Neutral Citation Number: [2019] EWHC 1326 (QB)

Case No: HQ17X00252

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2019

Before:

MR JUSTICE FREEDMAN

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Between:

MODA INTERNATIONAL BRANDS LIMITED

Claimant

- and –

(1) GATELEY LLP
(later known as GATELEY HERITAGE LLP)

(2) GATELEY PLC

Defendant

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- -

Mr Francis Bacon (instructed by **Ashteds Limited**) for the **Claimant**
Ms Sonia Nolten (instructed by **BLM**) for the **Defendants**

Hearing dates: 19, 20, 21 & 26 February 2019

- -

Approved Judgment

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

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MR JUSTICE FREEDMAN

Mr Justice Freedman:
Introduction

1. This is a claim for professional negligence in connection with a property transaction. It raises questions as regards whether there was professional negligence, whether there was any resulting loss, and, if so, whether damages are to be calculated on the basis of the balance of probabilities or loss of a chance. It concerns a property transaction between (i) the Claimant which is a company registered in the British Virgin Islands company number BC 1505163 incorporated on 30 September 2008 ("Moda"), and (ii) Mortar Developments (Nottingham) Limited which is a company registered in England and Wales company number 07335532 ("Mortar").

The witnesses

2. The three witnesses, who gave evidence, were as follows:

(1) Mr Richard Wilkinson: he is an experienced property dealer and developer. He does not have an interest in Moda, but acted as the agent of Moda giving instructions on its behalf. The shares of Moda are held by the Fox Trust, which holds the shares subject to trust arrangements for the ultimate benefit of the three children of Mr Wilkinson. Moda was the registered owner of title number P175334 which formed part of the property owned at the Odeon site, Chapel Bar, Nottingham. It is asserted also in evidence that Moda owns intellectual property rights and holds shares in a textile manufacturing business.

(2) Mr Austin Moore, a solicitor specialising in company and corporate law, who was a partner of Gateleys at its Nottingham office until he left on 1 May 2013 to set up his own practice. Mr Moore had been a close personal friend of Mr Wilkinson often spending holidays with him. He was instructed by Moda at the relevant time whilst a partner of Gateleys. I shall refer to the Defendants collectively or individually as 'Gateleys'. This is simplest: in fact, the First Defendant traded until 1 May 2015 and since that time, the Second Defendant traded and assumed the liabilities for the First Defendant up to 1 May 2015.

(3) Mr Robert Monk, a director of Mortar, which he has run for almost 30 years, but whose company did not instruct Gateleys in the transactions and sometimes acted without a solicitor through Mr Monk.

(1) Mr Wilkinson

3. I set out my impressions of the witnesses. Although he was a good friend of Mr Moore, Mr Wilkinson expected a professional service. As his evidence came over to the Court, the mixing of work and pleasure did not diminish this expectation. This dispute and the ensuing litigation have brought to an end to the friendship.

4. Mr Wilkinson came over to me as a tough negotiator. He regarded it as an important part of business to achieve the best possible terms. He came over as a person who would not lightly forgo any rights. Mr Moore said of him that *"he is a fighter and doesn't give up on points…"*.[1] There came a point when he wished to divest himself of assets and to have as much as possible in the name of his children. Hence, Moda came to be owned by his children as beneficiaries in a discretionary trust. He was also keen to minimise his exposure to taxation: he lives in Cyprus and uses offshore companies such as Moda, a BVI company and Nimbus Capital Limited, also a BVI company ("Nimbus").

5. An example of the toughness of Mr Wilkinson is that there was a question as to whether his exposure to Anglo Irish Bank ("AIB") would leave him exposed to personal bankruptcy if the deal with Mortar did not go through. This question was relevant to test his bargaining power. He was confident that that would not occur, and his judgment in that regard was vindicated. This was because he had organised his affairs since his diagnosis with prostate cancer in 2004 and his divorce in 2005 into trusts such that there would be no substantial assets of his own. He therefore had a conviction that AIB would be prepared to write off millions of pounds against him. It says something about his nerve that he was prepared to take a chance in this regard. It also comprises an unattractive aspect of how he organised his affairs.

6. I shall have to make findings below as to whether Mr Wilkinson was an honest witness. It was suggested that the Court cannot be satisfied that he was an honest

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[1] T2/74/21-22

witness. This was particularly in the context of detailed submissions regarding his pleaded case about instructions to enter into negotiations for rectification and his evidence as a whole about rectification. I shall consider this in some detail below in the context of the story as a whole.

Mr Moore

7. Mr Moore is an experienced solicitor in the field of corporate law and business transactions including the purchase of businesses. He appears to have a good following in his field. He was a former President of the Nottingham Law Society. He came over as being honest and cooperative, and it is common ground that he was not an untruthful witness.

8. However, it was apparent that he had a very large caseload. It may be that at the relevant time, this imposed strains on his ability to service his work adequately. Like many solicitors in transactional business, his contemporaneous notes left a lot to be desired, which he accepted. It also came over that he was a little casual in his communications, speaking too freely to Mr Monk. This confused the instructions which he was getting from Mr Wilkinson. Whether this had any effect is something which I shall consider later in this judgment.

9. The quality of his recollection outside the documents was not good, which might not be surprising. It seems important to have caution where, perhaps understandably, Mr Moore was attempting to reconstruct events which he had forgotten from the documents. From time to time, he was a little defensive in his answers, especially when there was no obvious answer as to alleged failings which were put to him.

10. He contended about his recollection that *"it is very good on those parts where I make statements. I have been absolutely assiduous in making sure I only say things I remember and can then absolutely be sure about. One of the difficulties is, when I don't know some of the parts I can't remember, and I will tell you when I cannot remember, so in answer to your question, yes, very sure."*[2] I shall have to consider in the context of the story as a whole whether Mr Moore's contention was correct such that I can rely on that which he says he recalls. Likewise, I must consider whether I

[2] T2/68/15-22 and also T2/70/25 – T2/72/12

can accept the submission made on behalf of Gateleys that his evidence was clear and reliable as to the central conversations between him and Mr Wilkinson.

Mr Monk

11. The witness statement of Mr Monk was received following a witness summons having been issued against him. Before that, there was only a witness summary leading to the inference that he had not been prepared to provide a statement to Gateleys. He was entitled to take that approach. When the witness summons had been issued, and it was obvious that he would be called to give evidence, he did prepare a witness statement. I took the view that, like Mr Wilkinson, he too was a knowledgeable and tough businessman.

12. Generally, I found his evidence one of a person who was detached from the case as if he had no real involvement in the matters before the Court. He came across as a person who was rather irritated about having become involved in this dispute. I did not find him to be a particularly cooperative witness: perhaps he thought that he had cooperated enough by providing a witness statement and thought it unnecessary or tiresome for him to be subjected to further questioning. In a sense, that was understandable because he was not a party or a representative of the parties before the Court, but he did seem to engage in the case much less than either Mr Wilkinson or Mr Moore.

13. Moda goes on to invite the Court to find that he was not a credible or honest witness. I shall have to consider this submission in the light of the case as a whole.

THE HISTORY

14. This case concerns two adjoining pieces of land ("the Site"). One part of the land was acquired in 2002 by Mr Wilkinson personally. It was registered under title P175334 in 2002 ("the Odeon Site") for the sum of £3,725,000 with the assistance of a 100 per cent loan from Anglo Irish Bank ("AIB"). Mr Wilkinson had a tenant of the property Springwood Leisure Limited which went into liquidation in 2004. The adjoining part of the Site was the Maid Marian Way frontage (title number NT434344) which was acquired by Nimbus, a BVI company incorporated in 2004, in June 2007 for £250,000 from Nottingham City Council. Nimbus made its purchase with a loan from RBS.

Nimbus is also owned subject to trust arrangements for the ultimate benefit of the three children of Mr Wilkinson. Nimbus had a substantial property portfolio in Nottingham.

15. In 2008, Mr Wilkinson approached Nottingham City Council for a residential scheme in respect of the Site and sought a change of use from a cinema to residential. He stopped paying the AIB loan from that stage. AIB had other dealings with him and companies with which he was associated.

16. In 2010, Mr Monk contacted Mr Wilkinson as regards the Site. As evidenced by a letter from Monks Estates Limited ("MEL") dated 7 May 2010, he proposed a residential development at the Site to achieve about 440 beds for Nottingham Trent University (which had a requirement for 600-700 new beds). He proposed a joint development agreement with Mr Wilkinson and Nimbus whereby MEL would offer a sum of £4 million for the Site to be paid on completion of the development and with the profit after development to be apportioned 25% for Mr Wilkinson/Nimbus. Mr Wilkinson sought to hold out for a 50/50 apportionment.

17. There is evidence of some pressure from AIB on 9 August 2010 in that an attendance note of Gateleys of that date records that Mr Wilkinson had to agree with AIB that he would pay the full amount of the debt and that 6 months of interest would be paid up front (which would be about £47,000) in return for AIB agreeing not to appoint a receiver for 6 months. The plan was expressed at that stage to be 35% of the shares to be held by Mortar as nominee. Mr Monk wished not to reveal the involvement of Mr Wilkinson because of the borrowing from AIB and also to conceal the same from his solicitor Mr Walker at Actons. The note also reveals the possibility of letting rooms to Harvard University and to realising as much as £10,000,000 with a total rent of £3,000,000 per annum.

18. In anticipation of an option agreement in favour of Mortar as a special purpose vehicle formed for that purpose, on 24 August 2010 Mr Monk agreed with Moda by a Declaration of Trust that 35 of the shares in Mortar held by him would be held on behalf of Moda ("The Declaration of Trust"). It was provided in Clause 1 that *"[Mr Monk] hereby agrees and declares that it holds the [35] shares and all dividends,*

bonus issue shares and other distributions and benefits in respect of the Nominee Shares on trust of the Beneficial Owner absolutely…"

19. Mr Monk also gave the following undertaking (Clause 2):

> *[Mr Monk] undertakes to [Mortar] for so long as the Nominee Shares are registered in [Mr Monk's] name ...*
>
> *'2.2 to account to [Moda] (or as [Moda] may direct) for all dividends, distributions or other benefits accrued or accruing upon the Nominee Shares…*
>
> "*not to cause or permit [Mortar] to enter into any contract or arrangement with [Mr Monk] or any person connected with [Mr Monk] nor to allow any charge or fee to be levied on [Mortar] without the prior approval of the [Moda]*".

20. Nimbus and Mr Wilkinson entered into an option agreement on 1 September 2010 with Mortar through Mr Monk. This option lapsed and a second option agreement was entered into on 15 November 2011. From February 2012, the second option having lapsed, Mortar no longer had the benefit of an option in respect of the Site.

21. Reference was made to appraisal reports. By 5 December 2010, it was apparent that the developer's pre-commencement costs were estimated at £200,000; by May 2011, there were incurred costs of £162,750; by May 2012, they were £201,206 and by July 2012, they had gone up to £223,557. The expense incurred by Mr Monk/Mortar could not be recovered in respect of land which, at that stage, it did not own. However, it was intended that it would be repaid back as part of waterfall provisions in the event that the project did proceed: this provided a growing incentive to make an acquisition as the expenses grew. Likewise, there was an interest which Mr Wilkinson had in proceeding due to his liability to lenders, and especially AIB, following the acquisition of the Site and the absence of income in respect thereof following the insolvency of his tenant.

22. Mr Monk continued to produce development appraisals projecting very substantial profits for the entire accommodation and for the retail scheme relating to the old

cinema foyer. There was no distinction in these reports between the Angel Row unit (the foyer of the cinema) and the remainder of the Site. There was provided between February and July 2012 information regarding the development, potential tenants and purchasers of the investment for the completed development. By way of example, a development appraisal of 31 July 2012 showed a projected profit of £2,806,352 including Angel Row and without Angel Row would be £1,942,873. There was reference to a deferred payment structure on the basis that purchasers did not want to pay until the development had been let, as well as constructed. By July 2012 Mr Monk was in discussion with Barclays Bank pension funds about funding the development of the whole Site. They had agreed to purchase the development land for £2.25m and it appears that at about the same time, some discussions took place with AIB with a view to seeking that it waived any entitlement to recover money over the purchase sum which was said to reflect the value of the land, that is to say £2.4 million. Mr Monk stated that a condition of this potential arrangement was that AIB would have a performance fee of £300,000 payable to them as a priority and additionally a further payment on completion of the development.

23. Mr Monk was desirous that the shares in Mortar could be used to bring in investors and to charge the shares so as to fund the development of the Site. Thus, discussions started for the drafting of a participation agreement in substitution for the Declaration of Trust, and Moda instructed Gateleys to effect a change of arrangements. Mr Moore suggested that the parties should enter into a contractual arrangement, and this became known as the Participation Agreement. In this arrangement, instead of having a 35% shareholding, there would be a joint venture. Mr Moore's manuscript note at a meeting of 20 August 2012 said *"35% nominee ⇒ 35% of gross profits. Gross returns less priority returns less expenses* <u>*but*</u> *note after management charges/in house."* This note refers to an arrangement to pay a sum of £56,000 to Moda as a priority return reflecting additional interest paid to AIB. There would be paid up to £200,000 for pre-contract expenses to Mortar. There would be paid a further sum to AIB of £300,000.

24. In August 2012 Mr Monk and Mr Wilkinson had a discussion about AIB and the apparent need to pledge all the shares in Mortar to AIB. It followed that an alternative arrangement had to be agreed to replace the Declaration of Trust.

25. By an email dated 21 August 2012, Mr Moore of Gateleys wrote to Mr Monk stating he was *"instructed by Moda which holds an equity interest in [Mortar]…The proposal is for that equity interest to be replaced by an agreement for Moda to participate in revenues from the development by Mortar of the Odeon site. This would be similar to a JV agreement."* He stated that there would be defined the gross revenues, the expenses to be deducted excluding in-house costs, setting the entitlement of Moda at 35% of that net revenue stream with preferential entitlements of the above sum of £56,000 to Moda (for payment of interest to AIB). He also sought a further sum of £800,000 each to Moda and the other Mortar shareholders: this was intended to be a sum equivalent to obtaining the Site from AIB at a reduced sum. In fact, the sharing of £800,000 each was not agreed since this would be a departure from the 65/35% arrangement. Mr Wilkinson's evidence is that this email was sent following the meeting of 20 August 2012 and a telephone conversation between him and Mr Moore.

26. On the same day, Mr Monk wrote to Mr Wilkinson attaching an up to date appraisal estimating a profit of £2.8 million with other specific details and attached some heads of terms of Aberdeen Asset Management which was looking to buy the Site on behalf of Barclays Nominees (George Yard) Limited. None of this contained any separate or proposed separate arrangement for the Angel Row Unit.

27. There appears to have been a further meeting on 21 August 2012 between Mr Moore, Mr Monk and Mr Wilkinson of which there are handwritten notes of Mr Moore on the appraisal documents of 31 July 2012. The note reflects the predicted profit of £2.8 million for the entirety of the sites, including a contingency of £500,000. This took into account the moneys which would be generated from the letting of the Angel Row unit.

28. Various documents were forwarded from Mr Monk to Mr Moore on 5 September 2012 including various intended leases. The covering email referred to the documents including a draft development agreement, but it appears that this was not then sent. In a discussion attendance note of 6 September 2012 of a meeting of Mr Wilkinson with

Mr Moore and Ms Trifunovic of Gateleys, it was recorded that the intended JV would be that Moda *"is to have an entitlement of 35% of the gross profits from the development project. RW expects his figure to be in the region of £1m."* Moda would invoice its entitlement as "Facilitation/finding fee". This does not distinguish between the Angel Row retail unit and any other part of the development.

