NCN: [2022] EWHC 2001 (Comm)
Claim No: CL-2019-000515

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Strand, London, WC2A 2LL

Date: 27 July 2022

Before:

THE HON MR JUSTICE ROBIN KNOWLES CBE

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Between:

BUGSBY PROPERTY LLC
(a company incorporated under the laws of Delaware) — **Claimant**

- and -

(1) LGIM COMMERCIAL LENDING LIMITED
(2) LEGAL & GENERAL ASSURANCE SOCIETY LIMITED — **Defendants**

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Andrew Twigger QC, Thomas Munby QC and Duncan McCombe (instructed by **Signature Litigation LLP**) for the **Claimant**
Orlando Gledhill QC, Mehdi Baiou and KV Krishnaprasad (instructed by **Clyde & Co LLP**) for the **Defendants**

Hearing dates: 11-14, 18-20, 25-29 October; 1-4 November 2021

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Robin Knowles CBE J:

Introduction

1. The Olympia Exhibition Centre ("the Site") is a famous and well recognised piece of London. An established exhibition, event, and conference business ("the Business") is run from it. In late 2015 the then owners, Capital & Counties Properties plc ("CapCo") put the Site and the Business (together "Olympia") up for sale.

2. The likelihood was that a purchaser would develop Olympia. Of a scheme to do so, Savills was later to say in providing a valuation:

> "This scheme is a unique opportunity to be involved in one of the most exciting place creations in the leisure sector in living memory. It is an iconic property. The development in prospect has the opportunity to be phenomenal."

3. The Legal & General Group attracts and invests pension funds and savings. Its business includes commercial lending as a form of investment. The Group includes the Defendants in this litigation, Legal & General Assurance Society Limited and LGIM Commercial Lending Limited (together "L&G").

4. The Claimant in this litigation, Bugsby Property LLC ("Bugsby") is a Delaware company. It was at all material times in the business of property investment sponsorship and of investment management.

5. In 2016 Bugsby approached L&G for finance towards a acquisition of Olympia. Bugsby and L&G signed a confidentiality and exclusivity agreement dated 25 January 2016 ("the Bugsby/L&G Exclusivity Agreement"). By the Bugsby/L&G Exclusivity Agreement, L&G agreed to afford exclusivity to Bugsby in relation to the possible acquisition.

6. In admitted breach of the exclusivity that had been agreed, L&G later became involved in arranging finance for another bidder for Olympia, known as the Yoo Consortium ("Yoo"). Yoo's bid, with finance from L&G, was chosen by CapCo over a bid involving Bugsby.

7. This litigation has followed. In it, Bugsby claims damages for breach of the exclusivity provisions of the Bugsby/L&G Exclusivity Agreement. It also alleges breach of the confidentiality provisions of that agreement, and claims remedies for alleged breach of confidence.

8. L&G's position is that its involvement in arranging finance for Yoo made no difference to Bugsby. For a number of reasons, it argues that CapCo would still have sold Olympia to Yoo. Further, it contends that if Bugsby had acquired Olympia, Olympia would have failed.

9. Each party discusses whether, and if so what, chances were lost by Bugsby. The term “loss of a chance” is used in different ways and with different asserted consequences. The number of actors, the range of possible decisions and actions, the effects of timing and sequence, the options for and prospects of development, the longer term and additional possibilities, all contribute to argument and counter argument that can become very complex indeed. Care is needed to avoid the pursuit of complexity in an attempt to reach a precision that is not in truth possible. The objective is instead a just result.

10. This is the judgment of the Court on the trial of Bugsby’s claims. The trial extended over a month, but with very extensive reading in addition, including after the trial.

Commercial sensitivity

11. Today, Olympia is being developed by Yoo. Unsurprisingly, some aspects of the case involved points of material commercial sensitivity. Some of the commercial sensitivity affects those, like Yoo, who were not parties to the case, and some of those made representations over the difficulties involved.

12. Before the trial, progress was made by the use of confidentiality regimes. At trial, with the cooperation of all concerned, including counsel and the press, the commercial sensitivity was managed in a way that kept the parts of the trial that, at the time, had to be in private to a minimum.

13. A draft of this judgment was then circulated to the parties and some third parties to allow consideration, discussion and, if necessary, representations about the commercial sensitivity of any part of its content before handing the judgment down in public. In the event there were no representations.

14. The final judgment as handed down in public gives an unedited account of my decision and essential reasons.

Bugsby

15. The driving force behind Bugsby was Mr Steven Marcus (“Mr Marcus”). Mr Marcus attended most of the trial, giving oral evidence over two days and providing lengthy written evidence.

16. I found an energetic individual, committed to his business endeavours and with a natural optimism. He did his best to assist the Court. I accept his evidence as conscientiously given and largely accurate, though he was capable of seeing things more positively than they were.

17. It appears that in the end, L&G had little time for Bugsby and Mr Marcus. At trial L&G was prepared to describe Bugsby as:

> "… wast[ing] several months of CapCo's time with a previous failed bid, causing CapCo to lose faith in Bugsby".

L&G was prepared to say that:

> "… nothing in [Mr Marcus'] background or subsequent career suggest that that any success at all was remotely likely",

and that Mr Marcus:

> "significantly and systematically exaggerated, to UBS, CapCo, HNA, Goldman Sachs and others, his and Bugsby's relevant experience and background."

18. I do not consider this attack had force. The "previous … bid" was one of many parts of commercial life affected by the result of the referendum on Brexit. Rather than lose faith in Bugsby, CapCo was in due course to treat Bugsby as a credible competitor to Yoo. Mr Marcus' career was still building, but what Mr Marcus had not yet acquired in terms of his own background and experience was addressed by his involvement of others, including UBS, HNA and Goldman Sachs.

19. UBS, HNA and Goldman Sachs were each content to work with Bugsby and Mr Marcus. In any event they had an appropriate focus on the acquisition rather than on personalities. L&G itself, when reapproached by Bugsby in December 2016 to provide finance in a proposed second bid, responded to Bugsby that "given 12 months of additional history" they "would consider taking another look". More expertise and experience still would come from the proposed involvement of an Advisory Board.

20. For the purposes of this dispute, the points just made are the points that matter. L&G was able to show examples where Mr Marcus had, when engaging with others, at least talked up his record, at times to the point of demonstrable inaccuracy in what he said to them. But these were all satellite points, and most would not have affected the assessment that others made for the purposes of the acquisition. Had there been "significant and systematic exaggeration" UBS, HNA and Goldman Sachs, and CapCo too, would quickly have seen it and would have turned away from Mr Marcus and from Bugsby as a result, but that is not what happened. Others would be happy to deal with him if he had the business proposition.

21. On L&G's case, Mr Marcus also overplayed his connection with his father (a significant figure in property development in the United States). However, there is ample room for a good faith difference of opinion over what that connection involved or could bring. I do not believe Mr Marcus is to be criticised for his opinion, sometimes optimistically held, and I accept it as genuine.

L&G

22. For all L&G's experience in investment, which was considerable, the area of property development debt financing in which it would be involved with an acquisition of Olympia was a relatively new area for L&G.

23. It was however an area L&G wanted to be more involved in. To that end it drew on expertise available to it from two employees in particular, Mr Stephen Boyle ("Mr Boyle") and Mr Ashley Goldblatt ("Mr Goldblatt"). Each gave oral and written evidence at the trial.

24. In Mr Boyle I found an individual who was weary of L&G by the time of the relevant events. Frustrated by the way L&G worked, he had settled into a routine of turning propositions down again and again. His lack of interest in events at the time likely affected his recollection.

25. In Mr Goldblatt I found an individual of long experience and expertise. However, a defensiveness about what happened over Olympia, leading to this litigation, affected the reliability of his evidence. There was a further problem with Mr Goldblatt's evidence in that he claimed at the outset that he had a good recollection of the matters to which this litigation relates, but there were material points he did not recall. In these circumstances, on occasion I had to treat his evidence with caution and at times prefer other evidence to his.

Other witnesses, and documentation

26. The Court also had the assistance of evidence at trial from Mr Roy Liao (of HNA) and Mr Pieter Idenburg, called by Bugsby, and Mr Stephen O'Mahony, called by L&G.

27. As appears below, the evidence of Mr Liao was of particular assistance.

28. The Court had no oral evidence at trial from other key commercial parties, including CapCo, UBS and Goldman Sachs, or external professionals engaged contemporaneously in Olympia, including Savills and Colliers. On the other hand, the amount of contemporaneous documentation at trial was large and extended to documents obtained from a number of third parties, often using court procedures.

Expert evidence

29. The Court further had the benefit of substantial independent expert evidence, across five expert disciplines:

(a) real estate finance from Mr Robin Priest of Alvarez & Marsal (and a former partner with Deloitte and before that the founder of Mapeley Limited); and from Mrs Fiona Freeman of FTI Consulting (and the former Head of UK Real Estate Transaction Management for Barclays Bank plc);

(b) business valuation from Mr Daniel Ryan FCA FRICS of Berkeley Research Group; and from Mr Steven Cornmell FCA of Duff & Phelps;

(c) property development and valuation from Mr Ian Mackie FRICS of Berkeley Research Group; and from Mr Andrew Tyler MRICS of Knight Frank (and with secondments to Hammerson and to Land Securities);

(d) quantity surveying from Mr Daniel Rowe FRICS of Jackson Rowe Associates; and from Mr Andrew Cox MRICS of Capital Consulting International; and

(e) property investment fund management from Mr Claudio Scardovi MBA of Alix Partners (and previously with Advent International, Nomura and Lehman Brothers, and a teaching professor at Imperial College London and Boccini University); and from Mr Stuart Jenkin of Martello Financial Services (and previously with Abbey Life, Providence Mutual Life and Frogmore).

30. The expert evidence included expert reports, memoranda from joint meetings, oral evidence under cross examination and concurrent oral evidence in response to questions from the Court.

Bugsby and L&G first meet over finance for an acquisition of Olympia

31. In late 2015, CapCo held a public sale process for Olympia. It is relevant to mention that the terms of any sale were of close and distinct interest to CapCo's pension trustees.

32. In December 2015, Bugsby made an indicative offer and proceeded to receive information from CapCo. Bugsby conducted some due diligence, analysing the prospects for business growth and development possibilities of the site. It assembled a team of leading professional advisers and started work on a proposed "Advisory Board" of prominent figures across different industries relevant to its vision for Olympia. At the same time Bugsby explored sources of finance, both with potential equity providers and with lenders.

33. On 18 January 2016, Mr Marcus and Mr Rob Payne (of UBS) met Mr Boyle of L&G to discuss possible L&G lending as part of the financing of an acquisition of Olympia. Mr Boyle has little or no memory of the meeting but said he was:

> "… sure Mr Marcus gave me lots of detail about what they were looking to do".

34. Mr Marcus in fact provided Mr Boyle with an introduction to Bugsby's business, history and future plans. He explained the proposed acquisition and Bugsby's intended involvement. He outlined the bid process so far and informed Mr Boyle that Bugsby had reached the final stage with a handful of others.

35. A summary of Bugsby's business plan for Olympia, including the Business and the development potential of the Site, was provided by Mr Marcus to Mr Boyle.

He provided some explanation of Bugsby's proposed investment structures for the acquisition, including that Bugsby was seeking debt finance at a level in excess of 50% loan to value.

36. Mr Marcus included reference to the idea that the high-profile nature of Olympia would act as a springboard for future fundraising. He also informed Mr Boyle of Bugsby's ambition to establish a real estate fund.

37. Mr Boyle asked questions of Mr Marcus and was told that further information would be provided upon signing a confidentiality and exclusivity agreement. A draft confidentiality and exclusivity agreement that was to become the Bugsby/L&G Exclusivity Agreement was sent to Mr Boyle later the same day.

38. On 24 January 2016 Bugsby approached HNA (through UBS) regarding Olymia. HNA did not pursue the opportunity at that time.

The Bugsby/L&G Exclusivity Agreement

39. After amendments, the Bugsby/L&G Exclusivity Agreement was signed and dated 25 January 2016. The Agreement addressed "Project Victory", defined as:

> "…the acquisition of [Olympia] and the implementation of Bugsby's proprietary business plan".

40. Clause 1 of the Bugsby/L&G Exclusivity Agreement defined "Confidential Information" in these terms:

> "… any and all (technical and non-technical) information disclosed or otherwise made available by or on behalf of Bugsby or its affiliates (or by or on behalf of any agent of, or adviser to, Bugsby or any such affiliate), however recorded preserved or disclosed, to [L&G] (or to any party acting for [L&G]) in relation to Olympia or Project Victory (whether or not marked or labelled as 'confidential' or 'proprietary') …
>
> And so that, for the avoidance of doubt:
>
> - Confidential Information shall include any notes, reports, analyses or other documents prepared by (or on behalf of) [L&G] reflecting or generated from any of the foregoing information; …"

41. Clause 2 required L&G to keep such information confidential and only use it for the purposes of the "Permitted Use" of:

> "… evaluation of [L&G] as a potential partner, capital partner, joint venture partner, co-investor, lender and/or provider of financing to Bugsby in [Project Victory]".

42. Clause 7, headed "<u>Exclusivity</u>", contained a broad exclusivity obligation of 18 months' duration in these terms:

> "**<u>Exclusivity</u>**: In consideration of the Confidential Information being furnished to [L&G] (and in acknowledgment of the nature of Project Victory and the acquisition of Olympia, the significant investment made to date in Project Victory by Bugsby and the substantial and differentiated value and intellectual property created by Bugsby pursuant to Project Victory and the acquisition of Olympia), [L&G] hereby agrees that, for a period of eighteen (18) months from the date hereof, it will not, directly or indirectly through any of its Representatives or otherwise, without the prior written consent of Bugsby, (a) contact, entertain or continue any discussions or negotiations with other prospective parties, land owners, or developers (or any respective affiliates, directors, officers, agents, employees or representatives thereof) or other third party other than Bugsby concerning Project Victory and the Acquisition of Olympia."

