Neutral Citation Number: [2020] EWHC 17 (Comm)

Case No: LM-2017-000087

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

Rolls Building.
Fetter Lane
London
EC4A 1NL

Date: 8th January 2020

Before:

HIS HONOUR JUDGE PEARCE

- -

Between:

(1) Mr DANIEL DONOVAN **(2) NALED LIMITED**	**Claimants**
- and –	
GRAINMARKET ASSET MANAGEMENT LLP	**Defendant**

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- -

Andrew Green QC and Dominic Howells (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimants**
Jonathan Seitler QC and James Kinman (instructed by **Howard Kennedy LLP**) for the **Defendant**

Hearing dates: 13th, 14th, 15th, 16th, 17th May 2019, 1st July 2019
Judgment handed down at Manchester Civil Justice Centre on 8th January 2020

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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.

Introduction

1. The First Claimant, Mr Daniel Donovan, has a history of working in the finance industry. He and members of his family are the beneficial owners of the Second Claimant, NALED Ltd.

2. The Defendant, Grainmarket Asset Management LLP ("GAM"), is a limited liability partnership engaged in the business of property development, investment and management. It is controlled by Mr Mark Crader.

3. During (approximately) 2013 to 2015, Mr Donovan and Mr Crader (through the vehicle of GAM) worked together in the development of property. It is Mr Donovan's case that he and his company, the Second Claimant, are owed money by GAM pursuant to an agreement entered into by the three parties relating to property development and investment.

Background

4. Mr Donovan and Mr Crader both worked for Lehman Brothers in the 1990s. They jointly invested in several properties but, in 2001/2002, Mr Donovan left Lehman Brothers and started his own fund, Front Point Partners; Mr Crader bought him out of their joint investments and thereafter they went their own separate ways for a while, in what appears to have been an amical parting.

5. Subsequently, Mr Crader incorporated two entities: in 2003, a company called Optimum Property Management Limited, which was concerned with the day to day management of properties (rent collection, service charge management, facilities management and maintenance and the such like); and, in 2005, GAM, a company whose business involved raising funds from investors and investing them, it being concerned with asset management at a strategic level.

6. One of the funds raised by GAM was held via a Luxembourg entity, PGF II SA ("PGF"). The relationship of GAM and PGF became difficult leading to litigation which Mr Crader describes in his witness statement as having involved "*detailed and acrimonious correspondence"* and having been "*heavily contested."*

7. The PGF dispute involved an office development at Lime Street in the City of London. Ultimately Mr Donovan and Mr Crader jointly acquired the property at Lime Street. That was a separate venture to the one that is central to this litigation. It is peripherally relevant in so far as it was an independent need for the men to maintain a professional working relationship.

8. In around 2012, Mr Crader and Mr Donovan began to discuss forming a joint venture to take advantage of the opportunities presented by a change in planning law by which it had become easier to convert property from commercial to residential usage. This was known as "*Permitted Development"* and on occasions is referred to as "*PD"*. It was Mr Crader's evidence that the PGF experience had led him to be reluctant about managing other people's money, but that Mr Donovan was enthusiastic for this.

9. Eventually, they agreed that Mr Donovan and GAM would enter into a joint venture agreement ("the JV agreement") in which money would be raised from investors and used to purchase and convert such properties. Each intended development project within the joint venture would be purchased by a limited partnership (a "JVLP") made up of companies in the GAM group, Mr Donovan (through NALED) and other investors that had entered into a limited partnership agreement ("LPA"). The JVLP would enter into a Property Management Agreement ("PMA") with GAM pursuant to which GAM would redevelop the property and thereafter manage it (with some facilities management jobs subcontracted to another company associated with GAM, Optimum). Investors would pay GAM an administration[1] fee calculated as a percentage (between 0.8% and 1%) of their investment in the JVLP. Of this fee, GAM would retain 90% and pay 10% to Mr Donovan. This split reflected the fact that Mr Donovan was acting on his own account, whereas GAM had a team of around 28 people[2], with the overheads of premises in London.

10. Since Mr Donovan (through NALED) and GAM would be liable to pay the administration fee but would be entitled to receive their share of the fee through

[1] At times called a management fee.
[2] This was a figure given by Mr Crader. It was suggested on behalf of Mr Donovan that this figure was an understatement and that the figure of 35 that appears in the documents is more accurate. I do not think that anything turns on this issue.

the arrangement referred to in the previous paragraph, it was later agreed that such fees would be rebated so that actual payment of the administration fees by GAM and NALED was not necessary.

11. On sale of the property, GAM would receive a further fee from the investors, called a performance fee, calculated by reference to the JVLP's return on investment. Mr Donovan and GAM initially contemplated that Mr Donovan would be paid 45% of the performance fee. That figure was later reduced to 40%.

12. In all, five projects were acquired using JVLPs as part of the JV agreement. They are conveniently known by the names of the places in which they were located, namely Slough, Farnborough, Elstree, Reading and High Wycombe. York Capital ("York") were investors in all but the first of the projects, that is Slough.

13. In around February 2015, the joint venture came to an end. Mr Donovan has subsequently worked as Chief Executive Officer of Core Industrial, an Irish real estate investment trust that is affiliated to York.

The claim in summary

14. By these proceedings, Mr Donovan seeks to recover:

    (a) 40% of the performance fees received by GAM in respect of JVLPs, on the grounds that Mr Donovan was unconditionally entitled to such fees, alternatively

    (b) 40% of the performance fee on the ground that Mr Donovan had wholly or substantially performed the work upon which payment to him was conditional; alternatively,

    (c) A quantum meruit award in respect of the services that he provided to GAM by reason of GAM's free acceptance of his obligations; and in any event,

    (d) The sum of £12,500, being the balance of the total sum that the Claimants contend were agreed to be due as administration fees.

15. The Second Claimant, NALED, contends that it is entitled to recover sums which have been deducted by GAM from its share of the proceeds of sale of the joint venture investments such sums reflecting performance fees that the Defendant contends were no longer subject to the rebate referred to at paragraph 10 above, once Mr Donovan had renounced the JV agreement.

16. The Defendant says Mr Donovan renounced this contract in or around January 2015, at a time when he had not performed all his duties under the joint venture, alternatively had not substantially performed those duties. Accordingly, he is not entitled to payment of the performance fee.

17. In its counterclaim, GAM seeks to recover from Mr Donovan the sum of £12,500, being the sum advanced to Mr Donovan by way of administration fee to which (on GAM's case) he is not entitled. GAM's claim is the corollary of the Mr Donovan's claim for £12,500. If he fails in his claim, this claim succeeds; conversely if he succeeds, this claim fails.

18. Further, GAM counterclaims against NALED in respect of performance fees that were not deducted from distributions made to NALED as an investor in the schemes, which sums the Defendant says should have been deducted once the JV was terminated.

The trial

19. At trial, the lay witnesses called by the Claimants were Mr Donovan himself and a business acquaintance, Mr Hall. The statement of his wife, Ms O'Donoghue, was admitted without challenge. The Defendant called Mr Crader and GAM's chief financial officer, Ms Morriss.

20. Both parties called expert evidence on the value of Mr Donovan's services. The Claimants called Mr Bell, the Defendant, Mr Virji.

21. Evidence was heard during the week of 13th to 17th May 2019, with the service thereafter of written submissions. Oral submissions were heard on 1 July 2019 and judgment was reserved. After the judgement was sent out in draft, written submission were received from both parties setting out suggested corrections

and from the Defendant seeking clarification on two issues. This judgment takes account of those matters.

The evidence

22. A very large number of documents and written communications have been created as part of the dealings between Mr Donovan and Mr Crader. The majority of these are emails and many have little if any significance to the dispute before the court. In this judgment, I quote from or summarise the key documents and the relevant evidence from the witnesses relating to those documents and associated events in chronological order.

23. As noted above, Mr Donovan and Mr Crader began to discuss a new joint venture in 2012. On 26 November 2012 (**G1/76**[3]), Mr Crader emailed Mr Donovan under the subject line "*Re: Malaysia"* and referred to having *"the capacity to manage another £300-£400m of active management stock… I would target active management opportunities…I would like a lock-in for 5 years but to operate a grey market depending on the shareholder make up. However happy to tailor as this would be your area."*

24. It was put to Mr Crader that this represented the reality of their relationship – he (through GAM) was to manage the stock and Mr Donovan was to deal with investment strategy. Mr Crader said that this was part of a discussion as to how they would work together, but that he wanted "*someone who was investing alongside me, to help me make the difficult decisions*."

25. On 30 November 2012 (**G1/91**), Mr Crader emailed Mr Donavan under the heading "*New fund my thoughts on profit distribution."* The email contained the following proposals:

"*Firstly whatever we do I want to be robust and therefore fair and that will continue to be so for the 5-7 year life (maybe more) of whatever we set up…*

Admin fee is split 90/10 in GAM's favour. GAM will be responsible (within this fee) for office space, staff to run the properties and head office along with all

[3] References in bold are to volumes and page numbers in the trial bundle.

other ancillary costs. GAM would still continue to run its other funds from the same office GAM will also pay your reasonable expenses and provide you with an office when you come to London if required. Your 10 in short will be just for you and all expenses will be for GAM. You should be aware that all the properties I am involved in are property managed by Optimum Property Management which receives a fee via the service charge/tenants for this. I envisage this being the case for our fund.

Performance fee split 55/45 in GAM's favour. I think the slight slope for GAM is due to the Admin fee paying you a salary.

Set up costs, these should be split equally between you though we should seek to make these success based just in case it blows up in our face."

26. In cross examination, Mr Donovan accepted that this was the first email about the proposed terms of the joint venture. He understood that a salary would only be payable once a fund had been set up.

27. By an email dated 6 December 2012 (**G1/207** and **G1/224**) from Mr Crader to Mr Farooq Ahmed (into which Mr Donovan amongst others was copied), Mr Crader sent out a document called "*Grainmarket Company Structure*." That document describes Mr Crader as "*Managing Partner*" and Mr Donovan as "*Investor Relations/Investment Advisor*". Similarly, in an Investor Presentation produced on 10 December 2012, Mr Crader is described as "*Managing Partner*" and Mr Donovan as "*Investment Partner*." Those with responsibility for finance, accounting property management, maintenance and the such like are shown as answerable to Mr Crader. In so far as those lines of authority might suggest that Mr Donovan's duties were limited to investment issues, Mr Crader emphasised in cross examination that GAM's business structure was not hierarchical. In her evidence, Ms Morriss agreed with this.

28. On 14 December 2012, the first draft of a documents entitled "New Fund – Heads of Term" (**E1/1**) was produced by Mr Crader. The Heads of Terms ("HoT") describes the venture as, "*A new property collective investment scheme marketed jointly but utilising the track record of GAM. Each of the parties will devote to the venture such time as the venture reasonably requires though it is*

envisaged the property investment decision will be made by GAM in consultation with D Donovan…" As to costs, the HoT provided, "*All costs directly attributable to the Venture will be borne equally but*[4] *the Parties. The Venture will contribute to the running costs of GAM's office based on the full reimbursement of any extra running costs incurred by GAM during the period of the Ventures operation. For the avoidance of doubt, this will include contributions to the partners of GAM and its employees save as for Mark Crader. The costs will openly available for the parties to view."* As to revenue, the HoT provided, *"The net administration fee after all costs will be split equally between the parties. The performance fee will be split 55% for GAM and 45% for DD*[5]." The HoT appointed Optimum Property Management as property manager to the properties once they were let.

29. In his witness statement (paragraph 25), Mr Donovan described this as "*the first iteration of the New Fund Agreement."* He states in paragraph 27 of his witness statement that, by the start of 2013, it was his understanding that he and GAM had "*agreed to enter a joint venture."* In cross examination, he agreed that he had not taken exception in writing to any of the terms in this document.

30. Mr Donovan was pushed in cross examination as to how it was envisaged that the fixed costs or overheads of the new venture would be dealt with. Mr Donovan stated that it was anticipated that GAM would pay those overheads – as he put it at one point, "*…basically Grainmarket would deliver its infrastructure to this venture. However if we had to, for instance, hire someone new, if we had to do anything that was directly incremental, I think is the word I use, to this venture, then the venture would have to pay for it."*

31. Mr Crader emailed the HoT to Mr Donovan under cover of an email dated 14 December 2012 (**G2/285**), describing it as "*my first stab at our JV term sheet."*

32. In a letter dated 3 October 2016 (**H/4**), Mr Crader's solicitors, having asserted that no agreement was ever concluded between GAM and Mr Donovan, proceed to state that, "*even had any agreement been concluded, the best evidence of its*

[4] Sic in the version of 14 December 2012; changed to "*by*" (which makes more sense) in the version of 6 March 2013 referred to below.
[5] Mr Donovan.

terms" would be the HoT. In cross-examination, Mr Crader stated that he could not say whether an agreement was concluded – "*we were constantly discussing and the agreement was constantly evolving."* He described the HoT as one of the best contenders as evidence of the terms of any agreement, though was not able to identify any other contenders.

33. In his witness statement, Mr Crader says that the HoT *"was an evolvement of the earlier discussions".* A meeting took place in early January 2013, but Mr Crader says, *"I do not recall agreeing that the Heads of Terms were agreed in full or that we had reached agreement in particular to the costs of the venture and my proposal that the venture share the cost of GAM's offices, member and employees. My understanding was that the Heads of Terms were a potential framework that would be negotiated and finalised in due course once there was more certainly to the venture"* (paragraph 29 of his witness statement.).

34. In his witness statement at paragraphs 35 to 42, Mr Donovan describes the initial fundraising efforts of the parties. Mr Crader describes similar efforts to market the venture in the first half of 2013 at paragraphs 32, 33 and 36 of his statement.