29. The note went on to say that Mr Wilkinson:

> "*wants to agree his 35% entitlement of the pre-tax profits as a "Facilitation/Finder's fee" before signing the contract with MDNL"*
>
> *Invoice for 35% entitlement of the below figures will be submitted at each payment stage which will include:*
>
> *A. Site fee*
>
> *B. Value Engineering Fee*
>
> *C. Letting Fee (Angel Row)*
>
> *d. Performance fee (final payment stage)*

The inter-relationship of the draft participation and development agreements

30. Mr Moore sent Mr Wilkinson a draft Participation Agreement on 7 September 2012. There was no suggestion in this draft that any part of the development profit and in particular that the Angel Row unit would be excluded. Mr Wilkinson replied seeking a copy of the development Agreement *"so as not to be in the dark."*

31. The billing guide over that period of time includes time spent by Mr Moore's assistant, Ms Daniella Trifunovic on 7 September 2012 and thereafter reading through the Development Agreement and comparing it with the Development Agreement. Nevertheless, over the next few days, there were various communications between Mr Wilkinson and Mr Moore about how the Development Agreement had still not been received. In the meantime, on 10 and 11 September 2012, Mr Moore advised by email that he had not received the Development Agreement.

32. An updated draft of the Participation Agreement was sent to Mr Wilkinson on 11 September 2012**.** In his covering e-mail, Mr Moore wrote

"I will keep to the line that we cannot draft this agreement until we see the development agreement. However, if you have the opportunity to please look at the document and we can assess where we are going with it. It would in my view be possible to have a contract like this without seeing the development agreement and still have a fair measure of protection. However, if he will not show us the development agreement, I cannot see how he could also accept us having monthly information and holding meetings about the development."

33. The witness statement of Mr Moore does not identify by reference to any documentary evidence how or when he passed on to Mr Wilkinson the draft Development Agreement. Mr Wilkinson is clear that he did not receive the Development Agreement until early 2015.

34. In his statement, Mr Moore states that Mr Monk did not want Moda to have a 35% entitlement from gross profit, and pointed out that he would have to pay corporation tax, and that Moda should get 35% net profit after tax. He also stated that Mr Monk contended that Mr Wilkinson should not benefit from the Angel Row part of the development which had not yet been let: Mr Monk and his associates would be having to find a commercial tenant, and he regarded it as unfair for him to have to share this part of the profit. Mr Monk rejected Mr Wilkinson's offer to be involved in the letting because he believed that this would interfere with his ability to accept an offer due to what he perceived as Mr Wilkinson's reputation for changing his mind; further, he felt also that his reputation might have a negative effect.

35. At paragraph 55, Mr Moore stated as follows:

"I recall telling Richard that Bob would not agree to Moda having a share of the Angel Row profits. This would have been orally by telephone because Richard was in Cyprus; it is not recorded in an attendance note because as I explained above, I did not always do this given the nature of my relationship with Richard. I would have been well aware in any event of Bob's views about the part B profits, because he and Bob were discussing the project and the parameters of their agreement frequently and then reporting back to me…"

The Revisions to the Participation Agreement

36. As referred to above, Gateleys sent Mr Wilkinson an amended version of the Participation Agreement on 11 September 2012. There was no amendment to Clause 1.2 in this version.

37. On 12 September 2012 at 08:44am, Mr Wilkinson sent an email to Mr Moore saying the *"draft was clear and to the point. I don't think from what you have said about the Development Agreement, that your participation agreement needs any amending… Please let me know the outcome of your chat this morning and as ever good luck."*

38. At 09:50am on the same day Mr Moore wrote to Mr Monk telling him *"I read the agreement [a reference to the draft Development Agreement] and told Wilko it looks "normal" to me and that as you said you get paid at the end. I can draft something straightforward on the back of it."* Gateleys' time records show that time was spent reviewing the Development Agreement on 11 and 12 September 2012.

39. The metadata records of Gateleys show that without any obvious reason the Participation Agreement was amended by Gateleys at 10:40am. The change to Clause 1.2 now defined "Developer's Profit" as follows:

> "*The "Developer's Profit" shall, without limiting clause 1.1, be determined in accordance with paragraph 2 of Part A of Schedule 4 to the DA, but adding back to such profit any charges or other payments to any "Mortar Party" which are not reimbursement of, or which exceed, amounts paid by the Mortar Party to third parties under the DA, the Building Contract or the Agreement for Lease."*

40. At 11.10 am Mr Moore and Ms Trifunovic attended Mr Monk to discuss the Development Agreement. The note records: "*RM stated that the only expected outstanding payment after Completion (which will be 15 working days after practical Completion) will be the letting of Angel Row*." There is no mention at all in this note that Clause 1.2 had been changed following discussion or agreement between Moda (through Mr Wilkinson) and Mr Monk. The only matter which Mr Moore said he would notify Mr Wilkinson about was the £300,000 payment to AIB.

41. Mr Moore appears to have given an amended version of the Participation Agreement to Mr Monk at the meeting on 12 September 2012. At no stage is there any documentary evidence that Mr Moore sent this revised version of the Participation Agreement to Mr Wilkinson or that he advised about the changes to it to Mr Wilkinson or Moda. In his email to Mr Monk dated 12 September 2012, Mr Moore thanked Mr Monk for the meeting and asked Mr Monk for his thoughts on the Participation Agreement. He said "*I believe I have kept it to the points needed for reasonable protection of Moda, but happy to clarify and refine.*"

42. Mr Moore held a further meeting with Mr Monk on 24 September 2012. In this meeting Mr Moore noted "*It was agreed that the entitlement to a "profit share" is more like a dividend.*" They discussed the issue of corporate taxation and Mr Moore said "*he would discuss with RW the suggestion that Moda take 35% of net profits (after tax).*" It would appear likely that Mr Wilkinson agreed this tax point but there is no documentary evidence that Mr Moore gave any advice on the distinction between Part A and Part B profits. The draft Participation Agreement was amended again and sent to Mr Monk for his approval. Despite the fact that Moda was the client of Gateleys, there is no documentary evidence that an amended copy of the draft participation agreement was provided to Moda or Mr Wilkinson for their approval.

43. In October 2012 Mr Wilkinson asked Mr Moore to press Mr Monk to complete the draft Participation Agreement. Mr Moore went to see Mr Monk on 17 October 2012, but there is no attendance note of this meeting.

44. On 18 October 2012, Mr Moore advised Mr Wilkinson by e-mail. He explained that there had been a more detailed review of the draft Participation Agreement by Adrian Goose, a director of Mortar. Mr Moore wrote that there were a few points which were capable of resolution including payment to AIB and allowance for management fees. He asked "*Do you accept that we can release the shares [in Mortar] on the contract coming into effect? I think you have enough legal protection under the contract and better protection than you have in respect of the shares.*" He concluded by saying "*the rest of the issues are really drafting points and I can handle them.*" Once again, there is no documentary evidence of advice being given about the meaning and effect of Clause 1.2 even though this related to land registered in the name of Mr Wilkinson

and Moda plainly had a commercial interest in securing profit derived from the sale and development of it.

45. Mr Moore and Mr Monk had further discussion about the Participation Agreement on 23 October 2012. Whilst there is no attendance note, it appears that Mr Moore called Mr Wilkinson to discuss Mr Monk's concerns about management charges.

46. Mr Wilkinson's response to Mr Moore on 25 October 2012 was as follows:

> *"Charles [Fish] is part of Mortar and as part of that team **he forms part of the service that I have paid for in the additional 15% profit sacrifice** [emphasis added]*".
>
> *If they wish to re-negotiate the whole deal then I am happy and will revert to 50% and half the Irish saving also agreeing say .5% of GDV as project costs – don't think this idea will go down, well do you?*
>
> *I think its wait and see what they want to do about quelling their last moments greed amongst themselves."*

47. Mr Moore amended the Participation Agreement again, as explained in his email to Mr Monk dated 25 October 2012. He made changes to Clauses 1.3, 2, 5.1 and 6.2. As before, there is no documentary evidence that Mr Moore sent these proposed amendments to Mr Wilkinson for his/Moda's approval.

48. Mr Wilkinson continued to chase Mr Moore for progress. Mr Moore responded on 30 October 2012 to say Mr Monk *"is dragging his feet"*. Mr Moore continued to press Mr Monk and although there is no attendance note of his conversation with Mr Monk, Mr Moore wrote to Mr Wilkinson by email dated 6 November 2012 to say that Mr Monk had been "*concentrating on the main deal of course. But he asked me some questions about what our deal means and I could answer them so I think he is going to sign the agreement with Moda. He is just reading through again.*"

49. On 13 November 2012 Mr Moore wrote to Mr Wilkinson, saying that he had chased Mr Monk and that *"he was moaning about extra costs and title issues and the Park Plaza people but it is going ahead and think I will get him signed up today."*

50. Mr Monk asked for further changes to clause 5.4 of the Participation Agreement. These were made by Mr Moore without any documentary evidence to suggest that there was any recourse to Mr Wilkinson or Moda. Mr Moore sent an amended Participation Agreement to Mr Monk alone on 15 November 2012. He wrote:

> *"I refer to our telephone conversation on Tuesday morning and attach a revised contract. This includes a new clause 5.4. This is for your assurance because it was always the position that profit calculations should include costs and expenses and those are not limited by the budget but by the actual outcome of the development project."*

51. The Participation Agreement was executed by Mortar and Mr Monk on about 18 November 2012, although it was dated 28 November 2012. It has never been executed by Moda. Whilst a copy was, as set out above, sent to Mr Monk/Mortar, a copy was not sent to Mr Wilkinson who remained unaware of the fundamental changes to Clause 1.2.

52. It appears that Mr Moore collected a copy of the Development Agreement. It was purported to be sent under cover of an email to Mr Moore of 11.49 on 11 September 2012, but it had to be resent. Eventually, Mr Moore appeared to have collected a copy because there is a copy in Gateleys' file dated 11 September 2012 attached to the email of 11 September 2012 purporting to send the Development Agreement. Mr Moore accepts that he went to the office of Mr Monk on that day to collect a copy. It seems likely that the draft of the email was prepared before receipt of the Development Agreement, but sent after it had been received.

53. An examination of the metadata has not been conclusive, but it reveals that there were changes of the Participation Agreement. I have set out some of the changes, but it remains unclear how and when it was that the absence of sharing of profits of the Angel Row unit got into the agreements. The important point in my findings is that at no stage was Mr Wilkinson and therefore Moda provided with copy agreements showing that there would be no sharing of the profits of the Angel Row unit.

54. There were then numerous further communications about issues other than the Development Agreement, culminating in the execution of the Participation Agreement

on 28 November 2012. This referred in Clause 2.1 to the Developer's Profit as referred to above.

55. The engagement terms of Gateleys were sent to Moda on 11 September 2012: there was a resolution of Moda accepting the same on 4 October 2012. There was a letter of Gateleys dated 22 November 2012 thanking Moda for returning the engagement terms by which time the terms of the Development Agreement had been agreed, and a copy of which was enclosed. The terms of this letter tell something about the understanding of Mr Moore as well as Mr Wilkinson as follows:

"The effect of this agreement is that Moda would give up a beneficial interest it has in some shares in Mortar Developments (Nottingham) Limited in exchange to a profit share agreement set out in the attached document based on a property development which is about to commence.

…

I cannot see any difficulties in the agreement from Moda's point of view. In fact, the contractual right to a share of profits is in my view preferable to having a beneficial interest in the share capital of the company which would give uncertainty as to any return. The level of profit share which may be earned from this development is also very uncertain, but there is effectively no positive obligation on Moda to do anything in exchange for the profit share so I see no realistic downside."

56. By a letter of 30 November 2012 from Mr Moore to Mr Monk, he attached the Participation Agreement and stated that this means that the Declaration of Trust dated 24 August 2010 is cancelled so that the share capital of Mortar was unencumbered. He also said that *"it was envisaged the agreement would be entered into on the same day as the development agreement, whereas, in fact, it looks like the development agreement may follow on a few days later."*

Completion

57. The Development Agreement was executed on 31 December 2012 and the Development Land was transferred to Barclays Nominees. On the same day, the Declaration of Trust was released by Gateleys enabling Mortar to deal freely with its

shares. Gateleys allowed this to happen, notwithstanding Mr Moore did not have an executed counter-part to the Participation Agreement and in circumstances where Harneys had raised in their email dated 21 December 2012 the need for them to have documents before signing the Participation Agreement. In fact, those matters were not addressed until 5 May 2013, by which time Mr Moore was at his new firm having left Gateleys on 1 May 2013. He did not pass on this query to Mr Wilkinson. In his email dated 5 May 2013 Mr Moore explained that the Declaration of Trust was released and that "*Moda now has a contractual right to profit on a development of property and not a share interest.*" He did not explain that part of the profit was now excluded by the Participation Agreement.

58. On 28 April 2013 Mr Moore wrote to Tony Alexander at Santander Bank in respect of a query relating to Moda. The response indicates no apparent apprehension on the part of Mr Moore of the effect of Clause 1.2:

> *"I can confirm the rights of Moda equate to 35% of the development profit on the Odeon Project, after some fixes prior payments to both Moda and Mortar in respect of expenses discharged by them totalling circa £500,000"*

59. The development progressed through 2013 and 2014. The Participation Agreement (but not the Development Agreement) was provided by Mr Moore to Mr Wilkinson on 4 September 2014. The covering email stated that payment of the first £556,000 was to be paid in a specific allocation and *"payment of the rest in 35%/65% proportions as money is received rather than at the end."* Again, this failed to identify the fact that the proportions would exclude the profits relating to the Angel Row unit.

60. Payments were made to Moda as follows, namely £56,000 on 5 November 2014 and, by way of interim payment, £250,000 on 18 November 2014. On 11 February 2015 Mr Moore sent an email to Mr Wilkinson attaching Part A of Schedule 4 of the Development Agreement. He did not send page 35 which was Part B relating to the Angel Row unit. On 26 February 2015 Mr Wilkinson asked Mr Moore if there was any further payment upon letting of Angel Row. Mr Moore's response did not deal with this. In fact, Part B, comprising page 35, is headed "Angel Row – Developer's Payment". It contains a detailed method for the calculation of an open market value

for the Angel Row unit which is to be calculated following the letting of the Angel Row unit, whereupon a payment is to be made for the same to Mortar with the effect that the value attributable to this part of the sites is to be received by Mortar and not by Moda. On the figures in the development appraisals, this would approximate to one third of the profit of £2,800,000 being excluded from the joint venture so that the same would be for the benefit of Mortar alone.

61. It was Jeanette Fearing, the secretary to Mr Wilkinson, who appears to have noticed that page 35 was missing and who sought it by an email dated 6 August 2015. This elicited a response on 10 August 2015 from Mortar, after consulting with Mr Monk, that they had sent the complete document in the past and that the point ought to be taken up with Gateleys. On 12 August 2015, Mr Moore provided the missing page to Mr Wilkinson under a cover with the heading "without prejudice". It is not apparent why the cover document was headed in this way.

62. In August 2015 Mr Wilkinson's assistant wrote to Gayle at Mortar saying that page 35 of the Development Agreement sent to them by Mr Moore was missing and asked for this. Gayle sent his version of the Development Agreement to Mr Moore on 11 August 2015 which was missing page 35.

63. Mr Wilkinson and Mr Monk then entered into discussion about the retail element of the development leading up to an exchange of emails on 18 August 2015. At the third bullet point is the response of Mr Monk to Mr Wilkinson's request for Moda's share of the profits attributable to the Angel Row letting. He wrote:

> *"The figure does not include any reference to Schedule 4 Part B Angel Row Profit as this is firstly NOT part of the Modus [sic] agreement, and secondly, is still unlet at present. To be clear, Moda International is not a party to any proceeds relating to Part B – Angel Rows developer payment as per the Modus Agreement. Part B is specifically excluded."*

64. On 22 August 2015 Mr Wilkinson wrote to Mr Moore, referring to the "*previously **unheralded** contention that the Angel Row frontage somehow is not included in the profit share arrangement"* (emphasis added).

