Neutral Citation Number: [2022] EWHC 1601 (Ch)

BL-2018-002028

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

22 June 2022

Before:

MR JUSTICE LEECH

- -

B E T W E E N:

BARROWFEN PROPERTIES LIMITED **Claimant**

- and –

(1) GIRISH DAHYABHAI PATEL **Defendants**
(2) STEVENS & BOLTON LLP
(3) BARROWFEN PROPERTIES II LIMITED

- -

MR JONATHAN DAWID (instructed by **Withers LLP**) appeared on behalf of the Claimant.

THE FIRST DEFENDANT appeared in person.

MR ROGER STEWART QC and **MR JOSHUA FOLKARD** (instructed by **Reynolds Porter Chamberlain LLP**) appeared on behalf of the Second Defendant.

Hearing dates: 10-12 May 2022

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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

I. Preliminary Matters

1. On 21 July 2021 I handed down a reserved judgment on liability, causation and most issues of quantum (to which I will refer as the "**Judgment**"): see [2021] EWHC 2055 (Ch). I found that the Claimant ("**Barrowfen**"), succeeded on its claims against both the First Defendant ("**Girish**") and the Second Defendant ("**S&B**") and I provisionally awarded damages or equitable compensation of £1,388,768.05 against both Defendants.

2. I now address three matters which I reserved for further argument and determination (the "**Reserved Matters**") and an application to correct the award of damages or equitable compensation in two respects. I am also asked to decide the principal sum on which interest should be awarded and the rate which should be applied. In this judgment, I continue to adopt the defined terms and abbreviations which I used in the Judgment itself. Moreover, where I cite paragraphs in square brackets below, I refer to paragraphs in the Judgment unless I identify another decision or authority from which that citation is taken.

3. I heard evidence and argument on these issues over three days between 10 and 12 May 2022. Mr Jonathan Dawid (who had not appeared at the trial) appeared for Barrowfen, Girish appeared in person and Mr Roger Stewart QC and Mr Joshua Folkard appeared for S&B (as they had done at the trial). I am grateful to them for their detailed and comprehensive submissions and I gratefully adopt Mr Dawid's terms for identifying the relevant issues:

   (1) *The Financial Costs Issue*: This issue arises out of my finding that Barrowfen was required to give credit for the increase in the developer's profit due to the adoption of the Revised Development Scheme: see [672]. I gave permission to Barrowfen to argue that the developer's profit should be reduced or eliminated because of the increased financial costs of the scheme and to adduce further evidence for that purpose: see section III (below).

   (2) *The Loss of Chance Issue*: I held that loss of a chance principles applied to the assessment of both damages and equitable compensation: see [327] and [328]. In relation to the Company Claims, I also held that there was a 60% chance that Prashant and Suresh would have taken control of Barrowfen and proceeded with the Amended Original Development Scheme by January 2015 if the Defendants had not committed the relevant breaches of duty: see [620] to [622]. I expressed

the provisional view that I should deduct the credit for the increase in the developer's profit before applying the loss of a chance percentage: see [677]. However, the point was not argued and I therefore gave permission to the parties to do so: see section III (below).

(3) *The Cumulation Issue*: In relation to the Administration Claim, I held that there was an 80% chance that Barrowfen would have avoided administration and begun the Amended Original Development Scheme by April 2016 if the Defendants had not committed the relevant breaches of duty: see [630]. However, I expressed the provisional view that the Company Claims and the Administration Claim were true alternatives and that Barrowfen was not entitled to recover damages or equitable compensation in relation to both claims: see [681]. But this point was not argued either and I gave permission to both parties to do so too: see section III (below).

(4) *The Girish Liability Issues*: I found that in breach of duty Girish failed to accept S&B's advice to pay the costs of £28,000 the Bedford Rectification Claim personally: see [355]. But although I held that S&B were not liable for these costs at [372] to [376] I failed to make a separate award of damages or equitable compensation against Girish for this sum. Barrowfen now invites me to do so. It also submits that I should not have assessed damages or equitable compensation against Girish on a loss of a chance basis in the light of my finding against him on the Company Claims: see [579]: see section IV (below).

(5) *Interest*: Barrowfen claimed interest at 3% over base rate. S&B argued that the Court should award interest at 1%. There was also a dispute about the principal sum and whether Barrowfen was entitled to recover interest on the income losses which it had incurred before applying the credit for the increase in the developer's profit was applied: see section V (below).

4. Both the Financial Costs Issue and the Loss of Chance Issue arise out of the credit which I applied for the increase in the capital appreciation of the Revised Development Scheme by comparison with the Amended Original Development Scheme. I determined this issue by reference to the developer's profit which Barrowfen would have earned or received on the completion of each development scheme. This issue arose as a result of S&B's application to re-re-amend to take the point shortly before trial. It is unnecessary for me to set out the procedural history because I set it out in detail in a judgment dated 3

February 2022 dealing both with the amendment application and S&B's application to exclude evidence: see [2022] EWHC 207 (Ch).

5. I gave permission to Barrowfen to amend to plead the financial costs which it had incurred in relation to the Revised Development Scheme including the opportunity cost to Barrowfen of injecting more equity into the Revised Development Scheme: see [2022] EWHC 207 (Ch) at [23]. S&B's objection to that amendment was that Barrowfen had not identified any specific alternative investment and, if it had, it would require further disclosure to properly test the allegation. This issue was resolved on the basis that Barrowfen confirmed that it was not relying on any specific investment opportunity and this was recorded in a recital to the Order.

6. In section II (below) I deal with the evidence from the trial which is relevant to the Reserved Matters and other issues which I have to determine. I also set out the new evidence given by the witnesses at this hearing which I found to be of importance in deciding those issues. In section III I address the Reserved Matters, in section IV I deal with the Girish Liability Issues and in section V I deal with interest before setting out my final disposal of the claim in section VI and my directions for the resolution of any consequential issues.

II. The Evidence

A. The Evidence at Trial

7. Mr Alford and Mr Clarke both gave expert valuation evidence at trial: see [636]. They agreed that the development costs of the Revised Development Scheme were £27,212,388 although I accepted Mr Alford's evidence that those costs should also include additional sales costs of £364,941 producing a total of £27,585,064: see [663]. The expert valuers also agreed the development costs for the Amended Original Development Scheme at £17,187,793: see [665]. After resolving a number of fairly narrow issues between them I found that the developer's profit for the Residential Development Scheme was £2,508,182 greater than the equivalent profit for the Amended Original Development Scheme. I did so on the following basis:

Table 1

Element	**Revised Development Scheme**	**Amended Original Development Scheme**
Retail	£8,688,885	£7,565,556
Community	£717,930	£940,478
Hotel	£9,463,181	£9,502,618
Residential/Student Housing	£21,343,480	£9,299,371
GDV	£40,213,476	£27,308,023
Construction Costs	**£27,585,064**	**£17,187,793**
Developer's Profit	**£12,628,412**	**£10,120,230**
Increase	**£2,508,182**	

8. Both experts had included finance costs in their calculation of the development costs although on a slightly different basis. Mr Alford had included finance costs at a debit rate of 6.00% and Mr Clarke had done so at 4.00%. Mr Alford's spreadsheet described this as debt finance and Mr Clarke's as equity finance. But it was common ground that both had calculated a figure for funding the entire development costs (whether as debt or equity). However, because the experts agreed about the overall figures, it was not necessary for me to make any findings in relation to the costs which they had included or their methodologies.

9. Mr Nick Powell, Barrowfen's accountancy expert for the Reserved Matters, exhibited to his supplementary report a copy of a global guidance note headed "Valuation of development property" and published by the RICS in October 2019 (the "**RICS Guidance Note**"). Appendix B, §B2.2.2 deals with the treatment of interest or financing costs and it provides as follows:

> "B2.2.2.1 In a basic residual valuation, finance is assumed at 100 per cent of both land and building costs.
>
> B2.2.2.2 The development property/land value finance costs are included by reference to the residual value being discounted by the borrowing costs over the development period.
>
> B2.2.2.3 There are three ways to determine the amount of interest paid on the cost of borrowing the building related costs:

- The first is to set out the costs as a cash flow and determine the total interest payments. These are then included as a cost to be deducted from the development proceeds. Some residual valuation proprietary software adopts this approach. In that form, it represents a cash flow model assuming 100 per cent borrowings on land and building/ ancillary costs and a fixed profit based on a per cent of GDV or costs.
- Second, interest on construction-based borrowings can be more crudely approximated by assuming that interest accumulates on half the development costs excluding land and profit at the cost of borrowing over the whole construction period.
- Third, it can be approximated by assuming that the whole of those costs is borrowed over half the construction period.

B2.2.2.4 Where the residual does not adopt a cash flow format, interest does play a role in giving the development appraisal some time frame to it with the interest payments crudely representing discounting of all values within the development time frame back to the present-day to form a current value for the land.

B2.2.2.5 It is normal for interest to be treated as a development cost up to the assumed letting date of the last unit, unless a forward sale agreement dictates otherwise.

B2.2.2.6 In the case of residential developments, the sales of individual units may occur at various stages during the development and the drawdown assumptions can be amended to compensate. As with any phasing of sales and lettings, this requires the cash flow format to replace the basic residual approach to identify the total interest payments that can then be deducted within the basic residual model.

B2.2.2.7 If an assumption is made that the completed development is held beyond the date of completion, first the attendant costs of holding that building should be added. These may include such items as insurance, security, cleaning and fuel. A proportion of the service charge on partially let properties may have to be included together with any potential liability for empty property taxes. Interest can then be accumulated in two parts; in the construction period and then in the post-construction period where the full costs of development can be included in the interest calculations.

B2.2.2.8 Where the client requires an appraisal considering particular financial arrangements, this can only be carried out within a cash flow appraisal."

10. It is now clear that Mr Alford and Mr Clarke had both followed §B2.2.2.1 and assumed finance of 100% (although at different rates) and that they had also followed §B2.2.2.2 and included the costs of finance over the development period. In his original expert report dated 29 March 2021 Mr Clarke stated in terms that his methodology assumed a sale of the Tooting Property once the development had been completed and the property had been let:

> "However, it should be noted that this methodology reflects an assumption that the development will be sold upon completion and letting, whereas it is the Claimant's stated intention to hold the Property as an income producing investment. Therefore, additional finance costs will be incurred to re-finance the Property on completion and subsequent interest costs should be off-set against in any calculations of loss of rent."

11. Barrowfen also adduced evidence of fact at the trial dealing with the way in which Barrowfen funded the Revised Development Scheme and the way in which it would have funded the Amended Original Development Scheme. Prashant's evidence was that Barclays had agreed to provide a two year construction loan of £22m for the Revised Development Scheme (converting into an investment loan on completion) and that Barrowfen would provide equity of £6.1m. Mr Stewart did not challenge this evidence as such but he put it to Prashant that Barclays would not have permitted Barrowfen to draw down the loan whilst the Patel family dispute was ongoing. I dealt with this issue at [606] to [612].

12. In relation to the Amended Original Development Scheme Barrowfen relied on a term sheet showing that RBS had agreed in principle to lend Barrowfen £13.98m subject to it making a cash contribution of £3.52m. The term sheet also stated that RBS would charge Barrowfen 3% above base rates until practical completion and 3% above base rates for the investment period of the loan. I also recorded that Prashant gave evidence that he would have raised the necessary equity by a rights issue or a loan from Aumkar and that Mr Stewart did not challenge his evidence that Barrowfen would have been able to raise the money: see [604].

B. Prashant

(1) Barrowfen's actual finance costs

13. Prashant gave evidence before me again in relation to the Reserved Matters. He made a witness statement dated 28 October 2021 ("**Prashant 6**") and a witness statement dated 2 May 2027 ("**Prashant 7**"). In Prashant 6 he gave evidence that as at 29 July 2021 the total development costs were £26,657,080 of which £20,551,583 had been funded by the Barclays loan and £6,105,497 funded by shareholder funds. He also gave the following, detailed explanation about how those funds were raised (references and footnotes omitted):

> "16. The equity element of the construction costs was paid out of Barrowfen's own funds. These funds in turn were raised by Barrowfen initially as debt from its parent company, Asian Agri Investments Ltd ("Asian Agri") pursuant to a subordinated debt agreement. This debt was converted into equity through the issue of 2,672,500 shares at £4 each in December 2019 and 150,000 shares at £4.50 each in December 2020 (i.e. a total of £11,365,000). The amount raised was more than the £6.1 million needed for the construction costs of the Tooting Property, as Barrowfen also needed funds to cover the costs of these proceedings and other professional fees. Part of the sum raised was also used to provide security to Barclays as I explain below. 17. I can confirm that Barrowfen intends to use the profits generated from the Tooting Property to pay a dividend to its shareholders. The dividend will be paid from available retained earnings once Barrowfen's audit is completed every year."

14. Prashant also dealt with the RBS loan in more detail and confirmed that the investment loan would have remained in place until April 2020 when he would have attempted to roll it over or looked for alternative finance. In Prashant 7 he brought the position up to date. His evidence was that the total development costs to completion will be between £27,901,900.33 and £28,001,900.33 and that the Barclays loan balance will be between £21,263,005.50 and £21,363,005.50 (excluding additional interest and bank charges).

15. Prashant dealt next with the reason why it was necessary to change the scheme. His evidence was that Barrowfen had to change from the Amended Original to the Revised Development Scheme because the former scheme was no longer viable. Barrowfen had lost Waitrose as its anchor tenant and he had been advised that construction costs had increased considerably:

> "Q. What you were doing in December 2016 was trying further to improve the profitability of the scheme, wasn't it? A. No, I was not -- what we were doing was simply working out what is going to be the best -- what is going to be the best planning consent that we can get for this scheme, but, yes, in effect, yes, improving obviously the profitability…MR JUSTICE LEECH: I'm sorry, Mr Stewart, before we leave, can you just remind me, Mr Patel, the reason why the -- and it may be that I've dealt with this in the judgment, but the reason why -- I seem to remember it was various of the tenants pulling out of the original development scheme which triggered you taking advice in relation to the revised -- what we've called the revised scheme. A. So there were two reasons. One was that we lost Waitrose as our tenant. MR JUSTICE LEECH: You lost Waitrose as your anchor tenant, yes. A. And the second thing our QS team advised the cost of this is now too great. MR JUSTICE LEECH: The costs of the original scheme? A. The costs of the original scheme had risen too far because construction costs went perpendicular between 2014 and 2016, and so therefore when they ran the numbers, the scheme was unviable in that we were making zero

> developer's profit on costs, if we did the same scheme. So we had to go back to seek new planning consent to add another floor so that we can catch up with the costs."

(2) Alternative Investment Opportunities

16. Although Barrowfen had not pleaded any specific investment opportunity, Prashant dealt with this at a relatively high level in Prashant 6. He gave two examples of investment opportunities which might have been available (references omitted):

> "Further, the lower equity commitment required for the Amended Original Development Scheme as compared to the Revised Development Scheme would have freed up funds for other investments. Given the relatively low cost of Barrowfen's debt compared with the investment return available, it would not have made financial sense for Barrowfen to use any surplus funds to pay down debt. I can confirm that in April 2019 I was presented with a couple of other development opportunities which were available for investment, either through Barrowfen or another family-owned company. The Poppin Centre site was over our budget with an estimated site cost of over £40,000,000. The Beresford site, however, had an estimated site cost of only £7,000,000 to £7,500,000. Had we been able to build the Amended Original Scheme (as found in the Judgment), we would have had sufficient funds available (together with a bank loan) to acquire the Beresford site."

17. Mr Stewart cross-examined Prashant about this evidence. He suggested that the Revised Development Scheme was more profitable than either of these alternative investments. Prashant would not accept this because the Revised Development Scheme did not include the land value. This debate ended with the following exchange:

> "Q. Let's just look at this. The court hasn't got any material at all, has it, before it to assess what opportunities were provided to Asian Agri, what it decided to do with its money. You haven't given disclosure of the board minutes, you haven't gone back and shown what was done in relation to this particular matter. You've simply produced one email, haven't you? A. That's right, and I mean as you're aware, the board is Suresh and myself. I mean, we have discussions, right, about it, but we're not going to always minute every single thing that we discuss, right, through formal board minutes when this is a family controlled group of entities."

(3) The Quality of the Investment

18. Prashant dealt next with Barrowfen's continued investment in the Tooting Property. It was his evidence that the Revised Development Scheme was now complete, that it could be sold in the open market but that it was a good investment with long term potential

value:

> "Q. The next point I want to just explore with you, and it may be that it's obvious, the development now is, as I understand it, essentially complete. Is that correct? A. Yes. Q. If you want to, you can now sell that in the marketplace as a completed development, Barrowfen can? A. Of course, it's a company, it can do whatever it wants. Q. If you find a more profitable investment opportunity you can utilise selling the Tooting development in order to take advantage of that other more profitable activity, can't you? A. It can be done, but it's very hard to replace what we have in Tooting. Q. Why is Tooting so attractive? A. This is a large site between Tooting Beck and Tooting Broadway station, it's on the high street, it's a well sought after area, and there's -- it's been flagged for a potential Crossrail station. I mean obviously I know that's been postponed indefinitely, but maybe it's revived. You cannot get another site like this that easily, especially something as large as Tooting, 0.6, 0.7 of an acre, and so close to the station. There are lots of sites that are very far from the station, they don't generate any value out of it. It's very difficult to find a site this large in London close to a station in Zone 3. MR JUSTICE LEECH: I don't think Mr Stewart was asking you about another development. I think he was just asking you if you wanted to convert it into gold you could put it into -- or to -- again, if you wanted to buy shares in a different market, you could actually realise the investment. I think that's the question that Mr Stewart was putting. You could have invested it in anything else, if you wanted to. A. Of course that can be done, but I think his question was why don't you do it? And I'm answering it because it's got long-term potential value, right, it's hard to get a site that's got, you know, good capital growth potential, but of course, of course, as a company, we can sell it if we want to. But I mean there's reasons why a company is not going to do it, especially if it's going to enhance the value, the land value is going to start picking up over the years, then why would a company want to do it? MR STEWART: Essentially what you're saying is that you regard this as being an excellent investment going forward. A. It's a good investment, right, on a high street -- prominent high street suburb."