35. On 11 February 2013, a potential investor in a JVLP requested a completed copy of a due diligence questionnaire put out by INREV (the European Association for Investors in Non-Listed Real Estate Vehicles). Mr Crader completed the document and sent it to Mr Donovan under cover of an email on 13 February 2013 (**G2/421**). In response to a question about the roles of the principal key personnel in relation to asset management, acquisition, disposals and fund management, the document says, amongst other things, "*Mark Crader is responsible for identifying acquisitions and for organising the banking finance for acquisitions…Dan Donovan is responsible for external investors into the fund and general strategy."* It is to be noted that an earlier version of that document (**G2/420.31)**, probably filled out on 11 February 2013 (see email of that date at **G2/420.1**) omits the words "*and general strategy*" from the description of Mr Donovan's role. Mr Donovan said of this amendment that it was a reference to strategy in terms of raising funds, not strategy in terms of property investment.

36. Mr Crader said of the descriptions of roles in the INREV document that "*when you are marketing people want roles"*, but "*we are not a sort of roles based company."*

37. Paragraph 2.6.7 of the INREV questionnaire asked whether "*the company had been involved in any arbitration, litigation or disputes with investors in your real estate funds in the last five years."* The answer provided (**G2/432**) was "*We have never had a dispute with any of our investors. We are currently involved in Pt8*[6] *proceeding which should be non-confrontational to define the scope of our Property Management Agreement with one of our funds. This clarification is important for the fund's tax status amongst other matters. As it is a pt 8 proceeding there are no sums in dispute and no losses. It is important that we get this clarification to protect the fund's tax status (amongst other things) and investors funds."*

38. In cross examination, Mr Crader accepted that the part 8 proceedings were not non-confrontational. He accepted that he knew these proceedings were going to be (in his words) "*potentially difficult"* from the time that he approached Mr Donovan as an investment partner in late 2012 and that ultimately they were "*heavily contested."* He denied deliberately playing down the extent to which the proceedings were confrontational.

39. Ms Morriss was also asked about this document. She said that she thought that the answer at paragraph 2.6.7 had been drafted by Mr Crader and herself. She described the wording as "*a fudge"*, it being "*the best truth we could put down."* She accepted that, by February 2013, the PGF dispute was "*highly confrontational."*

40. On 5 March 2013 (**G3/546.1**), GAM entered into an "*introducer agreement*" with Richard Davies Investor Relations Ltd (as the name suggests, a corporate vehicle for Mr Richard Davies' services). Clause 2.2 of the agreement sets out the services that it was anticipated that that Mr Davies would perform. It was suggested to Mr Donovan in cross examination that these were no different than the services that he contended that he was obliged to perform under the Joint

[6] A reference to Part 8 of the Civil Procedure Rules.

Venture, the implication being that, if the JV was employing others to effect introductions, Mr Donovan's role cannot have been exclusively relating to fund raising. His answer was that Mr Davies would simply introduce people whereas he would sell the fund.

41. In cross examination, Mr Crader accepted that there was never an overt discussion about the parties' relative roles in the joint venture, but that they merely worked together and share the administration and performance fees.

42. On 6 March 2013, Mr Crader emailed GAM's lawyers (**G3/547**), copying in Mr Donovan, a revised version of the document "New Fund – Heads of Term." **(E1/2**). The email described the document as "*the basic term sheet for Dan Donovan's and my new venture"*. It contained essentially the same description of the venture as referred to at paragraph 25 above. The reference to costs was amended to read, "*All costs directly attributable to the Venture will be borne equally by the parties and these costs must be agreed by the parties in advance of the cost being incurred."* The revenue divide remained the same save that reference was made to a fee payable in the event that "*the parties successfully contribute either directly or by third party to any additional equity in any of GAM's currently managed schemes"* in which case Mr Donovan would be entitled to fees on the same basis of any new scheme.

43. On 15 March 2013, Mr Donovan and Mr Crader received an email from First Avenue (**G3/591**) a marketer with a proposed marketing arrangement. Again, it was suggested on behalf of GAM that this was merely a duplication of the work that Mr Donovan was saying that he was obliged to perform.

44. On 5 April 2013 (**G4/726**), Ms Camfield, a solicitor to GAM emailed Mr Crader with a number of questions about the Joint Venture, including "*What is Dan's role going to be in relation to the new venture*," to which Mr Crader responded *"General marketing and fund raising, he will also advise on deal structure etc."* Mr Crader was asked about this answer in cross examination. He drew attention to the later response to a question about Mr Donovan's involvement in GAM's existing schemes, to which Mr Crader replied *"there is a probability Dan will be involved in PGF. If this happens, Dan's equity raising contribution will be*

recognised…" He said that the response to the earlier question about Mr Donovan's role was also a reference to his involvement in general marketing, fund raising and deal structure in relation to PGF. When it was pointed out that the earlier question explicitly referred to the "*new venture"* which could not be a reference to PGF, Mr Crader appeared to accept the point but went on to say that the email was "*badly drafted".*

45. More generally, Mr Crader accepted that he had taken the lead in aspects of asset management (such as the negotiations for the purchase of the property in Reading) but that he and Mr Donovan "*did everything in consultation."*

46. On 6 April 2013, Mr Crader, Mr Donovan, GAM, Grainmarket Properties Limited (another company in the GAM group) and four other people (Mr Hart, Ms Morriss, Mr Hatfield and Mr Mallon) entered into an agreement headed "the LLP Agreement" (**E1/4**) ("*the 6 April 2013 LLP agreement").* Whilst Mr Donovan is a signatory to the agreement, he is not stated to be "*an initial member*" of the LLP. The third recital refers to the initial members having agreed to the admission of new members prior to the date of that agreement. The fourth recital refers to the admission of Phillip Mallon (but not Mr Donovan) as a member from the date of the agreement. It would thus appear that the document anticipated that Mr Donovan was a new member admitted before the date of that agreement.

47. Several clauses of the 6 April 2013 LLP agreement merit mention:

(a) By clause 15.2, it was provided, "*Any member other than Mark*[7] *shall forthwith cease to be a member (and a designated member) and shall be expelled from the LLP upon being served with not less than 14 days' notice by Mark if any of the following occur … 15.2.5 the member resigns as a member or (save with the consent of Mark) a designated member."*

(b) By clause 16.1, it was provided, "*In the event that any member other than Mark is expelled for any of the reasons specified in clause 15.2, then*

[7] Mr Crader

16.1.1 he shall not be entitled to receive any share of the profit of the LLP from the date of his ceasing to be a member"

48. Subsequently a draft amended version of the LLP agreement was produced[8] (**E1/23 – "***the 21 April 2013 draft***"**) which differed materially from the 6 April 2013 LLP agreement, in that it referred specifically to Mr Donovan as a member (stating that he had been admitted as a member on 6 April 2013, which seems to contradict the implication of the 6 April 2013 agreement referred to at paragraph 46 above) and specified responsibilities on his part. As amended[9], clause 10 of that agreement reads thus:

"10 Members' obligations and duties

10.1 ~~At~~ Subject to clause 10.2, at all times the Members other than Mark shall:

10.1.1 devote to the Business (except during any leave …) such time and attention as shall be necessary for the proper performance of his duties…

10.1.4 conduct himself in a proper and reasonable manner and use his best skill and endeavour to promote the business.

10.2 Clauses 10.1.1 and 10.1.4 shall apply to Dan as if references to "the business" were to "the joint venture"…"

49. "*Joint venture*" is defined by the first recital of the 21 April 2013 draft[10] as "*the establishment of a new property collective investment scheme to be marketed jointly by Dan and the LLP".* That recital also defines "*joint venture costs,"* "*joint venture income"* and "*joint venture profits"* and the schedule to the document deals with the allocation of joint venture profits.

[8] Apparently on 21 April 2013 – certainly the evidence is that this is the document attached to the email of 22 April 2013 referred to at paragraph 53 and described as "*LLP agreement 21 April 2013*".
[9] The parts that are struck out in this passage indicate original text from the 6 April 2013 LLP agreement; parts that are underlined are added text in the 21 April version.
[10] Neither the definitions nor the schedule referred to in this paragraph appear in the 6 April 2013 LLP agreement.

50. The 21 April 2013 draft retained clause 15.2, the material parts of which are set out at paragraph 47 above. Clause 16.1 was amended to read: "*In the event that any member other than Mark is expelled for any of the reasons specified in clause 15.2, then: 16.1.1 He shall not be entitled to receive any share of the profit of the LLP or the Joint Venture Profits (as the case may be) from the date of his ceasing to be a member."*

51. Mr Donovan stated (both in his witness statement and in oral evidence) that he and Mr Crader did not discuss the terms of the 21 April 2013 draft. Later, he said that he was not sure that he had ever read this document.

52. Mr Donovan was asked in cross examination about the assertion at paragraph 45 of his witness statement that "*As far as I was concerned my agreement with Mr Crader and Grainmarket was recorded in the New Fund Agreement, with enough clarity to prevent any misunderstandings and I did not think we needed a professionally drafted contract."* He said of this that in fact they had not put enough attention into the document. Later he added, "*I thought the New Fund Agreement was clear enough. Mark and I were very clear and explicit when we talked about it and then, you know, we went off and tried to do this. For some reason the two of us should have sat down and got this all done properly and gone through it and we didn't do that…"*

53. On 22 April 2013, Mr Crader emailed the LLP agreement to Mr Donovan (**G4/768**), stating "*I think it's right but I think we could have done it better ourselves – i.e. the HoTs we drew up are clearer."*

54. On 26 April 2013, Acanthus Partners Ltd, wrote to GAM confirming its appointment as a financial advisor to GAM. It was put to Mr Donovan in cross examination that this was yet a further occasion (in addition to the contact with Mr Richard Davies and First Avenue described above) in which it was proposed that GAM would pay for a third party to carry out work which Mr Donovan said was part of this area of responsibility. Mr Donovan described the costs as being "*incremental*"[11] and being intended "*to try and get the venture done."*

[11] By which I took him to mean a cost incurred as a necessary or desirable expense to achieve success in the joint venture.

55. Mr Crader's attention was drawn to an invoice from Acanthus to GAM for a monthly retainer (**G4/960**) and Mr Crader's corresponding email of 12 July 2013 (**G4/959**) which contains a request to Mr Donovan to pay 50% of the fee. Whilst he accepted that this request for payment was pursuant to the joint venture of GAM and Mr Donovan and in accordance with reference in the HoT to the equal division of costs attributable to the venture, Mr Crader did not accept that this showed that the parties had reached a binding agreement by the time of the invoice and email.

56. A marketing presentation dated 18 July 2013 (**G5/970**), described Mr Crader as the person who "*leads the acquisition of properties and manages financing relationships."* Mr Donovan was said to be "*an investment finance veteran"* who "*has been involved in Grainmarket's development at various periods since inception and continues to provide extensive strategic experience and support."*

57. During cross examination of Mr Crader, Mr Green QC for the Claimants drew attention to an email from Mr Crader to his lawyers dated 22 October 2013 which related to issues that had arisen in the PGF litigation. In the email, Mr Crader raises a series of questions about legal issues relating to contractual repudiation and the liability to pay fees (similar issues to those that arise in this case). Mr Crader accepted that, although not a lawyer, he had acquired some experience of legal issues over 30 years of work in the property industry.

58. In late 2013, the parties were in detailed negotiations relating to the purchase of Cornwall House, a property in Slough. The opportunity to purchase this property seems to have come to Mr Crader's attention on 12 November 2013. The parties had on board three family and friends investors willing to provide 10% of the purchase price each. The initial plan for the balance of 70% was that Mr Donovan (through NALED) would provide 70% and GAM/Mr Crader the remaining 20%; this was later modified to an arrangement by which Mr Donovan loaned money to GAM in order that GAM's/Mr Crader's share was equal to that of NALED/Mr Donovan.

59. On 25 November 2013, Mr Donovan emailed (**G5/1055**) Andrew Rice (described in the *dramatis personae* as *"a head hunter working in the*

investment/senior executive sector and an acquaintance of Mr Donovan") about the Slough project stating, "*As promised attached is a very brief write up re permitted development and an example of what can be done. Slough probably isn't the best address but the numbers do seem to work."* Mr Donovan accepted in cross examination that this was an example of how he could assess an opportunity in the property investment market at some level and indeed accepted more generally that he had searched for properties for purchase pursuant to the JV agreement. Mr Donovan emailed Mr Crader on 12 December 2013 (**G5/1145.1**) identifying a potential property for investment. Again, on 13 January 2014, Mr Donovan emailed Mr Crader about a property in Epsom (**G6/1237.2**). The Defendant pointed to an apparent contradiction between this and the assertion at paragraph 40 of his witness statement that Mr Donovan was not involved in searching for properties for the joint venture to acquire.

60. It was common ground that the original performance fee split of 55%/45% was at some point varied to the that the split of performance fees would be 60%/40% in GAM's favour. This variation is first recorded on 17 December 2013 (**G5/1163**). Mr Crader emailed Mr Donovan, stating, "*just to confirm the fee split of 60/40 in GAM's favour is to be levied on outside investors. In order to keep the booking transparent these admin fees (if any) will be charged on all investment but rebated back to you and I. Performance fees are levied on individuals in any event and GAM will not charge you any performance fee."*

61. In cross examination, Mr Donovan agreed that this email reflected a discussion about performance fees being rebated. Since the performance fees were to be split between Mr Donovan and GAM, there was no point in Mr Donovan (or his company NALED) paying such fees then being repaid them. Accordingly, the fees would be rebated. Mr Donovan did not accept that this was done for reasons of tax efficiency.

62. Mr Crader accepted that an agreement as to fee exemption/rebate for GAM and NALED was reached at around the time of the beginning of the Slough JV. He considered it to be part of the broader agreement between GAM, Mr Donovan and NALED. Mr Crader was asked about a letter from his solicitors dated 16

December 2016 (**H/13**), which referred to "*the idea that Naled ... will be relieved from enforceable contractual provisions"* as "*fanciful."*

63. In the meantime, as part of the preparation for the Slough JV, Mr Crader had emailed Ms Camfield of Brown Jacobson solicitors on 6 December 2013 (**G5/1069**) stating "*Dan should also have a share of the promote so how do we do that?"* In her response at **G5/1174,** Ms Camfield states, "*I just wanted to pick up with you on Dan's promote. There are two possible ways to deal with that: (1) a side letter between GAM and Dan, confirming that GAM will pay 40% of the promote for Slough to Dan; or (2) amend the PMA so the promote is paid 60% to the LLP and 40% to Dan. The only reason I have not gone ahead and made this amendment to the PMA is that it raises the question as to how responsibility for the delivery of services is shared between GAM and Dan and what happens either fails to do so for any reason and I wondered also whether option 1 might be simpler."* Mr Donovan said of these proposals in an email of the same day that he thought a side letter would be better (see **G5/1176**).

