knew the contents of the letter of 20 September to be false.

106. The question which I have to address in relation to each Defendant – and it arises acutely in the case of Mr Sandy – is why he subscribed to the letter of 20 September. I am in no doubt that a director or senior employee of a public company who becomes aware of misconduct on the part of another director, is not only entitled but also bound to communicate his concerns to the Chairman in order for him to take such action as may be appropriate. As I said in the course of argument, it would have been possible for the Defendants in the present case to discharge that duty by writing in appropriate terms to Mr Newman, taking care of course to present to him an accurate account of the reasons for supposing that the misconduct had taken place. It is in my opinion significant that the letter written by Mr Sandy to Mr Newman on 22 September, which called for an investigation into the concerns about Mr Rackham's alleged misconduct, was couched in moderate terms quite unlike the letter of 20 September.

107. Were the Defendants motivated to write the letter by a desire to bring to the notice of the Chairman of WRG their concerns about the activities of Mr Cox and, more importantly about the conduct of Mr Rackham? Or were they abusing the occasion of the privilege by writing to Mr Newman for some improper ulterior motive? I consider first the motivation of Mr Sandy. I have already found that Mr Sandy knew that the contents of the letter of 20 September were in a number of material respects false and in other respects greatly exaggerated. In addition I have found that Mr Newman had not told Mr Sandy that morning that he and Mr Napier had agreed not to confront Mr Rackham about the allegations against him (see paragraphs 53-54 above). It necessarily follows that one of the major ostensible reasons for writing the letter was false. Those findings of themselves point strongly to the conclusion that Mr Sandy's motive for writing the letter was an improper one.

108. If Mr Sandy was actuated by some improper motive or motives, what motives? I am entirely satisfied on the evidence that Mr Sandy was, over the months, well aware that his job with WRG was at risk. I cannot accept the submission of Miss Page that the point was not put to Mr Sandy or that the evidence for it was "extremely flimsy". As stated in paragraph 31 above the performance of WRG since Mr Sandy took over as Chief Executive Officer

had been poor and was deteriorating. Both Mr Barrett and Mr Rackham had expressed their concerns to Mr Sandy (see paragraphs 33 and 35 above). I accept that Mr Sandy had a degree of animosity towards Mr Rackham for what Mr Sandy no doubt felt were his unfair criticisms of his performance. The non-executive directors had been discussing replacing Mr Sandy and appointing head-hunters to find a replacement. I acknowledge that the Kelda appointees were not in favour of dismissing Mr Sandy at that time and that Mr Sandy was not told about these discussions but he cannot in my view have been unaware what was afoot. To adopt Mr Newman's words, quoted in paragraph 38 above, Mr Sandy "took the hint as to his own position". As described in paragraph 55 above, Mr Newman had in September given Mr Sandy a clear indication of the Board's intentions. In my view part of the reason for consulting Gouldens was a worry on the part of Mr Sandy that his job was under threat.

109. If indeed Mr Sandy was actuated by nothing more than a desire to inform Mr Newman of alleged misconduct on the part of Mr Rackham, why was it that the letter complained of came into existence in such a rush after months of relative inactivity? I take Miss Page's point that of itself lack of urgency is not malice but, when it is followed by a period of urgent activity, it may constitute evidence of malice. Taking Fornham Park as an example, Mr Sandy (according to his account) had known of the claim that Mr Rackham diverted it for his own personal gain since May 2002. Yet nothing was said by him to Mr Newman about it until July at the earliest. I do not accept that this passage of time can be explained by the need to investigate the ownership of Rossfleet. The feverish activity which took place on 20 September as the letter was being prepared evidences the degree of urgency felt by Mr Sandy. I cannot accept that this sense of urgency arose simply because Mr Sandy was concerned to discharge his duty to report Mr Rackham's alleged misconduct to the Chairman. Moreover, in sending the letter Mr Sandy was ignoring the clear recommendations of Gouldens contained in their Reports of 18 and 20 September as to the course of action which should be followed. It is no answer for Miss Page to say that this was advice by Gouldens to the Board.

110. I have referred at paragraphs 101 to 102 above to the evidence given by Mr Sandy about the meeting with Candover on 18 September. I have to say that I take the view that Mr Sandy was deliberately seeking to mislead the court when he claimed not to have been present at that meeting. I should add that I reject without hesitation Mr Newman's claim that he did not become aware of Candover's forthcoming bid at the meeting. Candover's indicative offer was made two days later. Mr Huntington is clearly right that everyone present knew that Candover would be making an offer in the very near future.

111. The question is why Mr Sandy wanted to conceal the fact that he attended the meeting on 18 September. His presence at the meeting means that he knew that a further bid by Candover for WRG was imminent. I believe that Mr Sandy's knowledge of the Candover bid was a major reason why Mr Sandy wanted the letter of 20 September circulated as a matter of urgency. Miss Page argues that the imminence of a bid from Candover strengthened Mr

Sandy's position because WRG would not want to jeopardise the sale to Candover by dismissing the Chief Executive Officer. I do not accept that Mr Sandy saw this situation in that light at the time.

112. I return to the terms of the letter itself. What Mr Sandy clearly wanted was the dismissal of Mr Cox and the enforced resignation of Mr Rackham. The entire letter is directed at achieving those twin objectives. I consider that Mr Sandy calculated that a bid for WRG by Candover in the near future greatly increased his chance of achieving his objectives. The Board of WRG would be prepared to sacrifice Mr Cox and Mr Rackham would resign if that was the price which had to be paid for avoiding the resignations of Mr Sandy and the others with the attendant risk of Candover withdrawing its offer. Once Mr Rackham and Mr Cox were removed from the scene Mr Sandy's job would no longer be under threat.

