Neutral Citation Number: [2018] EWHC 1759 (Ch)

Claim No: HC-2016-001898

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

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

Date: Tuesday 17th July 2018

**Before** :

**MARTIN GRIFFITHS QC**
**(SITTING AS A DEPUTY HIGH COURT JUDGE)**

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**Between :**

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| **(1)** | **PAVILION PROPERTY TRUSTEES LIMITED** | |
| **(2)** | **PAVILION TRUSTEES LIMITED** | **Claimants** |
| | **- and -** | |
| | **URBAN & CIVIC PROJECTS LIMITED** | **Defendant** |

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**Kirk Reynolds QC** (instructed by DLA Piper UK LLP) for the Claimants
**Gary Cowen** (instructed by Ashurst LLP) for the Defendant

Hearing dates: 12–15 June 2018

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# Approved Judgment

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

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MARTIN GRIFFITHS QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

**Martin Griffiths QC (sitting as a Deputy High Court Judge):**

1. The Claimants and the Defendant (together with a guarantor party with which I am not concerned) entered into a Development Management Agreement ("the DMA") in relation to the development of a newly built commercial building at 49-51 Conduit Street London W1 ("the Property"). The Property is in Mayfair, between Regent Street and Savile Row. It is a mixture of shop premises at street level and office space on upper floors. The ground floor, and some of the office space, were eventually let to Dsquared2 as a flagship London shop.

2. The Claimants were named in the DMA as "Mourant Property Trustees Limited" and "Mourant & Co. Trustees Limited". They are now known as "Pavilion Property Trustees Limited" and "Pavilion Trustees Limited" respectively. At all material times, they acted through an agent called Aerium Finance Limited, whose Managing Director (now co-Chief Investment Officer), Mr Robin Carr, was the Claimants' sole witness at trial. Since all communications from and to Aerium Finance Limited in this case were on behalf of or (through them) to their principals, I will refer to them all, indiscriminately, as "the Claimants."

3. The Defendant was named in the DMA as "Terrace Hill Projects Limited". It is now known as "Urban & Civic Projects Limited". I will refer to it as "the Defendant".

4. The question in this case is whether the Defendant has lost its right to refer a dispute about the profit share to an Independent Expert in accordance with the terms of the DMA. The Defendant referred the dispute to an Independent Expert on 5 May 2016 (and that process has been stayed pending the outcome of these proceedings). The Claimants' case is that this was out of time, applying the terms of the DMA. If the Claimants win this action, the referral to the Independent Expert will be stopped, and the Claimants' calculation (which is that the Defendant's profit share is zero) will prevail. If the Defendant wins this action, it will be a matter for the Independent Expert to decide what if any profit share the Defendant is entitled to. The Claimants say that the profit share is nil. The Defendant has suggested it is a sum in the region of £2 million (witness statement of Mr Ainsworth).

<u>The terms of the DMA</u>

5. Part 2 of Schedule 4 of the DMA ("Part 2") provided for a profit share between the parties. The Claimants were to retain an amount equal to the Prior Return, defined as 36% of the Development Costs (paragraph 2.1 of Part 2). After that, any balance of Development Profit after the Prior Return was to be shared between the parties as to 85% to the Claimants and as to 15% to the Defendant (paragraph 2.2 of Part 2). The Defendant's 15% was the "Profit Share" defined in the DMA, and is the subject matter of this action.

6. The basis on which the Profit Share was to be calculated was set out, in various alternatives, in paragraph 4.1 of Part 2. The basis which in fact applied in this case is the alternative set out in paragraph 4.1.4 of Part 2. It was "an amount equal to the aggregate of the Market Value of the Property (on the assumption of a yield of 4.5%) and the Total Relevant Income minus the aggregate of the Deductible Costs and any Letting Incentives". The capitalised terms were defined.

i) "Market Value" was defined in the main body of the DMA (clause 1.1) as having "the meaning contained in the current edition of the RICS Valuation Standards Manual". Witnesses on both sides agreed that this was the basis sometimes referred to in their correspondence as a "Red Book valuation".

ii) "Total Relevant Income" was defined (in paragraph 1 of Part 2) as "the aggregate of the Development Income (as defined in Part 3 of Schedule 3)".

iii) "Deductible Costs" were defined (in paragraph 1 of Part 2) as "the aggregate of the Development Costs and the Net Purchaser's Costs".

iv) "Letting Incentives" were defined (in clause 1.1 of the main body of the DMA) as "any financial incentives (including any rent free periods) or capital contributions [with stated exceptions] agreed by the [Claimants] made to any Tenant..."

7. A number of other terms in the DMA were canvassed in cross examination of the witnesses, but I do not think it necessary to set them all out in my judgment. They bore, partly, on the correct methodology for calculating the profit share and it is not my function to calculate the profit share at this point. My function is to decide whether a referral of that question to the Independent Expert should be allowed to continue.

8. In that respect, it is the mechanism for establishing the Profit Share in paragraphs 3 and 4 of Part 2 which is critical.

9. First, the Claimants were to notify the Defendant "within 10 Working Days of the occurrence of the Calculation Date" (paragraph 3.1 of Part 2).

10. The Calculation Date was defined as "10 Working Days after the Realisation Date". The Realisation Date was defined as "the completion of a Relevant Disposal of all of the Property or (if earlier) 6 months after the Target Fully Let Date". In this case (there having been, in fact, no completion of a Relevant Disposal of all of the Property) the Realisation Date fell at the end of this 6 month period and not before, which was (it is agreed) on 30 March 2015. The Calculation Date was, therefore, 10 working days after that on (also agreed) 15 April 2015. 10 working days after that was 29 April 2015 and the Claimants should have notified the Defendant of the Calculation Date by then (under paragraph 3.1 of Part 2, quoted above).

11. Assuming no dispute about whether the Calculation Date had occurred (and there was no such dispute in this case), the steps prescribed by the DMA which are central to this case are then in paragraphs 4.2, 4.3 and 4.4 of Part 2.

12. Paragraph 4.2 of Part 2 provides:

> "4.2 Within 20 Working Days of the Calculation Date, the [Claimants] shall notify the [Defendant] of the amount of the Profit Share and provide to the [Defendant] the Calculation Information".

13. The "Calculation Information" was defined (in paragraph 1 of Part 2) as "such information as shall reasonably be required to enable the [Defendant] to ascertain whether the Profit Share has been correctly calculated".

14. Paragraph 4.3 of Part 2 provides:

> "4.3 The [Claimants] shall provide to the [Defendant] on request by the [Defendant] within ten Working Days of its notice served under paragraph 4.1 [should be paragraph 4.2], such additional information as the [Defendant] shall reasonably require in order to verify the accuracy of the calculation carried out by the [Claimants]."

15. It is common ground that the reference to a "notice served under paragraph 4.1" is a mistake, and should refer to a notice served under paragraph 4.2. Paragraph 4.1 does not deal with service of a notice; it is paragraph 4.2 which does that.

16. Paragraph 4.4 provides:

> "4.4 If the [Defendant] shall dispute the calculation of the Profit Share the [Defendant] may refer the dispute within 10 Working Days to an Independent Person but otherwise the [Defendant] shall be deemed to have accepted the accuracy of such calculation."

17. The "Independent Person" is defined (in paragraph 1 of Part 2) as a chartered surveyor of not less than 10 years' experience, either agreed by the parties or, failing agreement, appointed by the President or other appointed officer of the Royal Institution of Chartered Surveyors on the application of one of the parties, "and any reference to such person shall be as an expert."

18. The timetable and procedure of any referral to an Independent Person is set out in paragraph 9 of Part 2.

> "9.1 If a dispute under this Schedule is referred to the Independent Person he shall act as an expert and:
>
> 9.1.1 the [Claimants] and the [Defendant] will make written representations within 10 Working Days of his or her appointment and will copy the written representations to the other party;
>
> 9.1.2 the [Claimants] and the [Defendant] are to have a further 10 Working Days to make written comments on each other's representations and will copy the written comments to the other party;
>
> 9.1.3 the Independent Person is to be at liberty to call for such written evidence from either the [Claimants] or the [Defendant] and to seek such legal or other expert assistance as he or she may reasonably require;
>
> 9.1.4 the Independent Person is not to take any representations from the [Claimants] or the [Defendant] without giving both parties the

> opportunity to be present and to give evidence and cross examine each other;
>
> 9.1.5 the Independent Person is to have regard to all representations and evidence before him or her making his or her decision which is to be in writing and is to give reasons for his or her decision;
>
> 9.1.6 the Independent Person is to use all reasonable endeavours to publish his or her decision within 20 Working Days of receipt of the representations referred to in paragraph 9.1.2 or such earlier date as the parties shall agree as a term of the Independent Person's appointment; and
>
> 9.1.7 the Independent Person's decision shall be final and binding on the [Claimants] and the [Defendant] (save in the case of manifest error)."

The evidence and witnesses

19. A selection of contemporaneous documents and correspondence has been put in trial bundles contained in four lever arch files and amounting to approximately 1,400 pages. I have heard from three witnesses, each of whom was cross examined. These were (for the Claimants) Robin Carr ("Mr Carr"), now Co-Chief Investment Officer of the Claimants' agents, Aerium Ltd and (for the Defendant) Philip Leech ("Mr Leech"), Property Director of the Defendant's holding company, Urban & Civic Plc, and David Ainsworth ("Mr Ainsworth"), an Assistant Development Manager at the same company. There is a detailed joint chronology, with references to documents, and the original agreed List of Issues (which was refined in the course of the case) also included some common ground.

20. The evidence focussed on interactions and discussions between four main protagonists. These were, on the Defendant's side, Mr Ainsworth and Mr Leech (both of whom gave evidence) and, on the Claimants' side, Mr Carr (who gave evidence) and Ms Jane McKinney (who did not) ("Ms McKinney").