65. Mr Moore wrote back on 25 August 2015 to say that he had better give a written response to the issues raised by Mr Wilkinson which he eventually did on 18 September 2015, writing as follows:

> *"2. You maintain that the deal agreed between Moda and Mortar was for all profit including the Part B profit so the agreement is wrong. You will seek rectification on the agreed intention. I will obviously give evidence on that including indications on the file.* ***Having looked at the file****, I confirm notes of a meeting with you on 6 September 2012 (amongst other things) and longhand notes written on the development appraisal documents tend to support what you say, that, since there is reference to Angel Row on the development appraisal and the deal refers to all the profits.* ***Thus there does seem to be a case for rectification.*** (emphasis added)
> *That is probably the biggest point. The weakness is that the agreement is quite specific in referring to Part A of Schedule 4 to the Development Agreement."*

66. A 10 year-lease of Angel Row was granted to Northgate Fast Food (owners of Taco Bell) on 23 October 2015. Despite this, Mr Wilkinson wrote by email to Mr Moore asking Mr Moore to look at his files to see if there was any correspondence with Mr Monk or Mortar confirming that "*the two agreements should yield the same result.*" He continued:

> *"What I would like you to do please is speak to Bob Monk on the agreement issues only and in isolation of all other unsettled matters, so as to ascertain whether or not he will agree to rectify agreement on an honorable basis. It is my hope that he will agree but if not we will take further advice on the steps required to the court for rectification. "*

67. On 18 November 2015 Mr Moore responded to Mr Wilkinson after having spoken to Mr Monk:

> *"I have told Bob in person that you maintain the contract does not reflect the intentions of the parties in relation to that letting and you intend to seek rectification of it. He did not give any indication that he accepts or denies this. He said that this right may yield a profit in the future, but there is no value in*

this right now…"

68. In fact, it was not true that the Angel Row unit had yielded no value. By this time, it had been let which was likely to give rise to a large profit to Mortar. Indeed, Mortar received a success fee for Angel Row of £901,942.11 plus VAT on 12 January 2016.

The central issues

69. There have been set out substantially agreed issues between the parties with some minor points of divergence. I agree with the formulation of Miss Nolten on behalf of Gateleys as formulated at the outset of her closing submissions as follows:

"The central issues in this claim are:

a. What, if anything Mr Wilkinson and Mr Monk (acting on behalf of Moda and Mortar), agreed about the Part B profits; and

b. (On the assumption that he did not agree that Mortar would keep all of the Part B profits) what they would have agreed had a draft of the Participation Agreement [PA] been put forward which asserted an entitlement by Moda to share the Part B profits."

Central issue 1: *What, if anything Mr Wilkinson and Mr Monk (acting on behalf of Moda and Mortar), agreed about the Part B profits?*

70. On the first central issue, it is the case of Gateleys that there was a discussion which took place between Mr Monk and Mr Wilkinson that the Part B profits in respect of the Angel Row unit fell outside the joint venture such they would be paid to Mortar alone. To that effect, Gateleys relies on conversations of Mr Monk with Mr Wilkinson ("the Monk-Wilkinson conversations") and on conversations between Mr Moore and Mr Wilkinson ("the Moore-Wilkinson conversations"). It is necessary to consider whether there was an agreement in discussion to exclude the Part B profits in respect of the Angel Row unit. If this were the case, then this will answer the case in that Moda cannot win if Mr Wilkinson had agreed orally to forgo the profits from the Angel Row unit. In that event, the written agreements would simply reflect the

antecedent agreement, and it would not matter whether Mr Moore had circulated the written draft agreements, unless there was evidence of a change of mind. There is no such evidence: on the contrary, Mr Wilkinson's evidence is that at no stage did he know or countenance about a change from a 35% share in a company to a profit share of nothing in respect of the Angel Row unit. I shall now consider the relevant evidence, making findings about the three witnesses.

(a) Approach to evidence in general

71. In considering a commercial case such as this one, I start with the reminder of the correct approach to evidence. In recent cases in particular, there is the following:

(1) In *Armagas Ltd v. Mundogas S.A.* ("The Ocean Frost"), [1985] 1 Lloyd's Rep. 1, Robert Goff LJ (as he then was) said at p. 57:-

> "*Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses,* ***always to test their veracity by reference to the objective facts proved independently of their testimony,*** *in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and* ***where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth.*** **"** (emphasis added)

(2) *"...the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length....Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."* per Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) ("*<u>Gestmin</u>*") at [23];

(3) "*In almost every commercial case, the best approach for a judge to adopt in making factual findings is to be guided principally by the contemporary documents and the inferences which can be drawn from them and from known or probable facts, rather than oral evidence of witnesses"* (see *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC 3615 (Comm) per Males J (as he then was) at [70], and *Gestmin* at [15-23]).

(4) In an article of Bingham J (as he then was), which has been cited extensively judicially over the years entitled "*The Judge as Juror: The Judicial Determination of Factual* Issues", he said:

"The main tests needed to determine whether a witness is lying or not are, I think, the following, although their relative importance will vary widely from case to case:
(1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;
(2) the internal consistency of the witness's evidence;
(3) consistency with what the witness has said or deposed on other occasions;
(4) the credit of the witness in relation to matters not germane to the litigation;
(5) the demeanour of the witness."

Bingham J went on to conclude that the first three of the tests may be regarded in general as giving a useful pointer to where the truth lies, whereas the fourth test is more arguable. As regards the fifth, he was of the view that *"the current tendency is ... on the whole to distrust the demeanour of a witness as a reliable pointer to his honesty."* As is apparent from the above citations, since the article, that then current tendency has continued and been reinforced.

(b) The impact of the documents in the instant case

72. These strictures are particularly significant in the instant case because it is so heavily documented. If there are matters which are contradicted by the documents or even which are not documented, then it is important to proceed with caution. In this case, the documents considered above at some length show the following:

(1) Following negotiation, the parties agreed a Declaration of Trust in August 2010 and the percentage agreed was 35% (not 25% as offered by Mr Monk or 50% as sought by Mr Wilkinson). I attach some significance later in this Judgment to the fact that the parties negotiated a compromise about the amount of the percentage conferred on Moda. The Declaration of Trust did not seek to demarcate the Angel Row unit from any other part.

(2) The many development appraisals including detailed estimated profits did not treat differently the Angel Row unit from the rest, but treated it as a part of the Site which would give rise to an estimated profit of about £2.8 million.

(3) Contemporaneous notes of Mr Moore who was involved throughout are consistent with Mr Wilkinson's case that he was not informed of the change to exclude the Angel Row unit. This includes:

(i) Mr. Moore's manuscript note of the meeting of 20 August 2012 that *"35% nominee ⇒ 35% of gross profits"*: such qualification as there was did not tell that the Angel Row unit would be excluded. On the contrary, it told a tale of the joint venture share equating to the shareholding;

(ii) Mr Moore's email of 21 August 2012 which provides for the *"equity interest to be replaced by an agreement for Moda to participate in revenues from the development…"* was to the same effect and again is without exclusion of the Angel Row unit;

(iii) The note of the meeting of 6 September 2012 referring to an entitlement of 35% of the gross profits from the development project was without anything to indicate an exclusion of the Angel Row unit.

73. It has been submitted that the Declaration of Trust is not the mirror image of a joint venture because it might be more advantageous to share 35% of the business through a joint venture than to be a minority shareholder of 35% subject to any shareholders' agreement. Whilst that is correct, in this case the Participation Agreement was seen by Mr Moore himself as a substitute for the Declaration of Trust. In these circumstances, a 35% share of a company was perceived to convert into a 35% joint venture as evidenced by the equation of *"35% nominee ⇒ 35% of gross profits"* and all the other notes to like effect of Mr Moore. No reason was identified by Mr Moore for taking the Angel Row unit out of the profit share.

74. There are clear indications that Mr Wilkinson did not receive the Development Agreement and that he wished to see it, but did not. Upon receipt of the draft Participation Agreement on 7 September 2012, Mr Wilkinson sought a copy of the development agreement. The next communications show that Mr Moore did not have a copy of the development agreement.

75. Mr Moore has not identified how or when he passed on to Mr Wilkinson the Development Agreement, yet he did advise on 12 September 2012 that *"it looks "normal" to me"* without reference to the exclusion of the Angel Row unit. There is nothing in the documents disclosed which shows that he did send the Development Agreement to Mr Wilkinson.

76. The contemporaneous documentation shows to me that the evidence of Mr Moore at paragraph 55 of his witness statement is unlikely to be correct. I accept that Mr Moore was not meticulous about his attendance notes and that some conversations did take place directly between Mr Wilkinson and Mr Monk.[3] However, there is a consistency about the documents from Mr Moore to the effect that Mr Wilkinson was not provided with the draft Development Agreement at the material time.

77. If and to the extent that Mr Moore had the Development Agreement including page 35 and read it, he could not sensibly have advised that the Development Agreement seemed 'normal' to him. On the basis that Mr Moore had recommended the Participation Agreement to replace a 35% shareholding, it was very far from 'normal' to exclude the Angel Row unit. In circumstances where the shared profit was being

[3] He admitted that he was not always good at taking attendance notes at T2/141/1 – T2/141/19

reduced by about one third, it would have been obvious for a solicitor to warn very clearly that the intended deal (at least as he had understood it) was being substantially re-written.

78. This conclusion is even stronger when one imagines the reaction of Mr Wilkinson if he had been told that Mr Monk did not wish him to share the Angel Row profits and thus to remove one third of the profit to be received. From everything which I have seen at trial, Mr Wilkinson is a tough negotiator who would prefer to engage in brinksmanship rather than be a soft touch. That is evidenced by his request for 50% in the face of the offer of 25% before the Declaration of Trust and by his seeming lack of concern when told that Mr Monk was upset by the harshness of the terms which had been negotiated. Against the background of the Participation Agreement being presented to him as a substitute for the Declaration of Trust, it is clear to me that metaphorically he would have 'hit the roof' if in 2012 he had been told that Mr Monk had decided to exclude the Angel Row part of the profit. Yet on the case of Mortar, there was no opposition on the part of Mr Wilkinson to the new arrangements: he simply keeled over. It seems most unlikely, almost inconceivable, that Mr Wilkinson without any opposition would have accepted that he should be deprived of one third of the profit at a stroke.

79. It is also to be noted that the above documents bear out a vigilance on the part of Mr Wilkinson. He recognised the absence of the Development Agreement, and wanted to be advised in the light of whatever it said. He was given an assurance about it by Mr Moore that it looked "normal", when in the circumstances, as spelt out below, it was not "normal". Further, the reasoning of Mr Monk for the exclusion seems particularly unimpressive, namely that it would be his reward for negotiating the letting of the Angel Row unit. The concept of a reward to Mortar/Mr Monk or anyone associated with them other than repayment of out of pocket for expenses not referable to such a charge was something which Mr Wilkinson had sought to prevent. In any event, the reward would itself be regarded as grossly disproportionate.

80. Further still, the contemporaneous correspondence when Mr Wilkinson discovered what had happened is consistent with Mr Wilkinson's lack of knowledge theretofore: hence his reference to *"the previously unheralded contention"* that Mortar should not have to share the profit from the Angel Row unit. If Mr Moore had really given the

advice which he said that he had done, it is inconceivable that he would have gone on to be in any way sympathetic to Mr Wilkinson's position such as to say that *"there does seem to be a case for rectification"*. On the contrary, he would have reminded Mr Wilkinson of the conversation(s) referred to in paragraph 55 of his witness statement which, if true, would have prevented him from saying that there seemed to be a case for rectification.

81. Likewise, there is nothing in the contemporaneous documents between Mr Monk and Mr Wilkinson which leads to a different conclusion. There is simply the drafting of the Development Agreement and by the change to the Participation Agreement to make it depend upon that which is in the Development Agreement. That does not provide documentary evidence of Mr Wilkinson having been informed about it.

(c) The credibility of witnesses: Mr Moore

82. I must then consider the credibility of the witnesses, having made as the main point the documents themselves and the inferences which can be drawn from them and from the known or probable facts. It is easiest to start with Mr Moore because it is not said by either party that he was a dishonest witness. I refer to my general findings about his evidence above. He was hampered by his failure to take detailed attendance notes. He was a very busy man with 30-35 live client matters in 2012. It was apparent that he did not deliver to the standards that were desirable in the context of the instant transaction. Critically, there was no good reason for his failure to supply a copy of the Development Agreement to Mr Wilkinson: he accepted that he did not deliver it. Similarly, there was no reason not to send each draft of the participation agreement, particularly when he acknowledged that Mr Wilkinson was the sort of client who would read each document which he received.[4]

83. In his oral evidence, Mr Moore struggled when asked questions about how he could have been sympathetic to the possibility of rectification in the light of paragraph 55 of his witness statement to the effect that he told Mr Wilkinson that Mr Monk would not agree to the sharing of profits in respect of the Angel Row unit. He became reduced to saying that Mr Wilkinson could seek rectification on the basis that although he knew that Mr Monk wanted an agreement excluding the 35% in respect of Angel

[4] T2/82/3 – T2/82/16 and Mr Moore's witness statement at [25]

Row, Mr Wilkinson had agreed to that. The inability to provide satisfactory answers here was an indication that paragraph 55 of the witness statement may not have been accurate.[5]

84. When Mr Moore told Mr Wilkinson that the Development Agreement was "normal", this was misleading (albeit not deliberately so). If, as appears to be the case, he had not mentioned to Mr Wilkinson that the Development Agreement sought to exclude the Angel Row unit from the profits, it was in fact wholly abnormal.

85. In the end, the contemporaneous documents show Mr Moore's evidence to be unreliable. First, each of his communications in writing referred to above were to the effect that the Participation Agreement was in effect replicating the shares in the Declaration of Trust. He conceived of the participation agreement in this way, and it would not replicate the Declaration of Trust if the Angel Row unit accounting for one third of the projected profit were excluded from the profit share. Secondly, he advised about the Development Agreement as being "normal" without any warning about the exclusion of the profit share from the Angel Row unit, and for the reasons above, it is obvious that this was not normal. Thirdly, having failed to respond to Harneys from 21 December 2012 to 5 May 2013, he said that "*Moda now has a contractual right to profit on a development of property and not a share interest"*. This was misleading (again not deliberately so) in that it now had no right to profit in respect of a part of the development of the property, namely the Angel Row unit, instead of having a share interest in the whole of the development.

86. I am satisfied that Mr Moore's evidence in paragraph 55 of his statement that he recalls that he had told Mr Wilkinson that Mr Monk would not agree to Moda having a share of the Angel Row profits is based on a false recall. It has the tell-tale words "This <u>would have been</u> orally by telephone" (emphasis added) on the basis that it is based on reconstruction. He seeks to make out an argument as to why he would have expected Mr Wilkinson to be aware of Mr Monk's views: this is entirely divorced from the contemporaneous documents about converting a 35% equity share into a 35% share of profits. He seeks to equate waterfall payments referable to recouping expenditure as a priority payment to a change of arrangement which radically changes the nature of the 35% share of profits. I reject this part of Mr Moore's evidence as

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[5] T2/79/5 – T2/80/18

being based on false reconstruction and recall. In fairness to him, he rowed back from it in cross-examination.

87. The above shows that when Mr Moore claims, as above, that he had been *"absolutely assiduous in making sure I only say things I remember and can be absolutely sure about"*[6], this was simply an unrealistic and unfulfilled aspiration. At best, he was dependent on the contemporaneous documents, and where there were none, any remembering must have been based on an attempt to reconstruct something which he could not recall, let alone be *"absolutely sure about."* In fact, he did not have the recall which he claimed to have. Insofar as he sought to refresh his memory by reference to contemporaneous documents, he was highly selective. As was exposed in cross-examination, when having to confront his documents particularly of August 2012, he had no answer to the obvious picture, namely that there was no agreement on the part of Mr Wilkinson to exclude the Angel Row profits as far as he knew, and more importantly, he did not convey any desire of Mr Monk to exclude the same.

(d) The credibility of witnesses: Mr Monk

88. As regards Mr Monk, I have made general observations above concerning his evidence. His evidence was in my judgment severely shaken in cross examination. He stated in his witness statement at paragraph 25:

"In one of those conversations with Mr Wilkinson, where the agreement was reached between us increasing his share of profit from 25% to 35%, I also explained to Mr Wilkinson that I had arranged for myself (by which I meant through Mortar) a separate agreement in respect of the letting of the Angel Row unit."

89. The conversations referred to in Mr Monk's witness statement were in the context of the agreement of the Participation Agreement. However, that was untrue because the 35% was agreed in advance of the Declaration of Trust. In a letter written during trial after Mr Moore's evidence (who contradicted the notion that there was a discussion at that stage to a 25% share), Mr Monk's solicitor wrote to the solicitor correcting paragraph 25 so that it read that there was *"a heated conversation during which Mr Wilkinson attempted to persuade me to increase Moda's share from 35% to 50%. I*

[6] T2/68/15-22

refused to agree to that". This is a very significant change in his evidence for which there was no sensible explanation.[7]

90. Worse, at paragraph 32 of his statement, he stated that *"During the telephone conversation, I made that [the fact that he would share the fee for letting Angel Row with Mr Wilkinson] clear to Mr Wilkinson. He did not dispute or argue it."* By contrast, in his oral evidence, he said that *"he did argue, but we didn't negotiate."* He would not accept that his written evidence was untrue, but called it *"an interpretation"*.