113. I consider that the terms of the penultimate paragraph of the letter of 20 September cast considerable light on the motive for writing it. It is unmistakably a threat: five senior executives will resign unless Mr Sandy's demands are met. The sting of the ultimatum lies in the concluding words: the resignations will "for the avoidance of doubt, be announcable events". Why, one asks, tell Mr Newman and the other non-executive directors what they plainly already knew.

114. For the above reason I have arrived at the clear conclusion that in writing the letter complained of Mr Sandy was actuated by the dominant improper motive of procuring the speedy removal from the Board of WRG of Mr Rackham and Mr Cox and thereby avoiding dismissal from his post as it's chief executive officer. Of course, the risk remained that Mr Sandy would lose that employment in the event that Candover took over WRG. If that happened, however, Mr Sandy could expect to be generously compensated.

115. I can deal more briefly with the motivation of Mr Etheridge and Mr Hardman. As regards Mr Etheridge, I have set out at paragraphs 95-97 above my reasons for concluding that it is to a very limited extent that it can be said that he knew that the letter of 20 September was false or exaggerated. The basis for inferring improper motive is correspondingly slender.

116. Mr Etheridge's position is different from that of Mr Sandy in two other important respects. Firstly, it did not appear to me that the threat to Mr Etheridge's job was anything like as great as it was in Mr Sandy's case. Mr Sandy was the person whom Mr Rackham and others principally blamed for the poor performance of WRG. Board discussions took place about the dismissal of Mr Sandy, not Mr Etheridge. Head-hunters were eventually retained to find a replacement Chief Executive Officer, not a replacement Finance Director. It is true that Mr Rackham disagreed strongly with the changes to WRG's accountancy policies which Mr Etheridge was introducing. But I do not think that Mr Etheridge thought there was a real risk of his being

dismissed on that account.

117. The second respect in which Mr Etheridge was in a different position from Mr Sandy was that there is in his case no evidence that he was aware of an imminent bid from Candover. Of course it is possible that Mr Sandy told him about it in the twenty-minute conversation at 5.30pm on 20 September. But I would not be justified in drawing any such inference.

118. Finally, in relation to Mr Etheridge, the fact that he was in Madeira at the time when the letter was being drafted and indeed had been in Madeira for most of the previous two weeks has in my view a bearing on his motivation. He was removed from the fast-moving events of 18, 19 and 20 September. Apart from what he may have learned from the relatively brief telephone conversation with Mr Sandy on 20 September, there is no evidence that he was privy to Mr Sandy's thinking over the previous fortnight. I accept Mr Etheridge's evidence that he was much influenced, in deciding to approve the draft letter, by the fact that Gouldens appeared to have endorsed its terms. There is no evidence that Mr Etheridge was made aware of the more cautious advice which had been given by Gouldens as to the evidence needed to establish the claims of misconduct on the part of Mr Rackham or of the course of action which Gouldens had recommended (see paragraph 113 above).

119. I reject the contention that, in approving the letter, Mr Etheridge was actuated by an improper motive.

120. I come finally to Mr Hardman. He was of course far more closely involved than was Mr Etheridge in the investigation of the allegations against Mr Rackham, the meetings with Gouldens and the composition of the letter complained of. But there is in Mr Hardman's case a powerful reason for supposing that his reason for writing the letter was not the same as I have found Mr Sandy's to have been. That reason is that no-one has suggested that Mr Hardman's job with WRG was under any threat at all. Indeed it was Mr Rackham's evidence that he was satisfied with Mr Hardman's performance. Nor do I think that it would be legitimate for me to infer that Mr Hardman subscribed to the letter in order to assist Mr Sandy to retain his job. There was no evidence to that effect; nor was it suggested to Mr Hardman in cross-examination. I note also that it did not appear from the evidence that Mr Hardman knew that a further bid from Candover was imminent.

121. It is also necessary to bear in mind some answers which Mr Hardman gave towards the end of his oral evidence. He said that he had two professional differences with Mr Rackham but that it did not "get personal". He agreed that it would have been preferable to have been able to take more time over the drafting of the letter of 20 September; he felt that he was in a difficult position: as an in-house lawyer he had a duty to advise the Board but at the same time he was reporting to Mr Sandy. I accept that evidence.

122. I do not accept that Mr Hardman was actuated by any improper motive when he approved the sending of the letter.

Damages

123. It follows that there must be judgment on liability for Mr Rackham against Mr Sandy. Mr Rackham is accordingly entitled to an award of damages, that being the only remedy provided under the law in present circumstances.

124. I accept that the allegations in the letter of 20 September were of some gravity. On the other hand the circulation of the letter was very limited. Moreover, Mr Sandy drew back from the position adopted in the earlier letter when he wrote to Mr Newman on 22 September. There is a claim for aggravated damages in the Particulars of Claim. But it appears to me that this action was brought by Mr Rackham because no acceptable apology was offered to him rather than because his feelings had been hurt by the libel. No time was spent during the trial dealing with the issue of damages. To the extent that Mr Rackham seeks and is entitled to vindicate his reputation, that will be largely achieved by a reasoned judgment.

125. In all the circumstances I am of the view that a modest award of damages will suffice. The amount I award is £2,000.