43. Clause 8 of the Bugsby/L&G Exclusivity Agreement provided:

> "**<u>Non-Circumvention</u>**: [L&G] acknowledges it has not entertained previous discussions with any third party, including the listing agents and bankers Rothschild and CBRE, as well as the vendor CapCo … regarding Project Victory and the Acquisition of Olympia. [L&G] hereby agrees that its involvement with and all conversations (including but not limited to the above parties) regarding Project Victory and the Acquisition of Olympia will be exclusively through and with the involvement of Bugsby at all times, except as permitted by Bugsby's prior written consent."

Confidential information is provided by Bugsby to L&G

44. Following the signing of the Bugsby/L&G Exclusivity Agreement, Bugsby provided Mr Boyle with information, including confidential information, in order to allow L&G to assess the proposed acquisition and the question of financing by L&G.

45. I should say at this point that I understood the parties generally to accept that I can treat both Defendants as one (hence the combined reference to "L&G"), but with one exception that I record and should be taken to apply. This is that the Second Defendant (Legal & General Assurance Society Limited) does not accept that it received the confidential information that the First Defendant (LGIM Commercial Lending Limited) received. I did not understand the parties to require me to resolve whether the Second Defendant was correct in not accepting this. Other than reputationally the point does not seem to be material from a commercial viewpoint.

46. A number of documents were provided by Bugsby. These comprised a report prepared by BDO, an Information Memorandum prepared for CapCo by Rothschild, a presentation prepared by Olympia management, a document entitled "Turnover and EBITDA history for the sale group going back to 2006" produced by Bugsby, a document entitled "Alternative use and summary for the portfolio" prepared by Griffiths Eccles analysing development options for the

Site, and a "Skeleton termsheet" prepared by UBS which set out an indicative capital structure.

L&G declines finance

47. On 1 February 2016, Mr Boyle emailed Mr Payne of UBS stating that L&G would not be lending to Bugsby for the purposes of acquiring Olympia.

48. Mr Boyle's evidence was that he had a conversation with Mr Goldblatt the same day and said that he was going to decline the opportunity of Olympia. I do not accept that he did, and I consider him mistaken. Mr Boyle referred to a log but the presence of a log does not reassure me sufficiently. Had Mr Boyle had a conversation with Mr Goldblatt, Mr Goldblatt would have gone into the matter, and that did not happen even on Mr Boyle's account. On this point I prefer Mr Goldblatt's evidence that he would have remembered Olympia had it been mentioned:

> "… because Olympia has iconic status and is one of only three material exhibition complexes in the UK".

49. The truth is that Mr Boyle's focus on L&G and his attention to detail were waning at this point. It is relevant to note that much of the reason why the opportunity was declined was about L&G, or Mr Boyle for L&G, and not about Bugsby or Olympia. Mr Boyle wrote that the deal:

> "… realistically comes two years too soon for a cautious institutional lender".

Bugsby continues through 2016

50. Bugsby kept working on the possible acquisition. It made an offer to CapCo of £295 million on 15 February 2016 (up from an indicative offer of £256 million on 11 December 2015).

51. By March 2016, Bugsby had become the preferred bidder. It signed an exclusivity agreement with CapCo on 21 March 2016 ("the Bugsby/Capco Exclusivity Agreement"). This initially provided for an exclusivity period to 1 April 2016. On 22 April 2016 the period was extended to 8 July 2016.

52. On finance, by April 2016 Bugsby had confirmed its lender as Rothesay and its equity partner as Union Investment. Rothesay issued a term sheet on 30 March 2016, and Rothesay and Union Investment (a large German investment manager holding substantial assets for German insurance companies and pension funds) issued letters of support on 1 April 2016.

53. On 23 May 2016 AIG issued a term sheet to Bugsby.

54. Then, the Brexit referendum on 24 June 2016 saw Union withdrawing its interest indefinitely. Bugsby said that its bid for Olympia was put on hold. The exclusivity period of the Bugsby/Capco Exclusivity Agreement expired. CapCo cancelled the sale process for Olympia.

55. Nonetheless, during summer and autumn 2016, Bugsby continued to interact with CapCo and maintained its interest in the possible acquisition.

HNA joins Bugsby and makes contact with Goldman Sachs

56. Bugsby's efforts included a continued search for an equity partner. It spent time in that connection with Qatar Diar and the Qatar Investment Authority before ultimately attracting the Chinese group, HNA. On 13 May 2016 Bugsby and HNA entered into a Confidentiality and Exclusivity Agreement.

57. On 25 October 2016 Bugsby "reconnected" with HNA regarding the acquisition of Olympia. On 28 November 2016 Mr Marcus sent an email to HNA setting out the broad commercial terms of a proposed joint venture with Bugsby. At a meeting on 1 December 2016 HNA confirmed that the broad commercial terms were agreeable and that it wanted to join in a formal bid for Olympia.

58. Meanwhile, in November 2016, Bugsby made contact with Goldman Sachs to discuss debt finance, signing a confidentiality agreement on 6 December 2016. On 14 December 2016 Bugsby produced the "Project Victory – Business Plan" for Goldman Sachs.

59. In December 2016 CapCo took a debt facility of £100 million from BNP Paribas and Credit Agricole against Olympia.

Yoo develops and makes a rival bid

60. In the course of 2016 contact began between Yoo and CapCo in relation to a possible rival bid from Yoo for Olympia. Following an approach from CapCo Yoo Capital submitted an indicative offer of £295 million for Olympia, and 8 days later finalised an investment memorandum for the "DF/YC Fund Investment Committee" proposing the acquisition of Olympia.

61. Yoo's consortium was still forming. Yoo worked to bring on board equity backing from two German financial institutions, VKB and in due course BVK.

62. On 2 December 2016, Bugsby discovered that an indication of interest in Olympia had been made by Yoo.

63. Yoo (without BVK) submitted an offer letter to CapCo on 2 and 21 December 2016 (dated 15 December) in the sum of £295 million. The offer stated it was "Subject to contract", "confirmatory due diligence" and "Final Board Approval

of VKB and – if applicable – acceptance of the German financial authorities with respect to regulatory law / conditions."

64. The letter also stated that the offer was "not conditional upon third party financing".

Bugsby responds, and approaches L&G again

65. The news on 2 December 2016 about Yoo's indication of interest prompted HNA to accelerate its initial approvals process. There were several meetings between Bugsby, HNA and CapCo including a site visit on 16 December 2016.

66. Bugsby also made progress with its search for debt finance, advised by a team at UBS and BNP Paribas. In this respect, a confidentiality agreement was signed with Goldman Sachs on 6 December 2016 and regular communication between Bugsby and Goldman Sachs continued throughout December.

67. On 14 December 2016, while matters progressed with Goldman Sachs, Bugsby also approached L&G again, through UBS, regarding debt finance. Mr Boyle said that he was available for a call. The same day Bugsby and HNA conducted a site visit of Olympia.

68. By 21 December 2016, Bugsby had L&G's response that "given 12 months of additional history" they "would consider taking another look"; but "timing-wise this would definitely be a January project for them …".

69. L&G expanded to UBS that they were on another live deal and then "out for the [Christmas] break from tomorrow afternoon". Some "broad comments" from L&G were also reported by UBS, on the basis that "he hasn't reviewed the information pack since we last spoke".

Bugsby secures Goldman Sachs' interest in providing debt finance for a Bugsby bid

70. The same day, Goldman Sachs confirmed that it was interested in providing debt finance to Bugsby for the purpose of acquiring Olympia. UBS reported to Bugsby on feedback from various lenders contacted about lending on Olympia, including L&G.

71. Goldman Sachs advised that it had preliminary credit committee approval and could fit within a timetable to completion on 24 February 2017. Goldman Sachs reassured Mr Marcus in a telephone conversation that Goldman Sachs completed "99% of the transactions for which it issues term sheets".

Bugsby makes a formal offer for Olympia

72. Bugsby emailed to CapCo a formal offer letter in the amount of £303 million on 22 December 2016, dated 21 December 2016.

73. The letter set out a proposed timetable for exchange of contracts on 27 January 2017 and completion on 24 February 2017. Under cover of the same email was a letter from HNA to CapCo confirming its support for and involvement with Bugsby's bid.

The Yoo/Capco Exclusivity Agreement

74. However, the next day, 22 December 2016 CapCo entered into an exclusivity agreement with Yoo ("the Yoo/CapCo Exclusivity Agreement").

75. The Yoo/Capco Exclusivity Agreement granted Yoo exclusivity in respect of the acquisition until 28 February 2017, but this exclusivity period would terminate if Yoo did not meet a "check-in" by 5pm on 31 January 2017. The "check-in" required evidence of demonstrable progress in due diligence and obtaining a valuation. It also required confirmation that there were no material issues which might delay the acquisition and that the consortium remained willing to proceed on original offer terms.

76. Yoo had hoped for an exclusivity agreement to 31 March 2017, but had been refused. Yoo referred to a "Gentleman's agreement" to extend the period in due course. While CapCo would not give exclusivity past 28 February 2017, it does appear CapCo regarded 31 March 2017 as a hard deadline for Yoo to complete the transaction.

77. CapCo advised Bugsby that it had entered into an exclusivity agreement with another party. On 22 December UBS informed L&G that Bugsby had asked UBS to hold off discussions for the moment and that UBS would call L&G in January 2017. However, and notwithstanding the Yoo/CapCo Exclusivity Agreement, CapCo still had some contact with Bugsby and Bugsby's advisors at UBS concerning Olympia.

78. There was a discussion between Mr Fergus Horrobin of UBS and Mr Jobunputra (the CFO of CapCo) on 29 December 2016. In a meeting on 13 January 2017, Mr Gary Yardley (the CIO and MD of CapCo) informed Mr Horrobin of UBS that CapCo had instructed their lawyers to look into whether CapCo could terminate the Yoo/CapCo Exclusivity Agreement.

79. Mr Yardley told Mr Horrobin that the Yoo bid was "off the pace". He referred to the "check-in" at the end of January 2017 to monitor progress under the Yoo/CapCo Exclusivity Agreement, as potentially offering an opening for early termination of that agreement.

80. CapCo was later to facilitate a tour of Olympia on 9 February 2017 to Bugsby and HNA senior management, who were visiting London. This included HNA's Group CEO, Mr Adam Tan, and Mr Matthew Neal of CapCo.

Bugsby and HNA and heads of terms for a joint venture: the Bugsby/HNA Heads of Terms

81. During the visit by HNA to London, Bugsby and HNA confirmed written heads of terms for a joint venture ("the Bugsby/HNA JV Heads of Terms").

82. Bugsby does not argue that the Bugsby/HNA JV Heads of Terms were legally binding between Bugsby and HNA, and L&G emphasised at trial that they were not. However, their relevance is considerable. A revised draft was also circulated by Bugsby to HNA on 31 January.

83. The evidence of Mr Liao, which I accept, is to the effect that the document was agreed within HNA. This is challenged by L&G and the position is admittedly not clearcut, but I consider Mr Liao's evidence that the terms had been "referred to senior management of HNA Holdings and there were no objections or concerns" and that HNA's CIO said "please move forward" to be sufficient in the context and circumstances prevailing at the time to show that although not legally binding between Bugsby and HNA the document was agreed within HNA.

84. In summary, the Bugsby/HNA JV Heads of Terms provided as follows:

(a) Bugsby and HNA would establish a joint venture company that would acquire Olympia. The structuring would be subject to tax/regulatory advice.

(b) The joint venture company would enter into a management agreement with Bugsby for day-to-day management of the acquisition, with at least a five-year term.

(c) In terms of initial capital commitments, HNA would contribute £135 million or 95% of the initial required equity, and Bugsby would contribute £7 million or 5%.

(d) In terms of future capital contributions, Bugsby's liability would be capped at £9 million or 125% of its initial required equity.

(e) Any further equity contributions from HNA would be in the form of "Priority Equity" which would have the "same economic rights as other common equity" with "priority repayment rights" but would be "non-dilutive" of Bugsby.

(f) There would be an "Advisory Board".

(g) HNA's intention was "to hold its investment for the long term".

(h) Bugsby would have the option to exit by being bought out by HNA between 5 and 8 years after acquisition.

85. The Bugsby/HNA JV Heads of Terms also provided that fees would be paid as follows (paragraph 9; square brackets are in the original):

"• The Venture shall pay the following fees:

o An Investment Management Fee equal to 2% pa of drawn equity capital commitments, paid quarterly, to be split 1.75% pa to Bugsby and 0.25% pa to [HNA] respectively (to be included in [a] Management Agreement),

o An Acquisition Fee equal to 1% of the Enterprise Value, 50% of which shall be paid to Bugsby at closing and the balance to be credited to Bugsby's capital account;

o A Debt Arrangement Fee equal to 0.5% of Debt Proceeds, which shall be credited to Bugsby's capital account at closing.

• For asset management services provided by HNA ... HNA shall receive from the Company, on an annual basis, a special dividend equal to 1% of total drawn equity. This special dividend shall be paid only after all fees and debt service, and will count against HNA's 8% IRR preference in paragraph 11."

86. Paragraph 11 of the Bugsby/HNA JV Heads of Terms provided in these terms:

"• Bugsby shall earn a Promoted (or Carried) Interest over the Investor return. Cash flows shall be distributed in accordance with the following schedule:

o First, to reasonable reserves and debt service.

o Second, 100% to all Shareholders pari passu until they have received a return of equity capital invested and an 8% IRR, compounded annually.

o Third, 80% to Bugsby / 20% to Shareholders until Bugsby has realized a 20% share of total distributed profits.

o Thereafter, 80% to Shareholders / 20% to Bugsby."

Bugsby progresses debt finance with Goldman Sachs

87. On 29 January 2017, Goldman Sachs provided indicative terms for debt finance, with accompanying questions to Bugsby. By 10 February 2017, Goldman Sachs issued a full draft term sheet. By 15 February 2017, commercial agreement had been reached on final terms, with a timeline for completion on 7 April 2017.

88. On 20 February 2017, Goldman Sachs emailed a term sheet to Bugsby, describing it as intended to be "the final commercial agreement as regards the transaction". Goldman Sachs said it "look[ed] forward to moving forward with you".

