Neutral Citation Number: [2022] EWHC 1512 (Comm)

Case No: LM-2020-000172

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

Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: 16/06/2022

Before:

HH JUDGE RUSSEN QC

(Sitting as a Judge of the High Court)

- -

Between :

(1) PAUL RICHARDS	**Claimants**
(2) KEITH PURVES	
- and -	
(1) SPEECHLY BIRCHAM LLP	**Defendants**
(2) CHARLES RUSSELL SPEECHLYS LLP	

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Richard Leiper QC (instructed by **Cardium Law Limited**) for the **Claimants**
Nigel Tozzi QC and **Alexander Wright QC** (instructed by **Norton Rose Fullbright LLP**) for the **Defendants**

JUDGMENT ON CONSEQUENTIAL MATTERS

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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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HH JUDGE RUSSEN QC

HHJ Russen QC :

1. This is my judgment on the consequential matters arising out of my judgment dated 29 April 2022: [2022] EWHC 935 (Comm) ("the Judgment"). It addresses the following matters: (1) costs down to judgment; (2) interests on the Claimants' damages; (3) the Claimants' and the Defendants' respective applications for permission to appeal; and (4) the costs relating to this judgment (foremost, the costs incurred in making the submissions addressed in paragraph 3 below). Separate Forms N460 respect of the third matter have been provided to the parties.

2. I indicated at paragraph 515 of the Judgment that, in the absence of any further direction for an oral hearing, I would determine these matters on the basis of the parties' written submissions. Having received them, it appeared to me that the matters could fairly and justly be decided on the papers and the parties agreed that was the appropriate way forward.

3. In reaching the decisions below I have considered the following documents:

    a. the Claimants' Submissions on Consequential Matters dated 28 April 2022 (with draft of proposed Order attached);

    b. the Defendants' Submission on Interest and Costs dated 6 May 2022 (with draft of proposed Order attached and other attachments);

    c. the Claimant's Reply Submissions on Consequential Matters dated 11 May 2022, together with the clip of relevant pre-action, without prejudice ("WP") and without prejudice save to costs ("WPSATC") correspondence passing between the parties;

    d. the Defendants' Submissions on Permission to Appeal (and attached Grounds of Appeal) dated 13 May 2022;

    e. the Claimants' Application for Permission to Appeal dated 13 May 2022;

    f. the Claimants' Response to the Defendants' Application for Permission to Appeal dated 1 June 2022; and

    g. the Defendants' Response to Claimants' Application for Permission to Appeal dated 1 June 2022.

4. It has not been possible for me to act upon the Defendants' request (paragraph 20 of the Submissions dated 6 May 2022) that I should rule on the question of interest and costs before the applications for permission to appeal. Given the discretionary element of the decisions on the first two matters it would perhaps be unlikely that I would have granted permission to appeal against either, though I will provide for the "standard" 21 day period under CPR 52.12 for any further application by the Defendants to the Court of Appeal.

Costs

5. The Claimants say they are the successful party under the Judgment and that under the general rule (CPR 44.2(2)(a)) the Defendants should be ordered to pay their costs of the proceedings. They seek the assessment of those costs on the indemnity basis, on the ground of what is said to have been the Defendants' unreasonable refusal to engage in mediation.

6. They also seek a payment on account of their costs recovery (CPR 44.2(8)) in the sum of £787,388.40 including VAT (£656,157 excluding VAT). That sum is calculated by taking 75% of the incurred costs and 90% of the approved estimated costs as those appeared in the front sheet of the Claimants' costs budget appended to the Order of HHJ Pelling QC dated 16 April 2021.

7. The Defendants accept that they are liable to pay the Claimants' costs. However, they say the assessment should be on the standard basis. They say an appropriate payment on account the costs would be £600,000 including VAT.

8. In support of the application for indemnity costs, Mr Leiper QC pointed to four offers by the Claimants to mediate contained in WPSATC correspondence between 21 December 2018 and 17 December 2020. All but the last was made before the Claim Form was issued on 22 September 2020. The Defendants' response to the first offer (made by letter dated 21 December 2018) was to say they did not consider that a mediation would be productive or cost effective at that stage. Their letter dated 3 January 2019 said they would keep the merits of some form of ADR under review once full disclosure had been given. The second offer of mediation (or some other form of ADR which might be useful in narrowing the issues between the parties, perhaps by focusing upon causation and loss) was made on 24 May 2019. The Defendants responded on 7 June 2019 to say that there was no point in engaging in mediation or ADR as the claim was doomed to fail. The third offer, made by letter dated 11 September 2020 and by reference to draft Particulars of Claim, was met with the same response that there was no point in a mediation because the claim was entirely without merit. The fourth offer, made by a letter dated 13 December 2020 in the light of the Defence and in advance of a CCMC, again elicited the response that there was little point in having a mediation over an unmeritorious claim. That response dated 17 December 2020 also referred to the expense of a mediation and indicated that the Defendants would be prepared to have a short without prejudice call between solicitors to explain why a Part 36 offer of £500,000 made by them the previous month would not be increased.

9. Mr Leiper QC described this as a high-handed approach by the Defendants which was no doubt intended to overawe the Claimants and dissuade them from pursuing their claim.

10. He relied upon the decision of HHJ Waksman QC (as he then was) in *Garritt-Critchley v Ronnan* [2014] EWHC 1774 (Ch); [2015] 3 Costs LR 453. In that case the judge acceded to the claimants' application for indemnity costs based principally upon the defendants' failure to engage in mediation. As appears from the judgment on the application, the defendants had resisted the claimants' suggestion of mediation by saying that the positions of the parties were too far apart and, later, that they were confident of their position and did not consider there was any realistic prospect of the claimants succeeding. The main issue in the case was the factual one of whether or not a binding agreement for the issue of shares had been reached. If the claimants had established one had been concluded, the judge said there was a "*sliding scale of compensatory award*" and that it had become apparent to him during the course of the trial that the range was "*really very considerable indeed.*"

11. It is important to note that in *Garritt-Critchley* the court was deciding the application for indemnity costs in circumstances where, after a 4 day trial but before the judge gave his judgment on the claim, the defendants belatedly accepted the claimants' Part 36 offer to accept the sum of £10,000 plus their costs to date. That offer had been preceded by an earlier one under which the claimants had sought payment of £170,000, together with their

costs, and also one by which the defendant offered to accept three-quarters of their costs upon the claimant discontinuing the claim. In support of his conclusion that the defendants' "*failure to engage in mediation or any other serious ADR was unreasonable"*, the judge said their reasons for not doing so did not "*stack up*". In particular, the binary nature of the issue on liability, being one of fact, was one where both parties needed to engage in an analysis of the risk of their case not being accepted. The wide range of possible quantum scenarios was also an aspect which rendered the case suitable for mediation, as did a mediator's ability to defuse the emotion in the case and any feelings of distrust between the parties.

12. Mr Leiper QC also relied upon the reference in *Costs & Funding Following the Civil Justice Reforms* (8th ed, as contained in the 2022 White Book supplement) to the "*constant pressure from the judiciary and court users for greater use of ADR*." He said the defendant firm was particularly well-placed to appreciate this encouragement rather than disregard it.

13. The Defendants resist an order for costs on the indemnity basis by saying their approach to mediation was not unreasonable and that, in any event, an unreasonable refusal to mediate is only one facet of a party's conduct to be taken into account when determining costs. For the first point they relied upon the decision of Ramsey J in *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4l) Ltd* [2014] EWHC 3148 (TCC); [2014] 6 Costs LO 879 and for their second upon the decision of the Court of Appeal in *Gore v Naheed* [2017] EWCA Civ 369.

14. The first point was made by reference to the WPSATC correspondence relied on by the Claimants and also the Part 36 offers made by the parties: by the Claimants on 9 February 2021 in the sum of £4.25m, by the Defendants in the sum of £500,000 on 23 November 2021, and another one by the Claimants on 11 February 2022 in the sum of £3.5m. The Defendants also referred to without prejudice discussions between Leading Counsel as being consistent with a serious attempt by the Defendants to settle the dispute, though, as Mr Leiper QC observed, they remain privileged. He also said the first discussion took place on 2 February 2022 which he described as "the eleventh hour" in relation to the trial.