(4) The Standby Letter of Credit

19. In Prashant 6, it was Prashant's evidence that Asian Agri provided a standby letter of credit for the benefit of Barrowfen from the Bank of Singapore for at least £2.5m during the construction phase of the Revised Development Scheme. It was also his evidence that he intended Asian Agri to charge Barrowfen a fee of 1.75% per annum. He accepted in cross-examination that this fee was not recorded in the audited accounts for the financial years 2019 or 2020 (for which he was responsible).

20. He added to this evidence by exhibiting to Prashant 7 an email from Mr James Pidcock of Barclays to him dated 19 December 2021 on which he had made the following

annotation: "Contingent Liability £1m Stand By Letter Credit Fee – 1.75%". It was his evidence that at some point after 19 December 2019 he recorded on this email the instructions which he had given to Ms Mahadevan, an Australian qualified accountant in his office in Singapore, to request Barrowfen's auditors to include this fee in its audited accounts. He accepted, however, that there was no actual agreement between Barrowfen and Asian Agri for its payment:

> "Q. And you've got this email from looking at her file; all of that's correct? A. I've -- I mean, I have completely forgotten that I'd handwritten this stuff, but when it was discovered -- because we uploaded all her emails and mine, when it was discovered and I can see my handwritten notes, that's when my memory has been jolted that, yes, I was always telling her: put the fee in. Q. So just to be clear, this is a process of reconstruction caused by looking at the printed-out email of the zip file from April 2020? A. If you look at my sixth witness statement, I put in there -- and this is before I had seen this or it jolted my memory -- that I had always intended to put the fee in. It was always at the back of my mind that I needed to charge this because one entity should not basically entity gain, right, from the other, it needs to be always arm's length basis. Q. Right. Now, if we --A. I mean, there's no reason why one entity should not -- I should not put the charge through on one to the other. Q. Sorry? A. I was saying that there's absolutely no reason why I should not put the charge from one entity to the other. They're all related, but still I've always included the charge of one gains and the other is -- needs to pay for it. MR JUSTICE LEECH: Apart from this being in the back of your mind as you said, the only action you took was just to effectively write it on a piece of paper and give it to your in-house accountant. There's no formal decision by either company. A. No, I mean, look, it's -- as a family entity it's always going to be informal, but it's me controlling the company and driving it. I keep Suresh up to date with everything, but it's actually me that's driving the entire operations. MR JUSTICE LEECH: I fully understand that, but I'm just trying to establish in practice, insofar as there's a contract between Asian Agri and Barrowfen, it's taking place in your head. A. Yes, it's -- you know, myself thinking that, okay, what's -- what needs to happen on an arm's length basis, and then after I'm putting it through, but because it's family-based, my instructions are sometimes, as you see, handwritten and I expected my accountant to do it -- I mean, she's been with me for ten years now. MR JUSTICE LEECH: But all she would have done is just put an entry in the accounts? A. As a journal entry, yes, a journal entry and also I made a liability note because that needs to go into the notes of the accounts. MR JUSTICE LEECH: That may have been more important, in fact, because you needed to record the potential liability on the SLC. A. Yes, but it's just not happened, unfortunately."

21. Finally, Prashant exhibited to Prashant 6 a letter dated 20 October 2021 in which Barrowfen had agreed to pay Asian Agri a fee of £17,500 per annum for providing the

standby letter of credit which was deemed to accrue from the date of utilisation of the Barclays facility. The fee has not yet been paid but will become payable on the earlier of the date on which the Barclays facility is repaid, the standby letter of credit is cancelled or the investment facility is terminated. Prashant had executed the letter as a deed on behalf of both parties.

(5) Atlip House

22. Prashant also gave evidence that Atlip House Ltd ("**Atlip House**"), a company of which he is also a director, guaranteed the loan made by Barclays to Barrowfen and that this guarantee was secured by a charge over a property at 2 Atlip Road, Alperton, Wembley (the "**Atlip Road Property**") which Atlip House had earlier acquired for £12m. His evidence was that this was a financial benefit to Barrowfen and it had now agreed to pay a fee of £218,750 per annum to Atlip House for providing the guarantee and security based on 1.75% of the costs of acquisition.

23. He also exhibited to Prashant 7 a second letter dated 20 October 2021 which was headed "Collateral Fee Letter" which provided that so long as Atlip House acted as guarantor and the Atlip House Property remained as security, Barrowfen would pay a fee of £218,750 per annum. Again, the fee has not yet been paid but it is deemed to have accrued from the date of utilisation of the Barclays facility and it becomes payable on the earlier of the date on which the facility is fully repaid or the guarantee and security are released or the investment facility is terminated. Prashant had also executed the letter as a deed on behalf of both parties.

24. Neither of the two fee agreements had been put in place before I had handed down the Judgment and Mr Stewart cross-examined Prashant about this. Although Prashant said that he always intended to put the collateral fee arrangement with Atlip House in place, he accepted that he was prompted to do so by the Judgment:

> "Q. When you say Atlip didn't initially charge Barrowfen to provide this guarantee, am I correct in saying that that was at all times from the end of 2019 through until after judgment in 2021? A. Yes. Q. And by that time, as I understand it, there had been no discussions at all with any representative of Atlip and any representative of Barrowfen as to the possibility of charging for this. A. Yes, but as you're aware, I'm the director of both companies. Q. Yes, but just to be clear about this, this is a situation where after judgment and at the time when you were considering consequentials, what effectively

> happened was, well, why don't we try and charge for this? A. No, as I said in my witness statement, I had always intended the charge for both to be put through, it was at the back of my mind. The judgment reminded me that it's not been done, I need to go and do it. Q. Okay, well, it follows, I think, obviously from that that there had been no manifestation of this to anyone in the outside world, whether Suresh, your accountant, or anyone else. A. No, and the reason for that is that I -- Q. Sorry, "No, that's not true", or, "Yes, that is true, but"? A. Yes, that is true, but I single-handedly managed both the companies, I mean so therefore it's all just within me for me to go and execute these things. For example, if a charge needs to be put through, it's just myself remembering that I need to go and do it. Suresh takes a very, very much more higher level sort of understanding of what's going on, as and when I update him, but I'm the one in the UK every two months dealing with these companies. Q. And that led to correspondence which you produced and we probably don't need to look at, which you refer to and exhibit at 32 where you seek to look and see what a commercial charge would have been for this; is that right? A. Yes, so I'd always intended to just charge cost plus 1%, which is something that we regularly do within sort of related entities, but this time, when it comes to a property, I just wanted to ensure that there was an arm's length basis for charging this and so I asked Barclays what they would charge if they used security -- they used a property to provide security. Q. And I think final question on this, Mr Patel: by the autumn of 2021, there was no practical prospect of this guarantee being called upon because by that stage the development was very close to completion; correct? A. That's correct."

(6) Interest

25. Finally, I also asked Prashant how in practice Barrowfen funded the equity contributions which it was required to make by Barclays and how they would be invested in the meantime. His evidence was as follows:

> "A. So let me explain that. Right, so Suresh and I are directors of Barrowfen, we're also the directors of Asian Agri, right, so I mean there's no formal calling for funds as such because same person, you know, managing both -- different companies. We are looking at the ultimate outcome that if we develop this site, if we get the money across to develop this site, then we can, you know, start earning a rent out of this and a return out of this. Now, the way -- how Asian Agri was developed was that it was made the holding company of Aumkar Plantations and then we brought Barrowfen into the holding structure as well. Asian Agri had no money. It was seeded with a £10 million dividend from Aumkar Plantations to Asian Agri. So that became its seed funds. Those funds were invested into the money markets, right, so the US Dow, Nasdaq, whatever, and every time we needed money for Barrowfen and I think the court has seen now that there was injections of funds as and when invoices became due, right. So how we did it was in Asian Agri took a loan against the portfolio and then sent the money across. So Asian Agri has a debt at the moment it's incurring to supply equity to its -- to the subsidiaries below it. I mean, to answer your question, as soon as we believed that we

> need some money, I would utilise the facility in Asian Agri to drag a loan out of it, and then supply the funds."

26. I then asked him what kind of returns Asia Agri could expect to make on this portfolio of assets. It was his evidence that it was between 1% and 3% net of the loan interest which Asian Agri was paying to the Bank of Singapore:

> "MR JUSTICE LEECH: Can I just ask you, you mentioned a moment or two ago that money would have sat in Asian Agri rather than Barrowfen and you mentioned that Asian Agri put money on deposit. Is that right? It's effectively an investment vehicle for the family's wealth, presumably? A. It's got a portfolio with the Bank of Singapore and the funds are invested into corporate bonds, into equities, into managed funds, and so it just -- it's got a portfolio of diversified investment. MR JUSTICE LEECH: And what's the average return? A. Well, you can't look at the last two years because of Covid, but zero. I think we did 1% in 2020, and last year it was about 3% or a bit less than that. MR JUSTICE LEECH: Less than 3%? A. Yes, in 1s, 2s or 3s. MR JUSTICE LEECH: 1s, 2s or 3s. A. Yes, but that's net of the loan interest, because over the last two years Asian Agri drew a loan against its own portfolio. MR JUSTICE LEECH: Just explain to me how that works. A. Okay, so how it works is that we've got £10 million of funds invested in the money markets. MR JUSTICE LEECH: Is this a way of gearing up the 10 million? A. It is gearing. So if I want some extra cash, right, all I have to do is ask Barclays -- Bank of Singapore for a loan, and they will supply me, let's say, a million, and all that happens is that it's basically geared against their portfolio, and so they've got a limit of 65%, and so you can't borrow more than 65% of the portfolio. Now, typically what investors do is that they borrow and then they re-invest into the money markets and that becomes more collateral security, but in our case we're not doing that. In our case, we are pulling the funds out, out of the company."

27. Finally, I also asked Prashant what he would have done with the rental income which Barrowfen would have received from the Tooting Property. He stated that Barrowfen would have retained cash to pay its expenses but it would have declared a dividend in favour of Asian Agri with any surplus. He also stated that the priority would have been to "repay" Asian Agri rather than to pay down debt:

> "MR JUSTICE LEECH: It's not the equity point. Since the point has been raised I might as well ask you the questions. It's really about interest, so I'm trying to establish if Barrowfen actually had funds coming in on a regular basis since 2016, which is the rental income, would that have -- that would have passed through presumably to Asian Agri and then that just would have formed part of Asian Agri's investments; is that right? A. So that would have -- MR JUSTICE LEECH: Or would it have kept the money? You presumably would have had a sinking fund of some kind. A.

> Yes, so we would have done a dividend back to Asian Agri of a certain percentage of profits, right, so that we can still maintain a healthy cash flow in Barrowfen, right, to pay off all our expenses, but the liability is still sitting in Asian Agri, and so I do need to get funds back to Asian Agri so that it can pay down the -- MR JUSTICE LEECH: I'm really looking at the average rate of return that you could have expected over the last five or seven years. It's only in very rough terms for the purposes of assessing interest, so you said 1 to 3% over the last two years? A. That's Covid-related. MR JUSTICE LEECH: And the three years before -- well, it's only existed for three years. A. It didn't establish before then, right. This is the first time that we've actually invested into a portfolio. MR JUSTICE LEECH: So there's no real track record to describe how you would have -- what you would have done with the money or how -- what kind of rate of return you would have got. A. Well, the track record is affected -- because we're raising so much debt, right, the debt would have been paid off, so I wouldn't have incurred the cost of debt. MR JUSTICE LEECH: So you would have reduced the borrowings to Barclays. A. Yes, so I'm paying a couple of percent on interest, right, on pounds and what not, and so if I reduce the loan, then I save the interest cost. MR JUSTICE LEECH: And that's what you would have done with income coming through from -- if you'd had it since 2016? A. Yes, so I mean as -- MR JUSTICE LEECH: The Barclays loan or maybe Investec or RBS would have been converted into an investment loan by that stage. A. Yes, that's right, but that loan is obviously -- so I would have maximised the loan I possibly can, according to the value of the property, and then the rest of it would have been slowly dividend back into Asian Agri so that it could pay off its loans, because it's incurring interest, right, at the moment. But that's obviously to a percentage of -- I need to leave working capital, right, in Barrowfen. We're a property development company in the UK. As soon as I see a site, I send money back across, and if Asian Agri has more equity headroom in there, so that 65% loan margin -- loan that I took against the portfolio is now paid down 17 to 35. I've got that money sitting there where I can say let's send it back again, right, for the next investment opportunity, but everything is via the UK companies, it just -- it makes it -- we don't want to have a foreign entity investing in UK properties, we want a UK company. MR JUSTICE LEECH: That I understand. So just to be absolutely certain, your priority would have been paying down the debt before then dividending back up to Asian Agri; is that right? A. The priority would have been paying the equity debt off, so to speak."

B. Mr Powell

28. Barrowfen called Mr Powell to give expert accountancy evidence. His first report was dated 28 October 2021 and he made a supplementary report dated 26 April 2022. For 29 years he had been a partner in Ernst & Young LLP. He worked in the audit practice reviewing, testing and assessing clients' financial models, their calculation and the application to them of accounting standards. Since 2021 he has been a senior adviser to

Solum Financial Ltd. He was a straightforward witness with obvious expertise and I accepted his evidence. As with the expert valuers, there was little between the accountancy experts.

(1) Profitability

29. Mr Powell's instructions were to assess the impact of the finance costs associated with each scheme on their overall profitability. In Table 1 of his first report it was his evidence that the Revised Development Scheme was less profitable than the Overall Development Scheme when measured either by return on total capital employed ("**RoCE**") or return on equity ("**RoE**"). I reproduce his Table 1 as my Table 2:

Table 2

Item	Revised Development Scheme (2021)	Amended Original Development Scheme (2016)
(1) Construction cost	£27,585,064	£17,187,793
(2) Bank loan before sale of social housing	£22,000,000	£13,980,000
(3) Equity (cash injected)	£5,585,064	£3,207,793
(4) Total Capital: (2) + (3)	£27,585,064	£17,187,793
(5) Developer's Profit	£12,628,412	£10,120,230
RoE: (5) divided by (3)	**x 2.26**	**x 3.15**
RoCE: (5) divided by (4)	**45.8%**	**58.9%**

30. Mr Powell recorded that the source of the information in Table 2 (above) was the Judgment and this was not challenged. However, the figures require some explanation. The figures for (1) and (4) are the construction costs agreed by the expert valuers and the developer's profit in (5) are the figures which I found in the Judgment and which I have

set out in Table 1 (above). The loan figures in (2) are those set out in the RBS term sheet and the Barclays facility agreement to which I referred in the Judgment at [601] and [606] and which I have also discussed (above). Those figures were not challenged and Prashant has confirmed them in his most recent evidence.

31. As I understood it, however, the figure for equity or cash injected was simply the balance of the construction costs after deduction of the bank loans. These are notional figures because it was not necessary for the expert valuers to consider or agree these figures and for the purposes of comparing the profitability of both schemes Mr Powell has adopted them. But equally, it is not in dispute that Barrowfen has injected at least £6.1m of cash or equity into the Revised Development Scheme and would have been required to inject at least £3.52m of equity or cash to fund the Amended Original Development Scheme.

32. Mr Powell also explained his profitability figures in the text of his first report. Each £1 of equity invested in the Amended Original Development Scheme would have generated £3.15 of developer's profit whereas £1 of equity invested in the Revised Development Scheme has generated £2.25 of developer's profit (based on the development costs agreed between the expert valuers). If one turns to overall capital employed, then £1 of capital employed in the Amended Original Development Scheme would have generated £0.589 of developer's profit whereas £1 of capital employed in the Revised Development Scheme has generated £0.458 of developer's profit (based on the figures agreed by the expert valuers).

(2) Future Finance Costs

33. Both expert valuers adopted the conventional methodology of calculating the capital value of the Tooting Property at the completion of the relevant development by capitalising the future income stream and then deducting the development costs. But it was common ground that those costs only included the cost of financing the development until completion for the reasons which I have set out (above). Again, because there was no dispute between the valuers about the finance costs, it was unnecessary for me to decide whether any calculation of developer's profit ought to have taken account of the future costs of funding either scheme.

34. In his first report, Mr Powell calculated the net present value of the future interest payable

under the RBS and Barclays facilities adopting the figures in line (2) of Table 2 (above) and assuming a term of 25 years and similar interest rates. It was his evidence that the net present value of financing the debt for the Revised Development Scheme is £1,579,636 higher than the net present value of financing the Amended Original Development Scheme would have been.

35. Mr Powell also carried out a similar exercise to calculate the opportunity cost of the equity invested in each scheme. He calculated the total dividends which an investor could have expected to receive over a period of 25 years assuming a yield of 3.5% (which he benchmarked by reference to listed property development companies). He then discounted the total figure to arrive at the net present value of that dividend stream. It was his evidence that the opportunity costs of the Revised Development Scheme were £1,887,702 more than the opportunity costs of the Amended Original Development Scheme would have been.