89. A final term sheet (which had initial credit committee approval at Goldman Sachs) was then issued on 28 February 2017. This provided for a loan of up to £197 million with an interest rate of 4.45% above 3 month Libor repayable over

5 years. A timeline produced by Goldman Sachs on 1 March 2017 suggested completion by the end of that month.

Yoo seeks debt finance in connection with the possible acquisition

90. Although Yoo had stated that its offer was "not conditional upon third party financing", by early January 2017, Yoo was approaching a number of potential providers of debt finance, including L&G.

91. A number responded, and these included the following in particular. Alpha Real Capital provided a first and second term sheet, but for the limited sum of £85 million, on 17 and 18 January 2017. Greenoak and ICG Longbow were the only other two to provide term sheets by the end of January 2017. DRC issued an indicative term sheet on 7 February 2017. PGIM issued abbreviated terms on 9 February 2017 and AIG's were available on 10 February 2017. La Salle and Société Générale had issued their term sheet and mandate letter by 15 February 2017.

92. BNP Paribas and Credit Agricole did not issue a term sheet and declined the opportunity. Yoo considered terms from Och-Ziff to be "unworkable".

93. The non party disclosure in the case contains other references to possible lenders, unsurprisingly indicating activity and interest, although this, and the important question of potential further flexibility through negotiation, can always be debated when the material available is incomplete, and without more context from the individuals involved.

94. Yoo felt under considerable pressure when it came to debt finance. On 24 January 2017 Mr Lloyd Lee of Yoo was to write:

> "Debt – we need to drive these guys night and day to get us terms this week.".

Yoo's approach to L&G for debt finance

95. As for L&G, it engaged with Yoo from 18 January 2017 when Mr Roddy MacPhee of RDM Capital (a debt broker) made an approach to Mr Goldblatt. There was a pre-existing relationship between the two men.

96. The approach had come at the right time for L&G under Mr Goldblatt. Mr Goldblatt and L&G were struggling to achieve their ambitions in the real estate lending market, and were facing internal pressure for their poor "pipeline" of transactions.

97. They had closed only one deal in 2016 and were keen to move into new territory. I accept Bugsby's case that it is apparent that Mr Goldblatt saw lending for the acquisition of Olympia as a means to reverse his, and L&G's, fortunes internally

and externally by creating a market perception of L&G as an acquisition lender on big transactions.

98. Mr Goldblatt's evidence to me was that he did not know of the Bugsby/L&G Exclusivity Agreement. I am prepared to accept that evidence, but as L&G recognises, L&G was nonetheless bound.

99. Having read and heard their evidence, I am not persuaded that there was material discussion with Mr Boyle of the transaction and of the fact that Mr Boyle had declined on behalf of L&G to lend to Bugsby on the same acquisition the previous year. The position was that Mr Boyle rejected most transactions because of his view that L&G was rarely interested.

100. Mr Goldblatt decided to take charge of the transaction himself in 2017. This was because he wanted it from the moment he came across it. It was not (as Bugsby alleged) in order that any awareness of Mr Boyle's consideration of the opportunity the previous year could "plausibly be denied".

101. Mr Goldblatt toured the Olympia site with a more junior colleague (Mr Rouhiainen) on 26 January 2017. On 28 January 2017 Mr Lee of Yoo emailed Mr Goldblatt, Mr MacPhee of RDM and others following up on Mr Goldblatt's tour of Olympia, saying:

> "Key Terms: If we discuss and agree key terms early next week, that would be ideal. Credit Approval: If we can aim for Credit Approved terms, subj to DD and Docs, within a week or so thereafter, that would be ideal".

102. The following day, Mr Goldblatt wrote:

> "The main thing the borrower is concerned with is deliverability. The last basis point on price is not important."

I accept Bugsby's case that Mr Goldblatt's approach is illustrated by the fact that, even understanding that there was limited price competition, he would go on to offer terms that were more favourable than any other potential lender.

103. On the morning of 31 January 2017, Mr Goldblatt spoke to Mr MacPhee, discussing terms which he said in his oral evidence would have been very similar to those subsequently included in L&G's term sheet. Yoo were very pleased with this "quick and solid feedback".

104. When making the approach, Mr MacPhee had said, incorrectly,

> "Deal is in exclusivity until end of March."

Mr Goldblatt did not ask to see the exclusivity agreement to this effect. He accepted in oral evidence that L&G should have checked. L&G's understanding that Yoo had exclusivity until 31 March 2017 continued.

The "check-in" required by the Yoo/CapCo Exclusivity Agreement

105. As will be recalled, the Yoo/Capco Exclusivity Agreement provided for a "check-in" on 31 January 2017. This included requirements that Yoo confirm:

> "… that there are no material issues identified that in your reasonable opinion are likely to materially delay or prevent completion of the Acquisition";

and that they were:

> "… willing to proceed to completion of the Acquisition on the same terms as set out in your offer letter".

106. On 31 January 2017, Yoo (not including BVK) sent a confirmatory letter to CapCo intended to meet the terms of the "check-in" required by the Yoo/CapCo Exclusivity Agreement.

107. Yoo's "check-in" letter did not revise its offer letter position on debt finance. However, it seems clear that debt finance was by now intended. Notably, comments on an "Investor Update" for the Olympia transaction for 26 January 2017 stated:

> "Will need to recommend and agree strategy in next few weeks if we want to close with DEBT. Originally non-conditional financing, now understand it is."

108. The "check-in" letter confirmed:

> "… that we are not aware of any material issues identified to date which in our reasonable opinion are likely to materially delay or prevent completion of the transaction."

I accept Bugsby's point that L&G's rapid work by 31 January 2017, set against the limited response by that date from other possible lenders, was instrumental in assisting Yoo's ability to write the "check-in" letter in these terms.

109. The "check-in" letter had concluded:

> "This Letter is issued subject to the assumption that exclusivity will be extended to March 31, 2017 as previously discussed and agreed with you on December 9, 2016. If we could receive an updated exclusivity letter reflecting the extended dates by January 30th [sic], this would be appreciated, so as to allow our teams to continue to progress the Acquisition work-streams."

110. For CapCo, Mr Yardley's initial response to Yoo's letter was ambiguous as to whether the "check-in" requirements had been met. A call from Mr Lloyd Lee of Yoo to Rothschild (representing CapCo) was reported by Rothschild to Mr Yardley in these terms:

> "He is concerned that your reply suggests that we aren't confirming that they still have the existing exclusivity to end Feb - he acknowledged that

now is not the time to be discussing March which is helpful - but is worried that he is about to lose what he has to the end of Feb whilst he has '60' people working on this racking up a significant cost. This is the ambiguity that you and I discussed before you sent the email."

111. Rothschild then conveyed this advice to Mr Yardley:

> "I have spoken to David and we are of the opinion that the letter they have provided in reality passes the test that is in the Exclusivity Agreement regarding their 31 January reconfirmation therefore we would be hard-pressed to argue that the exclusivity should be terminated at this time. On this basis we probably wouldn't be giving up very much (if anything) by saying to Lloyd that we understand he has spoken to Peter and confirm that as things stand they still have the exclusivity to end Feb."

112. Mr Yardley replied:

> "Why don't we just say nothing or be non-committal until we receive there [sic] report."

113. In the event, CapCo did not terminate the Yoo/CapCo Exclusivity Agreement and did not extend the exclusivity period.

L&G progresses arrangements urgently for debt finance to Yoo

114. Meanwhile, L&G were preparing debt terms as a matter of urgency. Mr Goldblatt and his colleague Mr Rouhainen exchanged draft committee papers, and Mr Boyle and Mr Goldblatt exchanged emails concerning a draft term sheet for Yoo, on 1 February 2017.

115. Finalised indicative terms were issued to Yoo by L&G on Friday 3 February 2017. Mr Goldblatt and Mr Rouhainen submitted their internal committee approval papers.

116. Mr Goldblatt stated in oral evidence that, during this period,

> "… obviously work was being rushed through to try to assist in meeting a tight deadline".

There was this exchange in cross-examination:

> "Q. So that is eight working days from your first proper meeting to a term sheet that was pretty much agreed, yes?
>
> A. Yes.
>
> Q. Isn't that almost unheard of, that speed?
>
> A. It may be, but we did it."

117. On Tuesday 7 February 2017 L&G's credit rating committee approved a BBB rating. L&G's Retirement Direct Investment Review Meeting ("RDIRM") approved the transaction to proceed to the Group Capital Committee ("GCC") for authorisation the following week.

118. On 14 February 2017, internal CapCo emails discussed terminating the Yoo/CapCo Exclusivity Agreement.

119. On 15 February 2017 DFI circulated a "Project Olympus – Financing Options" document to Yoo and recommended that Yoo proceed with L&G.

120. Also on 15 February 2017, the GCC committee within L&G gave its approval (described by Mr Goldblatt's superior, Mr Bamber, as an "easy ride"), on the basis of the papers presented by Mr Goldblatt and Mr Rouhainan to the lower committees, and a summary of the RDIRM's committee's views which had been prepared (in a departure from usual procedure) by Mr Goldblatt himself.

121. L&G issued credit approved terms on Friday 17 February 2017 and these were signed by Yoo and L&G.

122. This came just in time as far as CapCo were concerned. Mr Terry O'Beirne of CapCo emailed his colleagues Mr Yardley and Mr Situl Jobanputra in these terms:

> "We had a meeting yesterday afternoon with Deutsche and Yoo to get an update on funding and pensions - Gary your conversation with them on Thursday had the desired effect. On the funding point, they claim to have agreed terms on a £150m debt facility from L&G (credit approved) to fund the acquisition. I have asked Toby [Cohen] from Rothschild to contact Ashley at L&G on Monday to confirm exactly where they are… Despite their continued reassurance this debt is not required to complete I am not convinced but L&G's comments on this should provide us with clarity on whether 31 March completion is realistic… They went to mention exclusivity but I buried this pretty quickly."

123. Likewise, in Mr O'Beirne's email of 18 February 2017:

> "Greater detail on the structuring will be required (Toby is going to ask L&G on Monday how far the buyer is on debt discussions…)".

124. Mr Goldblatt's witness statement made no mention of what passed between him and Mr Cohen of Rothschild on the following Monday. In cross-examination he said he could not remember the conversation.

125. Mr Jobanputra responded that what he called Yoo's "U-turn on not requiring external funding" was "probably grounds for breaking exclusivity". He said the deal:

> "… may be more problematic for the pension with a leveraged structure and under no circumstances should we entertain a deal with any financing

conditionality. Also suggests that March is unrealistic unless they are going to bridge it with their own equity."

126. Mr O'Beirne's reply was in these terms:

> "I agree with your points - this is far from a done deal. They have 10 days to close these 2 key points out as come 28 Feb (we do have the grounds to end now) they are £2m+ down in costs and out of exclusivity. Whilst it has been agreed that no formal paper was required for this week[']s board meeting, I assume an update will be provided to the board on where things currently are re ongoing discussions, in particular the pension discussions - this and the funding at present are the 2 biggest blockers to a deal."

127. I accept Bugsby's case that it was the fact that L&G had actually progressed to full credit approval on the preceding Friday 17 February which saved Yoo's bid in CapCo's eyes at that crucial juncture. Even then, CapCo's concerns clearly remained sufficient that it continued to take the position of not extending the exclusivity period. Bugsby also highlights other difficulties faced by Yoo at the time. For example, on costs, mentioned by Mr O'Beirne, BVK had not signed a proposed "cost cover" letter agreeing to pay its share of pre-transaction professional fees.

128. But Bugsby went further to contend at trial that the introduction by Yoo of debt finance "alter[ed] the structure of the Acquisition, entitling CapCo to terminate the Yoo/CapCo Exclusivity Agreement", so that exclusivity expired before 28 February.

129. In my judgment there is no possibility that the mere introduction of (simple) debt finance by Yoo would have caused CapCo to attempt to terminate, and it did not in fact. I do not overlook the pension fund context at CapCo. But it was simply not in CapCo's interests to take that step, whatever it might say about it and about the fact that it was not what the bid had said. Debt finance was also of course part of Bugsby's structure, and without issue.

The Yoo/CapCo Exclusivity Agreement expires; CapCo formally reengages with Bugsby but refuses exclusivity

130. On 5 February 2017 Mr Horrobin of UBS reported to Mr Marcus that CapCo had informed him that CapCo was:

> "… pressing Yoo on a particular point and if they stay flaky on it, this thing comes our way".

131. At 5pm on 28 February 2017, the exclusivity period under the Yoo/CapCo Exclusivity Agreement came to an end, without extension.

132. At 5.31pm on the same day, CapCo sent an email to Bugsby attaching a letter marked "28 February 2017, after 5pm (UK time)" formally re-engaging with Bugsby.

133. On 1 March 2017 Mr O'Beirne emailed Mr Yardley setting out six key points to be addressed should Bugsby/HNA re-issue their offer on Olympia stating:

> "… [a]s agreed, these can be discussed on a call with [Mr. Horrobin of UBS] with a follow up e-mail to ensure they are picked up…".

The points were: (i) headline price; (ii) acquisition structure; (iii) funding; (iv) pension; (v) conditionality; and (vi) timeline.

134. There followed a period of significant engagement between CapCo and Bugsby regarding the Bugsby bid. This included the provision of further /updated information concerning the transaction, negotiations between lawyers over the terms of a sale and purchase agreement, a meeting with the trustees of Olympia's pension plan and CapCo offering Bugsby/HNA a form of "lock-out" agreement.

135. It had always been HNA's position that a short period of exclusivity would be required to close the deal. CapCo was prepared to offer a draft "lock-out" agreement, whereby it would commit not to sell to other parties for a short period, in return for a Bugsby/HNA commitment on price and due diligence costs.

136. On 6 March 2017 a draft email was prepared for Mr Yardley to send to Mr Marcus. The draft email stated:

> "Our position remains that we are not prepared to enter into exclusivity with you [at this stage] and, therefore, we would not proposed having a principal-to-principal meeting to discuss this issue any further…".