64. There was further communication about a side letter in emails of 8 January 2014, including (for example) an email from Mr Donovan to Ms Camfield asking whether she would be sending through a side letter (**G5/1182**).

65. Ultimately, on 10 January 2014, Ms Camfield emailed Mr Donovan and Mr Crader under the subject line "*Re: Slough – documents for signing*", attaching a document called "*D Donovan Slough JV LLP Priority Profit Share Letter. DOC*" and stating that a draft side letter was attached (**G5/1195**).

66. The Defendant contends that the document at **E1/44** is the letter said to be attached to that email. This is a draft from Mr Crader to Mr Donovan referring to the Slough JV LP and the 6 April 2013 LLP agreement and stating, "*For the purposes of the Members' Agreement, I agree that, for so long as you remain a member, you shall be entitled to a priority profit share equal to 40% (forty per cent) of all performance fees received by GAM under the PMA."*

67. Mr Donovan accepted in cross examination that the document was probably sent to him. However, he said that he was surprised to see the document during the disclosure process of the litigation, and that he had not seen it or signed it at the

time it was sent (or at least did not recall seeing it). Mr Seitler QC for the Defendant pointed out that, in another email of 8 January 2014, Mr Donovan had made detailed comments on the Slough PMA, a document sent to him by Ms Camfield on 8 January 2014. He suggested that it would be odd that Mr Donovan should read and comment on that document yet not read and comment on the side letter unless he was content with the terms of the latter document.

68. On 8 January 2014 in an email to Mr Donovan (**G5/1184.1)**, Mr Crader repeated the point about the rebating of fees: "*Just to confirm the agreement where we do not get charged fees for our investments in our joint venture (or if we do they get rebated) applies to all vehicles controlled by us – this would mean in the Slough JV LP Naled would not pay fees. Nor would any of my entities in this case, First UK, First Prop and Grainmarket. In Slough the only fees actually paid would be Pat Walsh, Tim Wilkinson and Eli Kopilov - these would be split between us – again I think we agreed 60/40 in my favour but if you think different please let me know?...*"

69. On 10 January 2014 (**G5/1195**), Vicky Camfield emailed Mr Crader and Mr Donovan, under the heading "*re: Slough – documents for signing"* commenting on the proposed Property Management Agreement and attaching a draft side letter from Mr Crader to Mr Donovan **(E1/44)**. That letter referred to the 6 April 2013 LLP agreement (described as "the members agreement") and an intended limited partnership relating to the Slough project. It stated, *"For the purposes of the Members' Agreement, I agree that, for so long as you remain a Member, you shall be entitled to a Priority Profit Share equal to 40% of all performance fees received by GAM under the PMA."*

70. On 24 January 2014, a limited partnership was formed relating to the project in Slough known as the Slough Joint Venture Limited Partnership ("Slough JV LP") (**E1/52**). On the same day, GAM, NALED, Mr Crader, Mr Donovan, Mr Hart, Ms Morriss and Mr Mallon executed a property management service agreement relating to Slough ("the Slough PMA").

71. The Slough PMA provided by clause 4.1.1 that GAM should "*do all things reasonably necessary or desirable to carry on and manage the business*

successfully on behalf of the vehicle" ("*the business"* being defined in clause 1.1 as the acquisition, management, modification, enhancement and disposal of Cornwall House, Slough). As a promoter, Mr Donovan was obliged to procure that GAM would perform these services.

72. Slough was the first project of the joint venture that had come to fruition. At around the time that it was doing so, the parties were also exploring the possibility of entering into joint investment projects with York. A friend of Mr Donovan, Mr Alex Maddox, introduced Mr Donovan to a representative of York, Mr Diego Arroyo Ornelas (see email of 14 January 2014, **G5/1207**). Mr Donovan met Mr Ornelas on 16 January 2014 (see email of that date from Mr Donovan to Mr Crader about the meeting at **G5/1211**). Thereafter there was further contact by both Mr Donovan and Mr Crader with Mr Ornelas and his senior, Mr Akbar Rafiq.

73. On 2 May 2014, York, GAM, Mr Crader and Mr Donovan entered into a master agreement ("the York Master Agreement") (**E1/118**). The York Master Agreement provided in summary as follows:

    (a) Mr Crader and Mr Donovan were each prohibited from offering investment opportunities in certain real estate assets without giving York a prior opportunity to invest. (An exception was made for GAM's "friends and family" investors);

    (b) GAM, Mr Crader and Mr Donovan agreed that they or their affiliates would invest at least 20% of the funds required for any investment opportunity which they offered to York;

    (c) When York decided to accept an investment opportunity offered to it, it would use one of its companies to act as general partner to a JV LP, which would hold the investment.

    (d) The JV LP would be regulated by the terms of a *pro forma* Limited Partnership Agreement ("LPA"), the *pro forma* agreement appearing at **E1/10/138-176**.

(e) The JV LP would enter into a *pro forma* property management services agreement ("PMA") with GAM, on terms set out at **E1/10/178-219**. Of some potential significance are:

(i) Clause 4.1.4 of this which obliges each key person (of whom Mr Donovan is one) to "*assist the manager*[12] *to the best of his skill and ability in carrying out the services*."

(ii) Clause 15.2 which permits York to terminate the agreement on 3 months' notice in writing in any of the circumstances set out in clause 15.3.

(iii) Clause 15.3.1 which provides "*a key person default"* as one of the circumstances allowing for termination in clause 15.2.

(iv) Clause 1.1, which defines a "*key person default"* as "*a situation in which both of the Key Persons dies, is permanently incapacitated or ceases to be employed or engaged on a full time basis by or be a full time member or director of Grainmarket or the manager."*

74. Thereafter LPAs and PMAs were entered into involving York, GAM, Mr Crader and Mr Donovan as follows:

(a) On 19 May 2014, in respect of the proposed Reading development, namely the Reading Joint Venture Limited Partnership agreement ("Reading JV LP") and a property management agreement relating to Reading ("the Reading PMA").

(b) On 19 May 2014 in respect of the proposed Farnborough development;

(c) On 19 May 2014 in respect of the proposed Elstree development;

[12] That is to say GAM.

(d) In August 2014 in relation to the proposed High Wycombe development, the LPA being executed on 22 August 2014 and the PMA on 29 August 2014.

75. Mr Donovan accepted in cross examination that Alex Maddox, who had introduced York, was paid a fee of £5,000.

76. Mr Donovan was asked about other potential investors including Metropolitan Real Estate, Crescendo and Longbow. He accepted that Mr Crader had contact with these investors and that they might have taken the place of York as the major investment partner though did not accept that Mr Crader had brought them all in as investment partners. As Mr Donovan put it, "*I think Crescendo and Metropolitan – well Metropolitan came through Acanthus, Crescendo came through me and Longbow was Mark, but yes I think we could have both worried about time but we could conceivably have done something with one of these*."

77. Mr Donovan accepted that, in addition to fundraising and managing investor relations with York, his work for the joint venture had included financial reporting, assessing finance options for project development costs, pricing, handling a professional negligence claim and assisting with software to manage schedules for tradespeople. He described these things activities as being "*under the category of being a good corporate citizen."* He also accepted that he monitored expenditure on consultants, had been involved in interviewing a potential member of staff, advised on pricing issues relating to the fitting of kitchen units, looked at the possibility of fitting solar panels, reviewed architectural plans, considered options as to ventilation in the Slough project and discussed planning issues with the relevant local authority. He said that his concern was that the development work "*would validate our investment thesis."* However, in re-examination, he said that he could not have been expected to share in all aspects of the joint venture with Mr Crader – as he put it, "*I don't have the skills."*

78. By April 2014, Mr Crader and Mr Donovan were increasingly having arguments about the allocation of the costs of the joint venture. Mr Donovan describes how

"*Mr Crader pushed me to agree changes to the agreed costs-sharing*[13]*."* Mr Crader says that the disagreement about the costs arose "*for reasons that I have never understood"* but that the disagreement led to "*several heated discussions.*[14]*"*

79. In an email of 28 May 2014 (**G9/2067**) from Mr Crader to Mr Donovan and Ms Morriss, a trial period of a new agreement as to the payment of overheads to GAM was recorded. Mr Donovan asserted in evidence that this change in the arrangements *"damaged my relationship with Mr Crader quite badly…I felt that Mr Crader was taking advantage of the facts that he no longer really needed me to get York's money and that I was committed to the joint venture to ambush me. I found this profoundly unfair.*[15]*"*

80. On 30 September 2014 (**G10/2359)**, Mr Donovan emailed Ms Morriss expressing some concern about the payment of overheads to GAM.

81. On 8 October 2014, an exchange of emails took place between Mr Crader and Mr Donovan with a view to setting up a meeting to deal with problems in their business relationship. In one email, Mr Donovan said (**G10/2383.1**), "*I think it is clear that neither of us is getting out of this what we want to, which is a shame. I think this is not necessarily a reflection of either party, rather the reality of the situation. I don't know really how best to deal with this, which is a bit pathetic but the truth."* Mr Crader states in reply (**G10/2384)**, "*… we agree it's not really working. I am also slightly reticent to put matters such as this in writing because they can be seen as confrontational and I don't want to be…The sadness with all of this is I really think a partnership could work – we both have skills that I think compliment - but if we don't trust each other then it just won't be worth the angst for the next however many years it is… It should also be reiterated that one of the reasons I want a partner is because I want to work less and take less responsibility. I could remind you of various conversations around this point so I think (and hope) I was clear on that."*

[13] Witness statement, paragraph 90.
[14] Witness statement, paragraph 64.
[15] Witness statement, paragraph 93.

82. On 9 October 2014, Mr Crader emailed Mr Donovan (**G10/2394**) stating, amongst other things, "*I accept also that I wouldn't have found York without you (that also follows for Alex Maddox of course) but the business we sold them was my investment expertise and structure. I also fully accept and acknowledge your skill in getting the deal over the line, I probably couldn't have closed. I would remind you we actually split our roles with me dealing with the PGF demise so that should sit in the balance I think. Of course above all we both have to believe what we agree is fair and I am open to changing our current arrangement but only if it works for me. To that end I think we have to agree on some relative value hence this email. I hope we are both practical people and so arguably it will come down to economics. It would also be neglectful of both of us to just stumble on with the current agreement as it will create animosity in the future that might spill over into Lime."*

83. In an email to Mr Donovan dated 12 November 2014 (**G10/2455**), Mr Crader spoke of the fact that he had "*said on many occasions I want a full partner. That doesn't mean and, we discussed this at inception, we would not focus on different areas."*

84. On the same date (12 November 2014), Mr Donovan and Mr Crader were in communication about a proposed visit by representatives of York on the following day. By email, Mr Donovan said, "*I would prefer if you took York around tomorrow*", indicating that he had commitments later in the week. He said that his real reason for not wanting to meet York with Mr Crader was "*we both had an argument*[16]*, I felt the chemistry would be poor between us in front of York."* In the email he had "*dissembled to Mark."*

85. Whilst communicating with Mr Crader on 12 November 2014, Mr Donovan was also involved in emailing Mr Ornelas (**G11/2471.3)**. Mr Donovan said, "*I can't go on the school tour around the buildings tomorrow*[17]*. Are you free for lunch by any chance?"* Mr Donovan later forwarded that email as part of a chain of

[16] Seemingly an argument in relation to the Lime Street development.
[17] A reference to the meeting with York that he had told Mr Crader he could not attend.

emails to Mr Crader (**G11/2471.1**). However, in that version, the email to Mr Ornelas had been edited to remove reference to meeting for lunch.

86. In cross examination, it was put to Mr Donovan that these alterations amounted to forging the email chain. His response was "*I told Mark I couldn't do the meeting which was poor of me and I didn't want to draw attention to the fact I actually could have done the meeting."* He accepted that he had given a false impression of his dealing with Mr Ornelas, but denied that this was because of what he described as "*some grand plan with York…I just wanted to meet up with Diego and see how it was…"* He denied that he had altered the emails because (as counsel for the Defendant put it), he was "*planning his escape."* More generally, he said "*the notion that I was planning some exit from 2014 is simply not true."*

87. On 11 December 2014, Mr Crader emailed Mr Donovan **(G11/2502**) relating to the difficulties about funding overheads, apparent following a meeting on the previous day. He put the issue as follows: *"…It is really important that this rather minor issue doesn't spoil what I think can be profitable for us both…it is worth stating we do have an agreement on costs. It's covered in emails between late May and early June. I accept this was a change from what we originally thought and I also accept you feel you were "rail roaded." I say this without accepting you were. Indeed it was your suggestion that the agreement we now have was in place for at least a year. It is therefore upsetting that you now want to change it some 6 months in. First and foremost as it is you that want to change it the suggestions should come from you. I accept you say you don't know how to do this but the onus is on you to try. Therefore what follows below is not a solution but maybe a path to one. Firstly if we can't both be happy we should try and separate the PD business and take it out from my office as a first step. This way any costs that it incurs will be clear and it will have to pay them…Following on from that if you want to take the PD business on your own and I don't want this to be the case I am happy to discuss a price for you buying me out… I do think this would give us a problem with York because we did agree to see the schemes through but perhaps your relationship with them could persuade. I certainly don't want to deal with York without you. I also accept that*

this would be a draconian solution and I put it first so that we are both aware that this must be the natural solution if we can't agree. Turning back to what we currently have: we have agreed to 20% of the performance fee being the bonus pool, we have agreed to split the remaining 80% equally between you and I. I believe these terms are not an issue but let me know if you disagree. You are concerned about the admin fee split and feel this favours me. I think the admin fee split doesn't fully compensate me for the costs of running our shared interests." Mr Crader suggested that the joint venture might be separated from the remainder of GAM's business, thereby making it clear which were the relevant costs or alternatively that Mr Donovan might buy out Mr Crader's share of the joint venture.