36. In Table 6 of his first report Mr Powell then adjusted the developer's profit for the Revised Development Scheme to take account of both the additional costs of funding the debt and the additional opportunity costs of the injection of equity. I reproduce his Table 6 as my Table 3:

Table 3

Item	**Amount (in £)**
(1) Developer's Profit of the Revised Development Scheme	12,628,412
(2) Developer's Profit of the Amended Original Development Scheme	10,120,230
(3) Judgment's excess Developer's Profit: (1) – (2)	2,508,182
(4) Increased finance costs of the Revised Development Scheme	-1,579,682
(5) Increased notional equity costs of the Revised Development Scheme	-1,887,702
Adjusted Judgment's excess Developer's Proft: (3) + (4) + (5)	**-959,156**

37. Mr Powell accepted in cross-examination that his assessment of the future finance costs assumed that Barrowen would hold its investment in the Tooting Property for 25 years even though it could be sold at any time after completion:

> "MR STEWART: I think probably in those circumstances I'll just ask this: if you go to the next paragraph of what we were looking at, paragraph 3.3 on page 514, your calculations in relation to a fair investment appraisal are assuming holding the investment for 25 years; correct? A. That is correct. Q. And just to be clear what that therefore means is this: you are looking at two different investments, let us say. You're assuming you hold them for 25 years, but it's obviously the case that you can sell either one of them certainly when the development has been completed. Do you agree? A. Yes, you could sell it when development is completed, you could sell it part way through, you could sell it any time, really. Q. Now, just in relation to selling it, market economics dictates, does it not, that if you have an asset and you think that you can obtain a greater profitability on that investment elsewhere, you can sell it and buy what you think is going to be more profitable elsewhere? A. You certainly can, yes. Q. And what your figures are essentially doing is saying that over the course of a 25 year lifespan, one theoretical development might have been more profitable than a development which we've heard is just coming to a conclusion; yes? A. I think if I understand the question correctly, I think that's right. I am trying to assess two different projects over a 25-year period taking into account the financing costs to see whether one would generate more profit in current value terms than the other."

38. Mr Stewart also took Mr Powell to Mr Alford's report and showed him that Mr Alford had included the finance costs down to completion of the development in his development appraisals. The following exchange then took place:

> "Q. The point I'm -- we can look at the other ones, but the point I'm simply taking account of is that the cost of financing the increased costs of the development, until the point of completion, is taken account of in this calculation? A. I agree, the debt and equity elements of the financing, absolutely, I agree. Q. And so the critical point which comes in and which I think both you and Mr Isaacs, and I think most importantly the learned judge thinks ultimately a question of law, is this, which is whether or not you take into account a comparison between the position after practical completion or after the development has been let more accurately, because that's the point at which you're saying you take into account in the future? A. Yes, so from my perspective, this is a question of -- and I believe that it was -- is a matter that has already been discussed, but that the intention of Barrowfen was to develop and hold this property to a point in the future. Therefore, from my perspective, if I'm constructing a financial model around that, I would construct a financial model around the build through the future hold. Now, it's quite true that you can break that at any point, you could break that at completion of development, you could break that three months, three years into the whole period, but my understanding was this was a scheme to develop and rent and therefore what I have done is I have calculated, if you like, the equivalence to the finance costs you've just pointed out to me that match with the future rental income, hence to the completion of the scheme."

(3) Alternative Investment Opportunities

39. In both of his reports Mr Powell carried out what I would describe as a "thought experiment". In Table 1 of his supplementary report he calculated that the additional investment (both debt and equity) which was necessary to complete the Revised Development Scheme was £10,397,271. He then calculated the return which Barrowfen would have achieved if it had not invested that sum in the Revised Development Scheme but had been able to invest it elsewhere. He applied the same assumptions as in his first report and calculated that Barrowfen would have generated an investment return of £7,548,284 and, therefore, £5,040,102 more than it has actually done by investing in the Revised Development Scheme. In cross-examination, Mr Stewart asked him to explain this exercise:

> "A. So what I'm saying here is let's presume that on day one we had the choice of doing the original scheme or the Revised Development Scheme. Q. Okay, can we put some things in. Day one for these purposes being 2014? A. Yes, we can call it 2014. Q. Okay. A. So on that day, we had the choice of doing one or the other. That would have meant if we had the choice of doing one or the other, we by definition must have had available to us 27 million of cash. Is that okay? Q. Well, sorry, I want to understand what you're saying first before -- A. So if we had the choice of doing one or another, we must have had 27 million of cash, otherwise we couldn't have done the RDS. Q. Right. A. So on that day, we've got 27 million of cash, and we're trying to decide what to do with it. Q. Right. A. What I'm saying here is that we would -- if you like, the most profitable decision at that point in time would have been to put 17 million of it into the original scheme. The other 10 million that we had left over we would put part of that into a bank account or rather repay the loan that we would have had outstanding at that point in time, and we would have put part of that -- could have put part of that into a listed investment portfolio. Those two investments would have returned 3.1% and 3.5%, and over a 25-year period would have generated a sort of profit of 7.5 million. Q. Okay, well, I think I now understand what the table shows. I think I probably ought to put it to you. The figure of 10 million which you've used as being the expected profit is taken from residual valuations and for these purposes, take this from me, which assume a valuation at completion of the development. That's what the property valuers are doing. A. Yes. Q. At that point, you can do whatever you want with the 10 million, can't you? A. No, no, no, at that point you could do whatever you want with essentially the 17 million. The 10 million you have never put into your property. The 10 million has always been -- has always -- didn't get spent on the property. Q. Forgive me, if you look at your numbers, you've listed 17 million. A. Yes. Q. You've got a profit of 10 million. A. Yes. Q. At the end of the development, you have got 10 million surplus you can do what you want with. A. Which 10 million? Sorry, it's confusing because there's

> two 10 millions. Q. The one which is in the top right-hand corner, expected profit. A. So you've -- essentially at that point you've got two 10 millions. You've got the unrealised profit in the development, which is the top right-hand corner, and you've got the unspent funds from the 27 million that you started with, which is also 10 million. That's why using 10 is a little bit confusing, but, my Lord, am I explaining that clearly? Q. Well, let's just be clear about that. Those unspent theoretical funds, in order to have any opportunity in relation to them, you have to show, don't you, that you've been denied the opportunity to do something with them? A. You don't -- I don't believe you do have to, but here I'm showing that there is a very simple opportunity that doesn't take anyone a great deal of risk or imagination. It is basically that you would have used those unspent funds to partially put them into a listed development portfolio which exists as an opportunity for anybody at any time, and partly to repay the slightly -- the larger bank loan that you had outstanding at the time which would have generated a return for you."

(4) Atlip House

40. In his supplementary report dated 26 April 2022 Mr Powell also gave evidence about the recognition of loan guarantees under International Financial Reporting Standards and UK Financial Reporting Standards:

> "21. In the UK accounts may be prepared in accordance with one of a number of different accounting standards. Larger and listed businesses must use International Financial Reporting Standards (IFRSs). Smaller businesses can use UK Financial Reporting Standards (FRS100, FRS101 or FRS102). The accounting for, and disclosure of loan guarantees under each of these standards differs. 22. Smaller unquoted family or owner managed businesses will tend to opt for an accounting regime which has minimum strictures (FRS100 or FRS101) and as a consequence may not be required to book or disclose a charge for a loan guarantee. 23. As disclosed in the Barrowfen Properties Limited accounts, they account in accordance with FRS102 and are required to book a charge for a loan guarantee. If such a charge was not booked in the 2020 accounts this should be corrected in the 2021 accounts and, if material, noted as a prior year adjustment."

C. Mr Isaacs

41. S&B called Mr Roger Isaacs to give expert accountancy evidence. He made a report dated 24 March 2022 in reply to Mr Powell's first report. He has been a partner in Milston Langdon LLP since 1999 and the Chair of MGI Worldwide, a global network of accounting firms. He is a forensic accountant and a former Chair of the ICAEW Forensic Advisory Committee. Mr Isaacs was also a straightforward witness with obvious

expertise and I gave the same or similar weight to his expert opinions as I did to Mr Powell's evidence.

(1) Profitability

42. Mr Isaac's evidence was that the cost of equity was the cost which a company had to pay to attract investment to shareholders and although it was called a "cost" it was in reality a measure of the return paid to shareholders by way of dividends. He described it as a "measure of profit distribution" and it was his evidence that it would never be appropriate to include the cost of equity in a calculation of developer's profit. In cross-examination, Mr Isaacs accepted Mr Powell's evidence in relation to the figures themselves and the contents of Table 1 (above). For convenience I set out the relevant passages from his evidence together:

> "Q. Now, let's go to the section of Mr Powell's report you're dealing with. So that's the previous tab. And the paragraph reference in question is 28 to 31. So that's section 5 of Mr Powell's report headed "Measuring investment return". A. Yes. Q. As it says in the joint report, you agree with Mr Powell's mathematical calculations. A. Yes. Q. So you agree with the numbers in table A. Yes."
>
> "Q. But fundamentally you agree with the proposition, I think, that if you put more money in you normally expect to get more money out. A. Yes. Q. And therefore at least, given the larger investment of Barrowfen in the revised scheme, at least part of a reason that the resultant profit is larger is that more money went in. A. Yes. Q. And you haven't done any calculations to figure out what proportion of the profits coming out could be attributed to the more money which went in. A. Well, one can do it very simply because one can simply say that if a scheme costs £27 million and it delivers a profit of £12 million, you can work out for every 1 pound you put in what profit; and if you said of that 27 million, 10 million was extra investment, you can simply say, well, okay, if every pound delivered 7p of profit, which I think is excluding the land value where one ends up, you say, well, for every pound of the 10 million extra you put in you get 7p back. Q. So I think you're effectively agreeing with Mr Powell's calculations. A. I have always agreed with the -- his arithmetic, yes. Q. Okay, thank you. Now if we turn back to your report -- so that's what Mr Powell is saying in section 5, if we turn back to your report, page 490, where you've been asked to comment on this section and see what you say, if you just paraphrase it, at paragraphs 2.1.2 to 2.1.4, you say that developer's profit should include a cost of financing. A. Yes. Q. 2.1.5 you reproduce Mr Alford's numbers as used in the judgments. A. Yes. Q. And you show how he calculated developer's profit, and at 2.1.7 you say it's never appropriate to include the cost of equity in the calculation of developer's profits. A. In accounts, yes."

> "Q. So you could have just answered section 2.1, which asks you to comment on section 5 of Mr Powell's report, by saying that you agree that the revised scheme does have a lower equity and lower cost of equity -- sorry, and lower return on equity and lower return on capital than the amended scheme. A. Yes, I agree that. Q. Right. And you could have said that you agree that the reason it produces a higher level of developer's profit is that more money went into it. A. Yes, I agree with both those statements."

43. Mr Dawid also put a number of examples to Mr Isaacs which were closely related to Mr Powell's thought experiment to show that if Barrowfen had invested in the Amended Original Development Scheme the surplus capital would have generated an additional return. Mr Isaacs addressed Mr Powell's thought experiment in the following way:

> "Q. Well, have you seen -- if we go to his supplemental report, I think Mr Powell comes at essentially the same calculation with a slightly different way, paragraph 11. A. Yes, so this is what I mean when I say that I absolutely agree the maths, but there are different ways that one can calculate these things. So what paragraph -- we are agreed that there are two factors that resulted in the revised scheme delivering a higher absolute profit than the original scheme. The first of those factors is that the revised scheme was bigger and that was a positive factor, and the second is that it was pound for pound less profitable, and that is a negative factor; and if one undertakes an analysis as Mr Powell has done, his numbers are correct and I endorse them, but if -- but they are only relevant to the extent that one wishes to apportion profit in that way, and again ignoring the land values because of course that affects the proportions. But one can equally say, as I have said before, that because one ended up with £2 million more profit, that -- and one invested £27.5 million to get there, for every one of those £27.5 million one got an extra, I think it's about 7p in the pound. So you can -- you don't have to cut the numbers in this way. There are many ways you can cut the numbers. Arithmetically this is a correct way. The bit I have struggled with is what force it has -- where you take this calculation, where this calculation takes you."

(2) Future Finance Costs

44. Mr Isaacs did not accept that it was appropriate to include finance costs after completion of the development as a matter of logic. But he accepted that a buyer might approach a valuation in that way:

> "MR DAWID: Sorry, could I just ...I was going to say if what -- if the exercise which was conducted by the surveyors before his Lordship last year produced a gross development value which didn't include a net present value of future finance costs, do you agree it would be appropriate to put those back in? A. No, because it seems to me that -- let us assume,

> if one might, that actually the surveyors have used the approach whereby they use comparables, and they said there was a scheme that was almost identical to this scheme, and that causes us to value it at £40 million. Nevertheless, however they came to that number, valuation theory says that the number, however you've reached it, should be the best approximation you can get to the net present value of all the future income streams and costs associated with that development, be they finance, be they rent, be they voids, because a buyer buying the scheme, or indeed a seller deciding whether to keep it or sell it, will either by gut feeling or with a spreadsheet say: well, if I buy this scheme and I'm going to keep it for 25 years, what is it going to generate for me net net net, if I can call it that, "after tax, after finance, after risk, and that should be the price, value."

45. Mr Dawid put the RICS Guidance Note, §B2.2.2 to Mr Isaacs and he accepted that it would be appropriate to include the costs referred to in that paragraph where a developer chose not to sell but to let it immediately after development:

> "A. I haven't read this document, but my question is whether this refers to a situation in which a property is developed and then held for a few months before it's sold rather than being let out, ie what happens if you've got a period when the property is costing you money and not generating any income, and I don't -- because this appears to be, from the brief look I've had at it at the moment, more about constructing a property and it would of course be entirely right that if you completed a property in November but you decided it was the wrong time to sell it and you ought to let it and you held it for whatever reason until March, you would include all those costs to which that paragraph refers. But I'm not sure that this is talking about what we're talking about here, which is what happens once you've let the property and you're receiving rent, because then you do a completely different calculation, and the construction costs and whatever costs you've incurred to finance that construction are sunk costs, they're past costs, they have no relevance."

(3) Alternative Investment Opportunities

46. In his report Mr Isaacs' evidence was that Mr Powell's calculations on the lost opportunity costs implied that Barrowfen could not have raised additional equity or borrowings to undertake another project that was more profitable than the Revised Development Scheme. His evidence was that Barrowfen would only be disadvantaged by injecting additional capital into the Revised Development Scheme if it was restricted in its ability to raise capital and it had available an alternative investment opportunity which was more profitable. His oral evidence on this point was as follows:

> "Q. But put it this way, the amended scheme cost 17 million and the revised scheme cost 27 million, so we know Barrowfen could have raised an extra 10 million, if it wanted, without selling the site. A. Yes, but the last sentence of paragraph 22 said: "Had we been able to build the Amended ..." You can read it, it says: "Had we been able to build the ... Scheme ... we would have had sufficient funds ..." So there is a causal link there, as I read it, between building the scheme and generating funds. Q. But if you read the first sentence of the paragraph: "... the lower equity commitment required for the Amended Original ... Scheme as compared to the Revised ... Scheme would have freed up funds ..." So isn't what's being said here is that the reason we didn't have funds to buy another site is because they were all tied up in the revised scheme which cost a lot more? A. Yes, that's my understanding. MR JUSTICE LEECH: Let's assume that Mr Patel's evidence is that he could have done both, he could have done the original scheme and also invested in the Beresford site. A. Yes. MR JUSTICE LEECH: Does that affect the evidence that you've given in section 2.4? A. No, because it seems to me that -- well, if that were the counterfactual scenario, then one would compare the pound that one would have in one's pocket at the end of a counterfactual scenario where both the Beresford scheme had been completed and the original scheme had been completed with the profits that were generated at the end of the Revised Development Scheme."

(4) Atlip House

47. In his report Mr Isaacs also gave evidence that even if Barrowfen had informally agreed to pay a fee to Atlip House for providing a guarantee and security, he would have expected this to be recorded in their accounts. But there was no such disclosure. In cross-examination, he agreed that the level of the fee was a reasonable one. Mr Dawid then put Mr Powell's evidence on this point to him together with a practice note prepared by BDO. He suggested that Barrowfen was required by IFRS9 to recognise a liability to Atlip House for the loan guarantee even if there had been no agreed charge. Mr Isaacs resisted this suggestion. He explained his position in the following passage:

> "Q. If I go to Mr Powell's supplemental, tab 9, page 521 -- A. Yes. Q. -- paragraph 21, Mr Powell makes a point that, you know, larger companies, as you say, use -- A. We agree, yes. Q. -- IFRS. Smaller companies can use FRS100 or 102. A. They invariably do use. Q. He makes the point then at 22 that: "Smaller unquoted family or ... managed businesses will tend to opt for ... [a] regime which has minimum structures (FRS100 or FRS101) and as a consequence may not be required to book or disclose a charge for a loan guarantee." Then he says at 23: "As disclosed in the Barrowfen ... accounts they [apply] ... FRS102 and are required to book a charge for a loan guarantee." You don't disagree with that statement, do you? A. No, I agree with that statement. Q. So if they were required to book a loan guarantee -- sorry, a charge for the loan guarantee. A. Sorry, are required

> to book a charge. Q. Yes. A. So they are required, as I understand it, to recognise a liability if they are charged. Q. I'm sure you always have to recognise a liability if it's charged. You can't prepare a set of accounts and miss your liabilities. A. Sorry, a liability for the charge. So you have to disclose -- in the books of Barrowfen, Barrowfen has received the benefit of the Atlip being its guarantor. My understanding is that if that benefit was provided by Atlip free of charge there would be no need to recognise any liability because there wouldn't be a liability for a cost for that charge."