It was noted:

> "In relation to the exclusivity we've included the words 'at this stage' in square brackets, as we weren't sure how firm you wanted to be on the possibility of exclusivity in the future".

137. CapCo was unwilling to offer the period of full exclusivity required by HNA. It did not want to lose the Yoo bid if it needed it, although there was some reference to exclusivity that would allow both Yoo and Bugsby.

138. As Mr Yardley of CapCo was later to explain to Mr Allen Wu (a lawyer acting for HNA):

> "We do recognise the attraction to a buyer of being granted exclusivity but please understand that granting exclusivity at a late stage which would close out a highly advanced and certain offer, is not something that we could do. As you are aware, when the other party's exclusivity expired at the end of February we did not grant an extension, which we were under pressure to do, in order to accommodate the potential HNA interest. However, in such circumstances granting an alternative exclusivity to you, was equally not possible."

139. On 17 March 2017 Mr Marcus emailed Mr O'Beirne and Mr Yardley in these terms:

> "Thank you for the welcome letter, marked up SPA, data room access and draft lockout agreement
>
> We are meeting counsel this morning to review and will turn the lockout as soon as possible – commercial points of note to keep up momentum:
>
> 1) date – we need 15 working days which would be April 5/6 and could confirm funds before 31st march
>
> 2) cost cover – we need this to be unconditional for engagements to be arranged. Commercially this is the trade for the other party to keep running and an option on our higher deal
>
> 3) other party – we need this to be limited to the one party not open ended and HNA has requested the name of the other party to ensure that time and resource risk can be properly calibrated
>
> Also it would be helpful to get dates in calendar for PWC to sit with BDO, yourself, Yvonne at Olympia and for a sit down w the pension trustees – in light of the timings we'd look to get these done thurs / fri / Monday / Tuesday (starting tomorrow)"

140. Mr O'Beirne emailed Mr Yardley providing his reactions, which were: (i) "Point 1 – as agreed we can't move on 31 March end date – I will push back on this"; (ii) "Point 2 – I am inclined to push back on this – we are paying them for the lock-out which really should be the other way around. I suspect this could end discussions"; (iii) "Point 3 – I am more relaxed on conceding this one as its only for the next 2 weeks and we are not talking to any other buyer". Mr Marcus' email also stated "[I] look forward to getting the process moving towards exchange." Mr O'Beirne's email commented that Mr Marcus' email "is as expected".

Yoo continues with its bid, with L&G's help

141. Meanwhile, the pressure on Yoo to finalise its financing remained unremitting throughout March.

142. On 17 March 2017, an internal L&G email stated:

> "In this instance the borrower has an option to buy an asset which expires at the end of this month, so everyone is working hard to meet this deadline and I suspect it will go to the wire. We're financing the borrower and we're entirely dependent on their due diligence and management to close the deal, however I do know that they want this to happen as soon as possible, to avoid unnecessary month end stress."

143. In late March 2017 it became increasingly clear that Yoo would not be able to transact by the end of the month. The deadline was extended until mid-April 2017. Mr Goldblatt wrote in an internal L&G email:

> "… the volume of work required of all parties has resulted in some slippage and we are now looking for the transactions to be finalised by mid-April."

144. On 21 March 2017 Mr Goldblatt emailed Mr Lee of Yoo and Mr MacPhee of RDM Capital:

> "Completion date now aimed to be 7 April as even vendor can't achieve 31 March. None the less even that is still tight allowing for what is involved for the vendor, you and us.
>
> All commercial points for SPA likely to be resolved in the next 24 hours.
>
> There will be some practical points that simply cannot be achieved by the end of the reorganization that can be conditions subsequent. You will highlight these to NRF ideally today to feed into the facility agreement…"

Goldman Sachs affirms its support for Bugsby

145. Meanwhile, on 30 March 2017, Goldman Sachs provided Bugsby with a letter for provision to CapCo as follows:

> "We are enthusiastic about your proposed Acquisition and excited about the opportunity to work with you on the Debt Financing subject to the terms of this letter. Our enthusiasm for the Debt Financing is based on the due diligence which we have undertaken to date, including a review of business plan, cashflows and a tour of the property."

146. Goldman Sachs continued:

> "In addition we have had conversations with you regarding your views and the initial structure and terms for the Debt Financing. We have discussed the Debt Financing internally with senior members in the European Finance Group at Goldman Sachs as well as the Global Head of Real Estate Financing. Goldman Sachs is therefore highly interested in arranging and underwriting the Debt Financing subject to the terms of this letter and we believe that we should be able to work expeditiously with you towards completing the Debt Financing within a swift timeframe."

147. On the same day, Mr Steven Mastrovich of UBS reported in an email to Mr Marcus the terms of a conversation he had had with Ms Kim Torriani of Goldman Sachs, expressing the support of Goldman Sachs' senior decision-makers and its high confidence in making the loan. There were statements that Goldman Sachs were "highly confident and impressed" with:

> “Bugsby's knowledge of the asset, thoroughness of due diligence and ability to assemble a team to operate and manage the asset and create value”.

148. The email added specifically:

> “Goldman Sachs respects HNA as a partner and feels they are very credible”.

Early April: continued pressure on Yoo

149. A structure report by Deloitte summarised a complexity for Yoo that had been receiving attention:

> “We understand that, for German regulatory reasons, BVK and VKB cannot have equity exposure to the operating aspects of the Target Group's business, in particular non-real estate income and employees. As such, the proposal is that a separate legal entity owned by Deutsche Finance International LLP and Yoo Capital will be established to own the operating business (‘Opco Bidco’)”
>
> “Following the Transaction, the returns received by the Investors will be real estate related (i.e. rent or capital profits) which we understand is critical for German regulatory reasons”

150. Mr Goldblatt reflected in his oral evidence at trial:

> “… clearly there was pressure from Yoo to close by 31 March. But I do seem to recall that they passed on that CapCo in turn was keen for closure as soon as possible… my understanding was that CapCo was putting pressure on and Yoo was also in turn keen to close, as of course were we.”

151. The pressure caused by Bugsby’s position also affected Yoo’s deadlines. On 3 April 2017 Mr Goldblatt emailed Mr Boyle and others at L&G saying:

> “… had a meeting with the borrower on Friday … and was told that the vendor had significant concerns about the proposed transaction becoming public now (which seems quite possible), leading to a party that expressed an interest a couple of years ago potentially refreshing its interest, which would be difficult to rebuff. As a consequence completion of the acquisition and therefore our loan must occur by 12 April.”

152. Then on 3 April 2017 Mr Lee of Yoo wrote to Mr Goldblatt and others:

> “We have to be finished with the entire loan tomorrow and all CPs by Thursday to get a drawdown notice on Friday. There is no slippage on that day. We have the press looking to release an article, and if a competing bid comes in at the last minute, that is an enormous risk to all of us together. We already know the party that failed to perform 2 years ago is looking.”

4 April 2017: Bugsby bids again

153. On 4 April 2017, Bugsby and HNA sent a further offer letter to CapCo ("the Bugsby/HNA bid").

154. This offered a purchase price of £303 million, with negative working capital in the Business of £3 million [sic, though this is uncertain] and clearing a pension deficit of £2.3 million. A 10% non-refundable deposit was also offered. The letter requested exclusivity of 14 days for final financial due diligence and exchange of contracts, with completion 30 days thereafter, with the possibility of a 15-day extension.

155. Mr Wu (for HNA) emailed CapCo underlining HNA's commitment:

> "Our firm has been given the authority from HNA Group Top Management - Mr. Adam Tan, CEO of HNA Group to reach you and your Organization.
> …
> At this time, HNA & Bugsby again express their highest offer (i.e. £303,000,000 All Cash Purchase Price, £13,000,000 [sic, though this is uncertain] for target working capital and £2,300,000 payment to settle existing pension deficit) to you. Most importantly, HNA is planning to bring its best global resources into this great Olympia Exhibition Center to make it the greatest again.
>
> In return HNA just ask for a few more days under the protection of Exclusivity to complete its internal final approval process. HNA Global Acquisitions records speak for itself…"

156. The non party disclosure indicates that some within CapCo were sceptical about the bid or elements of it, although this must be understood in the context of Yoo's position as enabled by L&G, and also in light of views on negotiating tactics within CapCo. A close view is difficult without complete documentation and the opportunity to hear from the participants. An authoritative position was however to come from CapCo's Board.

6 April 2017: CapCo's Board deliberates

157. In a paper submitted to the CapCo Board on 5 April 2017, Mr Yardley recommended:

> "● consider, and if thought fit, approve the disposal of the Olympia Group to either the [Yoo] Consortium on the basis of the terms outlined above or, in the event that a transaction can be agreed at a higher price and on similar or better terms than the Consortium offer, to Bugsby /HNA (the "Disposal"); and
>
> ● delegate authority to a Committee comprising any two Executive Directors one of whom must be the Chief Executive to finalise and approve the Sale and Purchase Agreement and any other transaction documents (together the "Transaction Documents") and to authorise the execution of

the Transaction Documents by the relevant members of the Capital & Counties Properties PLC group, in order to effect the Disposal."

158. The CapCo Board formally adopted the recommendations on 6 April 2017.

159. Intensive correspondence followed including between Mr Marcus and CapCo.

160. L&G point out the following features from the CapCo Board Approval Paper of 5 April 2017:

(i) The board paper states:

> "We have also received indicative offer from a consortium comprising HNA and Bugsby. On the face of it their total offer represents an additional net proceeds of c.£20m, however at this stage its deliverability is considerably less certain than that of [Yoo]";

(ii) The board paper refers to terms having been provisionally agreed with Yoo;

(iii) The board paper states:

> "… it is unclear the extent of the due diligence that has been completed by Bugsby/HNA or whether the terms of their existing indicative offer would ultimately be reflected in the final transaction documents. Furthermore, their offer is dependent on a relatively high level of debt being achieved and is based on a 15-day exchange at a 10% deposit, with the remainder of their offer price received on a subsequent 45-day completion";

(iv) The board paper states:

> "…we have not yet received any evidence demonstrating that the Bugsby/HNA offer will be converted into an acceptable transaction";

(v) The board paper states:

> "…we are prioritising the [Yoo] offer as believe the greater certainty of completion to outweigh the possibility of a higher price being achieved with Bugsby/HNA".

161. Bugsby points out in response:

(i) The first page of the board paper notes that Yoo's period of exclusivity "expired at the end of February"

(ii) The section of the board paper quoted at L&G's point (i) above continues: "We are continuing to work with HNA and Bugsby to determine whether or not terms can be agreed at a higher price (and on similar or better terms) than with [Yoo]"

(iii) The section quoted at L&G's point (iii) above begins, in relation to the Bugsby / HNA transaction, "[a]lthough attractive, and on the face of it a relatively simple transaction to accommodate […]"

(iv) The board paper notes the regulatory restrictions applicable to VKB and BVK:

> "… we have been informed that due to capital allocation restrictions neither entity is permitted to hold operational assets within their respective funds"

(v) The board paper refers to HNA's requirement of exclusivity in these terms:

> "We are continuing to explore this offer but have refused to provide the exclusivity that they state they require given that this would involve shutting out [Yoo] at a time when they will be ready to exchange and complete which may endanger their offer"

(vi) The board paper also states:

> "… we will continue to work with Bugsby / HNA prior to closure with [Yoo], in order to provide ourselves with appropriate competitive tension and potential flexibility to undertake a transaction with them in the event that they are able to deliver, with certainty a better transaction than [Yoo]".

7 April 2017: Yoo successfully contracts to acquire Olympia

162. News of the potential sale of Olympia to Bugsby/HNA was reported in the press on 6 April 2017.

163. Mr Gavin Neilan (of DFI, as part of the consortium that was Yoo) in an email exchange on 6 April 2017 wrote:

> "To put this into context, if we do not resolve tonight, our investors are unlikely to be able to release funds first thing and we will almost certainly not close tomorrow thereby imbedding unnecessary risk in the success of this transaction. We have accomplished so much.".

164. On 6 April 2017 Mr Rouhainen of L&G, in an internal update email, stated:

> "We need to close the deal tomorrow most likely to block the new bid [the Bugsby/HNA bid]".

Mr Goldblatt responded to Mr Boyle's questions about timing saying:

> "Yes, with completion tomorrow. We may even pull it off!"

165. Later that day Mr Goldblatt emailed Mr Boyle again to say:

> "Another late night but generally a successful day."

Mr Boyle responded:

> "Can't believe you have got so far – fantastic effort."

166. On 6 April 2017 L&G was asked to take custody of high value bearer bonds for a short period. These bonds were understood to be required because of BVK and VKB's regulatory position.

167. L&G had only a portable safe in which to keep the bonds, but agreed to take them and keep them. This unusual course was in due course to lead to an internal compliance investigation and report process at L&G.

168. On 7 April 2017, CapCo and Yoo contracted for the sale and purchase of Olympia for £296 million.

L&G's part in Yoo achieving the acquisition of Olympia

169. L&G lent £151 million to Yoo on the purchase of Olympia, and a further £7.5 million on subsequent dates. It also provided valued effort, as the sequence of events shows, at a number of stages, right up to 6 April 2017.

170. The day after the deal completed, Gavin Neilan of DFI emailed Mr Goldblatt saying:

> "I wanted to personally extend my sincerest gratitude and thanks to you and your team for your support, professionalism and commercial acumen helping us close Olympia. It is very much appreciated. It was a herculean effort by all, but particularly your side, to pull together and close as we did to fend off a hostile rival bid. We look forward to a long term partnership on both this and many other transactions."

171. L&G announced their involvement by press release on 10 April 2017 with Mr Goldblatt saying:

> "Representing our first acquisition finance deal, this debt facility… demonstrates our ability to continue to move into areas that the market might not traditionally expect to see us in. Continuing to prove our platform's ability to understand and back alternative asset classes, in this case working through a complex arrangement in support of a time sensitive off-market transaction".