21. My impression from the evidence as a whole was that Mr Ainsworth and Ms McKinney were the people doing all the work. They reported to Mr Carr (in the case of Ms McKinney, acting for the Claimants) and to Mr Leech (in the case of Mr Ainsworth, acting for the Defendant), who were more senior to them and attended some meetings and participated in some correspondence. But neither Mr Carr nor Mr Leech appeared to have a detailed grasp of the process or the issues in the way that their subordinates did (quite understandably), and they were content, as I find, to leave matters of detail (but not matters for decision) to them. Mr Ainsworth and Ms McKinney were the people most engaged with the process. They had the liveliest understanding of all its elements and implications. They prepared and commented on the detailed figures and calculations in a way that neither Mr Carr nor Mr Leech were inclined or (from their higher vantage point) equipped to. Mr Ainsworth and Ms McKinney therefore had the strongest immediate interest in the twists and turns of the discussions, and that suggests to me that what they said, either in evidence to me or at the time (as evidenced before me), was more important and a more reliable guide to what was happening between the parties than the evidence of Mr Carr and Mr Leech, who were more disengaged, albeit that their evidence was also, of course, relevant.

22. Ms McKinney did not give evidence, although her emails are in evidence and witnesses refer to what she said and did at various meetings, so that is also in evidence, and, for the most part, not controversial. I have a draft unsigned witness statement from her on the single question (which is very much disputed) of whether a certain meeting was expressly said at the outset to be "without prejudice". Mr Carr in his evidence in chief also refers to Ms McKinney's evidence about that, on a hearsay basis (a topic to which I will return below). However, neither side wanted to call her as a witness, as either side might have done. Therefore, I take the view that I must not speculate about what evidence she might or might not have given if called, because it was for the parties to put that evidence before me if they chose to, and they both chose not to, except to the extent I have mentioned. Mr Carr's evidence was that Ms McKinney left his company in about the middle of 2016.

23. Mr Ainsworth I found to be an honest, convincing and impressive witness, with a very good recall, in line with his close involvement in the matters he gave evidence about.

24. Mr Carr I found to be less impressive. He had a tendency to give confident evidence about things he was then shown to be wrong about, and this combination of confidence and inaccuracy made me feel I could place little reliance on his evidence about anything unless it was supported (which it sometimes was) by the contemporaneous documents, or accepted by other witnesses. For example, he minimised the significance of the Dsquared2 letting, saying it was "probably about 20% of the building". It was put to him that it was actually 42%, at which point he said "In terms of value, it was about 20%". It was later demonstrated to him that the value percentage was 38%. He alleged poor market conditions "in the aftermath of Brexit". When it was pointed out to him that Brexit vote was not until June 2016, well after the events in question, he conceded only that this meant it had "less of an impact" and resisted the irresistible suggestion that it would not have had any impact. He asserted that a meeting began at 12 noon which he then did not dispute started at 1.30 pm. He was taken through some of the figures in an email of 9 February 2016 which appeared to contain errors and fallacies and steadfastly maintained they were correct, without being able to say why. He seemed to find it harder to remember what actually happened, with all its imprecision and messiness, than to remember and follow a line to take, in which he no doubt genuinely believed, with a view to winning the case. He also seemed to be a little slapdash and not to place much value on complete precision and accuracy. For example, on the important point (which I return to below) about whether he opened a meeting on 14 January 2016 by using the words "Without Prejudice", he said that he himself used "those exact words". When it was put to him that a Notice to Admit served on the Claimants' behalf alleged only that he made a statement "to the effect that" the meeting was taking place on a without prejudice basis, he did not accept that this was not quite the same. When it was, further, put to him that Ms McKinney had allegedly told the Claimants' solicitor that it was not Mr Carr who said the meeting would be without prejudice but Mr Leech, Mr Carr said "I don't think there's a distinction because I think it's quite clear that she also was clear that the words "without prejudice" were used."

25. Mr Leech was a different sort of witness again. He was more even handed than Mr Carr. He was willing to accept propositions and points potentially adverse to his side of the case. His evidence appeared reliable so far as it went but, because of his lack of close involvement, it was not as relevant as the evidence of Mr Ainsworth was (or as the evidence of Ms McKinney might have been). Some of the points which he accepted in

cross examination (I am thinking particularly of his evidence about whether meetings were "without prejudice") were by way of commentary on facts more than by way of evidence of recalled fact.

The factual narrative

26. With a number of important exceptions, the main narrative of events was largely undisputed. I will at this point set out the relevant chronology, sufficient to put in context the disputes which I will be dealing with in more detail, individually, below.

27. The DMA was dated 1 March 2012. On 11 February 2014, the Claimants entered into agreements for leases with Dsquared2. Dsquared2 took the retail space and some, but not all, of the upper floor office space.

28. At all material times, there were no other tenants for the Property. The Property was not, therefore, fully let, whether at the Target Fully Let Date (30 September 2014) or at any subsequent material time. As a result, as I have mentioned, the Realisation Date was 6 months after the Target Fully Let Date (i.e. on 30 March 2015) and the Calculation Date was 10 Working Days after that (i.e. on 15 April 2015).

29. As I have also mentioned, the Claimants were obliged by paragraph 3.1 of Part 2 to notify the Defendant of the occurrence of the Calculation Date within 10 Working Days. On the facts, since the Calculation Date was reached on 15 April 2015, the Claimants should have notified the Defendant of that on or before 14 May 2015. They did not do so. Mr Carr's evidence was that he was aware that "we should have notified [the Defendant]" but that, looking at the figures, "it appeared as if the Profit Share due to [the Defendant] was going to minimal or nil. Accordingly, we were concerned that if we notified [the Defendant] of this they would realise that they were effectively working for nothing and down tools at a key time in the Project". In other words, Mr Carr took a deliberate decision not to comply with the time limit. When asked in cross examination whether it concerned him that he was not complying with the DMA, he evaded the question until the third time of asking, when he said "I felt that the finalisation of the scheme outweighed the need to provide this information at this particular point." It is unattractive that Mr Carr took a cavalier approach to the Claimants' contractual obligations, particularly in the context of an action in which the Claimants take a time point against the Defendant, but it is not part of the Defendant's case that the Claimants' lack of respect for time limits contributes to the Defendant's claim to be entitled to refer the Profit Share dispute to the Independent Person as late as it did. The Claimants' case is that, while failure to adhere to the time limit for notification of the Calculation Date was a breach, time was not of the essence at that point, so the breach was of no consequence. That appeared to be common ground and so I will say no more about this aspect.

30. Continuing with the timetable set by the DMA (although it was not being respected), paragraph 4.2 of Part 2 required the Claimants to notify the Defendant "of the amount of the Profit Share" and to provide "the Calculation Information" within 20 Working Days after the Calculation Date, i.e. on or before 14 May 2015. This also was not done, as part of Mr Carr's decision to keep the Defendant in the dark about working by then (as Mr Carr believed) "effectively... for nothing".

31. The Defendant certified on 13 April 2015 that practical completion of the retail space was reached on 30 March 2015 and practical completion of the office space was reached on 10 April 2015. Two people at the Defendant most involved with the project (Rob Lane and Steve Lee-Sang) left, and it was at this point that Mr Ainsworth came on the scene for the Defendant. He arrived, therefore, without previous experience or knowledge of the project. The Claimants' delay meant that it was he who dealt with the outworkings of the DMA when the Claimants, eventually, implemented the DMA procedure.

32. The Claimants did this, not only late, but without, at least initially, any deference or attention to the DMA's structured process of formal notification, formal calculation, and provision of information in support of the calculation of profit share.

33. While the Claimants delayed, and did not mention the passing of the Calculation Date or their estimation of the profit share, leases were granted to Dsquared2 on 24 July 2015, pursuant to the agreements for leases entered into on 11 February 2014. Therefore, the agreements for leases and the leases themselves straddled the Calculation Date which fell on 15 April 2015.

34. Some months later, in November 2015, the Claimants began to broach the question of profit share. At first they did so obliquely. On 16 November 2015, Ms McKinney emailed Mr Leech out of the blue saying "Are you available Friday for a meeting to discuss the Conduit Street Project?". Mr Leech emailed back "Is there anything in particular you wish to discuss?". In reply, Ms McKinney said "We would like to discuss the outstanding issues on the project." On 18 November, Mr Leech asked "I feel I need to be properly prepared. Please would you therefore set out what the "issues" are with the building you wish to discuss". Ms McKinney replied "We want to review the outstanding issues, which we touched on during our site meeting the other day." Mr Leech had not been at that site meeting and there is no evidence that any issues touched on at that meeting included Profit Share; it seems unlikely that they did, and I find that they did not.

35. The meeting was fixed for 25 November 2015. Despite the Claimants' failure to identify the subject matter of the meeting as profit share, Mr Ainsworth prepared himself for it by looking at the terms of the DMA (which he was not previously familiar with, and which he had only in a draft version at that point) and asking the accounting team for financial information in advance of the meeting. By 24 November 2015, Mr Ainsworth had spotted that the DMA provided for a Calculation Date and that that date would have been in April 2015. On the eve of the meeting, therefore, Mr Ainsworth emailed Mr Leech saying "...we appear to be due the "Profit Share" now. My estimate being £3.5m." His evidence was that he reached this figure by entering new inputs into a computer model the Defendant had in-house. Mr Ainsworth on the following day, 25 November, which was the day fixed for the meeting, emailed a solicitor at Reed Smith, Jimmy Theodorou, asking for his opinion on whether the profit share was now payable.

36. The meeting took place on 25 November as arranged. It took place at 3 pm at the offices of the Claimants' agents, Aerium (for whom Mr Carr worked). Mr Leech attended alone on behalf of the Defendant. Since the arrangements had been made by Ms McKinney, Mr Leech did not expect anyone other than her to be there. He was surprised to see Mr

Carr, who he described as Ms McKinney's boss. Mr Carr (Mr Leech said) ended up leading the meeting.

37. Mr Carr's evidence about the meeting on 25 November 2015 was "In that meeting, which was very brief, I told Mr Leech that, largely because of the way in which the notional interest had been rolled up due to the delays in the Project, no Profit Share under the DMA was due to [the Defendant]". In cross examination, he was not able coherently to demonstrate that the rolling up of interest had that effect, but my concern is with the process rather than the figures. Mr Leech's evidence agreed with Mr Carr's, but Mr Leech added "It was a very short meeting: it lasted about ten minutes. I was irritated at the way in which they treated me. I thought that what Robin Carr said to me was a blatant try-on."

