Neutral Citation Number: [2021] EWHC 2401 (Comm)

Case No: CL-2018-000811

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

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

Date: 24/09/2021

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

PRIME LONDON RESIDENTIAL DEVELOPMENT JERSEY MASTER HOLDING LIMITED	**Claimant**
- and -	
WITHERS LLP	**Defendant**

- -
- -

Mr Nigel Tozzi QC, Mr Tony Singla and Mr Jonathan Scott (instructed by **CMS Cameron McKenna Olswang LLP**) for the **Claimant**
Mr Patrick Lawrence QC, Mr Carl Troman and Mr Diarmuid Laffan (instructed by **Clyde & Co LLP**) for the **Defendant**

Hearing dates: 8-11, 15-18 and 23 February 2021

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Approved Judgment

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

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1. This is the trial of a claim by the claimant ("Prime"), as assignee of the causes of action available to Glen House Development LLP ("Glen"), for damages for professional negligence against the defendant ("Withers") in respect of losses alleged to have been caused primarily by allegedly negligent advice given by Mr Andrew Wass, a partner in Withers specialising in litigation, at a meeting on 29 October 2014.

2. Prime allege that as a result of that advice, it proceeded from 29 October to 12 December 2014 on the basis that it was fully entitled to demolish the upper floors of a building owned by it called Glen House, 125 Old Brompton Road, London SW7 1NE ("Glen House") as part of its redevelopment notwithstanding that the ground floor was occupied by H.R. Owen Dealerships Limited ("HRO") under the terms of a lease between Glen (as successor to the landlord's interest thereunder) and HRO as tenant of the ground floor car showroom and basement of Glen House ("Lease"). It is alleged that this advice was negligent and that in consequence HRO commenced proceedings against Glen and obtained an interim injunction restraining the continuation of the redevelopment works. Glen maintains that if it had been advised correctly, then it would not have proceeded other than by prior agreement with HRO and that the effect of the erroneous advice was to deprive Glen of the real and substantial chance of agreeing better terms for the redevelopment of the building with HRO than in the event it was able to obtain by negotiation following the grant of the injunction and as a result was deprived of a real and substantial chance of proceeding with the development in a manner that would have involved significantly less delay and less cost. Withers denies breach of duty, denies that any loss was caused by the breaches alleged and denies that HRO would have proceeded any differently had Glen been advised as it is alleged it should have been.

3. The trial took place between 8 to 11, 15 to 18 and 23 February 2021. I heard oral evidence from:

    i) Mr Barnaby Joy, a director of Tenhurst Limited (whose role is explained below) who attended the 29 October meeting;

    ii) Mr Brian D'Arcy Clark, who was responsible for Savills Investment Management's interest in Glen House as further explained below and who also attended the 29 October meeting;

    iii) Mr Julian Symons; a director of Savills Investment Management who also attended the 29 October meeting

    iv) Mr Martin Wenlock; a construction project consultant employed by Tenhurst Limited from June 2014, who led the technical discussions with HRO concerning the redevelopment of Glen House and supervised the redevelopment work once it commenced;

    v) Mr Michael Plummer; a contractor employed by Tenhurst;

vi) Ms Emma Copestake, a conveyancing partner at Withers during the period material to this claim and the partner responsible for managing Withers' relationship with Glen, who attended the 29 October meeting;

vii) Ms Veronica Carey, a special counsel in Withers' property litigation department who prepared or helped prepare a briefing pack for Mr Wass prior to the 29 October meeting but who did not attend it;

viii) Mr Wass; and

ix) Ms Hannah Robinson, a senior associate employed by Withers in its conveyancing department who at all material times worked closely with and was supervised by Ms Copestake and who gave initial advice on the construction of the Lease in February, March and early October 2014 but who did not attend the 29 October meeting.

Of the witnesses who gave evidence at the trial, those who attended the 29 October meeting were Mr Wass and Ms Copestake on behalf of Withers and Messrs Joy, D'Arcy Clark and Symons on behalf of Glen. The meeting was also attended by Mr Hunter, whose role I explain below. However he did not give evidence at the trial.

4. A number of experts were due to give evidence relevant to the quantum aspects of this claim. However, aside from one head of loss, agreement has been reached as to the sums being claimed subject to the issues of breach and causation and so the parties decided not to call any of the expert evidence that was available. I return to this at the end of the judgment.

5. As will be apparent from the introductory summary set out above, the events with which this dispute is centrally concerned all took place in the last quarter of 2014 and the focus is primarily on what was said by Mr Wass at the 29 October meeting and thereafter and what Glen is alleged to have done thereafter allegedly in reliance upon what Mr Wass had said. The impact that this lapse of time inevitably has on the reliability of recollection of the witnesses is exacerbated so far as the Withers' witnesses are concerned by the fact that the briefing pack supplied to Mr Wass prior to the 29 October meeting has been lost and there are no attendance notes that summarise what was said at the meeting on 29 October 2014 apart from a very skeletal attendance note prepared by Ms Copestake, that sheds no light on what was said at the meeting.

6. After completion of the evidence, but before delivery of closing submissions, Ms Robinson discovered a note she prepared that led ultimately to the letter of 5 November 2014 that has become the focus of attention in relation to what Ms Wass had advised on 29 October. It is both surprising and unfortunate that none of the lawyers at Withers kept attendance notes of the advice that was being given and equally unfortunate that Ms Robinson only discovered what was a plainly material note after evidence had been completed. The failure to discover this note and disclose its existence as and when it should have been inevitably undermines the confidence that I have in the disclosure processes adopted by Withers.

7. In those circumstances, I have tested the oral evidence of each of the witnesses wherever possible against the contemporary documentation that there is, admitted and inconvertible facts and inherent probabilities. This is an entirely conventional approach

– see Onassis and Calogeropoulos v. Vergottis [1968] 2 Lloyds Rep 403 at 407 and 413. This is not to say that a judge can, or should attempt to, resolve factual disputes by referring only to contemporaneous documentation. It is necessary to consider all of the evidence – see Kogan v. Martin [2019] EWCA Civ 164 per Floyd LJ at paragraphs 88-89. There is however nothing either in this authority or the requirement to consider all of the evidence that prevents the evaluation of oral evidence using the techniques I have referred to. In my judgment the use of such techniques is all the more appropriate having regard to the passage of time since the events with which this case is concerned – see Gestmin SGPS SA v. Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm) per Leggatt J (as he then was) at paragraphs 15-22. Indeed it is difficult to see what other techniques could safely be adopted in a case such as this where none of the witnesses of fact are truly independent.

8. As will become apparent from what I say below, I have concluded that some of the witnesses gave oral evidence that I cannot safely rely on. This is not because I consider any of those witnesses have set out to mislead me - that is not alleged by either party against any of the witnesses – but simply because their lack of recollection by reason of the passage of time is such that I cannot safely rely on what they say other than to the extent their evidence is corroborated by reliable evidence or is an admission or is contrary to their interest. Rather than attempting to explain why this is so as a freestanding element of this judgment I explain below how and why I have come to these conclusions by reference to the events that are material to this dispute.

The Facts

9. Most of the background facts that are relevant are not in dispute. The underlying ownership of Glen is only material in order to understand some of the documentation that I refer to below. Glen was owned as to 95% by an investment fund known as the "*Prime London Residential Investment Fund*", ("Fund") which was managed by Savills Investment Management ("SIM"). Mr D'Arcy Clark was the person responsible for managing SIM's interest in the Fund. The remaining 5% of Glen was owned ultimately by Tenhurst Limited, a company whose business was and is that of property development through its control of a wholly owned subsidiary called Tenhurst (Capital) Glen Limited. At all times material to this dispute, Tenhurst Limited was controlled by Mr John Hunter. Mr Joy had a minority interest in and was a director of Tenhurst. Glen appointed a subsidiary of Tenhurst Limited called Tenhurst Advisory (Glen) Limited ("Advisory") to be its development manager for the redevelopment of Glen House. Both Mr Hunter and Mr Joy were appointed directors of Advisory. Advisory's appointment was by an agreement in writing but that agreement has not been produced. I refer to Tenhurst Limited, Tenhurst (Capital) Glen Limited and Advisory collectively hereafter as "Tenhurst".

10. Mr Joy undertook much of the day to day commercial and administrative work in connection with the development on behalf of Tenhurst, although Mr Hunter was involved in many of the strategic decisions taken in the course of the development. The relationship between the Tenhurst interests and the Glen interests depended on what was at the time material to this dispute a close professional relationship between Mr Hunter and Mr D'Arcy Clark. That relationship soured subsequently however. In the result, Prime has chosen to rely exclusively on evidence from Mr Joy and others employed or engaged by Tenhurst Limited or Advisory rather than on evidence from

Mr Hunter. Many of the emails that I refer to later in this judgment was either written or copied to Mr Hunter. It needs to be borne in mind throughout that there is no evidence from Mr Hunter available to explain or set the emails he wrote into context.

11. On 8 April 2011, Tokara Property Holdings Limited ("Tokara") acquired Glen House. At that time, Glen House was occupied by various tenants. The ground floor and lower ground floors had been occupied since 1999 by HRO and were used as a Ferrari car sales showroom. Tenhurst introduced Glen House to Tokara. Just over a month later, on 18 May 2011, Tokara entered into the Lease with HRO and a Licence ("Licence") by which each party was permitted to carry out works to Glen House, which were specified in the Licence. The terms of the Lease are central to this dispute.

12. The Lease defined certain words and phrases used elsewhere in the Lease. Those relevant included:

> "…
>
> **Contractual Term**: a term of years beginning on and including the 14th August 2010 and ending on, and including the 13 August 2025;
>
> **Development**: any reconstruction, redevelopment, refurbishment or renewal works carried out or intended to be carried out by the Landlord at the Building other than the Property (including any alteration to, or raising the height of, the Building) or at the Landlord's Neighbouring Property, as the Landlord may think fit;
>
> …
>
> **Permitted Use**: a car showroom together with ancillary offices; or a retail shop within Class A(I) (of the Town and Country Planning (use Classes) Order 1987 (as enacted at the date of this Lease) or any use within Class A2 of the Town and Country Planning (Use Classes) Order 1987 (as enacted at the date of this Lease);
>
> …
>
> **Planning Application:** any application or applications for the Planning Permission or for any approval required as part of the Planning Permission;
>
> **Planning Permission**: planning permission for any Development or any change of use at the Property;
>
> **Property**: the ground floor and basement of 125-133 Old Brompton Road, London SW7 1NE …"

By clause 2.1 of the Lease, Tokara let the Property (as defined) to HRO for the Contractual Term. The rights that were excepted from the Lease were set out in clause 4 of the Lease and included at clause 4.1:

> "(c) at any time during the term, the full and free right to carry out any Development;
>
> (d) the right to erect scaffolding at the Property or the Building and attach it to any part of the Property or the Building in connection with any of the Reservations or any of the Landlord obligations in the Lease; …
>
> notwithstanding that the exercise of any of the Reservations or the works carried out pursuant to them result in a reduction in the flow of light or air to the Property or loss of amenity for the Property provided that they do not materially adversely affect the use and enjoyment of the Property for the Permitted Use."

By clause 4.5 it was agreed that:

> "No party exercising any of the Reservations, nor its workers, contractors, agents and professional advisors, shall be liable to the Tenant or to any undertenant or other occupier of or person at the Property for any loss, damage, injury, nuisance or inconvenience arising by reason of its exercising any of the Reservations except for:
>
> (a) physical damage to the Property; or
>
> (b) any loss, damage, injury, nuisance or inconvenience in relation to which the law prevents the Landlord from excluding liability.
>
> PROVIDED THAT in exercising the Reservations the Landlord and anyone who is entitled to exercise them or anyone authorised by the Landlord shall use reasonable endeavours to cause the minimum disturbance to the Tenant and the Permitted Use and shall make good all damage to the Property as soon as reasonably practicable to the reasonable satisfaction of the Tenant."

By clause 31.1 HRO was prevented from using the Property as defined for any purpose other than the Permitted Purpose as defined; by clause 32.5, HRO agreed not to oppose any Planning Application or take any action which results in or is likely to result in the refusal of any Planning Application and, unsurprisingly given the earlier terms in the Lease, by clause 36, Tokara granted to HRO a qualified covenant of quiet enjoyment in these terms:

> "The Landlord covenants with the Tenant, that, so long as the Tenant pays the rents reserved by and complies with its obligations in this lease, the Tenant shall have quiet enjoyment of the Property without any interruption by the Landlord or any

> person claiming under the Landlord except as otherwise permitted by this lease."

13. Prior to the grant of the lease, there had been some discussion between Tokara and HRO concerning what Development was contemplated. Mr Joy's evidence as to the nature of these discussions as set out in his witness statement was hearsay based on discussions with a number of individuals at Tokara and Mr Hunter that he summarised at paragraph 19 as being to the effect that:

> "when the Lease and the Licence were agreed, Tokara had discussed with HR Owen its plan to undertake an extensive redevelopment of Glen House. At the time, this included alterations and additions to the floors of the building above HR Owen and, potentially, structural works within the HR Owen demise"

He does not suggest that there was any discussion prior to the Lease and Licence being agreed concerning the demolition of the floors above Glen House whether with HRO remaining in occupation or otherwise and Mr Joy did not suggest the contrary when he was cross examined on this point – see T2/16/15-16. I find that there was no such discussion.

14. Mr Joy says and it is not disputed that on 1 June 2011 Tenhurst Limited was appointed by Tokara as its planning manager for the purpose of obtaining a planning consent from the LPA for the redevelopment of Glen House and for finding alternative accommodation for HRO if the redevelopment of Glen House required its temporary relocation. Mr Joy states and again it does not appear to be in dispute that in the period from the date when the Lease was signed two redevelopment schemes were under discussion being:

> "First, there was a 'Base Case', which consisted of the works eventually approved under the planning permission granted in April 2013 (which involved partial demolition and redevelopment of Glen House to provide a mixed use commercial and residential development, comprising: office space on the lower ground, ground, first and second floors; five new residential dwellings on the third to fifth floors; provision of an additional storey; expansion of the existing building envelope at the first to fourth floors; and retention of existing car showroom at the ground floor level); and then the 'Upside Case', which involved a full knockdown and rebuild of the building with a cutting edge new building in its place."

15. By March 2014, when Glen was negotiating to purchase Glen House, the two development cases had evolved into three, which as described by Mr Joy in paragraph 23 of his statement were:

> "First, the 'Downside Case', which was the same as the Tokara Base Case. Second, the 'Base Case', which was the Downside Case plus a land use swap to replace two of the office floors with residential floors, so that there would be five residential floors in

> total. Third, the 'Upside Case', which was the Base Case, but with higher residential property exit prices per square foot and an extension to the penthouse apartment. The intention at this time was to develop the property in line with the Base Case. This became known as the "Base Scheme"."

As Mr D'Arcy Clark says in paragraph 26 (a) of his statement:

> "Glen's intention was to demolish Glen House and redevelop the property using the existing planning consent with the added benefit of a land use swap to convert one or more of the consented office floors into residential space. This included the option (which ultimately ran into the sand as part of the derailment of the project by Glen's dispute with HR Owen) of adding an additional, very light floor on top of the building which wouldn't require any strengthening works to the ground and basement floors. HR Owen were set to remain in situ during the development."

He maintains that the intention was that removal of non-structural elements and clearing out fittings, fixtures and contents would commence by October 2014 with construction work to be completed by January 2016.

16. In January 2014, Withers was retained to act on behalf of Glen in relation to the purchase of Glen House by an entity called Prime London Residential Development LP, which was controlled by Cordea Savills LLP, acting by Mr D'Arcy Clark. The retainer was contained in or evidenced by a letter from Withers dated 27 January 2014. On 11 March 2014, contracts were exchanged for the purchase by Glen of Glen House from Tokara, at a price of £26 million and on 20 March 2014, Glen and Tokara completed the purchase by Glen of Glen House. As part of that purchase, Glen stepped into the shoes of the landlord in relation to the Lease and License. The conveyancing aspects of the retainer were to be carried out by Ms Copestake assisted by Ms Robinson. In reality much of the work was carried out by Ms Robinson.

17. In the course of the conveyancing work there were two material communications from Withers to Glen. The first was contained in an email from Ms Robinson to Mr Joy dated 18 February 2014, in which she stated (amongst other things):

> "Another potential issue to flag is that Pemberton Greenish have provided a disclosure note and copy correspondence regarding the HR Owen lease. I attach copies to this email. You will note that HR Owen's solicitors have advised them that the potential redevelopment of the site may breach their lease. Pemberton Greenish have taken the view that this is just an attempt to impact on the sales process. <u>However, whilst the HR Owen lease does reserve rights to redevelop Glen House and there is a non-object clause relating to planning applications, the development rights are subject to the exercise of the right not materially adversely affecting the use and enjoyment of the demised premises for the permitted use (which as noted in the solicitor's letter is Class A</u>

> 1 or A2 and not B1 (a) as referred to in the current planning permission). Have you had any discussions with HR Owen regarding the proposed development as it would appear that there is potential for HR Owen to seek to object to the works? Ultimately, if the works did materially adversely affecting the use and enjoyment of the demised premises, HR Owen could seek an injunction to halt the works." [Emphasis supplied]

Mr Joy responded to this email by stating that:

> "HRO have been aware for 3 years that we intend to re-develop the site, and indeed we have entered into extensive discussions with them on this matter. They have always been supportive of the scheme because they understand that it will support the value and look/feel of their showroom. To put everyone's minds at ease, we have allowed for c. £500k of additional costs in the construction process for having HRO in situ during the build. This will include a full crash deck arrangement above the ground floor. In addition, we have budgeted a significantly reduced rent during the construction period. In summary, this is simply a positioning play on their behalf and it doesn't unduly concern us. That is not to say, however, that we don't try to make some commercial mileage out of this point with the seller -we should certainly raise it as a point of concern, for them to reassure us on. Also worth bearing in mind that HRO never objected to the scheme in the first place, having had full presentations from us at the time."