172. The press release quoted Mr Lee of Yoo saying:

> "We are extremely pleased to be working with L&G and, under [Mr Goldblatt's] leadership, L&G delivered with impressive speed, decisiveness and commercial mindset."

173. Elsewhere too, L&G have stressed in publicity materials that the Olympia deal shows their ability to move "at speed" and to show "decisiveness and leadership to secure the deal."

Following the acquisition

174. Following the acquisition, Yoo spent 18 months (and approximately £8.7 million in professional fees) designing an extensive redevelopment scheme for the site.

175. A Yoo Consortium Masterplan was submitted to the local authority in autumn 2018, and recommended for approval by the local authority planning officer on 30 January 2019. Final planning approval was granted on 25 October 2019, with a series of variations following. On 6 December 2019 Savills produced its Report and Valuation of Olympia for Goldman Sachs.

176. Yoo applied to Goldman Sachs for development finance on the basis of their initial business plan ("the IBP") and a model prepared by CBRE. Goldman Sachs agreed in the first quarter of 2020 to lend £875 million to Yoo.

177. Thereafter, initial works were undertaken in 2020. Yoo has reported monthly and quarterly to Goldman Sachs. Reports up to the end of Q1 2021 are amongst those disclosed in the litigation.

178. In the early months of 2021, Yoo also prepared an updated business plan (called at trial the "Final Business Plan" or "the FBP") for Goldman Sachs. Goldman Sachs approved in principle the drawing down of a large tranche of the loan for construction. A £600 million Main Works construction contract was signed with Laing O'Rourke, and main construction work commenced.

179. Yoo's investors approved the drawing down of substantial further equity investments for the redevelopment as recently as Q1 2021.

180. On Bugsby's case, Yoo (including DFI) stands to make very substantial profits from fees and carried interest.

Yoo and DFI launch real estate investment funds

181. The Olympia track record has helped Yoo and DFI to raise real estate investment funds.

182. The funds have been modest, but material. Yoo's first such fund (named the YC Fund II) has raised £200 million, targeting a fund size of £400 million. Bugsby points out that Yoo's announcement concerning this fund expressly states that it was raised "off the back of" Olympia.

183. Likewise, DFI has raised a first fund of €436 million, which it has credited in the press to its fund being "heavily pre-seeded" with the Olympia investment as its "first and largest asset", and it has since launched a second fund.

Liability: breach of contract

184. L&G accepts that its negotiation, arrangement and provision of loan finance to Yoo for the acquisition of Olympia involved repeated and continuous breaches of clauses 7 and 8 of the Bugsby/L&G Exclusivity Agreement.

185. The first breach was on 18 January 2017 when L&G was first approached by Yoo regarding finance for a possible acquisition of Olympia by Yoo.

186. The parties' statements of case include these exchanges:

(a) Paragraph 41 of Bugsby's Re-Amended Particulars of Claim:

"41. Every stage of [L&G's] negotiation, arrangement and provision of loan finance to [Yoo] for the acquisition of Olympia necessarily involved repeated and continuous breach of their obligations to [Bugsby]:

(a) Under clause 7 of the [Bugsby/L&G Exclusivity Agreement] not directly or indirectly through any of their representatives or otherwise, without the prior written consent of Bugsby, (which for the avoidance of doubt, was not sought and would not have been forthcoming had it been sought) to contact, entertain or continue any discussions or negotiations with other prospective parties, land owners, or developers (or any respective affiliates, directors, officers, agents, employees or representatives thereof) or other third party other than [Bugsby] concerning Project Victory and the acquisition of Olympia

(b) Under clause 8 of the Agreement that their involvement with and all conversations regarding Project Victory and the acquisition of Olympia should be exclusively through and with the involvement of [Bugsby] at all times, except as permitted by [Bugsby's] prior written consent (which, for the avoidance of doubt, was not sought and would not have been forthcoming had it been sought.)

(b) Paragraph 37 and 38 of L&G's Re-re-Amended Defence:

"37. As to paragraph 41 [of Bugsby's Re-Amended Particulars of Claim], [L&G] admit that through their involvement with and provision of finance to [Yoo] in its acquisition of Olympia, they were in breach of clauses 7 and 8 of the [Bugsby/L&G Exclusivity Agreement] from 18 January 2017.

38. [The First Defendant's] breaches of clauses 7 and 8 were inadvertent …

(1) … when Bugsby first approached [the First Defendant] in January 2016, it dealt with [the First Defendant] solely through Mr Boyle and only during the course of two weeks. Once he received the necessary financial information from Bugsby on Friday 29 January 2016, Mr Boyle swiftly made the decision, communicated to Bugsby the next working day, not to proceed in considering financing Bugsby's bid.

(2) When, a year later, [the First Defendant] entered into discussions with the [Yoo] regarding the financing of its proposed acquisition of Olympia … [the First Defendant] was represented by [the First Defendant's] Head of

Commercial Lending, Ashley Goldblatt, who had no knowledge of the [Bugsby/L&G Exclusivity Agreement] before the present dispute arose. Mr Boyle was not substantively involved in [the First Defendant's work with [Yoo] …

(c) At all material times, no [employees of the Second Defendant] were aware that Bugsby had previously approached Mr Boyle or [the First Defendant] in relation to the acquisition of Olympia and none had knowledge of [the Bugsby/L&G Exclusivity Agreement] …"

187. As will be seen, L&G's position is that its breaches of the Bugsby/L&G Exclusivity Agreement were inadvertent. It is accepted that this does not mean that they were other than breaches, from which legal consequences flow. I record however that in my judgment they were inadvertent in the way described above, rather than knowing and deliberate.

Liability: breach of confidence

188. It is common ground that Bugsby provided some confidential information to L&G (here, the First Defendant as detailed above) and that L&G owed Bugsby a duty of confidence concerning that information.

189. Bugsby alleges that in arranging and providing loan finance for Yoo, L&G misused Bugsby's confidential information. This includes to accelerate its consideration of Yoo's request for finance and to support or ease its decision to provide finance to Yoo. Bugsby infers that breach of confidence from a number of matters.

190. I accept the evidence at trial of Mr Goldblatt and Mr Boyle that they did not in fact use Bugsby's confidential information. No document showed misuse of Bugsby's confidential information by L&G. Against these findings, the inferences are not made out.

"Chance", "loss of a chance" and the authorities

191. Understandably, when discussing the loss caused by the breach of contract and the quantification of that loss, both parties spoke of "chance" and "the loss of a chance".

192. The phrase "loss of a chance" is one that is used in different ways. It can be used simply to describe the nature of loss suffered. It can be used to describe a "doctrine primarily directed to issues of causation". It can be used in "the evaluation of factors which go only to" the quantification of economic loss. The two brief phrases in quotation marks are those used by Patten LJ in Vasiliou v Hajigeorgiou [2010] EWCA Civ 1475 at [22] and [25].

193. When discussing “chance” or “loss of a chance” sometimes the Court will “not be concerned to distinguish between causation and quantification of loss”, and sometimes it will. Stuart-Smith LJ observed in Allied Maples Group Limited v Simmons & Simmons (a firm) [1995] 1 WLR 1602; [1995] EWCA Civ 17 that Davies v Taylor [1974] AC 207 was a case in which the court (the House of Lords) was not concerned to make the distinction. By contrast in Allied Maples itself the distinction mattered because the Court had not reached the stage of a trial on quantum, and at that point further evidence might be put forward.

194. In Perry v Raleys Solicitors [2020] AC 352; [2018] UKSC 5, the Supreme Court considered a case of negligent legal advice in breach of contract. Lord Briggs (with whom Lady Hale, Lord Wilson, Lord Hodge and Lord Lloyd-Jones agreed) said at [20]:

> “… the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends on what others would have done, that depends upon a loss of chance evaluation.”

Lord Briggs said at [21] that this was the “sensible, fair and practicable dividing line .. laid down” by the Court of Appeal in Allied Maples.

195. Summarising that decision, Lord Briggs said:

> “21. … Allied Maples had made a corporate takeover of assets and businesses within the Gillow group of companies, during which it was negligently advised by the defendant solicitors in relation to seeking protection against contingent liabilities of subsidiaries within the vendor’s group. Allied Maples would have been better off, competently advised, if, but only if: (a) it had raised the matter with Gillow and sought improved warranties and (b) Gillow had responded by providing them. The Court of Appeal held that Allied Maples had to prove point (a) on a balance of probabilities, but that point (b) should be assessed upon the basis of loss of the chance that Gillow would have responded favourably. The Court of Appeal (Stuart-Smith, Hobhouse and Millett LJJ) were unanimous in that statement of legal principle, although they differed as to the outcome of its application to the facts. It was later approved by the House of Lords in Gregg v Scott [2005] 2 AC 176, at para 11 by Lord Nicholls and para 83 by Lord Hoffmann.
>
> 22. The Allied Maples case was about the loss, due to negligence, of the opportunity to achieve a more favourable outcome in a negotiated transaction, rather than about the loss of an opportunity to institute a legal claim. But there is no sensible basis in principle for distinguishing between the two, and none was suggested in argument. In both cases the taking of

some positive step by the client, once in receipt of competent advice, is an essential (although not necessarily sufficient) element in the chain of causation. In both cases the client will be best placed to assist the court with the question whether he would have taken the requisite initiating steps. He will not by the defendant's breach of duty be unfairly inhibited in proving at a trial against his advisor that he would have done so, save perhaps where there is an unusual combination of passage of time and scarcity of other probative material, beyond his own unaided recollection."

196. I appreciate that I am now about to include a citation of appreciable length, but I hope it is valuable to do so. In Allied Maples itself, Stuart-Smith LJ said this (from 1609H, variously to 1618E) and see also Millett LJ at 1623):

> "In these circumstances, where the Plaintiffs' loss depends upon the actions of an independent third party, it is necessary to consider as a matter of law what it is necessary to establish as a matter of causation, and where causation ends and quantification of damage begins.
>
> (1) What has to be proved to establish a causal link between the negligence of the Defendants and the loss sustained by the Plaintiffs depends in the first instance on whether the negligence consists of some positive act or misfeasance, or an omission or non feasance. In the former case, the question of causation is one of historical fact. The Court has to determine on the balance of probability whether the defendant's act, for example the careless driving, caused the plaintiff's loss consisting of his broken leg. Once established on balance of probability, that fact is taken as true and the plaintiff recovers his damage in full. There is no discount because the judge considers that the balance is only just tipped in favour of the plaintiff; and the plaintiff gets nothing if he fails to establish that it is more likely than not that the accident resulted in the injury.
>
> Questions of quantification of the plaintiff's loss, however, may depend upon future uncertain events. For example, whether and to what extent he will suffer osteoarthritis, whether he will continue to earn at the same rate until retirement, whether, but for the accident, he might have been promoted. It is trite law that these questions are not decided on a balance of probability, but rather on the court's assessment, often expressed in percentage terms, of the risk eventuating or the prospect of promotion, which it should be noted depends in part at least on the hypothetical acts of a third party, namely the plaintiff's employer.
>
> (2) If the defendant's negligence consists of an omission, for example to provide proper equipment, given [sic] proper instructions or advice, causation depends, not upon a question of historical fact, but on the answer to the hypothetical question, what would the plaintiff have done if the equipment had been provided or the instruction or advice given. This can only be a matter of inference to be determined from all the circumstances. The plaintiff's own evidence that he would have acted to obtain the benefit or avoid the risk, while important, may not be believed by the judge, especially if there is compelling evidence that he would not. In the ordinary

way, where the action required of the plaintiff is clearly for his benefit, the court has little difficulty in concluding that he would have taken it. But in many cases the risk is not obvious and the precaution may be tedious or uncomfortable, for example the need to use eardefenders in noisy surroundings or breathing apparatus in dusty ones. …

Although the question is a hypothetical one, it is well established that the plaintiff must prove on balance of probability that he would have taken action to obtain the benefit or avoid the risk. But again, if he does establish that, there is no discount because the balance is only just tipped in his favour. In the present case the Plaintiffs had to prove that, if they had been given the right advice, they would have sought to negotiate with Gillow to obtain protection. The Judge held that they would have done so….

(3) In many cases the plaintiff's loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. In such a case does the plaintiff have to prove on balance of probability, as Mr Jackson submits, that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages?

Although there is not a great deal of authority, and none in the Court of Appeal, relating to solicitors failing to give advice which is directly in point, I have no doubt that Mr Jackson's submission is wrong and the second alternative is correct.

… In Spring v. Guardian Assurance PLC [1994] 3 WLR 354 the House of Lords held that an employer who negligently gave a bad reference for the plaintiff, their ex employee, might be liable to him in damages. The case was remitted to the Court of Appeal for the assessment of damages, the plaintiff's case being in essence that he failed to obtain employment with a third party because of the adverse reference. The defendants case was that the third party would not have employed him anyway. Lord Lowry (at p 377G) expressed the opinion obiter:

> "Once the duty of care is held to exist and the defendants' negligence is proved, the plaintiff only has to show that by reason of that negligence he has lost a reasonable chance of employment (which would have to be evaluated) and has thereby sustained loss: McGregor on Damages 14th ed. (1980), pp. 198 202, paras. 276 278 and Chaplin v. Hicks [1911] 2 KB 786 …. He does not have to prove that, but for the negligent reference, Scottish Amicable would have employed him,."

I respectfully agree with that statement of the law.

… [I]n Davies v. Taylor … the plaintiff sued under the Fatal Accidents Acts in respect of her husband's death. … The trial judge rejected the plaintiff's claim on the grounds that she had failed to discharge the onus of proof

which was upon her of showing on balance of probability that she had an expectation of dependency. The House of Lords held that the judge had applied the wrong test, but nevertheless upheld the decision on the ground that the plaintiff had only a speculative and not a substantial prospect of continuing dependency. In that case, the question whether or not the plaintiff had such a prospect depended not only on the conduct of the plaintiff, but also that of the deceased. At p 213A Lord Reid said

> "But here we are not and could not be seeking a decision that the wife would or that she would not have returned to her husband. You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All that you can do is to evaluate the chance. Sometimes it is virtually 100 per cent: sometimes virtually nil. But often it is somewhere in between. And if it is somewhere in between I do not see much difference between a probability of 51 per cent and a probability of 49 per cent."