91. I do not accept the evidence of Mr Monk. First, the change of his evidence from part of the negotiation from 25% to 35% to a rowing back from the established 35% shareholding has to me the hallmarks of recent invention, whether as a deliberate lie or a fundamental error in his recall. He has not explained the change of account. It is about a point which is fundamental to this part of his evidence. Secondly, the change from no dispute or argument in his written evidence to there being argument in his oral evidence is also a change in respect of something fundamental to this part of the evidence. This too has the hallmarks of recent invention, whether as a deliberate lie or a fundamental error in his recall. Thirdly, the original account makes no sense that there would have been neither argument nor negotiation. This is especially the case in respect of Mr Wilkinson, a tough negotiator, who would be most unlikely to keel over following the Declaration of Trust and the whole purpose of the Participation Agreement.

92. A point where Mr Monk has been found out as a person who is prepared to say untruths in negotiation is in connection with his statements that he did not know what profit would be obtained from the letting of Angel Row. He made such statements in Mr Goodrham's summary of Mr Monk's evidence (paragraph 9A of the witness summary) and in his statement to Mr Moore in November 2015 by which time the Angel Row unit had been let. He must have known that this was the case, and he has given no satisfactory explanation to show how he came to make such a statement.

93. This of course leaves to be explained how the Development Agreement was drafted as it was to exclude the profit from the Angel Row unit. It is likely that Mr Monk did

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[7] T3/113/25 – T3/114/19

seek to get this through hoping that it would not be picked up, as in fact it was not. It is possible that it was drafted by Mr Monk and not spotted by Mr Moore: it is possible that it was drafted between Mr Monk and Gateleys without Gateleys taking instructions from Mr Wilkinson as to whether this change was agreed. Exactly how and why the change occurred in the drafts is unclear. I do not accept Mr Monk's account that he had an antecedent agreement with Mr Wilkinson in respect of the exclusion of the profits from the Angel Row unit, and in this regard consideration will be given to Mr Wilkinson's evidence.

(e) The credibility of witnesses: Mr Wilkinson

94. As regards Mr Wilkinson, I have already commented on the improbability that he would simply keel over to the desire of Mr Monk to have about one third of the apparently agreed 35% for himself/Mortar. Further, this was improbable bearing in mind the context of the Participation Agreement as the agreement to replace the Declaration of Trust, and the contemporaneous documents showing that Mr Moore regarded it as such. By contrast, the evidence of Mr Wilkinson denying that he had agreed to the exclusion of the profit from the Angel Row unit was not only consistent with the documents, but had a resonance in the way in which he stated it in cross-examination, asserting that the suggestion that there was an agreement was a lie.[8]

95. It was suggested that Mr Wilkinson was a person who was demonstrated to be untruthful by aspects of his evidence. It was pointed out that in the Particulars of Claim before amendment at paragraph 32, it was pleaded that Moda had instructed solicitors, Ashteds, to negotiate with Mortar with the objective of achieving rectification of the Participation Agreement and/or a further agreement to provide a greater profit share to Moda, but the negotiations were unsuccessful. Following Ashteds coming on the record in this action, that paragraph was deleted because it was untrue: there had been no such negotiations. It was suggested that this was a lie in order to deal with mitigation. It was also said that the explanations of Mr Wilkinson were inconsistent and untrue, that he used rectification in the sense of sorting it out and that it was not pleaded with sufficient care. I regard it as unlikely that there was an attempt to lie to overcome the issue of mitigation because it would have been obvious that there was no action for or correspondence about rectification.

[8] T1/158/18 – T1/161/15; T1/163/4 – T1/166/8 and T1/170/2-11

Whatever the reason for this evidence, I find that it does not provide assistance as to the issue as to whether there was an antecedent agreement between Mr Monk/Mortar and Mr Wilkinson/Moda to exclude the profit from the Angel Row unit from the joint venture. Unlike the changes of account of Mr Monk, it is not a change central to the fundamental issue as to the alleged agreement.

96. Another point is the way in which Mr Wilkinson has chosen to organise/divest his assets. It is not attractive how this has been done, particularly in the expectation that his no longer having assets in his name might persuade AIB not to pursue the personal covenants from him. Whilst finding this aspect unattractive, it does not assist the Court as to whether there was an antecedent agreement of the kind referred to above.

97. I refer to my earlier observations about the evidence of Mr Wilkinson. None of his evidence indicates that he was concealing an antecedent agreement. From the nature of the man, if there had been an attempt to deprive him of 35% the Angel Row profits and he had known about it, he would not have forgotten it, and he would not have let it go in the manner suggested.

(f) Conclusion

98. In the circumstances, my findings are as follows:

(1) Mr Wilkinson/Moda did not agree with Mr Monk/Mortar that the profit from the Angel Row unit would be excluded from the definition of Developer's Profit in the Participation Agreement.

(2) Mr Wilkinson/Moda did not give instructions to Mr Moore that the profit from the Angel Row unit would be excluded from the Developer's Profit in the Participation Agreement.

(3) Mr Wilkinson was not advised by Mr Moore and did not otherwise know that Mr Monk had informed Mr Moore that he would not agree to share the profit from the Angel Row unit.

(4) Mr Moore did not advise Mr Wilkinson that Clause 1.2 of the Participation Agreement had been amended to exclude the profit from the Angel Row unit or

otherwise that the effect of the Participation Agreement and the Development Agreement was to exclude the profit from the Angel Row unit.

(5) On the contrary, the advice which Mr Moore gave to Mr Wilkinson was that the 35% share in the Declaration of Trust was turning into a sharing of 35% of profits of the development and that the Development Agreement was 'normal'. Whilst there were exclusions in respect of various specific items of expenditure, no advice was given as to an exclusion of the profit from the Angel Row unit.

(6) The first time that Mr Wilkinson/Moda discovered that the agreements as drafted were to exclude any profit from the Angel Row unit so that Mr Monk/Mortar would receive the totality of the same for itself was in August 2015 upon receipt of the Development Agreement and page 35 thereof and upon the point being taken by Mr Monk.

List of issues

99. There has been no agreed list of issues in that the parties were unable to agree them, which was regrettable. Nevertheless, the Court has the issues submitted by the parties respectively. In the light of them, I shall consider the following issues:

(1) Was there a prior agreement or understanding between Mr Wilkinson/Moda and Mr Monk/Mortar to exclude the profit from the Angel Row unit from the definition of Developer's Profit in the Participation Agreement.

(2) If no, what was the scope and extent of Gateleys' advice to Moda in respect of the terms of the agreements;

(3) Was Gateleys in breach of contract and/or negligent in connection with the agreements;

(4) Was Moda in breach of a duty to mitigate its loss by failing to seek rectification of the agreements;

(5) If the meaning and effect of the Participation Agreement in the form ultimately executed by Mortar had been brought to Moda and/or Mr Wilkinson's attention by

Gateleys, would Moda have proceeded without more with the Participation Agreement on the terms drafted;

(6) If Moda would not have proceeded with the Participation Agreement on the terms drafted, what would Mr Monk and/or Mortar have done? What would Moda and/or Mr Wilkinson have then done;

(7) Is this a case where there can be loss of opportunity damages? In that regard, do the damages depend upon a third party, namely Mr Monk/Mortar, and, if so, what is the effect of the third party through Mr Monk having given evidence;

(8) To the extent that damages are based on the evaluation of a chance, and to the extent that there is to be liability, how is that chance to be evaluated?

100. The first two of these issues relate directly to what Miss Nolten referred to as the first of the central issues, namely what if anything was agreed about the profit from the Angel Row unit. The third and fourth issues arise out of those findings. The fifth and sixth relate directly to the second of central issues, namely what would have happened in the event that Mr Wilkinson/Moda had not agreed that Mortar would keep all of the Angel Row profits. The seventh issue is a point of law in connection with loss of opportunity damages which has been the subject of oral submissions and supplementary written submissions. The eighth issue is a consequence of the factual findings and the legal issues relating to a loss of chance.

101. I shall now consider these issues.

(1) Was there a prior agreement or understanding between Mr Wilkinson/Moda and Mr Monk/Mortar to exclude the profit from the Angel Row unit from the definition of Developer's Profit in the Participation Agreement.

102. For all the reasons set out above, I am satisfied that there was no prior agreement or understanding between Mr Wilkinson/Moda and Mr Monk/Mortar to exclude the profit from the Angel Row unit from the agreements between the parties. Nonetheless, the effect of Clause 1.2 of the Participation Agreement read with page 35 of the Development Agreement was to exclude the profit from the Angel Row unit.

The effect was that Moda, instead of receiving 35% of the profits of the Site as a whole subject to various agreed deductions relating to expenditure incurred, would not receive any share of the profit relating to the Angel Row unit.

(2) If no, what was the scope and extent of Gateleys' advice to advise Moda in respect of the terms of the agreements;

103. It has been suggested that Gateleys' simply had an executory function to procure the execution of documents. I reject that submission. It is apparent that it was a part of Gateleys' retainer to advise Moda and/or Mr Wilkinson as agent of Moda on the meaning and effect of clauses in the Participation Agreement and the Development Agreement. The concept of the Participation Agreement to replace the Declaration of Trust was the brainchild of Mr Moore. It was incumbent on Gateleys to take steps to draft the Participation Agreement so that, as far as possible, it fulfilled the objective that the Declaration of Trust should turn into the Participation Agreement. It was also incumbent as part of this to ensure that the Development Agreement whether by itself or as incorporated into the Participation Agreement fulfilled the objective. If and to the extent that it did not, Gateleys had a duty to warn and advise Mr Wilkinson/Moda about this.

104. It is accepted that Gateleys did not have a duty to advise as to the commerciality of the deal: Mr Wilkinson was a sophisticated client who needed less hand-holding than less experienced clients. However, this all seems irrelevant to the instant case. This is a case where the Participation Agreement as drafted did not carry forward the percentages from the Declaration of Trust. Further, it is a case where Mr Wilkinson was not provided with the draft of the Participation Agreement or the Development Agreement, such that he could not have known, on the basis of the finding in respect of the first point, that the agreement in its final form excluded the profit from the Angel Row unit. In my judgment, it was incumbent on Gateleys to provide the relevant agreements before they were executed or otherwise agreed, and it was also their responsibility to advise and warn Mr Wilkinson about the exclusion of the profit share in respect of the Angel Row unit.

(3) Was Gateleys in breach of contract and/or negligent in connection with the agreements?

105. I am clearly of the view that Gateleys was in breach of contract and negligent in connection with the agreements. In particular, I am satisfied that it was in breach of contract and/or negligent in failing to take reasonable steps to procure that the Participation Agreement was drafted in such a manner as to maintain the entitlement of Moda to 35% of the profits in the Site as a whole in accordance with the objective of the Participation Agreement. Although this was subject to agreed priorities, absent a prior agreement to exclude the profits from the Angel Row unit, there was an obligation to take reasonable steps to procure that this was reflected in the Participation Agreement. The effect of Clause 1.2 and page 35 of the Development Agreement was that this was not achieved. In so doing, it failed to procure that which it set out to achieve, according to the contemporaneous documents, namely to convert the intended 35% shareholding into a 35% joint venture share.

106. If in fact Mr Monk/Mortar sought to change the basis of the deal so as to have the entirety of the profit of the Angel Row unit, then it behoved Gateleys immediately to provide clear warnings and advice about this volte face. In failing to alert Mr Wilkinson to the insertion of Clause 1.2 and the Development Agreement, Gateleys was in breach of contract and/or negligent in failing to warn and/or advise Mr Wilkinson/Moda. Gateleys failed in breach of contract and negligently to apprehend that the effect of the agreements was to exclude the profit share of 35% in respect of the Angel Row unit, and thereby failed to advise the Moda/Mr Wilkinson of the same: alternatively, if it did apprehend the same, Gateleys was in breach of contract and negligent in drawing this to the attention of Moda/Mr Wilkinson so as to take instructions in respect of the same, which would have been to reject the exclusion.

107. In order to fulfil its duties, as regards the insertion of Clause 1.2 and the Development Agreement, Mr Moore/Gateleys had a duty to establish that Mr Wilkinson/Moda understood and agreed to the precise wording and effect of the documents as executed and in particular as regards the foregoing. Far from doing this, when Mr Wilkinson made it plain that he wished to check the terms of the Development Agreement, Mr Moore failed to pass on a copy of the same and most of the drafts of the participation agreement to Mr Wilkinson/Moda. In breach of contract and/or negligently, Mr Moore on behalf of Gateleys advised that the Development Agreement looked ‘normal’ when with the exercise of reasonable skill and care, it would have been seen

that it was very far from normal in excluding the profits referable to the Angel Row unit.

108. In all these respects, it is evident that Gateleys through Mr Moore was negligent and/or in breach of contract.

(4) Was Moda in breach of a duty to mitigate its loss by failing to seek rectification of the agreements?

109. Assume for this purpose that there was a prior understanding between the parties that the Participation Agreement would take the place of the Declaration of Trust and that there was no agreement to exclude the profit of the Angel Row unit. Rectification might be said to arise in one of two ways. First, it might be said that the parties had in error failed to record their common intention to have a sharing of 65/35 applying to the Angel Row unit. That would be unlikely to work because it would be said that Mr Monk at some point before execution decided that he should seek to exclude the profit from the Angel Row unit. Accordingly, it would be said that he did not make a mistake, and so a case of common mistake would be almost bound to fail.

110. Second, and alternatively, it might be said that there was a unilateral mistake in that Mr Monk was seeking to take advantage of inattention and get in the exclusion of profit sharing. This is a form of unilateral mistake where one party takes advantage of the mistake of another in circumstances where it would be unconscionable for that to take place. That too would be unlikely to work since Mr Monk would say that (i) the percentages remained open for negotiation, and he negotiated by inserting the term excluding the profit from the Angel Row unit, and (ii) he believed that there was agreement to his change of mind because there was no objection whether from Moda directly or from Mr Moore.

111. There is a further point in respect of rectification for unilateral mistake. It would be necessary to show that Mr Monk was guilty of equitable fraud, that is that he behaved unconscionably in standing by when he knew either that Mr Wilkinson had made or was likely to have made a mistake. He would be able to say that he assumed that Gateleys would not have agreed the Angel Row position. It is conceivable that he might take the position further and say that there were conversations between himself and Mr Moore which may not have been passed on to Mr Wilkinson. This would be

consistent with paragraph 55 of the statement of Mr Moore: in other words, that as per paragraph 55, there was a conversation between Mr Monk and Mr Moore, but not between Mr Moore and Mr Wilkinson nor between Mr Monk and Mr Wilkinson. All of this would make an argument about unilateral mistake unlikely to succeed. Contrary to that which has been contended, these arguments are not the identical arguments as are in play in this case.

112. It is odd that Mr Moore should be complaining about a failure to mitigate in circumstances where his evidence (as per paragraph 55 of his witness statement) provides some support to Mr Monk. This is separate from the point that the evidence is not accepted as correct.

113. It is not a requirement of mitigation that a party has a duty to start hazardous litigation: see *Pilkington v Wood* [1953] Ch 770. In this case, the application for rectification would be likely to fail. Even if it had had a reasonable chance of succeeding, which I do not accept, it would be hazardous litigation and far from straightforward. There was no offer of an indemnity from Gateleys.