Mr Hunter also responded to Ms Robinson's email:

> "We need to be robust in our rebuttal on the HRO point. They allowed the planning to go forward as it did over a period of two years in full knowledge of all that it comprised. They are fully aware of the benefits that will flow once the building is revived moreover they never objected to our proposals and dealings with RBKC. They can't have it both ways. We might consider a reduction in rent but we won't be paying for any inconvenience."

This was wrong in at least one respect – as I have found, there had been no discussion prior to the grant of the Lease concerning the demolition of the upper floors of Glen House while HRO remained in occupation. Mr D'Arcy Clark responded to Mr Hunter in an email copied to Ms Robinson:

> "I agree with your responses and make the following points
>
> 1. I presume that our construction process allows for leaving the ground floor front of the building relatively unobscured .... if not, how obscured would it be and would HRO be within their rights to demand a rent reduction/compensation/lease termination as a result?

> 2. In practical terms where else could they go?
>
> 3. There is £500,000 put aside in the figures to keep them sweet which if unspent would be nice. But if it is spent - as a result of their showing that their business has been materially affected - and is successful in keeping them there, the subsequent additional uplift in rent at the next review - because of the improvements - will more than compensate.”

Ms Robinson responded to this email string on 19 February 2014 in an email to Mr Hunter and Mr D’Arcy Clark, which was copied to Ms Copestake and Mr Joy, in these terms:

> “I note John … [Hunter’s] comment on a robust rebuttal on the HR Owen point. However, this is really a post-completion issue and you need to be comfortable on this point given the potential issue raised by HR Owen's solicitor and that they may object to the proposed works.’’

18. Unsurprisingly given the terms of these emails, Prime does not criticise Ms Robinson’s advice in these proceedings although Prime’s witnesses have described it (wrongly in my judgment) as legalistic. One of the functions of a transactional lawyer is to inform his or her client of any legal difficulties that the lawyer identifies or ought reasonably to identify in the execution of that lawyer’s retainer. It is not the function of a lawyer to make the commercial judgments that have to be made in consequence of that advice. The judgment whether to proceed in the face of Mr Robinson’s advice was one for Glen and Glen alone to take. It chose to proceed in the face of the warnings that it had received. The tenor of the responses from Glen was that this difficulty would not be a problem in practice for a variety of commercial reasons including that HRO was understood to be supportive of the scheme and there was funding available in the budget to pay compensation for any material adverse effect that was proved. These responses are not surprising since there was a strong commercial imperative to proceed with this transaction in an attempt to deliver success for the Fund. To be clear, in my judgment the decision to proceed in the face of the advice received was driven by commercial considerations not by any misunderstanding as to the effect of the advice received or its significance. It is also worth observing that even at this stage, these internal emails did not suggest a willingness on the part of the Glen interests to engage with HRO on the impact of the redevelopment scheme other than robustly.

19. The final material communication from Withers prior to exchange is contained in its Report on Title dated 6 March 2014 (“RoT”), which again was prepared by Ms Robinson. In so far as is material the report stated:

> “As per email correspondence of 18 February 2014, the Sellers have provided a disclosure note in relation to HR Owen, one of the lessees at the First Property. We enclose a copy of the disclosure note and relevant correspondence with this Report. You will note from the enclosed documents that HR Owen's solicitors have advised them that the potential re-development of the first property may breach their lease. The Seller's solicitors

> have taken the view that this is just an attempt to impact on the sales process. However, whilst the HR Owen lease does reserve rights to re- develop Glen House and there is a non-object clause relating to planning applications, the development rights are subject to the exercise of the rights not materially adversely affecting the use and enjoyment of the demised premises for the permitted use (which is referred to in the lease as being class A 1 or class A2, and not class 81 (a) as referred to in the current planning permission). If the proposed works were to materially adversely affect the use and enjoyment of the premises demised to HR Owen, they could seek an injunction to halt the works. We understand from our discussions with you that there have been discussions with HR Owen regarding the proposed works and that they have been supportive of the scheme. We understand that there is an allowance of approximately £500,000 of additional costs in the construction process for having HR Owen in situ during the proposed redevelopment and any costs relating thereto. However, there is still a potential risk that HR Owen could object to the works and take action in relation thereto."

20. The disclosure note and correspondence and copy correspondence referred to in the RoT and earlier email from Ms Robinson consisted of a letter from Ellisons (the solicitors who acted throughout for HRO) dated 18 December 2013 and a Disclosure Note signed by Pemberton Greenish (the solicitors acting for Tokara in relation to the sale and purchase of Glen House to Glen) dated 14 February 2014. Turning first to the letter from Ellisons, it was addressed to Pemberton Greenish and stated materially:

> "Our client is aware that the whole building is being offered to the market as an opportunity to develop the site in accordance with planning consent granted in April of this year.
>
> Your clients will appreciate our clients' serious concern in view of the major works contemplated under the planning consent. If such works were to be implemented, our clients consider it would result in serious disruption to their business and permitted use under the terms of the Lease and may even require all the Tenants to relocate during any major building programme.
>
> We have advised our clients that the carrying out of such major works would exceed the rights that are reserved to the Landlord under the Lease since they would materially adversely affect our clients' use and enjoyment of the property and would cause major disturbance to our clients' business. We therefore consider that this would constitute a derogation of grant by your clients or their successors.
>
> …
>
> Whilst we understand our respective clients have had ongoing discussions, the purpose of this letter is to make your clients

> aware formally of our clients position in this matter and it is assumed that the other tenants of the building will have similar urgent concerns."

The Disclosure Note was in the following terms:

> "1. Takara have confirmed that they were approached by representatives of HR Owen in relation to their interest in acquiring Glen House from Takara. As a result of this, Takara granted them access to the data room in order for them to review the due diligence information relating to Glen House, in preparation for making a bid to acquire the building;
>
> 2. Correspondence from Ellisons (HR Owen's solicitors) was received the day before a bid was due from HR Owen (see correspondence attached). Following this correspondence, Takara rescinded their invitation to bid and no bid was received from HR Owen;
>
> 3. Pemberton Greenish's view (without knowledge of the background to the letter) was that the letter represented nothing more than an attempt by HR Owen to impact on the sales process of Glen House. Given the background to the letter, it is clear that this is even more evident;
>
> 4. Further, it is Pemberton Greenish's view that HR Owen's suggestion that the development at Glen House exceeds the rights reserved to the landlord under the HR Owen lease are without substance. Indeed, HR Owen accepted the grant of substantial rights in favour of Takara in relation to the proposed development of Glen House in the lease (which we recall John Hunter in particular signed off on at the time of the negotiation of the HR Owen lease). They also accepted a prohibition against opposing any planning application for the redevelopment works to Glen House;
>
> 5. We understand that in the context of this, HR Owen were fully aware of the scope of the redevelopment works to Glen House, following detailed discussions between HR Owen, Takara and Tenhurst as to the extent of the redevelopment works being considered. Indeed, HR Owen were seemingly sufficiently comfortable with the situation that they granted express rights for Takara to enter the HR Owen demise and to carry out extensive strengthening works to the HR Owen demise in order to prepare for the redevelopment of Glen House above the demise, even though ultimately these strengthening works were not required to be carried out.
>
> 6. Given the above, our view is that the contents of this letter do not indicate that HR Owen is genuinely seeking to claim any grounds for taking any action in relation to the proposed

> development works to Glen House. Given the background to the involvement of HR Owen in the bidding process for Glen House, to now seek to take issue with the redevelopment of Glen House would seem to us to be an attempt to impact on the sales process generally, as opposed to anything more substantive;”

The letter from Ellisons is a significant one since in essence it reflected accurately the case that they advanced on behalf of HRO just short of a year later.

21. It is against the background set out above that the first issue of fact that has to be resolved arises. Mr D’Arcy Clark maintains in paragraph 34 of his statement that he discussed the advice contained in Ms Robinson’s February email with Ms Copestake. It is fair to say that the dynamic that ensured that Withers was appointed was the professional relationship between Ms Copestake and Mr D’Arcy Clerk that went back many years. He says that after receipt of the February email, but before receipt of the RoT, he discussed the issue raised by Ms Robinson with Ms Copestake. He says that the substance of this discussion was:

> “I remember discussing the issue further with Ms Copestake prior to the purchase of Glen House. She assured me that she agreed with the view of Tokara’s solicitors (who had drafted the Lease and the License), which was that whilst anyone could issue an injunction, the landlord was permitted to redevelop Glen House with HR Owen in situ and was fully protected in doing so by the terms of the Lease. This was far more reassuring than Ms Robinson’s advice. As Ms Copestake was the supervising partner, with, I assumed, rather more commercial and practical experience than Ms Robinson in such matters, I believed that her view must be correct.”

This evidence is disputed by Ms Copestake.

22. I reject this part of Mr D’Arcy Clark’s evidence for the following reasons. Firstly, when Mr D’Arcy Clark was cross examined about this issue his oral evidence was both confused and inconsistent. He first gave oral evidence concerning this issue at T4/30/19 and following:

> “So I had asked Emma on a number of occasions, "Can we develop this building?" And she had assured me that yes, we could develop this building. I was quite aware about Hannah Robinson's warning that unless one did so in a sensible fashion that there was always the ability to -- for them to injunct, and Emma had also said as well, "Any party can of course injunct, but this building can be developed, I agree with Tokara's – with Pemberton Greenish's interpretation of that warning letter which was revealed in disclosure from Ellisons".”

He then said unprompted on at least two further occasions in the course of his cross examination that:

> "I had discussed it with Ms Copestake and said, "Can we develop this building?" And she said, "I agree with the Pemberton Greenish interpretation, yes, you can".

see T4/5024 and following. In each case these comments were made without Mr D'Arcy Clark having been asked by Mr Lawrence about these alleged conversations. He added in a similar vein a few minutes later "… *I didn't place as much weight on the opinion of Pemberton Greenish, but I did place a lot of weight on the opinion of Emma Copestake*."

23. Mr Lawrence turned to this issue in cross examination at T4/73 and following. It was in this context that the confusion to which I have referred started to emerge. At lines 17 – 19 Mr D'Arcy Clark said:

> "A. I think -- I don't think it would have been just one conversation, I think it would have been probably a running conversation during the purchase process."

However this is not what he said in his statement, which strongly implies that there was a single conversation located in time on an unspecified date between the February emails and the delivery of the RoT.

24. When Mr Lawrence pushed him to recall when and in what circumstances the conversation or conversations took place, the response was on the phone or in the office but then he remarked unprompted that " … *I cannot remember, it is a vague recollection, but I think we did*." This too is inconsistent with what Mr D'Arcy Clark said in his statement which is phrased in terms that suggest a clearly recalled conversation.

25. When pressed to explain the substance of what he said he was advised by Ms Copestake, his evidence was that " *... providing we behaved properly there was no reason why we could not develop the building ..."* – see T4/75/20. As he summarised what he maintained he had been advised a few minutes later, it was: "*Can we develop this building?" "Yes, you can"*.

26. However, even if that was correct it did not have the effect that Mr D'Arcy Clark has asserted in his witness statement, which had been that the effect of the oral advice he received from Ms Copestake was that " … *whilst anyone could issue an injunction, the landlord was permitted to redevelop Glen House with HR Owen in situ and was fully protected in doing so by the terms of the Lease.*". As he accepted in cross examination:

> Q. If -- your recollection seems hazy and as you know, it is challenged, but if -- in some sense it is challenged -- but even if that was said, "Can you develop this building?" "Yes, you can". If that was said, do you say that you would have taken that as meaning that the landlord under the lease had a completely unfettered, unqualified right to develop in any way that it chose without making any attempt to engage with the tenant or minimise disruption to the tenant?
>
> A. No.

Q. Did you take it that way?

A. No."

That is plainly inconsistent with what Mr D'Arcy Clark had said in his witness statement.

27. Aside from the obvious lack of a clear recollection of any relevant conversation going beyond what is obvious - that the site could be redeveloped – it is clear to me and I find that Mr D'Arcy Clark did not receive any relevant assurances from Ms Copestake in the period between 19 February and exchange. I reach that conclusion because:

i) There is not a single email to that effect from Mr D'Arcy Clark to any of Mr Hunter, Mr Joy or anyone within Savills that refers to any such conversation. Mr D'Arcy Clark's evidence is that the alleged conversation was materially more positive than had been the advice given by Ms Robinson. Had Mr D'Arcy Clerk received any such advice or assurance, it is close to certain that he would have reported the effect of that conversation internally, particularly having regard to (a) the commercial importance to Glen of the redevelopment of Glen House and (b) what Ms Robinson had said and his own response and that of Mr Hunter to what she had said;

ii) Given the terms of the RoT referred to earlier and that it was supplied by Withers after the alleged conversation between Ms Copestake and Mr D'Arcy Clark, it is inconceivable that Mr D'Arcy Clark would not have contacted Ms Copestake following receipt of the RoT, complaining that it was materially different from the oral advice he maintains he had been given in the alleged conversation, if there had been a discussion at the time and in the terms Mr D'Arcy Clark alleges in his witness statement. It is not suggested there was any such contact following receipt of the RoT;

iii) it is inconceivable if there had been such a discussion that Ms Copestake would not have passed on the substance of the discussion to Ms Robinson but that is not suggested. It is equally improbable that the RoT would have been in the terms it was if Ms Copestake had given the advice that Mr D'Arcy Clark alleges she gave in his witness statement;

iv) It is inconceivable that there would not have been mention of the assurances that Mr D'Arcy Clark said he had received from Ms Copestake in the course of the discussions at the meeting on 29 October but it is not suggested Mr D'Arcy Clark (or anyone else) made any reference to these assurances;

v) it is inconceivable that Mr D'Arcy Clark would have written the emails he sent following the meeting on the 29 October (which I set out in detail below) if he had received the sort of assurances that he claims to have received from Ms Copestake in February; and

vi) Glen's post completion conduct referred to below is consistent with my conclusion that no advice to the effect alleged by Mr D'Arcy Clark was given.

28. Although Prime relies on an email from Mr D'Arcy Clark to Mr Hunter on 8 December 2014 in which he states " … *Lets also not forget that, when we bought with you, Withers also opined that the right to develop was fully taken care of by the new lease*." as corroborating what he says concerning his alleged conversation with Ms Copestake, in reality that is so ambiguous as to be incapable of supporting what is alleged. There is no real doubt that the right to develop was "*... fully taken care of ...*" by the new lease in the sense that the new lease made provision for it. That is the point that Mr Lawrence put to Mr D'Arcy Clark at T4/81-82 which Mr D'Arcy Clark acknowledged to be correct. The attempt to rely on the final sentence of the 8 December 2014 email cannot survive the evidence that Mr D'Arcy Clark gave orally on this issue.

29. In any event, this sentence says nothing about what assurances Mr D'Arcy Clark says he received from Ms Copestake and in my judgment is outweighed in an evaluation of the evidence relevant to this issue by the fact that the RoT was in the same terms as the February email, there are no internal emails or other documentation of any sort that records the advice that Mr D'Arcy Clark says he received between receipt of Ms Robinson's February email and receipt of the RoT and no alleged communication of any sort between Mr D'Arcy Clark and Ms Copestake after the RoT was received that questions or sought clarification of what was contained in it, or, for that matter, before it, as might be expected from a shrewd businessman such as Mr D'Arcy Clark, who had received oral advice from his solicitor that was materially more positive than earlier advice received from a more junior solicitor.

30. These conclusions are material to an assessment of Mr D'Arcy Clark as a witness. As I have said already, I do not conclude that this is deliberately fabricated evidence. What it demonstrates however is that on a significant issue Mr D'Arcy Clark's recollection is unreliable. This means inevitably that I must be cautious before accepting his uncorroborated testimony save where it is admitted or is against his or Glen's interest.

31. The next time segment that it is necessary to consider is from completion on 20 March 2014 to down to 27 October 2014. Shortly after the purchase had been completed, Mr D'Arcy Clark sent an email to Ms Copestake (copied to Mr Hunter) in which he stated:

> "Vincent Tan - a particularly awkward Malaysian business operator - is in the throes of trying to acquire 100% of HR Owen. He owns the majority already.
>
> We both feel that we need to have a premier league Rottweiler briefed and ready to bark so loud that as when any attempt is made to be difficult he is left under no illusion as to our readiness for a fight. What or who do you recommend?
>
> At the very least I feel we need to prepare a file on the tenure of HR Owen to include - but not be limited to - the basis on which they took their current lease, the level of information with which they were provided during the negotiation and the degree of involvement that they have enjoyed in the planning process.
>
> I feel too that it is highly likely that the existing management will be replaced, in which case any verbal agreements and assurances will count for nought."

32. This email is significant first because its terms are inconsistent with Mr D'Arcy Clark having received the assurances that he says he recalls receiving from Ms Copestake prior to exchange and thus further supports my conclusions on that issue set out above. Had he received such advice he would have referred to it in passing at the very least in the context of this communication. Secondly, it is consistent with the commercial imperatives that drove the acquisition in the first place – the need to acquire Glen House, redevelop it and sell on the redeveloped units before the Fund was due to close – continued to apply. It also reflects a perceived change in the negotiating dynamics that Mr D'Arcy Clark and Mr Hunter had taken comfort from when deciding to proceed with the acquisition in the face of Ms Robinson's warnings. That said, the development timetable had not changed materially from that which applied in the pre-acquisition phase – see paragraph 4 of the draft instructions to Squibb Group Limited (Glen's chosen demolition contractors), where it is stated that:

> "The current intended start date for the Works on site is 13 October 2014, and you agree and acknowledge that the intended completion date of the Works is 6 March 2015 subject only to extension in accordance with the terms of the Contract and subject to the entering into of the full Contract."

33. The first clear contact made on behalf of Glen with HRO came on 11 August 2014, when Mr Hunter wrote to the then managing director of HRO Mr Doyle. In his email of that date Mr Hunter stated:

> "We are acutely aware of the requirement for HRO to continue its business from the showroom at 125 Old Brompton Road without interruption or disruption, while at the same time our consented development is in progress on the upper floors. Notwithstanding this, we did make it our business to ensure HRO were properly informed of the development plan throughout the planning process, all of which is well documented. This week we will send you various method statements to explain and illustrate the demolition and construction process to be employed. Moreover we will set up a presentation of the sound insulation (Echo Barrier) and noise monitoring system to be installed, prior to works commencing, so that you can see for yourselves the self-imposed strict procedures to be adhered to. Who should we contact to organise a date for giving this presentation?"