15. In addition to relying upon what they described as their measured Part 36 offer, the Defendants highlighted that their initial response to the proposal of a mediation was that it should follow disclosure, with the position remaining unchanged in terms of there having been no disclosure by September and December 2020, and also pointed to the provision for mediation in their costs budget as an indication that they were open to mediation.

16. The parties have made comprehensive and helpful written submissions on the question of whether or not indemnity costs should be ordered on the basis that the Defendants unreasonably refused to engage in a mediation. I have considered them in the light of the relevant correspondence and do not intend to repeat them in full here.

17. Having reflected upon the arguments I am not persuaded by the Defendants' argument that their approach to mediation was not unreasonable, that is to say it was a reasonable one. On this aspect, I am persuaded by Mr Leiper's response to that argument in his Reply Submissions dated 11 May 2022. In particular, in my judgment he was correct to observe that the Defendants' response of January 2019 was a refusal to mediate; that any concern about the need for some disclosure to shed light on certain aspects of the case (their letter focussed upon the absence of any realistic alternative investment in IPS UK) could have

been explored in preparation for mediation or inquired into at a mediation; and that certain assumptions which the Defendants' submissions reveal had been made about the Claimants' motivations for and expectations of the litigation (which meant "*mediation was therefore most unlikely to succeed*") were just the kind of matters which a mediator would have explored. As was recognised by the observations of the judge in *Garritt-Critchley*, at [18], most mediators are skilled in seeking to moderate the expectations of any party which may be based on matters collateral to the merits of its case.

18. I would add that the same authority, at [23], also addresses the Defendants' point about the expense of a mediation given the uncertainty over its outcome. They compared the combined budgeted costs of approximately £105,000 with the judgment sum of less than £1.5m. However, not only does this involve undue scepticism over the prospects of a successful mediation but the more relevant comparison is between the costs of a mediation and the costs involved in taking the claim to a trial. The Claimants' and the Defendants' approved costs budgets (excluding VAT and ATE insurance premiums, if applicable, and making either no or insufficient allowance for the submissions mentioned in paragraph 3 above) were in the total sums of £755,037 and £865,762 respectively. Further, as the Claimants pointed out by reference to the fee earner time included in the ADR phase of the Defendants' budget, the costs of a mediation would have been significantly less than the £105,000 figure.

19. In concluding that the Claimants have the better of the argument on the Defendants' first point, I also bear in mind the point that the Defendants' Part 36 offer was made only just over 3 months before the trial. Mr Leiper QC said this showed that the Defendants wanted to take the litigation to the wire in circumstances where they knew the Claimants had an ATE insurer behind them who, as a matter of commercial common sense, would be applying pressure on the Claimants to settle the action. I make no judgment about that but the timing of the Defendants' offer signifies their general passivity in the ADR process over the period of almost 3 years since a mediation was first proposed.

20. In conclusion, the Defendants' reliance upon 5 of the 6 factors identified by Ramsey J in *Northrop Grumman v BAE Systems* at [56ff] as bearing upon the reasonableness of a refusal to mediate – (1) the nature of the dispute; (2) the merits of the case; (3) attempts at other settlement methods; (4) costs of ADR; (5) the prospects of successful ADR – does not assist them.

21. However, the Defendants' second point is that an unreasonable refusal to mediate is only once facet of a party's conduct to be taken into account when determining the appropriate order for costs. Mr Tozzi QC and Mr Wright QC referred to the judgment of the Court of Appeal in *Gore v Naheed* [2017] EWCA Civ 369, at [49], where Patten LJ, citing an earlier decision of the court, said *"…a failure to engage, even if unreasonable, does not automatically result in a costs penalty. It is simply a factor to be taken into account by the judge when exercising his costs discretion…"*.

22. In *Gore v Naheed* the defendant appellants did not rely upon what they contended to have been the claimant's unreasonable refusal to mediate in support of an argument for indemnity costs. Instead, as the losing party liable to pay the claimant's costs, they argued that judge should have made some allowance in their favour for the fact that the claimant had either refused to or failed to engage with their proposal of mediation. That had also been the thrust of the unsuccessful argument (for a discount in the costs liability to reflect

an unreasonable refusal to mediate) in *Northrop Grumman*. It was unsuccessful in that case because the judge found that the defendant's conduct in unreasonably refusing to mediate was balanced out by the claimant not accepting an offer which they failed to better.

23. The Court of Appeal in *Gore v Naheed* concluded that the judge's refusal to make any such allowance was not wrong in principle and declined to interfere with his order. The case concerned declaratory and injunctive relief over a right of way and the judge had said that he considered that the case raised quite complex questions of law which made it unsuitable for mediation. Patten LJ expressed his own view in more general terms when he questioned whether "*the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated*". He went on to endorse the observation that even an unreasonable failure to engage in mediation does not automatically result in a costs sanction.

24. Although I have concluded that the Defendants' failure to engage the Claimants' proposals for a mediation was unreasonable, that is only one aspect of the conduct to be considered in the exercise of the discretion under CPR 44.2. Further, "*the conduct of all the parties*", together with any measure of qualified success that a party may have achieved, is just one factor amongst all the circumstances that are to be considered alongside the general rule favouring the overall successful party when it comes to exercising it. A "failure" to engage in (or at) a mediation clearly does not carry the clearly defined costs consequences of an unaccepted but effective Part 36 offer; not least because of the difficulty of identifying with confidence, even in hindsight on what should be a summary determination rather than a further mini-trial, where any "blame" really lay within the pursuit and conduct of what is a privileged process. The uncertainty of outcome at any proposed mediation also means that the party who is suggesting unreasonableness on the part of the other cannot point to the result at trial and demonstrate that costs have been wasted through the mediation not having taken place.

25. In my judgment, the Defendants' failure in this case to engage constructively with the mediation proposals does not justify an order for costs against them on the indemnity basis. To make such an order would involve elevating that factor over others which weigh in their favour. Those others include them successfully resisting a significant part of a claim put at around £4.3m (see the Judgment at [90]-[91]) and doing significantly better than either of the Claimants' Part 36 offers proposed (thereby avoiding the consequences of CPR 36.17(1)(b)). That is a very different outcome from the one in *Garritt-Critchley*.

26. In circumstances where neither side made a cost-effective Part 36 offer, the Defendants' unreasonable conduct in relation to mediation is in my judgment sufficiently marked by an order that they pay the Claimants' costs down to and including trial on the standard basis. That is an appropriate "sanction" for them not engaging in a process of ADR which might have curtailed those costs in a significantly lower sum at an earlier stage of the proceedings.

Payment on Account of Costs

27. The Claimants seek a payment on account of their costs entitlement in what they said was the reasonable sum of £787,388.40 including VAT. The relevant figure net of VAT is £656,157. This was based upon them taking 75% of their incurred costs and 90% of their

approved estimated costs and of the costs of budget preparation. The decision of Birss J (as he then was) in *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 3258 (Ch); [2015] 3 Costs LR 463, at [60], is relied upon to support the lesser discount of 10% of those costs which have been the subject of scrutiny within the cost management regime.

28. The Defendants said the payment on account should be £600,000 including VAT. They reached the net of VAT figure of £500,000 by taking 50% of the Claimants' incurred costs figure of £291,747.65 and deducting almost £100,000 from their estimated costs of £463,290 before then applying the 10% discount indicated by *Thomas Pink*. This leads to figures of £145,873.83 and £340,000, respectively, which produces a round figure of £500,000 plus VAT once costs for the budgeting process at 3% have also been included. Particular points were made about the amount of the Claimants' incurred costs relative to the Defendants (£159,317) and the fact that they engaged two different firms of solicitors (Withers LLP and then Cardium Law Limited) at the pre-action stage. In relation to estimated costs, they questioned whether the £50,000 budgeted for the witness statement phase and the £15,950 for settlement discussions could have been incurred and pointed out that a mediation (budgeted by the Claimants at £34,500) did not take place.