88. At paragraph 124 of his witness statement, Mr Donovan stated that "*matters came to a head"* with this email and that *"I thought that Mr Crader was essentially firing me."* He did not consider that separating the administration of their joint venture from that of GAM to be practical. He said in cross examination that he reacted "*quite strongly"* to the idea of moving the office out of GAM's premises. However, he accepted that Mr Crader was not firing him *"in the legal sense."* He said that by this stage, they both knew that the relationship was not working, but he denied that he was saying this because he was already "*planning his escape"* to York.

89. On 23 January 2015, Mr Crader drew down a loan in relation to the York JV LP. Mr Donovan sets out his position in relation to this at paragraph 127 of his witness statement. It is Mr Donovan's case that this was a turning point in their relationship and that he did not wish to work with Mr Crader anymore. The rights and wrongs of Mr Donovan's conduct as set out in that paragraph of his witness statement were explored in evidence. The Defendant contends that this is relevant to whether Mr Donovan genuinely felt that their relationship could not work or whether this was simply an excuse for turning away from Mr Crader and towards a newly developing relationship with York.

90. In an exchange of emails between Mr Crader and Mr Donovan on 26 January 2015:

(a) At 10.55, Mr Crader stated, "*have you any further thoughts on this*[18] *- if we are to change the agreement we should try and do so – if not we just let the agreement continue but I was under the impression you were not happy with that. I would reiterate that my suggestion that you buy me out (at a to be agreed fair price) should be considered by you."* ***(G11/2579)***

(b) At 13.13, Mr Donovan commented on these suggestions: "*…You are right that I agreed to change the terms but I don't feel that they are fair to me. You think differently and I can't do anything about that and thus can't and won't ask for any changes. We could move the office. I have looked into it. Andrew Rice has space that will cost pretty nothing – however this is hardly the point is it? The real issue is that this doesn't suit either of us. I don't have the expertise on the build phase you do; so it is logical that I should leave. If you think what I have done to date merits compensation that would be nice but as it isn't documented so clearly I can't ask for anything."*

(c) At 14.46, Mr Crader emailed Mr Donovan on the same day (**G11/2582**) stating, "*Thanks for this but you leaving doesn't address the issue we have with York…the point is we have to get York comfortable and happy as we all agreed to see out the schemes. York is very much your relationship and I really think they would be happier with you than me…However if the above doesn't suit you and if I take over I certainly want and expect you to make return – I don't think we have a situation where nothing is documented – it is – see attached*[19]*… Above all I don't want this to be acrimonious but let's face it you and I don't work together well and we have to keep a relationship going for Lime St's sake. Perhaps you are next over we can work out the exit."*

(d) At 15.06, Mr Donovan sent an email (**G11/2585**) stating, "*Mark, it is best that I leave. I hope York will be ok with it. They understand that you are the person with the build expertise. I am happy to speak with them. I really doubt an entire switch would work with York or indeed be possible.*

[18] A reference to the email of 11 December.
[19] I am unclear what was attached to this email.

My point re documentation isn't that there isn't any agreement per se. rather that it would be nice to be paid for the work I have done to date but I know I can't ask/enforce it…."

(e) At 15.08, Mr Crader responded (**G11/2585),** "*OK then let's discuss how we tell York about it."*

(f) Mr Donovan in turn replied at 15.17, *"I haven't thought about it but I think I will in the first instance speak with Diego. I don't think much commentary is needed. Simply my work is done as all the projects are in the build phase. Susanna I presume will deal with their reporting needs. I need to concentrate on the loan issue*[20]*so unless you really disagree with that approach I need to focus on this for the next few hours."*

91. Again, it was put in cross examination to Mr Donovan that his real reasons for stating that the relationship would not work was his desire to work with York instead. Mr Donovan denied this. He said that *"there wasn't a basis to work."*

92. As to the statement that he could not enforce the agreement as to fees, Mr Donovan said, "*I knew we had this mess of an agreement that was basically an email chain, it was going to be a nightmare to work out what it was going to be."* They did not have "*a rock to cling on."*

93. It is the Defendant's case that this exchange of emails amounted to a renunciation of the contract by Mr Donovan. Mr Crader was asked in cross examination about paragraph 65 of his statement, in which he spoke of having been faced with Mr Donovan's "*repeated indications that he was going to leave*." He accepted that, although he knew Mr Donovan was unhappy, there had been no indication of an intention to leave the joint venture before 26 January 2015 and indeed that the first suggestion of Mr Donovan leaving was that made by Mr Crader in his email of 14.46 on that day.

94. Mr Crader was also asked in cross examination as to whether he accepted that a binding contract existed by the time of the exchange of emails on 26 January 2015, in light of the assertion in his solicitors' letter of 3 October 2016 (**H/4**)

[20] The issue referred to at paragraph 127 of Mr Donovan's witness statement at **C/34**.

that Mr Donovan "*unilaterally withdrew from the nascent arrangements in January 2015.*" He accepted that by this time the parties had agreed both the costs split and (on a trial basis) the profits split and accepted therefore that "*there must have been an agreement at some time."* Mr Crader accepted that the letter failed to refer to the rebate agreement.

95. On 28 January 2015 (**G11/2686**), Mr Crader emailed Mr Donovan referring to there being "*some issues that we should address prior to informing York…. These are as follows and in no particular order. (1) Do you want to sell your equity in the schemes…(2) I want to work out (if we possibly can) a division of the current accrued income that we are both happy with… (3) How do we address any potentially accrued performance fee?...(4) Finally we should take the opportunity to discuss Lime St and the workings of a relationship/ investment we are locked into for some time."*

96. On 3 February 2015 (**G12/2717**), Mr Crader emailed Mr Donovan relating to a number of issues, one of which was, "*Your exit from the PD schemes. My email of last week set out the issues and don't think it is in anyone's interest to leave this in limbo."*

97. Mr Crader emailed Mr Donovan on 9 February 2015 (**G12/2798**) and spoke of waiting "*until next week to discuss our potential fee split to date."*

98. In an email to Mr Donovan of 19 February 2015 (**G12/2873**), Mr Crader spoke of a meeting to "*finalise your exit from the PD project"* and referred to working to a potential departure date for Mr Donovan of 28 February 2015.

99. On 22 February 2015, Mr Crader emailed Mr Rafiq of York Capital, stating that, "*Dan is going to reduce his involvement in the residential schemes to that of passive investor. The schemes will continue to be run as they currently are by the team around myself and I can foresee no change to the time and attention we expend on them."* Mr Crader was asked in cross examination as to how this was consistent with his case that Mr Donovan was involved in more than just investment strategy. He replied that he was simply trying to ensure that York retained confidence in the venture, given that the departure of Mr Donovan was a "*key person default"* entitling York to terminate the PMA with GAM.

100. More generally, Mr Crader was asked about his evidence at paragraph 68 of his witness statement as to tasks that he and others at GAM had to do following Mr Donovan's departure. With the exception of Mr Donovan's role in reporting to York, Mr Crader did not identify tasks that he said were Mr Donovan's personal responsibility, as opposed to being a responsibility of GAM that was shared amongst its staff (including Mr Donovan whilst he remained in the venture). Ms Morriss' evidence on this issue was to like effect.

101. As to Mr Donovan's role in relation to York, on 26 March 2015 (**G12/2909**) Mr Donovan emailed Mr Crader stating, *"York have asked me if I would stay involved to attend qtrly meetings etc – I have said I am happy to do this. I presume this isn't an issue as it should make things easier."* Mr Crader did not respond to this.

102. Mr Donovan also referred in the email of 26 March 2015 to a proposal regarding what was payable to him. That included the payment of management fees to 28 February 2015, and the full performance fees to 28 February 2015 and 50% thereafter.

103. In cross examination, Mr Donovan was asked why he was willing to agree to take less than what he believed to be his full entitlement. He responded that he "*just wanted clarity and closure."*

104. On 30 March 2015, Mr Crader responded (**G12/2909**) offering a deal as follows:

"*1. Management fee: we have been trying to pay you £12,500 – However if I were to increase that to £25,000 to settle all that you are due in management fees would you be content with that?*

2. Performance fee: we had agreed an 40/40/20 split where you would get paid 40%. I suggest you get 20% of the total fee whatever it is whenever it is paid.

3. Your equity: This will be traded and no fees levied (inc Slough) by us on your investments."

For the avoidance of doubt this would only cover the projects I currently have with York. If I did something else with them in the future (I don't think I will) you would be due neither management nor performance fee."

105. Mr Donovan's response (**G12/2909**) was, "*To be honest I think my suggestion is a little more reflective of the actuality but if you want to do it this way.*

- *Agreed on management fees*[21] *etc.*
- *Performance fee as you suggest is I think it little unfair. As I said my work was front loaded etc I think 30% to me is a fair compromise.*
- *I do think some trail on future deals, albeit small, is appropriate. As I said it was/is the best deal they ever gave out. That being said I am not going to fight on this."*

106. In an email on 1 April 2015, Mr Donovan (**G12/2913**), "*I don't think this is a fair representation of the time involved. I started working on this, incurring costs and earning nothing Jan 2013. That should be the starting point. You may not think it but it was far from trivial to get this done. As such I think 30% is a fair compromise. Re trail: what I said remains but I am not going to fight on it."*

107. Mr Crader responded to this on 2 April 2015 (**G12/2913**), "*It's a shame as I really think I am being more than fair at 20%...The performance fee split was based on you helping with the build. It made you equal with me and doing the same amount of work. To leave and yet get 75%*[22] *of what you would have got had you worked for the next two years just doesn't seem right or fair."*

108. On 17 December 2015, Mr Crader emailed Mr Donovan (**G13/2967**) asserting that Mr Donovan had no right to fees because "*You left GAM in February 2015 when we couldn't agree on an apportionment of the costs of running the York investments. You also know I offered you the option of taking the projects on yourself without me and you refused…I made an offer which is still open for*

[21] The Defendant subsequently paid £12,500 to Mr Donovan's nominee, Landour Limited, on account of such fees.
[22] That is to say 30% proposed by Mr Donovan, rather than the 40% that he would have received had the contract continued.

acceptance, for you to be paid 20% of the fees York pay GAM pursuant to the four projects you helped set up with them."

109. Mr Donovan responded on 23 December 2015 (**G13/2966**) that it had never been agreed that he would not be entitled to performance fees. He described the email of 26 January 2015 (that referred to at paragraph 90(b) above) as *"sarcastic."*

110. Mr Donovan was asked during cross examination about his involvement in the activities of in the JV agreement. He said that his role was to "*help Mark raise funds for GAM".* He said of his activities with Mr Crader, "*We did discuss strategy and we did discuss property, but I always deferred to Mark on property acquisitions.*" Mr Donovan accepted that, in many email communications, he and Mr Crader had discussed matters of strategy, but he maintained that he had deferred to Mr Crader on such issues.

111. The Claimants' letter of claim (**H/1**) contends that the parties entered into a contractual relationship, which it calls the New Fund Agreement, in December 2012 and that this was varied by the email of 28 May 2014 referred to at paragraph 79 above. The term "*New Fund*" of course appears in the first version of the HoT dated 14 December 2012 and the revised version of 6 March 2013.

112. In its letter of response dated 3 October 2016 (**H/4**), the Defendant, whilst acknowledging that there were negotiations in late 2012 continuing into 2014, contends that no agreement was ever concluded between the parties. The letter goes on, "*Even had any agreement been concluded, the best evidence of its terms would be the Heads of Terms"*.

Expert evidence

113. The parties each called evidence from an expert in corporate finance. The purpose of such evidence was to assist the court with valuing the services provided by the First Claimant if the court finds that he is entitled to payment based on a quantum meruit.

114. The Claimants called Mr Timothy Bell. He has extensive experience both in hedge funds and in the private investments market.

115. In his initial report, Mr Bell took the view that the value of the First Claimant's services was best based on that of a third-party fund-raiser operating on a deal by deal basis. Applying the Lehman formula, on an assumed fund raise of £40 million, remuneration would have been in the range 3% to 5%, that is to say £1.2 million to £2 million. The basis of such figures can be seen in the table at paragraph 94 of his report, being the figure in the "*total*" column for either "*small private markets firm/complete raise/full marketing/first fund/difficult*" or "*small company/complete raise/full marketing/series B/C/difficult*." The essential difference between these two is whether the Defendant was correctly assessed as a "*small private markets firm*" or a "*a small company*." Mr Bell did not consider that the distinction between an in-house fundraiser and a third-party fundraiser was relevant, given the deal-by-deal nature of the fundraising.

116. In support of his use of the Lehman formula, Mr Bell relied on the fact the arrangement with York was closest to a deal-by-deal model since York were never obliged to invest in any particular project of the joint venture. He considered the Defendant to lie between the "*major private markets firm*" and the "*fledgling company*" for the purpose of the table, the fundraising being "*difficult*" because of the litigation in which the Defendant was engaged.

117. He accepted in cross examination that the Lehman formula supposed a reducing percentage for higher fund raising. So, for example the figure might be 5% for the $1 million, 4% for the next $1 million and so. Indeed, in re-examination, his attention was drawn to paragraph 93 of his report where he referred to such staging.

118. As an alternative, he stated that the 40% or 45% of the performance fees generated by each project (in other words, that which the parties agreed should be paid) was *"not out of line with what an informed market participant might expect to receive as a founder partner for making a significant contribution to fundraising*" such as that resulting in the investment by York.

119. In the joint statement, Mr Bell corrected his assumption of a raise of £40 million. However, he went on to assert that the appropriate starting point under the Lehman formula was 5% of capital raised.

120. In cross examination, he accepted that this figure was erroneous since it assumed that York would invest £40 million, whereas in fact the evidence was simply that York had first refusal on investment of £40 million. He was asked as to why he had moved from the 3%-5% of his original report to the unqualified figure of 5% in the joint statement. Mr Bell said this was because it was clear that the capital raising was for individual deals rather than a discretionary fund.