38. It is common ground that this meeting was not "without prejudice" and that it did not trigger the clause 4.2 process, since (whether or not it sufficed to qualify as formal notification of a profit share of nil) there was no attempt to provide Calculation Information, i.e. the information "reasonably required to enable the [Defendant] to ascertain whether the Profit Share [had] been correctly calculated".

39. Mr Leech followed up with an email on 30 November 2015 in which he objected to the unexpected subject matter of the meeting, and to the suggestion that the profit share was nil. He said "It would therefore be helpful if you would provide me with your financial calculations to support your argument. I understand that this is a requirement within the DMA in any event." Mr Carr apologised in an email of 2 December and said "We will revert shortly."

40. On 7 December, Mr Ainsworth chased Mr Carr for the profit share information by email, saying "On Friday I had hoped to speak with you quickly regards the [DMA] profit share calculation; clearly the Calculation Date (16th April 15) for profit share purposes has passed. I wondered who you proposed using for the red book valuation or has this been undertaken already? If you could please provide formal notification of the Calculation Date along with the Calculation Information that would be appreciated."

41. On the same day, Ms McKinney replied to Mr Ainsworth, saying "We have the [Practical Completion] date as the calculation date, 30 March 15. Although the date has passed, we have used market data from that time period. Our calculation is attached." She was wrong about the Calculation Date which was, as I have said, 15 April 2015, not 30 March. There were two attachments, both taken from existing document formats and containing a good deal of extraneous as well as (in some respects) controversial information and calculations, including some figures (in red) that were estimates and some calculations which, on Mr Ainsworth's evidence, did not correctly follow the formulae prescribed for calculation of Profit Share in the DMA. The profit share was said to be £1,480,754 before deduction of "Interest Owed to Aerium" said to be £2,586,119, leaving a net profit share for the Defendant said to be a deficit of £1,105,365. I will refer to this calculation as "Calculation 1".

42. On 15 December 2015, Mr Leech emailed Mr Carr and Ms McKinney saying "As per the attached notice, we do not agree with the calculation and dispute that our share is nil - in the first instance, however, we feel it is best if we meet to discuss the calculation

rather than simply referring it to a third party. If you are in agreement please could you respond as indicated in the notice by the date required".

43. The attached notice was in the form of a letter from Mr Leech to Mr Carr, headed with a reference to the DMA and, specifically, to "Schedule 4, Part 2 - Profit Share." The letter said:-

> "Without prejudice, further to your notice of 7th December 2015 confirming the Calculation Date has passed and providing us with your Calculation Information with regards to the Profit Share we write to confirm that we have now reviewed the calculation provided and dispute it.
>
> In the event of a dispute such as this under strict interpretation of the [DMA] we should refer the matter to an Independent Person within ten working days. However, given the time that has elapsed since the information was supposed to be given, it would seem sensible and preferable to meet to try to agree the Profit Share first.
>
> If you, as Employer, could confirm in writing by return that the period for referral to an Independent Person could be extended by six weeks, then the parties could meet to agree the figure.
>
> If we do not receive the above confirmation from the Employer by Thursday 17th December 2015 we will have no choice but to refer the matter. Note the [Defendant] reserves all its rights in respect of timelines and notifications.
>
> We look forward to hearing from you shortly."

44. Ms McKinney replied by email to Mr Leech (copied to Mr Carr, Mr Leech's PA, and Mr Ainsworth) on 16 December 2015, saying: "We agree to delay the period for referral to an independent person by six weeks." It is common ground that this was an agreement to delay the expiry of the 10 working day deadline prescribed by paragraph 4.4 of Part 2 until Thursday 28 January 2016, that being 6 weeks after the day following Ms McKinney's email of 16 December. The Claimants' case is that, the Defendant having failed to refer the dispute to the Independent Person on or before the agreed extended deadline of 28 January 2016, it is precluded by the terms of paragraph 4.4 from disputing the profit share calculation of zero sent with supporting spreadsheets on 7 December 2015 (Calculation 1). Paragraph 4.4 provided, it will be recalled, "If the [Defendant] shall dispute the calculation of the Profit Share the [Defendant] may refer the dispute within 10 Working Days to an Independent Person but otherwise the [Defendant] shall be deemed to have accepted the accuracy of such calculation."

45. On 23 December 2015, Mr Ainsworth emailed the Claimants' solicitors, Eversheds, asking for "a soft copy of the finalised leases with Dsquared - both for the 2nd floor office and retail..." However, he did not get them.

46. On 14 January 2016 a meeting took place between Mr Ainsworth and Mr Leech for the Defendant and Mr Carr and Ms McKinney for the Claimants. I will refer to this as the

"First Meeting". No notes of the meeting were produced in evidence by anyone. The Claimants' case is that this meeting was expressly or impliedly stated to be held "Without Prejudice" and I will return to that when I decide the issues, of which that is the first.

47. On 20 January 2016, Ms McKinney emailed Mr Ainsworth saying: "I know there were multiple surveys done on Conduit Street. Please send me the one that has the correct measurements."

48. On 21 January 2016, Mr Ainsworth replied to Ms McKinney. He said:

> "Please find attached the final area reports from Plowman Craven.
>
> Further to our meeting last week we would appreciate you providing the Knight Frank valuation you referred to and agreed to send us. You may find that the area information in the attached is helpful to you.
>
> Also, to reiterate my comments at Friday's meeting, our workings adopt a "DCF" [i.e. Discounted Cash Flow] layout only. The underlying maths follows a Red Book term and reversion approach. It is not a full DCF model incorporating rental value growth and concomitant required return.
>
> We are keen to draw a line under the profit share calculation swiftly and look forward to receiving the Knight Frank report and your thoughts shortly."

49. The extended 6 week deadline, agreed (for the purposes of paragraph 4.4 of Part 2) in the email exchange of 15-16 December, expired on 28 January 2016. No-one referred to it as it approached, or immediately afterwards. It came and went without any further meeting or material communication between the parties.

50. On 9 February 2016, Ms McKinney emailed Mr Ainsworth (copied to Mr Leech and Mr Carr). She said: "As requested in our meeting on 14th Jan 2016 I have attached a letter from our valuers. The letter states the valuers' view on the achievable market rent for [the Property], at both December 2014 & December 2015." The attachment was from Knight Frank, but it was not the valuation discussed at the First Meeting on 14 January, because it took the form of a letter dated after the First Meeting: it was dated 25 January. It purported to outline the Market Rent for the Property "in both December 2014 and December 2015" (neither of which, of course, corresponded to the Calculation Date) and it did so floor by floor, with a final line of sub-totals and a grand-total which were expressed approximately ("Say"), and came to a grand-total of £3,307,638. It included both the space actually let to Dsquared2 and the space which at the date of the letter was still unlet. It concluded "Please note that there has been a slight change in the floor areas due to practical completion of the building in March 2015."

51. Ms McKinney's email of 9 February 2016 then continued by saying "In addition, we have several comments regarding the valuation you provided in the aforementioned meeting" (i.e. the First Meeting on 14 January).

> "1. As advised by our valuer, a DCF would not be used in a UK Red Book valuation. A standard valuation would follow the proceeding structure.
>
> 1. Assign a rental value to the space
>
> 2. Capitalise the Rent at a yield
>
> 3. Deduct letting and void costs from the capped value
>
> 2. The following Costs should be included as Development Costs
>
> 1. The Use Swap - For a Resi [residential land use] swap in the amount of £800k
>
> 2. Use Swap Agents Fee - in the amount of £40k
>
> 3. Project Monitoring Costs for our 3rd party project monitor in the amount of £123,700
>
> 4. The adjustment on Admin costs should be £880,702, we are permitted £50k/annum.
>
> 5. The deduction for rent free incentives should be included in your development costs in the amount of £4.11m."

52. Ms McKinney's email then said: "Below is an adjustment of your calculation taking into account the above mentioned points, excluding the valuer's rent, even at your current rents. The rents used are..." and she then set out square footage rents for every floor, from the 1st to the 6th floor, i.e. all the floors and not only those actually let to Dsquared2.

53. Immediately after that, Ms McKinney set out in tabular form what purported to be a detailed calculation of the Defendant's 15% profit share, consisting of 20 lines of figures, including sub-totals. The bottom line produced by this calculation (which I shall call "Calculation 2A") was that the Defendant's 15% profit share came out as a deficit of £42,322 (whereas the Calculation 1 deficit had been put at £1,105,365). Mr Carr was cross-examined about Calculation 2A and the cross-examination seemed to establish that it corrected at least one error in Calculation 1 (the point at which Interest of £2,287,012 was entered into the calculation, although the figure itself was also disputed, and Ms McKinney used a figure not accepted by Mr Ainsworth) but contained other errors on its face (notably, double-counting costs for Admin Cost Adjustment, Project Monitor, Use Swap and Use Swap Fees which Mr Carr agreed had already been included in the deductible Development Costs).

54. Immediately after setting out Calculation 2A, Ms McKinney continued her email by saying "However, we know that rents will not be at your projected levels. If you used our calculation of value with the updated rents you arrive at the answer below." She then set out a further and more elaborate calculation, including 23 lines of figures, sub-totals and a grand total (which I shall call "Calculation 2B").

55. Calculation 2B, like Calculation 2A, included figures for all the floors, including the unlet areas, and was not limited to the areas actually let to Dsquared2. However, it included different values for the unlet areas, which were based on those in the Knight Frank letter dated 25 January attached to this email of 9 February in which Calculation 2A and 2B appear. Calculation 2B is attacked by the Defendant on various grounds, such as its deduction of rent voids for the whole building rather than only the unlet parts of the building, but, since I am not deciding the amount of profit share, if any, I need not go into detail. The conclusion of Calculation 2B was that the Defendant's 15% profit share came out at a deficit of £822,313 (compared with a deficit of £42,322 in Calculation 2A and a deficit of £1,105,365 in Calculation 1).

56. The email of 9 February 2016 concluded, after setting out Calculation 2B, by saying "Please let me know your thoughts".