29. The Claimants responded to these points by saying the Claimants total costs were about 15% lower than the Defendants' costs, that there was little duplication of cost on the change of solicitors (and that their pre-action costs were lower than the Defendants' own) and that the pre-action costs also included an extensive review of the documents and the preparation of a draft valuation report. In relation to estimated costs, they say that the amounts budgeted for the witness statement and settlement phases were in fact incurred even though no mediation took place.

30. In *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), at [23], Christopher Clarke LJ said the aim of identifying a reasonable sum to be paid on account of costs (CPR 44.2(8)) can be achieved by estimating the likely recovery on a detailed assessment and *"…. taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad*." The judge rejected the suggestion that the test was one of identifying the "*irreducible minimum*" of recoverable costs, though I recognise that, notwithstanding the court's power to order interest on any later repayment, his test is designed to minimise the prospect of an interim payment later proving to be an overpayment.

31. In light of my decision as to the basis of assessment, on any detailed assessment the Defendants would have the benefit of the doubt on any question of reasonableness or proportionality which may arise in respect of particular aspects of the Claimants' costs: CPR 44.3(2). Although the provision underpins the use of the 90% figure indicated by the *Thomas Pink* decision, they would also wish to argue on the assessment that there is "*good reason*" to depart from certain of the Claimants' budgeted figures for the purposes of CPR 3.18. The Claimants' favourable comparison of the parties' overall costs (and of their pre-action costs) probably assisted them at the costs budgeting stage, and it reinforces the use of a higher percentage for budgeted costs than for incurred costs when fixing the payment on account, but it does not provide a conclusive answer to the Defendants' points of anticipated challenge on a detailed assessment.

32. Adopting the approach in *Excalibur Ventures* to the circumstances in this case I have concluded that a reasonable sum to be paid on account of the Claimants' costs is £713,000

including VAT. I have reached this round figure by taking 70% of their incurred costs of £291,747.65 and 90% of budgeted costs taken (for these purposes) to be £430,000 before adding 3% for the budget drafting and budget process and finally adding VAT.

Interest on the Judgment Sum

33. The issues between the parties are over the rate of pre-judgment interest and the date from which that interest should run. The court has a discretion over both matters under section 35A of the Senior Courts Act 1981 as is recognised by the Claimants' invocation of it, using the standard phraseology, in paragraph 37 of the Particulars of Claim.

Rate

34. The parties are agreed that interest runs at the rate of 8% under the Judgments Act 1838 from the date of the Judgment: CPR 40.7 and 40.8.

35. The Claimants seek pre-judgment interest at the rate of 8% above BoE base rate from 3 December 2014 (the First Valuation Date identified in the Judgment) until the date of the Judgment. They rely upon their evidence that the lack of funds, following their departure from the Company, meant they were unable to make returns from ventures or investments and that they had to secure litigation funding in order to pursue the claim against the Defendants.

36. The Defendants say the rate proposed by the Claimants is wholly excessive and that the rate should be what they submit is the 'conventional' commercial rate of 1% above base. They submitted that what the Claimants may or may not have done with the additional funds is entirely speculative and should have been the subject of a pleading in support of a discrete head of loss (which in all likelihood would have been too remote to be recoverable).

37. In *Carrasco v Johnson* [2018] EWCA Civ 87, at [17], Hamblen LJ, as he then was, considered the guidance in earlier cases and summarised the approach to an award of interest as follows:

> *"(1) Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as compensation for damage done or to deprive defendants of profit they may have made from the use of the money.*
>
> *(2) This is a question to be approached broadly. The court will consider the position of persons with the claimants' general attributes but will not have regard to claimants' particular attributes or any special position in which they may have been.*
>
> *(3) In relation to commercial claimants the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers.*
>
> *(4) In relation to personal injury claimants the general presumption will be that the appropriate rate of interest is the investment rate.*

(5) Many claimants will not fall clearly into a category of those who would have borrowed or those who would have put money on deposit and a fair rate for them may often fall somewhere between those two rates."

38. It is therefore clear from the second proposition that the court adopts a broad brush approach to the award of interest which does not involve speculation about what the claimant would otherwise have done with the money of which he has been deprived. Instead, in a case like the present the court usually adopts as the appropriate measure the cost which the class of claimant to which he belongs would have incurred in borrowing that money. This is what is generally known as "the commercial rate": see the 2022 White Book paras. 16AI.2 and 16AI..7. The notes in the White Book explain (by reference to authority) that the "usual practice" of the Commercial Court in awarding pre-judgment interest at 1% above base rate is no more than a starting point and that awards of 2% above base rate are common.

39. I am guided the approach in *Carrasco,* including the fifth proposition in relation to a blending of rates, and looking at them with the objective categorisation required by the second proposition I take account of the fact that the Claimants were individuals who had received substantial funds in late 2014. That indicates they were in a class of litigants whose need for credit would be less pressing than their desire to pursue other investment opportunities. In my judgment, the rate of interest to be paid on their damages is 2% above base rate.

Accrual Date

40. The Claimants said that pre-judgment interest should run from 3 December 2014: the First Valuation Date adopted for the purpose of Scenario 2. Mr Leiper QC said the question of possible delay, after that date, of a Scenario 2 transaction coming about had already been factored into my assessment of the chance of it doing so.

41. The Defendants argued that the start date for the pre-judgment interest should be 31 October 2018.

42. Three points are relied upon to support that later date. The first is that Scenario 2 under the Judgment (to which the First Valuation Date is relevant) would have taken some time to come about and would probably have involved an element of deferred consideration under the hypothetical purchase. The second point is that the damages awarded against them include an element of loss (around 15% of the damages awarded) which reflects legal costs incurred between July 2016 and early 2018. The Defendants say that these first two matters support a date of the end of April 2017 for true accrual of loss. Their third point relates to the delay in commencing the claim, which was issued on 22 September 2020. The Defendants contrast that date with the crystallisation of the Claimants' loss through the settlement of the Leaver Litigation in the middle of January 2018 which was some 32 months before. Their suggested start date of 31 October 2018 reflects all three points and the adoption of a much reduced period between crystallisation and commencement to allow for the taking of advice and the completion of the pre-action process.

43. In relation to the first and second points, the Judgment (at [418] and [450]) contained an evaluation of the chance of the Claimants securing a purchaser who would have paid the

£8m valuation of IPS UK as it was determined to be at the First Valuation Date. The Judgment does not contain any express or implicit finding that the resulting value of the lost opportunity would have been received by them on the First Valuation Date. Indeed, in their oral closing submissions at trial [Day 6 p. 162 (9-24)] the Claimants relied upon the point that there may have been a delay in completing the Scenario 2 transaction, after the First Valuation Date, in support of their case that the percentage prospects of the full value being realised should be higher rather than lower. I had this in mind when deciding the chance was to be assessed at 75%.

44. As the Judgment makes no assumption as to when the hypothetical transaction would have completed, I consider that part of the Defendants' first point does have some force in the context of the exercise of the court's discretion under section 35A. That said, I am not persuaded that it is appropriate for me to speculate about how the consideration under that transaction might have been made up (including potentially deferred elements of consideration) when my evaluation was confined to the realisable value of the shares being sold: compare the Judgement at [449]. The Claimants' second point also has traction in relation to the element of loss made up of the costs of the Quantum Judgment.

45. However, I am not persuaded that their third point does when, as explained above, the Claimants made three proposals to mediate between December 2018 and the issue of proceedings.

46. Mr Tozzi QC and Mr Wright QC relied upon the decision of Jackson J, as he then was, in *Claymore Services v Nautilus Properties* [2007] EWHC 805 (TCC); (2007) BLR 452, at [55], where he said: "[*w]here a claimant has delayed unreasonably in commencing or prosecuting proceedings, the court may exercise its discretion either to disallow interest for a period or to reduce the rate of interest*." The judge went on to say that the court must take a realistic view of delay and that it is not reasonable to expect any party to take every litigious step at the first possible moment, or to concentrate on litigation to the exclusion of all else. He said delay should only be characterised as unreasonable for these purposes when, making due allowance for the circumstances, it can be seen that the claimant has neglected or declined to pursue his claim for a significant period.