114. It is in distinction to a case of rectification of a will by a disappointed intended beneficiary which was treated as reasonable mitigation: see *Walker v Medlicott & Son* [1999] 1 WLR 727. In that case, there was no offer of an indemnity, but it was found that the evidence on both sides would have been "precisely the same". If there was a good claim for negligence, a fortiori there was a good claim for rectification. That does not apply in the instant case. Mr Monk/Mortar would be able to say that it was deliberate to exclude the Angel Row profits, and that since the agreement was executed in the knowledge that Mr Moore had been acting for Moda, Mortar through Mr Monk did not know that there was a mistake on the part of Moda. Alternatively, there was the real possibility that the issue would become that there were conversations between Mr Monk and Mr Moore, not passed on to Mr Wilkinson, to the effect that Mr Monk would not agree to share the profits from the Angel Row unit. In either scenario, Mortar would be able to contend that (a) there was no common intention to agree the sharing of the profits of the Angel Row unit, and (b) there was no taking advantage of Moda of the kind required for unilateral mistake: on the contrary, there was a belief that through its solicitors Moda agreed to this sharing of the profits. Whilst that is not to say that there was no possibility of rectification, the

conclusion is that rectification proceedings did not have a good prospect of success; such an action did not mirror the professional negligence proceedings; as part of reasonable mitigation, Moda was not reasonably expected to bring a claim for rectification.

Central issue 2: (On the assumption that Mr Wilkinson did not agree that Mortar would keep all of the Part B profits) what they would have agreed had a draft of the Participation Agreement [PA] been put forward which asserted an entitlement by Moda to share the Part B profits."

115. This involves various stages to be examined. They comprise the fifth and sixth of the issues above, namely

(5) If the meaning and effect of the Participation Agreement in the form ultimately executed by Mortar had been brought to Moda and/or Mr Wilkinson's attention by Gateleys, would Moda have proceeded without more with the Participation Agreement on the terms drafted;

(6) If Moda would not have proceeded with the Participation Agreement on the terms drafted, what would Mr Monk and/or Mortar have done? What would Moda and/or Mr Wilkinson have then done?

116. As regards the fifth question, the evidence of Mr Wilkinson was clear that if he had been advised about the effect of the intended Participation Agreement and the intended Development Agreement, he would not have been prepared to enter into the same and would have required that Mortar share profits of 65/35 in respect of the development as a whole including the Angel Row unit.

117. It was put to Mr Wilkinson that he would have conceded the position on behalf of Moda in the event that Mr Monk on behalf of Mortar had insisted that he would not share the profits from the Angel Row unit. It was suggested that he needed to sell the Site and so he would have agreed it. Mr Wilkinson firmly rejected this. It was

suggested that he would have been prepared to take the hit on the Angel Row unit in order to get the property sold, to which he said that *"this is entirely incorrect."*[9]

118. It is necessary to consider these answers in context. There were circumstances which, in my judgment, indicate that it was important for both Moda/Mr Wilkinson and Mortar/Mr Monk to proceed to make a deal between the parties. They had already entered into the Declarations of Trust. It was apparent by 2012 that they were more of an encumbrance because they impeded the ability of Mortar to borrow money. Hence, the desire to replace the same with a Participation Agreement.

119. Nevertheless, they had since 2010 been seeking to do a deal with each other. The Declarations of Trust showed that long term commitment such that in effect the shares of Mortar were held 65/35 as between the Monk parties and the Wilkinson/Moda parties. The commitment to each other had continued such that when the first Declaration of Trust ran out, they entered into a second Declaration of Trust. When the second Declaration of Trust ran out, there was still an understanding that the parties would proceed with each other.

120. It was claimed by both sides that they had alternative courses open to them beyond the other. As regards Moda, Mr Wilkinson's evidence was that Miller Birch, a property development company, had been interested in acquiring the Site from Moda. There is no detailed documentary evidence to substantiate this. Mr Wilkinson says that his agent Mathias Perry was hounded by calls from Miller Birch wanting to make the acquisition. He says that there were other companies besides, but they are not even identified, and there is no evidence to show that any of them would be prepared to proceed, and on what terms. There is no reason to find that any of this was untruthful evidence. As regards Miller Birch, there is a long way to go from expressions of interest and proceeding with a project. The project with Mortar was far more tangible and more likely to come to fruition than such interest as there was from Miller Birch. Further, there is no case to the effect that in the event that Moda had been properly advised, it would have entered into an agreement with a specific third party and earned a profit of a certain amount whether replicating the intended profit with the Angel Row unit or some other profit.

[9] T2/11/19-T2/12/20

121. In my judgment, whilst there may have been some interest in the development, the interest was not tangible, and the only interest likely to come to fruition on the evidence put before the Court was Mortar/Mr Monk. The effect is that Mr Wilkinson/Moda did have some pressure lever about doing a deal with Mr Monk/Mr Mortar. Had Mr Wilkinson known of the attempt to exclude profit from the Angel Row unit, one can imagine that he might have been very annoyed and that he would have preferred to walk away immediately. However, having got so far with the development project with Mr Monk/Mortar, this cannot have been a sensible strategy. The desired course must have been to effect an agreement with Mr Monk/Mortar. The question then is which company would be the more likely to have wilted under the pressure.

122. Was the position of Mortar/Mr Monk any different as regards the party with whom they could contract? Their contention is that it was different because, it is said, Mr Monk had an arrangement with AIB that in the event that it took possession as mortgagee of the Odeon Site, it would sell the Odeon Site to Mortar/Mr Monk. There is a difficulty about this evidence. This emerged for the first time in cross-examination. It did not feature either in the information provided by Mr Monk to Mr Goodrham as referred to in his statement or in the witness statement of Mr Monk himself. It was contended in response that the information was of a secret nature, and therefore was not referred to. It is difficult to accept this account because if it were so, one would expect some documentary evidence and, in any event, for the story to emerge before oral evidence in the trial.

123. Besides, if that were really something that was ever available to Mr Monk/Mortar, then it might have been that it would have been available to them to cut out Mr Wilkinson/Moda altogether and to have negotiated with AIB directly and to have achieved far better terms with them in the first place. Just before the conclusion of Mr Monk's oral evidence, he sought to deal with this question, but his answers are difficult to understand:

"Judge: If you had that arrangement with Anglo

Irish, why didn't you just forget about this, the Angel Row

argument?

A. (Inaudible).

Judge: Why didn't you just walk away from

Mr Wilkinson and just deal with Anglo Irish Bank?

A. That is a question I have often asked myself, my Lord.

I was very close to doing that.

Judge: When you asked yourself, did you give

an answer to the other party?

A. I should have done it perhaps. I should have done it.

Kaplan, the tenant, would have been quite happy – had spoken to

them -- we had stretched them going to 450 beds, they actually

wanted 400. It would have suited them. Planning wouldn't

have been an issue. We would have had to go back to planning.

We had the height and the massing.

Judge: So, when you asked yourself the question, did you come

up with no answers as to why you hadn't done it or what?

A. As the deal came together, right at the very end, I

thought it best to carry on with what we'd got. And it

was finally, it was -- the last piece of the jigsaw didn't

come until literally New Year's Eve.

Judge: What is the last piece of the jigsaw?

A. We had to get Park Plaza's bankers to sign off the

agreement, which was BlackRock at the time. And they

were -- he was on holiday.

Judge: So, if Mr Wilkinson had insisted on

the Angel Row part of the deal being all part of it,

without knowing the price in relation to Anglo Irish,

how can you say what would have happened?

A. I know the price would have been considerably less.

Considerably less. Far more than my having to share

35 per cent of this deal.

Judge: And the source for your knowledge is?

A. My relationship with the bank. They trusted me because

I had done a previous project with them."[10]

124. This evidence is in my judgment unsatisfactory for the following reasons, namely

(1) if it were the case that Mr Monk had an arrangement of this kind with AIB, then one would expect that long earlier, the concept of the 35% deal would have been abandoned. The only sensible explanation is that there no understanding with

[10] T3/175/line 3 - T3/176/15

AIB, or if there was one, it was not sufficiently concrete to rely upon it, and therefore did not obviate the need to deal with Moda/Mr Wilkinson.

(2) the evidence that Mr Monk had been asking himself why he had not proceeded on this basis did not elicit any sensible reason: *"I was very close to doing that…" "I should have done it perhaps" "I thought it best to carry on with what we'd got…"* Again, this simply strengthens the conclusion that if there was any understanding, it was not sufficiently tangible for him to rely upon it. The conclusion that it was *"best to carry on with what we'd got"* is consistent with my findings that there was a mutual drive to continue to deal with each other.

(3) the fact that there was no specific price which had been agreed with AIB: just that it would be considerably less. This is another sign that there was not a tangible deal.

125. In any event, it is difficult to imagine, even if it were true, how such an arrangement could have worked in practice. It would have required the LPA receiver or other insolvency practitioner to have sold to Mortar or Mr Monk on such terms as it considered were appropriate. The object would be to recover the best possible price. In those circumstances, it seems that it could not have been guaranteed that the sale would be to Mortar/Mr Monk, or that the terms of an offer of sale would be for a suitable price. Doing the best on the information before me, it is possible that Mr Monk had mooted this idea with AIB, but that is not to say that there was an agreement to that effect or, if there were any such agreement, that it would have had any legal force. Mr Bacon submitted that at the material time, AIB was a government owned bank, and that it is difficult how such unwritten arrangements would have carried any weight. At the end of the evidence, Mr Monk recognised that there was a substantial risk in the event of appointment of LPA receivers or foreclosure that Mr Monk/Mortar would have to bid against other developers in respect of the property in order to acquire it. He did not think that anybody else would build it without a pre-let (and he believed that Kaplan the student accommodation provider whom he had found, would only deal with Mr Monk/Mortar). However, he recognised that this would be at risk.

126. In all the circumstances, I do not accept that it is the case on the evidence before the Court that there was a deal with AIB in place, nor that there was a good chance of such a deal being achieved. In the light of all the circumstances including the evidence cited in the preceding paragraphs, I am satisfied that Mr Monk/Mortar is unlikely to have set great store on his chance of securing a deal with a receiver or on foreclosure.

127. Looking at everything, I have come to the conclusion that the only tangible project for Moda and Mortar was the instant project. Further, Mortar had invested considerable resources into the instant project. It is apparent from the contemporaneous documents that Mr Monk/Mortar had invested hundreds of thousands of pounds. The only deal on the table which offered the prospect of recouping the same was by proceeding with a joint venture with Moda.

128. Similarly, the benefit for Moda in proceeding was that it would have for itself the benefit of being able to pay off its liability to AIB either in full or in a settlement on terms to which AIB would agree without recourse against Mr Wilkinson or Moda. It is true that rather surprisingly, the pressure of AIB on Mr Wilkinson/Moda was far less than might have been expected bearing in mind the absence of interest payments since 2008. Despite this, there were two factors which would have made it desirable, at least, for Moda to proceed with Mr Monk/Mortar. First, there was the desire to satisfy AIB given the consequences eventually of not being able to do so. Secondly, there was the desire to share a profit from the development.

129. A further factor was suggested to Mr Monk, namely that if he purchased from a receiver/AIB, he would simply have acquired the Odeon site without the Angel Row site, and that he needed to have both to make a development. His response was that the Odeon site could be developed by itself because the existing entrance was wide enough [T3/166]. He also claimed that there was a difficulty in respect of the Angel Row unit because there were problems with the hotel complex next door, namely Park Plaza [T3/168]. In my judgment, there appears to be some force in this yet additional difficulty to the evidence of Mr Monk and part and parcel of the already thorny path that he would have to go down if he were to seek to proceed without Moda/Mr Wilkinson.

130. On Tuesday 26 February 2019, before final speeches, but after the conclusion of evidence, Mr Bacon sought to introduce new evidence comprising a section 278 agreement about an access road in respect of the Angel Row site. He sought to rely on this evidence in order to show that the real entry to the site would be on the Angel Row site and to attempt to disprove the evidence of Mr Monk that he was not dependent on acquiring the Angel Row site, sometimes referred to in this context as the Nimbus site. Mr Bacon said that the need for this only emerged because of the evidence of Mr Monk about the ability to access the Odeon site alone.

131. In the exercise of my discretion, I have decided not to allow this further evidence for the following reasons, namely

(1) The issue did not arise for the first time in Mr Monk's evidence. It arose more generally whether the Angel Row site was a ransom strip, as was part of Mr Wilkinson's evidence [T1/58-59]. The Claimant therefore could have been expected to provide this evidence in good time, if it considered it to be important.

(2) If it were to be admitted, I do not accept that it would be restricted simply to admitting the section 278 agreement: it could well be necessary to hear evidence from Mr Monk (who by this stage had completed his evidence and had gone away on holiday), Mr Wilkinson and possibly planning evidence around the issue as a whole.

(3) In these circumstances, there would be a prejudice about allowing such evidence at this late stage without opening up further factual evidence and possibly expert evidence e.g. from a person with planning knowledge and experience.

(4) Bearing in mind the above factors, it would be unjust to allow such evidence after the conclusion of evidence without opening up further evidence in this case.

(5) As a matter of case management, (i) this was not the central evidence in the case; (ii) it was only one of a number of factors informing about the counter-factual case, and (ii) the other factors are adverse to Mr Monk/Mortar such that it would be disproportionate and unnecessary to have this belated further line of inquiry.

132. On the basis of the evidence which has been admitted, the feasibility of obtaining the Odeon site without the Angel Row site was another potential factor of uncertainty to be taken into account in the question as to whether in broad terms Mr Monk could have managed without Moda/Mr Wilkinson.

133. I therefore conclude that there was a shared desire to complete the development, and that it was in the interests of neither party to walk away from each other. If and insofar as there were other possibilities, they were not such in my judgment as gave reasonable confidence in their respective ability to make profit without the other in this project.

134. In view of the above, in my judgment, there was a real and substantial possibility that Moda would have earned all or some part of the 35% profit in respect of the Angel Row unit in the event that it had been properly advised. If and insofar as it was a part of the case of Gateleys that it would have refused to go ahead rather than pay all or a part of the 35% profit, I reject this. If this ever was a part of the evidence, Mr Monk indicated in his oral evidence that he would have been prepared to have moved from this. Mr Monk said the following:

> "MR BACON: Mr Monk, the truth is that, if Mr Wilkinson on
>
> behalf of Moda, had not agreed to exclude Part B
>
> profits, you would not have walked away, you would
>
> negotiated with him.
>
> A. Who knows?
>
> Q. Pure speculation, isn't it?
>
> A. It is pure speculation.
>
> Q. You cannot say what you would have done, so there are
>
> various options available, is that what you are saying?

A. Yes. I had options.[11]

135. Mr Monk said the following:

> *"Q. There is no evidence whatsoever of anything on Mr Moore's file to say that he had a discussion with Mr Wilkinson to say that you had insisted upon Part B profits being excluded?*
>
> *A. Not that I had insisted, saying that I was very unhappy and would like them removing. I was not prepared to share them.*
>
> *Q. But you would have done, wouldn't you?*
>
> *A. I might have done.*
>
> *Q. You might have done, thank you.*
>
> *A. Who knows.*
>
> *MR BACON: Who knows."*[12]

136. This is an admission at least that Mr Monk might have been prepared to share profits in respect of the Angel Row unit. I should add that although I have some regard to this evidence against his interest, I have had more regard to the commercial realities. They include the following, namely

(1) When the Option Agreement was made and renewed, it was on the basis of a shareholding of 65/35 in respect of the development as a whole with no carve out in respect of the Angel Row unit;

(2) Initially, Mr Monk had wished to have a 75/25 split, and when he moved to 65/35, he did so without a carve out for the Angel Row unit;

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[11] T3/166/25 – 167/9

[12] T3/169/13-24

(3) When expenditure occurred in anticipation of a binding agreement between the parties, there was no deviation from that understanding;

(4) The Development Agreement was intended to convert shareholding into profit share. Whilst there is a difference between the two conceptually, it was intended in principle that the transition should be without a change in shares;

(5) It is right to say that Mr Wilkinson sought to deviate from the profit share by a proposal that a sum of £1.6 million of the first part of the profit was shared equally as to 50% each, but that was rejected by Mr Monk. This might have set in train the unhappiness of Mr Monk and the desire to move from the 65/35 sharing as regards the Angel Row unit. Mr Wilkinson's desire was to share equally the part of the profit which might come from the reduction in the amount required to pay off AIB. Nevertheless, having made his attempt to obtain a 50/50 share, Mr Wilkinson retreated to the 65/35 share even including the additional £1.6 million which would have been available on AIB taking a lesser price[13];

(6) Mr Monk's reason for departing from the 65/35 share might have been justified in his own mind for a number of reasons. First, he may have been annoyed about the attempt of Mr Wilkinson to have departed from the share in his request to share the sum of £800,000 each. However, Mr Wilkinson had retreated from this. Secondly, Mr Monk says that he thought that there should not be any sharing of the Angel Row unit because Mortar would procure the tenant in respect of that unit. When Mr Wilkinson said that he would be prepared to assist in procuring a tenant, Mr Monk did not wish Mr Wilkinson's help because he thought that the reputation of Mr Wilkinson would be problematical in view of the non-payment of interest to AIB. Despite this debate, I do not see any co-relation between procuring a tenant for the Angel Row unit and wiping out a 35% share of profit in respect of the same. The nature of the intended profit share was that it was to be shared more in favour of Mortar than Moda, the one to reflect the development and the other to reflect having acquired the land in the first place.