57. On 19 February 2016, Mr Carr emailed Mr Ainsworth (copied to Mr Leech and Ms McKinney) in the following terms:

> "I am following up on my colleague's, Jane McKinney, email below when she attached a letter from Knight Frank confirming their view of the market rents for the building as part of their independent valuations as at December 2015 and December 2016. This confirms the numbers that we provided you with when we last met."

58. Pausing there, the email of 9 February did not confirm the numbers given at the First Meeting on 14 January (at this date, still, the only meeting at which detailed numbers were provided). The numbers at that meeting (Calculation 1) were different both in their constituent elements and in the final figure arrived at for the Defendant's 15% profit share from those in Ms McKinney's email of 9 February (Calculation 2A and 2B). However, although "the numbers" were different, the outcome (deficits in varying amounts, and, therefore, a payable Profit Share of zero in each case) was indeed the same.

59. The email then referred to Knight Frank's rejection of a DCF (discounted cash flow) valuation as the basis for a Red Book valuation (as Ms McKinney's email had) and defended other aspects of Ms McKinney's calculation. Mr Carr then said:

> "We also prepared a further calculation using the rents endorsed by Knight Frank which demonstrate even more clearly that no profit is due to [the Defendant] and I trust that you now accept the position. This calculation was attached to Jane's email below [of 9 February], and provided without prejudice to any argument we may have that you are deemed to have accepted that the profit share is nil."

60. The next paragraph referred to the departure of a Defendant employee, and suggested that the Defendant "has, in practice, not been taking any part in the letting process for some time now" and, in that context, said: "On the assumption that you do now accept that no profit payment arises, I suggest that we do formally look at bringing your role to an end under the DMA..." The email concluded: "I look forward to hearing from you."

61. The "further calculation using the rents endorsed by Knight Frank" can only have been a reference to Calculation 2B, although the other parts of the email do not apparently refer to Calculation 2A.

62. The reference to this being provided "without prejudice to any argument we may have that you are deemed to have accepted that the profit share is nil" is now relied upon as a reference to the effect of paragraph 4.4 of Part 2 in the event that the Defendant failed to refer a dispute about the calculation of profit share to the Independent Person "within 10 Working Days". There is no evidence that anyone had referred to this provision in oral or written discussions in the period before the date of this email (on 19 February) and after the exchange of emails on 15 and 16 December (which had agreed the 6 week extension of time). Mr Carr's email did not identify the provision that he had in mind when making this point and, the point not having been taken before, or threatened as a point to be taken before, it is not surprising that Mr Ainsworth (as he admitted in evidence) did not understand what Mr Carr was talking about. If the 6 week deadline was being applied, the provision of Calculations 2A and 2B on 9 February was already after expiry of the deadline on 28 January. Moreover, the email of 9 February itself had not referred to this point.

63. By email of 24 February, Mr Leech responded briefly to Mr Carr's email of 19 February, saying "we will get back to you on the matter of the DMA during the course of next week." Mr Carr replied on 26 February saying "Thanks", before going on to other matters not relevant to this case.

64. The next substantive communication in this email chain was a long and formal email dated 2 March 2016 from Mr Ainsworth to Mr Carr and Ms McKinney, copied to Mr Leech. It was headed (unlike any of the previous correspondence) "Without Prejudice/Subject to Contract - 49-51 Conduit Street Profit Share". It covered a whole page. It stated "Although your workings now more closely follow the methodology set out in the contract there do still appear to be a number of errors...". Those alleged errors are then discussed. On the other hand, Mr Ainsworth also in this email concedes some methodological points on the Defendant's side.

65. The thrust of the email is "We have updated our model which we believe follows the correct methodology, even if we are at odds on the inputs to be used. Once you have reviewed it please can you confirm if you agree the workings methodology on the first sheet ("Profit Share - working") are in line with the DMA and you accept the approach." So far as the inputs are concerned, Mr Ainsworth stressed in this email:

> "Importantly we should note the inputs for market rental values, void periods and rent free periods come from your Initial Profit Share Workings, dated 7th December [i.e. Calculation 1], as shown on the final tab of the attached file for reference... We have not accepted these figures...
>
> In summary, we disagree with your summation that no Profit Share is payable. On your inputs a payment of c£1m is due (a payment is still due using Knight Frank's estimate). We believe it should be more. As per our letter dated 15th December, we are happy to continue working with you to find a mutually

> acceptable position and to that end perhaps another meeting would be useful? Alternatively, we can refer the calculation to an Independent Person as per the contract."

66. Attached to the email were detailed figures and calculations, arriving at a 15% profit share for the Defendant of £997,953. As was stated in the email, this was said to be the position even if the Claimants' own figures were used, the key difference being one of methodology. Mr Ainsworth believed (and there seems to have been some basis for it) that Calculations 2A and 2B, like Calculation 1, simply failed correctly to apply the methodology laid down in the DMA for the calculation of profit share, at least in some respects.

67. Evidently, Ms McKinney then called Mr Ainsworth because, at 7.50 pm on the same day (2 March 2016), Mr Ainsworth emailed her (copied to Mr Leech and Mr Carr) saying "Thank you for your call earlier; Again, very happy to sit down with you to talk through the calculations." Mr Ainsworth also referred to and attached "the final Plowman Craven report for the retail", including accurate and updated floor areas for the retail space (occupied by Dsquared2) which (he said) were different from those on which Knight Frank based its figures for those areas. The undisputed evidence is that, in the call that preceded this email, Ms McKinney and Mr Ainsworth had agreed to meet to discuss Mr Ainsworth's calculation of 2 March without, in that call, settling on the date when they would do this.

68. On 7 March 2016, Ms McKinney emailed Mr Ainsworth offering him dates "to go through the model." The date subsequently agreed was 10 March.

69. On 10 March 2016, therefore, a further meeting took place ("the Second Meeting"). This was the only meeting between the parties since the First Meeting on 14 January. On this occasion, the meeting was attended only by Mr Ainsworth and Ms McKinney: neither Mr Leech nor Mr Carr were there. There were no notes of the meeting. Consequently, the only evidence of what happened is from Mr Ainsworth, and I accept his evidence (which was not substantially challenged in cross examination).

70. During the course of the meeting, Ms McKinney realised she had forgotten to bring with her a hard copy of a new calculation from the Claimants' side (which I will refer to as "Calculation 3") and she therefore emailed it to Mr Ainsworth during the meeting using her phone and it is in the papers. It is in a similar format to Calculation 2A and 2B. However, the Defendant's 15% profit share now comes out in Calculation 3 as a deficit figure of £480,715 (compared with the deficits of £1,105,365 in Calculation 1, £42,322 in Calculation 2A and £822,313 in Calculation 2B). Since it was still a deficit, however, it would still provide zero by way of further payment.

71. Mr Ainsworth's evidence was that he told Ms McKinney that the Knight Frank letter attached to the email of 9 February was not on an RICS Red Book valuation basis (as required by the DMA) and was not at the Calculation Date. He tried to show that there was a profit share due using varying approaches and inputs. They reviewed points from Ms McKinney's email of 9 February and Mr Ainsworth's email of 2 March. He agreed with her that the Relevant Income, as defined in the DMA, was zero, on the basis of information provided by her. He agreed with her that the Corporate Costs, as defined in the DMA, allowable within Development Costs, should be limited to £158,000. The

rationale for Disposal Costs was explained (and in a later email of 10 March confirmed as 0.9% of Market Value). Mr Ainsworth highlighted differences to the Plowman Craven measured area reports. He asked Ms McKinney to clarify the Claimants' use of differing area inputs. He pressed her for copies of the signed leases with Dsquared2, which he had still not received despite asking Eversheds for them in his email of 23 December. He explained that he wanted to confirm that the floor areas in the executed leases reflected the measured areas on Practical Completion. He asked her to confirm the lease position in relation to Dsquared2 and to confirm acceptance of the Plowman Craven measured survey over her proposed areas.

72. At the end of the meeting, Ms McKinney said that she would take it back to Mr Carr and get back to Mr Ainsworth. This is confirmed by an email she sent to Mr Ainsworth later that day: "I will go through everything we did today with Robin tomorrow, Monday at the latest. We also want to come to a resolution." Mr Ainsworth's evidence was: "She left me with the impression that she accepted that I had proved to her that the way in which I did the calculation, i.e. my model, was correct. I thought that she recognised that I had shown that a payment was due... There was no horse-trading in our discussion. It was a productive discussion, the result of which she needed to take back to Robin Carr to get ratified... I expected the next conversation to be about actually calculating the correct Profit Share most likely with the aid of an Independent Third Party in relation to the subjective inputs." He also said "That meeting had a different dynamic from the meeting on 14 January 2016 [the First Meeting] which Robin Carr attended. Jane McKinney asked questions and we had a constructive dialogue about what, technically, we were trying to say."

73. This Second Meeting was the last meeting before referral to the Independent Expert on 5 May 2016, which was some 61 days or 8½ weeks later. Between those two dates, - 10 March and 5 May - the Claimants simply stopped responding to the Defendant (with the exception of a without prejudice offer made by the Claimants in April, which I will come to). The hopes that Mr Ainsworth had when he left his constructive one-to-one meeting with Ms McKinney proved to be unfounded. The overwhelming likelihood, given that I accept Mr Ainsworth's evidence that Ms McKinney appeared cooperative and sympathetic, is that it was Mr Carr who chose not to engage, it being understood at the end of the Second Meeting (as I have said) that the position needed to be referred to him. Mr Carr's oblique reference to the deeming provision in his earlier email of 19 February 2016 ("...any argument we may have that you are deemed to have accepted that the profit share is nil...") shows that he was already alive to the potential time-bar point arising from paragraph 4.4 of Part 2 (and he confirmed this in his evidence).

74. On 23 March 2016 (nearly two weeks after the Second Meeting on 10 March), having heard nothing in the meantime, Mr Ainsworth emailed Ms McKinney and Mr Carr, saying "Robin, Jane. Hope you're well. I wondered if you had both had opportunity to speak following the session Jane and I had on Thursday 10th March - keen to get an update when you are ready." This was ignored.