This email is significant because it acknowledges the "*requirement*" for HRO to continue its business from the showroom at Glen House "*… without interruption or disruption …*" This acknowledgement is consistent with the conclusion I have reached above concerning the basis on which Glen completed the acquisition of Glen House – that is that Ms Robinson's advice had been understood but Glen had decided to proceed in the face of the warnings given by Ms Robinson and not on the basis of the assurances allegedly received by Mr D'Arcy Clark from Ms Copestake prior to exchange. This is further reinforcement for my conclusions on this issue referred to above.

34. Later in August 2014, Mr Doyle left HRO and Mr Stephen Cilia was appointed by HRO to represent its interest. Thereafter discussions took place between the Glen interests and Mr Cilia concerning the work that Glen planned to undertake at Glen House and the steps that Glen proposed to take to mitigate the effect of that work on HRO's operation. Nothing turns on the substance of those discussions. Although Glen's case is that a dispute between HRO and Glen started to develop or escalate from August 2014, it is to be remembered that HRO had made its position clear in the Ellisons letter that led to the advice from Ms Robinson referred to above. Glen chose to proceed in the face of that indication in the hope that it would be able to proceed with HRO's agreement or cooperation but HRO's starting point had not altered. That this was so is apparent from Mr Cilia's email to Mr Wenlock (who was the main source of information being passed from Glen to Mr Cilia at this stage) of 3 September 2014, where he stated:

> "As you know HR Owen have reserved their rights and continue to do so as they are extremely concerned that such works will be detrimental and cause nuisance to their occupation and business. We therefore need to better understand if and how any such works can be carried out without effecting HR Owen's business. Until such comfort is achieved I think it would be prudent for Tenhurst not to sign any contracts such as demolition to ensure everyone's interests are covered and to ensure that any method of works are approved and have a minimal impact to HR Owen."

35. The discussions continued throughout September. Again the detail does not matter. However, so far as Mr Cilia was concerned, he considered that he had not been supplied with the information that he should have been supplied with to enable him to advise HRO properly and that the position had not altered materially from that which applied on 3 September, as is apparent from his email to Mr Hunter of 3 October 2014, in which he stated:

> "Following the meeting on the 22nd September where a generic acoustic scheme for the benefit of neighbouring properties and a general overview of the proposed demolition was presented to us, we have not received a copy of the presentation or any further information as promised. We did receive further information, as of yesterday, which we have responded to and highlighted that the info is either not relevant or does not provide any information of use. Therefore, we remain unable to evaluate with any accuracy the impact of your proposed demolition and re-construction works upon H R Owen's use and enjoyment of the car showroom at ground floor level.
>
> We ask you again to provide us with the relevant information and documentation explaining exactly what works that you propose to do, how you propose to do them, and over what time period. Please provide this within the next 7 days.
>
> In the meantime it remains the position of H R Owen Ltd that the demolition and reconstruction works that you briefly outlined to

> us will materially adversely affect the use and enjoyment of the premises as a high quality car dealership, and all rights in this respect are reserved. Should you begin works before agreeing suitable terms with H R Owen Ltd then you do so at your own risk."

Notwithstanding the terms of this email, which as I have said maintained a position which was consistent with that first adopted on behalf of HRO by Ellisons prior to the acquisition by Glen of Glen House, Glen continued to believe that in essence the protests and objections from HRO were simply HRO angling for a commercial deal of some sort – see paragraph 46 of Mr Joy's first statement – or a "*legal ransom*" as Mr Joy described it in an email to Mr Wenlock (copied to Mr Hunter) of 7 October 2014. That was in essence the view that Mr Hunter and Mr D'Arcy Clark had come to prior to purchase.

36. It was in that context that Glen first returned to Withers for advice. By his email of 7 October to Ms Copestake and Ms Robinson, Mr Joy stated:

> "HR Owen (who, as you know, occupy the LG and G floors) are trying to cause us a few issues (no doubt seeking some financial ransom). Attached is a copy of the 15 year lease signed in May 2011. Presumably we simply stepped into the shoes of Tokara at acquisition?
>
> We are in the process of writing a note to HR Owen to point out that the attached lease specifically includes reference to the landlord doing redevelopment works (see definition of "Development" and clauses 4.l(c) and (d), together with appropriate rights of entry at clause 4.2). On this basis it would seem rather difficult for them to argue that we are interfering with their quiet enjoyment (clause 36) by doing our redevelopment? Please could someone just quickly confirm that we are on the right track here?
>
> In addition, it should be noted that HR Owen were very supportive of our plans all along (from April 2011) because they realised they would be getting a much better building above them and a more luxurious setting for their showroom. It seems that it's only now that they are looking to hold us to ransom because they sense that we might be prepared to pay them a fee or reduce their rent (i.e. it's purely a commercial play).
>
> If someone can give me a quick call today/first thing tomorrow that would be great. Would like to send out my note tomorrow morning."

37. A number of points emerge from this email of importance to how things developed subsequently. Firstly, it is not the sort of email that would have been written had Mr Joy been informed by Mr D'Arcy Clark of the advice that he allegedly received orally from Ms Copestake prior to receipt of the RoT. Had such advice been received, it is inconceivable it would not have been passed on to Mr Joy directly or indirectly and had

it been it is inconceivable that Mr Joy would have been writing to Withers in these terms. In fact, as I have found, there was no communication by Mr D'Arcy Clark of the advice that he alleges he was given orally by Ms Copestake because no such advice was given.

38. Secondly, when Mr Joy refers to a "*note*" he is referring to either a letter or email. This nomenclature was used routinely by him, Mr Hunter and Mr D'Arcy Clark. This is relevant to an understanding of some emails that passed between the parties to which I refer below.

39. Thirdly, Mr Joy knew or ought to have known that Glen's relationship with HRO was governed by the Lease, notwithstanding what he said at the end of the first paragraph of his email. That is apparent from the February email from Ms Robinson referred to earlier and most clearly from the RoT, which for this purpose has to be read in its entirety. It remains unclear to me why he included that sentence in his email.

40. Fourthly, it is possible to detect the genesis of the approach that developed following the meeting on 29 October from the second paragraph quoted above.

41. Finally, the belief of the Glen interests that HRO's position was nothing more than a legal ransom (the view that the Glen interests had held from the moment they first saw the Ellisons letter and the disclosure note) remained undimmed as is apparent from the final paragraph quoted above. That is a view that Withers had never expressed agreement to prior to completion. The only suggestion that they did is in Mr D'Arcy Clark's evidence about the alleged conversation (or conversations) between him and Ms Copestake. That is evidence that I have rejected.

42. Ms Robinson responded to the 7 October email by an email to Mr Joy of 8 October 2014 copied to Mr Hunter and Ms Copestake amongst others in which she stated:

> "I attach a copy of my email of 18 February 2014 on the HR Owen lease and also a copy of our pre-contract report on Glen House and would refer you to paragraph 3.14.2. As noted in the email and the report, whilst there are rights reserved to redevelop the property and a non-object clause in relation to planning, if the proposed works were to materially adversely affect the use and enjoyment of the HR Owen premises, they could seek an injunction to halt works. You do therefore need to bear this in mind and I note that there was an allowance in the budget for additional costs relating to HR Owen."

43. Mr Joy replied by email the same day (copied to Ms Copestake and Mr Hunter amongst others) seeking advice as to the "*realistic likelihood*" of HRO succeeding in getting an injunction and repeating his view (for which there was no and never had been any objective support or evidence) that HRO was " … *simply trying to get some financial inducement, rather than being overly concerned with the effect on their business*". Again, that letter is inconsistent with Mr Joy having been told of Ms Copestake's alleged advice to Mr D'Arcy Clark. Whilst I have found that Mr D'Arcy Clark did not communicate this alleged advice to anyone else, it is inconceivable that he would not have done so had he received it, given the advice that had been given by Ms Robinson in the emails referred to earlier.

44. Ms Robinson replied by email, copied to both Mr Hunter and Ms Copestake repeating the advice previously given that "*...Clause 4.1 notes that the exercise of the reserved rights, including the right to carry out any development are subject to the proviso that they do not materially affect the use and enjoyment of the demised premises for the permitted use.*" This is consistent with the advice that she had given in her pre-exchange emails referred to earlier. In relation to the impact of the quiet enjoyment provision covenant, Ms Robinson advised that:

> "The quiet enjoyment provision means that the landlord must ensure that the tenant will have possession of the property without interference or interruption from the landlord or anyone claiming under the landlord. From a practical perspective, if a landlord foresees that there may be a breach of the quiet enjoyment provision, it can seek to avoid a claim by ensuring that it acts as reasonably as possible when doing anything that may result in inconvenience to the tenant and discussing proposals with the tenant (which I note you have done). However, the interpretation of redevelopment rights are a matter of construction and the courts have tended to construe redevelopment clauses restrictively. Pre-lease representations made by the landlord may be relevant to show what was contemplated when the lease was granted and whether the tenant took the lease anticipating the proposed works. Were you involved at that stage?
>
> There is no set rule as to what would constitute a breach of quiet enjoyment or a material effect on the use and enjoyment of the property. It will be a matter of considering how long the works will take, whether access will be interrupted and if so, for how long and what temporary access there will be and what steps will be taken to minimise the impact of noise, dust, vibrations etc on the tenant. Therefore the more you can do to minimise any impact on the tenant the less likely it is there would be a breach of the landlord's obligations, but as noted above, from a practical perspective if you are open with the tenant and discuss ways of minimising any impact, it may avoid a potential claim."

Mr Joy responded by email stating:

> "HR Owen were completely aware of our plans from early 2011. Indeed, they were very supportive because they realised they would be getting a much nicer building/setting. The current lease was negotiated with them AFTER we had made them aware of our re-development plans. It was not until the development plans became a reality that they have made any issue whatsoever.
>
> What all this boils down to is that they will want us to pay them some money to either (a) put up with the building works or (b) decamp to their site in Melton Court down the road. It's 90% about cash and 10% about disruption.

> We have gone on the front foot in terms of engaging with them and providing information and we have also given a full presentation on noise mitigation etc. There will be little or no access disruption.
>
> We will send our note to HRO and let's see what happens."

Two points need to be noted about this reply. First, when Mr Joy refers to "*...our plans from early 2011 ...*" he is referring to Tenhurst's plans while working with or for Tokara. Secondly, nothing in the plans discussed prior to the execution of the Lease involved demolition of the floors above the Property occupied by HRO. Thirdly it remained Mr Joy's view (no doubt reflecting the common view of Tenhurst and Glen) that HRO wanted to be paid some money for the adverse impact that the proposed development of Glen House would have on it.

45. Mr Joy then communicated by email with Mr Cilia sent on 9 October 2014. It is not necessary that I set out all of that email. However in it, Mr Joy suggested that Mr Cilia was attempting to create a paper trail for use against Glen, that (Tenhurst) had first engaged with HRO about the redevelopment plans in the first quarter of 2011 and added:

> "Sixthly, we are confused at your final para. Back in May 2011 (when Tenhurst was involved with the previous ownership vehicle, Takara) we negotiated a new lease with HR Owen which specifically referred to the ability of the landlord to carry out development works (see definition of "Development" and clauses 4.l(c) and (d), together with appropriate rights of entry at clause 4.2). Clause 36 of the lease needs to be read with these elements in mind.
>
> Given the terms of your lease and the fact that H R Owen has to date been very supportive of our redevelopment plans from day 1, we really don't understand the sudden change of direction."

46. On 16 October it become apparent that HRO was seeking or had sought legal advice, when a letter was sent by Ellisons to the solicitors who had acted for Tokara, in essence making the same points that Ellisons had been making throughout namely that " … *the proposed demolition and reconstruction works will materially adversely affect our Client's use and enjoyment of the premises as a high quality car dealership, and all rights in this respect are reserved. Should your Client begin works before agreeing suitable terms with our Client, then your Client does so at its own risk*." This was forwarded to Withers by the solicitors who had acted for Tokara to whom the letter had been sent in error by Ellisons and then by Ms Robinson to Glen. On receipt of this, Mr Joy responded to Ms Robinson by email observing that:

> "Obviously the big concern is that HRO will go for an injunction when we start the demo works. We assume they can't go for pre-emptive strike as until works start we won't have created any potential interference with quiet enjoyment. Perhaps we can have a call with Brian/Cordea to agree our defence strategy? Am available any time."

Ms Robinson responded to this by advising:

> "As to the comment in your final paragraph, potentially an injunction could be sought even before works have commenced in order to prevent the alleged infringement if H.R. Owen can satisfy the court that the works will materially adversely their use and enjoyment. It should be noted that injunctions are an equitable remedy, awarded at the court's discretion and are not granted lightly. If you/Cordea do wish to discuss this further please let us know. As I am sure you will appreciate, advising on the H.R. Owen lease was not covered by our engagement letter and will therefore be charged on a time spent basis as at this stage we do not know how matters will develop."

47. Mr D'Arcy Clark states in his witness statement that:

> "On the afternoon of 21 October 2014, I called Ms Copestake to discuss the developing dispute with HR Owen and to seek her recommendation for a 'Rottweiler' to take our side in the matter. Ms Copestake advised me that Glen needed to instruct a litigation lawyer and said she would refer us to her colleague Mr Andrew Wass, a litigation Partner at Withers."

This is significant because at the heart of Prime's case is that it was in essence ready willing and able to negotiate with HRO at all times down to 29 October. However it had not done so before 9 October and the email of that date was not conciliatory. Mr D'Arcy Clark's contact with Ms Copestake on the afternoon of 21 October suggests that a robust line was being taken in the face of advice from Ms Robinson that an Injunction could be sought even before work had commenced.

48. Thereafter discussions by email continued between Glen and Mr Cilia, culminating in a suggestion from Mr Joy to Mr Cilia that there be a without prejudice lunch meeting between them also attended by Mr Hunter to see whether any progress could be made. However, Mr Cilia's position remained constant – as he put in his email to Mr Joy of 23 October:

> "The reservations in favour of the landlord at Clause 4 of our Lease are subject to the proviso that the works do not materially adversely affect H R Owen's use and enjoyment of the premises for this purpose. It remains our position that they will, and frankly we fail to see how such extensive works can be done with H R Owen in occupation without having a material adverse effect upon the dealership. This is exactly why the previous owner Tokara proposed to relocate H R Owen temporarily to suitable alternative premises whilst the works were done, and be suitably compensated."

49. Following Mr D'Arcy Clark's approach to Ms Copestake concerning the appointment of a "*Rottweiler*" lawyer to fight Glen's corner against HRO, Ms Copestake recommended that Mr D'Arcy Clark meet Mr Wass and an appointment was made for Mr Hunter, Mr Symons and Mr D'Arcy Clark to meet Ms Copestake and Mr Wass at

Withers' offices during the afternoon of 29 October 2014. The initial idea had been that this would be a no obligation meeting to see whether Mr Wass was the person the Glen interests wanted to represent them in any dispute with HRO – see the email from Mr D'Arcy Clark to Mr Hunter of 21 October. Mr D'Arcy Clark's view concerning HRO's true motivations had not altered – see paragraph 44 of his first statement. Mr Hunter was apparently clear however as to what he was expecting from the meeting with Withers. As he put it in an email to Mr Joy and copied to Mr D'Arcy Clark concerning the position adopted by Mr Cilia:

> "He's throwing his weight around - he's promised his Masters to bully us into submission.
>
> We need to start demolition before he serves proceedings on us. Our draft Withers letter of next Wed needs to take the form of a warning off notice.
>
> Prepare to take up arms." [Emphasis supplied]

This suggests that prior to the meeting, Mr Hunter was expecting the outcome to be or to include a letter in uncompromising terms to be sent by Withers on behalf of Glen. There is nothing in this email to support the view expressed by Mr Joy in particular (but others as well) that Mr Hunter wished to negotiate an agreed methodology for the demotion part of the redevelopment with HRO. That Mr Hunter did not wish to do anything other than what he said in his email referred to in the previous paragraph is entirely consistent with Mr D'Arcy Clark's request to Ms Copestake on 21 October that she identify an appropriate rottweiler lawyer to fight Glen's corner. It is not consistent with any real desire on the part of Glen to reach an amicable agreement with HRO concerning the redevelopment project and was consistent either with Glen wishing to "*warn off*" HRO (based on the assessment that all HRO was seeking was a "*legal ransom"*) or, perhaps, a recognition on the part of Glen that HRO were unwilling to agree any practical way forward. In fact the outcome of the meeting was the sending of a letter to Ellisons in uncompromising terms.

50. On 28 October, Mr Joy received an email from EC Harris, a consultancy appointed by HRO to represent its interests in relation to the proposed demolition and construction activities at Glen House. EC Harris expressed the view that "*…The use of the Premises as a premium automotive sales location in our opinion lowers the threshold at which the development works will adversely affect the day-to-day use and enjoyment of the Premises by HRO …"* It added that:

> "Given that it is proposed that HRO will continue to trade throughout the demolition and re-construction activities, we have significant concerns over the noise, vibration, dust and delivery/removal logistics which will cause significant disruption to the Ferrari dealership for the whole duration of the works. "

Before then setting a number of bullet point proposals as to how the demolition work should be carried out before culminating with this warning:

> "Given the proposed development timeline we would like your express assurance that the works will not go ahead without fully adopting/addressing the points raised above, and would appreciate (on behalf of HRO) a proactive response to our suggestions by letter or email at your earliest convenience and by close of business on Monday 3rd November. If these measures are not adopted to minimise the adverse effect upon HRO's use and enjoyment of the Premises you may leave HRO with no alternative but to seek injunctive relief from the Court, although we and HRO hope that such action can be avoided."

The view of both Mr Joy and Mr D'Arcy Clark was that EC Harris's requirements list imposed extensive and onerous restrictions on the demolition process that it would be impractical or perhaps even impossible to deliver.