47. Mr Leiper QC countered by relying upon the decision of Mr Roger Ter Haar QC, sitting as a Deputy High Court Judge, in *Hart v Large* [2020] EWHC 1302 (TCC), at [45]-[48], where *Claymore* was cited by the defendant in support of a submission that 3 years' worth of interest should be deducted from the amount payable to the claimants to reflect their delay in bringing the claim and their failure to observe the relevant pre-action protocol during that period. Although the judge accepted there had been some delay and such non-compliance (when he doubted that compliance with the protocol would have made a significant difference to the case) the judge declined to act on that submission. He referred to the claimants being in a difficult position of facing numerous problems with their house (the subject matter of the proceedings) which were not of their making.

48. Mr Leiper QC also relied upon the decision of Hildyard J in *Challinor v Juliet Bellis & Co* [2013] EWHC 620 (Ch), at [47]-[48], where, in addressing *Claymore*, he said:

> *"In this context, and as is reflected in the passage quoted above, delay is not to be characterised as unreasonable unless it can be seen that the claimant has neglected or declined to pursue his claim for a significant period. The delay must truly be*

exceptional and inexcusable, having made allowance for the fact that delays and lulls do occur in litigation; an example would be where an action has inexcusably been allowed to go to sleep for years: see per Colman J in Athenian Harmony (No 2) [1998] 2 Lloyd's Rep 425 at 427, in a passage also quoted in Claymore (at paragraph 52)."

49. In *Challinor* the judge rejected the defendant's submission (summarised at [29]) that the claimants should be deprived of interest for approximately half the relevant period claimed because of their delay in bringing and prosecuting their claims. He said *"..... the delays in this case are not such as to warrant any reduction in the periods during which interest is to be paid ..."*.

50. I am not persuaded that the lapse of time between crystallisation and commencement should be categorised as exceptional or inexcusable in the light of the Claimants' overtures in relation to mediation. However, the Defendants' other points should carry some weight in the exercise of my discretion.

51. Rather than separating the two elements of the Claimants' loss for the purpose of identifying separate start dates for the accrual of pre-judgment interest on different elements of the damages award, I have instead taken account of the Defendants' second point in fixing upon a later date than the one I would have identified by reference to their first point alone. Recognising that the Claimants did not begin to incur the costs of the Quantum Judgment until a later point in time, and weighing that point (in relation to some 15% of the total damages) accordingly, I have concluded that pre-judgment interest of the Claimants' damages should run from 1 December 2015.

Permission to Appeal

52. The Claimants and the Defendants both seek permission to appeal certain aspects of the Judgment.

53. The Claimants' proposed appeal relates to my approach to calculation of their loss under Scenario 2.

54. The Defendants' proposed appeal relates to my finding of liability and also my approach to the quantum of the Leaver Litigation costs recoverable from the Defendants in damages and to the suggested credits against the damages (generally) otherwise payable by them.

55. In support of its application, each side says I have made an error (or more than one) which means that the relevant ground of appeal has a real prospect of success. In support of their challenge to my finding of liability, the Defendants also say there is a compelling reason why the Court of Appeal should be allowed to re-consider my decision. In other words, the ramifications of that finding are such that the appeal would raise an important point of principle within the meaning of CPR 52.7(2)(a)(ii).

56. The Defendants say that the Claimants' proposed ground of appeal raises a new case which was not raised at trial and which is inconsistent with their pleaded case. Accordingly, they should not be permitted to run the new case now. In return, the Claimants say that the Defendants' Ground 3 rests upon detailed submissions upon the amount of the legal costs

referable to the Quantum Judgment which the Defendants chose not to make at trial and should not now be permitted to advance.

57. I would also note that neither ground was sought to be raised in support of the suggested exercise of the so-called *Barrell* jurisdiction (see the 2022 White Book at paras. 40.2.1 and 40.2.1.2) following circulation of the draft judgment on 14 April 2022. The judgment was handed down two weeks later, though the fortnight included the Easter bank holiday weekend so that, had either been raised, it might have been necessary to postpone the handing down. The *Barrell* jurisdiction in fact concerns the judge's the power to reconsider a conclusion in a delivered judgment and to reverse a decision in a delivered judgment, provided that the resulting order has not been formally completed. However, the later passage in the White Book refers to it in the context of the period between circulation of the draft judgment and handing down.

58. Neither the Claimants on their proposed ground of appeal nor the Defendants, on their Ground 3, invited me in response to the draft judgment to reconsider my proposed conclusions on the points to which those grounds respectively relate. In saying this, in the context of proposed appeals to the Court of Appeal, I fully recognise that court has said that such a step should only be taken in an exceptional case or for strong reasons: see *Royal Brompton NHS Trust v Hammond* [2001] EWCA Civ 778, at [11], and *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002; [2008] 1 WLR 1589 (Note), at [51]. Although the scope for the parties to re-open submissions after the process of delivering the Judgment had been initiated was therefore narrow, on reading the applications for permission to appeal I was immediately struck by the point that in substance they each seemed to be saying that (to borrow the language of Smith LJ in *Egan*) I had decided at least part of the case "*on a point which was not properly argued*."

The Claimants' Application

59. The Claimants contend that, on my findings in the Judgment, the correct calculation of the damages payable by the Defendants is not £1,454,000 but £2,646,825.

60. This does involve an argument not raised either at trial or in support of a suggested exercise of the *Barrell* jurisdiction (extended as mentioned above). I should note that the draft judgment had referred to the deduction of the £175,000 settlement sum as being a matter of common ground between the parties: see the Judgment at [480]. However, although the court might reasonably have expected the line of argument summarised below to have been flushed out before, I recognise that the Claimants' ground of appeal rests upon a point of principle which is said to govern the approach to calculating damages for loss of a chance. The fact that the point was not flagged before the application for permission to appeal may say something about its applicability to the present case but, if I have erred in principle to the tune of over £1.2m, I would be reluctant to refuse permission to appeal on the ground it was not raised previously when any issue about its lateness might be appropriately reflected in any order for costs on the appeal.

61. At paragraph 478 of the Judgment, I applied the evaluative figure of 75% (to a shareholding value of £8m) to produce the sum of £6m as the headline figure for the loss suffered by the Claimants in not turning their shares into cash under Scenario 2. At paragraph 479, I did the same in relation to the figure of £300,000 which I had identified as their liability for the costs of the Quantum Judgment (their own and the Company's, as explained in paragraphs

459 and 460). I *then* applied the credits for the cash received under the Transaction and the later settlement of the appeal in the Leaver Litigation.

62. The Claimants say there was an error in my approach: the figure of 75% should have been applied not to the £8m valuation of their shares, before then debiting in full the cash of $4,595,900 received from the Company under the Transaction, but instead to the difference between those two figures. Doing so produces a figure of £2,553,075. The Claimants reach the figure of £2,646,825 by adopting the same approach when the £300,000 of their costs relating to the Quantum Judgment and the £175,000 received by them under the settlement of the Leaver Litigation are respectively included as a credit and debit in the calculation.

63. This approach is said to be the correct one by reference to a passage in *Jackson & Powell on Professional Liability* (9th ed), at para. 11-274, and the decisions of the Court of Appeal in *Hartle v Laceys* [1997] EWCA Civ 1130 and *Ministry of Defence v Wheeler* [1998] 1 WLR 637.

64. The passage in *Jackson v Powell* is directed to the court's evaluation of a chance when assessing damages in a case such as the present. The authors say:

> "*Where the matter is in doubt, the approach generally taken by the courts is (i) to assess damages on the basis of a particular hypothesis and then (ii) to scale down the award according to the probability that the hypothesis is correct."*

65. The Claimants' loss under Scenario 2 reflects their lost chance of receiving more cash for the sale of the shares in IPS UK than they in fact received under the Transaction and also their lost chance of avoiding the costs of the Quantum Judgment. In accordance with the approach described in *Jackson & Powell*, the 75% figure has been applied to reflect the 25% uncertainty over them realising the full value of their shareholding (on the basis they were worth £8m) and avoiding those costs (on the basis they were £300,000). There is no such uncertainty over the sums they received from the Company under and as a consequence of the Transaction and which are actual receipts to be set against the scaled down figures for the damages, as assessed, under Scenario 2.