75. A week later, on 31 March 2016, Mr Ainsworth emailed them again, saying (after some introductory pleasantries) "Further to my email last Wednesday, please can we have your thoughts following the detailed session on the model." He also spoke to Ms McKinney on the telephone, but she told him she had not yet discussed the profit share figures with Mr Carr or his boss Mr Franck Ruimy.

76. A week later, on 7 April 2016, Mr Ainsworth emailed Ms McKinney and Mr Carr again, saying "Thanks for your call last week, Jane; I just wondered if you had been able to discuss this matter with Frank [Ruimy] now? As you know we wish to move this conversation along now." This was ignored.

77. On 18 April 2016, Mr Carr broke his silence. He rang Mr Ainsworth and told him that the Claimants intended to make an offer the next day. Three days later, on 21 April 2016, Mr Carr called Mr Ainsworth and made what everyone agrees was a without prejudice offer to settle the profit share claim for £100,000. Although everyone agrees it was made without prejudice, the Claimants put it in as part of what they say was an entirely without prejudice chain of communications starting with the First Meeting (an issue I deal with below) to enable me to decide whether they were, as a whole, without prejudice. The Defendant, on the other hand, does not accept that the whole chain of communication starting with the First Meeting was without prejudice (the issue I will deal with below) but does assert that this particular call was without prejudice. The Defendant initially objected to this call being referred to. However, Counsel for the Defendant said in the opening submissions that, notwithstanding that initial objection, and given that the Claimants had chosen to put this call in evidence before me, the Defendant's position is now that I can and should take it into account in my judgment.

78. Mr Carr's evidence is that he told Mr Ainsworth the call was on a without prejudice basis and Mr Ainsworth agreed with that. Mr Carr told him that the Defendant was out of time to refer the profit share dispute to the Independent Person but the Claimants were keen to conclude in an amicable fashion and was therefore willing to make a goodwill offer of £100,000. This figure was arrived at by taking into account (1) Mr Ainsworth's calculation showing a profit share (using the Claimants' figures but Mr Ainsworth's methodology) of £997,953; (2) the Claimants' view that profit share on any calculation would be nil (3) the Claimants' view that the profit share was deemed to be nil in any event because the Defendant was out of time to refer the dispute to the Independent Person and (4) the Claimants' desire to avoid the time and cost of a legal dispute about whether the Defendant was out of time. Mr Ainsworth responded by saying that he appreciated the attempt to reach an amicable conclusion but the matter was out of his hands because his Managing Director, Mr Nigel Hugill, had now taken a direct interest in the issue. Mr Ainsworth said he would report the offer back to Mr Hugill and they would then revert with a response.

79. Mr Ainsworth's recollection is broadly similar. His evidence is that Mr Carr said at the start of the call that he was going to make an offer, and said clearly that it was going to be on a without prejudice basis. Mr Ainsworth agreed that was fine. Mr Carr said that he wanted to draw a line under the conversation while maintaining a positive relationship. He said that he intended to make a financial offer which would be below the Defendant's expectations, "due in part to his belief that no payment was legally due." He said that he had received legal advice that key dates had passed. He said that he was willing to make a goodwill payment of £100,000. Mr Ainsworth said the matter was now in the hands of Mr Hugill.

80. The main difference between these accounts is that Mr Carr's account is more fully reasoned, and it is also more explicit about the deeming provision and the basis on which it was said that any reference would now be out of time. I prefer Mr Ainsworth's account to Mr Carr's in this respect. My observation of Mr Carr suggests that he would

probably have been less rather than more precise, and my assessment of Mr Ainsworth is that he was a reliable witness with a good recollection. It would also be in line with the indirect way Mr Carr referred to the deeming provision in his email of 19 February 2016 for him to have been indirect in the telephone call (perhaps in order not to alert Mr Ainsworth so clearly to the point that he would immediately attempt to rectify the position) and this, too, supports Mr Ainsworth's version.

81. The next thing that happened was the reference, on 5 May 2016, by the Defendant to the Independent Person, of which the Claimants were notified on the same day. By 15 June 2016, it had been agreed that the reference should be stayed pending the outcome of these High Court proceedings. The Claim Form was issued on 27 June 2016.

Were the communications between the parties on and after the First Meeting on 14 January 2016 expressly without prejudice?

82. The issues that I am to decide were agreed between the parties, and refined in the course of the trial.

83. The first issue is whether the communications between the parties on and after the First Meeting on 14 January 2016 were expressly stated and agreed to be taking place on a without prejudice basis, with the result that they are inadmissible in evidence before me. It is accepted that, if they were, the Defendant will lose the action, because, without reference to these communications, there is nothing to put against the agreed deadline of 28 January 2016 and its expiry without a reference to the Independent Person. This issue turns on a conflict of evidence.

84. The meeting on 14 January 2016 started at 1.30 pm (not at noon as Mr Carr said in his witness statement). Earlier that day, at 10 am, Mr Carr emailed Jeremy Brooks, a partner in the Real Estate Department of the solicitors firm King & Wood Mallesons LLP, and asked "How do we best the meeting takes place on a without prejudice basis? Is it worth informing [the Defendant] by email in advance that we are only meeting them on a without prejudice basis?". It is obvious that there is a word missing from the first sentence; probably it was meant to read "How do we best [ensure] the meeting takes place on a without prejudice basis?" This email was in response to an email from Mr Brooks 3 days earlier, dated 11 January 2016, consisting of 6 paragraphs, almost all of which have been redacted before me. The only fragment I have been shown says: "...your meeting tomorrow with [the Defendant]... I would suggest you expressly agree that the meeting is without prejudice." There was no email reply to Mr Carr's query. However, his evidence is: "About an hour before the meeting was due to start, Mr Brooks responded to my email by telephone and told me that I should state at the beginning of the meeting that it was to be held on a without prejudice basis."

85. Mr Carr's evidence was "Accordingly, this issue was at the forefront of my mind and so, when the meeting began, I said to Mr Leech and Mr Ainsworth that it was taking place on a without prejudice basis. I recall that Mr Leech in particular acknowledged this and replied to me "of course" (or similar words to that effect)".

86. The Claimants also put in evidence what was initially double hearsay evidence from Ms McKinney to a solicitor, James MacDonald-Pearce, and from the solicitor to Mr Carr, who said in his witness statement: "I understand from [Mr MacDonald-Pearce] that he has been in contact with Ms McKinney and she recalls that Mr Leech said to me

that the meeting was going to be "without prejudice" and I agreed with this. Although it is obvious that Ms McKinney's recollection differs from mine as set out above, the important point is that we both recall that it was stated and agreed at the start of the meeting that it was going to be on a "without prejudice" basis and this exchange was between Mr Leech and myself."

87. A witness statement from Mr MacDonald-Pearce was filed in support of an unsuccessful attempt to obtain a strike out (on the 'without prejudice' point) from a Master, but it did not refer to this hearsay evidence. Mr MacDonald-Pearce was not called as a witness before me. No attendance or other notes of Mr MacDonald-Pearce's conversation with Ms McKinney were disclosed, although they would not have been privileged given that what she allegedly said was put in evidence through Mr Carr. In the course of the trial, however, I was given a copy of an email from Mr MacDonald-Pearce to Ms McKinney dated 18 November 2016 (so, 10 months after the meeting in question) saying:

> "Further to our recent telephone discussions, I attach a very brief draft witness statement from you regarding the meeting which occurred with Urban & Civic on 14 January 2016.
>
> Can you please review your statement and let me know whether you have any comments/amendments to make? Needless to say, it is important that you are comfortable with everything that is said in your statement and it is in your own words. The draft refers to the matters set out in Robin's statement so a draft of that is also attached.
>
> Were you able to find your notebook and review the notes you made of the meeting on 14 January 2016?"

88. The attached witness statement is unsigned and undated. No-one suggests that Ms McKinney approved it. Rather, it is suggested that it supports the double hearsay evidence of Mr Carr because it will presumably have been based on what Ms McKinney had said on the telephone to Mr MacDonald-Pearce (of which no attendance note or other note has been produced). The relevant paragraph reads:

> "Robin Carr and I met with the Defendant's Philip Leech ("Mr Leech") and David Ainsworth ("Mr Ainsworth") on 14 January 2016 at Urban & Civic's offices at 50 New Bond Street. The meeting began at around noon. At the start of the meeting, I believe that Mr Leech said to Mr Carr that the meeting was going to be "without prejudice" and Mr Carr agreed by saying "yes"."

89. I regard this evidence as flimsy and unsatisfactory. Not only is there no signature or other communication from Ms McKinney to confirm that she adopts it as her evidence but it is damaging to the credibility of the point that Mr MacDonald-Pearce was not called to give evidence about what she had said in the preceding telephone calls and to be cross examined (he having been willing and able to file witness statements in support of the strike-out application, without addressing this point about evidence from Ms McKinney). However, for what it is worth, it seems to undermine Mr Carr's evidence rather than to support it. The issue being whether Mr Carr used the words "without

prejudice", this draft statement says he did not, but that they were used by Mr Leech. Since Ms McKinney's draft statement was expressly drafted on the basis that it was hoped it would conform to Mr Carr's (a draft version of which, although I have not seen the draft, was submitted with it and referred to in it), I would expect Mr MacDonald-Pearce to have explored with Ms McKinney whether she was prepared to support Mr Carr's claim to have said the words himself. This makes her failure to do so in the draft all the more striking.

90. So far as the reference to Mr Leech having used the words is concerned, I reject it. No-one says that Mr Leech did use those words, including Mr Carr, who was adamant in cross examination that his case was that he, personally, had used the exact words "without prejudice". Given what I have described as the flimsy nature of the evidence in the draft witness statement based on the telephone call, perhaps I do not need to go further than that. However, I do notice that Mr Leech had used the words "without prejudice", in his letter of 15 December 2015, which opened: "Without prejudice, further to your notice of 7th December 2015 confirming the Calculation Date has passed and providing us with your Calculation Information with regards to the Profit Share we write to confirm that we have now reviewed the calculation provided and dispute it." That does not mean that he said those words at the meeting on 14 January 2016; Mr Carr says he did not; Mr Leech himself says he did not; and Mr Ainsworth says he did not. I find that he (that is, Mr Leech) did not. It is common ground that Mr Leech's use of the words in his letter of 15 December 2015 did not by itself render either that letter or subsequent communications without prejudice so as to exclude them from the evidence before me.