51. It is against that background that two events of importance took place on 29 October 2014. The first was the lunch attended by Mr Joy and Mr Hunter with Mr Cilia and the second was the meeting at Withers. So far as the lunch was concerned, the outcome was that Mr Hunter proposed the appointment of an independent adjudicator to ensure that HRO was not materially adversely affected by the redevelopment works. This was not agreed at the lunch but was not rejected either. However, nothing was said by Mr Cilia that suggests HRO would agree to what was proposed. There is nothing in what had been said by or on behalf of HRO down to that date that suggested HRO was willing to cede decisions as to what would and would not materially adversely affect the use of the demised premises to a third party.

52. What happened at the meeting on 29 October is the most material issue of fact to be decided in this case. What in fact was said and decided is shrouded in mystery largely because none of the participants took any notes at any stage in the process. That neither Ms Copestake nor Mr Wass took any meaningful notes nor arranged for a trainee or junior solicitor to attend the meeting in order to take a proper note is surprising and contrary to reasonable professional practice, particularly where decisions were being taken as to how to proceed in what had become a commercially sensitive situation. The only note of the meeting is that in Ms Copestake's daybook in which she recorded: "*If activities contemplated – no derogation [from] grant unless unreasonable – contract is relevant*". I am critical of this failure on the part of two Withers partners to take this elementary step.

53. It is only slightly less surprising that Mr Joy did not take any notes either in the circumstances since he is a qualified solicitor and he maintains the advice given by Mr Wass involved rejecting all Ms Robinson's advice to date. Given the importance that this alleged change had for the redevelopment of Glen House and the relationship of Glen with HRO in relation to it, I would have expected at least Mr Joy to have recorded the substance of what was being said.

54. Although Ms Robinson did not attend the meeting, she was directed to draft the letter that is was decided at the meeting would be sent by Withers to Ellisons. She has some notes which set out most of the text of the first draft of the letter. I have little doubt that had this material been disclosed when it should have been instead of after completion of the evidence, Ms Robinson would have been cross examined by Mr Tozzi QC on

behalf of Prime as to the origin of the notes and in particular whether they were drafting notes or represented instructions from either Ms Wass or Ms Copestake. However Mr Tozzi realistically decided not to apply for the recall of Ms Robinson.

55. Some assistance might also have been obtained from the contents of the briefing pack that was put together for Mr Wass on 28 October. However that cannot be, or at any rate has not been, found.

56. In summary therefore, there were no meaningful attendance notes of the meeting kept by Withers, no notes were kept by Mr Joy or anyone else attending the meeting on behalf of Glen, and the briefing pack supplied to Mr Wass on 28 October has not been found. In other circumstances, this material would have been the anvil against which the rival contentions as to what was said at the 29 October meeting might have been tested. In the result, both parties seek to draw inferences as to what was actually said at the 29 October from the surrounding circumstances, inherent probabilities or improbabilities and the contents of emails and other correspondence both internal, external and sent to third parties. It is necessary therefore that I complete the factual narrative before reaching my conclusions as to what happened on the balance of probability at the 29 October meeting.

57. Prime's pleaded case as to what happened at the meeting is set out in paragraph 18 of its re-amended Particulars of Claim in these terms:

> "At that meeting, Mr Wass and Ms Copestake advised that:
>
> (1) Glen's HR Owen's right to quiet enjoyment under Clause 36 of the Lease was subject to Glen's right to develop Glen House as provided in Clause 4.1; and
>
> (2) Accordingly that under the terms of the Lease Glen's right to develop Glen House was not restricted by the condition that Glen must not "materially adversely affect" HR Owen's use and enjoyment of its premises.
>
> (3) HR Owen had no (or no real) prospect of obtaining an injunction to restrict or halt the development of Glen House.
>
> (4) Glen's legal position was so strong that it ought to cease engaging in negotiations with HR Owen."

Withers' case pleaded in paragraph 7 of its re-amended Defence is that

> "At the meeting on 29 October 2014:
>
> a. Glen instructed Withers that it could not comply with the proposals for the conduct of the demolition and development set out in the letter from EC Harris dated 28 October 2014 because those proposals were unworkable and would make the development impossible.

b. Glen instructed Withers that HR Owen had been completely aware of the development plans from early 2011 and had been aware, and was supportive of, the development plans before the Lease was negotiated in May 2011. This, if true, would have provided support for a construction of the Lease which favoured Glen. However, it was not entirely true. HR Owen had not been informed in 2011 that the proposed development would involve the demolition of Glen House with HR Owen in occupation of its demised premises.

c. Withers specifically warned Glen that HR Owen could not be stopped from applying for an injunction.

d. Glen and Withers agreed a strategy whereby:

i. Withers would write a letter to HR Owen, in robust and confident terms, asserting that Glen was entitled to proceed as it proposed and was not obliged to comply with HR Owen's proposals.

ii. Withers' robust letter would be designed to deter HR Owen from seeking an injunction and, instead, place Glen in a position to negotiate directly with HR Owen a resolution of the dispute on the best terms possible.

e. Withers did not withdraw or correct the advice which it had provided in February and March 2014, as set out in paragraphs 10 and 11, or by Ms Robinson in the weeks prior to the meeting, on 8 and 17 October 2014, as set out at paragraph 6 above.

f. Glen and Withers understood that the letter Withers would write would take a very robust position in order to strengthen Glen's position in the negotiations which were bound to follow with HR Owen."

58. Neither party contends that the construction of the Lease pleaded in paragraph 18(1) and (2) of the re-amended Particulars of Claim is correct. It is self evidently not correct. This leads Prime to submit simply that this was negligent advice on which Glen acted. Withers' submit that the advice is so obviously incorrect that no lawyer would advise in those terms and that of itself is a reason for concluding that no such advice was given.

59. Following the meeting on 29 October, work commenced within Withers on the drafting of a letter that was to be sent by Withers to Ellisons that set out Glen's position. The purpose of the letter was to deter HRO from applying for an injunction to restrain Glen from proceeding with its development of Glen House. The initial drafting was carried out by Ms Robinson although her draft was then developed by Mr Wass. The notes that were disclosed after completion of evidence contain what appear to be substantial parts of what became Ms Robinson's draft. It is not in dispute that it was Mr Wass who instructed Ms Robinson to draft the letter.

60. Although Mr Wass and Ms Robinson cannot remember, it is inherently probable, given that Ms Robinson was not at the 29 October meeting, that Mr Wass would have outlined to Ms Robinson what he wanted the letter to say and the purpose that it was designed to achieve because it would have been difficult if not impossible for even a first draft of the letter to be prepared without that information. That factor together with the fact that much of the first draft was retained in the subsequent versions of the draft letter when amended by Mr Wass lead me to conclude that the draft reflects accurately the instructions that I conclude were given by Mr Wass to Ms Robinson when instructing her to draft the letter. I have considered whether Ms Robinson might have received her instructions from Ms Copestake but have concluded that is not a tenable option. It was not suggested by either party and is not consistent with the fact that the draft was delivered to Mr Wass and was edited (but only relatively lightly) by him before being sent out in his name. It is inherently more probable that Ms Robinson received her instructions from Mr Wass and that therefore the contents of the letter reflected the discussion that had taken place at the meeting.

61. It is common ground that paragraph 6 of the letter that was sent eventually is the critical paragraph for present purposes. The essential scheme of that paragraph is apparent from Ms Robinson's manuscript note and in my judgment reflects the instructions that Mr Wass gave to Ms Robinson as to what the letter was to say. The manuscript note records that "*... cl.36 – has carve out for "except as otherwise permitted" + clients permitted development is wide + cl 4 reservations 4.1(c) + (d) + proviso →refer back to carve out in cl 36 ...*". Ms Robinson's initial draft included at para 6:

> "Whilst clause 4.1 of the Lease is subject to the proviso not to materially adversely affect the use and enjoyment of the demised premises for the permitted use defined under the lease as noted above, the quiet enjoyment obligation is subject to such matters as otherwise permitted under the Lease, which would include the proposed redevelopment."

The draft was then amended by Mr Wass. Those amendments included amendments to paragraph 6 as follows (additions underlined and deletions shown struck through):

> "Whilst clause 4.1 of the Lease is subject to the proviso not to materially adversely affect the use and enjoyment of the Property ~~demised premises~~ for the P~~p~~ermitted U~~u~~se ~~defined under the Lease~~ as noted above, the Q~~q~~uiet E~~e~~njoyment Covenant ~~obligation~~ is subject to such matters as otherwise permitted under the Lease, which would include the proposed redevelopment."

The lightness of Mr Wass's amendments to this paragraph in my judgment show that the terms in which it had been drafted by Ms Robinson reflected the instructions she had received from Mr Wass and that the paragraph as amended by Mr Wass shows that he was aware of its terms and was satisfied with the terms in which it was expressed once he had amended it. These factors, together with those mentioned earlier concerning Ms Robinson's manuscript note, lead me to conclude that paragraph 6 reflected accurately what Mr Wass had said at the 29 October meeting. However this conclusion does not assist in deciding whether what Mr Wass said was advice as to

Glen's position, as alleged in paragraph 18 of Prime's re-amended particulars of Claim, or merely a strategy to argue in robust and confident terms that Glen was entitled to proceed as it proposed and was not obliged to comply with HRO's proposals as Withers allege in paragraph 7 of its re-amended defence. That issue is something which can be resolved only by inferences to be drawn from the email traffic that followed the supply of the draft to Glen by Withers, given the absence in particular of any attendance notes setting out what was discussed and decided at the meeting.

62. On 30 October, Mr Joy sent an email to Mr Wass and Ms Copestake, the material part of which said "*...Just* touching *base to see if we can have a look at your long form note!*". There was a suggestion in the course of the trial[1] that this was or might have been a request by Mr Joy for a note confirming the advice that had been given during the meeting on 29 October. If and to the extent this suggestion was maintained by Prime I reject it. As I have explained earlier and as will be apparent from some of the emails I have quoted from earlier in this judgment the phraseology used by Mr Hunter, Mr D'Arcy Clark and Mr Joy was to refer to emails and letters as notes. It goes without saying that there is nothing wrong with this but it means that where they refer to notes generally that will be a reference to an email or letter. That is exactly what Mr Joy was referring to in his 30 March email and that is precisely how Mr Wass understood it because his response by email on 30 October 2014 was to state "*As promised, here is a draft letter to Ellisons for your review and approval"* and enclose a copy of the draft letter discussed in paragraph 46 above.

63. On 3 November, Mr Joy emailed EC Harris in response to its email of 28 October saying "*… Our lawyers will shortly be sending a note setting out our position …*" and on 4 November Mr Joy emailed Mr Wass stating:

> "please can we now send your letter. …
>
> Our plan is to start sending bits of information over once you have sent your letter, showing that we are being helpful even where the legal position is strongly in our favour."

64. The letter was finalised and sent to Ellisons on 5 November 2014. Given its importance to the issues between the parties I must set it out in full:

> "Dear Sirs
>
> **Your client**: HR Owen Dealerships limited
>
> **Our client**: Glen House Development LLP
>
> **Property**: Glen House 125 Old Brompton Road _London SW7 3RP
>
> We refer to your letter of 16 October 2014 in relation to the above Property. We note that your client considers_ that the proposed demolition and reconstruction works· will materially adversely affect their use and enjoyment of the premises as a

[1] See paragraph 50(1) of Prime's written opening submissions.

high quality car dealership. We have advised our client of their rights in relation to the proposed work and we do not consider your client's. position to be meritorious for the reasons set out below.

1. We-.refer to clause 36 of the Lease dated 1 a May 20H made between Tokara Property Holdings Limited (1), HR Owen Dealerships Limited {2) and HR Owen Plc (3) (the Lease'). Adopting the definitions in the Lease, Clause 36 states that:

"The Landlord covenants with the Tenant that, so long as the Tenant pays the rents reserved by and complies with its obligations in this lease, the Tenant shall have quiet enjoyment of the Property without any interruption by the Landlord or· any person claiming under the Landlord except as otherwise permitted by this lease" (emphasis added) (the 'Quiet Enjoyment Covenant').

Consequently, the Quiet Enjoyment Covenant is subject to the exception of matters otherwise permitted under the Lease, which clearly include the development rights reserved in clause 4 of the Lease.

2. Clause· 4.1. of the Lease reserves various Rights for the benefit of the Landlord which includes at sub-paragraphs (c} and (d) the rights at any time during the term to carry out any 'Development', as defined, .and the right to erect scaffolding at the premises at the Property or the Building.

3. “Development is widely defined as

"any reconstruction, redevelopment. Refurbishment or renewal works carried out or intended to be carried out by the Landlord at the Building other than the Property (including any alteration to, or raising the height of, the Building) or at the Landlord’s Neighbouring Property as the Landlord may think fit"

4. Development' unambiguously includes the proposed works that our client intends to carry out.

5. The provisions of the Lease were of course subject to commercial arms' length negotiations between the parties, who both had the benefit of legal advice, and the scope of the possible works permitted under the Lease were contemplated by the parties at the time the Lease was entered into. We refer you to the case· of *Lyttelton Times Co Limited v. Warners Limited* [1907] AC 476 which provided there would be no derogation of grant where a landlord's proposed activities were clearly contemplated by the landlord and the tenant when the Lease was granted.

6. Whilst clause 4.1 of the Lease is subject to the proviso not to materially adversely affect the use and enjoyment of the Property for the Permitted Use, as noted above, the Quiet Enjoyment Covenant is subject to such matters as otherwise permitted under the Lease, which would include the proposed redevelopment.

7. Further, we refer to clause 4.5 of the Lease, which provides that the Landlord will not be liable to the Tenant

"for any loss, damage, injury, nuisance or inconvenience arising by reason of its exercising any of the Reservations except for:

(a) physical damage to the Property; or

(b) any loss, damage, injury, nuisance or inconvenience in relation to which the law prevents the Landlord from excluding liability.

PROVIDED THAT in exercising the Reservations the Landlord and anyone who is entitled to exercise them or anyone authorised by the Landlord shall use reasonable endeavours to cause the minimum disturbance to the Tenant and the Permitted Use and shall make good all damage to the Property as soon as reasonably practicable to the reasonable satisfaction of the Tenant".

8. Therefore, whilst the exclusion for liability for loss, damage, injury etc is subject to causing minimum disturbance, the requirement on the Landlord· is only to use reasonable endeavours. So any loss your client may incur as a result of the redevelopment. has been expressly excluded by the parties in the Lease (subject to the low threshold prescribing the manner in which the works are carried out).

9. We wish to make the point that your implicit threat to seek an injunction is misguided and premature. The development works themselves will not involve a breach of any covenant on our client's part because it was expressly contemplated by the Lease. Our client has complied fully with its obligations placed upon it in the Lease in relation to the manner in which the works are carried out. Furthermore, your client has been kept apprised, on a timely basis, of the detailed consented work that is to be undertaken having first engaged with your clients on the proposed development in early 2011 {including information relating to the application pursuant to s61 of the Controls of Pollution. Act 1974).

10. If your client were to seek an injunction in relation to the redevelopment works, we will seek recovery of our client's costs on the indemnity basis in relation to the failed application. Further any application must be made on full notice to our client

> at this firm and we expressly reserve the right to bring to the notice of the Judge the contents of this letter".

65. On the same day and after the letter had been sent, Mr D'Arcy Clark circulated an internal email within Savills which stated:

> "I enclose the final version of the letter prepared and sent by Andrew Wass of Withers to put HRO back in their box. To me it is a rare occurrence: a legal document that is absolutely on the button, clear and incontrovertible. It also is his actual opinion as well - not just a letter designed to frighten. This might be an easy win - we will find out - but I am impressed by this guy so far."

The attitude displayed in this email ("… *put HRO back in their box*…") is entirely consistent with that disclosed by the material from Mr D'Arcy Clark and Mr Hunter in the period between 9 and 29 October that I referred to earlier. That said, the email is also clearly consistent with Mr Wass having advised Glen at the meeting on 29 October in the terms set out in the letter including in particular paragraph 6. There was no reason for Mr D'Arcy Clark to be writing self-serving emails at this stage.

66. Ellisons responded by letter dated 11 November 2014. In so far as is material that letter stated:

> "… If (which is not admitted) the works fall within the reservations and/or the definition of Development the issue is whether those works can be carried out without having a materially adverse affect upon the use and enjoyment of the demise as a high end Ferrari dealership…
>
> Will you now please respond to each of the proposals bullet pointed in the letter from E. C. Harris of October 28th, either confirming that each point will be fully adopted before any work starts, or explaining in detail why each point will not be adopted. You/Your Client have had two weeks to reply, so we will only allow you three more days to 5pm Thursday to do so. If no satisfactory response is received, our Client may seek injunctive relief without further corresponding with you. …
>
> As to paragraph No. 9 in your letter, you suggest your Client first engaged with ours in early 2011. Your Client only acquired its interest in March 2014, although we appreciate that one or two individuals may have been involved throughout. As far as we are aware, all discussions with your Client' s predecessor in title about works to the building specifically provided for our client to vacate whilst the works were done, your Client's predecessor in title thereby acknowledging that the works could not be done whilst our Client remained in occupation without causing a material adverse effect upon our Client's use and enjoyment of the demise. Please provide disclosure of all communications passing between our Client and your Client or it's predecessor if your Client is to maintain this assertion."

The first of the paragraphs quoted above shows that Ellisons understood Withers to be suggesting that Glen could proceed in effect without regard to the qualification contained in clause 4.1 of the Lease and rejected that proposition. Thus, whilst the drafting of paragraph 6 of Withers' letter is at best obfuscatory, its general effect had clearly been understood and rejected. The second paragraph shows that HRO's position even at this stage was that it expected substantial compliance with the list of requirements contained in EC Harris's letter.

67. Withers responded to this by a letter of 14 November 2014. Only two points of substance emerge from that letter. First, in the second paragraph, Mr Wass said "*We have advised our client that its legal position, as set out in our letter to you dated 5 November 2014, is meritorious and indeed nothing in your letter has altered that advice*". Secondly, the letter went on to assert that EC Harris's proposals were "*inherently unreasonable"*, that Glen was " *… prepared to ensure that the development is conducted in accordance with best practice, that noise and disturbance to your client are kept to a minimum and that a continual dialogue with your client is maintained throughout the development so that any concerns your client may have can be addressed at the first instance directly by our client …*" but that any application for an injunction was "*…without merit and likely to fail"*. The correspondence between Ellisons and Withers thereafter down to 8 December took matters no further.