D. The Joint Statement

48. In their joint statement dated 1 April 2022 Mr Powell and Mr Isaacs reached agreement on the following matters:

> "3.1 RI agrees with the arithmetic of NP's calculations, specifically; the measurements of investment return, the net present value of the debt finance and the net present value of the equity finance. 3.2 RI and NP further agree that Gross Development Value is an investor agnostic valuation not calculated with regards to a specific investor's costs of capital and therefore to a specific investor's finance costs. 3.3 NP considers that his calculations of finance cost contribute to a fair investment appraisal, in line with generally accepted practice, of both schemes assuming a hold period of 25 years and taking into account Barrowfen's specific weighted cost of capital i.e. their cost of debt finance (interest) and a notional cost of equity. 3.4 RI agrees that NP's approach is one that would be appropriate for the purposes of investment appraisals, particularly in relation to the comparison of different theoretical investment opportunities."

49. They disagreed about other points. But it is unnecessary for me to record any of them apart from the point which they described in the heading to paragraph 4.3 as the "Intergroup charge for the loan guarantee". They explained the nature of their disagreement as follows:

> "4.3.1 NP and RI agreed that, had a charge been raised by Atlip House Limited (AHL) on Barrowfen Properties Limited (BPL) the amount of this should have been disclosed in the related parties note to the statutory accounts of both companies. No such disclosure had been made. The related party note of BPL disclosed that a guarantee was in place and AHL's accounts referred to the charge in its commitments and contingencies note.
>
> 4.3.2 NP understands that an invoice was raised for the charge in October 2021.
>
> 4.3.3 NP and RI differ in their view as to the practice of making such cross charges. NP considers that where one party gives a guarantee in favour of another, lnternational Financial Reporting Standard no.9 (and replicated in

> Financial Reporting Standard 102) dictates that a charge should be calculated. However for companies consolidated within the same UK group this is often erroneously overlooked and no charge is recorded.
>
> 4.3.4 RI has never seen a charge made by any of the unquoted family or owner-managed businesses, akin to Barrowfen, of which he has experience."

50. Both experts were also asked what they meant by an "investor agnostic valuation" (above). Mr Powell accepted that it included the direct or generic costs of generating the relevant income stream but did not take account of the individual circumstances of the investor. Mr Isaacs broadly agreed. He accepted that it was not a "Barrowfen specific" valuation and he was then asked how he would go about producing such a valuation:

> "So how would Mr Patel then go about calculating for himself what the net -- you know, the actual value to him based on his blend of equity and debt would be? A. He would do a cash flow forecast with the rent and the tax and the finance costs built into it to see whether -- and work out what discount rate, although I've never seen a business -- I mean, very few business people ever really do this in practice, what discount rate he thought appropriate and would see whether the net present value was greater than the amount he could get on the open market, and that would determine whether or not, if he were taking a commercial decision, he would keep or sell. MR JUSTICE LEECH: And in doing that exercise, he would build in both his -- the finance costs, cost to him of financing the purchase and as well the costs of his own money that he was putting into it. A. Well, there are two ways that one can do that. One can either apply a notional cost of equity, one does that to see whether it exceeds -- one only does that if one says well I'm only going to invest in projects which deliver me more than 15% per year or whatever one's hurdle rate may be, and then you assess the outcome of your calculation against the yardstick of zero. An equally sensible way of doing the calculation is to ignore that and say well if the outcome is 15% or more I'll do it and if it isn't, I won't. So whether you put it in as a notional cost and then see if you set the hurdle at zero or whether you just say I want to achieve a return of 15% or whatever it is that you think is reasonable comes out at the same -- MR JUSTICE LEECH: So you would be doing an exercise that calculating the cost to you or the profitability -- A. You would look at the profitability and then you would say; is that acceptable?"

III. The Reserved Matters

E. The Financial Costs Issue

(1) Developer's Profit

51. Mr Dawid advanced two arguments that Barrowfen should not be required to give credit

for the £2,508,182 at all. First, he submitted that the additional developer's profit or capital appreciation for which I gave credit was solely attributable to the increased investment made by Barrowfen in the Revised Development Scheme. Secondly, he submitted that the Court should also take into account the cost to Barrowfen of funding the increased investment in the Residential Investment Scheme not only during the development of the Tooting Property but over the life of the investment.

52. Mr Stewart submitted that I should continue to hold that Barrowfen was required to give credit for the full £2,508,182 for three reasons: first, Barrowfen's approach assumes that it was locked in to the Revised Development Scheme (which it was not) and that capital constraints prevented it from investing in other projects; secondly, Barrowfen should not be entitled to avoid giving credit for the profit by relying on a notional reduction in the profitability or efficiency of the scheme; and, thirdly, the Court should not recognise that Barrowfen has incurred any opportunity costs in relation to the additional investment because it was unable to point to any alternative investment opportunity which it would have made. The second point addressed Mr Dawid's first argument and the first and third points addressed his second argument. I deal with each of Mr Dawid's arguments in turn.

(a) Profit attributable to increased investment

53. I accept that the Revised Development Scheme was less profitable than the Amended Original Investment Scheme based on either of the tests used by Mr Powell for measuring their financial return. In particular, I accept the contents of Table 2 and that the RoE for the Revised Development Scheme was x 2.26 compared with x 3.15 for the Amended Original Investment Scheme. I also accept that the RoCE for the Revised Development Scheme was 45.8% and compared with 58.9% for the Amended Original Development Scheme. Mr Isaacs accepted all of these figures without qualification.

54. I am satisfied, therefore, that the increase in developer's profit of £2,508,182 cannot be attributed to the increased profitability of the Revised Development Scheme over the Amended Original Development Scheme. I also accept that viewed in isolation the increase in the developer's profit can be attributed to the increase in capital employed in the Revised Development Scheme for the following reasons:

(1) For the Residential Development Scheme Barrowfen borrowed an additional £8,020,000 (i.e. £22,000,000 - £13,980,000) and injected equity of £2,377,271 (i.e.

£5,585,064 - £3,207,793) using the figures in Table 2. This gives a total of additional capital employed of £10,397,271.

(2) It was Mr Powell's evidence that every £1 of capital employed generated a return of £0.458. Based on this measure of profitability the return on the additional capital employed by Barrowfen in the Revised Development Scheme was £4,761,950.01,

(3) It was also Mr Powell's evidence that each £1 of equity generated £2.25 of developer's profit. Based on this measure of profitability the return on the additional equity of £2,377,271 which Barrowfen introduced into the Revised Development Scheme was £5,348,859.70.

(4) It is clear, therefore, from both these measures of profitability that Barrowfen would not have made the increased developer's profit if it had not injected the additional capital of £10,387,271 into the Revised Development Scheme.

(5) Mr Isaacs accepted that there were two factors which generated the "higher absolute profit" for the Revised Development Scheme: first, the scheme was bigger (a positive factor); and secondly, the scheme was not as profitable (which was a negative factor). Barrowfen was only able to carry out a bigger scheme by injecting £10m more capital but because the scheme was not as profitable, the profit was not as big as it would have been if the Revised Development Scheme had the same level of profitability as the Amended Original Development Scheme.

55. However, like Mr Isaacs, I am not sure where Mr Powell's calculations take me. What his evidence shows is that the Revised Development Scheme is slightly less profitable than Amended Original Development Scheme would have been (but only if it had been implemented in 2016). But it is important not to lose sight of the fact that it was a profitable scheme and an attractive investment and that Barrowfen got a very substantial return on its entire investment including the additional capital investment. If Prashant had been carrying out the kind of cashflow forecast which Mr Isaacs described in December 2016, then he would still have been satisfied that the Revised Development Scheme was profitable and that it was worth making the additional investment.

56. Mr Dawid relied upon the decision of the Supreme Court in *Swynson Ltd v Lowick Rose LLP* [2018] AC 313 in support of his argument that the profit should be solely attributable

to the additional investment. In that case, C (a lender) made loans to B (a borrower) after relying on a due diligence report prepared by D (a firm of accountants). C claimed damages from D for negligence in the preparation of the report but by the time the action came to trial B had repaid the loans using funds advanced by H (who owned and controlled C but was prepared to refinance the loans personally). It was a term of the advance which H made to B that it must use the advance to repay the loans from C. I have taken this brief summary from the judgment of Lord Mance JSC at [37] to [44].

57. Rose J (as she then was) held that C did not have to give credit for the repayment of these loans and the Court of Appeal upheld her judgment by a majority. The Supreme Court held, however, that C had to give credit for the repayment of these loans because they could not be treated as collateral or as *res inter alios acta*. Lord Sumption JSC (with whom Lord Neuberger, Lord Clarke and Lord Hodge all agreed) dealt with this issue at [11] to [13]:

> "11. The general rule is that loss which has been avoided is not recoverable as damages, although expense reasonably incurred in avoiding it may be recoverable as costs of mitigation. To this there is an exception for collateral payments (*res inter alios acta*), which the law treats as not making good the claimant's loss. It is difficult to identify a single principle underlying every case. In spite of what the Latin tag might lead one to expect, the critical factor is not the source of the benefit in a third party but its character. Broadly speaking, collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss. Thus a gift received by the claimant, even if occasioned by his loss, is regarded as independent of the loss because its gratuitous character means that there is no causal relationship between them. The same is true of a benefit received by right from a third party in respect of the loss, but for which the claimant has given a consideration independent of the legal relationship with the defendant from which the loss arose. Classic cases include loss payments under an indemnity insurance: *Bradburn v Great Western Railway Co* (1874) LR 10 Ex 1. Or disability pensions under a contributory scheme: *Parry v Cleaver* [1970] AC 1. In cases such as these, as between the claimant and the wrongdoer, the law treats the receipt of the benefit as tantamount to the claimant making good the loss from his own resources, because they are attributable to his premiums, his contributions or his work. The position may be different if the benefits are not collateral because they are derived from a contract (say, an insurance policy) made for the benefit of the wrongdoer: *Arab Bank plc v John D Wood Commercial Ltd* [2000] 1 WLR 857, paras 92–93 (Mance LJ). Or because the benefit is derived from steps taken by the claimant in consequence of the breach, which mitigated his loss: *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, 689, 691 (Viscount Haldane LC). These principles

> represent a coherent approach to avoided loss. In *Parry v Cleaver* [1970] AC 1, 13, Lord Reid derived them from considerations of "justice, reasonableness and public policy". Justice, reasonableness and public policy are, however, the basis on which the law has arrived at the relevant principles. They are not a licence for discarding those principles and deciding each case on what may be regarded as its broader commercial merits.
>
> 12. On the judge's findings, the loss recoverable by Swynson from HMT was that which arose from its inability to recover (i) the 2006 loan which it had made to EMSL on the strength of HMT's reports about Evo's financial strength, and (ii) the 2007 and 2008 loans which it made in a reasonable but unsuccessful attempt to mitigate the loss arising from the 2006 loan. So far as the 2006 and 2007 loans were concerned, that loss was made good when EMSL repaid them. The fact that the money with which it did so was borrowed from Mr Hunt was no more relevant than it would have been if it had been borrowed from a bank or obtained from some other unconnected third party. There was nothing special about the fact that Mr Hunt provided the funds, once one discards the idea that HMT owed any relevant duty to him. The short point is that the repayment of the 2006 and 2007 loans cannot be treated as discharging them as between Swynson and EMSL, but not as between Swynson and HMT.
>
> 13. If, in December 2008, Mr Hunt had lent the money to Swynson to strengthen its financial position in the light of EMSL's default, the payment would indeed have had no effect on the damages recoverable from HMT. The payment would not have discharged EMSL's debt. It would also have been collateral. But the payments made by Mr Hunt to EMSL and by EMSL to Swynson to pay off the 2006 and 2007 loans could not possibly be regarded as collateral. In the first place, the transaction discharged the very liability whose existence represented Swynson's loss. Secondly, the money which Mr Hunt lent to EMSL in December 2008 was not an indirect payment to Swynson, even though it ultimately reached them, as the terms of the loan required. Mr Hunt's agreement to make that loan and the earlier agreements of Swynson to lend money to EMSL were distinct transactions between different parties, each of which was made for valuable consideration in the form of the respective covenants to repay. Thirdly, as the Court of Appeal correctly held, the consequences of the refinancing could not be recoverable as the cost of mitigation, because the loan to EMSL was not an act of Swynson and was not attributable to HMT's breach of duty."

58. Lord Mance concurred in the result: see [45] to [50]. Although Lord Neuberger PSC agreed with Lord Sumption, he gave a separate judgment. He addressed the question whether a benefit is *res inter alios acta* at [96] to [100] and the kind of benefits for which a claimant must give credit at [98]:

> "Further, I do not consider that the reasoning in *Parry v Cleaver* [1970] AC 1 assists Swynson's first argument. In *Parry's* case, the House of Lords

> addressed the question whether a plaintiff was bound to bring into account insurance payments, charitable payments, pension payments and the like, which were payable owing to the injury suffered as a result of the defendant's tort, when assessing the damages which could be recovered from the defendant. Lord Reid stated at [1970] AC 1, 13 that the answer should depend on "justice, reasonableness and public policy"; however, this should not be treated by judges as a green light for doing whatever seems fair on the facts of the particular case. Ignoring cases of mitigation, and while it would be wrong to pretend that there could never be any exceptions, it seems to me that the effect of the reasoning in *Parry's* case is that the types of payments to a claimant which are not to be taken into account when assessing damages, are either those which are effectively paid out of his own pocket (such as insurance which he has taken out, whether through his employer, an insurance company or the government), or which are the result of benevolence (whether from the government, a charity, or family and friends), all of which can be characterised as essentially collateral in nature."

59. Lord Neuberger also agreed with the dissenting judgment of Davis LJ in the Court of Appeal and I consider it helpful to refer to his judgment reported at [2015] EWCA Civ 629 at [30] to [34]:

> "30. As found by the judge, the 2006 loan was made by Swynson in reliance on the advice of HMT. That advice was negligent. Swynson would never have made the 2006 loan (or, it may be, the 2007 loan) but for that negligent advice. In such circumstances, and in accordance with ordinary compensatory principles, I would expect the measure of Swynson's damages accruing by reason of such negligence to be assessed by reference to the amount of the capital advanced, perhaps with any outstanding interest, less the amount of any repayments made by the borrower.
>
> 31. On that approach – in my view, the correct approach – it is evident that, in the circumstances of this case, Swynson has suffered no loss. The entire amount of the 2006 loan (and 2007 loan) was paid off in 2008 by EMSL, the borrower. It was paid off by utilisation of the funds injected into EMSL by Mr Hunt under the Loan Agreement of 31 December 2008 . EMSL's obligations to pay Swynson under the 2006 and 2007 Loan Agreements were thereby discharged; and Swynson's rights of repayment under those Agreements were satisfied in full. In my view, in a nutshell, that is dispositive of the matter.
>
> 32. That Mr Hunt never appreciated – to the extent that he thought about it – that his cash injection into EMSL for this purpose might have the consequence of nullifying an effective claim on the part of Swynson against HMT seems to me to be neither here nor there. In fact, it seems to me to be neither here nor there whether or not it was even appreciated by December 2008 that HMT may have been negligent.
>
> 33. This case is not about mitigation as such. Rather, it is about avoidance of loss. I simply do not see, in the circumstances of this case, the

> availability of an argument that what happened here was *res inter alios acta* and that HMT should not be permitted to benefit from the financing supplied by Mr Hunt. The essential fact remains that this was a refinancing of EMSL whereby the 2006 and 2007 loans were repaid by EMSL to Swynson in full.
>
> 34. That this is not to be regarded as *res inter alios acta* or some kind of collateral transaction is, in my view, demonstrated by the structure of the repayment. Swynson was not repaid by some third party, whether or not acting "benevolently". Swynson was repaid by EMSL itself – the counter party to the loan agreements – pursuant to the covenants to repay contained in the loan agreements procured by the negligence of HMT. The causal connection is therefore plain: and the avoidance of loss to Swynson has been achieved by the very party who was otherwise in breach of the contract. This therefore cannot be regarded as a collateral matter."

60. Mr Dawid placed particular reliance on the extract from Lord Sumption's speech (above). He submitted that the additional investment of £10m should be treated as Barrowfen making good (or reducing) its loss from its own resources: see [11]. He also relied on the example in [13] where Lord Sumption considered what the position would have been if H had paid the funds to C but had not then used them to pay off the debt. Mr Dawid submitted:

> "So if what happens is that as a result of an adviser's breach you lose money, and to make up for that loss you go out and raise more money, that's not a benefit for which you have to give credit. That's collateral. If what happens is if someone comes in and actually makes good the loss itself, that's different, but all you're doing is raising money to make up for the consequence of the breach, that's not collateral, or rather that is collateral, we say that's analogous to the situation here because what happened here is that S&B's breaches and Girish's breaches left Barrowfen in a position where in order to develop the Tooting property at all it had to proceed with the Revised Scheme, but that in turn left a £10 million gap in the finances. To fill that gap, Barrowfen went out and raised the capital. It got debts and it got equity, but that capital is not a benefit which Barrowfen received in consequence of the breach.
>
> Another way of looking at it is the mitigation way of looking at it. You can ask the question can it be said that the act of raising the additional capital was itself an act of mitigation. I say no, that can't be right, because that implies that any time a wrongdoer causes loss to a company with the result that the company -- say the company has made a bad investment based on bad investment advice and that wipes out the company's capital, and it goes and it needs capital so it raises that money from the shareholders or from its bankers it would not be open to the adviser to say, well, hang on a minute, you haven't made any loss, because you've got it all back from your shareholders. That's not the law, and it's not good accounting, we say, and one of the reasons it's not good accounting, as I went through with Mr

> Isaacs, is that equity goes in -- you know, capital and equity go into the balance sheet, they don't operate as a deduction against your loss, it doesn't make good a loss for money to come in from a shareholder."