91. Mr Leech and Mr Ainsworth both gave evidence that neither the words "without prejudice" nor words to the effect that the meeting would be conducted on a "without prejudice" basis were used by Mr Carr or anyone at the meeting on 14 January 2016. I accept their evidence, and prefer it to the evidence of Mr Carr. While Mr Brooks had suggested beforehand that Mr Carr should say that the meeting would be without prejudice, I do not think it follows he actually did so, and I find that he did not do so. Mr Carr was not a meticulous person, as it seemed to me. It does not surprise me that he overlooked this point when the meeting actually began, as the evidence of the other witnesses persuades me he did.

92. No other basis for saying that the communications on and after 14 January 2016 were expressly stated or agreed to be "without prejudice" was put forward. I now turn to the question of whether they were on a "without prejudice" basis by implication.

<u>Did the nature and content of the communications on and after 14 January 2016 mean that they were without prejudice in any event?</u>

93. The next agreed issue is whether the nature and content of the communications on and after 14 January 2016 meant that they were without prejudice in any event.

94. It has long been established that communications may be "without prejudice" and, therefore, inadmissible in evidence at a subsequent trial, whether or not the words "without prejudice", or even words to that effect, are used in the course of them. The classic statement of this principle is in *Rush & Tomkins Ltd v Greater London Council* [1989] AC 1280 per Lord Griffiths at 1299D-1300A:-

> "The "without prejudice" rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in *Cutts v Head* [1984] Ch 290, 306:
>
> > "That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co. v. Drayton Paper Works Ltd* (1927) 44 R.P.C. 151, 156, be encouraged fully and frankly to put their cards on the table.... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."
>
> The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence "without prejudice" to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission."

95. Lord Griffiths also says: (at 1300C) "...the rule is not absolute and resort may be had to the "without prejudice" material for a variety of reasons when the justice of the case requires it." I deal with exceptions that might possibly apply to this case, below.

96. However, before coming to exceptions, the question is whether (quoting Lord Griffiths) these were "negotiations genuinely aimed at settlement". It seems to me clear that they were. The discussions on and after 14 January 2016 were conducted in the context of the Defendant's letter of 15 December 2015 in which Mr Leech gave formal notice of a dispute, raised the possibility of referral to the Independent Person within 10 working days as required by the DMA, and said "However, given the time that has elapsed since the information was supposed to be given, it would seem sensible and preferable to meet to try to agree the Profit Share first." That, in my judgment, envisaged a

negotiation to avert the reference. I find that the subsequent meetings and communications, starting with the First Meeting on 14 January 2016, were "to try to agree the Profit Share" as Mr Leech suggested in his letter. They were negotiations aimed at settlement. Mr Leech accepted this in his cross examination. Therefore, on the face of it, they were subject to the "without prejudice" rule.

97. I accept that Mr Ainsworth and Mr Leech did not think that they were being conducted subject to a "without prejudice" rule that would exclude them from evidence in a subsequent trial. The "without prejudice" rule did not apply by agreement and I have found that Mr Carr did not seek or obtain such agreement. However, the cases show that "without prejudice" protection of negotiations genuinely aimed at settlement is founded on public policy as well as on agreement and, in some cases, where there is no agreement express or implied, rests only on public policy. Indeed, as Hoffman LJ pointed out in *Muller v Muller* [1994] EWCA Civ 39, *Rush & Tomkins Ltd v Greater London Council* [1989] AC 1280 itself "is an example of the privilege resting purely on grounds of public policy without any element of implied agreement, because the party against whom the privilege was claimed was not a party to the negotiations".

98. If neither party wants their negotiations to have this protection, they can either be clear and explicit about at the time (for example, by saying in terms that the discussions are to be on an open basis) or they can jointly waive the protection in subsequent litigation (such as this) to which they are both parties. But (I have found) no-one was explicit at the First Meeting about whether the discussions were to be on an open basis, or not. Mr Carr evidently did want the protection to apply (although he did not, as I have found, say so at the First Meeting), and the Claimants have not waived the privilege. Consequently, I find that the protection applies, unless the Defendant can bring itself within one of the exceptions.

99. It follows that (subject to the question of whether an exception applies), not only those parts of the discussions which might constitute identifiable admissions, but all of the discussions, are protected: *Ofulue v Bossert* [2009] 1 AC 990 [2009] UKHL 16 per Lord Neuberger at paragraph 89.

<u>Does an exception to the "without prejudice" rule apply in the circumstances of this case?</u>

100. The next agreed issue is whether the communications between the parties on and after the First Meeting on 14 January 2016 "are nonetheless admissible as an exception to the operation of the without prejudice rule, as proving a variation of the substantive rights of the parties".

101. All the cases recognise that the "without prejudice" rule is not absolute. I have already quoted Lord Griffiths's dictum in *Rush & Tomkins* in that respect. On the other hand, the "without prejudice" privilege is important, and it cannot be set aside on an arbitrary or unpredictable basis if it is to retain its force. Exceptions must be formulated in accordance with clear principles. This was done by Robert Walker LJ in *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436, a judgment applied by the House of Lords in *Ofulue v Bossert* [2009] 1 AC 990 [2009] UKHL 16 and by the Supreme Court in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2011] AC 662 [2010] UKSC 44.

102. Per Robert Walker LJ in *Unilever* at 2444C-D:

> "Nevertheless, there are numerous occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote. The following are among the most important instances.
>
> (1) As Hoffmann LJ noted in *Muller's* case, when the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible. *Tomlin v Standard Telephones and Cables Ltd* [1969] 1 WLR 1378 is an example...
>
> ...
>
> (3) Even if there is no concluded compromise, a clear statement which is made by one party to negotiations and on which the other party is intended to act and does in fact act may be admissible as giving rise to an estoppel. That was the view of Neuberger J in *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1997] FSR 178, 191 and his view on that point was not disapproved by this court on appeal."

103. I have limited my citation to exceptions (1) and (3), because these are the exceptions relied upon by the Defendant in the agreed issues. Of course, Robert Walker LJ is not writing statute law when setting out these exceptions and they are given only as "among the most important instances" (at 2444D). Indeed, (at 2445H) he says "...my summary is far from exhaustive." Thus, it was accepted by the Claimants, and I think rightly, that, although exception (1) applies to "a concluded compromise agreement", it should apply, also, to any concluded and legally enforceable agreement. Similarly, although exception (3) refers to estoppel where "a clear statement which is made by one party to negotiations and on which the other party is intended to act and does in fact act", it should apply, also, to any enforceable estoppel.

104. In relation to *Unilever* exception (1), the agreed issue is: "was there a concluded agreement that the 10 day time limit in paragraph 4.4 of Part 2 of Schedule 4 of the DMA as extended by the parties should not run until reasonable notice given by either of the parties to bring the suspension to an end; alternatively the provision of the information as per Issue 6 below?".

105. In relation to *Unilever* exception (3), the agreed issue is: "was there a promissory estoppel by conduct as formulated in Issue 7 below and, if so, is that within *Unilever* exception (3)?"

106. Therefore, to succeed on exception (1), the Defendant must succeed on Issue 6 (alleging a concluded agreement). Similarly, to succeed on exception (3), the Defendant must succeed on Issue 7 (alleging an estoppel). I can therefore deal with both the exceptions by dealing with those substantive issues in their places, below.

Did Calculation 2A, Calculation 2B and Calculation 3 supersede Calculation 1?

107. The next agreed issue is, on a true construction of the terms of the DMA, were the two calculations provided by the Claimants on 9 February 2016 (Calculations 2A and 2B) and the calculation provided by the Claimants on 10 March 2016 (Calculation 3) intended to, and did they, "supersede" the calculation provided on 7 December 2015 (Calculation 1)? i.e. were they fresh calculations for the purpose of paragraph 4.2 of Part 2 of Schedule 4 of the DMA?

108. The significance of this issue is that, if they were, the timetable in paragraphs 4.2 - 4.4 of Part 2 might start afresh, including the timetable for referral to the Independent Person. In his closing submissions, Counsel for the Defendant made it clear that he was inviting me to find that the later calculations were replacements of Calculation 1. The Claimants' case, on the other hand, is that the later calculations were simply part of their attempt to persuade the Defendant to drop the profit share claim, by showing that the result was zero whatever calculation was adopted, notwithstanding points being put by Mr Ainsworth.

109. The Defendant's case was based on evidence from Mr Ainsworth. That evidence was, however (in keeping with Mr Ainsworth's scrupulously honest and fair approach to giving evidence) not very robust in the Defendant's favour. In cross examination, it was put to Mr Ainsworth, in relation to Calculations 2A and 2B, that (not least given that there were two of them) there was nothing in the letter to suggest that either or both of Calculation 2A and 2B were to be substituted for Calculation 1. Mr Ainsworth said "She's sent me two new profit share figures with two new profit share calculations. I had assumed that these were now what it was that Aerium [for the Claimants] believed was true." But, shortly after, he said "I'm not sure I saw these as formal under the DMA." After the next question, he hesitated, stopped dead, and changed his mind, saying "By that I mean... I guess the point I'm trying to clarify there is that I didn't see the – I guess actually no, I'm wrong, sorry, they are essentially formal notifications, they are providing us a profit share. I'm wrong." The transcript does not convey the way in which these words emerged and, in particular, the impact of Mr Ainsworth's hesitations. My clear impression was that Mr Ainsworth was, in the first part of this evidence, saying what he thought at the time - which was not that they were "formal under the DMA". In the second part of his evidence, he was simply basing himself on the wording of the letter as he re-read it in the court room under cross examination, at which point he was making a submission about how that letter might be read. Moreover, he did not seem at all convincing in his revised position. The admission that, at the time, "I'm not sure I saw these as formal under the DMA" seemed to me a better reflection of the dynamic of the meetings and emails themselves, as they unfolded at the time.

110. In any case, I think this is a question to be answered objectively, rather than on the subjective understanding of the recipient of Calculations 2A, 2B and 3.