68. The 14 November letter was the subject of internal email discussion. Mr Wass circulated a first draft for review on 12 November. Mr D'Arcy Clark emailed Mr Wass with copies to Ms Copestake, Mr Symons and Mr Hunter stating:

> "My only change would be to say" We have advised our clients .... " Rather than "Our clients have been advised that .... ". I don't want there to be a scintilla of doubt in their minds that our position is anything other than what we (and you) say."

Mr Wass made the proposed change without further comment, as is apparent from the quotation from the version sent to Ellisons referred to in the previous paragraph of this judgment. Prime rely on this email and Mr Wass's response because it is argued that Mr D'Arcy Clark's email reflects his understanding of the position at that stage and that Mr Wass did not suggest otherwise supports the view that such was his understanding as well. I return to this point below.

69. Ellisons continued to assert reliance on the materially adverse effect provision within clause 4.1 of the Lease which led to emails from Mr Joy and Mr D'Arcy Clark that Prime rely on as demonstrating their understanding of the advice that they had received on 29 October. Following Ellisons' response to the 14 November letter from Withers, Mr Joy emailed Mr Wass:

> "Seems they are deliberately misconstruing the quiet enjoyment element of the lease, along with the factual history. Regardless of what conversations took place between us and HRO back in 2011, the lease defines what development means, and this includes demolishing the building. Even if no mention had been made of demolition with them in situ (which we dispute), it's

> completely irrelevant. Indeed, believe the lease has an entire agreement clause.
>
> …
>
> Do we shut up shop or do we keep playing legal tennis?"

Mr Wass's response was: "… *My view is that we leave it. We have made our position crystal clear. ...*" Following some further email traffic on what if anything further should be done in light of Ellisons most recent letter, Mr Joy said in an email to Mr Wass and Ms Copestake of 21 November that was copied to all relevant parties:

> "Is there a genuine need to do more work at this stage when, as Andrew says, we have made our position crystal clear? Shouldn't all this start and finish with the lease?"

Prime maintains that this is consistent with Mr Joy's understanding of what was said at the 29 October meeting being as it alleged – being in essence what was set out in paragraph 6 of the 5 November letter.

70. On 2 December 2014, Withers received a further letter from Ellisons, which repeated much of what that firm had said before and as before threatened an application for an injunction. Mr Wass circulated the letter and Mr Joy responded by email that day to Mr Wass stating:

> "From your experience, is this likely to be a bluff, or do they really think they have a case?
>
> Surely the latter is inconceivable, given the terms of the lease and as per your views of their chances to obtain an injunction? If it's not a bluff it doesn't really stack up .... unless they are being very poorly advised ...."

Prime submits that again this reflects Mr Joy's understanding of the advice that had been given on 29 October. It is a clear assertion that Mr Wass had advised that any application by HRO for an injunction would fail given the terms of the Lease. Mr Wass did not dispute the substance of what Mr Joy had said. Instead, his response was:

> "I think that it is a bluff ... but in case it isn't I do think we should consider explaining in some detail why the EC Harris letter is "inherently unreasonable" and amounts to "unworkable demands". If they do go off to court it would be v helpful for the judge (and possibly persuasive) to see a detailed letter from us justifying our position, which is reasonable, and explaining why the demands in the EC Harris letter are not."

The reference to "*inherently unreasonable*" was to what had been first asserted by Mr Wass on behalf of Glen in the 14 November letter.

71. Mr D'Arcy Clark apparently shared the same view as Mr Joy as to what advice had been given at any rate in relation to the prospects of success of an application for an

injunction. His reaction to the 2 December Ellisons letter is contained in an email he sent to Mr Hunter in which he said:

> "Would it not be a good thing for them to apply for injunctive relief now - and fail. At least we are not in the middle of works. Wouldn't it have the effect of clearing the path thereafter?"

This is consistent with a belief on the part of Mr D'Arcy Clark that Glen would be successful in resisting any application for an injunction and that could only have been on the basis of what had been said at the 29 October meeting. No such advice had been or is suggested to have been given prior to that date and no material advice had been given thereafter. Mr Hunter's response is opaque on the issue that matters for present purposes.

72. On 3 December 2014, a conference call took place between Mr Wass, Mr D'Arcy Clark, Mr Hunter and Mr Joy. Mr Wass prepared an attendance note of the conversation. It records Mr D'Arcy Clark as saying words to the effect "*Bring on injunction*". This is consistent with what he had said in his email to Mr Hunter quoted above and with his understanding of the advice that had been given previously. The note concludes by what is apparently a summary of the advice that had been given in the course of the conference call to the following effect:

> "APW said 50%+ chance of HRO not getting injunction
>
> APW odds on that GH can defeat an application for injunction on basis of analysis of lease
>
> - matter of construction"

Glen maintains that this was a volte face from the position that Mr Wass had adopted at the 29 October meeting as reflected in the 14 November letter. Some stripping out works were commenced then or shortly thereafter and on 8 December 2014, HRO issued its claim for an injunction and applied for an interim injunction.

73. Following receipt of the Particulars of Claim in those proceedings, Mr Joy emailed Mr Wass concerning what HRO had pleaded concerning the effect of clause 4.1 of the Lease, in which he said:

> "… does the wording at the end of clause 4.1 "provided that they do not materially adversely affect the use and enjoyment of the Property for Permitted Use" contradict/ undermine your argument about the quiet enjoyment clause (36) being subject to the works? Was this point picked up by us before? A debate about what constitutes material adversely affecting enjoyment sounds like one with no clear cut answer ...."

This suggests that the issue concerning the effect of clause 4.1 summarised by Mr Joy came as a surprise to him. That is consistent with him having been advised on 29 October or at least with him having understood the advice given on 29 October as being that set out in para 6 of the 14 November letter. Mr Wass's response was in his email of 9 December 2014 he said:

> “I've attached our letter to Ellison dated 5 November. Para 6 deals with the "materially adversely" point. Para 7 then goes on to quote clause 4.5 of the lease in relation to the exclusion of liability of the Landlord provided reasonable endeavours are used to cause minimum disturbance to the Tenant.
>
> I am not convinced by para 4 of the Particulars of Claim. I think 4.5 of the lease gives us more protection as long as we use reasonable endeavours to cause minimum disruption whilst carrying out the development. Ultimately it's a matter of construction.”

Mr Joy considered that this was not the same as the advice that Glen had been given on 29 October. As he put it in his email response:

> “When this HRO issue first arose in early Oct we were advised by your colleagues at Withers that our development would be subject to the quiet enjoyment provisions in the lease. On this initial advice we were minded to try and reach a compromise with HRO, with measures such as the appointment of an independent arbitrator to rule on what would be a fair and reasonable method of demo / construction. When we attended the Withers case conference we were told that the quiet enjoyment provisions are indeed subject to our development rights, the key words being “except as otherwise permitted by this lease”. With this in mind we were advised that we were in a very strong position and that any injunction would be bound to fail.
>
> Our concern is a phrase like “ultimately it’s a matter of construction”. This is very different from the emphatic position previously advised. A grey area is not something we want to be entering into because all it does is ramp up costs and create project delays.
>
> Prima facie it seems that, at best, the material adverse point is a grey area (i.e. what constitutes material adverse effect?) and, having read the particulars of claim, it is not at all clear how this will affect our position. If anything, the material adverse point seems to be the critical point of the whole lease, and our development rights appear to be completely subject to it. Had we been advised of this at the time of the case conference, we would have taken a very different and much more conciliatory approach!”

Although this email was copied to Ms Copestake, neither Ms Copestake or Mr Wass responded substantively to these points. Had Mr Joy misstated the tenor of the advice that had been given it is almost inevitable that either Ms Copestake or Mr Wass would have corrected the position.

74. Unless it could be argued that this was a dishonest attempt to give the impression that emphatic advice had been given when in fact it had not (an allegation made by Withers but later withdrawn by way of re-amendment to its Defence) it would appear that Mr Joy (consistently with what he had said in his earlier emails referred to above) had understood Mr Wass's advice to be as set out in paragraph 6 of the 5 November letter and that it had been given in terms that were at least as confident as the "*odds on*" assessment at the 3 December conference call. In a context such as this, I consider that phrase was intended by Mr Wass to mean and was understood by the Glen representatives as meaning that it was very likely or probable that Glen would defeat an application for an injunction.

75. Withers instructed initially leading counsel and then (because leading counsel ceased to be available) very experienced landlord and tenant junior counsel to act on behalf of Glen in relation to the application by HRO for an interim injunction to restrain Glen from continuing work at Glen House. The application was issued as an urgent on notice application and was listed for hearing on 12 December 2014 before Edwards-Stuart J.

76. In summary at that hearing, the Judge indicated that he disagreed with the interpretation of the Lease put forward in Withers' letter of 5 November 2014 and counsel advised Glen that it should accept that it was only entitled to carry out development works in so far as such works did not *"materially adversely affect"* HRO's use and enjoyment of the Property. I expand on this below. The contrast between this advice (which it is common ground was correct) and that recorded in the note of the 3 December conference call is striking and stark – because at that point as the Note records, Mr Wass was advising Glen that it was odds on that it could defeat an application for an injunction on the basis of analysis of the Lease. In my judgment this advice could only have been advice to the effect set out in paragraph 6 of the 5 November letter.

77. On 13 December (the day following the hearing), Mr Joy reported the outcome of the hearing to Mr Hunter in these terms:

> "The judge informed us and our barrister agreed (and Withers accepted) that the Withers advice re material adverse effect was wrong. Indeed, paragraph 6 of the 5 Nov letter … was specifically discussed in open court and both sides had to agree that the lease actually did the opposite of what said paragraph states."

It is common ground that there was a conference at court during the hearing and that in the course of that conference, counsel advised that paragraph 6 of the 5 November letter was wrong; that Mr Wass accepted it was "*bullish"* but that Ms Copestake accepted counsel's advice as correct – see T6/181-182 and T7/1-2. As she accepted in her evidence, paragraph 6 was entirely circular – see T6/62-6. To be clear it was wrong and negligently so. It was this discussion that formed the basis of the discussion that followed in court. It was as Mr Joy put it in one of his emails "… *a far cry from our case conference on 29 Oct and the Withers letter to Ellisons on 5 Nov (para 6 in particular)*."

78. Following the hearing and a report of what had happened sent to Mr D'Arcy Clark, Mr D'Arcy Clark sent an email to Mr Joy with copies to Mr Wass and Ms Copestake in which he stated:

> "I am therefore at a loss trying to understand where we really are. So that I may understand please could you explain:
>
> Is our position:
>
> A) The one as clearly stated by Emma and Andrew at our initial meeting with Andrew. This was that our case was clear and unarguable and that the lease, as drafted, granted us full rights to redevelop. In other words any offer to settle now is merely for the sake of expediency.
>
> B) As you now assert, following Friday's hearing, namely, that the words 'materially adversely' take precedence over the remainder of the wording and intention of the lease - in other words that our lease does NOT in fact allow us to do all that we want
>
> Or
>
> C) That we are in the right but have been comprehensively out-manoeuvred and do not have the luxury of time to argue our point?
>
> The answer clearly has implications as to whether our offer should be WP or not.
>
> Emma and Andrew I would be grateful for your views on these questions too."

79. It is now necessary to draw together my conclusions concerning what took place on 29 October. In my judgment it is probable on the basis of the material to which I have referred that Mr Wass did give advice to the effect set out in paragraph 6 of the 5 November letter. I reach that conclusion because:

    i) The letter of 5 November was first drafted immediately following the meeting on 29 October by Ms Robinson on instructions from Mr Wass. Those instructions appear to have been given immediately following the completion of the 29 October meeting while the substance of what had been said was fresh in his memory. What appears in Ms Robinson's notes, her first draft and the amended version are all materially in the same terms. There is thus no real doubt that the concepts set out in the letter reflected what had been discussed at the meeting. That this is so is corroborated by Mr Joy's email referred to in paragraph 58 above (" … *deliberately misconstruing the quiet enjoyment element of the lease* …"), the summary of the advice given during the conference call on 3 December set out in paragraph 61 above (" … *analysis of lease ... matter of construction* …") and Mr Joy's two emails referred to in paragraph 73;

ii) The material referred to above is not consistent with advice having been given to the effect that an ultimately legally unsustainable position was being adopted by Withers for the purposes of attempting to bolster Glen's position. My reasons in summary for reaching that conclusion are that:

a) Mr Wass was willing to alter his letter of 14 November so as to include within it the phrase that we " … *have advised our client that its legal position, as set out in our letter to you dated 5 November 2014, is meritorious and indeed nothing in your letter has altered that advice*". As Ms Copestake accepted in her oral evidence a recipient of the letter would understand that to be a representation of fact as to what Withers had done – see T6/73-74. Mr Wass was driven to accept that it would be improper for a solicitor to say in a letter to a third party that he had advised a client that an application was without merit and likely to fail if he had not given such advice – see T7/194-5. Whilst the use of the same phrase in the earlier letter was ambiguous in context, in the letter of 14 November it is not. A solicitor will not represent the contents of a letter as reflecting advice given by him or her unless (a) he or she has authority from his or her client to do so and (b) it is true for otherwise it would be a fraudulent misrepresentation. In my view it is much more probable that the representation made in the letter (changed to the terms used specifically at the request of Mr D'Arcy Clark) is true than the alternative;

b) Mr D'Arcy Clark's request referred to above is consistent with Mr Wass having given advice in the terms that Glen allege;

c) The email exchanges referred to above between Mr Joy and Mr Wass are consistent with Glen having been given advice in the terms alleged by Glen;

d) Mr D'Arcy Clark's point referred to above concerning in effect to induce an application by HRO for an injunction before work commenced would be commercially irrational unless advice to that effect had been given. The only place and time when such advice could have been given was at the meeting on 29 October;

e) The advice recorded as having been given at the 3 December conference call (see paragraph 61 above) that it was " … *odds on that GH can defeat an application for injunction on basis of analysis of lease* …" is in my judgment short hand confirmation of the advice that had been given on 29 October and "*odds on"* means what I have said it means above. No one suggests that advice on 3 December was more strongly supportive than the advice given on 29 October and there are no signs of any alarm bells ringing in the minds of any of Mr Hunter, Mr D'Arcy Clark or Mr Joy at that stage;

f) The reaction of Mr Joy in relation first to HRO's Particulars of Claim and then Mr Wass's advice in relation to it is consistent with him considering that there had been a significant change of position by Mr

Wass in relation to the advice that had been given. Mr Joy's assertion that "… *we attended the Withers case conference we were told that the quiet enjoyment provisions are indeed subject to our development rights, the key words being "except as otherwise permitted by this lease". With this in mind we were advised that we were in a very strong position and that any injunction would be bound to fail..*." is consistent with all the material I have referred to above;

g) Mr. D'Arcy Clark's reaction, which I consider to be an obvious and genuine reaction to what occurred following the hearing before Edwards-Stuart J is equally consistent with emphatic advice having been given at the 29 October meeting; and

h) If the position was that the 5 November letter had been written for the purpose of improving Glen's negotiating position, it is inexplicable that no attempt was made to start negotiating until after the hearing of the interim injunction application. To the contrary, when advice was sought from Mr. Wass on this issue, his advice was not to engage – see the exchanges referred to above when Mr. Joy asked Mr. Wass "*Do we shut up shop or do we keep playing legal tennis*?", to which Mr Wass's response was " … *My view is that we leave it. We have made our position crystal clear. ...*" Had his advice been to send the letter to bring pressure to bear on HRO to reach an agreement about the redevelopment of Glen House, this is not the advice that he would have been giving. Although Mr Lawrence submits that neither the letter of 5 or 14 November manifested an intention not to engage with HRO, I do not agree. Paragraph 10 of the 5 November letter does not suggest that Glen was inviting negotiation and the suggestion in the 14 November letter that Glen would ensure that " … *a continual dialogue with your client is maintained throughout the development so that any concerns your client may have can be addressed …"* was made only in the context of an uncompromising stance as to the rights available to HRO under the Lease. In any event, as I have said the exchanges between Mr Wass and Mr Joy suggests very clearly that engagement was not something that was being contemplated.

80. I reject the notion that there was any discussion about Ms Robinson's advice at the 29 October meeting. In one sense it might be expected that one of Mr Joy, Mr D'Arcy Clark or Mr Hunter might have challenged Mr Wass's advice by reference to what Glen had been advised by Ms Robinson in her email advice referred to earlier and/or by reference to the advice contained in the RoT as is submitted on behalf of Withers – see paragraph 26 of Mr Lawrence's closing submissions. However, that is to ignore the commercial context. As I have said already, Glen was under very significant pressure to make a success of the Glen House project. That is why Glen chose to proceed with the purchase notwithstanding the warnings given by Ms Robinson and by Withers in its RoT. Thereafter, there was a real prospect that if the redevelopment of Glen House could not be completed within the time scale planned there would be significant adverse consequences for the Fund investors. That problem was made worse by HRO becoming closely controlled by Mr Tan and by its change of management. Thereafter, Glen was faced with what it considered to be unreal demands by HRO underpinned by a threat to

apply for an injunction to restrain the development which left Glen in a commercially unenviable position. That was why Mr D'Arcy Clark wanted to retain a legal rottweiler; that's why Mr Hunter saw the situation as or as needing a "… *call to arms* …" and why he wanted a "*warning off*" letter to be sent to HRO. When Mr Wass gave them the advice that I have concluded he gave on 29 October, that was quite simply music to the ears of the Glen representatives. They were not interested in testing or challenging the advice they were given. They were interested only in receiving strong positive advice – which in the event they received – and of matching action to the word of that advice – which is what they got in the form of the letter of 5 November.