61. Mr Stewart relied on the extract from the judgment of Lord Neuberger and submitted that the additional investment did not fall into any of the categories of benefit which he described. Mr Stewart also submitted that it was necessary to look at the entirety of the transaction and not the additional investment in isolation. In support of this submission he relied on the famous passage in the speech of Viscount Haldane LC in *British Westinghouse Electric and Manufacturing Co Ltd* [1912] AC 673 at 689-690:

> "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in *Dunkirk Colliery Co. v. Lever*, "The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business."
>
> As James L.J. indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.
>
> *Staniforth v. Lyall* illustrates this rule. In that case the defendants had chartered a ship to New Zealand, where they were to load her, or by an agent there to give the plaintiff, the owner, notice that they abandoned the adventure, in which case they were to pay 500l. The ship went to New Zealand, but found neither agent nor cargo there, and the captain chose to make a circuitous voyage home by way of Batavia. This voyage, after making every allowance for increased expense and loss of time, was more profitable than the original venture to New Zealand would have been. The Court of Common Pleas decided that the action was to be viewed as one for a breach of contract to put the cargo on board the plaintiff's vessel for which the plaintiff was entitled to recover all the damages he had incurred, but that he was bound to bring into account, in ascertaining the damages arising from the breach, the advantages which had accrued to him because of the course which he had chosen to adopt.
>
> I think that this decision illustrates a principle which has been recognized in other cases, that, provided the course taken to protect himself by the plaintiff in such an action was one which a reasonable and prudent person might in the ordinary conduct of business properly have taken, and in fact

> did take whether bound to or not, a jury or an arbitrator may property look at the whole of the facts and ascertain the result in estimating the quantum of damage."

62. This passage was the subject of argument in *Swynson Ltd v Lowick Rose LLP*. Rose J and the majority of the Court of Appeal accepted an argument based on Viscount Haldane's reasoning that the payment which H made to B to repay the original loans was *res inter alios acta* because it did not arise out of D's breach of duty or in the ordinary course of business. For a summary of this argument and their conclusions: see [45] (Lord Mance). The Supreme Court rejected this argument for the reasons set out in the passages from the judgments of Lord Sumption and Lord Neuberger which I have already cited extensively. But Mr Stewart relied on this passage and the example of *Staniforth v Lyall* for a different purpose. He submitted that it was clear from these passages that the Court had to look at the "whole of the facts" in order to decide whether the relevant transaction was to be ignored in assessing damage.

63. Mr Stewart also submitted that the example given by Lord Sumption in [13] (above) provided no support for Barrowfen's argument. If H had lent the money to C but it had not used those funds to repay the original loans made by C, the payments would have been irrelevant. In [13] Lord Sumption was doing no more than making the point that it did not matter how B raised the money to repay the loans if they had the effect of making good C's loss. This can also be illustrated by an example given by Davis LJ in the Court of Appeal at [39]:

> "These cases also, in my view, show that invocations of the "adventitious" or "fortunate" nature of the means of repayment of the original loan cannot necessarily carry the day (cf. the observations of Staughton LJ in the Court of Appeal in *Linden Gardens Limited v Lenesta Sludge Disposals Limited* (1992) 30 Con LR 1). Suppose, for example, that a loan is made to an individual borrower in reliance on negligent valuation advice without which the loan would never have been made. Suppose, too, that the security, negligently valued, is worthless and that the individual borrower is otherwise without assets. The negligent valuer, in the ordinary way, thus faces liability for the full amount of the loan. But then suppose that the borrower receives an unexpected inheritance from a distant relative or a win on the lottery, by means of which he is able to repay, and does repay, the lender in full. As I see it, the negligent valuer then has no substantive liability in damages: just because the lender has, in the event, suffered no loss. That the lender has suffered no loss is by reason of purely adventitious circumstances: but that, in such a context, makes no difference. So here, in my opinion."

64. I accept Mr Stewart's submissions on this issue. It is important to remember that the issue which I had to determine was not whether the additional investment of £10m which Barrowfen made in the Revised Development Scheme was collateral or *res inter alios acta* but whether the profit which it made on its completion was a collateral benefit. In my judgment, this required the Court to look at the whole of the facts and not simply "the money in and money out" approach which Mr Dawid put to Mr Isaacs.

65. I have found that Revised Development Scheme formed part of a continuous transaction of which the breaches of duty committed by Girish and S&B were the inception: see [673]. I have also found that if the decision to change from one scheme to the other was not caused by that conduct, then Barrowfen is not entitled to recover damages for the delay in implementing the Revised Development Scheme: see [673](iv). In my judgment, therefore, both the investment of additional funds and the additional profit formed part of the same continuous transaction and Barrowfen must give credit for the additional profit. If the additional investment and the additional profit did not form part of that continuous transaction, then it ought to follow that Girish and S&B should not be liable to compensate Barrowfen for the additional delay in implementing the Revised Development Scheme or the costs associated with doing so.

66. I was initially attracted by the alternative way in which Mr Dawid put his case and that I should treat Barrowfen's conduct in raising additional capital as mitigation of the loss. However, on analysis I am not satisfied that this leads to the conclusion that Barrowfen should not give credit for the additional profit. I fully accept that Barrowfen mitigated its loss by raising additional finance from Barclays and additional equity from Asian Agri and that if it had been unable to do so or to develop the Tooting Property, it might well have suffered a capital loss. But it was able to develop the Tooting Property, it made a profit on its investment and it made a profit which exceeded the profit it would have made if Girish and S&B's breaches of duty had not prevented it from developing the property earlier. By doing so, it avoided some of the losses which it suffered as a consequence of the delay.

67. In *Swynson Ltd v Lowick Rose LLP* (above) Davis LJ stated that it was not a case about mitigation as such but a case about avoidance of loss. In my judgment, the instant case is the same. There was no real dispute between the parties at trial that Barrowfen mitigated successfully by implementing the Revised Development Scheme. The real issue was

whether it had avoided part of the income losses which it had suffered by making a capital gain. I am satisfied that it did for the reasons which I gave. Moreover, the fact that Barrowfen had to raise £10m of additional finance to complete the Revised Development Scheme does not change things. I find support for that conclusion in the example given by Davis LJ (above). If Barrowfen had been able to raise the entire £10m by way of a gift or an interest free loan either from Asian Agri or from Prashant himself, there would be little argument that it had made a capital gain for which it should give credit.

68. In conclusion, I accept that the additional profit of £2,508,182 was attributable to the additional capital which Barrowfen raised from Barclays and Asian Agri and that Barrowfen would not have been able to carry out the Revised Development Scheme without it. I also accept that it was reasonable for Barrowfen to mitigate its loss by carrying out the Revised Development Scheme. However, in my judgment the increased developer's profit which Barrowfen earned from that scheme was not collateral or *res inter alios acta*. All of those findings were reflected in my conclusions that Barrowfen was entitled to recover the lost income and additional costs up until completion of the Revised Development Scheme and that the increased developer's profit formed part of a continuous transaction of which the breaches of duty were the inception.

(b) Future Finance Costs

69. Mr Dawid's alternative argument was that in assessing the additional profit the Court should take into account the future costs of funding the Revised Development Scheme over the life of the investment. He relied on Mr Powell's evidence that the cost of funding the additional investment over 25 years would eliminate the credit. He also relied upon the RICS Guidance note at §B2.2.2.7 and pointed out that Mr Clarke had included finance costs to the completion of the development on the assumption that the Tooting Property would be sold upon completion and letting.

70. I accept Mr Powell's evidence that the increased cost of funding the Revised Development Scheme over 25 years will be £1,579,682 and that the opportunity cost to Barrowfen of investing additional shareholders' funds in the scheme was £1,887,702. I also accept that the total of these costs exceeds the amount of the additional developer's profit by £959,156: see Table 3 (above). Again, Mr Isaacs did not challenge any of these figures.

71. I also accept that as a matter of valuation methodology it would be appropriate for Barrowfen to include future finance costs in a current valuation of the Tooting Property given if Prashant intended to hold it as a long-term investment. I accept his evidence on this point. I also accept Mr Isaacs' evidence that it would be appropriate to include future finance costs in a calculation of the developer's profit if that was the investor's intention or if one was carrying out a "Barrowfen specific" valuation. RICS Guidance Note, §2.2.2.7 also provided support for this conclusion.

72. The real issue, to my mind, is whether the Court should adopt an "investor agnostic valuation" or a "Barrowfen specific valuation" for the purpose of deciding whether to include future finance costs in the calculation of developer's profit. The expert valuers adopted an investor agnostic valuation and assumed that the Tooting Property would be sold at completion of the development (and that any purchaser would carry out its own investor specific valuation). Mr Powell has now included the future costs which Prashant might include in his own development appraisal but he accepted that this was based on the assumption that Barrowfen intended to hold the Tooting Property as a long-term investment.

73. In my judgment, the decision whether to adopt an investor agnostic valuation or a Barrowfen specific valuation is not a matter of valuation methodology but a matter for legal argument. I deal first with Mr Stewart's argument that Barrowfen has suffered no prejudice as a consequence of the additional investment in the Revised Development Scheme because it cannot point to any alternative investment opportunity which it would have made or any capital constraints on its ability to invest.

74. Barrowfen remains bound by the concession which it made in the Order dated 3 February 2022 that it was not relying on any specific investment opportunity in support of its case. Nevertheless, I accept Prashant's evidence that the lower equity commitment required for the Amended Original Development Scheme (as compared to the Revised Development Scheme) would have freed up funds for other investments and that it would not have made financial sense for Barrowfen to use any surplus funds to pay down debt. I accept, therefore, that Barrowfen would have had a further £2,377,271 available for investment if it had not carried out the Revised Development Scheme and that it would have looked for an alternative investment opportunity if those funds had been available.

75. Mr Stewart relied on *Swingcastle Ltd v Gibson* [1990] 1 WLR 1223 (CA) and [1991] 2 AC 223 (HL) in which he appeared with Mr Roger Toulson QC (as he then was) for the proposition that in order to recover damages the claimant must show that the relevant funds would have been used for another transaction. He also relied on *Mortgage Express v Countrywide Surveyors Ltd* [2016] PNLR 35 and the following passage in *McGregor on Damages* 21st ed (2020) at 34—080 (footnotes omitted):

> "The one situation where a lender might properly claim interest at the rate at which they had contracted with their borrower is where they can show that, had they been properly advised by the surveyor or valuer, they would indeed not have lent to that particular borrower but would have been able to find a substitute borrower to whom they could have lent on the same terms. Lord Lowry in effect recognised some such possibility when he awarded his 12 per cent interest: "… in the absence of any evidence as to how the lenders financed the loan or evidence showing how the money, if not lent to the borrowers, could have been profitably employed." However, the lender would need to be able to show that they had limited funds available for lending and that the new borrower was one not only who would have agreed to the same terms but to whom they would not otherwise have been able to lend. Such a case is likely to be rare."

76. I accept that *Swingcastle* remains good law in relation to lenders' claims and that the propositions in *McGregor* accurately reflect the law as it applies to cases of that kind. However, in my judgment they have no application in the present case and I reject Mr Stewart's argument for the following reasons:

(1) It is important to remember that I am not asked to decide whether Barrowfen is entitled to recover damages for an alternative profitable investment which it was unable to make but whether it should give credit for a profitable investment which it did make. I am not satisfied that *Swingcastle* and the line of lenders' cases upon which Mr Stewart relied have any relevance to that exercise.

(2) But even if it is appropriate to apply principles for the assessment of damage to the assessment of a collateral benefit, I accept Mr Dawid's submission that *Swingcastle* is concerned with causation and not assessment of damage. I have already found as a matter of causation that Barrowfen lost an alternative investment opportunity, namely, to invest in the Alternative Original Development Scheme.

(3) I also accept Mr Dawid's submission that the appropriate principles for assessment were set out by Toulson LJ (as he had then become) in *Parabola Investments Ltd*

v Browallia Cal Ltd [2011] QB 477 at [23], [24] and [34]. It is not necessary for the Court to find that Barrowfen would have made a specific investment or what profit it would have produced. It has to make a reasonable assessment whether Barrowfen would have found an alternative investment opportunity which would have produced a similar profit to the figures in Table 3 (above).

(4) In my judgment, a reasonable assessment of all the facts leads to the conclusion that Barrowfen would have avoided the additional finance costs of £1,579,682 and found an alternative investment opportunity which would have produced a RoE of £1,887,702. In reaching this conclusion I attach weight not only to Prashant's evidence but also to Mr Powell's thought experiment that over a 25 year period it would not have been so difficult to generate these kind of returns.

77. I turn, therefore, to Mr Stewart's alternative argument, namely, that it is not appropriate to adopt a Barrowfen specific valuation and to include future finance costs because Barrowfen is not locked into the Tooting Property and could realise its investment at any time. He made his submissions in a characteristically forthright fashion:

> "MR STEWART: It's complete nonsense, and the reason it's complete nonsense is 46. The constructor's cost used in the calculation, and just pausing there, only represents those costs up until the completion of the development phase, but does not take into account that the future rental stream comes within associated future costs being the finance costs. And that's the nonsense of this, because what he then does is he looks at the net present value of the debt finance and assumes -- and this is most clear from actually the joint accountancy report which I took him to at 514, 3.3: "NP considers that his calculation of finance costs contribute to a fair investment appraisal in line with generally accepted practice of both schemes assuming a whole period of 25 years and taking into account Barrowfen's specific weighted average cost of capital." Well, that's just nonsense. It is complete nonsense. If they want to sell this and use this money for something else, they can do it now, and what they are trying to do is have their cake and eat it. They want to have a fabulous large scheme in Tooting which Mr Patel has no intention of selling because he thinks it's far more valuable to him and he is going to do it. He also wants to have the hypothetical extra cost of making an investment, which he would never have been able to make on his original investment, because he wouldn't have had the extra space and so forth, and he wants us to pay for it. And it is really magic money. It really is a magic money tree, and I don't mean this in any -- it is not, in my submission, difficult to see that it is fundamentally wrong in principle."
>
> "MR STEWART: Well, the big points are here: interest is already -- well, return on capital, whether interest or on equity, is baked into these

> valuations for the period of delay for which you're giving credit. I'm going to come on to the SLC and the guarantee in a minute, but that is a notional cost of finance which is baked into these matters. What Mr Powell's exercise is doing is looking, as he says, perfectly fairly, and as the experts agree on the basis of a 25-year locked-in period which just doesn't represent reality, and the difference, and so on, is, as your Lordship says, down to that assumption, and it's not one, in my submission, that can or should be made. One assesses damages at a particular point because then the claimant can do what it wants with its money."

78. I accept Mr Stewart's submission that it is not appropriate to include any future finance costs (whether debt or equity) in the appraisal of the developer's profit for the Tooting Property and I do so for the following reasons:

(1) Prashant accepted without qualification that Barrowfen could sell the Tooting Property in the marketplace as a completed development. He also accepted that if it found a more profitable investment Barrowfen could sell the Tooting Property to take advantage of it.

(2) He also accepted that Barrowfen "can do whatever it wants". In substance, he was accepting that the decision whether to hold or sell the Tooting Property is now one for the directors of Barrowfen and that the causative effect of the breaches of duty by Girish and S&B came to an end on the completion of the development.

(3) In my judgment, therefore, any finance costs which Barrowfen has incurred or will incur after completion of the Revised Development Scheme and over the life of its investment do not form part of the single, continuous transaction which I found at [673]. Barrowfen could sell the Tooting Property tomorrow and realise the entire profit without incurring any further finance costs and could re-invest immediately in something more profitable. The decision to hold the investment for the foreseeable future is not the consequence of any breach of duty by Girish or S&B but of Prashant's own commercial judgment.

(4) It was, therefore, appropriate to include finance costs until completion in the calculation of the developer's profit for the Revised Development Scheme in accordance with the RICS Guidance Note, §B2.2.2.2 but not the future finance costs in accordance with §B2.2.2.7. Mr Alford and Mr Clarke included the finance costs to completion as part of their agreement of the overall development costs and

Mr Clarke did so on the assumption that after completion the Property could be sold in the open market. In my judgment, this was the right assumption to make.

(2) The Standby Letter of Credit

79. It was also Barrowfen's case that the Court should reduce the credit of £2,508,182 by £34,136.90 because Barrowfen had incurred liability to pay a fee of 1.75% per annum to Asian Agri for the period from 19 December 2019 to the end of November 2021. I am not satisfied that Barrowfen had incurred any liability to pay such a fee either before the trial or before I handed down the Judgment for the following reasons:

(1) I am prepared to accept Prashant's evidence that he intended Asian Agri to charge Barrowfen a fee of 1.75% for the standby letter of credit and that he instructed Ms Mahadevan to request Barrowfen's auditors to include this fee in its audited accounts soon after 19 December 2019.

(2) However, I am not satisfied that Barrowfen had assumed any contractual liability to pay that sum to Asian Agri before October 2021. There is no suggestion that there was an express agreement between the two companies and Mr Dawid did not argue that such a contract should be implied.