111. I think it is clear from the evidence as a whole that what Mr Carr and Ms McKinney were doing, at all times, at least prior to the Second Meeting on 10 March 2016, was saying that the profit share was zero. Mr Carr, in particular, was not interested in the detail. He had decided the profit share was zero; he had said so informally at the meeting on 25 November 2015; and, in Calculation 1 produced on 7 December 2015, he had (he thought) a demonstration that the profit share was zero. Neither he nor Ms McKinney

saw themselves as engaging in a formal DMA process because their position was that such a process would be pointless, because the outcome was going to be zero, whatever argument there might be about the precise amount of the deficit. They never resiled from Calculation 1, in the sense of withdrawing it and replacing it with others. Rather, what they did was to model alternatives, to make their point that the outcome - no profit share - would always be the same. I therefore find that they at no time intended to withdraw Calculation 1 or to indicate that subsequent calculations re-started the process under paragraph 4.2 of Part 2 and that they at no time did so.

112. I am supported in this finding by the dates. Mr Carr was alive to the time limit point and I accept his evidence, which is not inconsistent with the documents, that he was alive to it when the initial deadline of 28 January 2016 expired. It would be unthinkable for him to re-start the paragraph 4.2 process after that and lose that advantage. Calculations 2A and 2B were provided in an email of 9 February. Mr Carr was referring to the time limit openly in his letter of 19 February. It is fanciful to suggest that Calculation 3 (on 10 March) would set that aside. In any event, Calculation 3 was put forward at a meeting at which Mr Carr was not present, and both those present at the meeting (Ms McKinney and Mr Ainsworth) acknowledged that Mr Carr needed to sign off any progress that might be made.

113. Nothing in the calculations themselves suggests that they are put forward in substitution for Calculation 1, let alone that they were fresh calculations for the purpose of paragraph 4.2 of Part 2. Calculations 2A and 2B were in the email of 9 February 2016. The first part of that letter is an attack on Mr Ainsworth's approach and, after that passage, Calculation 2A is introduced with the words "Below is an adjustment of your calculation taking into account the above mentioned points..." In reading this, I emphasise the word "your" in "an adjustment of your calculation". This was not a calculation put forward by the Claimants to supersede Calculation 1. It was a calculation to show that even on Mr Ainsworth's figures, which the Claimants did not accept, the profit share was still zero. After that, Calculation 2B is introduced with the words: "However, we know that rents will not be at your projected levels. If you used our calculation of value with the updated rents you arrive at the answer below", followed by Calculation 2B. In reading that passage, I emphasise the word "If". This was not a calculation put forward by the Claimants to supersede Calculation 1. It was a demonstration that "if" they used the Claimants' calculation of value with the updated rents, the Knight Frank figures would still mean there was no profit share.

114. Calculation 3 is even less plausible as a substitution for Calculation 1 (or for Calculations 2A or 2B). It was sent without any covering wording, in the course of the Second Meeting which took place only between Mr Ainsworth and Ms McKinney. It continued to show a profit share of zero and was therefore consistent with the Claimants' line that they were demonstrating that, whichever way you looked at it, the Defendant was on a hiding to nothing. It was also sent in the context of a meeting which ended with agreement that the matter had to go to Mr Carr next. There was no suggestion that Mr Carr had approved Calculation 3 as a substitution for earlier calculations. Calculation 3, like Calculations 2A and 2B, was a tool for argument, to support the outcome of Calculation 1, which was zero profit share. There was no need to withdraw Calculation 1, it was not intended to withdraw Calculation 1, and an objective observer would not in my judgment have concluded that Calculation 1 had

been withdrawn, superseded, or substituted, or that the subsequent calculations were fresh calculations for the purpose of paragraph 4.2 of Part 2.

The requests for information at the Second Meeting on 10 March 2016

115. The next agreed issue is: Were the requests for information, allegedly made by the Defendant at the meeting on 10 March 2016 (namely, (i) a copy of the leases granted to Dsquared 2; and (ii) confirmation of acceptance of the Plowman Craven measured survey as against the proposed areas or alternatively a new solution to the retail ITZA calculation), requests falling within paragraph 4.3 of Part 2? In particular, were they requests for "such additional information as the [Defendant] shall reasonably require in order to verify the calculation carried out by the [Claimants]"?

116. The Defendant relied on this issue, in conjunction with the previous issue, to support its case on the next two issues. Since I have found against the Defendant on the previous issue (about whether Calculations 2A and 2B and 3 superseded Calculation 1) I do not strictly have to decide this issue, which has no relevance on its own. However, for completeness, I will.

117. So far as the requests themselves are concerned, I have already indicated that, Mr Ainsworth being in my judgment a reliable witness and, indeed, the only witness to what happened at the Second Meeting on 10 March 2016, I accept his evidence about that meeting. I accept that these requests for information were made.

118. Were they requests falling within paragraph 4.3 of Part 2? In particular, were they requests for "such additional information as the [Defendant] shall reasonably require in order to verify the calculation carried out by the [Claimants]"? In my judgment, they were.

119. So far as the leases were concerned, Mr Ainsworth had been asking for these since his email to Eversheds on 23 December 2015, which was after Calculation 1 and before the First Meeting on 14 January 2016 and subsequent calculations. He asked for them again at the meeting on 10 March 2016. At that point, he only had the agreements for leases rather than the completed leases. Since the leases were integral to the valuation, I think it was a reasonable requirement that he should be given sight of the leases themselves in order to check their dates, and any respect in which they might augment, or vary, the terms of the agreements for leases. When he made his request, and renewed it, he was not told that they were not reasonably required. In paragraphs 24 and 40 of his witness statement for this trial (dated 22 December 2017, being his third witness statement), Mr Ainsworth gives his reasons for asking for the completed leases in relation to the question of profit share. I think that the completed leases qualified as "additional information" which were "reasonably require[d] in order to verify the calculation carried out by the [Claimants]", within the meaning of paragraph 4.3 of Part 2.

120. So far as the request for confirmation of acceptance of the Plowman Craven measured survey is concerned, I accept Mr Ainsworth's evidence that the Plowman Craven evidence was important because it showed that the retail areas had created about 500 extra square feet and this could be relevant to the value of the reversion and therefore to the market value. I think that this too qualified as "additional information" which was "reasonably require[d] in order to verify the calculation carried out by the [Claimants]", within the meaning of paragraph 4.3 of Part 2.

The running of time after a request for reasonably required information

121. The next agreed issue only arises if the previous two issues (later calculations superseding Calculation 1; and whether the requested information was reasonably required for paragraph 4.3 purposes) are decided in the Defendant's favour. I have decided the first of those two issues against the Defendant. However, for completeness, I will briefly address this one anyway.

122. The parties have agreed the formulation of this issue in the following terms: If [the previous two issues are decided in the Defendant's favour], was the Defendant, in the circumstances described in paragraph 29 of the Defence, entitled pursuant to the provisions of paragraph 4.4 to make its application for a referral on 5 May 2016 in relation to the calculation which was provided by the Claimants on 10 March 2016? In particular: (a) Assuming the calculations provided on 9 February 2016 and 10 March 2016 superseded the calculation provided on 7 December 2015 [an issue I have decided against the Defendant]; and (b) Assuming the requests for information allegedly made by the Defendant at the meeting on 10 March 2016 were requests falling within paragraph 4.3 [an issue I have decided in the Defendant's favour]; then:

    (i) did the time limits set out in Paragraphs 4.3 and 4.4 of the DMA continue to govern the relationship between the parties after 14 January 2016, alternatively 28 January 2016, or were such time limits suspended indefinitely subject to reasonable notice being given by either of the parties; or

    (ii) did the 10 day time limit for making a referral in paragraph 4.4 run from the date on which the requested information was provided (as the Defendant contends, that being after 5 May 2016) or did it run from the date on which the original or superseding calculations were provided (as the Claimants contend, all of those being more than 10 days before 5 May 2016)?

123. Paragraph 29 of the Defence alleges that the Calculation Information (that is, the additional information reasonably requested under paragraph 4.3 of Part 2) was not provided in full until after the referral to the Independent Person and, in part, not at all. It then says "The ten working days which Paragraph 4.4 of Part 2 of Schedule 4 to the DMA provides for making an application for the appointment of an Independent Person had therefore not even commenced in relation to Calculation 3, let alone elapsed." Since I have found that Calculation 3 did not supersede Calculation 1, this point is moot.

124. However, for what it is worth, I do see that there is an ambiguity in the timetable set out in paragraphs 4.2 - 4.4 of Part 2, which is: from what date do the 10 Working Days for referral to the Independent Person run? Do they run (as the Claimants contend) from the date of the original notification of Profit Share and its supporting Calculation Information under paragraph 4.2? Or do they run from the date of a request for reasonably required additional information under paragraph 4.3 or indeed from the date on which that information is actually provided (as the Defendant contends)?

125. Paragraph 4.2 provides for the Profit Share to be notified with the supporting Calculation Information; paragraph 4.3 provides for the Claimants to provide to the Defendant "on request by the [Defendant] within ten Working Days of its notice served under paragraph [4.2] such additional information as [the Defendant] shall reasonably require..." The "ten Working Days" in paragraph 4.3 expressly run from the notice

served under paragraph 4.2 (the typo for clause 4.1) and this is the time limit for making a request for additional information. This means that the date for compliance with the request is not specified in paragraph 4.3. If (as the Claimant contends) the 10 working days in paragraph 4.4 run from the date of the paragraph 4.2 notification of profit share, the referral to the Independent Person has to be made on or before a request for additional information made on the last day of the time limit in paragraph 4.3. That seems unlikely. I think the better view is that the time limit in paragraph 4.4 runs from the date on which the information requested under paragraph 4.3 is actually provided. That is supported by the fact that paragraph 4.4 comes immediately after paragraph 4.3, and not immediately after 4.2.

126. However, since I have decided that Calculation 1 was never superseded, and since no request for additional information was made within 10 working days of Calculation 1, this point does not help the Defendant. Calculation 1 was notified on 7 December 2015. There was no request for information until the request for leases, which was not made until 23 December 2015 at the earliest, even if one counts a request made directly to Eversheds as a request to the Claimants. If one does not, there was no request for additional information until the First Meeting, which was not until 14 January 2016, well beyond the 10 Working Day limit from the date of Calculation 1.