81. Mr Lawrence also submits that if the outcome was as I have concluded it to be, Mr Wass would not have asked Ms Robinson to draft the letter. I agree that on the face of it, it would be odd to ask a lawyer whose advice had been rejected to draft the letter advancing a new case. However, Ms Robinson was an associate in the firm and Mr Wass was one of the more senior partners of the firm. It does not appear to have been suggested that Ms Robinson would send out the letter or be concerned further in advising the client but was merely instructed internally to prepare the first draft of the letter in accordance with instructions given to her concerning its contents by Mr Wass, which draft was then altered by Mr Wass and sent out by him. Even if this is wrong and it was inconsistent to involve Ms Robinson unless the position was that Withers were advancing the case set out in the 5 November letter simply for the basis of improving Glen's negotiating position, the evidential impact of that point is outweighed by the other factors to which I have referred.

Conclusions Concerning Breach of Contract and Duty

82. Withers admits that it was retained in October 2014 to act for and advise Glen in relation to the evolving dispute with HRO and that it owed Glen a duty to exercise reasonable care in acting for and advising it – see paragraph 6 of its re-amended Defence. That duty was a concurrent duty in contract and tort though nothing turns on that in this case. It is common ground that the standard of care expected of Withers must reflect the fact that it is a City firm holding itself out as having experience and expertise in, among other things, real estate and litigation although in my judgment whether this is so or whether the standard to be expected is simply that of a reasonably competent solicitor does not affect the outcome on the breach issues that arise.

83. It follows from the findings set out above that I find that down to the hearing on 12 December 2014, Withers had advised Glen that HRO's right of quiet enjoyment was subject to Glens right to develop contained in clause 4.1 of the Lease and thus that Glen's right to develop was not qualified by the no material adverse effect proviso. I further find that this was both wrong and was advice that no reasonably competent solicitor in the position of Mr Wass or Withers could have given in the circumstances. That it was untenable is apparent both from the comments of Edwards-Stuart J at the hearing, from the advice given by counsel at the hearing and from Ms Copstake's acceptance of that advice both at the conference at court on the day of the hearing and in her evidence. Further and in any event it was plainly wrong applying the basic principles of construction that apply to the construction of all documents in English law, because if right it deprived the language of the proviso of any effect and could plainly not have been what the parties intended by the language they used when the Lease is read as a whole as it should have been. Mr Lawrence did not suggest otherwise

at the trial. Indeed, as he accepted in the course of his opening submissions, "… *no one with any sense could have read the Lease in that way*."

84. I further find that at no stage during the meeting on 29 October or at any time thereafter did Mr Wass advise (a) as to the distinction between a final and an interim injunction or (b) the test[2] that the courts of England and Wales apply when considering whether to grant interim injunctions or (c) that such applications would be resolved by asking whether HRO had a serious issue to be tried as to whether the proposed redevelopment was in breach of the Lease and then resolving whether to grant an injunction by reference to issues concerning the adequacy of damages and, ultimately, the balance of convenience. I further find that this was an omission that no reasonably competent solicitor in the position of Mr Wass or Withers could have made in the circumstances. It was plainly highly material to the practical concern that Glen had at the 29 October 2014 – which was simply whether HRO could delay the development of Glen House by seeking an injunction which would have as its effect to inflict commercial harm on the fund. Reasonably competent advice would have been that given ultimately by counsel – that an interim injunction would be difficult to resist at the interim stage and that the best way of minimising the resulting commercial damage was either to negotiate a development methodology with HRO or seek a direction that there be a speedy trial and seek to defeat the claim to a permanent injunction by reference to a comprehensive scheme for the development of Glen House that eliminated as far as reasonably practicable the risk of a material adverse impact on HRO and could be supported by undertakings by Glen to the Court.

85. I find that the true position concerning the effect of the Lease and the principles that apply to the grant of interim injunctions became apparent to Glen no earlier than 13 December 2014, when counsel advised Glen in the presence of Ms Copestake and Mr Wass as to the true meaning and effect of the Lease and the test that would be applied by the Judge to the application for an interim injunction. The advice given by leading counsel was not passed on by Ms Copestake to Glen as she accepted in the course of her cross examination, Withers did not withdraw the advice previously given prior to the hearing and counsel was not able to give any advice to Glen until the hearing.

The Settlement Issue

86. Prime alleges that Withers was negligent in the way it conducted settlement negotiation on behalf of Glen in essentially three respects – first, by failing to ensure noise levels reflected HR Owen's rights under the Lease, secondly by failing to provide for unrestricted works outside HR Owen working hours and thirdly by failing to advise on risk of delay caused by the IEA process.

87. The terms of the settlement are contained in a consent order made by Akenhead J on 29 January 2015 and sealed on 3 February 2015. In so far as is material for present purposes it provides that Glen undertook:

> " (i) Not between12:00 and 14:00 or between 16:00 and 18:00 hours each day (the "Quiet Times") to cause vibration exceeding 1 mm/s PPV or noise exceeding the Ceiling Noise Level or Levels agreed in writing (which includes by email) between the

[2] See American Cyanamid Co v. Ethicon Ltd [1975] AC 396

> Acoustic Experts in accordance with paragraph 3 of the Schedule or in default of agreement determined by the independent Acoustic Expert in accordance with paragraph 4 of the Schedule (the "Ceiling Levels")
>
> Outside of the Quiet Times:
>
> …
>
> (iii) Not to cause vibration exceeding 2mm/s PPV or noise exceeding the Normal Noise Level or Levels agreed in writing (which includes by email) between the Acoustic Experts in accordance with paragraph 3 of the Schedule or in default of agreement determined by the Independent Acoustic Expert in accordance with paragraph 4 of the Schedule (the "Normal Noise Level") save for periods of no more than I hour on giving the Claimant not less than 24 hours prior written notice, to occur not more than once per week (Monday to Sunday).…

Under the terms of the settlement, Glen agreed to waive the annual rent until either 25 April 2016 or the removal of all scaffolding from the Building whichever was later. In the event there was a dispute concerning normal baseline or ceiling noise levels by paragraph 4 of the schedule to the consent order, it was to be referred to a named expert for expert determination. In arriving at a determination, the expert was required to have regard "*... at all times to the sensitive nature of [HRO's] occupation and the relevant terms of the Lease ...*".

88. Turning to the first of these allegations made, Prime alleges that there is no reference within the Lease to " *… the sensitive nature of [HRO's] occupation ...",* that its inclusion in the consent order imposed a more stringent standard of noise control than that to which HRO was entitled under the Lease and that Withers by Ms Copestake were negligent by failing to ensure that it was removed.

89. The second point concerns the fact that the settlement provides for "normal Noise" Levels not to be exceeded at any time other than the Quiet Times. It is alleged that this was negligent because the language Ms Copestake had agreed meant that noise could not exceed the Normal Noise Level even in periods outside HRO's business hours and no one at Withers advised Glen of this until after the consent order had been approved and sealed. Glen instructed a new firm of solicitors to seek a variation of the consent order but this was not achieved until 26 January 2016 (by a consent order of that date) when unrestricted noisy works became permitted outside the hours of 08.30-18.00 (Monday to Friday), 08.30-17.00 (Saturday) and 10.30-17.30 (Sunday).

90. The third allegation is that Withers failed to advise Glen of the risk of delay created by the expert determination process. No mechanism to enforce the stipulation as to the timing of the IAE's determination. It is alleged that in the result the expert's final determination was not produced until 13 May 2015.

91. Returning to the first of these points, I accept – indeed Ms Copestake did not dispute – that there was no express language in the lease that justified the inclusion within the settlement of a reference to " *… the sensitive nature of [HRO's] occupation ...".*

However, Ms Copestake's point is that this was not something she inserted. It was something that Ellisons (the solicitors who acted throughout for HRO) had insisted on. I accept this was so since it had its origin in the points made on behalf of HRO prior to the 29 October meeting and stemmed from the view that customers for Ferrari cars are likely to be peculiarly sensitive to sub optimal trading conditions. This is not surprising given that such cars are priced at 6 and 7 figure sums. None of this comes as a surprise – it was known to the original lessor when the Lease was entered into and for that matter to Glen when it acquired Glen House. Although it is submitted on behalf of Prime that this misses the point because that factor was not recognised in the language used in the lease, I consider that itself misses the point. In fact it is close to obvious that the selling of Ferrari cars for six and sometimes seven figure sums will be sensitive to noise and vibration and thus was something HRO and its advisors would be specially concerned to control.

92. Ms Copestake sought instructions on this issue from Mr Joy and however reluctantly he agreed to what was proposed. I do not regard Ms Copestake as being negligent in relation to this issue. The demand was one that came from HRO and was consistent with the position it and its solicitors had adopted throughout. She sought and obtained instructions in relation to the issue. There is a causation issue that arises in any event because Prime maintains the only reason why HRO was able to insist on the point was because Glen were in a weak bargaining position following the grant of an Injunction. This is an issue I will have to consider in much more detail when considering the causation issues that arise. However, in relation to the narrow and confined point I am currently considering I make clear at this stage that I consider it probable that HRO would have insisted on this language whenever settlement discussions took place (as is accepted in Prime's closing submissions, "*…Ellisons clearly thought the "sensitive nature" language was an important point in their client's favour …")* and I think it probable too that Glen would have agreed to the language being included simply as the price of obtaining agreement as in fact Mr Joy did. Even if this is wrong, no loss has been pleaded or proved to have been cause by the breach alleged.

93. The issue concerning a failure to provide for unrestricted work outside HRO's working hours falls into a different category however. It strikes me again as close to obvious that this was an issue that a transactional lawyer such as Ms Copestake ought to have spotted during the drafting process and stood firm on.

94. It is not an answer to say that the language used reflected the agreement reached commercially by Mr Hunter because it is the function of a transactional lawyer to convert broadly commercial terms into a legally workable document.

95. It is plain that HRO could have no interest in what happened at Glen House outside its working hours and in my judgment Ms Copestake was under a duty to inform Glen that the effect of the agreement it was being asked to enter into had that effect.

96. I am sure that if this point had been spotted, it would have been eliminated by negotiation between solicitors because HRO had no interest in insisting on the agreement having the effect that in fact it ended up having. Equally, had the point been drawn to Mr Joy's attention (he said in the course of his evidence and I accept that he did not spot the point when he was asked to review and approve the document) he would have instructed Ms Copestake that it was not acceptable and was to be negotiated away.

As I have said, I have no doubt that Ellisons would have agreed to that because HRO was not entitled to such a provision having regard to the terms of the Lease since noise outside its working hours could not " … *materially adversely affect the use and enjoyment of the Property for the Permitted Use*." For what it is worth, there is some support for this being the likely outcome to be gained from the fact that ultimately this defect was resolved by an agreed variation. This claim has been quantified at £32,939.30 in relation to costs that would have been saved had the settlement terms been properly drafted and legal costs of £236,272.19 on legal fees incurred in obtaining the variation. I do not understand these sums now to be in dispute but I will hear counsel further at the hand down on this issue if these sums are disputed.

97. I do not accept that Ms Copestake was negligent in failing to warn Glen that of the risk of delay created by the expert determination process. That was inherent in the scheme as set out in the settlement order and it is entirely unreal to suppose that the very experienced and seasoned property development professionals that represented Glen would not have been aware of that risk. It is both obvious and inherent. In any event, even if this is wrong, no loss has been proved to have been caused by this alleged breach of duty.

Causation

98. It is common ground that the questions I have to determine are (a) whether on the balance of probability Glen would have sought to negotiate a settlement with HRO had it been advised correctly, and (b) if so whether there is a real and substantial chance that less onerous conditions could have been negotiated than in fact were achieved by the settlement consent order– see Allied Maples v. Simmons and Simmons [1995] 1 WLR1602 *per* Stuart-Smith LJ at 1614:

> "... the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be."

This approach was approved most recently by the Supreme Court in Perry v. Raleys Solicitors [2019] UKSC5; [2020] AC 352 *per* Lord Briggs at paragraph 21. It follows that Prime must prove that but for the breach of contract and duty I have found proved, Glen had a substantial chance of reaching an agreement with HRO by 12 December 2014 that permitted the demolition works to be carried out to industry best practice standards rather than the terms that in fact were agreed and set out in the consent order settling the claim by HRO against Glen. It maintains that its chances of achieving such a result should be assessed at 80%. There is also a subsidiary issue to which I have referred already namely what if any losses followed from the failure to provide for unrestricted work outside HRO's working hours.

99. Withers' central submission in relation to this issue is that any weakness in bargaining position was caused by the commercial decision taken by Glen to purchase Glen House

subject to the Lease and in the face of the advice that it had received from Ms Robinson prior to exchange and as set out in the RoT and not by the erroneous advice given by Withers and principally by Mr Wass between 29 October and 13 December 2014. As I have said already, the decision to purchase in the face of such advice was one of commercial judgment for Glen.

100. Withers maintain that HRO had been planning legal action in relation to the proposed development for many weeks prior to the application for an interim injunction. Although Prime submit there is no evidence to support such a proposition, I do not agree. It is apparent that was what was being planned because the threat of an application for an injunction was made explicitly in the EC Harris letter and was implicit in the correspondence from Ellisons referred to earlier. That the application had been carefully planned is apparent from the volume and sophistication of the evidence garnered in support of it. In my judgment the reality is that HRO's demands would have been the same whether or not an injunction had been obtained since (assuming counter factually that an application for an injunction had not been made), the grant of the Injunction made no real difference to either the time it would have taken to negotiate an agreement with HRO or the terms of that agreement. I reach that conclusion because (1) it was always open to HRO to apply if the terms offered by Glen were not satisfactory on a proper construction of the Lease; (2) equally, if the terms offered were satisfactory on a proper construction of the Lease then that would have enabled Glen to apply for the discharge of the interim order just as much as to resist one being made; and (3) the real issue for Glen was the commercial imperative of getting the demolition element of the redevelopment completed quickly. If and to the extent that caused Glen to make concessions in the course of the post injunction negotiations it is probable that that would also have caused it to make similar concessions in the context of counter factual negotiations after 29 October.

101. Consideration of this issue must start with what Prime contends to be the proper construction of the Lease. Prime submits that on a proper construction of the Lease read as a whole, the proviso that to clause 4.1 of the Lease requires that the words " … *do not materially adversely affect…"* to be construed consistently with clause 4.5 of the Lease (which is an exclusion of liability provision), the proviso to which refers to a requirement to " … *use reasonable endeavours to cause the minimum disturbance to the Tenant and the Permitted Use* …" This leads to Prime submitting that " … *the standard of "reasonable endeavours" is, therefore, built into the Lease as a standard applicable to the Landlord's exercise of its reserved rights, and clause 4.5 clearly envisages the possibility of the Tenant suffering some nuisance or inconvenience* …" In sum, Prime submits that the phrase "… *do not materially adversely affect…"* should be construed as meaning " … *provided that reasonable endeavours are used not to materially adversely affect the use and enjoyment of the Property for the Permitted Use.*" Assuming this construction is at least realistic this leads Prime to argue that Glen was entitled to exercise its right to develop provided that it used reasonable endeavours to minimise any material adverse effects and whether reasonable endeavours were to be or had been used was to be tested by industry best practice rather than whether it had taken all reasonable precautions.

102. That this is the or at least a realistically arguable construction is not seriously in dispute and I proceed on that basis. However, it is not the only arguable construction that could apply. HRO could realistically argue that on a proper construction of the Lease read as

a whole, clause 4.1 and 4.5 are concerned with different issues and that it is to be inferred from the use of different language in each clause that it was intended to apply different tests and that the construction for which Prime now contends ignores the express words the parties to the Lease had chosen to use. On this approach, the word "*materially*" should be given full effect and must be construed in the factual matrix mentioned earlier – namely that all parties to the Lease knew that HRO would be operating a Ferrari dealership from the Premises and that it had not been suggested to HRO prior to the acquisition of Glen House that redevelopment would involve demolition of all or any of the floors above the Premises demised to HRO.

103. I accept that had Glen been advised as it should have been, then it would have sought to arrive at an agreement with HRO concerning the redevelopment of Glen House. It is idle to suppose otherwise because there would have been no other realistic alternative. Glen's commercial judgment at the time it decided to acquire Glen House notwithstanding the risks involved was that HRO was simply seeking to take opportunistic advantage of the situation and that in effect it could be bought off. That was at least in retrospect a serious commercial misjudgement, which resulted from a failure to take at face value the strong reservations registered on behalf of HRO and the impact that development of the sort concerned would have on a tenant operating a Ferrari dealership from a building that was being demolished on the floors above those demised to HRO.

104. If negotiations had taken place from 29 October and those negotiations had failed on the basis that Glen had offered to carry out the demolition of Glen House above the part of the building occupied by HRO in accordance with industry best practice but HRO had refused to agree, then Glen's only option would have been to commence proceedings probably for declaratory remedies. It is possible but unlikely that such proceedings could have been resolved summarily but a speedy trial might have been ordered. In any event a stale mate would have resulted that would have lasted for an indeterminate future period until the issue could be resolved by court order. The alternative would have been for Glen to do as it did and proceed without any agreement in place with HRO, which would have been to run the risk of it starting proceedings broadly as it did.

105. Even assuming that a court could be persuaded to arrive at the construction of the Lease for which Prime now contends at an interlocutory stage, it is unlikely that the question whether Glen was proposing to carry out the work in accordance with best industry practice could be arrived at other than following a trial. Even assuming a speedy trial was ordered, that would still mean that the dispute could only be resolved at an indeterminate time in the future. None of this would have been acceptable to Glen for all the reasons explained earlier as to why they were so anxious to be advised that they were in a strong position to resist an application by HRO for injunctions restraining the demotion element of the redevelopment of Glen House.

106. Although Prime maintain the advice given on 29 October was the point after which the Glen decision makers decided to litigate rather than negotiate that is not the point that matters. In fact, Glen had maintained a robust response to HRO down to the 29 October meeting as I have explained. That is apparent from the internal email traffic to which I have referred above that passed between Mr D'Arcy Clark, Mr Joy and Mr Hunter during the Autumn of 2014. As I have said, HRO had rights under the Lease that

enabled HRO to frustrate and delay redevelopment of Glen House and was a well advised and successful commercial entity that intended to take aggressive action to protect its position and had made clear that was its intention prior to the acquisition by Glen of Glen House. The reality is that negotiating a means by which the development could take place with HRO remaining in occupation was always going to be difficult essentially for the two reasons already identified – at the time the Lease was entered into all the relevant parties knew that HRO was, and intended to continue, operating a Ferrari dealership from the premises and secondly it had not been suggested to HRO prior to execution of the Lease that redevelopment would involve demotion.