(3) Although Prashant was a director of both companies, his evidence was that the decision to charge a fee was "at the back of his mind". Mr Dawid did not suggest that it was possible for Prashant to make a binding contract on behalf of both companies in his head and if he had intended to exercise his authority to enter into a binding contract on behalf of both companies, I would have expected him to call a board meeting of both companies and to minute the arrangement.

(4) Finally, if Barrowfen had assumed a legal liability for the fee of £34,136.88, I would have expected it to pay the fee and for there to be a clear record of payment. But Prashant did not suggest that Barrowfen had paid the fee in either of his two most recent statements and he was not taken to any documents to confirm that the fee had been paid.

80. I have to decide, therefore, whether to permit Barrowfen to deduct a fee which Barrowfen has now agreed to pay with retrospective effect after I handed down Judgment and with

knowledge that it would (or might be) relevant to the determination of the Reserved Matters. In his Skeleton Argument Mr Dawid submitted that the two fees which Barrowfen incurred to Asian Agri were additional finance costs which went into the calculation of the developer's profit and which I must take into account:

> "These two fees (together, the "**Security Costs**"), which together total £460,249.99 (again, as at 1 November 2021), represent an additional financial cost resulting from the change from the AODS to the RDS. Again, Barrowfen does not claim these additional costs as a loss in their own right, but asks only that they be taken into account when assessing the amount of credit to be applied against its loss in respect of the additional profit generated by the RDS. Given that, on Mr Powell's calculations, the cost of the additional capital deployed by Barrowfen is itself enough to eliminate this credit, it is only if the Court determines that the cost of capital is not to be taken into account (or that only some of it should be) that the Security Costs will make any difference to the quantum of damages awarded to Barrowfen."

81. Mr Stewart submitted that Barrowfen assumed liability for the fee of £34,136.88 voluntarily to inflate its losses and that they are not legally recoverable from S&B because the "legal responsibility question" must be answered in the negative. By this he was referring *Manchester Building Society v Grant Thornton UK LLP* [2021] 3 WLR 81 at [6](6) where Lord Hodge and Lord Sales formulated this question as follows:

> "Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question)."

82. He submitted that S&B's breaches of duty were not the effective cause of the liability to pay the fee, Barrowfen's assumption of responsibility broke the chain of causation and that liability for this fee was not the reasonably foreseeable consequence of S&B's breaches of duty (as found in the Judgment) and was therefore too remote to be recoverable as damages.

83. I accept Mr Dawid's submission that it is not appropriate to approach this issue as if I were assessing whether the fee which Barrowfen has agreed to pay is recoverable as damages (and this is consistent with the approach which I adopted to future finance costs). Moreover, I am not satisfied that Prashant executed the letter dated 20 October

2021 on behalf of both parties with the intention of inflating Barrowfen's losses or that, even if he did, it is permissible for me to disregard its legal effect on that basis. Mr Stewart did not suggest to Prashant that it was a sham or that it was not intended to take effect according to its terms.

84. Nevertheless, I am not satisfied that I should take the fee of £34,136.88 into account when calculating the capital appreciation for which Barrowfen must give credit. In my judgment, this fee did not form part of the single, continuous transaction which I found at [673] for the following reasons:

(1) I have held that Barrowfen did not assume any legal liability to pay the fee before entering into the agreement on 20 October 2021. Moreover, it received the benefit of the standby letter of credit for the period between November 2019 and October 2021 without being charged by Asian Agri.

(2) When he was cross-examined about the relationship between Barrowfen and Atlip House, Prashant accepted that he "single-handedly managed both companies", that "it's all just within me to go and execute these things" and "if a charge needs to be put through, it's just myself remembering that I need to go and do it". I find that the relationship between Barrowfen and Asian Agri was the same.

(3) In substance, therefore, Prashant was accepting that the decision to charge a fee after I had handed down Judgment was one for him because he controlled both companies and implicitly accepting that the causative effect of the breaches of duty by Girish and S&B had now come to an end.

(4) Moreover, if the fee had formed part of the same continuous transaction of which the breaches of duty were the inception, I would have expected Prashant to follow up his conversation with Ms Mahadevan immediately and to ensure that it was properly recorded and paid.

(3) Atlip House

85. Finally, it was Barrowfen's case that the Court should deduct the sum of £426,113.01 from the profit of £2,508,182 because Barrowfen had incurred a fee to Atlip House for providing the guarantee and security to Barclays. Again, I am not satisfied that Barrowfen

had incurred any liability to pay a fee to Atlip House either before the trial or before I handed down the Judgment for similar reasons:

(1) I am prepared to accept that Prashant intended Atlip House to charge a fee to Barrowfen for providing the guarantee and security before I had handed down the Judgment. I also accept that Prashant only ever intended to charge a fair fee. Mr Isaacs accepted that the fee was fair and Prashant later asked Barclays to provide him with a benchmark for the fee which he ultimately decided to charge.

(2) But as with the fee for the standby letter of credit, I am not satisfied that Barrowfen assumed any contractual liability to pay Atlip House for the guarantee and security. Again, there is no suggestion that there was an express agreement between the two companies and Mr Dawid did not argue that such a contract should be implied.

(3) Moreover, Prashant's evidence was that he did not communicate his intention to charge such a fee to anyone. Again, Mr Dawid did not suggest that it was possible for Prashant to make a binding contract on behalf of both companies in his head and if he had intended to exercise his authority to enter into a binding contract on behalf of both companies, I would have expected him to call a board meeting of both companies and to minute the arrangement. Given the sum involved, I would also have expected him to require a formal contract between the two companies.

(4) Again, if Barrowfen had assumed a legal liability for a fee of £426,113.01, I would have expected it to pay the fee and that there would be a clear record of payment. But Prashant did not suggest that Barrowfen had paid the fee and he was not taken to any documents to confirm that the fee had been paid.

(5) I accept Mr Isaac's evidence that it would only have been appropriate for Barrowfen to recognise a liability for a fee of £426,113.01 if it had been charged that fee by Atlip House and there would be no need to recognise that liability if the guarantee and security had been provided free of charge. This is common sense and I cannot see how the application of an accounting standard like IFRS9 to Barrowfen's audited accounts could lead to the assumption of a liability to pay the fee where none existed before.

86. Finally, I am not satisfied that I should take the fee of £426,113.01 payable under the

agreement dated 20 October 2021 into account when calculating the credit for capital appreciation which Barrowfen must give. In my judgment, this fee did not form part of the single, continuous transaction which I found at [673] for the same reasons which I gave in relation to the fee of £34,136.88 payable to Asian Agri for provision of the standby letter of credit.

(4) Conclusion

87. I therefore find in favour of Girish and S&B on the Financial Costs Issue. In particular, I find that Barrowfen is required to give credit for the increase in the developer's profit of £2,508,182 even though Barrowfen invested additional capital of £10,397,271 in the Revised Development Scheme (based on the figures which I used in the Judgment). I also find that Barrowfen is not entitled to deduct from the increase in developer's profit either the future cost of funding the debt of £1,579,682 or the opportunity cost of investing additional shareholders' funds of £1,887,702 or the fees of £34,136.90 in respect of the standby letter of credit and £426,113.01 in respect of the Atlip House secured guarantee.

F. The Loss of Chance Issue

88. In the Judgment I expressed the provisional view that the deduction for capital appreciation should be made before the loss of chance percentage is applied: see [677]. Mr Dawid submitted that I was right to do so because loss of a chance is an aspect of causation not quantification and it is necessary to assess the financial impact of each counter-factual considered by the Court including any countervailing benefits for which credit must be given and then weight these according to the percentage likelihood of each.

89. For the proposition that the loss of chance doctrine forms part of the law of causation Mr Dawid relied upon *Vasiliou v Hajigeorgiou* [2010] EWCA Civ 1475 at [20] to [22]. In those paragraphs Patten LJ analysed what he described as the "*Allied Maples* approach" in terms of causation and in the last sentence of the passage he stated that: "The loss of a chance doctrine is primarily directed to issues of causation and needs to be distinguished from the evaluation of factors which go only to quantum."

90. For the proposition that the Court should make the relevant deduction before applying

the loss of a chance percentage Mr Dawid relied upon *Hartle v Laceys* [1999] Lloyd's Rep PN 315 and *Ministry of Defence v Wheeler* [1997] 1 WLR 637. In *Hartle v Laceys* C entered into a restrictive covenant on the acquisition of a residential property. The land was unregistered and V, the original vendor, failed to register the covenant as a land charge. C acquired the neighbouring property with a view to selling them both for development. However, his solicitor failed to appreciate that the restrictive covenant was void for lack of registration and approached V for consent, who immediately registered the charge and took a tough bargaining position. As a consequence, C lost the opportunity to sell both plots to a developer at the height of the market.

91. The judge at first instance held that damages should be assessed by reference to the diminution in the value of the property as a consequence of the registration of the covenant. The Court of Appeal reversed his decision and after a detailed assessment of the facts, held that C was entitled to recover damages for the lost chance of selling the property before registration after giving credit for the actual proceeds of sale. Ward LJ (with whom Schiemann and Beldam LJJ agreed) assessed the loss of chance percentage as 60% and he dealt with the question whether the deduction for the proceeds of sale should be applied before or after applying that percentage as follows at 329 col 2 to 330 col 1:

> "We have found that Mr Hartle lost the chance of selling his property before the market slumped. We have decided that he had a real chance of selling for £375,000, that being our valuation of the price which would have been agreed between a willing vendor - Mr Hartle - and a willing purchaser in the market conditions of the day. Had such a sale taken place, only the net proceeds would have enured for his benefit and so the agent's and solicitors' costs fall to be deducted. Making some estimate of those and perhaps rounding down, I assess the net proceeds of the lost sale to be £360,000. That is my starting point. The parties are at liberty to calculate a more precise figure, but I do not encourage it.
>
> Mr Hartle did not lose £360,000. He lost the chance of making it. Given all the imponderables and uncertainties, the chance of achieving such a sale could not be rated at more than 60%. The damages for the loss of that chance appeared to me at first sight to be £216,000. That sum would of course have to be reduced because, although he lost that chance of a sale he did not lose the property. It was still there to sell. Credit, it appeared to me, would have to be given for the proceeds of the actual sale. We now know he received £70,000 on 5 February 1993 and £80,000 on 27 January 1994. Costs were inevitably incurred in connection with those sales but it would not be right to deduct them for the purpose of these calculations.

> Having reduced the notional sale proceeds to the net figure, it would be a wrongful duplication to discount the actual proceeds of sale.
>
> When I put my tentative views to the parties, I said, without giving it much thought at all, that credit against the damages of £216,000 should be given for the £150,000 actually received. That would mean judgment for £66,000. But is that the right approach? Prompted by Mr Davidson once again so fairly sowing seeds of doubt about the correctness of that approach, I have wrestled with the mathematics. If 'a' is the lost sale proceeds and 'b' the actual proceeds, are the damages properly to be awarded (a x 60%) - b or are they (a - b) x 60%. That can be further reduced to either 0.6a - b or 0.6a - 0.6b. On the figures, is it £216,000 - £150,000 ie. £ 66,000 or is it 60% of the difference between £360,000 and £150,000 ie. £126,000.
>
> Reducing the formulae to appropriate language, is the measure of damages the difference between the value of the opportunity to sell before 18 November 1988 and the value of the opportunity to sell after that date or is it the difference between the price he lost the chance of achieving and the actual selling price, that difference being reduced by 40% to reflect the value of the chance? I confess I have not found it easy to decide.
>
> I have come to the conclusion that the latter approach is the correct one. Take slightly different facts. Assume just for the sake of the argument that Berkeleys were in Mr Wyllys' office with banker's draft for £375,000 in one hand and pen poised in the other to sign contract and conveyance when the Sloggets telephoned to say they had registered their charge, so the deal was lost. One might well then say that Mr Hartle had lost a certain sale, or one as certain as certain can be. His damages would be a - b with no discount because the chance is assessed at 100%. If the chance were 99%, one would make the 1% reduction. On the facts we have found a - b is to be reduced by 40%. The unfairness of the former solution can be tested in this way. Assume we had found an 80% chance of a sale. 80% of £375,000 is £300,000. Assume the property was sold 12 months later for £300,000. It cannot be right that the loss of such a high chance does not sound in damages. If the 0.6a -0.6b formula is adopted, then the loss of the chance always has a value.
>
> Look at it another way. When Miss Chaplin lost the opportunity to participate in Mr Hicks' beauty contest, there was nothing left for her. She had lost the only chance she would ever have of winning the prize. Having lost the chance, she was left with nothing. Mr Hartle did not lose everything when he lost this sale. He lost the chance of the sale but he did not lose the property itself. He retained the chance to sell it at some indeterminate time for some indeterminate price. He lost the chance of getting the excess of a over b but his chance of getting a - b was only 60% and so he should only recover 60% of it. In my judgment Mr Hartle is entitled to damages of £126,000 under this head of his claim."

92. In *Ministry of Defence v Wheeler* (above) the Ministry of Defence unlawfully discriminated against four servicewomen, who were discharged from the services when

they became pregnant. In each case the industrial tribunal awarded compensation by assessing the percentage chance that each claimant would have completed her total period of service but also deducted post-dismissal earnings which she had earned in mitigation. The Court of Appeal had to decide when that deduction should be made. They followed *Hartle v Laceys* and held that the deduction should be made before the percentage chance was applied. Swinton Thomas LJ (with whom Mantell and Hirst LJJ) agreed was taken with the obvious unfairness of applying the loss of chance percentage before the deduction. He stated as follows at 644G-H and 645D-E:

> "At first sight Mr. Pannick's example, and the reasoning put forward to support it, appears to be attractive and was certainly attractively put. However it is, in my judgment, clearly flawed. As Mr. Langstaff submitted, Mr. Pannick's equation, and his example, focus solely on the amount that the applicant would have earned in the armed forces instead of focusing on the entire picture which is the amount she would have earned in the armed forces and the lesser amount that she has or would have earned in civilian life and deducting one from the other. Thus it is clearly wrong to take, for example, 60 per cent. of the salary that she would have earned in the armed forces and deduct from that 60 per cent., 100 per cent. of the sums earned in civilian life. The same discount must be applied to both sides of the equation to obtain a fair and just result and an accurate calculation as to the amount that the claimant has actually lost. (Accordingly to reach that result you take 60 per cent. of the potential earnings, and 60 per cent. of the actual earnings and deduct one from the other.)"
>
> "To illustrate his proposition Mr. Langstaff takes the example of a woman who is employed at the rate of £8,000 per annum. She had the opportunity of being promoted to a job earning £12,000 per annum but is wrongfully deprived of the opportunity of doing so. The court finds that her chances of promotion to £12,000 per year were 50 per cent. According to Mr. Pannick's formula the loss would be £6,000 (half of £12,000)—£8,000 (current earnings), meaning that not only had she suffered no loss but was better off. The proper equation is to say that her loss was £12,000 less £8,000, namely £4,000, and then apply the 50 per cent. discount resulting in a loss of £2,000 per annum. Mr. Langstaff submits that that example illustrates the importance of not focusing solely on the proposed income which has been lost but on the totality of the picture."

93. Mr Stewart drew a distinction between a case where the claimant has lost the chance to obtain the difference between the benefit lost and the credit received and a case where (as here) the claimant has lost the chance to obtain a particular benefit but must credit for some other benefit received. He submitted that if the claimant has received a "compensating advantage not forming part of the loss of chance analysis" then he or she

should give credit for that benefit in full.

94. Mr Stewart relied on *Harrison v Bloom Camillin (No 2)* [2000] Lloyd's Rep PN 404 in which Neuberger J (as he then was) had awarded damages against a firm of solicitors for failure to issue a claim in time against a firm of accountants, who had prepared a negligent investigation report in relation to the acquisition of a business. The question arose whether he should have applied the same percentage to a credit for the accountants' unpaid fees and when the point was taken, he held that the loss of chance percentage should not be applied to the unpaid fees for the following reasons:

> "5. The second point raised by Miss Start relates to the deduction of £15,000 to take into account Touche Ross's claim for the costs of the Report. I deducted it (by apportioning the liability for it equally between the two claimants) when assessing what damages the claimants would recover from Touche Ross. The damages at the first stage were assessed on the basis of what I thought the claimants would have recovered against Touche Ross, but were then discounted at the second stage to take into account uncertainty. The discount was applied to the £15,000 as well. Miss Start contended that I should not have deducted the £15,000 at the first stage, but should have deducted it at the second stage, namely after the deductions of 35% and 20%, which I have just been discussing, had been made.
>
> 6. In other words, Miss Start contended that, having arrived at £15,000 as the figure which Touche Ross was entitled to recover from the claimants in respect of the Report, that was not a figure which should have been discounted in the way I have just described, because there was no uncertainty about Touche Ross's ability to recover that sum, once it had been assessed. For the reasons discussed in my judgment, it is clear that the claimants would have no defence, save on the question of quantum, to a counter claim by Touche Ross for the cost of the Report. Despite Mr Salter's argument to the contrary, I see no escape from Miss Start's argument on this point."

95. Mr Stewart also relied on *Richards v Speechly Bircham* [2022] EWHC 935 (Comm) in which Cs claimed damages for negligence against a firm of solicitors for negligent advice in relation the sale of shares. His Honour Judge Russen QC awarded damages on a loss of a chance basis but appears to have deducted sums paid under the sale itself without applying the loss of chance percentage: see [478], [479] and [494]. The decision is of limited assistance because it appears to have been common ground that Cs had to give credit for these sums in full. But as far as it goes, it provides another example to support Mr Stewart's general proposition.