121. Counsel for the Defendant put it to Mr Bell that this was illogical, since he had been aware at the time of this first report that the fund raising was on a deal by deal basis. Mr Bell did not deal with this point but rather raised another reason for the change in the figure, namely that the lower level of capital raised (in the region of £16 million rather than the £40 million he had previously assumed) would justify a higher percentage. This was not a point that he had made previously.

122. Mr Bell also amended his opinion in the joint statement by including in the calculation not only monies raised from York but also the investment contributed by friends and family investors in the various projects. He had included this figure because he had been asked (seemingly by those acting for the Claimants) whether such investment should be included in the calculation. On this basis, he calculated the value of services in the range £929,000 to £989,000 based on 5% of the capital raised from York and 2.5% of the Capital raised from friends and family investors. The higher figure is based on the assumption that York would have invested more in the projects in which they were involved but for their permitting friends and family investors to become involved and that therefore the higher percentage ought to be charged on all of the investment in the York projects. The lower figure is based on the actual investments of York and friends and family respectively[23]. Mr Bell accepted that some of the friends and family investors had invested because of their connections with Mr Crader not Mr Donovan. He also agreed that there was no industry standard as to how the investments of friends and family were to be dealt with in a fundraiser's remuneration.

[23] See the calculation at paragraph 10 of Mr Bell's supplemental report.

123. Following service of the joint statement, a further report from Mr Bell was served on behalf of the Claimants. In that report, he again referred to the argument that Mr Donovan's remuneration under the terms of the putative agreement (40% or 45% of performance fees and up to 50% of management fees after costs) was "*not out of line*" with what would be charged. He described this method as having the "*advantage*[24]*…that it factors in considerations that potentially suggest a higher rate of remuneration than the Lehman formula*" though in cross examination he stood by the assertion on his original report that this was the inferior method to the use of the Lehman formula.

124. In the supplemental report, Mr Bell also explores the possible valuation of Mr Donovan's services based on what he would have been paid as an employee of the Defendant with responsibility for fundraising. He suggests an annual salary of £150,000 and a bonus (guaranteed in the first year) of at least £350,000, a total remuneration package of at least £500,000 per year, giving a figure of £1,025,000 for the period start of 2013 to February 2015.

125. As Mr Bell indicated in his report, there were weaknesses with this approach. He acknowledged that there is no market standard for the bonus in this situation. He also raised four reasons why the analogy with the in-house fundraiser might not be a good one:

(a) Mr Donovan did not in fact seek guaranteed remuneration but rather a profit share.

(b) Mr Donovan's investment credentials were well above those of the person who would be so employed;

(c) Fundraisers are not normally recruited for deal-by-deal capital raises.

(d) Mr Donovan himself made contributions to the ventures, which would point to a higher level of remuneration.

[24] Of course, whether this is an advantage depends on one's point of view. From the point of view of the Defendant, as the paying party, this could be perceived as a disadvantage since it increased the amount payable.

126. On behalf of the Defendant, Mr Hanif Virji gave evidence. He has experience in corporate finance, including raising debt and equity capital.

127. Mr Virji considered that the starting point to calculate the value of the services provided by Mr Donovan was that amount that a corporate finance boutique would charge. He considered this to be calculated as follows:

(a) A monthly retainer of £5,000;

(b) A success fee of 1.00% to 1.25% of the capital actually raised less the retainer;

(c) Disbursements;

(d) VAT.

128. Mr Virji then deducts the amount that would be chargeable as overheads, in order to reflect, in the case of non-salaried partner of a boutique, the overheads and profit of the business, or in the case of the in-house fundraiser, the overheads of the in-house employer.

129. Taking the period of fund-raising to be 1 February 2013 to 2 May 2014, Mr Virji calculates the total retainer at £75,000 (15 months at £5,000 per month) and (using total monies raised of £16,838,000) a success fee, gross of the retainer, in the range £168,380 (based on 1%) and £210,475 (based on 1.25%). The total fee after deduction of overheads of 50%-75% is in the range £84,190 to £157,856[25]. Mr Virji posits a central figure in that range of £121,023.

130. In cross examination, Mr Virji accepted that the range of fees for deal to deal mandates in which he had been involved was 1% to 2%. He further agreed that he had not given reason for selecting a fee range of 1 to 1.25% either in his original report or in the joint statement. He said that the range was influenced by the fact that the investment strategy involved a concept, namely buying and converting properties. With each investment, a separate company would be created for the purchase of the asset and therefore the investment was in a

[25] Of course, the retainer is deducted from the success fee then added back in, so the range is in fact simply 50% of the lower success fee to 75% of the higher fee.

discrete asset rather than on the more generalised risks of a company with other potential liabilities.

131. Mr Virji acknowledged that the litigation involving the Defendant and PGF was likely to have some adverse impact on the ease of fund raising. He accepted that a fundraiser would not normally be expected to contribute their own capital, whereas that was what was anticipated here. He agreed that this was unusual, the more so because Mr Donovan was going to contribute to the costs of the business. Mr Virji felt that the risks inherent in investing in the business would be assessed differently and not be reflected in the fee for fundraising, since the decision to invest was independent of the agreement to fundraise. He did not think that either of these factors justified a higher valuation of the services on a quantum meruit basis.

132. As to the deduction of a figure to the services provided by a boutique, Mr Virji accepted that this was a matter between the boutique and its employee – it did not reflect what the party in the position of GAM would have to pay.

The Claimants' case on the claim

133. The First Claimant seeks relief in respect of the share of fees for the Slough, Reading, Farnborough, High Wycombe and Elstree projects that he alleges is due to him pursuant to his agreement with GAM.

134. The Claimants' primary case is that the contractual arrangement between Mr Donovan and GAM was contained in or is evidenced by the "*New Fund – Heads of Term*" document of 6 March 2013. The parties had by then agreed to go into business and had produced the term sheet for that venture; subsequently they went into business acting in accordance with that term sheet. They rely in particular on the following:

(a) The parties both identified the HoTs as being relevant contractual documents in the pre-action correspondence.

(b) The email forwarding the HoT to GAM's solicitors dated 6 March 2013, into which Mr Donovan was copied, clearly identifies that the parties have agreed to the terms in that document.

(c) On the other hand, later documents that appear to include other terms, such as the 21 April 2013 draft referred to at paragraph 48 and the draft side letter emailed on 10 January 2014 and referred to at paragraph 66 are not agreed as final.

135. The Claimants criticise the Defendant's case on the formation and terms of the contract as consisting of "*an ambulatory set of obligations varying over time as the partes undertook various work and discussed and discarded draft documents in which their agreement might be formalised*." The Claimants contend that the Defendant fails to identify any document(s) that embody the JV agreement and equally fails to show any specific discussions or conduct that support the conclusion that Mr Donovan's contractual duties had the wide ambit contended for by the Defendant.

136. The Claimants' case is that the best evidence of the parties' duties under the contract is the actual tasks that they performed. Mr Donovan focussed on securing investment for the projects and Mr Crader (together with other GAM personnel) focussed on the identification, purchase, re-development and sale of relevant sites. This division is understandable because it reflects their respective areas of experience and expertise.

137. At paragraph 18 of closing submissions, Mr Green for the Claimants put it thus[26]:

> *"(a) Mr Crader, along with other GAM personnel, was primarily responsible for finding sites for the joint venture to acquire and managing re-development and sale of those sites i.e. the property elements of the venture. That was the nature of GAM's expertise.*

[26] Admittedly in the context of describing the parties' respective duties rather than describing what they actually did.

(b) Mr Donovan was primarily responsible for seeking and/or securing investment to finance the acquisition of those sites. He also acted as an investment relations manager and a point of contact for investors on an ongoing basis. That was his area of expertise."

138. Whilst Mr Donovan accepted that he undertook some duties outside of this primary area of responsibility, the Claimants contend that this was a consequence of his acting as "*a good corporate citizen."* In any event, those wider duties were limited as demonstrated by the inability of either Mr Crader or Ms Morriss to provide any detail of tasks that fell onto the shoulders of anyone at GAM (including Mr Crader himself) following Mr Donovan's departure. Mr Crader's statement to Mr Rafiq in the email on 22 February 2015 above that matters would "*continue to be run as they currently are"* following Mr Donovan's change of status to that of passive investor demonstrates the reality of how the venture operated.

139. The Claimants deny that Mr Donovan's actions in ceasing to be involved amounted to a breach of his contractual obligations because:

(a) The Claimants contend that Mr Donovan's entitlement to performance fees under the joint venture and the entitlement to remission of the administration fees that would otherwise be payable by NALED were independent of any obligation to perform the contract on Mr Donovan's part.

(b) In any event, by the time that the parties fell out such that Mr Donovan ceased to be active in the venture, he had already either wholly or substantially performed his obligations under the contract;

(c) Even if he had not performed his obligations, his failure to do this did not amount to breach, still less repudiatory breach – rather it reflected an agreement between the parties by which he would cease that role.

(d) Were Mr Donovan to be in repudiatory breach, such breach was not accepted by the Defendant.

140. The Claimants go on to argue that, even if he was not entitled to the payment under the express terms of the contract, Mr Donovan can claim payment on a quantum meruit. That argument is put on two bases:

(a) That a term should be implied in the agreement that Mr Donovan would be paid for his services in order to give it business efficacy;

(b) Mr Donovan is entitled to payment to prevent the Defendant being unjustly enriched, pursuant to the doctrine of free acceptance.

141. On the issue of administration fees, the Claimants contend that the exchange of emails referred to at paragraphs 104 and 105 above amounts to a concluded contract compromising this aspect of the case by an agreement to pay £25,000 to the First Claimant. Of this, £12,500 has been paid by the Defendant to a nominee of Mr Donovan. The outstanding balance is £12,500, which the First Claimant seeks on the claim. The Defendant's counterclaim for £12,500 is an attempt to recover the amount already paid and should fail because of the binding agreement.

142. As to the payment of performance fees to NALED, the Claimants contends that the discussions, confirmed by Mr Crader in his email of 8 January 2014 referred to at paragraph 68 above gave rise to an agreement ("*the fee exemption agreement"),* pursuant to which NALED became unconditionally entitled to an exemption from paying performance fees on its investment in projects pursuant to the JV agreement. The Claimants' case is that the continuing right of an exemption to the payment of such fees was not conditional upon the JV agreement continuing. NALED was not a party to the JV agreement. The fee exemption agreement was made by Mr Donovan on behalf of NALED and the rights and obligations created by it are entirely different than those contained in the JV agreement. In any event, there is nothing in any of the material contended to be relevant to the terms of the JV agreement by which the continued existence of the fee exemption agreement is said to be conditional upon the continued existence of the JV agreement.

143. The Claimants seek sums deducted from the distribution of monies in respect of the Slough, Elstree, High Wycombe and Reading projects. Those sums were

deducted because of the Defendant's contention that, once the JV had been terminated, NALED was no longer entitled to the benefit of the fee exemption agreement.

144. In the alternative, the Claimants contend that the Defendant is estopped by convention or representation from denying the continuing force of the fee exemption agreement. The representations and/or bases of convention relied upon are:

(a) The email of 17 December 2013;

(b) The email of 8 January 2014;

(c) The failure of GAM to deduct any figure in respect of an alleged liability for performance fees when making distributions in respect of the Farnborough, Reading and Elstree projects, even though those distributions were made after the alleged termination of the JV agreement.

The Defendant's case on the claim

145. The Defendant accepts that it entered into a contractual relationship with Mr Donovan but contends that it is not possible to demonstrate an offer and acceptance of particular terms of a JV agreement. No one contends that the first version of the HoT represented the terms that were agreed, and no later document can be pointed to which contains clear terms and which was unequivocally accepted. Rather this was a contract entered into by performance. One must look at the entirety of the parties' conduct to determine its terms.

146. The Defendant's pleaded case (in the Re-Re-Amended Defence and Counterclaim at **A/26**) is that the respective duties of GAM and Mr Donovan were as follows:

> "*9.2.1 Each of GAM and Mr Donovan would work towards the success of the Projects*[27] *(and any further projects) putting in such work as was reasonably required.*
>
> *9.2.2 Neither party's obligations under the (contract) were limited to discrete functions. Each of GAM and Mr Donovan were required to participate in the financing, setting-up, management and completion of the projects (and any further projects) … in general terms endeavouring to promote the interests of the projects (and any further projects) and assisting each other to do so to the best of their ability."*

147. The Defendant contends that Mr Donovan renounced the contract by one or both of two acts:

(a) his email of 15.06 on 26 January 2015, in which Mr Donovan stated, "*it is best that I leave"*;

(b) his failure to continue or work on the joint venture from around January/February 2015.

148. That renunciation was accepted by one or more of:

(a) Mr Crader's email at 15.08 saying "*OK then let's discuss how we tell York about it."*

(b) GAM no longer requiring Mr Donovan to perform work;

(c) Informing third parties such as York that Mr Donovan's role was changing to passive investor;

(d) Negotiating with Mr Donovan as to what payment should be made in respect of his work on the projects.

149. The Defendant denies that this is an appropriate case for the First Claimant to recover on a quantum meruit:

[27] As defined at paragraph 17 of the Re-Amended Particulars of Claim - the Slough, Farnborough, Elstree, Reading and High Wycombe JVs.

(a) On the implied term argument, it is not necessary to give business efficacy to this agreement that a term be implied as to a liability to pay Mr Donovan for his services. To the contrary, in a joint venture such as this, the parties have a mutual interest in knowing that their joint venture will not leave part way through. A right to payment in such circumstances would impose a burden on the joint venture and further would be inconsistent with the agreement that Mr Donovan and GAM contribute equally to the joint venture.

(b) As to the argument in unjust enrichment, such a claim would be barred by the effect of the decisions in Costello v MacDonald [2011] EWCA Civ 930 and Re Richmond Gate Property Ltd [1965] 1 WLR 335, on the ground that a party cannot recover pursuant to the doctrine of unjust enrichment where the parties have expressly contracted as to the circumstances in which remuneration is payable.

150. As to Mr Donovan's claim for management fees, the Defendant contends that the alleged right to such fees is pursuant to negotiations between the parties that were interdependent with the claim for performance fees. Those negotiations did not lead to a concluded agreement and therefore Mr Donovan has no right to the money claimed.