66. In my judgment, the flaw in the Claimants' approach is revealed by the application of the 25% discount *after* inclusion of the credits for the cash consideration and settlement monies. This involves treating their receipt of those monies as being subject to the same degree of uncertainty as that which reflects their chance of realising the full £8m value of their shareholding. Another way of reaching the Claimants' figure of £2,553,075 is to deduct £3,446,925 (£4,595,900 x 75%) from the £6m which represents the value of that chance. Yet there was nothing contingent (or hypothetical) about the Claimants' receipt of £4,595,926. It stands unaffected by the hypothetical assumption that the Claimants would have cashed in on that chance and therefore should not form part of the scaling down process which, as *Jackson & Powell* state, rests upon an assessment of what that chance was, as opposed to recognition of an indisputable fact.

67. In contrast to the two authorities relied upon by the Claimants, what they actually received from the Company (and for which they must give credit) was in no sense contingent upon or derived from the "lost chance" of doing better elsewhere.

68. In *Hartle v Laceys* (at section 4: "*The calculation of the loss*"), Ward LJ, having evaluated the claimant's chance of selling his property at £375,000 (by a certain date and producing net proceeds of £360,000) at 60%, then proceeded to determine the measure of damages. He began with the observation that, although he had lost that chance (valued at £216,000) he did not lose his property. The claimant in fact sold the property some years after the relevant date, receiving the total sum of £150,000 in two instalments some 5 and 6 years later. His lordship had first assumed that £150,000 would be credited against the £216,000 to produce a net loss of £66,000. However, in the light of further submissions he questioned whether that was the right approach. On a point which he confessed he had not found easy to decide, he identified the issue of the quantification of damages both in a formula and in words, saying:

> *"On the figures, is it £216,000 - £150,000 i.e. £66,000 or is it 60% of the difference between £360,000 and £150,000 i.e. £126,000?"*

69. In terms of a formula, the choice was therefore between (1) A x 60% minus B and (2) A minus B x 60%.

70. Ward LJ, with whom Schiemann and Beldam LJJ agreed, concluded the latter approach was the correct one. I note that his lordship dealt with the question of interest on the damages in the next section of his judgment. He had dealt with the issue of "*interest as damages*" - i.e. the claimant's recovery of compound interest and other bank charges as special damages - in the preceding section. In the later section, he observed that increased overdraft and bank charges would have been incurred through the lost proceeds of sale not being credited to the claimant's account on the earlier date (with the actual receipt of sale proceeds in those later years coming into the calculation from the appropriate dates of receipt) before the 60% assessment of the lost chance was then applied to the resulting overcharge.

71. I mention the point about interest because the court's approach to the assessment of the damages for the loss of the chance of the earlier sale (producing net proceeds of £360,000) appears to have relied heavily upon the timing of the lost chance. In particular, in favouring the second of the two options identified by him, Ward LJ said:

> "*The unfairness of the former solution can be tested in this way. Assume we had found an 80% chance of a sale. 80% of £375,000 is £300,000. Assume the property was sold 12 months later for £300,000. It cannot be right that the loss of such a high chance does not sound in damages. If the 0.6a – 0.6b formula is adopted, then the loss of the chance always has a value*."

72. As Ward LJ recognised, the choice between the two options was not an easy one. In a case relating to the lost sale value of an asset where the later receipt of £150,000 (for a property retained after the date for assessment of damages) was a matter of indisputable fact, the case for instead adopting the first option appears to me to have been a strong one. I would add that my assumption would be that it would be right for the components of the applicable formula to be treated consistently (whereas the Court of Appeal took the net proceeds of sale figure for 'A' but the gross sale price for 'B' because there would otherwise be a "*wrongful duplication*" of the discount for sale costs). Further, if the first option was adopted, there would appear to me to be no case for then discounting the interest payable on the damages, over the period between the hypothetical sale and the actual sale, by the

same percentage discount applicable to the assessment of the chance of the hypothetical sale.

73. I note the court's emphasis that the claimant had not lost his property, which he sold some years later for £150,000. The observation that "*he lost the chance of getting the excess of 'a' over 'b' but his chance of getting 'a'* [minus] *'b' was only 60% so he should only recover 60% of it*" appears to me to be a point that could be said to support the first option. By also discounting 'b' by 60% (i.e. taking 0.6b) the court increased the recovery from £66,000 to £126,000. Yet it clearly did not intend to quantify the claimant's lost chance (assessed at 60%) of selling earlier at a net price of £460,000 which, it seems to me, is what would be required to justify the claimant retaining the property worth £150,000 *and* recovering damages of £126,000 (being 60% of the excess between those two figures).

74. The fact that the realisation of the value of £150,000 was delayed was addressed in the other sections of the judgment dealing with interest and interest as damages. In the court's example based upon the lost sale at £300,000, the sale 12 months later at that price does not mean that the lost chance ("0.8a") had no greater value. However, the later sale would indicate that the claimant's recovery should be fixed by reference to the time value of money (taking account of any overdraft or bank charges of the kind mentioned in the other sections of the judgment) over the 12 month period.

75. As the Defendants suggested in their response submissions, the logic to support the adoption of the second option in *Hartle v Laceys* would be that, if there was a 60% chance of selling the property at £360,000 (net) then the same percentage governs claimant's chance of selling for £150,000 (gross). For the purpose of the counter-factual (i.e. non-negligent) scenario, the property is to be taken to have been sold at the earlier date and could not be sold twice. By reason of the defendant's negligence the claimant "gained" a 60% chance to receive £150,000 which would not have existed in the non-negligent, counter-factual scenario.

76. I note the court did not apply a 40% chance to the sale at the lower price which the relentless pursuit of such logic to mutually exclusive sales *might* suggest. My own uncertainty over whether or not such reasoning should prevail over the known fact that the claimant later sold the property for £150,000 before sale costs (as opposed to only £90,000) is reinforced by my acceptance of the Defendant's submission at trial that the chances of a vendor achieving a sale at a particular price diminish as the price increases: see the Judgment at [429]. It is therefore not clear to me why the percentage chance of selling the property for £150,000 should be taken to be the same 60% (only) as was applied to the chance of getting £375,000 for it.

77. In any event and despite my doubts, in this case the Claimants *did* "lose" their shareholding in IPS UK. They sold it to the Company at the First Valuation Date. When assessing the damages for the lost chance of selling to another purchaser at a higher price, on that same date, I can see no proper basis for discounting the actual sum received by them under the Transaction. To do so would involve inflating their loss, by 25% of £4,595,900, even though they received the full amount of that sum. The benchmark against which the notional higher is assessed is that figure, not £3.447m odd as if there was somehow also only a 75% chance of the Company either entering the Transaction or, having concluded it, then making good on the payment due under it. To take the example given by Ward LJ, it is as if Ms Chaplin was wrongly excluded from competing for the first prize in Mr Hick's

beauty contest but was allowed to compete for and duly won the second prize, hands down. The fact that she won second prize might inform the court's assessment of her chances of having won the first prize but the value of the prize she actually received cannot be second guessed. She could not have won both prizes but the court is only concerned to assess her chances of missing out of the first prize and the value of that over and above the second prize she won so convincingly.

78. Therefore, in the present case, and as the Defendants contend, the sequence of causation was not as it was in *Hartle v Laceys*. The finding in the Judgment at [399], reached on the balance of probabilities, that the Claimants would have walked away from the Transaction was a determination which was binary in nature. It was not a decision reached through a percentage evaluation which then falls to be applied to the proceeds received under the Transaction. As Lord Hoffmann explained in *In re B* [2008] UKHL 35; [2009] AC 11, at [2], on a factual question to be decided on the application of the burden of proof:

> "*The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened*."