96. I prefer Mr Dawid's submissions on this issue and having heard full argument I am satisfied that my provisional view was correct and that the deduction for capital appreciation should be made before the loss of chance percentage is applied. I have held that there was a 60% chance that Barrowfen would have implemented the Amended Original Development Scheme in January 2015 and it was common ground that it would have been completed by September 2016: see [622] and [632]. What Barrowfen lost, therefore, was the opportunity to develop the Tooting Property five years earlier than it did and the value of that opportunity is to be assessed by focussing on the entire picture (as in *Ministry of Defence v Wheeler*), which involves a comparison between the income which Barrowfen lost with the capital appreciation which it gained.

97. In my judgment, there is no relevant distinction between the present case and *Hartle v Laceys*. As Ward LJ pointed out in the last paragraph of the extract (above), C lost the chance to sell but he did not lose the property itself. What he lost, therefore, was a 60% chance of achieving a better price at an earlier date in time. The position is the same here. Barrowfen lost the chance to develop in 2015 but it did not lose the Tooting Property. What it lost, therefore, was the chance of achieving an income stream at an earlier point in time but from an asset with a lower capital value. As Ward LJ put it: "He lost the chance of getting the excess of a over b but his chance of getting a - b was only 60% and so he should only recover 60% of it."

98. *Hartle v Laceys* was not cited in *Harrison v Bloom Camillin (No 2)* and it is possible that Neuberger J might have reached a different conclusion if it had been. However, in my judgment the decision can be distinguished. The decision is concerned with lost litigation and not a hypothetical transaction and Neuberger J approached the question whether the loss of a chance percentage should be applied to the unpaid fees by considering whether the firm of accountants would have been entitled to bring a separate counterclaim for their recovery and, if so, whether it was certain to succeed. He therefore approached the issue on the basis that there were two separate claims and that the loss of chance percentage should not apply to both of them.

G. The Cumulation Issue

99. I held that there was a 60% chance that in January 2015 Barrowfen would have commenced the Amended Original Development Scheme. I also held that there was an

80% chance that Barrowfen would have avoided administration and that in April 2016 it would have commenced the Revised Development Scheme. Mr Dawid argued that these findings were cumulative not alternative for the following reasons:

(1) It follows from the first finding that there was a 40% chance that Prashant and Suresh would not have taken control or begun the development by January 2015 and that Girish would have remained in control of Barrowfen in 2015 and would have followed through with his plan to put Barrowfen into administration.

(2) It also follows from the second finding that even if Girish had remained in control and had followed through with his plan to put Barrowfen into administration, there was an 80% chance that he would have been unsuccessful, that Prashant and Suresh would have avoided administration and begun the Revised Development Scheme in April 2016.

(3) Barrowfen is entitled to recover not only damages for the 60% chance that Prashant and Suresh would have successfully taken control and commenced the Amended Original Development Scheme by January 2015 but also damages to reflect the 40% chance that they would have been unsuccessful combined with the 80% chance that they would have been successful later in avoiding administration and commencing the Revised Development Scheme.

(4) Accordingly, Barrowfen is entitled to recover 32% (i.e. 80% of 40%) of the £3,498,157.09 in damages which I awarded for the Administration Claim, namely, £1,119,410.20.

100. This argument had a powerful logic and I found it convincing. However, Mr Dawid recognised that a possible objection was that I had failed to take account of other outcomes or contingencies on which I had not made findings in the Judgment. He gave as an example the possibility that Prashant and Suresh were unable to proceed with the Amended Original Development Scheme because they were unable to obtain funding. But he pointed out that I had dealt with issue at [611] to [613]. He also relied on my conclusion that it was not appropriate to address each counter-factual separately because they were all steps which led to a "single outcome" which was to assess the overall percentage chance or likelihood of that final outcome: see [622].

101. Mr Stewart did not contend that it was wrong in principle to award damages on a cumulative basis where the Court has found that there is a real and substantial chance that two or more beneficial outcomes would have eventuated. In my judgment, he was right not to do so. The Court often takes this approach and in *Ministry of Defence v Wheeler* the Court of Appeal also held that the cumulative approach should be adopted. Swinton Thomas LJ dealt with this point at 650D-E:

> "Mr. Pannick submits that, as a matter of plain logic, if there are a series of contingencies, the possibility of the second factor occurring is a percentage of the first factor. The first question that must be asked is what is the percentage chance that the applicant would return to the forces on the first day that she could after the birth of her child. The second question is the percentage chance that she would have remained in the forces for five years. The next question is whether she would have remained after the period of five years. That question can only be answered logically as a further percentage chance of the percentage chance on day 1. In my judgment, Mr. Pannick is correct in submitting and the appeal tribunal were correct in concluding that the percentage chances must be applied cumulatively."

102. Mr Stewart submitted, however, that in the present case the Company Claims and the Administration Claim were true alternatives and that if I were to award 60% of the damages (as assessed) on the Company Claims and 80% of the damages (as assessed) on the Administration Claim, this would lead to double recovery. He gave various examples. I am satisfied that this submission was based on the misapprehension that Barrowfen was claiming 80% of the damages which I awarded on the Administration Claim rather than 32% of them (i.e. 80% of 40%).

103. Mr Stewart also submitted that it was not possible to say that the outcome of the Administration Claim was contingent on the outcome of the Company Claims and that an alternative outcome was that Prashant and Suresh were successful in taking control of Barrowfen but did not carry out the Amended Original Development Scheme. He advanced the following submission in his Skeleton Argument:

> "61. Moreover, a 60% chance that the AOS would have started by January 2015 does not mean there was a 40% chance that the AOS would have proceeded after January 2015 but before April 2016. The 40% chance includes all scenarios in which the AOS did not start in January 2015, including scenarios in which the AOS would not have started at all (such as that Girish Patel would not have 'fallen into line' and supported the

> development, or that Prashant Patel would have sold the site having obtained control of Barrowfen)."

104. He also dealt with Girish's conduct in more detail in his oral submissions. He submitted that I had taken a holistic view at [622]. But he submitted that this prevented me from making a cumulative assessment because there were a number of different counter-factual factors which interrelated in different ways. He continued as follows:

> "MR STEWART: Taking up just one of them, which is relevant so far as I am concerned, whether Girish would have taken up and followed advice, paragraph 591, and you say in your judgment in relation to the 60% that's the most difficult question. Well, there are a whole series of possibilities in relation to that. Girish plainly would have still felt very strongly about other aspects of the family dispute, and the idea that Girish would, as it were, have simply said, "Well, that's fine, you go ahead, I'm not going to do anything", your Lordship might regard as being pretty unlikely. So what might he have done? Well, he might have said, "Right, it's in interest to sever everything, we're buying off, we'll have some separation", and there would have been a glorious family settlement and there wouldn't have been private prosecutions and alterations of wills and everything else. But I mean that is one possibility. The other is that there would have continued to be various forms of harassing action of different forms, court actions, different things, all sorts of other matters going on. The important point for present purposes in my submission is that you cannot be certain at all that encompassed within the 40% which is the chances of, as it were, that and a whole series of other things not occurring is that everything else would have proceeded in the same way to the start of the administration. That is just unrealistic on what your Lordship knows about this dispute and indeed what your Lordship's findings are as set out in appendix 2."

105. I deal first with Prashant's conduct. The case which Mr Stewart put to Prashant was that he was not interested in the development of the Tooting Property and his interest in Barrowfen was part of a scheme to capture Girish's assets. But I found on a balance of probabilities that Prashant and Suresh would have proceeded with the development: see [617]. Moreover, because Prashant and Suresh were directors of Barrowfen, this issue did not form part of my loss of a chance assessment. Given my finding, it is no longer open to S&B to argue that Prashant would not have proceeded with the Amended Original Development Scheme but would have sold the Tooting Property after taking control of Barrowfen.

106. Girish's conduct is more problematic. I dealt with the question whether he would have taken and followed independent advice at [591] to [593]. I held that there was a real and

substantial chance that he would have taken Guernsey law advice and consented to an order that Yashwant be written up as the senior shareholder of the Mrs PD Patel Trust. But I went further and found that on a balance of probabilities Girish would have accepted, taken and followed that advice: see [593].

107. When I came to deal with Girish's conduct in the context of third party funding, I relied on the earlier finding at [593]. But I also found that it was likely that he would have fallen into line and supported the development for a number of reasons: see [610] and [611]. I did not explore what might have happened if Girish had not fallen into line and whether there was a real and substantial chance that RBS or Investec might have refused to fund the development if he had objected to it. Equally, I made no findings about what (if any) action Girish might have taken to hold up the development after he had lost control of Barrowfen.

108. Does the fact that I made no finding on these potential outcomes prevent me from awarding damages on a cumulative basis? I am not satisfied that it does. I left open the possibility that Girish's conduct should be attributed to Barrowfen when I considered whether he would have taken independent legal advice on behalf of the company. For this reason I also made alternative findings: see [327] and [328]. It is not open, therefore, to S&B to argue that there was a real and substantial chance that Girish would not have consented to an order that Yashwant be written up as the senior shareholder of the Mrs PD Patel Trust or that a continuing dispute over the Trustee Resignation Documents would have prevented RBS or Investec from funding the Amended Original Development Scheme.

109. But in any event, I accept Mr Dawid's submission that by the time I had completed my analysis, I was assessing the percentage chance of a single outcome, namely, whether Prashant and Suresh would have taken control and proceeded with the Amended Original Development Scheme. In arriving at that conclusion I had to consider and assess a significant number of different counter-factual factors. I identified those factors by reference to the evidence presented at trial and the individual points which Mr Stewart put to Prashant, Suresh and Girish. Moreover, I even made detailed findings on the wider family dispute in Appendix 2 and took those into account: see [616].

110. In my judgment, I made sufficient findings in the Judgment at [579] to [619] to be

satisfied that the outcome of the Administration Claim was contingent on the outcome of the Company Claims and that if Prashant and Suresh had been unable to take control of Barrowfen or implement the Amended Original Development Scheme, Girish would have followed through with his plan to put the company into administration. I am satisfied, therefore, that I should award damages on a cumulative basis and I, therefore, award Barrowfen 32% (i.e. 80% of 40%) of the damages for which I found Girish and S&B liable on the Administration Claim.

IV. Other Matters

H. The Girish Liability Issues

(1) The Bedford Rectification Claim

111. I held that Girish failed to accept the advice of both S&B and counsel that he was liable for the costs of the Bedford Rectification Claim (which amounted to £28,000): see [354]. I also held that S&B were not liable for agreeing that Barrowfen should pay the costs: see [377] to [379]. However, I failed to make a separate award of damages or equitable compensation against Girish for this head of damages: see [699]. I also made the same award of damages against both Girish and S&B: see [710].

112. Mr Dawid submits that this was an oversight and that I should have made a separate award of damages of £28,000 against Girish. I accept that submission. Moreover, I am satisfied that it remains open to me to amend the Judgment to include such an award. I have not completed my assessment of damages in relation to any of the issues and I have not made an order. I, therefore, award Barrowfen damages of £28,000 against Girish in respect of the costs of the Bedford Rectification Claim and my Order will reflect that award.

(2) Causation

113. I held that if Girish had complied with his statutory duties under the Companies Act 2006, Prashant would have been appointed a director of Barrowfen at the extraordinary general meeting on 14 May 2014: see [579]. I also found that if S&B had complied with the firm's duties to Barrowfen, Prashant would have been appointed a director by early September 2014: see [594] and [595]. Thereafter, I applied loss of chance principles to

the assessment of equitable compensation and damage against both parties: see [597] to [622].

114. Mr Dawid submitted that I should not have applied those principles to the claims against Girish because it was only appropriate for the claims against S&B. He also submitted that I had assessed damages and equitable compensation against both parties on the assumption that Girish's liability was co-extensive with that of S&B. He, therefore, submitted that I should amend the Judgment and award damages against Girish on both the Company Claims and the Administration Claim without applying any deduction for loss of a chance.

115. Mr Dawid did not appear at the trial for Barrowfen and Girish appeared in person both at the trial and at the subsequent hearings but he made no submissions directed to this issue. Mr Stewart assisted the Court by making some general submissions (for which I am grateful to him). But in preparing this judgment I decided that I ought to review the basis on which Barrowfen's counsel pleaded and presented the claims for damages against both parties in order to determine whether I had made an error in the way in which I approached the assessment of damages or equitable compensation and failed to address Barrowfen's pleaded case or the submissions which counsel had made to me at trial.

116. I am satisfied that I made no error and that I approached the assessment of damage in the way Barrowfen's counsel invited me to (and consistently with its pleaded case). I could leave the matter there. But in case Barrowfen seeks to pursue this issue on appeal, I prefer to explain why I have reached this conclusion. I begin with Barrowfen's pleaded case. In the Re-Amended Particulars of Claim Barrowfen's case was that the breaches of duty committed by Girish and S&B had caused the same losses: see paragraphs 113 to 118. Indeed, Barrowfen's primary case was that if S&B had complied with its duties, Prashant would have been appointed a director on 8 May 2014. Barrowfen's pleaded case on loss of a chance (added by amendment) was as follows:

> "Further or alternatively, the breaches of duty by Girish, Stevens & Bolton and Barrowfen II have caused Barrowfen to suffer the loss of a chance of avoiding the losses (and receiving the corresponding rental income) pleaded in paragraphs 116 and 117 above in that there is a real and substantial chance that but for their breaches of duty Prashant and Suresh would have taken control of Barrowfen earlier than 1 December 2015 and/or that Barrowfen would have completed the development of the

> Tooting Property earlier than December 2020, for the reasons set out in paragraphs 113 to 115 above."

117. S&B made a detailed request for further information of those paragraphs but in the reply to that request, Barrowfen's counsel drew no distinction between the claims against Girish and the claims against S&B. Barrowfen declined to give further particulars of its case on loss of a chance beyond the following:

> "Barrowfen claims that it has lost a virtual 100% chance, alternatively such lesser chance as the Court determines."

118. In their Skeleton Argument for trial counsel relied on the case as pleaded in both the Re-Amended Particulars of Claim and the reply to the request for further information. In relation to the issue whether the Defendants' breaches of duty prevented Prashant and Suresh from taking control (but that issue only), they submitted that Girish and S&B had to be considered separately:

> "288. For this issue (only), the breaches of Girish and S&B need to be considered separately.
>
> 289. In relation to Girish, his breaches of his directors' duties in improperly removing Bedford from the register of members (and causing Barrowfen to rely upon this), improperly writing up the register of members, forging Suresh's resignation as a director and forging the resignations of Suresh and Yashwant as trustees of the Mrs PD Trust and appointing himself as trustee of the Mrs PD Trust clearly prevented Prashant and Suresh from taking control. But for Girish's conduct, Prashant would have been appointed as a director at the EGM on 8 May 2014, and Prashant and Suresh would have taken control of the board of directors at that time.
>
> 291. As explained in paragraph 272 above, the issue of what each of Girish and Bedford would have done if S&B had complied with its duties is to be determined on the basis of loss of a chance, rather than balance of probabilities (although, for the avoidance of doubt, Barrowfen says it satisfies either test).
>
> 292. If S&B had acted in accordance with its duties, Prashant and Suresh would have taken control of Barrowfen at the EGM on 8 May 2014, alternatively some time thereafter: (1) If S&B had provided Barrowfen (acting by Girish) with advice that did not prefer the interests of Girish personally over those of Barrowfen, and Girish (acting as director of Barrowfen) was told, for example, that Bedford's membership of the company should be reflected on the register of members, the likelihood is that Girish would have followed that advice. See Girish's letter to Mr King dated 3 March 2014, which stated [F1/252/1651]: "In light of the above can you kindly advise if Barrowfen and the writer can refuse to recognise [Bedford] call for a meeting. Are there any alternatives for the writer!".

> The inference is that if Mr King had not been inhibited by what he perceived to be the best interests of Girish, and had advised Girish (acting as director of Barrowfen) that Barrowfen should recognise Bedford as a member and its call for a meeting, Girish would have (reluctantly) followed that advice. See also Girish following S&B's advice not to contest Bedford's claim when Bedford was forced to issue rectification proceedings; Girish following S&B's advice (shortly before trial) to consent to Suresh's claim that the Purported Director Resignation Letter was not an authentic resignation letter.
>
> (2) If S&B had provided separate advice to Barrowfen about these issues (either to Suresh or to the shareholders), or alternatively if it had ceased acting due to a conflict of interest, the likelihood is that Bedford, Prashant and Suresh would have taken immediate steps to take control of Barrowfen's board, which would have included (i) proceeding with the EGM on 8 May 2014, and putting the burden on Girish to bring a legal challenge to the effectiveness of the appointment of Prashant as a director at that meeting (which he would not have done, as shown by his failure to defend Bedford's rectification proceedings), and/or (ii) if necessary, bringing immediate rectification proceedings to regularise the position. The evidence shows that Bedford, Prashant and Suresh were taking active steps, with the assistance of Withers, to take control of Barrowfen at the time and if S&B had provided the advice set out above and/or ceased acting on the grounds of conflict, the likelihood is that they would have taken immediate and robust action to take control. Prashant says that he only agreed on behalf of Bedford not to proceed with the meeting of 8 May 2014, because he trusted that an investigation by an English firm of solicitors would quickly establish that Bedford was in fact a member of Barrowfen and advise the company to acknowledge Barrowfen's membership: para 68 of Prashant's w/s [B/1/15]."