151. In respect of NALED's claim, the Defendant contends that the sum that NALED seeks to recover in respect of the Slough, Elstree, High Wycombe and Reading projects and the sums of £25,562 paid by the Defendant to NALED by way of rebated performance fees relating to Farnborough and £62,671 for such fees relating to Reading, are sums to which NALED is not entitled because the termination of the JV agreement brought the fee exemption agreement to an end. The Defendant points to the following:

(a) The discussion about the fee exemption agreement was in the context of renegotiating the split of performance fees under the JV agreement. Thus, the parties must be taken to have intended the fee exemption agreement to depend on the continuation of obligations under the JV agreement.

(b) The fee exemption agreement was agreed to pertain not only to NALED but also to "*all vehicles controlled by"* Mr Donovan. Thus Mr Donovan must be taken to have been the contracting party under the fee exemption agreement.

(c) According to Mr Donovan's witness evidence at paragraphs 62 to 66 of his statement, the promises were made to him, not NALED.

(d) The purpose of the fee exemption agreement was to avoid tax inefficient payments. Once Mr Donovan withdrew from the continuing ventures, the need for such an agreement fell away.

The Defendant's case on the Counterclaim

152. The Defendant's counterclaim has two parts:

(a) As against NALED, rebated performance fees

(b) As against Mr Donovan, management fees.

153. In each case, the Defendant's case is the exact corollary of its Defence to the claims by NALED for the wrongful deduction of rebated performance fees on other projects and hence this argument does not need to be dealt with further.

The Claimants' case on the counterclaim

154. Again, the Claimants' defence to the counterclaim is the corollary of their claim for the alleged wrongful deduction of performance fees from distributions made to NALED and the failure to pay the balance of the management fee to Mr Donovan. No further consideration is required of those arguments.

The Issues

155. By the conclusion of the trial, it was clear that the following issues arise for determination on the claim:

A. What were Mr Donovan's duties under the JV agreement?

B. What was/were the condition(s) for payment of Mr Donovan under the JV agreement?

C. Was Mr Donovan in repudiatory breach of the JV agreement?

D. If Mr Donovan was in repudiatory breach, did GAM elect to terminate the JV agreement by acceptance of that repudiation?

E. Is Mr Donovan entitled to payment for services provided to GAM pursuant to the contract either as having wholly or substantial performed his obligations on which payment was conditional?

F. Is Mr Donovan entitled to payment for services provided to GAM pursuant to an implied term of the agreement providing for remuneration on a quantum meruit?

G. Is Mr Donovan entitled to payment for services provided to GAM on a quantum meruit pursuant to the doctrine of unjust enrichment?

H. If Mr Donovan is entitled to payment on a quantum meruit, what is the value of the services that he provided?

I. Is Mr Donavan entitled to payment of £12,500 pursuant to an agreement to share GAM's management fees?

J. Was the fee exemption agreement between NALED and GAM part of the JV agreement?

K. If the fee exemption agreement was not part of the JV agreement, was an entitlement to its benefits conditional upon the continued existence of the JV agreement?

L. Is NALED entitled to the benefit of the fee exemption by reason of estoppel by representation or by convention?

The Law

156. In considering the issue as the formation of any contractual relationship between Mr Donovan and GAM, l bear in mind the following principles:

(a) Whether the parties have concluded a contract and, if so, on what terms, is to be determined by what they have agreed (RTS Flexible Systems Ltd v Molkerei [2010] 1 WLR 753);

(b) What the parties have agreed is to be determined not by their subjective states of mind but by what has been communicated between them by words and/or conduct (again, RTS Flexible Systems Ltd v Molkerei);

(c) Where the parties' communications are ambiguous, the court should engage in an iterative process of checking a suggested interpretation with the words of the contract and the commercial consequences of that interpretation (Wood v Capita [2017] UKSC 24);

(d) Where there is evidence of a transaction that is performed on both sides, it may be unrealistic to argue that there was no intention to enter into legal relations (G Percy Trentham Ltd v Archital Luxfer Ltd [1993] 1 Lloyds' Rep 25);

(e) Where a contract arises from both written or oral communication and subsequent conduct, the subsequent conduct is relevant to the terms of the contract between the parties (Liverpool City Council v Irwin [1977] AC 239, Carmichael v National Power plc [1999] 1 WLR 2042 and Great Northern Railway Ltd v Avon Insurance plc [2001] EWCA Civ 780);

157. On the issue of the alleged conditionality of Mr Donovan's entitlement to fees under the contract, the relevant law can be summarised as follows:

(a) Whether the fulfilment of a contractual obligation by one party is a condition precedent to the contractual liability of another party is a matter for construction of the contract (Stavers v Curling (1836) 3 Bing NC 355);

(b) In order to show that the right to remuneration is conditional on prior complete performance of obligations under the contract requires positive evidence of an intention to create such a situation (Appleby v Myers (1866-67) LR 2 CP 651);

(c) Such an intention is relatively uncommonly found in contracts of retainer for professional services (Smales v Lea [2011] EWCA Civ 1325).

(d) Where payment is found to be conditional upon performance of the entirety of a party's obligations under the contract, the potential severity of this is mitigated by the rule that, where the contract has been substantially performed, a party may recover the contractual sum due subject to abatement or set off as allowed by the law (Sim v Rotherham [1987] Ch 216 and Wilusznski v Tower Hamlets LBC [1989] ICR 493).

158. As to the argument of repudiation/renunciation, the relevant principles are:

(a) Repudiation by renunciation arises where a party evinces an absolute intention not to perform its duties under a contract (Spettabile Consorzio Veneziano v Northumberland Shipbuilding Co (1919) 121 KT 627, approved in Woodar Investment Development v Wimpey Construction [1980] 1 WLR 277).

(b) The aggrieved party accepts a repudiation by clear and unequivocal conduct showing that it is treating the contract at an end (Vitol SA v Norelf Ltd [1996] AC 800).

159. In considering the alternative argument of the Claimants for payment on a quantum meruit, I have borne in mind:

(a) A term will be implied into a contract where it is necessary to do so in order to give business efficacy to the agreement.

(b) Alternatively, monies may be due on a quantum meruit basis so as to avoid a party being unjustly enriched at the expense of another.

160. Dealing with the implied term argument, the Court will imply a term where it is so obvious as to go without saying or where it is necessary for business efficacy (paragraphs 18 to 21 of the judgment of Lord Neuberger in Marks and Spencer plc v BNP Paribas [2015] UKSC 72).

161. As to the argument based on unjust enrichment, I have declined to deal with the issue of quantum meruit on an academic basis and I do not deal with the law on this issue further.

162. The doctrine of estoppel by representation was usefully summarised by Ms Joanna Smith QC sitting as Deputy High Court Judge in Cleveland Bridge (UK) Limited v Sarens (UK) Limited [2018] EWHC 751 as follows

(a) A makes a false representation of fact to B;

(b) A intended or knew that it was likely that the false representation would be acted upon;

(c) B, believing the representation, acted to its detriment in reliance upon it;

(d) A subsequently seeks to deny the truth of the representation;

(e) A has no defence to the estoppel.

163. In the same case, the Judge summarised the elements of estoppel by convention:

(a) An estoppel by convention can arise when the parties to a contract act on an assumed state of fact or law.

(b) The assumption must be shared by the parties, or at least assumed by one and shared in by the other;

(c) The assumption must be communicated between the parties.

(d) The party claiming the benefit must have relied on the common assumption;

(e) It must be unconscionable or unjust to allow the person now seeking to state a different legal or factual position to be allowed to rely on that position.

Discussion – the witness evidence

164. Each of the parties in this case attacks the evidence adduced by the opposing side on the grounds that the other's witnesses, especially the leading players, are unreliable if not downright dishonest.

165. In considering the oral evidence in this case, including the significance and extent of any dishonesty and any attacks on the reliability of witnesses, I bear in mind the comments of Leggatt J (as he then was) in Gestmin v Credit Suisse [2013] EWHC 3560 at paragraphs 16 to 20 cited by him and expanded upon in paragraphs 66 to 70 of his judgment in Blue v Ashley [2017] EWHC 1928: *"The best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts."*

166. This valuable expression of the need to be cautious about accepting witness evidence does not of course entirely discharge the judge from the duty of making an assessment of witnesses and their evidence (see HHJ Gore QC in CBX v North West Anglia NHS Trust [2019] WLUK 57, cited with approval in Kogan v Martin [2019] EWCA Civ 1645). Even in a commercial case with the parties taking firmly entrenched positions, it is necessary to look with some care at the evidence of the main actors where that might provide valuable context and explanation.

167. It is a striking feature of this case, that in period when the business relationship between Mr Donovan and Mr Crader was breaking down in, they nevertheless remained on polite terms within emails and indeed seemed to show sympathy for the position of the other even if they did not accept it. That goodwill was also apparent during the witnesses' oral evidence though it is singularly absent from their written statements. This might suggest that this court should not be too quick to find that the evidence of the witnesses has been adversely affected by the typical bad feeling that permeates commercial litigation. However, both sides made telling points about the reliability of the others' witnesses that I bear in mind.

168. In Mr Donovan's case, the Defendant draws attention to the following inconsistencies in his account:

(a) Whilst Mr Donovan often portrayed himself as inexperienced in the property development market, this is belied by other material. For example, in his witness statement at paragraph 17, he says "*Grainmarket … had what I did not: expertise in property management, knowledge of the UK property market…"* On the other hand, he and Mr Crader are described in draft promotional material from the early 2000s for the First Property Growth Partnership as "*experienced property financial professionals"* (**G1/13**).

(b) The same draft document says that the management company, First Property Growth Managers Ltd, appeared to be "*run on a day-to-day basis by Mark Crader and Dan Donovan."* In cross examination, Mr Donovan described this as "*salesperson spin."*

(c) In promotional material for CORE Industrial REIT, of which he is CEO, Mr Donovan is described as having "*over 30 years' senior level experience in finance and real estate."* He said that this was "*inaccurate."*

(d) The material relating to CORE also speaks of him having established *"a real estate business in 2012."* In cross examination, he agreed that this last reference was to GAM, that it was "*the best articulation of what I could come up with at the time*" and that "*it probably is misleading."*

(e) In his witness statement, Mr Donovan says at paragraph 26, "*before this case I have never been involved in litigation."* When asked about this in cross examination, he said that it meant to refer to "*personal litigation"* – he acknowledged that he had been in litigation in the District Court in the United States where he had worked as part of a class action and had declared that he worked for 256 hours on the case in the period from May 2013 to December 2015 (see paragraph 15 of his declaration in the US District Court at **G13/3171**). He still described his involvement as "*de minimis*" albeit that he accepted that, as the former owner of the plaintiff

in that action, he had assisted in the preparation of the damages claim, in producing documents and in responding to interrogatories. He denied that his evidence about his involvement in that litigation was dishonest.

(f) Mr Donovan accepted that he had edited the email referred to at paragraph 85 above. He said that he had removed the reference to trying to arrange a lunch appointment so that Mr Crader would not know of it. In cross examination, he did not accept that this was deceitful or dishonest, saying that these were strong words. He could not however think of a better word for what he had done. Mr Donovan denied that this conduct was part of a broader plan at that time to leave his venture with GAM and enter into separate property deals with York. However, as the Defendant points out, he accepted having discussed deals with Mr Ornelas of York on 28 August 2014 and 6 September 2014. He stated that he had only been approached by York to work with them after the relationship with GAM had come to an end but the Defendant contends that his oral evidence on the timing of that conversation was unconvincing (see the evidence shortly before a break on the morning of the third day of trial). In any event, he had declined to disclose his email traffic with York which might have shown the true nature of the contact between them.

(g) Whilst Mr Donovan spoke in his witness statement of there being an "*Agreed Division of Responsibilities*"[28] (see in particular paragraph 27.2 of his statement), he said that it was the lawyers not he who had drafted the statement in this fashion. In fact, in his witness statement he also stated that he did not remember discussing the question of the division of work with Mr Crader (see paragraph 21). On the other hand, in cross examination, Mr Donovan accepted on a number of occasions that marketing material had portrayed him as being involved in business strategy more generally and that the joint venture had negotiated with others (such as Mr Richard Davies, First Avenue and Acanthus) for

[28] The witness statement has this phrase as a term of art, in bold letters with capitalisation of the main words.

specific assistance in fundraising. This suggested that his role was far less narrowly defined than was suggested in his statement.

(h) The contradiction between Mr Donovan's acceptance that he was involved in looking at potential properties and the contents of paragraph 40 of his witness statement, was relied on as another example of an inconsistency in the Claimant's evidence.

(i) The Defendant contends that it is inconceivable that Mr Donovan did not see the undated draft side letter referred to at paragraph 65 above at the time that it was sent, given that he had been asking for a copy of the document and was clearly copied in to the email by which Ms Camfield sent the document.

169. It is also the case that, at frequent points in his evidence, Mr Donovan was prone to reflect on his dealings with Mr Crader generally rather than to focus on the question that he was being asked. A lot of his answers were vague and might be thought to have been an attempt to distract from the unsatisfactory nature of his answers.

170. Further, the Defendant accuses Mr Donovan of disloyalty to the joint venture by negotiating with York. In my judgment, it is not necessary to determine when Mr Donovan started to contemplate a working relationship with York that effectively superseded that with Mr Crader/GAM. This may have begun whilst he was still working with Mr Crader but been withheld. However, such conduct, even if broadly considered to be disreputable, would not affect the outcome on the matters that I have to decide.

171. However, taken together, the matters identified by the Defendant in paragraph 168 above cause me to be particularly cautious about accepting Mr Donovan's account where it is contentious and is not supported by contemporaneous documentation.

172. I have no particular concern about the reliability of the evidence of Ms O'Donoghue and Mr Hill, though it must be said that neither greatly assists in determining the matters that I have to consider. In particular, in respect of Mr

Hill's evidence as to what responsibilities Mr Donovan and Mr Crader were each assuming, it is apparent that he had limited knowledge beyond what he had been told and had assumed.