Extension of time by agreement

127. The next agreed issue is further or alternative to the previous issue. It too, however, depends on the Defendant succeeding on the submission that Calculations 2A, 2B and 3 superseded Calculation 1, which I have decided against the Defendant, as well as on the submission that it had outstanding reasonable requests for additional information, which I have decided in the Defendant's favour. I will nevertheless consider it.

128. This issue alleges that the time limit expiring on 28 January 2016 was extended by agreement. It will be recalled that this is one of the bases on which an exception to the without prejudice rule is alleged as well.

129. The agreed formulation of this issue is: Did the parties, by their conduct, agree to vary the agreement of 15/16 December 2015 (extending time for a referral by 6 weeks to 28 January 2016) to the effect that the Defendant could make a referral at any time subject to either party giving reasonable notice to bring the suspension to an end; or alternatively within ten working days of the provision of the information allegedly requested by the Defendant at the meeting on 10 March 2016?

130. The reasoning of the second part of this is supported by the issue about when time ran in the event of a timely request (not more than 10 working days after the notification of profit share) for reasonably required additional information under paragraph 4.3, which I have decided in the Defendant's favour, namely that, in the event of such a request, the 10 working days for referral to the Independent Person did not run until the date on which the information was eventually provided. But it does not work unless I also find that Calculation 1 was superseded by the later calculations, which (as I have explained) I do not.

131. The reasoning of the first part - alleging that time was suspended indefinitely until either party gave reasonable notice to bring it to an end - is based on *Chitty on Contracts* paragraph 22-042 which discusses waiver or forbearance, i.e. (quoting paragraph

22.040) the position when "one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract..." In that situation, paragraph 22-042 of *Chitty* cites various authorities in support of the following propositions:-

> "The party who forbears will be bound by the waiver and cannot set up the original terms of the agreement. If, by words or conduct, he has agreed or led the other party to believe that he will accept performance at a later date than or in a different manner from that provided in the contract, he will not be able to refuse that performance when tendered. However, in cases of postponement of performance, if the period of postponement is specified in the waiver, then, if time was originally of the essence, it will remain so in respect of the new date. If the period of postponement is not specified in the waiver, the party forbearing is entitled, upon reasonable notice, to impose a new time-limit, which may then became of the essence of the contract."

132. Cases cited in support of the final sentence include the judgment of McCardie J in *Hartley v Hymans* [1920] 2 KB 475, to which I was referred.

133. In closing submissions, the Defendant's Counsel identified the particular passages in the evidence which he relied upon as supporting his case on this issue. He relied entirely on the evidence of Mr Ainsworth. He referred, in particular, to the following:-

(1) Mr Ainsworth's second witness statement (dated 10 March 2017) at paragraph 14 in a section responding to paragraph 9 of an earlier statement from Mr Carr. The material passages of this paragraph state: "I emailed the Plowman Craven area reports to Jane McKinney on 21 January 2016... I asked for a copy of the Knight Frank valuation in order to see if the Profit Share would be nil using what I had suggested was the correct methodology. I had assumed, when I was told about the Knight Frank valuation, that they had run a full valuation, which is what Robin Carr led me to believe. He also said to me that, on the basis of their figures, he was sure that the Profit Share would be nil, even after allowing for the corrections to their calculation methodology I had just presented. My response to that was that I would run it through my model, and see what the result was, when I received the Knight Frank valuation. I also commented in my email [of 21 January 2016] on my own approach to the workings."

(2) Mr Ainsworth's third witness statement (dated 22 December 2017) at paragraphs 30-33. These state, in relation to the First Meeting on 14 January 2016: "Once we had reviewed the calculation I had produced, Robin Carr stated that there was a new Knight Frank valuation which had not been used in Calculation 1... I thought this valuation would be useful. I assumed that it would be based on evidence and carried out comprehensively. This is why I asked them to send it to me, so I could run the figures from it through the model I had produced or compare their approach to mine if it was suitably comprehensive. Robin Car said that when we input the figures from the Knight Frank valuation into the model I had produced, the Profit Share would still be nil. I took away from this that a new calculation would be produced, and that Robin Carr would either provide [the Defendant] with the figures to produce the new calculation or that

[the Claimants] would produce the new calculation themselves, which they did on 9 February 2016. Following the 14 January 2016 meeting, I thought the urgency had gone out of the 28 January 2016 deadline for a referral to an Independent Person. As I understood the situation, discussions were ongoing, a new calculation was required and I was waiting to receive the Knight Frank valuation for the new inputs. On 20 January 2016, Jane McKinney emailed me asking for a copy of the Plowman Craven measurement survey... I sent this to her on 21 January 2016."

(3) Mr Ainsworth's cross examination on Day 3 from page 36 line 22 to page 40 line 17.

(4) Mr Ainsworth's cross examination on Day 3 page 57 line 14 to page 62 line 11.

134. Mr Leech's evidence was that he could not remember whether the deadline of 28 January 2016 was in his mind after the First Meeting on 14 January 2016, which was the last meeting he was involved in. Therefore, only the evidence of Mr Ainsworth was available to support the Defendant's case on an agreement (or on estoppel, which is the next issue).

135. Mr Ainsworth's evidence in cross-examination was that, up until the end of the First Meeting on 14 January 2016, "I thought we were sticking to, I had six weeks and I would have to then extend it or refer it [i.e. make a reference to the Independent Person]. But the way the meeting played out and ended, I was left with the impression that we weren't working to that, and then that impression solidified when the valuation which I understood they could send me at any time wasn't forthcoming straightaway, it came after the date. So I assumed we mustn't be working to the dates." At the end of his re-examination, I referred Mr Ainsworth to this evidence, in relation to the meeting of 14 January, i.e. that he left with the impression they were not working to the six week deadline, and I asked "Was there anything said or done which created that impression?" He replied: "We didn't explicitly talk about a new timeline or anything like that. What I inferred from what Mr Carr had said was that what we now needed to do was provide the valuation, run it through calculation, whether he was doing this or I wasn't, to demonstrate that essentially there was no value in this. And I inferred from that that we were going to wait until that was done, that that was what the next step was."

136. I find nothing in this evidence, or in the acts and communications of the parties, taken as a whole, which would suggest to an objective person standing by that it had been agreed by the Claimants that the deadline expiring on 28 January would not, after all, expire, or should be extended or replaced, or should be suspended.

137. It is true that no-one referred to the deadline. But it was explicit from the correspondence between the parties on 15-16 December 2015 that there was such a deadline. As a result of that correspondence, time was running under paragraph 4.4 of Part 2 from 7 December 2015 when Calculation 1 was provided and (by agreement) it had only been extended to six weeks, expiring on 28 January.

138. Mr Ainsworth thought the 28 January deadline still applied when he went into the First Meeting on 14 January 2016. Although he left the meeting having made requests for information, which he understood would be met, those requests were not made under paragraph 4.3 because the time for such a request ("within ten Working Days of [the Claimants'] notice served under paragraph [4.2] [i.e. Calculation 1 on 7 December

2015]" had already expired. Time was not extended or suspended by Mr Ainsworth making those requests or by the Claimants apparently being willing to meet them.

139. Mr Ainsworth did not ask for a further extension of time, or for a suspension of time. I find that nothing that was said at the First Meeting on 14 January 2016 could reasonably have led Mr Ainsworth to believe that it was so extended or suspended. I accept that his subjective assumption when he left was that the deadline was no longer important, but this was an unfortunate misjudgement on his part. The Claimants did not, in my judgment, on the evidence, including Mr Ainsworth's evidence, indicate by their words or conduct that they were agreeing to an extension of time, or to a suspension of time. The First Meeting broke up on 14 January, which was still two weeks before the agreed deadline for a referral on or before 28 January. If (as proved to be case) the Claimants did not provide the information before then, in my judgment that deadline remained in place and the Defendant still had to make a referral on or before that date. By failing to do so in time, they lost (under paragraph 4.4) the right to do so at all, and were deemed to accept Calculation 1.

140. Therefore, I find against the Defendant on this issue.

Estoppel

141. The final agreed issue is the Defendant's estoppel case. It will be recalled that this is also a basis on which it is alleged that the Defendant can claim an exception to the without prejudice rule.

142. The Defendant alleges a promissory estoppel of the type considered in *Snell's Equity* at paragraph 12-022, as formulated by Robert Goff J in *BP Exploration co (Libya) v Hunt (No 2)* [1979] 1 WLR 783. This requires (quoting Robert Goff J at 810):-

> "(1) a legal relationship between the parties; (2) a representation, express or implied, by one party that he will not enforce his strict rights against the other; and (3) reliance by the representee (whether by action or by omission to act) on the representation, which renders it inequitable, in all the circumstances, for the representor to enforce his strict rights, or at least to do so until the representee is restored to his former position."

143. The agreed formulation of this issue is: Are the Claimants, by their conduct, estopped from contending that the Defendant was required to make a Referral by 28 January 2016? In particular (cf *Snell* para 12-022, citing Robert Goff J in *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 810):

(a) Did the Claimants impliedly represent by conduct that they would not enforce any right to insist on a referral being made by 28 January 2016?; and

(b) Did the Defendant rely on that representation by not making a referral by 28 January 2016?; and

(c) Does that render it inequitable, in all the circumstances, for the Claimants to enforce any obligation on the Defendant to make a referral by no later than 28 January 2016?

144. The evidence relied upon by the Defendant in support of this estoppel is the same evidence of Mr Ainsworth relied upon in support of the agreement, which I considered in relation to the previous issue.

145. This evidence does not, in my judgment, support a finding that the Claimants impliedly represented by conduct that they would not enforce any right to insist on a referral being made by 28 January 2016. I find that the Claimants made no such representation, whether by conduct or otherwise. Consequently, I find against the Defendant on this issue, also.

## Conclusion

146. The result is that the Defendant is deemed under paragraph 4.4 of Part 2 to have accepted the accuracy of the Claimants' calculation that the profit share was zero, and the Claimants are entitled to judgment.