And at D he said:

> "If the balance of probability were the proper test what is to happen in the two cases which I have supposed of a 60 per cent and a 40 per cent probability. The 40 per cent case will get nothing but what about the 60 per cent case. Is it to get a full award on the basis that it has been proved that the wife would have returned to her husband? That would be the logical result. I can see no ground at all for saying that the 40 per cent case fails altogether but the 60 per cent case gets 100 per cent. But it would be almost absurd to say that the 40 per cent case gets nothing while the 60 per cent case award is scaled down to that proportion of what the award would have been if the spouses had been living together. That would be applying two different rules to the two cases. So I reject the balance of probability in this case."

In that case the Court was not concerned to distinguish between causation and quantification of loss. But, in my judgment, 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.

All that the Plaintiffs had to show on causation on this aspect of the case is that there was a substantial chance that they would have been successful in negotiating total or partial (by means of a capped liability) protection. In his findings … the Judge went further than this and consequently further than he need have done, because he held that as a matter of probability the Plaintiffs would have succeeded in negotiating one of the alternative solutions. The problem about this is that there may be further evidence at

the quantum hearing … in my opinion Mr Moxon Browne QC was correct to accept that the Judge is free on the quantum hearing to assess the chance of successful negotiation as greater or less than 50% in the light of any further evidence, and is not bound to hold that it was greater than 50%.

… as I have indicated in his findings …, he went further than he need have done for the purpose of finding negligence and causation. Some amendment to these findings is necessary. The Judge should feel free to reconsider the degree of probability of the negotiations having a successful outcome in the light of the points to which I have referred and any further evidence. The assessment of this chance will lie between that which just qualifies as a substantial chance and a near certainty, … The assessment is complicated by the fact that one of the possible outcomes would have been only partial protection by means of a capped liability. In as much as the Judge is assessing the chance of success, the alternative is of course failure, namely that in spite of attempts to renegotiate the Plaintiffs would not have succeeded and would have gone ahead at the same price and on the same terms."

197. Alongside the citation, included in the passage above, from Lord Reid in Davies v Taylor it is useful to include this passage from Lord Diplock at 176 in Mallett v McMonagle [1970] AC 166:

"The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards."

198. Then in Morris-Garner v One Step [2018] 1 AC 649; [2018] UKSC 20 Lord Reed (with whom Lady Hale, Lord Wilson and Lord Carnwath agreed) said:

"37. The quantification of economic loss is often relatively straightforward. There are, however, cases in which its precise measurement is inherently impossible. As Toulson LJ observed in Parabola Investments Ltd v Browallia Cal Ltd (formerly Union Cal Ltd) [2010] EWCA Civ 486; [2011] QB 477, para 22:

"Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have

happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss."

38. An example relevant to the present case is the situation where a breach of contract affects the operation of a business. The court will have to select the method of measuring the loss which is the most apt in the circumstances to secure that the claimant is compensated for the loss which it has sustained. It may, for example, estimate the effect of the breach on the value of the business, or the effect on its profits, or the resultant management costs, or the loss of goodwill: see Chitty on Contracts, 32nd ed (2015), paras 26-172 - 26-174. The assessment of damages in such circumstances often involves what Lord Shaw described in Watson, Laidlaw at pp 29-30 as "the exercise of a sound imagination and the practice of the broad axe".

199. Parabola Investments itself [2011] 1 QB 477; [2010] EWCA Civ 486 (Toulson LJ, with whom Mummery and Rimer LJJ agreed) is cited further in the decision in Vasiliou (above) with which I began this section of this judgment using two brief phrases from the judgment of Patten LJ. It is valuable to return to the text of Vasiliou in greater detail, including to see those brief phrases in their full intended context but also the key passages from Parabola.

200. Patten LJ (with whom Ward and Black LJJ agreed), later cited with approval by Floyd LJ in Wellesley Partners LLP v Withers [2016] Ch 529, said this:

"20. The general rule is that the claimant must prove that the defendant's breach caused the loss which he seeks to recover by way of damages. That must be proved on the balance of probabilities. When that is done the loss is recoverable in full subject only to questions of mitigation or remoteness. In some cases, however, where the claimant's ability to have made the profit which it claims depends on the actions of unrelated third parties, there may be room for arguing that the court should approach the issue of causation by taking into account the chances of those events having occurred.

21. In the classic loss of a chance case the most that the claimant can ever say is that what he (or she) has lost is the opportunity to achieve success (e.g.) in a competition (Chaplin v Hicks … or in litigation (Kitchen v Royal Air Forces Association [1958] 1 WLR 563). The loss is by definition no more than the loss of a chance and, once it is established that the breach has deprived the claimant of that chance, the damage has to be assessed in percentage terms by reference to the chances of success. But there will be other loss of chance cases where the recoverability of the alleged loss depends upon the actions of a third party whose conduct is a critical link in the chain of causation. The decision of this court in Allied Maples … has established that causal issues of that kind can be determined on the basis that there was a real and substantial chance that the relevant event would have come about.

22. To that extent the Allied Maples approach may assist a claimant by providing an alternative way of putting his case on damage which avoids

the possibility of total failure inherent in the judge being asked to decide whether, on the balance of probabilities, the causal event would have occurred. But caution needs to be exercised in identifying the contingency which is said to represent the lost chance. The loss of a chance doctrine is primarily directed to issues of causation and needs to be distinguished from the evaluation of factors which go only to quantum.

23. So in the first claim the respondent's case on causation was straightforward. The appellant's breach of covenant had made the operation of the restaurant a legal impossibility. As a result, it did not trade. There was therefore no doubt at all that the breach had caused the loss subject only to the quantification of that loss. The issues raised about the respondent's competence and the restaurant's prospects of success were not matters that went to causation at all. They were relevant at most to the assessment of how profitable (or not) the restaurant would have been had it been able to operate. If it would have been a commercial failure Mr Vasiliou could have received no more than nominal damages for the breach.

24. Judge Levy, in the passages I have quoted from his judgment, found as a fact that Zorbas would have been a successful restaurant and therefore assessed its lost profits on that basis. His analysis of the variable factors I have outlined which formed the agreed components of that calculation involved taking into account the time needed to establish a reputation and other everyday contingencies but did not involve a more general discount of the kind described in Allied Maples to take account of the statistical possibility of failure. That was excluded by his finding that the restaurant would have been a success.

25. Where the quantification of loss depends upon an assessment of events which did not happen the judge is left to assess the chances of the alternative scenario he is presented with. This has nothing to do with loss of chance as such. It is simply the judge making a realistic and reasoned assessment of a variety of circumstances in order to determine what the level of loss has been. This process was described by Toulson LJ in Parabola Investments Ltd v Browallia Cal Ltd & Others [2010] EWCA Civ 486 …

> "[22] There is a central flaw in the Appellants' submissions. Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the Defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a Claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss.
>
> [23] The Claimant has first to establish an actionable head of loss. This may in some circumstances consist of the loss of a chance, for example, Chaplin v Hicks [1911] 2 KB 786; 80 LJKB 1292, [1911-

13] All ER Rep 224 and Allied Maples … , but we are not concerned with that situation in the present case, because the judge found that, but for Mr Bomford's fraud, on a balance of probability Tangent would have traded profitably at stage 1, and would have traded more profitably with a larger fund at stage 2. The next task is to quantify the loss. Where that involves a hypothetical exercise, the court does not apply the same balance of probability approach as it would to the proof of past facts. Rather, it estimates the loss by making the best attempt it can to evaluate the chances, great or small (unless those chances amount to no more than remote speculation), taking all significant factors into account. (See Davis v Taylor [1974] AC 207, 212, [1972] 3 All ER 836, [1972] 3 WLR 801 (Lord Reid) and Gregg v Scott, [2005] 2 AC 176 para 17, [2005] 4 All ER 812 (Lord Nicholls) and paras 67-69 (Lord Hoffmann)).

[24] The Appellants' submission, for example, that "the case that a specific amount of profits would have been earned in stage 1 was unproven" is therefore misdirected. It is true that by the nature of things the judge could not find as a fact that the amount of lost profits at stage 1 was more likely than not to have been the specific figure which he awarded, but that is not to the point. The judge had to make a reasonable assessment and different judges might come to different assessments without being unreasonable. An appellate court will therefore be slow to interfere with the judge's assessment. As Lord Wright said in Davis v Powell Duffryn Associated Collieries Ltd [1942] AC 601, 616-617, [1942] 1 All ER 657, 111 LJKB 418:

> "An appellate court is always reluctant to interfere with a finding of a trial judge on any question of fact, but it is particularly reluctant to interfere with a finding on damages which differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate. No doubt, this statement is truer in respect of some cases than of others . . . . It is difficult to lay down any precise rule which will cover all cases, but . . . the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered.""

26. In the assessment proceedings in the first claim Judge Levy reached a view about the prospects of success for the restaurant and then proceeded to carry out this sort of exercise in relation to the issues about cover turns and increases in profitability. As Toulson LJ, I think, makes clear, that process is not the kind of exercise contemplated as the second stage in Allied Maples and does not require a discount to be made for the possibility of failure which, on the judge's own findings, was non-existent.

27. This is, I think, made clear in the judgment of Sir Anthony Clarke MR in Owners of the Ship "Front Ace" v Owners of the "Vicky 1" [2008] EWCA Civ 101 where he said this:

> "[72] There are many cases in which courts or arbitrators have to determine what rate of profit would have been earned but for a tort or breach of contract. As I see it, in a case of this kind, where the court has held that the vessel would have been profitably engaged during the relevant period, where there is a relevant market and where the court can and does make a finding as to the profit that would probably have been made (and has been lost), there is no place for a discount from that figure to reflect the chance that the vessel would not have been employed.
>
> [73] It has not in my experience been suggested in the past that any such discount should be made. This situation is to be contrasted with a case in which it is not shown that the vessel would have been profitably employed but she might have been. It may be that in those circumstances it would be possible to approach the problem as a loss of a chance. However, I would not wish to express a firm view on that question in this case, where it does not arise on the facts. Here, given the exercise carried out by the experts and given the figure agreed by them, there is in my opinion no warrant for a reduction of 20%, either to reflect a risk that the vessel would not have been employed or for contingencies to reflect that the figure agreed might not be accurate."

28.The task of the judge is to decide what profit could have been made. Once he does this any further discount is inappropriate. Judge Levy decided that he was assessing the profits of a successful restaurant. The only issue was how successful.".

201. But making profits rather than losses depends on many things including what third parties (for example, customers) would or would not do. Nugee J at first instance in <u>Wellesley</u> observed as follows ([2014] EWHC 556 (Ch) at [188]):

> "… The profitability of the restaurant in Vasiliou presumably depended on whether it would have attracted sufficient custom, or in other words whether a number of third parties would have chosen to come to Mr Vasiliou's restaurant; and this does not seem very different in kind, only in degree, from the question in Allied Maples which was whether the third party in question would have chosen to accede to Allied Maples' request for a particular contractual term. It may be that the difference is between one particular third party and a pool of potential customers; in the case of an individual third party, the Court must assess the chance of his acting in a particular way, but in the case of a pool of potential customers, the Court is not concerned with how any individual would have behaved but with whether there would have been sufficient custom generally to make the business a success.

> … Be that as it may, it is clear from Parabola and Vasiliou that if the Court finds that trading would have been profitable, it then makes the best attempt it can to quantify the loss of profits taking into account all the various contingencies which affect this: see Parabola at [23]. This neither requires any particular matter to be proved on the balance of probabilities (see Parabola at [24]) nor has anything to do with the loss of a chance as such (see Vasiliou at [25]). The assessment of the loss will itself include an evaluation of all the chances, great or small, involved in the trading (see Parabola at [23]). Once the judge has assessed the profits in this way, any further discount is therefore inappropriate (see Vasiliou at [28]).".”

202. The major judgment of Bryan J at first instance in Assetco plc v Grant Thornton LLP [2019] Bus LR 2291; [2019] EWHC 150 (Comm) was also cited by both parties. The case went to appeal (below), but the judgment at first instance contains valuable citation, including from many of the authorities above and others, and valuable observation on many points. I draw on it later in this judgment.

203. But I move on now to mention three further authorities selected by one or both of the parties as useful illustrations in the context of the present case. On balance I do not think they take things much further in terms of principle, but that is not why they were selected. The first two of the three authorities, were understandably selected because they involved breach of confidence. Mr Andrew Twigger QC drew attention to the application of “loss of a chance principles” in them. All three cases do show same practical working out in particular cases, although cases less involved than the present.

204. The first was SBJ Stephenson Ltd v Mandy [2000] FSR 286 where a duty of confidence had been agreed by contract:

> “The active issues on the amount of damages properly to be awarded to SBJ in the light of the findings which I have already made were, firstly, the amount to be deducted from SBJ's gross loss of 1999 commission and brokerage fees in respect of the eight clients in order to reach its net, claimable loss; secondly, the amount, if any, to be awarded for future loss of commission and fees in respect of renewal business in respect of the eight clients which is likely to be or may be lost by reason of the breaches of contract committed by Mr Mandy; thirdly, the amount of damages, if any, to be awarded for the possible loss of other clients of SBJ through Mr Mandy's breach of contract; and finally, the amount of any damages for lost management time, and loss of good-will or reputation, and lost business due to reallocation of staff.
>
> …
>
> The assessment of future losses after 1999 in respect of the eight lost clients is more difficult. They have been lost as a result of Mr Mandy's breaches of contract. It seems to me unlikely that SBJ will win them back, unless the result of this case drives Mr Mandy out of Amilcroft and broking in the area, which it would be speculative to propose. All the eight had been

clients of SBJ for some years; many years - up to seventeen - in some cases. So they no doubt had a loyalty to SBJ. On the other hand their departure to Amilcroft demonstrated a stronger tie to Mr Mandy personally. That would have been weakened by his year on the touchline had he not broken his covenants. But it is unlikely that it would have disappeared by 4 January 2000 when he would be free to solicit custom for the second year's renewals and it would be more difficult to prove that he was using protected information when so doing. Mr Mandy's neighbour, Mr White of Lifting Equipment, would probably have followed Mr Mandy as soon as he could. But even that is impossible to judge with certainty, and it is impossible to judge with any confidence whether the others would have stayed with SBJ or moved to Amilcroft, or wherever else Mr Mandy was by the year 2000. The clients might have left SBJ for some other reason altogether, although that is unlikely. A detailed examination of each case would be unrewarding of the effort involved, in my view.