173. For their part, the Claimants describe Mr Crader's evidence as "*evasive, dissembling and argumentative."* They draw attention in particular to the following:

(a) Mr Crader's evidence to explain the letter from his solicitors of 3 December 2016 in response to a letter of claim from solicitors for Mr Donovan. That letter sets out a different case than the one he now advances. Mr Crader declined to say whether he had read and/or approved the letter and would not say whether he considered it to be truthful at the time it was sent.

(b) The inconsistency between the letter from Mr Crader's solicitors dated 16 December 2016, describing the suggestion of a fee rebate agreement as "*fanciful"* and Mr Crader's evidence acknowledging that such an agreement was reached.

(c) Mr Crader's explanation of the part of the INREV questionnaire quoted at paragraph 37 above asking about whether the fund manager, GAM, had been involved in any dispute or litigation. His attention was drawn to the dispute between GAM and PGF. After a somewhat lengthy disputation about whether this was a dispute "*with investors"* (which Mr Crader did not accept), he conceded that it could not properly be said that the dispute was "*non-confrontational."* He denied that he was being dishonest in his description of the PGF dispute, yet his own evidence shows that description to be incorrect.

(d) Mr Crader's evidence in respect of the email of 5 April 2013 at paragraph 44 above was unconvincing and was suggestive of an attempt to evade a difficult piece of evidence.

(e) Mr Crader's evidence in respect of his solicitors' letters is particularly unsatisfactory. He stated that these were documents drafted by lawyers

> and said, "*I am being led by lawyers."* Yet he acknowledged that he had read them and their meaning cannot be said to be obscure to someone who has the insight into legal issues demonstrated by the email of 22 April 2013 referred to at paragraph 53 above and who drafted two versions of the HoT. At best (from Mr Crader's point of view), his solicitors have seriously misunderstood his instructions, drafting a letter that does not reflect his true case, and he has failed carefully to check it; at worst, he is party to a false account of dealings between the parties.

174. Ms Morriss was also asked about the PGF dispute. She thought the answer to question 2.6.7 had been drafted by Mr Crader and herself. She variously described the answer as "*truthful"*, "*a fudge", "the best truth we could put down at the time"* and "*probably not the whole truth".* She was ultimately asked whether it was "*utterly misleading"* to which she responded, "*if you say so, yes."*

175. In the case of both Mr Crader and Ms Morriss, I have the same caution as in Mr Donovan's case. Features of their evidence identified above suggest that it may be unreliable. I should therefore be cautious in accepting contentious parts of their evidence, in particular where it is not supported by contemporaneous documentation.

176. As to the expert witnesses, I had considerable concerns about the reliability of Mr Bell's evidence. The point made on behalf of the Defendant, to the effect that he had tailored his evidence to give that which was most favourable to the Claimants has force. He was able to provide no rational basis for changing his opinion from the range of 3% to 5% to the fixed figure of 5%; his figures for what an in-house fundraiser employed by GAM would have earned lacked any solid foundation; and his suggestion that the figures actually discussed by the parties seems no more than an after the event basis for supporting figures that he was struggling to justify by other means. Moreover, the use of the word "*advantage*" in the passage cited at paragraph 123 above is suggestive of a partisan approach to the evidence which is inconsistent with the duty of an expert to give opinion which is independent of the cause of the party who instructs them.

177. My overall impression was that his ever-changing position was an attempt to shore up the figure that he had suggested in his original report by other means, once he realised that his original methodology made a mistaken assumption about the investment by York.

178. As to Mr Virji, overall, I found his justification of his figures more persuasive. They seemed to be broadly based in his real experience. Moreover, his opinion that friends and family investors introduced by GAM would not be brought into the calculation is a commonsense approach where these were investors who seemingly were known of and were always going to be bought in as investors in the projects.

179. However, I had two doubts about certain aspects of his approach:

(a) He did not adequately explain why he took a range of 1% to 1.25%. his own figures would suggest a range of 1% to 2% for work of this nature. He provided no justification for taking a lower range than this.

(b) The deduction of a figure to reflect the overheads and profit of the supposed boutique supposes that Mr Donovan's services are to be valued based on what he would have been paid in such a role. But given that he was both an investor and someone contributing to the start-up costs of the project, he cannot be equated to someone employed by a boutique. It is arguable that the true comparison of his services is with what the boutique would have supplied, not what the employee of the boutique would have supplied – therefore no further deduction for the cost of providing those services are called for.

Discussion – the issues

A. What were Mr Donovan's duties under the JV agreement?

180. Two important matters should be identified in the first place:

(a) The parties agree that they entered into contractual relations; the only dispute is as to the terms of that contract, although associated with that issue is the issue as to when the contract was concluded.

(b) It is important to distinguish the issue of Mr Donovan's obligations under the JV agreement on the one hand and his actual day to day involvement in the venture on the other. They are not necessarily coterminous, although performance may be good evidence of the existence of a contract that has arisen through performance.

181. A considerable amount of time was spent during the trial in addressing the relative responsibilities of Mr Donovan and Mr Crader. It clearly suits Mr Donovan's case to assert that his role in the joint venture had largely finished by early 2015, in that the investment had been secured and structured such that, on his case, had had substantially discharged his obligations under the contract and is entitled to payment. Conversely, it suits Mr Crader to contend that Mr Donovan's duties were broader and continued beyond the time that he left the venture.

182. Given my scepticism about the reliability of both leading witnesses, I do not find their verbal testimony at all persuasive. The contemporary documents are inevitably somewhat less than detailed in their portrayal of this issue. Moreover, many of the documents on which emphasis has been placed clearly had a presentational role. Whilst it is understandable that GAM may have wished to portray a clean-cut structure with clear lines of responsibility to potential investors, it is equally easy to understand that, in reality, things may have been rather less rigid.

183. Overall, it is clear that that Mr Crader personally and GAM generally were significantly more experienced in the management of commercial assets than Mr Donovan, but that Mr Donovan was willing, indeed at times, eager to assist in discussing those plans. Notwithstanding the extreme positions of the parties in their witness statements, this situation seems to have accord both with that described by Mr Crader in his email of 12 November 2014, namely that they were "*full partners*" but had a "*focus on different areas*" and with Mr Donovan. In cross examination, several of his answers showed his willingness to engage in various aspects of the purchase, development and disposal of sites. That willingness is also demonstrated in email correspondence some of which is summarised above.

184. Whilst the split of administration fees tends to support the contention that more of the burden of managing the properties fell on GAM's shoulders than fell on Mr Donovan's, it must be borne in mind that GAM employed staff and provided office accommodation (including for Mr Donovan himself). It adds little to the identification of duties pursuant to the contract.

185. In my judgment, Mr Green's formulation referred to at paragraph 137 above is an accurate summary of the tasks actually undertaken by Mr Donovan, Mr Crader and GAM generally, with the qualification (if it be necessary) that the use of the word "*primarily*" in each case acknowledges that people at times carried out tasks outside of their primary area, such that Mr Donovan sometimes undertook tasks relating to the acquisition, re-development and sale of the sites and Mr Crader at times undertook tasks relating to securing investment and managing relations with investors. Each recognised the area of expertise of the other, but each had sufficient knowledge and interest in the other's area to justify their assisting in it. Mr Crader's email of 12 November 2014 referred to at paragraph 83 above is consistent with such conduct.

186. It is apparent from the largely uncontroversial evidence identified at paragraph 34 above that, in the first half of 2013, Mr Donovan and Mr Crader had taken steps to raise investment for their intended venture. That amounted to the beginning of the performance of the scheme contemplated in the HoT draft of 14 December 2012.

187. It is notable that later documents relating to the relationship between Mr Donovan/NALED and Mr Crader/GAM, in particular the revised HoT emailed on 6 March 2013, the 6 April 2013 LLP agreement and the 21 April 2013 draft were consistent with the terms referred to in this document, albeit that they contained additional terms. Mr Crader's request in July 2013 for payment of 50% of an expense of the joint venture from Mr Donovan (see paragraph 55 above) is equally consistent with the parties having reached a concluded agreement on the terms of the HoT as revised in March 2013.

188. As to the positions of the parties in retrospect:

(a) Mr Donovan saw the HoT as recording their agreement;

(b) Mr Crader appears to have considered the HoT to have been the closest to what the parties intended (see email of 22 April 2013).

189. It has at times been suggested that Mr Crader's and Mr Donovan's relationship was more in the nature of a partnership – the Claimants touched on the suggestion at paragraphs 49 and 50 of its opening submissions and at paragraph 8(c) of their closing submissions and Mr Crader uses the word "*partner"* in his email of 12 November 2014. However, neither party has advanced the case in its pleadings that the legal status of this relationship was in the nature of partnership

190. . Although the Claimant applied to amend its case to aver that the relationship was by way of partnership, that application was refused and therefore a finding to that effect is not open to me.

191. In my judgment, the Claimants' analysis of the formation of the contractual relationship of the parties most naturally fits the evidence here. The parties had, by the time of the provision of the revised HoT in March 2013, reached agreement to go into business together and had agreed on the principal terms of their relationship. Those terms were recorded, and Mr Donovan and Mr Crader started to act in accordance with those terms.

192. The Defendant's counter argument of a contract that was entered into by performance over a prolonger period of time is inconsistent with the position that the parties had reached by the time of the revised HoT being shared in March 2013. In any event, it leads to a situation in which it becomes difficult to identify any clear time at which the parties had entered into a contractual relationship, with a corresponding problem that no clear contractual terms can be identified, in particular where obligations are agreed to have varied during the relationship. Given that the parties agree that they entered into a contractual relationship, the analysis in the previous paragraph far better encapsulates that relationship.

193. It follows that this is a contract that arises from the conduct of the parties in the light of their written and oral communications. As indicated above, the conduct of the parties was broadly as described in paragraph 18 of the Claimants' closing submissions. However, I have some difficulty with reaching the suggested

conclusion that Mr Donovan's contractual duty was simply that stated at paragraph 18(a) of those submissions.

(a) The very wording of that sub-paragraph discloses the truth that Mr Donovan in fact discharged other tasks within the joint venture, assisting in the performance of those matters which it is argued were the responsibility of Mr Crader/GAM.

(b) In any event, even on his own evidence, Mr Donovan's duties went beyond "being responsible*"* for seeking investment. His duties included actually seeking the investment. This may be thought to be implicit in the use of the word "*responsible*", but it demonstrates that the true nature of his duties cannot be clearly encapsulated in that formulation.

194. The Claimants plead that Mr Donovan's "*primary"* responsibility pursuant to the contract was "*seeking and/or securing investment to finance the acquisition"* of sites identified by GAM, as well as acting as an investment relations manager and point of contact for investors. The Claimants accept that he in fact did more than this but assert that this was merely acting as "*a good corporate citizen."* That explanation however merely presupposes the answer to the very question that it seeks to answer, namely: what were Mr Donovan's duties under the contract? It is not inherently more probable that his actions were simply the result of his behaving as a "*good corporate citizen"* than that his actions were an outward manifestation of a contract pursuant to which he had some kind of general duty to pursue the interests of the joint venture as contended for by the Defendant.

195. The Claimants rely on the split of the administration fee (90%/10% in GAM's favour) of further evidence of Mr Donovan's limited involvement in the management of the properties themselves.

196. The Defendant's formulation at paragraph 9.2.1 of the Re-Re-Amended Defence and Counterclaim, namely a duty on each of the contracting parties "*to work towards the success of the projects"* seems to come closer to the reality of what the respective parties performed, if one adds the words "*as was consistent with their experience and expertise."* In my judgment, that most neatly encapsulates

what the parties, by their written communications and conduct, should be taken to have agreed.

B. What was/were the condition(s) for payment of Mr Donovan under the JV agreement?

197. As identified at paragraph 157157, positive evidence is required to show that payment for services is conditional upon the performance by a party of its obligations under the contract. The circumstances of this case demonstrate why such evidence is required.

198. The commercial context of the JV agreement is a situation where Mr Donovan and Mr Crader (personally and through GAM) have identified an opportunity and believing that they have skills which taken together will potentially permit them to take advantage of that opportunity. They have then gone on to act jointly so as to seek to give effect to the opportunity. Their actions have involved, amongst other things: investing their own capital into the venture; introducing family and friends wo have invested in the venture; marketing the venture; approaching other investors; managing the relationship with other potential and actual investors; identifying relevant properties; purchasing properties; redeveloping properties; and selling properties.

199. Whilst the JV continued, it would not be realistic to define what precisely amounted to discharge of the contractual obligations of either of the contracting parties by strict reference to a list. It is only at the point of the breakdown of the relationship when (on the Defendant's case), Mr Donovan has walked away from the JV that it is possible to identify a failure of performance that might be said to be a failure to discharge a condition precedent to payment under the JV agreement. Whilst it is open to the Defendant to argue that Mr Donovan was in breach of contract by abandoning the JV (entitling them to claim damages for any loss caused by such breach), it is not obvious why the payment of the performance fee should be dependent upon continuing to perform duties, when some of the duties had already been performed. This is all the more so where, notwithstanding my finding of a contract obligation on Mr Donovan's part to work towards the success of the projects in a manner consistent with his

experience and expertise, the reality was that Mr Donovan's experience and expertise lay mostly in fundraising and managing investor relationships, which had been mostly performed.

200. On the evidence before me, the promises of performance of contractual duties on the one hand and payment of fees on the other were independent, at least in respect of the so-called performance fee. The situation was somewhat different in respect of the administration fee, a point dealt with below.

201. It is of course the case that Mr Donovan accepted in his email of 26 January 2015 that he had no entitlement to payment. I wholly reject Mr Donovan's suggestion that this comment was "*sarcastic"* (intending to mean, as I understand it, that he really thought he was entitled to payment notwithstanding what he said). There is nothing in the tone of the email to suggest sarcasm, nor does it make any sense that he would be sarcastic on this issue. Given that talk of his leaving the partnership was at an early stage, it is almost inconceivable that he would have started any negotiation as to what was due to him by sarcastically suggesting that nothing was.

202. The email might be thought to suggest an acceptance on Mr Donovan's part that he had not performed the duties that gave rise to a right to remuneration and/or that by leaving the venture he had become disentitled to any right to payment.