137. There follows from the foregoing the following:

[13] T1/134/4 – T3/136/14

(1) Although there was no binding agreement between the parties, Mr Monk was seeking to change the profit share in circumstances where his reasons for so doing were not convincing.

(2) Mr Monk felt strongly about it, but there was not a lot for him to feel strongly about, because what he wanted was a departure from what had been agreed in principle.

138. What was required was to seek to nip this in the bud. This did not occur because the point was missed by Mr Moore. If Mr Moore had picked up this point and he had informed his client, then Mr Wilkinson would have made his feelings known.

139. The commercial issue is then whose will would have broken first. Both Mr Wilkinson and Mr Monk are, as I have found, hard-headed businessmen. It was not wrong in law for each of them to behave as such. For each of them, it was important to preserve this relationship and to do a deal: in any event, the deal had its own momentum as the only deal available and one to which each had invested a lot of time and money. I am satisfied that there was a high chance that they would have entered into a deal with each other.

140. Consideration must also be given to Gateleys' submission that the parties' respective entitlements were being negotiated and so the removal of the Angel Row unit was part of such negotiation. I do not agree: there is a great difference between a waterfall arrangement providing priority payments to reimburse that which had already been paid out and the idea that all was up for negotiation at this stage. The point can be made against Mr Wilkinson that he sought to make a special case of the sum of £1.6 million, the sum saved vis-à-vis AIB, which Mr Wilkinson sought to have shared 50/50 and to say that just as he was renegotiating, so did Mortar. Even if that is true, there is more significance in what happened next. Mortar utterly rejected this as being contrary to the original bargain, and insisted that this too would be subject to the 65/35 split. That, if anything, makes a point for Moda. With a firm hand, that attempt was pushed away, reverting to the 65/35 split. That is a good indication that in the event that similar firmness had been shown the other way, Moda had a good chance of being able to resist the attempt on the part of Mortar to resile from the

earlier position, so that it would share the entirety of the profit from the Site in the proportions of 65/35.

141. Thus, the agreement in principle was such that there was a very substantial prospect that Mr Monk would step down if told in no uncertain terms that it was contrary to the deal in principle to change the profit share in such a substantial way at such a late stage. In my judgment, the apparent unfairness of Mr Monk's position must affect the extent to which he would have been prepared to see through the idea of his not sharing the Angel Row unit. However, in respect of two hard-headed businessmen, there was also to be considered the strength or otherwise of their respective bargaining positions. Contrary to Mr Monk's evidence, I take the view that the only tangible option was with Moda/Mr Wilkinson, and his evidence about other realistic alternatives is not satisfactory for the reasons set out above.

142. As regards Mr Wilkinson, I recognise that his evidence is that he would have sought to go elsewhere and would have refused to deal with Mr Monk if he insisted or appeared to insist on his proposal of not sharing the profit from the Angel Row unit. However, given that he did not have any solid other deal in place, even Miller Birch, I am of the view that he is likely to have proceeded with some caution. He would, owing to his personality, have been firm in his opposition to not sharing, but if there came a point in time, when it appeared likely to him that there would not be a reversion to the 65/35 share, I take the view that he would then have been prepared to negotiate albeit with great reluctance. I reject his counter-factual evidence that he simply would not have been prepared to do a deal.

143. Whilst Mr Wilkinson must have been concerned about the possibility that AIB would become more interventionist, he had managed to string them along for years since stopping to make interest payments from 2008 onwards. Further, although it is an unattractive position for someone who has been involved in so many business interests making his children's position apparently very secure at the expense of his own position, he does seem to have had the conviction that his divestment of assets was such that after selling the Odeon site, AIB would have to recognise that there would be no enforcement against Mr Wilkinson personally. In other words, he believed that he had a very high prospect of AIB awaiting his sale. He appears also to have believed that in the event of sale by AIB, it was likely to have been without

recourse to him, having regard to his having divested assets. Mr Wilkinson gave evidence that he believed that there would be other possible purchasers: this is possible, but there was little or no documentary evidence to corroborate this.

144. I am satisfied from this evidence that Mr Wilkinson was under no more pressure than Mr Monk/Mortar about the loss of the sale. On the contrary, the parties having got as far as they did in connection with the transaction, there must have been a strong pull for them to proceed with it rather than to start again with a new suitor.

145. I have come to the overall views that

(1) If Mr Moore had drawn to the attention of Mr Wilkinson that Mr Monk was seeking not to pay Moda the 35% share in respect of the Angel Row unit, then Mr Wilkinson would have required Mortar to pay the 35%;

(2) In all likelihood, Mortar would have entered into an agreement with Moda under which it would have paid a percentage for the entirety of the Site without an exclusion in respect of the Angel Row unit;

(3) I assess the most likely scenario that if Mr Moore had immediately sought to nip this in the bud is that the 35% deal would have gone through in respect of the entirety of the Site. I reach that view taking into the account the following matters:

(i) the absence of good reason to depart from the principle that had already been agreed;

(ii) the fact that the driving force for the parties was to complete a deal;

(iii) the fact that 65/35 had been a negotiated compromise in the past. Attempts to depart from that had failed as was evident in respect of the £1.6 million, where Mr Wilkinson had sought parity, but agreed to abandon that opportunistic demand;

(iv) the brinksmanship of Mr Wilkinson which might have led Mr Monk to think that he might lose the deal in the event that he persisted with the different arrangement for the Angel Row unit;

(v) for reasons which I shall consider below, the suggestion that Mr Monk could have fulfilled his development without some kind of joint venture with Moda/Mr Wilkinson had significant difficulties. Mr Monk must have appreciated these difficulties, and that there were powerful reasons for him to revert to the overall 65/35 profit sharing arrangement. He would have appreciated these reasons so if he had been forced to confront these realities in late 2012 by proper advice having been given and Mr Moore/Mr Wilkinson saying in no uncertain terms that Mr Monk should not depart from the principle which had been established.

(4)The possible scenarios to consider are that

(i) there would have been a deal at 65/35 confirming the previous agreement in principle. For the reasons set out in (3) above, this scenario would have been the most likely ("the first scenario").

(ii) the parties would have been at loggerheads, but a negotiated deal would have been done somewhere between a very large part of the 35% profit of the Angel Row unit and a very small part of the 35% profit of the Angel Row unit. Since the pointers to Mr Monk giving in seem compelling, I treat the first scenario as the most likely. However, there was a significant, if less likely possibility of a negotiated settlement, representing the realisation of both parties that compromise was better for each

of them than walking away with no deal ("the second scenario").

(iii) The parties would have been at loggerheads and there would be no concession by the parties or either of them whether in the terms of the first scenario or the parties would not do not a deal as envisaged in the second scenario. I regard this third scenario as the least likely because it would have flown in the face of the momentum of the deal of the parties and the practical driving forces to do a deal with each other. Nevertheless, it is not possible to exclude this possibility in the event that the argument began to rage and caution was thrown to the wind by either one or both of the strong-minded personalities. Understandably, there is no evidence before the Court of what Moda/Mr Wilkinson would have achieved without the deal with Mr Monk/Mortar, and so his case on damages depends on the loss of obtaining a deal with Mr Monk/Mortar of the 35% share of profits in its entirety as the primary case, or some other evaluation such as a loss of a chance as the secondary case.

146. In her opening, Miss Nolten at paragraphs 53-54, Ms Nolten said the following:

"53. Moda's case on causation is that:

a. Had such a term been included, Moda would have received the sum of £315,679.74, being 35% of the Part B profits (see further below as to quantum) [1/2/16].

b. This is not a "loss of a chance" case because the Participation Agreement failed to reflect what had already been agreed [1/5/84].

c. If it is a "loss of a chance" case, Mortar would have agreed terms "at least" as favourable (i.e. the same 35% deal or better) [ibid].

54. No alternative case has been advanced that Mortar might have agreed some different but lesser deal. Gateley will resist any attempt to introduce such a case by way of cross-examination."

147. In the course of my preparation of this judgment, I alerted the parties to further relevant law which I considered might be relevant including cases about oral evidence, passages from Kramer on Contractual Damages and cases referred to therein. In line with paragraph 54 of her skeleton, and despite Mr Monk having accepted that he might have negotiated a settlement at a percentage of less than 35% in respect of the Angel Row unit, Miss Nolten says in her recent note of 29 April 2019 that this is a case which is not open to Moda. Following emails sent on my behalf on 7 May and 8 May 2019 to the parties, Ms Nolten has continued to submit that this case is not open to Moda. She has contended that since the Claimant's primary case is that he would have insisted on his right to receive 35% of all profits, and since he has not mentioned any other chance that it is not open to the Claimant to contend further or in the alternative a loss of a chance of a negotiated settlement of less than 35%.

148. In fact, the case on causation as pleaded by Moda in its Amended Particulars of Claim is as follows:

"33. Had the First Defendant discharged the duties it owed to the Claimant then:

33.1 The Claimant would have had a right to receive 35% of all the profits from the development of the Site, including the profits categorised as part B profits;

...

33.4 Further or alternatively, the Claimant would have sought to negotiate with MDNL a more beneficial contractual arrangement which was as favourable to the Claimant as the situation following the Declaration of Trust, and/or alternatively which provided the Claimant with a contractual entitlement to a 35% share in profits of the development such that (at the very least) the Claimant would have received 35% of the profits relating to the lease of the property to Taco Ball; and/or alternatively at least more favourable than the effect of the

Participation Agreement, read together with the Development Funding Agreement (and in the circumstances MDNL would have agreed to enter into a contract on those terms)."

149. In my judgment, the pleading does allow for the possibility of a different, but lesser, deal. That is because the Particulars of Claim refer to Moda seeking to negotiate with Mortar a more beneficial contractual development such that at very least Moda would have received 35% of the profits relating to the lease of the Angel Row site. That was the aspiration. However, that aspiration may have been fulfilled, but it does not follow that this is an all or nothing pleading. Having aspired towards that result, it does not follow that if it was not achieved that there would not have been a negotiated settlement. It depended upon not only Moda, but also Mortar.

150. In an email of 13 May 2019 in response to the emails above of 7 and 8 May 2019, Miss Nolten has submitted that the Claimant is confined to whatever the chance was that it would have agreed 35% of the Angel Row profits. She refers to paragraphs 63.1 and 63.2 of the Reply which referred to the 35% profits having been agreed so that this was not a loss of a chance, and that if it was a loss of a chance, that the percentage of the chance of agreeing a 35% share in the profits was very high. She also says that the case was opened on the basis that the only loss of chance referred to was this loss of chance. I do not accept that this overrides the analysis set out in the preceding two paragraphs about the loss of a chance of a negotiated settlement with Mr Monk/Mortar. What was not pursued by the Claimant is an alternative case of the loss of a chance of doing better than 35% with Mr Monk/Mortar or the loss of a chance of terms with Miller Birch or some other party.

151. In any event, in my judgment, in dealing with a counter-factual situation, the Court does not have to accept any assertion that is put forward, whether by Moda that it would have achieved a deal at 35% or by Mortar that it would not have entered into a deal either at 35% or for any percentage. Even if the language had not been used of seeking to negotiate to obtain 35%, the Court in my judgment is entitled to come to a conclusion on the basis of its assessment of the counter-factual. In that way, the Court is entitled to come to an assessment to which it considers would or might have occurred. In the consideration of the law which follows, there is reference to how the Court is not bound to accept that a witness would have done what at trial he or she

says that he or she would have done, and has some doubts about the value of hypothetical evidence as to what a third party might have been prepared to do.

152. If there had been anything in this pleading point, which in my judgment, there is not, the Court would then have had to assess if there is any prejudice in proceeding on the basis of considering the chance of a lesser percentage. The Re-Amended Defence pleads at paragraph 46.4.1 that at highest there is a loss of a chance of attempting to negotiate with the terms of the Participation Agreement that were as favourable to the Claimant as the terms of the Declaration of Trust and/or the chance to negotiate for a contractual entitlement to a 35% share of the profits relating to the lease in respect of the Angel Row unit to Taco Bell. That is consistent with Moda's definition of the issue, and it must admit the possibility of the negotiations ending up in a compromise of a lesser percentage than 35%.

153. In submitting that the Claimant has not put a secondary case about a negotiated settlement below a 35% share of the profits, Miss Nolten submits in her email of 13 May 2019 that Gateleys has lost the opportunity to cross-examine Mr Wilkinson on this basis or to re-examine Mr Monk. She also submits that the cross-examination of Mr Monk was in any event far too unspecific to support a finding about a percentage other than 35%. Mr Bacon in his email of 14 May 2019 recognises that Moda's claim has focused on the lost opportunity to negotiate an outcome of a 35% share of the Angel Row profits, but he says this does not preclude the Court from assessing the three outcomes (identified in paragraph 145(4) above) in order to value the loss of a chance.

154. I have to say that even if the negotiated outcome (the second of the three possible outcomes) was not pleaded, I regard the objection to the ability of the Court to consider the possibility of a negotiated percentage as unrealistic. It seems to me an obvious possibility that this might arise. Any further evidence of Mr Wilkinson and Mr Monk would not have assisted. Mr Wilkinson's evidence is that he would insist at 35% (his witness statement at paragraph 100) and Mr Monk's evidence is that he would not be prepared to agree to pay for a share of the Angel Row unit (albeit there was his treatment of any other scenario as pure speculation in the passages cited above). In these circumstances, there would have been nothing usefully to obtain from further probing of these witnesses. That does not preclude the Court from

considering the matter counter-factually and considering whether there was a real possibility of a negotiated settlement of less than 35%, and if so, assessing the same by reference to objective circumstances including the commercial realities. In all the circumstances, the Court is not precluded from considering the possibility of a negotiated settlement and indeed ought to do so.

155. I shall return to percentages about these three possibilities after considering the question of law about loss of opportunity damages. It is therefore necessary at this stage to consider the seventh and the eighth questions above.

Loss of a chance

(7) Is this a case where there can be loss of opportunity damages? In that regard, do the damages depend upon a third party, namely Mr Monk/Mortar, and, if so, what is the effect of the third party through Mr Monk having given evidence;

(8) To the extent that damages are based on the evaluation of a chance, and to the extent that there is to be liability, how is that chance to be evaluated?

Introduction

i) **Submissions on loss of a chance**

156. Having concluded that there has been a breach of contract and/or negligence, I have to consider what damages, if any, have come from the liability. It is necessary to consider when a claim can be established for loss of opportunity, that is a claim is for a percentage loss as opposed to an all or nothing claim. The distinction is that in a case which depends on proving a case on the balance of probabilities, nothing more than in excess of 50% suffices to prove the case. However, if and to the extent that a loss of chance suffices, even if the chance is 50% or substantially less, damages can be recovered. The corollary is that even in a case where the chance is in excess of 50%, there is not an award of 100%, but of the full damages reduced according to the appropriate percentage.

157. Mr Bacon on behalf of Moda submitted that this is a case where either he has proven that but for the wrong, Moda would have achieved a profit split of 65/35 for the

entirety of the development. He says this as his primary case that Moda would have insisted on its right to receive 35% of all profits because this had already been agreed: see Wilkinson statement at [100-101]. However, he says as an alternative argument that if it depends on the hypothetical actions of Mr Monk, the Court will need to quantify the loss of a chance. In that event, he submits that there was a very high prospect that such an agreement would have been made which he assesses as an 80% chance.