In these circumstances it was agreed that I could only judge the question of damages for loss of income from the eight clients, after 1999, as a loss of chance case, applying the guidance given in Allied Maples …. Performing that exercise, I take the view that Mr Mandy's overtures in 2000 would probably have drawn most of the eight clients away from SBJ, but that there was a real or substantial, rather than a speculative, chance that a significant minority would have stayed with SBJ, and then stayed for many more years, had Mr Mandy not drawn them away at the first opportunity in breach of his contract.

Painting with a very broad brush, I value the loss of that chance, caused by Mr Mandy's breach of contract, at £45,000, which is an approximation to one third of the lost net commission and fees for a multiplier of three years, and only coincidentally to one year's loss of the whole commission and fees from all the lost clients. That figure is calculated to take account of any acceleration in receipt of the award compared with loss of commission and fees.

I am not persuaded that SBJ's prospects of retaining other clients than the eight who have already been lost, have been significantly damaged by Mr Mandy's breaches of contract. I am not persuaded that those breaches have caused lost management time, loss of goodwill or reputation or lost business due to reallocation of staff, in a way which is quantifiable as damages suffered by a large, busy concern like SBJ. I make no award of damages under those heads"

205. The second authority referred to by Mr Twigger QC was Také Ltd v BSM Marketing Ltd [2007] EWHC 3513 (QB) in the Court of Appeal. In this case the duty of confidence was a fiduciary duty owed by an agent:

"This is a defendant's appeal on quantum of damages from a decision dated 30 October 2007 of His Honour Judge Toulmin CMG, QC, sitting as a Judge of the High Court. By that decision the claimant obtained judgment for £144,871.54 inclusive of interest. The judge had on 12 April 2006

found the defendant liable in damages for breach of fiduciary duty to the claimant and for breach of its duty not to misuse confidential information obtained during the period for which it acted as an agent for the claimant.

The claimant is a company which specialises in the importation, wholesaling and design of high and medium quality furniture, especially (though not exclusively) beds. It imports furniture from China and south east Asia and then supplies it to various retailers in this country. The judge had found that, as a result of the defendant's breaches of duty, an existing customer of the claimant, Dreams, placed no order with the claimant from 30 June 2005. There was also a finding of liability in respect of a prospective customer, Argos, and part of the award of damages related to that.

…

The legal basis on which the assessment of damages should be made was not in issue below, namely as the loss of a chance of further orders. That required not merely an assessment of the chance but also an assessment of the profit which the claimant would have made, had the chance materialised. In the case of the prospective orders from Dreams, this exercise was made up of two elements: first, loss of profits in respect of the existing range of products, and secondly, loss of profits in respect of a range of new products. It is necessary to deal with the issue under each of those two headings.

For the claimant, Mr Sinai emphasises that the judge had already found earlier in his judgment that there had been a strong trading relationship between the claimant and Dreams, that there was a substantial chance that the claimant would have received orders for new products and that these would not have been only in replacement of orders for older products. No material was put forward by the defendant to support any lower figure than that supplied to the accountant as an estimate.

With some hesitation, I have concluded that the judge was entitled to accept this estimate, supported as it was by the claimant's managing director, Mr Sadaghiani. It is an estimate which has to be seen in the context of the judge's assessment of the chance of the claimant having sold these new products to Dreams, had it not been for the defendant's breaches of duty. The judge expressly took a cautious figure for the chance of new orders, putting it at only 25%, as compared to 80% in respect of orders for existing products. One suspects that that figure of 25% was relatively low because the judge was prepared to take the claimant's relatively high figure for the volume of such sales. In any event, he had no other estimate put before him. I therefore would reject this ground of appeal."

206. As the third of the three authorities, both parties claimed support from Nicholas Prestige Homes v Neal [2010] EWCA Civ 1552. In this decision the Court of Appeal (Ward, Patten and Black LJJ) decided that breach of an agreement to give an estate agent a period of exclusivity to sell a house gave rise to damages

for loss of a chance. It is right to note that neither side was represented before the Court of Appeal, and the Court cited no authority.

207. The Court approached causation on a balance of probabilities, of whether the estate agent had and lost a chance to sell a house. The chance was then evaluated as a matter of damages. Ward LJ said:

> "But for the breach it seems to me plain on a balance of probabilities that Nicholas Prestige Homes would have had a chance of selling the property themselves … the eventual purchaser did go through with the purchase, and therefore it seems to me on a balance of probabilities that the breach caused the loss of the chance for Nicholas Prestige Homes to sell the home.
>
> The next question therefore is: what damages flow from the loss of that chance? We have to evaluate whether that chance is purely speculative or whether it is real and substantial. In the events as they happened, given the purchasers' attraction to the property, which was unwavering from the point of their being introduced to it to their concluding the sale, it must be that this was a real chance, a substantial chance, which was lost by reason of the breach.
>
> …. In the result, it seems to me that this was a certain chance and that no discount should be afforded for the imponderables involved in any case involving the assessment of chances.
>
> In those circumstances, it seems to me to follow that the claimants lost the chance of earning the whole of their commission, they are entitled to damages accordingly, and I therefore would allow the appeal and enter judgment for the claimants in the sum of [the whole amount of the agreed commission]."

"The Object of the Duty"

208. L&G argued that the loss of a chance:

> "… may, in itself, constitute a recoverable head of loss only if the object of the duty that was breached is the provision of the chance".

Whilst I acknowledge and respect the presence of debate over the question whether this is a requirement, the present case is perhaps not one that assists the debate.

209. The context and terms of the Bugsby/L&G Exclusivity Agreement are such that an "object of the duty" requirement would readily be satisfied. I have set out the terms of Clauses 7 and 8 of the Bugsby/ L&G Exclusivity Agreement earlier in this judgment.

210. Mr Orlando Gledhill QC (who appeared with Mr Mehdi Baiou and Mr KV Krishnaprasad) said in his oral closing:

"… the object of the duties that L&G has breached, the object was not to provide Bugsby with the chance to acquire Olympia or to earn fees from acquiring Olympia. The object of the duty was to protect Bugsby's confidential information."

211. Mr Gledhill QC refers to references throughout to confidentiality, including to the purpose:

"… to protect the confidentiality of ceryian confidential information of Bugsby and its affiliates to be disclosed to [L&G] solely for use in the evaluation of [L&G] as a potential … lender and/or provider of finance to Bugsby in the acquisition of [Olympia]".

212. But these references are not alone, and accepting that the agreement must be read as a whole and in context, the fact remains that the parties also contracted for exclusivity and in terms of Clauses 7 and 8. In fact the most relevant object of the duty for present purposes was to protect Bugbsy from L&G negotiating with other possible competitors to Bugsby for the acquisition of Olympia.

213. Mr Gedhill QC says that the object of clauses 7 and 8 is "not to prevent L&G from providing finance to third parties" but:

"[i]nstead the focus of these provisions is on ensuring the L&G did not conduct discussions with third parties that might result in the (unwitting) disclosure of Bugsby's confidential information and also on Bugsby having control over the flow of information to and from L&G in relation to the transaction".

214. However, it is accepted that the clauses precluded L&G from providing finance to other parties. I have no doubt that was part of their purpose and object and not simply, as L&G put it, "a collateral consequence of … protection of Bugsby's confidential information". Asked at the time whether this was so, the parties' answer - assessed objectively - would be obvious.

215. Mr Gledhill QC cited the decision of Toulson J in <u>Fyffes Group Limited and Others v Templeman and Others</u> [2000] 2 Lloyd's Rep 643; [2000] EWHC 224 (Comm). Dealing with a claim for damages for loss of a chance where the duty breached was the duty not to take bribes, Toulson J said:

"<u>Loss of a chance</u>

Mr Howard submitted that by agreeing to Mr Templeman's request for secret commission Seatrade deprived Fyffes of the opportunity of negotiating through an honest and prudent negotiator; and that if, in relation to any particular aspect of the service agreement and its addenda about which they complained, Fyffes failed to establish that an honest and prudent negotiator would probably have negotiated a more favourable agreement, they are entitled to damages reflecting the value of their lost chance that he would have done so. Mr Jones submitted that if Seatrade failed to establish as a matter of probability that any particular clause was objectionable by the standard to be expected of an honest and prudent negotiator, Fyffes

would have failed to establish any loss under that head and that it would be wrong in those circumstances to award them damages under the head of loss of a chance.

The subject of damages for loss of a chance can give rise to vexed questions, and so it is important to start from first principles.

On any question of damages the fundamental principle is that the object of the law is to put the injured party in the same position as he would have been in but for the wrong. As Denning J put it in Duke of Westminster v Swinton [1948] 1 KB 524, 534:

> "The real question in each case is: What damage has the plaintiff really suffered from the breach?"

In approaching that question there is an important distinction between identification and measurement of the wrong (injury) done to the claimant - or, to use legal terms, between causation of loss and quantification of loss. The distinction is easy to see in theory, but drawing the boundary line can be difficult in practice because questions of causation and quantum can be closely entwined.

Causation of a head of loss must be established on a balance of probabilities. Quantification of a head of loss may involve an assessment of all shades of risks and possibilities. If after a road accident an injured person develops epilepsy, which impairs his job prospects, it is for him to establish on a balance of probabilities that the epilepsy was caused by the accident. If he succeeds, in assessing his pecuniary loss the court will have to take into account his prospects of promotion, any risk of redundancy and all other factors which might materially have affected his future employment prospects. In that sense quantification of damages often involves assessment of a loss of a chance.

However, there is a separate sense in which the expression is also used, and it is important not to confuse them. As I have said, causation of a head of loss has to be established on the balance of probabilities. But there are cases where the courts have recognised a loss of a chance as a form of head of loss in itself. In those cases causation is established by showing on the balance of probabilities that the claimant has lost a chance of some real value. The lost chance may be of securing a benefit (eg a prize in a beauty competition, as in Chaplin v Hicks … or of avoiding a liability (eg under the terms of a lease, as in Allied Maples Group Ltd v Simmons and Simmons ….

In Allied Maples … the Court of Appeal rejected a submission that a loss of a chance could only constitute a head of loss where the claimant lost a valuable right or chose in action. A loss of a chance may constitute an identifiable head of loss where the provision of the chance was the object of the duty which has been breached; for in such a case the deprivation of that chance is the essence of the wrong. Thus in Chaplin v Hicks the wrong consisted of failing to give the plaintiff a fair opportunity of succeeding in

the competition. In the solicitors' negligence cases (such as Hall v Meyrick [1957] 2 QB 455, Cook v Swinfen [1967] 1 WLR 457, Kitchen v Royal Air Force Association [1958] 1 WLR 563 and Allied Maples …) the essence of the breach of duty was that it deprived the client of a chance of securing a benefit or avoiding a liability which it was within the object of the retainer to secure or avoid. Richardson v Mellish (1824) 2 Bing 229 and Davies v Taylor [1974] AC 207, often cited as loss of a chance cases, were concerned with questions of quantification rather than causation of loss. The former concerned the extent of the plaintiff's loss of earnings resulting from the defendant's breach of contract and the latter concerned the value of a widow's dependency on her deceased husband for the purposes of her claim under Fatal Accidents Acts.

In the present case the essence of Fyffes' claim against Seatrade for damages is that they were defrauded by being overcharged for Seatrade's services as a result of the corrupt relationship between Seatrade and Mr Templeman, an allegation which the parties agreed should be tested by reference to the hypothetical honest and prudent negotiator. If they have failed to establish as a matter of probability that they overpaid Seatrade in a particular respect, in my view they have failed in that respect to establish causation of a head of loss, with the result that no question of quantification arises, and I reject their alternative claim for damages for loss of a chance.

If I had reached the opposite conclusion, it would have been necessary to apply it consistently. The reason for recognising a loss of a chance in certain circumstances as a head of loss is not to provide a fall back for a claimant who fails to provide his primary case, but because there are circumstances in which deprivation of a chance is the essence of the wrong. If in the present case it were right to regard Fyffes' ground of action not as being that they overpaid Seatrade in consequence of the corrupt relationship between Seatrade and Mr Templeman (which is their real complaint), but that Seatrade wrongfully caused them the loss of a chance to obtain a benefit through an honest and prudent negotiator (which is to confuse the substance of the claim with the mechanism for determining it), each part of the claim would have to be approached on that basis. Taking the bunker clause as an example, where I have found for Fyffes in the amount claimed by concluding that as a matter of probability an honest and prudent negotiator for Fyffes would not have agreed to the revised clause proposed by Seatrade, on a loss of a chance approach it would have been necessary to discount the sum claimed to allow for the possibility of a different outcome."

216. Respectfully to the argument of Mr Gledhill QC, I see nothing in these passages that detract from the answer given in this section of this judgment. Touslon J spoke of the situation in which " a loss of a chance may constitute an identifiable head of loss where the provision of the chance was the object of the duty which has been breached". To the extent necessary that requirement is satisfied by the contractual duty with which this case is concerned, and has been advanced as such by Bugsby.

217. Cases of breach of statutory duty (as in Britned Development Ltd v ABB AB [2019] Bus LR 718) were also cited, but these have their own context and again do not meet the answer given in this case.

Causation and quantification in the present case

218. The present case is not one where L&G's breach of contract was by its omitting to do something. The breach of contract comprised positive acts by L&G to assist Yoo. That is the area of historic fact.