119. However, after making these detailed submissions, counsel did not suggest that I ought to assess damages on a different basis if I found in Barrowfen's favour in relation to this issue. Indeed, they continued to present the case on the basis that Girish and S&B were liable for the same losses: see paragraphs 293 to 318. In their Written Closing, counsel reminded me of their pleaded case and then made the following submissions:

> "230. Barrowfen claims that but for the breaches of duty by Girish and S&B, Prashant and Suresh would have taken operational control of Barrowfen on 8 May 2014, which was the date of the EGM called by Bedford, alternatively some time thereafter: paragraph 113 Re-Re Amended Particulars of Claim [A/2/55]; Response 43 to RFI [A/8/254].
>
> 231. For the reasons explained in paragraphs 270 and 272 of Barrowfen's Skeleton, this issue of causation is to be assessed on the basis of loss of a chance. For the avoidance of doubt, Barrowfen says it comfortably passes the balance of probabilities test, if the Court considers that this test is to be applied.

232. In relation to Girish, it could hardly be clearer that his breaches of his directors' duties in (i) improperly removing Bedford from the register of members (and causing Barrowfen to rely upon this) and/or preventing or delaying reinstating Bedford on the register of members, (ii) improperly writing up the register of members, (iii) forging Suresh's resignation as a director and (iv) forging the resignations of Suresh and Yashwant as trustees of the Mrs PD Trust, prevented Prashant and Suresh from taking operational control at the EGM on 8 May 2014 or alternatively some time thereafter. Bedford requisitioned the EGM on 8 May 2014 for the purpose of considering and passing a resolution to appoint Prashant to the board of directors [F1/266/1767]. If Girish had not improperly denied Bedford's rights as a member, the EGM would have gone ahead and the resolution appointing Prashant as a director would have passed, with the support of Bedford, and Suresh and Yashwant as trustees of the Mrs PD Trust. Prashant and Suresh would then have represented the majority on the board of directors and they would have taken operational control of Barrowfen (and the majority of shareholders would have exercised their powers as necessary to ensure that this remained the case).

233. In relation to S&B, Barrowfen puts its case in two alternative ways. Firstly, having decided to provide advice to Barrowfen, S&B owed a duty to act in the best interests of Barrowfen and not to prefer the interests of Girish over Barrowfen in the advice that it gave. As explained in detail above, S&B should have advised Girish (as director of Barrowfen) to update Barrowfen's register of members to record Bedford's ownership of 60,000 shares, so that Bedford could proceed with the EGM on 8 May 2014 (or alternatively, at the very least, S&B needed to advise Barrowfen to make an immediate application for rectification seeking this relief). S&B should not have advised Girish to write up the Mr DP Trust and the Mrs PD Trust in the register of members in a way that prolonged Girish's control (and without this advice, as recognised in paragraph 2.3 of the note of conference with Jonathan Russen QC [F2/383/2772], neither the Mr DP Trust nor the Mrs PD Trust could or would have voted to block a resolution supported by Bedford). S&B should also have advised Barrowfen to accept Suresh's confirmation that he had not resigned as a director (n.b. if Prashant and Suresh had majority shareholder control they would have been able to pass a resolution to reinstate him in any event).

234. If S&B had provided appropriate advice to Barrowfen, the likelihood is that Girish would have followed it. In cross-examination, Girish confirmed that if Mr King had advised him to write up Bedford as a member, he would have accepted that advice and acted upon it [Day8/p.34, line20 – p.35, line 2]. He further explained that the "self-help" approach to writing up the register of members was based upon the legal advice he received [Day8/p.52, lines 10-13] [Day8/p.53, lines 11-18]. He also confirmed that if S&B had advised him to accept what Suresh was saying that he had not resigned as a director, he would have followed that advice because he was "basically depending on the professional advice from the people who were acting for Barrowfen" [Day7/p.120, line 19 – p.121, line 10].

> 235. Whilst Girish provided untruthful instructions to S&B about the authenticity of the documents upon which he relied, the evidence shows that when S&B gave him clear legal advice, he followed it. For example, Girish did not contest Bedford's claim to rectify the register of members on the advice of Mr King. He also ultimately consented to Suresh's claim that the Purported Director Resignation Letter was not an authentic letter upon the advice of Mr King. That Girish would follow S&B's legal advice was also seen in his letter of 3 March 2014 in relation to Bedford's requisition of an EGM [F1/252/1651]: "In light of the above can you kindly advise if Barrowfen and the writer can refuse to recognise [Bedford] call for a meeting. Are there any alternatives for the writer!" This wording indicates that whilst Girish wanted to deny Bedford's rights to call an EGM, if Mr King had provided Girish with clear advice that he should and could not do so, he would have followed that advice.
>
> 236. Secondly, in circumstances where the director giving instructions to S&B was subject to a clear conflict of interest, S&B should have provided separate advice to Barrowfen about these issues (to Suresh, as the other director, alternatively to the shareholders – see *Newcastle International Airport Ltd v Eversheds LLP* [2015] BCC 794 at [79] – [85] [AB/Tab 47]) and/or it should have ceased acting for Barrowfen due to the conflict of interest. In either of those circumstances, the likelihood is that Bedford, Prashant and Suresh would have taken immediate steps to take control of Barrowfen's board, which would have included (i) proceeding with the EGM on 8 May 2014, and putting the burden on Girish to bring a legal challenge to the effectiveness of the appointment of Prashant as a director at that meeting (which he would not have done, as shown by his failure to defend Bedford's rectification proceedings), and/or (ii) if necessary, bringing immediate rectification proceedings to regularise the position. The evidence shows that Bedford, Prashant and Suresh were taking active steps, with the assistance of Withers, to take control of Barrowfen at the time and if S&B had provided the advice set out above and/or ceased acting on the grounds of conflict, the likelihood is that they would have taken immediate and robust action to take control. Prashant evidence that he only agreed on behalf of Bedford not to proceed with the meeting of 8 May 2014 because he trusted that an investigation by an English firm of solicitors would quickly establish that Bedford was in fact a member of Barrowfen and advise the company to acknowledge Barrowfen's membership was unchallenged: paragraph 68 of Prashant's w/s [B/1/15]."

120. It is clear, therefore, that Barrowfen continued to maintain its pleaded case at trial. It is also clear that counsel were still asking me to consider the conduct of Girish and S&B separately in deciding whether their breaches of duty prevented Prashant and Suresh from taking control. But by closing submissions, however, they were submitting that this was an issue which had to be determined on a loss of a chance basis. Finally, in the remainder of their closing submission counsel continued to draw no distinction between the claim against Girish and the claim against S&B: see paragraphs 237 to 264. For example, they

posed the question "Quantification: what lost rental income has Barrowfen suffered by reason of the attempts to maintain control?" They then answered that question as follows:

> "245. In the recovery of equitable compensation for breach of fiduciary duties by S&B and breach of directors' duties by Girish, Barrowfen is entitled to recover for all losses caused by the breaches of duty (in the sense that the loss must flow directly from the breaches). Foreseeability of loss and remoteness is irrelevant: see *AIB Group (UK) place v Mark Redler & Co Solicitors* [2015] AC 1503 at [89], [133] – [138] [AB/Tab 48]; *Swindle v Harrison* [1997] 4 All ER 705 at 715 h – 718 b [AB/Tab 18].
>
> 246. To quantify the lost rental income caused by the delay, it is necessary to establish (1) the length of delay to the completion of the development of the Tooting Property; and (2) the monthly rental income that Barrowfen would have generated from the developed Tooting Property.
>
> 247. In relation to the length of the delay, it is common ground that if works on either the Unamended Original Development Scheme or the Amended Original Development Scheme had commenced in January 2015 (or sometime thereafter), they would have completed within 20 months: see paragraph 2.01 of the Joint Statement [C/10/566]. If construction had commenced in January 2015, the development would therefore have been completed by September 2016. This confirms Mr Radmore's evidence that the development was due to be completed by September 2016 in time for the 2016/17 academic year: paragraph 28 of Mr Radmore's w/s [B/3/91].
>
> 248. In the real world, the evidence is that the Revised Development Scheme is due to be completed in April 2021 [Day4/p.170, lines 16-24].
>
> 249. Barrowfen therefore claims for the delay of up to 55 months from September 2016 (when the Amended Original Development Scheme should have been completed) until April 2021 (when he Revised Development Scheme will be completed)."

121. In the Judgment, I accepted the submission that I should consider the conduct of Girish and S&B separately in deciding whether their breaches of duty prevented Prashant and Suresh from taking control. I also accepted counsel's submissions on the facts in relation to Girish and found that if he had complied with his duties as a director, Prashant would have been appointed at the meeting on 8 May 2014: see [579]. I did not accept their specific submission that if S&B had complied with its duties, Prashant would have been appointed on 8 May 2014. But I accepted their broader submissions on causation and held that that Prashant would have been appointed by September 2014: see [594] to [596].

122. Although I dealt with Girish and S&B separately in addressing this issue, I treated it as a loss of a chance issue because this is what I had been asked to do. Moreover, I expressed my misgivings about this at [328] and it has been necessary for me to revisit the point in

dealing with the Cumulation Issue. I accept that I drew no distinction between the claims against Girish and S&B thereafter in assessing damages or equitable compensation. But I did so because Barrowfen's counsel made no distinction between them and did not submit that I should assess damages or equitable compensation for Girish and S&B on a different basis.

123. I have corrected the error which I made in relation to the costs of the Bedford Rectification Claim. In my judgment it is not otherwise open to Barrowfen to challenge the award of damages or equitable compensation which I made against Girish. I assessed damages in accordance with the case which Barrowfen advanced in the Re-Amended Particulars of Claim and if it wished to argue that I should have assessed damages on a different basis for Girish and S&B, Barrowfen ought to have applied for permission amend. It would also have been necessary for Barrowfen to apply to withdraw the concession which counsel made in paragraph 235 of their Written Closing (above).

124. I have no doubt that the decision which counsel took to run the same case against Girish and S&B was a pragmatic one. Given the number of issues in play and the range of different findings which I might have made in relation to breach of duty, it would have been very difficult for them to predict an outcome in which I would be required to assess damages or equitable compensation on a different basis against Girish and S&B or what effect it would make on the ultimate figures. It is far too late for Barrowfen to have a change of heart now.

125. In any event, I am far from satisfied that Mr Dawid was correct to submit that I should not have applied the loss of chance percentage to any award of damages or equitable compensation against Girish. Although I found that Prashant would have been appointed a director if Girish had complied with his duties, the claim against him still depended on the hypothetical conduct of a number of third parties and I set out the relevant counter-factual factors at [597] to [619] and [627]. It may be that there would have been some justification for adopting a higher loss of chance percentage in relation to the Company Claims. But for the reasons which I have already set out in some detail, I am not prepared to entertain such an argument now.

I. Interest

126. Before applying the credit for capital appreciation and the loss of chance percentage I

found that Barrowfen's losses on the Company Claims amounted to £4,822,797.09: see [678]. I have also found that before applying the loss of chance percentage Barrowfen's losses on the Administration Claim were £3,498,157.09: see [680]. Barrowfen also claims interest on these sums and Mr Dawid submitted that it was entitled to recover interest not just on the net sum after deduction of the capital appreciation (which arose on the completion of the Revised Development Scheme) but on the total losses which it had incurred before that date. I deal with this issue first. I then deal with the applicable rate. The parties did not ask me to determine the date or dates from which interest should run in the expectation that they would be able to agree figures once I had decided the issues of principle.

(1) The Principal Sum

127. It was common ground that the statutory power to award interest did not extend to the gross income losses which Barrowfen had suffered before the application of the credit for capital appreciation. The editors of *McGregor on Damages* 21st ed (2021) provide the following explanation at 19—042 (footnotes omitted):

> "A further limitation on the awarding of statutory interest also stemming from the fact that it may only be recovered on the damages awarded and not on any higher amount has come to the fore. Where the defendant's negligence causes the claimant to lose a particularly profitable sale of a property which the claimant is only able to sell later but before judgment at a reduced price or which they are still retaining at judgment at a reduced value, and their damages are calculated at the profitable resale price less the reduced price or value, statutory interest falls to be given on this net figure and is not available on the profitable resale price lost despite the fact that this loss has continued for some considerable time after its accrual. This result the claimants had eventually to concede in *Blue Circle Industries v Ministry of Defence* where their property, damaged by the defendants' breach of statutory duty, had not, as anticipated, been profitably sold and was still retained at judgment."

128. Mr Dawid submitted, however, that Barrowfen was entitled to claim interest as damages. He drew my attention to the reply to S&B's request for further information in which Barrowfen had claimed damages for the lost opportunity to reinvest and generate a return on the annual rental income which it would have received from the Amended Original Development Scheme. He also drew my attention to the claim for interest under the equitable jurisdiction in the Re-Amended Particulars of Claim.

129. I am satisfied that Barrowfen has adequately pleaded a claim for interest as damages on the basis that it would have re-invested any profits and generated a return on its income from the Tooting Property. I am also satisfied that Barrowfen has proved its claim. Prashant gave evidence that Barrowfen would not have used surplus funds to pay off the Barclays loan (or any other lender such as RBS or Investec) but would have looked for alternative investment opportunities. If he had been unable to identify any individual opportunities, he would have returned the funds to the Asian Agri portfolio.

130. Accordingly, I hold that Barrowfen is entitled to claim as damages the lost opportunity to earn interest on the total sum of £4,822,797.09 in relation to the Company Claims and the lost opportunity to earn interest on the total sum of £3,498,157.09 in relation to the Administration Claim. I have assessed the percentage chance of Barrowfen receiving those payments at 60% and 32% respectively. I therefore award interest as damages on 60% of £4,822,797.09 (i.e. £2,893,678.20). I also award interest as damages on 32% of £3,498,157.09 (i.e. £1,119,410.20). If the parties are unable to agree the relevant date or dates from which interest should run, I will decide that issue.

(2) Rate

131. Mr Dawid submitted that I should award interest at 3% over base. He relied on the rate of interest which Barrowfen paid Barclays and under cover of a letter dated 1 June 2022 Withers sent me a schedule showing that Barrowfen paid 3.6% over base from 20 January 2020 until (at least) 24 March 2022 and that this resulted in a spread of between 3.6% and 4.3% interest per annum. He also submitted that Barrowfen would have used surplus funds to pay down the RBS facility.

132. I am not satisfied that I should award interest on this basis. Barrowfen's pleaded case was that it would have re-invested any rental income and Prashant's evidence was consistent with this. It was his evidence that surplus funds would have sat in Asian Agri and that his priority would not have been to pay down the bank debt but to declare dividends in favour of Asian Agri to enable it to pay off the loans on its leveraged investment portfolio.

133. I prefer, therefore, to base my decision on Prashant's evidence about the rate of return which Asian Agri has recently received from its leveraged portfolio of investments at the Bank of Singapore. His evidence was that the return was between 1% and 3% although

it had been as low as zero. On this basis, I find that Barrowfen is entitled to recover interest at a rate of 2% above base rate. I do so on the basis that this was the median figure after its own interest costs. Again, if the parties cannot agree about the appropriate base rate to be applied, I will also decide that issue.

V. Disposal

134. I therefore confirm and make final my provisional finding that Barrowfen is entitled to damages or equitable compensation of £1,388,768.05 in respect of the Company Claims against both Girish and S&B. I also award damages or equitable compensation of £316,792.03 against both Girish and S&B in respect of the Administration Claim. Finally, I correct the Judgment and award damages or equitable compensation of £28,000 in respect of the costs of the Bedford Rectification Claim against Girish only. I dismiss the balance of Barrowfen's application to the correct or amend the Judgment.

135. I also award interest as damages or equitable compensation at the rate of 2% above base rate or rates on the loss of a chance percentage of the gross rental income which Barrowfen would have earned from the Amended Original Development Scheme against both Girish and S&B. In particular, I award interest on £2,893,678.20 (i.e. 60% of the gross rental income) in relation to the Company Claims and interest on £1,119,410.20 (i.e. 32% of the gross rental income) in relation to the Administration Claim. I also award interest at the same rate against Girish on the award of £28,000 for the costs of the Bedford Rectification Claim.

136. I leave it to the parties to try and agree the date or dates from which interest will run, the amount of any interest and the form of any order. I also leave it to the parties to agree whether a further consequential hearing is necessary either to deal with costs or for permission to appeal. But in any event, I extend time for any application by any of the parties for permission to appeal until 21 days after I have made or approved a final order.

VI. Postscript

137. When I circulated the original draft of this judgment, I had awarded Barrowfen £1,119,410.20 in respect of the Administration Claim and without making any deduction for the capital appreciation. By email dated 21 June 2022 Mr Folkard raised this point and submitted that I should have required Barrowfen to give credit for the capital

appreciation in relation not only to the Company Claims but also in relation to the Administration Claim. This produces the following calculation (£3,498,157.09 – £2,508,182) x 32% = £316,792.03: see [134] (above). By email also dated 21 June 2022 Mr Dawid confirmed that this was the correct figure.

138. Both counsel are right but although the point is agreed, it is important for me to explain why Barrowfen must give credit twice. This can best be explained by assuming that Barrowfen had failed on the Company Claims and had only succeeded on the Administration Claim. In that event it would have been entitled to the lost opportunity to carry out the Amended Original Development Scheme but at a later date. It would still have been required to give credit for the increase in the capital value of the Revised Development Scheme.

139. As it is, I have found that Barrowfen succeeded on both the Company Claims and the Administration Claim and lost two separate and distinct opportunities to develop the Tooting Property. But damages to compensate Barrowfen for each lost opportunity must reflect the increase in capital value each time. Once one focusses on the point, it is an obvious one. But I am grateful to Mr Folkard for pointing it out and to Mr Dawid for conceding the point quickly.