79. Having received 100% of the proceeds received through completing the Transaction, when it has been established on the balance of probabilities that the Claimants would have walked away from it for the chance of receiving more under an alternative transaction, it is only the prospect of them securing that alternative which falls to be evaluated in percentage terms. But they must give full credit for the sums received under the Transaction against the sum reached through that process of evaluation. It cannot be right to adopt a formula which, in effect, amounts to saying there was only a 75% chance they would have walked away from the Transaction so that they should be entitled to keep (and not account for) 25% of its proceeds.

80. In my judgment, the same point distinguishes the decision in *Ministry of Defence v Wheeler* relied upon by the Claimants. That was a case where the (no wrongdoing) counter-factual scenario clearly did justify the court in approaching the prospect of two alternative and mutually exclusive types of ongoing employment opportunities by reference to the same percentage evaluation.

81. In that case the Court of Appeal upheld the decision of the Employment Appeal Tribunal to apply the percentage chance of the applicant servicewoman completing their periods of service (had they not been unlawfully dismissed) after, rather than before, making a deduction in respect of earnings from alternative employment received in mitigation of their lost service earnings (the so-called "method 2").

82. The alternative approach ("method 1") would have involved the court first taking the sum which reflected the loss of the applicant's service earnings, discounted to reflect the chance that she would not have remained in the armed forces, and then deducting the amount she had or should have earned from alternative employment. In adopting method 2, Swinton Thomas LJ explained, at p. 642, that the principle of putting the applicant in the same position, so far as possible, as she would have been but for the unlawful act "*is less easy to*

apply in respect to future as opposed to past losses and less easy in respect of percentage chances as opposed to ascertained facts." His reasoning in support of method 2 (when, applying method 1, mitigation earnings of £5,000 would mean no damages were recoverable in respect of a 50% chance of earning £10,000 service earnings) was:

> *"..... if there was a 50 per cent. chance of earning £10,000 in the Army, there was equally a 50 per cent. chance that she would not earn £5,000 in civilian employment, and to arrive a true figure of actual loss the latter must be put into the equation as well as the former. Mr Pannick's equation ignores the real, existing loss in a comparison between the £5,000 actually earned, and the £10,000 which the applicant had a 50 per cent. chance of earning. It is impossible, in my judgment, to say that an applicant who is earning £5,000 per annum following her dismissal has suffered no loss when she had a 50 per cent. chance of earning twice that amount, £10,000.*"

83. The case therefore required the court to apply a reciprocal percentage to reflect the inter-dependent chances of two mutually exclusive employment scenarios coming about for the purpose of determining the applicant's loss of future salary.

84. In my judgment, that approach is not justified where the only percentage discount to be applied is one which reflects the evaluation of the Claimants' chance of receiving the full £8m value for their shares as at the First Valuation Date against the fact of what they had actually (and quite independently) received under the Transaction.

85. I therefore refuse the Claimants' application on the basis that the proposed ground of appeal has no real prospect of success.

The Defendants' Application

86. The Defendants seek permission to appeal on four grounds.

Ground 1

87. The first ground of appeal, in relation to my finding of liability, is directed to the issue of construction raised by the Company's Articles. The matters relied upon in support of this ground were fully argued by the Defendants at trial.

88. The Defendants say that my analysis of articles 13.3 and 18.4.1 shows that the competing interpretation adopted by May J in the Quantum Judgment was wrong and that their true meaning is clear. It follows that a reasonably competent solicitor was entitled to proceed on the basis of that clear meaning, so that it was unnecessary for the Defendants to advise the Claimants that the provisions could be interpreted so as to apply the RPP to a Good Leaver.

89. In their submissions in support of this ground Mr Tozzi QC and Mr Wright QC say that the diffidence I expressed in doubting the correctness of the decision of May J and the competing interpretation advanced by the Company and its solicitors (which the judge accepted) cannot detract from the true meaning of the Articles as a reasonable person would

have understood it to have been at the time of the Transaction. They pose the rhetorical question as to where a solicitor's duty is to end if he has a "*duty to warn its client that on every material clause a court could construe it incorrectly*."

90. That question invites the further rhetorical question as to where the Defendants' duty to advise upon the Articles was to start if it did not extend to consideration of, and advice upon the potential impact of the language of article 18.4.1. Both questions have to be considered in the light of the Defendants' decision not to call Mr Crossley as a witness so that he could be asked to offer his view upon them. The provision plainly was a material (and bespoke) provision of the Articles which was at the heart of the Claimants' entitlement under the Leaver Provisions. For the reasons identified in the Judgment at [388] (particularly at (vi)) the Defendants were obliged to consider the meaning of it. That conclusion is not sought to be challenged.

91. As to whether the provision was so clear that a potentially competing meaning (involving the risk of the RPP applying) did not fall to be mentioned by a reasonably competent solicitor, I observed (the Judgment at [329]) that the meaning of article 18.4.1 was not easy to discern. It is one thing to say that I have reached a clear conclusion about what the provision means and another to say that there was no uncertainty or doubt involved in the process of getting to it. Yet the ground of appeal presumes that, having considered its language, the reasonably competent solicitor would have felt no need to express any doubt over its true meaning.

92. For the reasons which emerge from the need for consideration of the parties' argument and from my own additional observations in section J of the Judgment, I do not accept that premise. The Defendants' point (noted at [107]) that, had the Defendants expressed such doubt, they would been met with Livingbridge saying the provision had the meaning later given to it by May J is also relevant here. It is also relevant that the Defendants were not able to offer a clear explanation for the phrase within article 18.4.1 which was highlighted in the Claimants' closing submissions and which continued to puzzle me: see the Judgment at [335] and [354].

93. In my judgment, a more realistic assessment of what was required from the reasonably competent solicitor was illustrated by the question which Mr Tozzi QC put to Mr Richards in cross-examination (albeit, I recognise, with the focus upon the Defendants' case on causation in terms of how the Claimants would have reacted to such advice): Day 2 pp. 150(1)–152(23). The "non-negligent" advice taken by Mr Tozzi for the purpose of that question, put in terms of identifying a litigation risk, involved the Defendants bringing article 13.3 to the Claimants' attention and saying: "*well, although it seems pretty clear that that's only to apply on a share sale where there are some proceeds of sale to be distributed on an exit because it's an exit provision, there might be a judge out there, because all litigation carries a risk, who could conclude that it should also apply if you were dismissed and had to transfer your shares*."

94. Assuming (and it is an assumption) that, on the proposed appeal from the Quantum Judgment, the Court of Appeal would have favoured my interpretation of article 18.4.1 over that adopted by May J, noting that the Claimants do not now seek to challenge my finding on the point, I must obviously recognise that the court might well have reached its conclusion more easily and succinctly than by the process revealed in section J of the

Judgment. That court is expected to review the correctness of decisions of High Court judges without the diffidence required of me in the novel situation presented by this case.

95. Nevertheless, for the purpose of granting permission to appeal on Ground 1, I do not consider the Defendants have a real prospect of successfully persuading the Court of Appeal that the meaning of the provision was so clear that it did not call for comment or advice from the Defendants. I therefore refuse permission to appeal on the basis that it should be for a judge of that court to say otherwise on the application for permission.

Ground 2

96. The second ground advances the alternative contention that, even if the meaning of the Articles was not clear, I was nevertheless wrong to conclude that the risk of the Claimants becoming Good Leavers, to whom the RPP applied, was a significant risk against which the Defendants were obliged to warn the Claimants. This was also an argument advanced by the Defendants at trial.

97. As I have highlighted (Judgment at [388(vi)]) the RPP was not only of significance in any litigation over the financial consequences of the Claimants' wrongful dismissal: compare paragraph 90 above. It also impacted upon other situations in which either Claimant might leave the Company, either through his own choice or other unwelcome circumstances. The extent of the risk presented by the RPP should not be judged in hindsight by reference only to the particular, unanticipated circumstances in which it actually materialised: compare the initial observation at [383] of the Judgment. I do not accept, for example, that the Defendants were under no obligation to advise upon the risk presented by the RPP in the event of a Claimant dying, becoming incapacitated or resigning within a year or two of joining the Company.