158. Miss Nolten on behalf of Gateleys says that the loss of a chance does not apply in this case. She points to what she describes as a lacuna in the law. The analysis of a loss of a chance applies where the incidence of damages depends upon the hypothetical acts of a third party. In the instant case, the third party, that is Mr Monk/Mortar gave evidence to the Court. In those circumstances, there is no difference between a case where the relevant third party has given evidence as one not involving a third party: in both cases, the Court would have all the relevant evidence. Thus, she says that the test should be a balance of probabilities test. Miss Nolten's primary submission is that Mr Monk/Mortar would not have agreed to continue with the deal and so that damages are nominal in contract, and negligence is not made out due to the absence of damage. Her secondary case is that even if there was a chance of a sharing of profits, that was no higher than 50%. Accordingly, applying the test of the balance of probabilities, Moda has failed to establish its loss on the balance of probabilities and the claim must fail.

ii) The law on loss of a chance

159. Cases depending on the loss of a chance of application to the instant case are ones where the outcome depends in whole or in part upon how a third party would have acted. The leading case was until recently the Court of Appeal decision of *Allied Maples Group Ltd v Simmons & Simmons* [1995] EWCA Civ 17 (*"Allied Maples"*). Many of the cases concern negligence in connection with litigation where the loss of opportunity is the loss of the case with uncertain prospects of litigation. *Allied Maples* is closer to this case because it is the loss of a chance in a transaction depending upon the attitude of the counter-party in the event that the claimant had been advised as to its rights.

160. In *Allied Maples*, as in this case, the issue arose out of a solicitor's negligence. It involved the failure to give advice as to the absence of a warranty which the counter-party had rejected. Counter-factual questions then arose as to whether if the solicitor had given the correct advice as to the potential consequence of not having the warranty, (a) would the Claimant have sought to insist that he obtain such a warranty, and (b) if he had done so, would the counter-party have agreed to that? The case of *Allied Maples* makes it clear that the balance of probabilities is to be applied to the first of those questions and the loss of chance of damages to the second of those questions.

161. The lead authority, which has substantially approved *Allied Maples* is the recent Supreme Court decision of *Perry v Raleys* [2019] UKSC 5: [2019] 2 WLR 636. That case involved negligence in the course of litigation as a result of which the claimant was deprived of his ability to pursue his case. The Supreme Court did not distinguish in principle between loss of an ability to have a certain clause in a non-contentious case and being deprived of a piece of litigation. The relevant law was summarised by Lord Briggs at [20-22]:

"…the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation.

21. This sensible, fair and practicable dividing line was laid down by the Court of Appeal in Allied Maples Group Ltd v Simmons & Simmons (a firm) [1995] 1 WLR 1602, a decision which received surprisingly little attention in either of the courts below (although, in fairness, the trial judge cited another authority to similar effect: namely Brown v KMR Services [1995] 4 All ER 598). Allied Maples had made a corporate takeover of assets and businesses within the Gillow group of companies, during which it was negligently advised by the defendant solicitors in relation to

seeking protection against contingent liabilities of subsidiaries within the vendor's group. Allied Maples would have been better off, competently advised, if, but only if: (a) it had raised the matter with Gillow and sought improved warranties and (b) Gillow had responded by providing them. The Court of Appeal held that Allied Maples had to prove point (a) on a balance of probabilities, but that point (b) should be assessed upon the basis of loss of the chance that Gillow would have responded favourably. The Court of Appeal (Stuart-Smith, Hobhouse and Millett LJJ) were unanimous in that statement of legal principle, although they differed as to the outcome of its application to the facts. It was later approved by the House of Lords in Gregg v Scott, at para 11 by Lord Nicholls and para 83 by Lord Hoffmann.

22. The Allied Maples case was about the loss, due to negligence, of the opportunity to achieve a more favourable outcome in a negotiated transaction, rather than about the loss of an opportunity to institute a legal claim. But there is no sensible basis in principle for distinguishing between the two, and none was suggested in argument. In both cases the taking of some positive step by the client, once in receipt of competent advice, is an essential (although not necessarily sufficient) element in the chain of causation. In both cases the client will be best placed to assist the court with the question whether he would have taken the requisite initiating steps. He will not by the defendant's breach of duty be unfairly inhibited in proving at a trial against his advisor that he would have done so, save perhaps where there is an unusual combination of passage of time and scarcity of other probative material, beyond his own unaided recollection."

162. Lord Briggs pointed to consequences of the foregoing distinction. The first is the all or nothing outcome adverted to above. The second is that generally a negligence claim is subjected to the full rigours of an adversarial trial, but there are cases where *"for the purpose of evaluating the loss of a chance, the court does not undertake a trial within a trial"* [at 24]. At [31], Lord Briggs summarising the effect of the authorities said that they show that *"where the question for the court is one which turns upon the assessment of a lost chance, rather than upon proof upon the balance of probabilities, it is generally inappropriate to conduct a trial within a trial."*

163. There is further assistance in the speech of Lord Briggs as to when a court determines damages on the basis of a loss of a chance subject to the claimant proving in a case like this that if he had known of the circumstances, he would have sought to insist on the counter-party restoring the profit share. Lord Briggs referred to cases concerning the future and the counter-factual where the court occasionally departs from the ordinary burden on a claimant to prove facts on the balance of probabilities by having recourse to the concept of loss of opportunity or loss of a chance.

164. In a litigation case, what has been lost is often a claim with uncertain prospects of success and where it would be absurd to decide the matter on an all or nothing basis. Since such cases are frequently settled without the need to go to an all or nothing trial, it is often artificial to assess the damages on that basis [at 17].

165. Lord Briggs then said the following at [18-19]:

"18. Sometimes it is simply unfair to visit upon the client the same burden of proving the facts in the underlying (lost) claim as part of his claim against the negligent professional. This may be because of the passage of time following the occasion when, with competent advice, the underlying claim would have been pursued. Sometimes it is because it is simply impracticable to prove, in proceedings against the professional, facts which would ordinarily be provable in proceedings against the third party who would be the defendant to the underlying claim. Disclosure and production of relevant documents might be impossible, and the obtaining of relevant evidence from witnesses might be impracticable. The same departure from the practicable likelihood that the underlying claim would have been settled rather than tried is inherent in any such process of trial within a trial.

19. But none of this means that the common law has simply abandoned the basic requirement that a claim in negligence requires proof that loss has been caused

by the breach of duty, still less erected as a self-standing principle that it is always wrong in a professional negligence claim to investigate, with all the adversarial rigour of a trial, facts relevant to the claim that the client has been caused loss by the breach, which it is fair that the client should have to prove."

166. Lord Briggs referred to the oft cited judgment of Simon Brown LJ in *Mount v Baker Austin* [1998] PNLR 493 who stated at 510D-511C in the context of a losing the chance to fight a case the following:

"1. The legal burden lies on the plaintiff to prove that in losing the opportunity to pursue his claim (or defence to counter-claim) he has lost something of value i.e. that his claim (or defence) had a real and substantial rather than merely a negligible prospect of success. (I say ´negligible' rather than ´speculative' - the word used in a somewhat different context in Allied Maples Group Limited v Simmons & Simmons [1995] 1 WLR 1602 - lest ´speculative' may be thought to include considerations of uncertainty of outcome, considerations which in my judgment ought not to weigh against the plaintiff in the present context, that of struck-out litigation.)
2. The evidential burden lies on the defendants to show that despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position and heavier still where, as here, two firms of solicitors successively have failed to do so. If, of course, the solicitors have advised their client with regard to the merits of his claim (or defence) such advice is likely to be highly relevant.
3. If and insofar as the court may now have greater difficulty in discerning the strength of the plaintiff's original claim (or defence) than it would have had at the time of the original action, such difficulty should not count against him, but rather against his negligent solicitors. It is quite likely that the delay will have caused such difficulty and quite possible, indeed, that that is why the original action was struck out in the first place. That, however, is not inevitable: it will not be the case in particular (a) where the original claim (or defence) turned on questions of law or the interpretation of documents, or (b) where the only possible prejudice from the delay can have been to the other side's case.

4. If and when the court decides that the plaintiff's chances in the original action were more than merely negligible it will then have to evaluate them. That requires the court to make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out. Generally speaking one would expect the court to tend towards a generous assessment given that it was the defendants' negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure…"

167. In *Harrison v Bloom Camillin* [2001] PNLR 195 at 230-231 at [100-103], Neuberger J (as he then was) considered what was to happen where the loss of chance was in respect of a point of law which the Court in a professional negligence action might be in a good position to be able to assess. Neuberger J treated as "fair and practical" the Court being far more ready to determine a point of law than a point of fact. It seemed to him that in the third and fourth points of Simon Brown LJ in *Mount v Baker Austin*, even in the case of a point of law, it seemed implicit that even in a point of law case, the Court would still in an appropriate case decide the matter on a loss of chance basis.

168. In that case, Neuberger J went on to say at p.231 [104-106] that in some loss of chance cases, it would be appropriate to look at matters with *"a fairly broad brush"*. In others, the Court would be comparatively prepared to come to a clear conclusion on at least some of the outcome e.g. where the evidence and arguments were substantially more extensive than in most loss of a chance cases, but not if the oral and documentary evidence were substantially less than would have been available in an action.

169. Applying this to the instant case, the onus is on Moda to prove on the balance of probabilities that in the event that Gateleys had pointed out that Mortar wished not to apply the 35% share to a part of the development, Moda would have sought to insist on receiving its 35% share of profits. If Moda can satisfy that, it does not follow that Moda will succeed. That is because even if Moda would have sought to insist upon obtaining a 35% profit in respect of the whole of the development, it does not follow that Mr Monk/Mortar would have agreed to share the profit in respect of the whole.

170. In order to establish a loss, it would be necessary to establish that there was a real and substantial chance, and not a speculative one, that Mr Monk/Mortar would have agreed either to share 35% for the whole of the development or to some negotiated compromise whereby the 35% would have been shared in some proportions. On the basis of a loss of a chance, the claimant is required *"only to prove that the lost claim had a real and substantial, rather than merely negligible, prospect of success, following which the court [is] obliged to conduct an evaluation of the prospect of success, rather than a trial within a trial of the underlying claim."* per Lord Briggs at [34] in *Perry v Raleys* summarising a part of the judgment of Simon Brown LJ in *Mount v Barker Austin* [1998] PNLR 493 (referred to in more detail above).

(iii) Is the law different where the third party has given evidence?

171. Before considering how the prospect of success is evaluated, it is first necessary to consider the argument of Miss Nolten that as a matter of law, the analysis is based on balance of probabilities because the Court has received the evidence of Mr Monk. The argument is that in *Allied Maples*, the Court did not hear from the third party (or all relevant third parties) and so had to make a hypothetical assessment of the loss of a chance. However, Gateleys says that the position should be different where all the relevant evidence is before the Court. It was submitted that there was no authority in point, and so the Court must make its own assessment.

172. I invited attention to McGregor on Damages 20th Ed. at the hearing which takes the clear view that it makes no difference in principle that there is a loss of a chance. I have been assisted since the conclusion of oral submissions by a written submission on 1 March 2019 from Miss Nolten and by Mr Bacon's response of 4 March 2019 in respect of a passage in McGregor on Damages 20th Ed. [10-065 – 10-067]. Attention was drawn to a decision of HH Judge Hodge QC in *Stone Heritage Developments Ltd v Davis Blank Furniss* who, having found that the Claimant's case could not succeed, went on to apply the balance of probabilities test instead of a loss of a chance because the third parties had been before the Court. However, in *Tom Hoskins Plc v EMW Law*, Floyd J, albeit having little evidence of whether a third party would have completed a contract with the claimant appeared to be against allowing third party evidence to move the law from loss of a chance to balance of probabilities.

173. At para 10-066, McGregor said the following:

"In Stone Heritage His Honour Judge Hodge [QC] considered that the rationale for the distinction between claimants and third parties is that claimants can give evidence upon which a view can be taken but third parties are generally not before the court. This is a rationale which does not appear in any of the authorities. Judge Hodge appeared to think that this was the rationale based on public policy that Lord Hoffmann was propounding in Gregg v Scott but, as has been pointed out, Lord Hoffmann does not provide us with the public policy ground that he may have had in mind. In any event Judge Hodge [QC]'s rationale is considered to be misconceived. In this whole area we are dealing with loss of a chance and this is so whether the chance lost is or is not dependent on the actions of a third party. There should be no difference between the various cases. No doubt where a third party's acts are in issue and the third party is called upon to give evidence, this will assist the court in determining the strength, or the weakness, of the chance, which might lead to total recovery or a nil recovery, but there is no need for the court to apply the balance of probabilities test so as to have to decree a total, or else a nil, recovery where uncertain, despite the third party's evidence, of how he would have acted. Moreover, it would be unfortunate if decisions should turn on the availability or otherwise of witnesses which would generally be fortuitous and could be tactically arranged."

174. There is a similar approach taken by Floyd J (as he then was) in *Tom Hoskins plc v EMW Law* [2010] EWHC 479 at [126] where he said the following (apparently contrary to the view of HH Judge Hodge albeit that Stone Heritage was not referred to in the judgment):

"…The loss of a chance principle is not, as it seems to me, simply a judicial tool to aid with difficult questions of causation or assessment of damages. The principle has a very significant effect on both the recoverability of and assessment of damages. In principle, therefore, its application ought to depend on the nature of the loss claimed rather than the evidence which happens to be called…."

Floyd J also referred to *4 Eng Ltd v Harper* [2009] Ch. 91 where a submission had been made that damages for loss of a chance did not apply because third-party evidence had been called. This was not accepted on the facts in that not all the

relevant third-party evidence was available, but in any event, David Richards J declined to express a view on the appropriate approach if all relevant third-party evidence had been before the Court.

175. Subsequently, in the emails of 7 and 8 May 2019, I referred the parties to Kramer on Contractual Damages 2nd Edition [13-93–13-94]. Kramer states that the better view is that the loss of chance analysis applies even where there is a third party who has given evidence. I received submissions in that regard from Miss Nolten on 13 May 2019 and by Mr Bacon in response on 14 May 2019. I should add that a question raised as to whether this line was available on the pleadings has been answered rightly by Miss Nolten (with which Mr Bacon agrees) that the matter does not depend on pleadings but on law and/or a rule of evidence, and the Court must decide the answer accordingly.

176. In the light of the authorities and the textbooks and applying legal principle, I conclude that even where a third party has given evidence, the Court should prefer the analysis that loss of chance damages apply for the following reasons, namely

(1) The distinction in case law is founded not on whether the Court has all the evidence that it requires, but upon a difference between what the Claimant proves about its conduct and the putative actions of a third party. That is what was decided in *Allied Maples* and in cases referred to above until and including *Perry v Raleys* without this distinction having been made. Further, and in any event, such distinction as has been made has generally not been qualified by reference to whether evidence from the third party was adduced or could have been adduced. On the contrary, the principle as summarised by Floyd LJ in *Wellesley v Withers LLP* [2015] EWCA Civ 1146; [2016] Ch. 529 at [99] is that *"in those cases the court does not demand that the claimant establish his case of causation on the balance of probabilities: see the Allied Maples case, at p 1611A–C. All the claimant has to show in such cases is that the chance is a real or substantial one."*

(2) Although the cases referred to above do not deal directly with the question as to what is to happen when the third party has given evidence, they do, in my judgment, provide some steer. That is to say that when it comes to cases about the future and the counter-factual, there are cases where the Court does not require the

all or nothing approach. The reasoning cited from Lord Briggs in *Perry v Raleys* above indicates a pragmatism where it is impracticable to have a proof of all or nothing as opposed to a loss of a chance.

(3) There is an important distinction between the level of engagement of a third party and a party in litigation: only the latter has to give disclosure, and although disclosure might be sought against a third party, the Court is usually much more restrictive about applications against third parties. Further, as in the instant case, the third party's involvement generally may be far more reluctant and less committed than in the case of a party. Thus, the notion that the Court has all the evidence that it could expect in the event that the third party had been a party to the action is usually not correct;

(4) If the distinction depended upon the third-party evidence having been provided, then it would follow that the same distinction should be made where the third party would be expected to have given evidence and did not: this would be very difficult to appraise. Further as McGregor opined *"it would be unfortunate if decisions should turn on the availability or otherwise of witnesses which would generally be fortuitous and could be tactically arranged."*

177. For these reasons, I have come to the view that the decision should not depend on whether a third party has given evidence. However, the fact that a third party has given evidence may be relevant to the assessment of the chance.