203. However, it seems to me that this email probably reflects a belief on Mr Donovan's that the lack of clear statement of entitlement in a mutually acknowledged document would make it difficult to resolve what, if anything was due to him. So it has proved to be. But that does not mean that, on the proper interpretation of the relationship between the party, the court should not find the existence of a contractual liability to pay in the circumstances that arise. Accordingly, I do not find that this aspect of Mr Donovan's evidence, unsatisfactory as it may be, assists in determining the case or undermines my conclusion that the promises of performance of contractual duties and payment of fees were independent of each other.

C. Was Mr Donovan in repudiatory breach of the JV agreement?

204. The Defendant's case is that Mr Donovan renounced the contract by one or both of the acts particularised at paragraph 147 above. Both arguments are problematic, and I am persuaded by neither.

205. As to the first, the email from Mr Donovan comes in a sequence of emails on 26 January 2015. In context, the first suggestion of the possibility of Mr Donovan leaving the joint venture came from Mr Crader. Taking the emails together, there is no sense that Mr Donovan was saying that he would not perform his contractual obligations. Indeed, the opposite is true – in the email at 15.17, Mr Donovan is expressly asking for time to consider matters so that he can focus on an issue that was of concern to the joint venture; far from showing an intention to renounce the joint venture, he was showing an intention to act so as to promote it.

206. As to the second argument, whilst it is correct that, following the emails on this date, Mr Donovan did not do much to further the joint venture, this cannot properly be interpreted as a refusal of performance such as to amount to renunciation of the contract. Rather, the failure to perform was simply a case of Mr Donovan stepping down from his day to day role in agreement with Mr Crader. The Claimants point to the fact that the Defendant has been unable to identify a single instance of Mr Donovan being asked to perform work and his declining to do so. Indeed, Mr Donovan positively offered to continue to liaise with York (see email of 26 March 2015), but Mr Crader did not respond to the offer, merely referring in the email of 30 March 2015 to "*The projects I currently have with York*."

207. Whilst there is obvious sense in the Defendant's explanation that there was no point in bombarding Mr Donovan with requests to work if he did not wish to have continuing day to day involvement in the joint venture, the circumstances show that the failure to bombard him with such request was consistent not with an acceptance by the Defendant of repudiation by Mr Donovan but rather a jointly agreed position in which Mr Donovan withdrew from all but his passive duties in the joint venture.

208. It is correct that, on his contractual duties as I found them, he had a continuing duty to work towards the success of the projects and it was not the case that the projects had all come to completion. But in the context of his particular experience and expertise, it is not surprising that the parties should, in the event of a fall out, agree that he should cease to be more than a passive investor in the projects.

209. Whether the contractual position was thereafter the continuing existence of the JV agreement with an understanding that Mr Donovan would not have day-to-day involvement (the Claimants' favoured position at paragraph 136 of its written closing submissions) or that there was consensual termination of the JV agreement (the Claimant's secondary position at paragraph 137 of the closing submission) might be thought academic. In either event, there was no corresponding variation in Mr Donovan's right to performance fees on completion of each project, given my findings on issue B.

210. However, in supplemental submissions received after this judgment was sent out in draft, the Defendant has sought clarification as to which of these analyses the Court considers correct. The reason for this request is that, in the event that this judgment were successfully appealed on the issue as to whether the promises of performance of contractual duties and payment of fees were independent of each other, the question of whether the JV agreement continued in effect notwithstanding the matters set out at paragraph 147 above might affect the determination of the Claimant's right to performance fees and NALED's right to fee exemption.

211. I decline to provide clarification on this use for two reasons:

    (a) I do not have submissions from the Claimant on this issue. The Defendant's submissions were filed by email at 7.35pm on the day proceeding the hearing for handing down judgment and the Claimant by then had indicated that it did not intend to attend that hearing because it was neutral in respect of the only matter not agreed relating to that hearing, the Defendant's application for an adjournment of the time for applying for permission to appeal. Whilst it would of course have been

possible to adjourn the handing down of judgment to seek the Claimant's submissions on this issue, that would have involved delaying the handing down of judgment and a potential delay to a further hearing to deal with consequential matters. I do not consider this to be in accordance with the overriding objective.

(b) Where a first instance decision is the subject of a successful appeal on one issue, that might affect the Appeal Court's assessment of the court's judgment on other issues. Where issues are wholly discrete and, in particular, where the determination of issues turn upon assessment of witness evidence, there may nevertheless be considerable benefit in the first instance Judge making findings on issues even where, because of other parts of the judgment, those findings are academic. Here, any finding as to whether the JV agreement continued in force may be affected by material that is relevant to other aspects of the judgment that may be challenged on appeal. In any event, the distinction between the Claimant's alternative arguments is a matter not of primary fact finding but of inference and legal interpretation from other findings that have already been made. Accordingly, the Appeal Court is as well placed as I am to determine this issue.

D. If Mr Donovan was in repudiatory breach, did GAM elect to terminate the JV agreement by acceptance of that repudiation?

212. Given my finding that Mr Donovan was not in repudiatory breach, the question of acceptance becomes academic. Indeed, I consider the Defendant's conduct after the allegedly repudiatory acts to be evidence that the change in roles thereafter was consensual.

213. However, if I were wrong on the issue of repudiatory breach such that the email timed as sent at 15.06 on 26 January 2015 was considered to be renunciatory in nature, the matters particularised at paragraph 148(a) and (b) above would have the quality of acceptance that offer. Equally, if Mr Donovan's failure to perform further services was found to be repudiatory, the Defendant's failure to insist on such performance would be in the nature of accepting that repudiation rather

than simply being the consequence of an agreement that Mr Donovan step down from his previous role. Either way, the argument that GAM elected to terminate the JV agreement by acceptance of the repudiation would have succeeded,

E. Is Mr Donovan entitled to payment for services provided to GAM pursuant to the contract either as having wholly or substantial performed his obligations on which payment was conditional?

214. Were I to be wrong on issue B, the conditionality of payment, and issue C, the alleged repudiation of the contract, the question of whole/substantial performance would arise.

215. It will be readily apparent from my analysis of the contractual duties above that I do not think that it could be argued that Mr Donovan had wholly performed his duties; he had the continuing duty to work towards the success of the projects generally. It would equally not in my judgment be right to say that he had substantially performed his obligations under the contract. The joint venture involved identifying and securing investment, identifying and purchasing properties, re-developing the properties and selling them. The stage reached with the York projects in particular was still fairly early, with redevelopment work still to be completed and sale of the residential units to take place.

216. It would therefore have followed that, had I found the promise of payment not to have been independent of the contractual duty to further the joint venture and had I found that Mr Donovan was in repudiatory breach of the JV agreement then, given that I would have found acceptance of repudiatory breach, I would not have found that he had either wholly or substantially performed his duties under the contract sufficient to entitle him to payment of the fees under the contract.

F. Is Mr Donovan entitled to payment for services provided to GAM pursuant to an implied term of the agreement providing for remuneration on a quantum meruit?

217. The relevance of a finding on this issue and/or on issue G is of course again dependent on supposing, contrary to my findings above, that the Defendant

succeeded on issues B and C and is therefore academic. Again however, it is potentially helpful to the parties to deal with the issue.

218. The Defendant raises a powerful argument that the presence of an implied term of a right to payment for services provided if the JV agreement was terminated is in tension with the nature of such a venture. From the beginning the parties to the JV contributed financially to the venture and provided services to it. They each had a mutual interest in the other staying in the venture. It is by no means obvious that a term that allowed a party to recover the value of services that they had provided if they chose to leave the venture was either necessary to give the venture business efficacy or indeed was what one would expect. Such a term might positively encourage a venturer to leave in circumstances that were likely to leave the other in trouble, quite possibly out of pocket.

219. It follows that, in my judgement, the proposed term does not meet either of the tests for an implied term set out above.

G. Is Mr Donovan entitled to payment for services provided to GAM on a quantum meruit pursuant to the doctrine of unjust enrichment?

220. Again this issue is academic because of findings on other issues.

221. The Defendant's argument that the doctrine of unjust enrichment is not available to the Claimant is based in part on the decision in Costello v MacDonald. Given that that decision was considered by the Court of Appeal in Barton v Jones [2019] EWCA Civ 1999 in a judgment handed down subsequent to written and oral closing submissions in this case, it would not be fair to deal with this issue without hearing further submissions on the effect of the recent decision. However, since my decision on this point is academic unless other aspects of my judgement are reversed on appeal and since the Court of Appeal will be as well placed as I am to determine the argument based on unjust enrichment, it is inappropriate for me to deal with it.

H. If Mr Donovan is entitled to payment on a quantum meruit, what is the value of the services that he provided?

222. Yet again, the relevance of a finding on this issue is dependent on supposing, contrary to my findings above, that the Defendant succeeded on issues B and C and therefore, in the light of those findings, is academic. However, unlike issues F and G, this issue is determined by the court's assessment of the evidence that has been heard and is unaffected by the decision in Barton v Jones.

223. For the reasons set out above, I find the evidence of Mr Bell unpersuasive. The better evidence is that of Mr Virji, with the provisos that I have identified at paragraph 179 above.

224. On balance, the proper approach to the valuation of Mr Donovan's services on a quantum meruit basis is to take mid-point of Mr Virji's range of 1% to 2%, that is 1.5%, and to apply that to the York Investment of £16,838,000[29]. This gives a value for the services of £252,570. No further deduction is required for overheads/profit.

I. Is Mr Donavan entitled to payment of £12,500 pursuant to an agreement to share GAM's management fees?

225. As I have identified above, the issue here is as to whether the part of the negotiation relating to the payment of management fees was binding when the negotiations did not come to fruition on the larger issue of the payment of performance fees. But for the part payment of £12,500 by the Defendant, this would not have been a straightforward issue. Whilst the negotiations are not headed to be without prejudice, there would have been a respectable argument that the deal was intended to be an all or nothing agreement. But, in the event, the payment of money pursuant to that aspect of the negotiation and its acceptance without reservation is compelling objective evidence that the parties intended that agreed part of their negotiation to be binding.

[29] For the reason set out above, it is not necessary to add the retainer to the claim, since it would such addition would be exactly balanced by the deduction of the retainer from the success fee.

226. Accordingly, in my judgment the First Claimant is entitled to the further payment of £12,500 pursuant to that agreement. Equally, the Defendant's counterclaim fails.

J. Was the fee exemption agreement between NALED and GAM part of the JV agreement?

227. It is common ground between the parties that they entered into an agreement that had the effect of exempting NALED and companies in the GAM group from paying performance fees by rebating fees that would otherwise be due. The only explanation that has been proffered for the parties reaching such an agreement is the avoidance of the adverse tax effect of such fees being paid by NALED and vehicles in the GAM group only to be paid back to the beneficial owners of those companies, the First Claimant and the Defendant. Whilst it is correct that Mr Donovan was known to be the controlling mind of NALED and that his negotiations are capable of being interpreted as actions on behalf of that company, the truth is that the only identifed benefit of this agreement is to benefit him personally, by avoiding a tax liability on the receipt of fees whilst enabling his company, NALED to retain sums otherwise due from it.

228. It follows that, in my judgement, the fee exemption agreement is part of the JV agreement. Termination of the latter would terminate the former.

229. However, for reasons that I have identified above, I reject the argument that Mr Donovan was in repudiatory breach of the JV agreement. Consequently, the putative acceptance of that alleged breach cannot have terminated the contract. Further, I find no other evidence that the JV agreement was terminated. It follows that, on my findings, the fee exemption agreement continued.

K. If the fee exemption agreement was not part of the JV agreement, was an entitlement to its benefits conditional upon the continued existence of the JV agreement?

230. Given my finding on issue J, this issue is no longer live. Had it been, the very matters that led me to resolve issue J in the Defendant's favour would equally have led me to make a finding in the Defendant's favour on this issue.

L. Is NALED entitled to the benefit of the fee exemption by reason of estoppel by representation or by convention?

231. Again, given my finding on issue J, this issue is not live.

232. Had it been live, I would not have found that NALED was entitled to the benefit of fee exemption by reason of estoppel for the following reasons:

(a) Whilst the actions of the Defendant in making distributions to NALED without the deduction of performance fees is consistent with a representation and/or convention that such fees were not due, I cannot see anything by way of detrimental reliance that would allow the Claimants to make out an estoppel by representation. The only detriment alleged is the obligation to pay the performance fees. Yet if that obligation exists, the detriment does not flow from the representation at all – it flows from that very underlying obligation to pay.

(b) Again, for the purpose of estoppel by convention, the Claimants are unable to show any act in reliance, and equally cannot show any unfairness or unconscionability in allowing the Defendant to assert the true position of liability for the fees.

233. It follows that, if the Claimants had otherwise failed to make out their case for payment of the performance fees, the arguments of estoppel by representation and/or convention would not have availed them.

Conclusion

234. It follows from my judgment above that:

(a) The First Claimant is entitled to his share of performance fees due on JV projects;

(b) The First Claimant is entitled to the balance of £12,500 in respect of the settlement of his claim for administration/management fees;

(c) The Second Claimant is entitled to performance and/or administration fees that have been deducted from distributions made to it in respect of all ventures in which it has invested as part of the JV;

(d) The Defendant's counterclaim fails.

235. I am invited to adjourn this matter for the following purposes:

(a) To enable the matter to be listed for a further hearing before me at the convenience of the parties in order to determine the order consequential upon this judgment;

(b) To enable the parties to make any application for permission to appeal after the final order has been determined.

236. I am conscious of the judgment of the Court of Appeal in McDonald v Rose [2019] EWCA Civ 4, in particular the reference to the fact that a party intending to seek permission to appeal should normally be expected to formulate its application by the time that judgment is handed down. The difficulty here is that the need for and the terms of any application for permission to appeal are likely to be influenced by the terms of the final order consequent upon this judgment. In those circumstances, it is not consistent with the overriding objective to force the parties to make an application for permission to appeal before the final order is determined. Accordingly, I adjourn consideration of any application for permission to appeal until the further hearing. In consequence, I extend time for filing any Appellant's Notice until 21 days after the adjourned hearing.