98. The Claimants' evidence summarised in the Judgment at [388(iii)] did not elevate the risk, which was one created by the language of the Articles, or operate to impose a heightened duty upon the Defendants (as suggested in support of this ground of appeal). However, it should have brought home to the Defendants what was required to meet the conventional standard of care required of a reasonably competent solicitor advising upon the meaning of article 18.4.1. The evidence highlighted the materiality of that provision for the purpose of the Defendants' retainer, in contrast to other unspecified provisions of the Articles which are held out by the Defendants as being equally material for the purpose of demonstrating that the suggested duty is unworkable and/or unjustified in principle. If the meaning of that provision was unclear then the significance (to their clients) of the risk of it being construed in an unwelcome way should have been obvious to the Defendants.

99. As the concept of 'Market Value' was central to various (and separately negotiated and defined) leaver scenarios, in my judgment the Defendants have no real prospect of persuading the Court of Appeal that the risk presented by the RPP to the determination of that value was not a significant one.

100. In my judgment also, the Defendants' reliance upon CPR 52.7(2)(a)(ii) does not support the grant of permission. I do not consider that the Judgment operates to extend the duty upon a solicitor giving advice in the non-contentious business context. For the purpose of the standard of care required under this particular retainer, I have addressed above the

reasons why the RPP and article 18.4.1 were material provisions, despite the actual trigger for their application in the Leaver Litigation not being contemplated in 2014, and why the lack of clarity in the latter provision created a significant risk. Most of the arguments deployed by the Defendants at trial, and the other matters relied upon in support of Grounds 1 and 2, serve to highlight the point that the court is concerned only with what was reasonably required of the Defendants in the performance of their particular retainer.

101. I therefore refuse permission to appeal on Ground 2.

Ground 3

102. Ground 3 comprises two limbs. I address below the extent to which the matters relied upon in support of this ground were foreshadowed by the Defendants' argument at trial. The Defendants did not rely upon them in support of a suggested exercise of the *Barrell* jurisdiction (as extended) following circulation of the draft judgment and prior to it being handed down

103. The first limb of ground 3 is that the Claimants did not discharge the burden of demonstrating that the sum of £300,000 (before application of the loss of a chance discount) was £300,000. The Defendants say I was wrong to try to do the Claimants' job for them by performing my own analysis of the Clyde & Co invoices. They say they had no opportunity to address the figure of £300,000 before circulation of the draft judgment on 14 April 2022. The second limb is that my decision about the amount of the costs of the Quantum Judgment was unsupported by and contrary to the weight of the evidence. The Defendants say that the sum awarded in respect of the Leaver Litigation costs was far too high.

104. These arguments are to be considered in the light of the way in which the legal costs were addressed at trial. As I noted in the Judgment (at [460]) the parties did not address the detail of the invoices at trial. The Claimants' (very succinct) evidence was that all of the Leaver Litigation Costs were recoverable ([451]-[452]) whereas the Defendants' position was that the costs referable to the Quantum Judgment (the Claimants' own costs and the Company's costs payable by them) should be capped at what they said was a generous £100,000 before discounting for loss of a chance ([455]-[456]). That at least was the Defendants' position at the beginning of the trial (Opening Submissions para. 96.1 and fn. 149), though by the end of it they submitted the Claimants had failed to prove loss in relation to any costs claim (Closing Submissions para. 209).

105. The Claimants clearly did incur a loss in the form of costs of the Quantum Judgment and my rejection of the Defendants' ultimate submission is not sought to be challenged. It is important to note that the figure of £300,000 (the Judgment at [460]) includes the £50,000 which was paid by the Claimants to the Company ([454]) and the fees of Alix Partners totalling £37,613 (referenced in the Defendants' table mentioned at [457]) which were also referable to the Quantum Judgment.

106. The points of detail which are now advanced in the Defendants' submissions dated 13 May 2022 therefore go, on my understanding, to the balance of approximately £212,000. In relation to the suggested error in my approach ([458]-[460]) I note that those submissions

say that a several entries which related to the employment tribunal dispute "*were wrongly booked against the High Court proceedings*".

107. I do not accept the Defendants' point that, in analysing the invoices of Clyde & Co, I did the Claimants' job for them. My impression at the time of preparing the Judgment was that it was very much part of the job required of me in the light of my finding of liability in relation to the Quantum Judgment. The parties had presented me with rival submissions of all or nothing nature. Neither was correct but the finding clearly sounded in some damages beyond the £50,000 paid to the Company.

108. The Claimants are correct to say that, in the light of their primary case that none of the legal costs were recoverable, it was for the Defendants to decide whether or not to make detailed points in the alternative. Allowing for the fact that (as already noted) the Claimants had clearly suffered some loss in relation to the costs of the Quantum Judgment, beyond the £50,000, the same could be said against the Claimants so far as a scaling down from their claim to everything was concerned.

109. In the light of the Defendants' proposed appeal on this ground, these observations have now caused me to reflect upon whether I should have instead announced my finding of liability on this aspect and directed the taking of an account (or, perhaps more accurately, the making of an inquiry) in accordance with PD40A. I say that because pursuit of this ground of appeal would, it seems, inevitably involve the Court of Appeal examining the detail of the solicitors' invoices in the manner of a quasi-account. However, the Defendants did not suggest that as the proper course when reflecting upon that finding within the draft judgment and they do not suggest now that I was guilty of a procedural irregularity in failing to do so.

110. Instead, both limbs of Ground 3 rest upon the contention that that I have reached an erroneous finding of fact in relation to quantum.

111. Although I am mindful that my finding was reached following my best attempt at an analysis of the voluminous and detailed solicitors' bills, rather than an assessment of the testimony at trial, this ground does therefore run up against an appeal court's general approach to an appellant's invitation to review a finding of fact made by the trial judge.

112. The appeal court is generally reluctant to act upon such an invitation. However, I recognise that it will be prepared to interfere with such a finding which had no basis in the evidence or which reveals a demonstrable misunderstanding of relevant evidence: see *Henderson* v *Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 W.L.R. 2600, [57]-[67], per Lord Reed. The Defendants say this is such a case, albeit without them quantifying the value of an error which (on my analysis of the position) is said to devalue, though not completely undermine, a figure of around £212,000.

113. On the Claimants' proposed ground of appeal I concluded that the fact that their point was not raised until after the handing down of the Judgment should not, without more, be a reason for refusing permission to appeal on a point of legal principle.

114. I take a different view on the Defendants' challenge to my finding of fact. It seems to me that the way the point has emerged, post-Judgment, and the uncertainty over the value of the gain they would hope to secure on the 'quasi-account' are both matters which the

single Lord Justice should consider in deciding whether or not to grant permission. I therefore refuse permission to appeal on the basis that I am not persuaded that, in these circumstances, there is a real prospect that the Court of Appeal will entertain an appeal on this ground.

Ground 4

115. The final ground for the proposed appeal rests upon the contention that I was wrong in law to find that the Claimants did not have to give credit against the damages payable by the Defendants for (1) their remuneration received by IPS Group; (2) the damages awarded by May J; and (3) the sums received in settlement on the employment tribunal proceedings.

116. The Defendants say that those benefits were both factually and legally caused by the breach of duty. They say that I fell into error in seeking to distinguish between "capital" and "income" losses and in concluding that (the Defendants being liable for damages only in respect of the former to reflect the Claimants' loss of shareholding value) the credits of an income nature fell foul of 'duty nexus" reasoning: see the Judgment at [490].

117. The Defendants now rely upon the decision of the Supreme Court in *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly Travelplan SAU) of Spain (The "New Flamenco")* [2017] UKSC 43; [2017] 1 WLR 2581 and of the Court of Appeal in *Assetco plc v Grant Thornton UK LLP* [2020] EWCA Civ 1151; [2021] Bus LR 142 in support of the argument that credit should be given for the three categories of financial benefit. They say that all three flowed from the Transaction into which the Claimants would not have entered but for the Defendants' breach of duty.