178. If I were wrong about the foregoing, and there is scope in some cases as a matter of fairness and pragmatic justice for a case to be decided upon the balance of probabilities because of the availability of third-party evidence, I should have held that this would not apply in this case. Such an exceptional case would be one where the participation of the third party would be involving a participation not significantly less than the participation of a party. In this case, the participation of Mr Monk is of a much lesser order. First, his evidence was by way of a witness summary. It was only shortly before trial when he was being compelled to give evidence that he provided a witness statement, with limited time to consider and react to it. Secondly, he did not provide disclosure in this case in the way in which a party would provide, and any application for third party disclosure would have had to be constrained as befits the

sensitivity of the Court to a third party. Thirdly, the engagement of Mr Monk to this case, as has been stated above, was far more limited than that of the parties: on the contrary, he was relatively disengaged. If, contrary to what I have found above, there might be a case where a third party will be equated to a party for this purpose such that the proof has to be all or nothing, it is not in this case. The interests of fairness and pragmatic justice would not be served by departing from the loss of a chance analysis.

(iv) How does the Court assess the loss of the chance?

179. How then does the Court go about its assessment of the loss of a chance? Various points arise from the legal cases. In particular, the reference of Lord Briggs in *Perry v Raleys* to avoiding a trial within a trial is apposite. It may be that this is particularly resonant in a case where there is the loss of the chance of litigation, albeit that in a case where the point of the litigation is one of law, it could in some cases be as well tried in the subsequent action as in the first action which did not take place.

180. More problematic is the usefulness or otherwise of third parties who might opine on what they would have done in the counter-factual world. The Courts have expressed some doubt as to the usefulness of evidence from a third party in that the question is hypothetical and it might all depend on the strength or otherwise of the other side's bargaining position and how strongly they felt at the time, as Stuart Smith LJ contemplated in *Allied Maples* at p.1314.

181. That a court is not bound to accept that a witness would have done what at trial he or she says that he or she would have done was stated in A*lliance & Leicester Building Society v Paul Robinson* (4 May 2000) by Chadwick LJ at [31-33]:

> *"31. However if, as was the present case, a witness is asked to consider a situation which was not covered by any policy or guidelines and which had not previously arisen in his experience, his evidence as to what he would have done in that situation may properly be regarded as speculative. He can do no more than speculate as to what he would have done in circumstances which he had never previously met.*

32. Mr Cramp and Mr Tew were adamant that they would not have continued with the transaction. The judge, after considering their evidence, said this, at page 25 line 13 of his judgment:

"I found these answers wholly unconvincing. They smacked of hindsight and of justification. They lacked all commercial reality. Having seen Mr Cramp and Mr Tew, and having read the documents I have no doubt that this loan of £1,266,000 would have been made even if the background with Oldrose had been spelt out ..."

33. That were the seventh reason which the judge gave for his conclusion. In reaching that view the judge is not suggesting that Mr Cramp or Mr Tew are giving dishonest evidence. Rather, he is saying that he does not accept their assessment of how they would have reacted to a situation with which they were not in fact confronted. That is, to my mind, a conclusion which a judge who has seen and heard the witnesses is entitled to reach. He is not bound to accept that the witnesses would have done what they now say they would have done. He can test that against the circumstances as they actually were. And he can make his own assessment of what the person who he has seen and heard in the witness box would have been likely to do in those circumstances."

182. Kramer at paragraph 13-94 stated that *"witnesses, even if telling the truth, will, with hindsight…not be the most reliable judge of what they would have done",* citing *Talisman Property Co (UK) Limited v Norton Rose* per Moses LJ at [41] who said:

"There is no doubt but that the judge was entitled to reject the confident assertion of Mr O'Brien that he would not have advised Wyko to seek the advice of counsel and the evidence of Mr Davidson that he would have relied upon the opinion of Mr O'Brien, provided that it was strongly maintained. It should be remembered that both of those witnesses were being asked to give evidence on the basis of hypothetical facts which had not in fact occurred. They were being asked to speculate. The judge was entitled to reject the fruit of that speculation since he, himself, was being asked to speculate and assess the loss of a chance."

183. I have borne in mind the comments made by Ms Nolten in her email of 13 May 2019 when given the opportunity to comment on these cases.

184. In my judgment, the Court is mandated to assess the circumstances, particularly by reference to the commercial context and to appraise what are the chances that a particular result would have eventuated. The reminders above from Robert Goff LJ in the *Ocean Frost* and from Leggatt J in *Gestmin* cited above are particularly resonant in this context. If oral evidence of what actually occurred has to be tested by reference to the objective facts, how much more so the speculation about the counter-factual.

185. The next and related question is how the Court approaches quantifying the chance where there are several possible outcomes. In a negotiation, there may be many different outcomes. Thus, in *Allied Maples*, it was necessary to consider what might have occurred in the event that there had been a negotiation following rejection of the broad warranty. As Hobhouse LJ stated at [1621]:

"The Judge will have to assess the Plaintiffs' loss on the basis of the value of the chance they have lost to negotiate better terms. This involves two elements: what better terms might have been obtained there may be more than one possibility and what were the chances of obtaining them. Their chance of obtaining some greater improvement, although significant, may be less good than the chances of obtaining some other lesser improvement. It will be a question for the Judge, on the basis of the evidence already adduced together with any further evidence which the parties place before him at the further trial, to make his assessment of the value of what the Plaintiffs lost."

186. Kramer on Contractual Damages, after quoting the above, stated:

"In weighing up the lost chance, the court has to weigh up the small chance of a huge reward, the large chance of a medium reward, the small chance of a small reward, and the small chance of no reward (for example)."

187. Sometimes the Court assesses the separate chances and adds them together, and sometimes it averages them off. In *Wellesley Partners Ltd v Withers LLP* above, the claimant head-hunter lost a 15% chance of a recovery of over £3million and a 45%

chance of a medium recovery of over £1 million, but there was a 40% chance of no recovery, giving rise to an overall loss of just over £1 million. In *Football League v Edge Ellison* [2007] PNLR 2, Rimer J at [294] stated that *"My conclusion is, and I find, that the FLL had (a) a 70% chance of obtaining guarantees from Carlton and/or Granada for up to £160m of ONdigital's commitment; and (b) a 40% chance of obtaining guarantees for the remaining £155m of its commitment. In arriving at these percentages I have given the FLL the benefit of my doubts as to the appropriate upper limits."* Sometimes, there is a most likely result sitting in the middle of a range that in a case such as the instant one a third party would have paid. In *Ball v Druces & Attlee* (No.2) [2004] PNLR 39 at 275, Nelson J said *"Where there are various possible outcomes to an assessment of quantum the right approach is to evaluate the chance of success of each of the possible outcomes, giving a percentage assessment for each category of lost chance."*

188. Once a substantial chance has been identified, the Court is then bound to come up with a figure however rough the assessment. Sometimes, as Neuberger J identified *Harrison v Bloom Camillin*, it will be a broad-brush approach.

189. Further, as Simon Brown LJ said in his fourth proposition cited in *Mount v Barker Austin,* the Court will seek to make its assessment based on the evidence. There is no scope for a bonus in the percentage to mark sympathy to the Claimant who has been wronged or a punitive element. However, in the event of some doubt as to the correct percentage, one might expect "*a generous assessment"* given that the wrong of a defendant has deprived the claimant of the chance. This is what Rimer J was referring to in the last sentence of the quotation from his judgment in *Football League v Edge Ellison*, quoted at paragraph 186 above.

190. Reference should be made to the word "speculative" in the first of the four propositions above of Simon Brown LJ in *Mount v Barker Austin*. I do not read Simon Brown LJ as saying that there was a distinction in principle between loss of litigation damages and loss of transaction damages: rather he was making his remarks in the context of litigation damages. In *Perry v Raleys*, in the passage cited above at [22], Lord Briggs stated that "*there is no sensible basis in principle for distinguishing between the two"*. It therefore follows that the Court cannot reject the case on the

basis that there is an element of speculation about the damages provided that there is a real and substantial loss.

Applying the law to the facts

191. I have come to the conclusion that the instant case is one about loss of a chance. The reason is that the case depends in whole or in part upon what a third party, that is Mr Monk/Mortar, would have done. However, the first stage is to consider what would have happened in the event that Gateleys had given the correct advice as regards the attempt by Mr Monk/Mortar to have the whole profit for itself in respect of a part of the development.

192. I have set out above in detail how the evidence of Mr Wilkinson is to be preferred to that of Mr Monk as regards the issue of whether there was an oral agreement to have no profit share in respect of a part of the development. Mr Wilkinson would not have been prepared to have entered into such an agreement: he would have taken the view that this was not what he had bargained for. He would have recalled the negotiation which had taken place before the Option Agreement and how there had been agreement to a 65/35 split of the shares in the event that the option had been exercised. He would have noted that there was no distinction between one part of the development and another. He would have realised that the effect of attempting to deprive him of the profit from the Angel Row development was that he would at a stroke be deprived of one third of his 35% share of the projected profit of £3,000,000: in other words, that his share would fall from about £1 million to two thirds of £1 million.

193. By parity of reasoning, I find in the event that if at the point of just before the Participation Agreement, it had been brought to the attention of Mr Wilkinson that Mr Monk no longer wished to share the profit as regards the Angel Row unit, Mr Wilkinson would have refused the request. In saying that this was going back on the agreement of the parties, he would not have been deflected by statements of the kind that have been relied upon by Gateleys. In particular, it would not have mattered to him that as a matter of law, a lapsed option agreement did not give rise to any obligation to have a Development Agreement. Nor would it have concerned him that there was a difference in principle between the concepts of the option involving

Moda's acquisition of a 35% interest in a company (subject to the difficulties of being a minority shareholder) and a joint venture in which there would have been expected to a be a right to share profits.

194. Mr Wilkinson regarded the Development Agreement as a way of enabling Mr Monk/Mortar to exercise out of time the Option Agreement, and understandably so. The only reason why the Option Agreement was not reinstated was because the shares of the company were required as security, and so the joint venture agreement fulfilled its purpose in its stead. Indeed, it appears to have been the brainchild of Mr Moore and embraced by Mr Monk and himself. True it is that it might have had an advantage over the minority shareholding for the Claimant, but that was not the point. The point was that the sharing of the profits had been agreed through the vehicle of a company, and the joint venture was the nearest thing to it.

195. The minority shareholding would have been akin to a partnership, sometimes called a quasi-partnership, such that in unfair prejudice petitions under section 994 of the Companies Act 2006, prejudice might be found on a dominant quasi-partner ignoring the basis of the quasi-partnership. In such circumstances, in an order to buy out the minority shareholders, frequently there is no discount to reflect the minority nature of the shareholding. In short, the distinction between the shareholding route and a joint venture might not have been great given that the company is founded on a quasi-partnership. Even to the extent that there was a distinction, it does not matter greatly because Mr Wilkinson was treating the minority share of a joint venture as being akin or close to a minority shareholding because Mr Moore had conceived joint venture as fulfilling the same purpose.

196. In these circumstances, the attempt of Gateleys to treat the Development Agreement as a different concept and therefore involving a different negotiation from the Option Agreement should be viewed with some scepticism. There is a parallel between the second of the four propositions of Simon Brown LJ in *Mount v Barker Austin* of a solicitor who advises that the prospects of success of intended litigation are high until by his own negligence he deprives his client of the ability to pursue it. Faced with that, a court would look with some caution at a defence of the same solicitor who claims that the prospects would have been low. So by parity of reasoning, the Court is entitled to view with some scepticism how one moves from a Development

Agreement designed to have some replication of the Option Agreement upon the initiative of Mr Moore to an argument that the two agreements were so different that there was no answer to Mr Monk/Mortar wishing to have the whole of the profit of the Angel Row unit.

197. In my judgment, Mr Wilkinson would have sought to insist that Mr Monk/Mortar was moving from the agreement in principle for the sharing of the profits of the project by attempting to write new rules. A solicitor in the position of Mr Moore should have been expected to be sympathetic to that position and to negotiate forcefully for his client Moda. In these circumstances, I am satisfied that it has been proven (without any question of a loss of a chance) that Mr Wilkinson/Moda would have instructed Mr Moore to seek to have deleted any clause about sharing of profits of the Angel Row unit. It therefore follows that Moda has established the first part of that which is required under *Allied Maples*.

198. The next question is whether there was a real and substantial chance that Mr Monk/Mortar would have agreed either to share the profits of the Angel Row unit in 65/35 shares or to some lesser extent. Here the analysis above and particularly at paragraph 145 above about the three possible scenarios is repeated. The question is how that translates into percentages. I have come to the conclusion, applying each of the principles above, that they equate to the following percentages, namely

(1) the most likely scenario for the reasons above stated in paragraph 145(3) above is that Mr Monk/Mortar would have been persuaded to have reverted to the 65/35% split including of the profits of the Angel Row unit. In my judgment, there would have been a 50% chance of that resulting. The assessment of 50% takes into account the fact that until this attempt of Mr Monk to move the goalposts, the parties were intending to enter into a deal with each other. Indeed, there was until then a shared expectation that the deal would be 65/35 for all the reasons described above. Mr Wilkinson is particularly likely to have been strident in negotiations because of a sense of outrage about the attempt to move the goalposts, and willing to engage in brinksmanship. For the reasons set out above, Mr Monk's bargaining position was not strong. Indeed, whilst the above might indicate that the chance was greater than 50%, I do not go any higher because Mr

Wilkinson also had difficulties absent any other concrete proposal for dealing with the property.

(2) the second most likely scenario is that the parties would have done a deal somewhere between a high fraction of 35% and a low fraction of 35% (there are many possibilities of what it could have been within that range, but taking into account all of the permutations, it would, in my judgment, have overall as an average have been half way in the range, equating to one half of 35%). I consider that the second scenario involves a loss of a chance of greater than no deal (the third scenario) because the parties are more likely to have recognised that it would be better, or at least, safer for them to have negotiated a settlement than to have the uncertainties of not doing so. I therefore assess the second scenario as being significantly less than the first scenario, but as being higher than the third scenario. I have referred to this second scenario at paragraph 145(4)(ii) above. Applying mathematics to that, a half of 30% means that there would have been a 30% chance of obtaining 17.5% (i.e. one half of 35%). This is taking into account the matter set out in the brackets at the end of the first sentence of this sub-paragraph (2).

(3) The third and least likely scenario was a breakdown of negotiations and the parties moving away from one another. This remaining chance is assessed at 20%. This reflects that it still had a significant chance, albeit small relative to the chance that there would be a deal. The reasoning as to why this was the least likely appears at paragraph 145(4)(iii) above. I have got to 20% not simply as the sum left over after assessing for 50% and 30% for the first two scenarios: I also regard this as an appropriate evaluation for the third scenario by itself.

199. There are various further features to relate, namely

(1) The effect of the combination of the first and second scenarios is that there is an 80% chance that there would have been a loss arising out of the negligence and/or breach of contract of Gateleys. If, contrary to the above analysis, it had to be proven that there was a loss on the balance of probabilities, this is satisfied.

(2) The effect of the finding about the first and second scenarios cumulatively is that the loss of the chance is 50% of the 35% share together with 30% of a 17.5%

share. This equates to 22.75% of the whole instead of 35% of the whole i.e. ([50% x 35% = 17.5%] + [30% x 17.5% = 5.25%] = 22.75%.

(3) It is agreed between the parties that the profits of the Angel Row unit that were received by Mortar on 12 January 2016 were a sum of £901,942.11. 22.75% of that sum comprises a sum of £205,191.83.

200. It follows that the claim of Moda has succeeded against Gateleys to the extent of damages in the sum referred to in paragraph 199(3). Since circulating the draft judgment, the parties have calculated that a sum of £221,209.22 would reflect the above sum, together with an appropriate rate of interest. Accordingly, there will be judgment to Moda in the sum of £221,209.22.

201. The parties have been liaising about the preparation of a draft order to reflect this judgment. If and to the extent that any consequential matters cannot be agreed, I shall endeavour to deal with them at the same time as handing down the judgment. I am grateful to both Counsel for the assistance which they have given to the Court throughout the trial and thereafter and for the quality of their respective written and oral submissions.