107. Had Mr Wass advised as he ought reasonably to have advised on 29 October, the reality is that nothing fundamental would have altered. HRO would have continued to make the demands that it made and either an agreement would have been reached in broadly the terms reached ultimately or Glen would have continued as it was doing with the result that HRO would have applied for the Injunction it ultimately sought and obtained. Critically in either the factual or counter factual situation it was open to Glen to seek either declaratory remedies or the discharge of the interim order on the basis that it was and planned to do everything that it could be required to do under the Lease. As I have explained, there was a risk that a court would not resolve that issue other than at a trial and thus that there would be an indeterminate delay while a trial could be fixed. That was something that Glen was anxious to avoid at all costs and it was that factor that governed its decision making following the grant of the injunction and would equally have done so when negotiating in the counter factual situation. The reality was as articulated by Mr D'Arcy Clark in his email to Mr Hunter of 8 December sent following the service of proceedings by HRO that day (see Mr Wass's email of that date to Mr D'Arcy Clark and Mr Hunter amongst others) when he remarked to Mr Hunter:

> "Whilst clearly this is a problem we could do without, the fact that it is happening now indicates that it would only have happened in the future - at some time - and possibly less convenient. Wass gave us an unequivocal view at the outset (subsequently toned down in a way that is typical of the profession) so let's go with that."

108. That this was what both Mr Hunter and Mr D'Arcy Clark thought would happen is apparent from the email traffic immediately prior to 29 October following Mr Cilia being instructed to act on behalf of HRO in late September 2014.

109. On 3 October, Mr Cilia had sent an email to Mr Hunter complaining about the quality of information provided about the impact of proposed demolition and re-construction works on HRO's use of the demised premises and continued:

> "We ask you again to provide us with the relevant information and documentation explaining exactly what works that you propose to do, how you propose to do them, and over what time period. Please provide this within the next 7 days.
>
> In the meantime it remains the position of H R Owen Ltd that the demolition and reconstruction works that you briefly outlined to us will materially adversely affect the use and enjoyment of the

> premises as a high quality car dealership, and all rights in this respect are reserved. Should you begin works before agreeing suitable terms with H R Owen Ltd then you do so at your own risk."

110. On 6 October, Mr D'Arcy Clark was describing HRO's solicitors as "… *beginning to show signs of being potentially extremely difficult* …" and that although " … *He may not have the right to do so ... nothing will stop him serving injunctions which would hold us up*". Mr Hunter remarked in an email on 7 October of Mr Cilia's email of 3 October that "*We are heading for a Barney*!" On the same day, Mr Joy was describing Mr Cilia's conduct as having " … *all the overtures of a legal ransom* …" Mr Joy clearly had in contemplation that HRO would commence proceedings for as he said in the same email " … *Another matter to bear in mind that John raised the other day- perhaps better that we actually get started on site and then they try and injunct us because we can then counterclaim for damages more easily*." Whilst the logic for such an approach is questionable without first asking if there would be a legally defensible basis for a counterclaim, the general thrust is apparent – HRO was seen by Glen as representing a much more serious problem than had been contemplated when Glen House had been acquired.

111. On 16 October Ms Robinson forwarded the letter from Ellisons that had been sent in error to Pemberton Greenish in which Ellisons stated HRO's position as being:

> "Our Client's agent Stephen Cilia met recently with your Client/Client's representatives to discuss your Client's proposed demolition and reconstruction of the above Property. We attach for your file a copy of the subsequent email that Stephen Cilia has sent to John Hunter.
>
> It remains our Client's position that the proposed demolition and reconstruction works will materially adversely affect our Client's use and enjoyment of the premises as a high quality car dealership, and all rights in this respect are reserved. Should your Client begin works before agreeing suitable terms with our Client, then your Client does so at its own risk."

There then followed the exchanges referred to in the previous section of this judgment consisting of the warning from Ms Robinson that an application could be made for an injunction before work was commenced and Mr D'Arcy Clark seeking a recommendation of a "*rottweiler*" lawyer for Glen to appoint.

112. By 25 October, the discussions between Mr Joy and Mr Cilia had not proved fruitful. By an email of that date Mr Cilia had said that " … *based upon the information that has been provided the works will undoubtedly have a material adverse effect upon H R Owen's use and enjoyment of the premises as a high end Ferrari dealership*". Mr Joy passed this email to Mr Hunter (who it will be recalled was to attend the lunch with Mr Cilia together with Mr Joy). Mr Hunter's response was:

> "He's throwing his weight around - he's promised his Masters to bully us into submission.

> We need to start demolition before he serves proceedings on us. Our draft Withers letter of next Wed needs to take the form of a warning off notice.
>
> Prepare to take up arms."

In my judgment this email plainly shows that in Mr Hunter's mind at least it was probable that HRO would commence proceedings and that Glen would have to be very firm in resisting such a claim if a satisfactory compromise was to be arrived at – hence the need to "... *take up arms"*. This was followed by the letter from EC Harris which contained the proposals for managing the demolition process that included a requirement that " … *continuous noise and vibration monitoring equipment should be installed within customer accessed areas of the HRO demise for the duration of the proposed works, with 'stop work' or 'not to be breached' levels agreed by all parties prior to works commencing (it is anticipated that physical tests will need to be completed for these levels to be set)"*. It was this and other proposals contained within the letter that were described by Glen as unworkable at the 29 October meeting. There is nothing about what happened in October that suggests there was any prospect of negotiating a way forward that was materially different from that which was agreed in the end.

113. This analysis is also consistent with what Mr Joy said in his email to Mr Hunter of 11 December, where having summarised Ms Robinson's advice as being " … *Basically, she flagged up the material adverse effect point, and said that we would be subject to it* …", Mr Wass's alternative advice and the retreat from it, Mr Joy then said this of its impact:

> "My genuine view is that Withers didn't interpret the lease correctly the second time, and they then gave us the wrong advice, which we have subsequently relied upon. We are now past the point of no return with litigation and costs. My guess at the costs of trial etc are c. £80k to £100k, and we will still have to negotiate our position. <u>We could have simply negotiated straight away at a cost of almost nothing</u>. This is not to mention the massive time commitment we are having to give to this, and the opportunity cost thereof. My estimate of the net cost to the JV of this poor advice is at least £100k plus Tenhurst time at £50k, plus any delays, which probably run at £100k per month (Dominic can confirm the latter number)." [Emphasis supplied]

Whilst of course this remark was made before rather than at the end of the negotiations that followed with HRO, there is no evidence that suggests that the breach of duty I have found proved caused Glen to agree terms that were any more adverse to its interests than would otherwise it would have had to agree in any event. The commercial imperatives were materially the same on 29 October as they were on 14 December. The position of HRO and its advisors was the same on 29 October as it was on 14 December. Further as is now obvious from the application issued by Ellisons on behalf of HRO, HRO had been planning litigation for many weeks prior to 29 October and in my judgment its approach was not materially altered by what happened between 29 October and 14 December or at any rate there is no evidence to contrary effect. There was no

realistic prospect of Glen achieving a materially better position in negotiation with HRO on 29 October than following the grant of the injunction on 14 December.

114. Both parties accept that if HRO had been aware of the demolition plan prior to execution of the Lease that would have been a point strongly in Glen's favour. Ellisons had alleged in its letter to Withers of 20 November that HRO had "*...never understood before the Lease was entered into that your Client would demolish the building down to ground floor and then rebuild it whilst our Client remained in occupation of the ground floor and basement. Your Client has not had any or any adequate regard to the restriction that the Lease imposes upon your Client's ability to develop."* I accepted that this was correct earlier and as Mr Joy stated:

> "As we are not currently in the position to call upon evidence from the likes of Tokara and Pemberton Greenish, who were the ones negotiating the lease with HRO in April I May 2011, we do not have much in the way of useful written correspondence with HRO. This being the case, it is likely that the issues will focus on what constitutes material adverse effect and what is fair and reasonable and best practice in terms of demo and construction methodology. I.e. the expert evidence will be key."

115. Returning to the first question that I have to resolve in a loss of a chance case namely whether on the balance of probabilities Glen would have done anything different had it been advised correctly on 29 October, I find that it would have done precisely what it did following the interim injunction being granted – it would have endeavoured to negotiate the best terms that could be obtained from HRO and its advisors to enable the redevelopment to take place. As I have said, Ms Robinson advised clearly on at least two separate occasions prior to the delivery of the RoT and in the RoT concerning the risk Glen was taking in acquiring Glen House for redevelopment. Glen chose to proceed on the basis of its own commercial assessment of that risk. As I have said, that involved tasking the firm line referred to in the internal emails referred to in the previous section of this judgment.

116. Even if it is accepted that there was a change in stance by HRO following the majority shareholder's acquisition of the balance of the shares in the company and the replacement of its senior management, there was absolutely nothing that Glen could do apart from negotiate the methodology of the re-development with HRO. That did not change following the grant of the injunction because the legal test remained the same. What HRO was entitled to demand was governed by the true meaning and effect of the Lease and if Glen offered to HRO less than it was entitled to then HRO was entitled to an injunction to restrain development and if HRO persisted in seeking more than it was entitled to Glen was entitled to either resist the grant of an injunction or seek its discharge. The commercial problem as well after the grant of the injection as before was that posed by the delay to the project caused by legal action. That caused Glen to make concessions during the negotiations that in fact took place and in my judgment would have caused it to make exactly the same concessions in the counter factual situation in which an injunction had not been obtained. Mr D'Arcy Clark was clear on that point in cross examination when he said:

> "Q. … the general view was that the settlement order as made on 22nd or 23 January 2015 was workable; it wasn't perfect, but it was workable, that was the general view yes?
>
> A. Well, anything was better than an injunction being granted, waiting a long time for the case to be heard and having no assurance that that would go in our favour. So anything was better than that. … We had our backs against the wall."

Glen had its back to the wall because of the commercial constraints to which I have referred. These were no different when the negotiations in fact took place to what they would have been if, counter factually, the negotiations had commenced on 29 October 2014. A little later in this section of his cross examination, Mr D'Arcy Clark described HRO's solicitors as "*... unscrupulous and obstructive ...*" which I make clear I do not accept but he then added

> "It led me to form the view that they were on the front foot and they could frankly say whatever they wanted to and we would have to agree to it.

117. However, that was not the result of the negligent advice that Withers gave on 29 October or because an interim injunction had been granted to HRO on 12 December 2014. It was the result of Glen purchasing Glen House subject to the Lease to HRO, then seeking to develop Glen House by demolishing most of the building without HRO having been informed that was the plan at the time it entered into the Lease and by the commercial constraints that Glen was operating under as well before as after 29 October. That the terms of the settlement were in excess of what was required by industry best practice was not caused by the negligent advice or the grant of the injunction either. It was the result of Glen having to reach an agreement rather than face the uncertainty, the risk posed by the correct construction of the Lease, cost and delay of resolving the issue in court. As Mr Joy said in the course of his cross examination, "*... as every developer knows, the surest way of killing your development is litigation and so that, frankly, is very much a last resort".* However, none of that had been caused by the negligent advice either. That was the result of the factors to which I have referred earlier. But for these factors and in particular the commercial constraints that applied, Glen could have simply discontinued negotiations and proceeded with the litigation.

118. The reality is that the negligent advice given on 29 October delayed the process by the time that elapsed between that date and the date when the interim injunction was granted. It also meant that Glen incurred the expense it incurred in relation to the proceedings, which would probably though not certainly have been avoided had the correct advice been given.

119. HRO had established its legal strategy weeks prior to 29 October and had made it abundantly clear to Glen that it had no intention of agreeing to what was planned by reference to anything other than what it considered adequately protected its interests. That was the position adopted by its solicitors and property advisors prior to 29 October and that continued to be its approach throughout.

120. If Glen had considered that what was being demanded exceeded what HRO was entitled to under the Lease it could have returned to Court just as in the counter factual

situation it could have broken off negotiations and sought declarations in legal proceedings commenced by it or commenced work and resisted any application for an injunction as and when HRO applied for one, in either case having first obtained the expert evidence to support its technical case that what it was offering to do accorded with best practice and its legal case that it was required to do no more than that. In fact it did not do that because that would have added to the delay and expense and would have worsened the commercial pressure under which it was operating and that is precisely what would have happened in the counter factual situation for exactly the same reasons. In the counter factual situation, it is probable that Glen would have had to go to trial in order to stand the best chance of succeeding. Even if a speedy trial direction was obtained (and being permitted to move to the front of the queue for its own commercial interests did not guarantee that such a direction would be given) that would have still involved significant delay. In any event there were the legal risks to which I have referred earlier. None of that was acceptable to Glen as is apparent from Mr D'Arcy Clark's answer referred to in paragraph 99 above.

121. The reality is this: Glen's weakness stemmed from its purchase of Glen House subject to the Lease intending to develop it by demolishing much of the building when the Lease had not been negotiated on the basis of such a scheme. From then on Glen wanted to develop because it considered there was a profit to be made from such development and as Mr Lawrence put it in his opening " *... HRO was always (no matter what Glen did or said) going to battle to ensure it got as large a share of that profit as possible doing the least damage to its own business. That is just 'business'*" It was not caused by the advice given on 29 October or any reliance by Glen on that advice thereafter. Critically Glen was not deprived of the opportunity of testing HRO's resolve by litigating the issue. That did not happen and in my judgment would not have happened in the counter factual situation. HRO's rights under the lease viewed in the context of the commercial pressures that Glen was under caused the settlement that was entered into and in my judgment would have resulted in similar terms for similar reasons had negotiation commenced on 29 October rather than immediately after the interim injunction had been obtained. The only difference is that probably the outcome would have been achieved about 6 weeks earlier than would otherwise have been the case.

122. Prime has failed to prove as a matter of causation that Glen had a real or substantial chance as opposed to a speculative or negligible one of obtaining a better outcome if it had commenced or continued negotiations on 29 October as opposed to recommencing negotiations after 14 December.

Damages

123. In light of the conclusions that I have reached so far, It is strictly not necessary for me to reach any conclusions as to the damages that might have been recoverable had I concluded that Prime had established a real and substantial chance that HRO would have agreed terms that were different from those in the event agreed. I am fortified in that view by the fact that aside from one head of loss to which I refer further below, the quantum of loss is agreed. It would be wrong of me to attempt to arrive at a figure representing the allegedly lost chance given the findings that I have so far made.

124. The total losses in respect of which it is contended that the alleged loss of the chance should be quantified in summary is as follows:

i) Extension of rent-free period:

£742,524.66

ii) Increased duration of demolition and associated costs:

£465,000.00

iii) Further costs of compliance with Settlement Order:

£128,839.82

iv) Delay in commencing demolition – costs thrown away:

£521,567.91

v) Extended period of demolition – additional fees and expenses:

£170,000.00

vi) Financing costs £6,516,900.00

vii) Costs thrown away on abortive construction phase

£1,524,318.98

viii) Diminution in value of Glen House

£1,962,500.00

TOTAL £12,031,651.37

125. With one exception (that relating to part of the Financing Costs) the figures are agreed as figures subject to the arguments concerning breach and causation already addressed. Given my conclusions on the causation issues I intend to deal with the quantum issues shortly.

126. The financing costs claim is pleaded at paragraph 55(6) of the re-amended Particulars of Claim. This is quantified at £6,516,900. This part of the claim consists of two parts. The first is a claim for additional interest payable under what is known in these proceedings as the Maslow facility resulting from delay in commencing demolition in the period between 12 December 2014 and 17 August 2015 (quantified in the sum of £575,434.39) and interest charges incurred over the difference between the time it is said it would have taken to complete demolition using a best practices solution and the time that in fact it took applying the constraints contained in the consent order by which HRO's claim was settled (quantified in the sum of £559,719.31). The sum of these claims exceeds what is pleaded and Prime confines these sums to those pleaded being in total £1,118,900. There are two disputes about the Maslow element of the claim. The first concerns a pleading point by which Withers maintain that each element should be capped to the maximum claimed for that element. Mr Tozzi submits that this is wrong

and that he should be confined only to the total that he has pleaded for both elements of the Maslow element of the claim. I agree subject to the issue addressed below. I cannot see how Withers could conceivably have been prejudiced by this point as long as the sums in fact claimed (a) have been proved and (b) add up to the total claimed sum.

127. The second issue concerns the period of the extended demolition caused by the settlement order method taking longer that best practice methodology. Mr Tozzi's proposal was that I should adopt a median position between the two experts on the basis that I had not heard from either. I reject that as the correct approach. The correct approach is that contended for by Withers: where neither expert has been called the only safe course is to adopt the common position of both. Mr White and Mr Greenwell are agreed that the relevant minimum period of delay to the demolition is 3½ months. Mr Greenwell contends for a period of 5 months delay but he was not called to give evidence to that effect. In those circumstances I find a period of delay of 3½ months should be adopted for the purposes of calculating the total sum attributable to delayed demolition. That being so the sum contended for by Prime - £559,719.31 – so not proved and the only sum recoverable is that arrived at applying the delay period of 3½ months, which as I understand is agreed in the sum of £429,129.10. Mr Tozzi submits I should not permit this issue to be argued because it is not pleaded. That is wrong: This is an evidential point and one that Withers is fully entitled to rely on given the state of the evidence. Mr Tozzi relies on the fact that other heads of loss have been agreed as sums by applying the split the difference approach for which he contends. That may be appropriate for settlement purposes but where there has been no agreement the course I have adopted is appropriate on the evidence available. Had Mr Tozzi's client wanted to obtain a better outcome in relation to this hear it should either have insisted on a global amounts settlement using the methodology which Mr Tozzi seeks to rely on or should have called the expert evidence available to Prime. In fact, as Mr Tozzi frankly and fairly accepted this point was overlooked. Whilst I understand that is so, that does not lead to any different outcome. In the result, this part of the claim quantifies at the sum of £575,434.39 and £429,129.10.