118. In *The "New Flamenco"* the issue was whether or not the owners of the vessel, on their claim for loss of profits caused by the charterers' repudiatory breach of the charterparty, had to give credit for the benefit of a significantly higher sale price for the vessel than would have been obtained if it had been sold only after the charter had run its course. The owners had decided to sell the vessel upon the charterers' breach and before the fall in the market which occurred during the two year extension which the charterers had agreed but then repudiated. Lord Clarke said, at [30], that on the decision as to whether that benefit was to be credited against the claimant's loss:

> *"The essential question is whether there is a sufficiently close link between the two and not whether they are similar in nature. The relevant link is causation. The benefit to be brought into account must have been caused either by the breach of the charterparty or by a successful act of mitigation."*

119. It is clear from the propositions summarised by Popplewell J (as he then was) in the *The "New Flamenco"*, endorsed by the Supreme Court at [16], that it is not sufficient for the Defendants to say that the Transaction provided the occasion or context for those receipts. Instead, "[*t]he causation test involves taking account all the circumstances, including the nature and effects of the breach and the nature of the benefit and loss, the manner in which they occurred and any pre-existing, intervening or collateral factors which played a part in their occurrence*." As the Defendants recognise, the test is not just one of factual causation but legal causation.

120. In *Assetco plc v Grant Thornton UK LLP*, at [232], David Richards LJ recognised this in approaching the issue of credit for benefits in a professional negligence claim, saying:

> *"……..* The New Flamenco *is clear authority that "but for" causation is insufficient and that, before credit is given for a benefit, it must be shown to have been legally caused by the breach. This was acknowledged by Lord Sumption JSC in* Tiuta [2017] 1 WLR 4627, para 12 *where he said that the general rule is that "where the claimant has received some benefit attributable to the events which caused his loss, it must be taken into account in assessing damages" (emphasis added), with the exception of collateral benefits. The reference to benefits being attributable to the events causing the loss encompasses legal, as well as factual, causation……"*

121. The term 'duty nexus' was only coined by the Supreme Court four years after *The "New Flamenco"* (and after the decision in *Assetco*) and I did not have Lord Clarke's formulation of the test in mind when making the point in the Judgment, at [490], that the employment related benefits were collateral to the loss for which the Defendants were liable. Nevertheless, there is in my view a broad symmetry between the tests respectively governing the inclusion of a head of loss within the recoverable damages and the inclusion of a benefit as a credit against such damages. In *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20; [2021] 3 WLR 81, at [6], the Supreme Court distinguished "the duty nexus question" from "the factual causation question" as follows as follows: "*(5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2* [i,e. the 'scope of duty question'] *above?*" It seems to me that Lord Clarke's question could equally be phrased by talking about the need for a "sufficient nexus" between the benefit and the subject matter of the defendant's breach (the breach of the relevant duty being assumed at stage 3 in the approach to causation set out in *Manchester BS v Grant Thornton*).

122. *The "New Flamenco"* was not cited at trial (whereas the first instance decision in *Assetco* was on a different point) and the distinction I drew between "capital" and "income" losses was not made with me having in mind a suggestion that the benefit had to be of the same kind as the loss in order to be taken into account in reducing that loss. It is clear from the same paragraph of the judgment in that case that any such categorisation should not be permitted to detract from the essential question identified by Lord Clarke. That said, his lordship agreed with that part of the judge's proposition which said "*such a difference in kind may be indicative that the benefit is not legally caused by the breach*."

123. I distinguished between the nature of the two losses to illustrate the 'duty nexus' point and also the fact that the expert evidence was only directed to the former. It was the Defendants who (by the argument summarised at [485]) speculated about the value of the Claimants' employment with an alternative buyer under Scenario 2. They asserted that such alternative employment would have been at a lower salary (this, implicitly, despite them providing the same level of service over the same number of contracted hours as they provided to the Company) and now wish to argue on appeal that "an appropriate deduction" from the damages award should have been made to reflect the (presumed-to-be) greater employment-related benefits received from the Company.

124. I note that in saying that credit should be given for the Claimants' employment related "benefits" the Defendants appear to make no allowance for the fact that, after the First Valuation Date by reference to which the damages are assessed, the Claimants had to provide service under their contracts of employment. That the employment related benefits would have been a neutral factor on any calculation of damages under Scenario 1 (which the Defendants appear to accept) is I think a point which illustrates the fact that the Claimants gave consideration for them. As I observed in the Judgment at [490], there is a danger in overlooking this obvious point when considering whether the Defendants can properly claim credit for the receipts.

125. The employment-related receipts were not caused by the Defendants' breach of duty but by the Claimants agreeing to work for the Company. In my judgment, this basic point serves to undermine the Defendants' ground of appeal. I recognise I may have gone too far in describing the receipts as "collateral benefits" (Judgment at [490]) if that suggests there was no causal relationship, not even a factual one, between the Claimants' employment and the Defendants' breach which resulted in the Claimants entering into the Transaction of which their employment was one aspect. Nevertheless, in my judgment, the fact that there is no reason to doubt that each Claimant agreed to give valuable service in return for his salary (and the other terms of the Service Agreement which grounded the claims for damages or compensation on termination) means there is no proper basis for analysing them as benefits.

126. Having regard to the point that the Claimants were gainfully employed before the Transaction (in the same business) and the Defendants' contemplation that they would have been employed as part of any alternative transaction – albeit in each case at a lower salary than that agreed by the Company – I also find it difficult to see how there can be said to be a sufficient causal nexus between the Defendants' breach and the suggested benefits. Instead, a "*commonsense overall judgment*" on this aspect (per *The "New Flamenco"* at [16]) indicates that they were attributable to the Claimants' independent decision to provide their "human capital" to the Company rather than the Defendants' oversight on a matter relevant to the realisable value of their share capital. I recognise that their employment was a key part of the Transaction, into which the Claimants would not have entered but for the Defendants' negligence. However, that only provides an answer to the factual causation point, not the legal causation one.

127. Further, it was no part of the claim against the Defendants that, by proceeding with the Transaction as a result of their negligence, the Claimants had lost an alternative (and better) income-generating opportunity elsewhere. In saying this, I also recognise that the restrictive covenants binding on the Claimants as the Company's employees meant that they were not as free as the owners in *The "New Flamenco"* had been to realise a benefit independently of the contract giving rise to the loss sought to be recovered in the claim. However, as with the converse situation in that case, where the benefit achieved through the avoidance of a drop in capital value was not an act of mitigation capable of mitigating the loss of the income stream caused by the charterers' breach, the Claimants' receipt of a salary from the Company did not mitigate the capital loss on the sale of their shareholdings.

128. Even if there had been a sufficiently close causal link between the Defendants' breach of duty and the receipt of those benefits to satisfy the legal causation test (on the assumption that the Transaction provided more than just an opportunity for the Claimants to offer their service in return for a salary and that no real distinction should therefore be drawn between

the salary under the Service Agreements and the price under the Share Purchase Agreement) the question of what they might have received under any alternative arms' length employment in Scenario 2 is a matter of pure conjecture. In addition to this casting doubt upon the assumption, and the concept of a "benefit" that would not have been received but for the Defendants' negligence, this means that the proposed ground of appeal is entirely unsupported by evidence. In my judgment, it is not enough to point to the salaries paid by the Company being higher than those which the Claimants had previously received from IPS UK (in which, of course, they held over 85% of the shares whose value was capable of benefiting from lower overheads) or to assume that they were higher than would have been paid by any employer (if any) under Scenario 2.

129. In my judgment, Ground 4 therefore has no real prospect of success and I refuse permission to appeal on this ground.

Costs Relating to this Consequential Judgment

130. The Defendants' response submissions dated 1 June 2022 urged that the Claimants' application for permission to appeal should be dismissed with costs.

131. In my judgment, the decisions reached by me on all of these consequential matters clearly point to the conclusion that each side should bear its own costs relating to them. Adopting the meaning of the respective phrases set out in PD 44 para. 4.2, I therefore make no order as to the costs of and caused by this judgment.