128. The other element to this head of claim concerns what is known in these proceedings as the Topland facility. By the summer of 2016, Maslow were no longer prepared to continue funding the project and had become entitled to bring it to an end by reason of the breach by Glen of one or more of the loan covenants. Glen was forced therefore to seek commercial funding from other sources to enable it to discharge the Maslow facility and cover its costs between the completion of the demolition phase and its sale of Glen House to a third party to complete the development. Mr D'Arcy Clark's evidence (which I accept on this point since there is no evidence to contrary effect) was that there was a very small pool of lenders who were prepared to offer this type of funding other than Topland Jupiter Ltd. The sums claimed under this head is £5,398,000, being interest and fees of £4,759,567, legal and valuation fees totalling £44,653 and break fee payable to Maslow of £598,000.

129. The Topland claim is one that Withers submits should be disallowed in its entirety as a matter of law on the basis that " *(w)hether one examines this claim from the perspective of causation, scope of duty or foreseeability, Withers are not legally responsible for that loss, which was apparently caused by refinancing and the time it took to sell Glen*

House in the property market as it prevailed two to four years after Withers gave the advice about which complaint is made."

130. Mr Joy's explanation of these events in summary is that (a) by June 2016, Glen's debt with Maslow had been passed on to an entity trading as Dragonfly Finance Lending; (b) Dragonfly no longer wished to support the project and accelerated repayment from 10 August 2017 to 30 September 2016 and increased the exit fee to that referred to above; and it was necessary to enter into the Topland facility in order to provide a financial bridge that re-financed the redevelopment whilst Glen sought a purchaser. Mr Joy maintains that the reason why Glen House was sold after demolition had been completed was because of (i) the difficult financial situation described above and (ii) because Mr D'Arcy Clark and Mr Hunter had fallen out. The reasons why Dragonfly was able to insist on these revised terms are set out in the internal email from Mr Haworth to Mr Joy, Mr Hunter and Mr D'Arcy Clark dated 8 June 2016:

> "We are in 'technical' breach of the current facility due to the delays within the development programme (primarily the extended demolition programme) as well as the increase in costs (demolition+ build). Whilst Dragonfly are comfortable that they aren't at risk in the transaction they have a long stated desire to stop lending large sums to the prime resi sector.
>
> When the facility was taken out the demolition cost was estimated at £600k. Since then, as we all know, it has increased to c. £2m. We have a strong relationship with the current lender and rather than issuing us with formal notices, they offered us an extension to September to allow us to complete the demolition and seek an alternative funder."

131. Withers does not dispute that Dragonfly was entitled to take these steps. It follows from this material that I find that the Topland facility was one entered into for the reasons claimed – that is because the Maslow facility was being brought to an end and it was necessary to obtain re-financing in order to enable that to happen and to provide a financial bridge until a sale could be achieved.

132. As to the reasons for the premature sale of Glen House (inevitably at an under value given the partly completed state of its redevelopment) I accept Mr Joy's explanation as to why it was decided to sell just as I accept Mr D'Arcy Clark's – which is that in effect completing the redevelopment had become financially impossible because as he puts in his statement " … *to continue to develop the site required the Fund which had invested in the project to be extended to 2020 and would only be financeable through deleveraging through sales or injecting further equity. The only alternative became to sell the undeveloped site*"; that the Fund behind Glen was coming under significant pressure from its investors so that further equity funding would be impossible or very difficult and so Glen was unable to proceed with the development and was forced to sell Glen House. Finding a buyer was not straightforward because Glen:

> "… had to find a buyer whose cost of funding was lower than HR Owen's rent and who could essentially remove the scaffolding from the site (thereby bringing an end to the rent

> holiday) and wait out the Lease before redeveloping Glen House. As such, Glen were negotiating from an extremely weak position in any event and, moreover, the Topland Facility was about to expire, the interest was eating up the remaining equity and Topland could foreclose if repayment was not forthcoming by the due date."

133. Mr Lawrence submits that none of this was reasonably foreseeable to Withers as on 29 October and is plainly irrecoverable.

134. In her oral evidence, Ms Copestake accepted that she would have foreseen that delays to the Glen House Development would cause Glen to incur financing costs, and that delays would create a real risk that the development phase of the project might not be able to be proceed at all:

> "Q … this assignment on, you knew or must have realised. knew, can I suggest, from your previous discussions with and emails from Mr D'Arcy Clark, and indeed also as this transaction progressed, that the proposed purchaser was going to be a special purpose vehicle, Glen House Development; you knew that, didn't you?
>
> A. Yes.
>
> Q. … You knew that the Prime London Residential Development Fund which was managed by Cordea Savills was going to be the most significant investor?
>
> A. Yes.
>
> Q. You would have known, presumably, that the SPV and the fund would have wanted to minimise that risk, as far as possible anyway, by trying to identify and address any potential obstructions or difficulties which might otherwise be confronted by the proposed development?
>
> A. Yes.
>
> Q. And you would also have known, wouldn't you, that if there was a delay in being able to proceed with the development, that was likely to result in additional cost?
>
> A. I would agree with that, yes."

135. In light of these answers, I accept Prime's submission that no issue of reasonable foreseeability can arise because this evidence means that either Ms Copestake actually foresaw that if there was a delay this would result in additional cost or it strongly supports the proposition, which is in any event obvious, that if a commercial development is delayed then the financial costs of the development will increase. Withers don't suggest otherwise in relation to the Maslow costs. However, Withers submit that there is a difference of principle between the increase in the Maslow costs

caused by the delay in completing the demolition and the Topland claim, which Mr Tozzi dismisses as in truth a concern about the amount of the claim and the amount has no impact on foreseeability.

136. Where, as here, a claim is brought for breach of both a contractual and a tortious duty, generally the relevant test is the contractual one – see Wellesley Partners LLP v Withers LLP [2015] EWCA Civ 1146; [2016] 2 W.L.R. 1351 - that is whether at the time of making the contract, a reasonable person in the position of the defendant would have had damage of that kind in mind as not unlikely to result from a breach.

137. Prime submits and I accept that the outcome applying this test will depend on whether this case is to be treated as an "*advice*" rather than an "*information*" case within the meaning accorded to those terms in Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd [1997] A.C. 191. I accept Mr Tozzi's submission that on the facts of this case, the damages issues in this case should be approached on the basis that the case is an advice case since Withers were under a duty to advise as to what the appropriate course was for Glen to take. Such an outcome is entirely consistent with both Carter v TG Baynes & Sons [1998] E.G.C.S. 109 and the Scottish case of Kirton Investments Ltd v VMH LLP [2011] CSOH 200; [2012] P.N.L.R. 11. In those circumstances, Withers is liable for all the foreseeable consequences of action taken in reliance on the advice that Mr Wass gave. On this basis if otherwise recoverable, in my judgment Prime is entitled to recover damages for all the foreseeable losses that result.

138. Returning to the Topland loan costs, I find that the need to enter into the Topland loan was caused by what was at least arguably a breach of the terms of the Maslow loan, which in turn was a foreseeable consequence of delay to the project for the reasons identified in the email from Mr Haworth to Mr Joy, Mr Hunter and Mr D'Arcy Clark dated 8 June 2016 referred to above.

139. In relation to the sale of Glen House after demolition but before completion of the development, I reject the notion that Glen should have mitigated its loss by continuing with the project as a submission that is commercially unreal for all the reasons given by Mr D'Arcy Clark in his witness statement, the relevant part of which is set out above. I accept Mr D'Arcy Clark's explanation as to why it was difficult to sell the building being again as set out in the part of his statement quoted above. Any delay in selling will have been the result of attempts to get the best price obtainable. That approach is not merely commercially obvious, but was the probable fiduciary obligation of those managing an arm's length funded investment fund such as the Fund. It was plainly a foreseeable consequence of delay to a development project that the developer would cease to be able to fund completion of the redevelopment and that if that happened the most likely outcome would be that the developer would need to sell the development site. It was also plainly foreseeable that there would be difficulty and therefore delay in the sale of the property caused by the need to sell a partly developed site.

140. Finally, I reject the suggestion that any failure to mitigate has been demonstrated by reference to the failure to continue the Maslow loan. Once there has been a breach of a loan agreement of the sort Glen had with Maslow, that entitles the lender to terminate the loan, whether the loan is continued ceases to be something the borrower can control. Unless it can be said that the default is wholly unconnected with the delay to the demolition work, and that is not alleged here, it is a foreseeable consequence of the

delay that a breach of the lending covenants or a default event may occur that entitles the lender to bring the facility to a premature end and the need for the borrower to find alternative finance, possibly at greater cost, will arise.

141. In light of these conclusions, had the issue arisen, I would have proceeded on the basis that the Topland finance charges should have formed part of the losses to which any percentage loss of chance figure should be applied.

142. Turning now to the rest of the heads of loss two points follow from the conclusions I have set out above. First, save where there has been an agreement as to the sum involved subject to the breach and causation issues, all sums must be calculated where relevant on the basis that the difference between demolition to best practice standards and to the standards imposed by the consent order is 3½ months and all foreseeability issues must be resolved on the basis that the duty was an advice not an information provision duty so that Withers is liable for all the foreseeable consequences of action taken in reliance on the advice that Mr Wass gave.

143. The only remaining points that I need address are the following. First the sum in relation the rent-free period, Withers contend that should be reduced to £734,995.89, which is the pleaded sum claimed. This was a point taken by Withers in correspondence and has not been resolved. I am not able to accept that point. Aside from the fact that the figure appears to have been agreed, I cannot see how Withers could conceivably have been prejudiced by this point as long as the sums in fact claimed have been proved or agreed.

144. It was submitted on behalf of Withers that Glen failed to mitigate its loss under this head by removing the scaffolding. It is unreal to suppose that Glen would not have removed the scaffolding earlier if it reasonably could have done so given the impact of its continued presence on the rental income that Glen was able to recover. Given this factor I accept what Mr D'Arcy Clark says in his third statement as to the reasons why the scaffolding was retained. Subject to the issues of liability and quantum and to arriving at a suitable percentage multiplier had I concluded that the loss of a chance claim has been established, this head of claim has been made good.

145. I turn next to the increased duration of demolition and costs in connection with that activity. This sum has been agreed as being the additional cost of carrying out demolition to the method required by the consent order as opposed to the cost of carrying out to a best practice standard. I need say no more about it.

146. The next head of loss is the cost attributable to the delay in commencing demolition. The sum claimed has been agreed in the sum of £128,839.82. Withers submit that these sums would have been incurred in any event because "…*acoustic testing, monitoring, expert advice and independent adjudication would always have been required even on the Claimant's case* …" The first answer to this deployed by Mr Tozzi is that the issue has not been pleaded. In my judgment it does not have to be. Prime has been put to proof of the losses it is entitled to recover and the point that these costs are not losses caused by the breach of duty relied on is one that Withers is entitled to make in the circumstances of this case.

147. Withers suggest there is an element of "double counting" in relation to this claim because noise and vibration monitoring costs would be incurred in any event. I reject this point because the reasonable cost of providing such monitoring has been taken

account of in the assessment by Mr Cheema - see paragraph 47 of his third report and his revised calculation table in the same report.

148. There is a further point concerning the cost of providing for an adjudicator. It is said that the cost of appointing an adjudicator would have been incurred in any event since that was what Mr Hunter and Mr Joy had been seeking agreement for at the lunch on 29 October and in effect what ended up in the consent order. I agree with Mr Tozzi that this is not a point that Withers can take at this stage having agreed the figures. This point was not one that was taken when considering figures for agreement. It appears to have been mentioned for the first time in the written closing submissions. The point is not one that has been explored in cross examination and in consequence this issue has not been the subject of any compare and contrast type evidence as to what an adjudicator would have charged nor has there been any exploration of what services the adjudicator would be required to provide, to what time scales or costs or even how frequently his or her services would be called upon. All this means that I cannot take this point into account.

149. Turning now to the wasted costs claimed in respect of delay in commencing demolition, this is an agreed figure. Withers' point in relation to this head of loss (aside from the caveat in respect of the agreement being subject to all issues concerning liability and causation) is that not all the delay in the commencement of demolition from 12 December 2014 to 17 August 2015 resulted from Withers' breach of duty because there would always have been substantial delays to the commencement of demolition caused by whatever agreement Glen was able to arrive at with HRO. Prime's case on this issue assumes that on 12 December, Glen could have commenced work. Withers submits that this is commercially unreal because work could not commence until (a) noise monitoring equipment had been installed, (b) both parties had appointed their own experts, (c) an adjudicator has been identified and appointed (assuming he or she was willing to accept appointment) and (d) the demolition methodology had been revised so as to reflect (i) a change of contractor and (ii) that it complied with best practice. This leads Withers to submit that the amount of any delay for which damages can be recovered by reference to this head does not exceed the period between 12 December 2014 to the settlement on 23 January 2015.

150. This is an issue that ought to have been pleaded by Withers if they intended to rely on it because in my view this crosses the line from requiring a case to be proved to advancing a positive case. Had the issue been pleaded it is one that Prime could have explored both with its experts and with the two demolition contractors that it engaged with. Whilst I remain sceptical that a method statement could be obtained from a demolition contractor, an adjudicator identified, formal agreement reached between the parties and the adjudicator and between the parties and all the preparatory work done between 29 October and 12 December, so as to enable work to commence on that date, it is not an issue that has been explored during the trial and I conclude that Prime can legitimately complain that it has been taken by surprise in relation to this issue. In those circumstances, I conclude that the points relied on by Withers are not properly open to it and conclude that had it been relevant the loss of a chance would have been calculated on the basis this head of loss had been proved. Had Withers wished to assert that the loss covered by this head should have been calculated over a period other than Prime contends for – possibilities include 12 December to 23 January or the 6 week period

prior 17 August when in fact work commenced – it was for Withers to plead and prove a positive case to that effect. It chose not to do so.

151. The next head of loss is the additional professional fees and expenses that became payable as a result of the extended demolition period. This sum has been agreed and no answer is offered other than the liability and causation points that I have resolved already. I need say no more about this head of loss.

152. The next head of loss is a claim for the costs thrown away on abortive construction. The sum claimed has been agreed by the parties. Withers submit that this head of loss is not recoverable because it was not foreseeable that the alleged breaches of duty on the part of Withers would cause Glen to decide not to proceed with the construction phase of the project and so cause professional fees to be thrown away as a result. This is an unreal analysis, essentially for the reasons I have given already in respect of the Topland finance costs claim. I do not need to repeat them. As I understand Withers' submissions, this head of loss engages exactly the same principles as the Topland claim and in my judgment resistance to it fails for the same reason.

153. Finally I turn to the diminution in value claim. As pleaded this head of claim alleges that by reason of the terms of the settlement consent order, redevelopment of Glen House was substantially more difficult than would have been the case on the claimed counterfactual of an agreement with HRO that permitted demolition in accordance with industry best practice and in consequence Glen suffered a diminution in the value of Glen House of approximately £1,965,000. The diminution figure has been agreed as a figure in the sum of £1,962,500. I have explained already why it was foreseeable that if delays occurred it might be necessary to sell the building in a partly developed state. Withers remaining point in relation to this issue is that the valuation that has been agreed is of Glen House in March 2014, being a point earlier in time than Withers negligence or Glen's losses. Withers maintains therefore that no damages can be recovered under this head because there is no evidence as to the value of Glen House at the relevant time.

154. Although the ostensible reason for Prime adopting this course is to strip out any possible effect of extraneous market movements on the valuation and focus solely on the effect of Withers' negligence, I do not accept that is a legitimate exercise. It is entirely inconsistent with Prime's case that this is an advice case and thus that Withers is liable for all the foreseeable consequences of action taken in reliance on the advice that Mr Wass gave. There are any number of reported solicitor's negligence cases where market movement has been taken account of in such cases.

155. More fundamentally, it is or should be common ground that the default position is that damages should be assessed at the date the wrong occurs, which in relation to the tort of negligence, where damage is of the essence of the tort, is when the loss caused by the breach of duty occurs – see Smith New Court Securities Ltd v Scrimgeour Vickers [1997] AC 254 *per* Lord Brown Wilkinson at 265H-266C – but equally it is common ground that a court can and should depart from that rule where it is necessary in order adequately to compensate the claimant for the damage suffered by reason of the defendant's wrong – see, specifically in relation to the tort of negligence, Dodd Properties Ltd. v. Canterbury City Council [1980] 1 W.L.R. 433 and more generally, County Personnel (Employment Agency) Limited v. Alan R Pulver & Co

[1987] 1 WLR 916 per Bingham LJ (as he then was) at 925-6; and Smith New Court Securities Ltd v Scrimgeour Vickers per Lord Brown Wilkinson at 265H. As things stand, I do not see any justification for departing from the default position on the evidence available. Whilst it is sometimes submitted that damages should be assessed at a date after the loss has been caused, it is novel or at any rate very unusual to suggest that they should be assessed prior to that event.

156. I will invite short further submissions at the hand down of this judgment as to how best to approach this issue. It may be that it can be agreed that there is no material difference between the value of Glen House in March 2014 (when Glen acquired it) and 29 October 2014. However, I await further submissions on that point.

157. Finally, as will be apparent from what I have said earlier, Withers were negligent in the way in which they prepared the settlement consent order. It is agreed that the loss caused by this in terms of project delay quantifies at £32,939.90. Withers disputes the professional fees in connection with the application to vary the terms of the settlement consent order. This is quantified in the sum of £236,272.19. That figure is agreed as a figure so I need not take up time describing how it is arrived at. It is an incurred cost. I am satisfied that these sums have been proved for the reasons given by Mr Tozzi orally and because no part of the make up of these sums was challenged in the course of cross examination either. In those circumstances, I am satisfied that these sums are recoverable as damages in relation to the negligently prepared consent order.

Conclusion

158. No alternative claim has been advanced by Prime based on a delay of 6 weeks between 29 October and 12 December 2014 or some reflection of that period. In light of my conclusions on the causation issue in relation to Mr Wass's advice, that is the only claim that could succeed by reference to that breach of duty. In relation to the breach of duty I have found established in relation to the settlement order, I assess damages in the sum of £236,272.19 and £32,939.90.