219. For the limited period from 22 December 2016 to 28 February 2017, Bugsby was unable to bid because there was the period of exclusivity granted to Yoo by CapCo under the Yoo/Capco Exclusivity Agreement. But that period of exclusivity was underway before L&G was first involved with Yoo on 18 January 2017, that is before any breach of its contract with Bugsby. Then from 28 February 2017, when Yoo no longer enjoyed exclusivity, Bugsby was free to continue to prepare, make and maintain its bid right up to the point when Yoo succeeded. So Bugsby still could bid, and in fact did. It was not altogether excluded from the competition.

220. Thus by assisting Yoo, L&G did not cause Bugsby to be unable to bid, but it may have reduced Bugsby's chance to succeed with its bid, and always recognising that a bid is itself (only) a chance to succeed. But even here Bugsby has to meet L&G's contention that Bugsby's bid had no chance of succeeding in the first place, even without L&G's assisting Yoo. According to L&G, CapCo was not prepared to sell to Bugsby and Bugsby was unable to finance its bid. And if Bugsby did have a chance of success, still, says L&G, that chance of success was not reduced if Yoo was still able to finance its bid from sources other than L&G, and in time.

221. Time is important, to the case of either party for causation as well as quantification of loss, because the competition for Olympia was not on a fixed date and allowed a race without in practice (and despite attempts) a fixed date as its finishing line. Further, in a case like the present there is a major spectrum of variables, including the chance of Bugsby achieving an acquisition of Olympia and on what terms (both of the deal and to resource and achieve the deal), the chance of Olympia succeeding and how and in what way and for how long, the chance of successful involvement in a successful Olympia leading to further rewards. Within any alternative scenario or counterfactual there are many steps in a case like the present. Some would be steps by Bugsby, and some by third parties. One step will affect the next. Each may alter some part of the commercial picture: for example, the level of interest on a loan or the terms of return on capital, or the time and cost required. The contributions to each chance may combine the actions and decisions of the claimant, of specific others, of customers and the public, of markets, and – also relevant here – of world-changing events like the pandemic. Materially, one event, or the timing or sequencing of one event, may cause or affect another. With a commercial venture as large and individual as Olympia these realities are in full flow.

222. The present case is nonetheless at heart one of the "many" referred to by Stuart Smith LJ where "the plaintiff's loss depends on the hypothetical action of a third party [in fact, third parties], either in addition to action by the plaintiff … or independently of it". In such a case, the claimant will succeed "… provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages". On the authorities, including and as summarised in Allied Maples (above), Bugsby:

> "must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If [Bugsby] 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"

223. There is some parallel in Spring v. Guardian Assurance plc (above) where the positive act was provision of the bad reference for the claimant ex employee and the defendant's case was that the third party would not have employed him anyway. Stuart Smith LJ in Allied Maples agreed with Lord Lowry that the claimant only had to show that by reason of that negligence he has lost a reasonable chance of employment (which would have to be evaluated) and had thereby sustained loss; "He does not have to prove that, but for the negligent reference, Scottish Amicable would have employed him."

Approach

224. As I embark on the balance of this judgment, I propose to take the following approach:

(1) I keep in mind throughout that the Court's task is to reach an overall judgment that does justice to the case, having understood the detail but also having stood back to see the wood from the trees. Decisions of the highest authority signal the importance of clarity, common-sense, practicality and realism: see Perry, Davies, Mallett and Morris-Garner (above).

(2) Where, as here, there has been a trial addressing both causation and quantification of loss, and the evidence advanced by the parties on both is complete, I do not consider it wrong to take causation and quantification together; that is, to deal at the same time both with the question of whether chances were real and substantial and with the question of the evaluation of the chances.

(3) I propose to treat all key stages, up to and including the stage that would contend success with Olympia leads to the establishment of property investment funds, as stages involving questions both of causation and quantification.

(4) Where the case reaches quantification, I keep in mind that there is not a single "correct" figure. The parties are instead entitled to a judicially

determined figure, reached in accordance with principle and after consideration of the circumstances of the case. Although Judges will strive for consistency and predictability, that can only realistically produce a figure within a range.

(5) In a complex case like the present, although I do break down key elements or stages, I do not consider it wrong to resist laying out an intricate single sequence of possible steps, with a percentage or combination of percentages at every step, and multiplying percentages throughout. The appearance of precision would be artificial. The many percentages in a case like this would often overlap, be affected by similar considerations, or be interdependent rather than independent (see Hanif v Middleweekes [2000] Lloyd's Rep PN 920, and Section G.2.5 (para 418 to 449) of Bryan J's judgment in Assetco (above) and the authorities there reviewed).

Release by Bugsby of L&G's obligations

225. For completeness I should record that, in the present case, there is no possibility that Bugsby would have agreed to release L&G from their obligations, even for a price.

226. The same would not necessarily be so in all cases. But here Bugsby wanted Olympia. Releasing L&G from their obligations would simply undermine Bugsby's commercial objective, and in practice that was not an outcome that Bugsby would have been interested to assist or sell.

CapCo's preparedness to sell to Bugsby in 2017

(1) The 2016 bid by Bugsby

227. CapCo had had enough confidence in Bugsby's first bid in early 2016 to enter into the Bugsby/CapCo Exclusivity Agreement. I am not persuaded by L&G's suggestion that the fact that that bid did not develop to an acquisition was held against Bugsby by CapCo. It was suggested to Mr Marcus in cross-examination that CapCo considered that Bugsby was unreliable following the withdrawal of its first bid. However, I accept his evidence that in meetings with CapCo they had told him that they did not have any negative views of Bugsby as a result of the withdrawal of its first bid.

228. And Bugsby was not alone. As it points out, both expert evidence and contemporary press reports indicate that withdrawals of this nature were seen in the market immediately following the Brexit referendum. Mr Marcus recalls Mr Yardley saying:

> "… we did the same, mate, I don't blame you".

229. CapCo Board Minutes from 21 July 2016 record that (following the Brexit referendum):

> "It was now envisaged that Olympia would be retained in the short term, but the longer term aim was to secure a sale."

The Minutes from the audit committee of the same day record:

> "Olympia[:] The recent offers to acquire the Venues business were noted at approximately £300m. As at the valuation date there were no factors which would warrant a change to this value. It was anticipated that there would be downward pressure on this valuation at the year-end if the business has not been sold."

230. By 1 December 2016, CapCo's overall financial position as recorded in its Chief Executive's Report of that date was stated in these terms:

> "… there is insufficient capital to undertake significant new activities and consideration should be given to sourcing partner capital or asset disposal. Opportunities to release value will be considered including a [redacted] disposal of Olympia".

CapCo also made statements that:

> "… price and net proceeds, together with speed and certainty of execution will be the key drivers of any favourable decision by the [CapCo] Board."

231. CapCo was not without other options, but it reasoned:

> "If we take the view we have pushed Olympia's value as far as we can (not an unreasonable assumption and any profit that may be left is nothing compared to what we have already captured), we are executing our strategy in disposing of non-core assets to focus on our core assets and… [I] think there is a strong argument to sell now for the price tabled…".

(2) CapCo's perspective on Bugsby and on Yoo

232. L&G contended that:

> "The Yoo Consortium was, compared to Bugsby/HNA, by far the more reputable, reliable and desirable counterparty".

233. The evidence did not persuade me that Yoo or Bugsby was more or less reputable or reliable than the other. At one point L&G referred to Yoo and DFI in an internal report as "relatively small players in the real estate segment", but it would not have been more generous in its assessment of Bugsby.

234. In my judgment, to CapCo each was a desirable counterparty to a contract to sell Olympia, especially when account is taken of others supporting and working with each. CapCo saw value in competition between Yoo and Bugsby,

and saw each as leading a credible proposition. In CapCo's eyes, as was the case, neither Bugsby nor Yoo was substantial, but that did not mean either lacked credibility.

235. Mr Idenburg, a former CEO of the owner of Excel London was positive about Mr Marcus. I can see why. He had energy, commitment and access to expertise.

236. Mr Marcus described contact with CapCo in July and September 2016 and an in-person meeting in October. True, of a December 2016 meeting an email says:

> "I heard the Bugsby meeting was not as positive as we would have liked."

However there is no indication that this was seen as Bugsby's fault.

237. It was suggested to Mr Marcus in cross-examination that CapCo neglected to provide updated figures in December 2016 and that this indicated a lack of interest in the Bugsby bid. I do not think that inference is borne out by what was a brief episode.

(3) The Yoo/CapCo Exclusivity Agreement

238. It was suggested by L&G that the provision of an exclusivity agreement by CapCo to Yoo in December 2016 meant that CapCo had a "clear preference" for Yoo at that stage (which is before L&G became involved for Yoo). Mr Marcus was realistic to accept the existence of a preference, but gave convincing evidence to the effect that this preference was "transitory". Subsequent events bear that out.

239. Yoo's success in obtaining exclusivity in December 2016 was for the practical reason of assisting with a swift sale. Before the grant of a period of exclusivity to CapCo, an internal email chain within Yoo indicates that it was Bugsby's interest which meant that CapCo was:

> "… not keen on an extended period of exclusivity [with Yoo] so think we should push on accelerated signing and (rolling) short exclusivity periods with milestones".

240. On 24 December 2016 Mr O'Beirne of CapCo wrote that he was:

> "… positive [Yoo] will do a deal but not convinced about Bugsby",

but he went on to include the point that:

> "Assuming Bugsby knows our current exclusivity position they should still be there at the end of January should we decide to end exclusivity with Yoo…".

241. When declining to extend Yoo's exclusivity beyond the end of February 2017, Mr Yardley explained that the reason was:

"… in order to accommodate the potential HNA interest [ie Bugsby]",

whilst making clear that

> "… granting an alternative exclusivity to [Bugsby], was equally not possible."

242. Even during the period of exclusivity enjoyed by Yoo, there was informal contact between CapCo and Bugsby/HNA including, at least as a matter of courtesy, the provision of a site visit to senior HNA executives. Once the exclusivity period came to an end CapCo engaged formally with Bugsby/HNA. Bugsby/HNA was offered a lockout agreement.

243. In cross-examination, Mr Marcus was taken to various emails in which he expressed concerns about Bugsby being used as a "stalking horse". He candidly accepted that this was a concern but said that his concerns were assuaged by CapCo and by UBS. A paper from Mr Yardley to the CapCo board makes clear that Bugsby would not just provide competitive tension but also "potential flexibility to undertake a transaction with them".

244. It will be recalled that on 6 April 2017 CapCo's Board accepted a recommendation by Mr Yardley that

> "● consider, and if thought fit, approve the disposal of the Olympia Group to either the [Yoo] Consortium on the basis of the terms outlined above or, in the event that a transaction can be agreed at a higher price and on similar or better terms than the [Yoo] Consortium offer, to Bugsby /HNA (the "Disposal"); and

(4) Bugbsy and Olympia's pension trustees

245. L&G suggested to Mr Marcus in cross-examination that the Olympia pension trustees had never given "final approval" for Bugsby's bid. Again, Mr Marcus accepted that this was the case.

246. But at the time of the bid, he received positive feedback from the trustees. This he thought to be sufficient. He was mistaken in his view about sufficiency, but I see no good reason to doubt that the pension trustees would have given final approval to the Bugsby/HNA bid.

(5) CapCo and HNA

247. Mr Marcus accepted in cross-examination that CapCo had "rightly or wrongly" some concerns about dealing with a Chinese party. However, any such concerns were clearly limited. They all preceded HNA's later difficulties, addressed below.

248. CBRE wrote in an email to Bugsby on 21 March 2017 that they had:

> "… absolutely no concerns over their [HNA's] financial muscle".

Rothschild also reported to the CapCo Board on 5 April 2017 that:

> "HNA as a party provides credibility. Rothschild has had positive dealings with them in the past".

Mr Yardley wrote in an email to HNA on 7 April 2017 that CapCo had:

> "… [a] great deal of respect for what is an impressive organisation",

and that they:

> "… would welcome an opportunity to potentially do business with HNA in the future".

(6) <u>Overall</u>

249. L&G's written opening argued that it was:

> "… far from likely that CapCo would have sold Olympia to Bugsby even if [Yoo] had fallen away and left Bugsby as the sole bidder".

I disagree. I consider Bugsby's case is closer to the mark when it argues that:

> "… not only was CapCo keen to sell, it was clearly keen to sell to Bugsby/HNA if the [Yoo] bid faltered".

250. CapCo was a willing seller of Olympia. Within limits, which included the need for a proposition to be credible, its interest was in the level and achievement of the price rather than the identity of the purchaser.

251. On the balance of probability Bugsby would have done all that was required of it to the end of CapCo being prepared to sell to Bugsby. In my judgment there was a real and substantial chance that CapCo would have been prepared to sell to Bugsby.

252. When it comes to quantification, I would evaluate the chance of CapCo being prepared to sell to Bugsby as a near certainty.

Bugsby's ability to finance its bid

(1) HNA

253. Mr Liao of HNA was an impressive witness. He was clear, personally driven, with the seniority and experience to know what HNA was capable of and how to get things done. I accept Mr Liao's evidence that HNA was excited about the

opportunity and eager to move forward to complete the acquisition of Olympia with Bugsby.

254. Mr Liao was explicit that he was under great pressure from above to complete the acquisition of Olympia. Mr Liao was also clear as to HNA's ability to complete the deal quickly:

> "From the moment exclusivity was granted, I believe it would have taken HNA around 10 days to finish this process and exchange contracts and then a maximum further 30 days to complete the deal."

255. As Mr Liao says in his witness statement, and I accept:

> "I understand the Defendants say that a Bugsby/HNA acquisition would not have taken place by 1 April 2017 and they suggest it would not have taken place before 1 August 2017… . This is not correct in my view. HNA Property was very quick at closing real estate deals once agreements in principle were reached by the parties. My team closed 7 deals worth USD3.6 billion from November 2015 to May 2017 including the acquisition of 245 Park Avenue in Manhattan in May 2017 for £2.21bn, which was closed in 36 days.
>
> …
>
> If Capco had accepted our initial offers, there is no doubt that HNA would have moved very quickly. I believe the purchase could have been completed by early March 2017 and possibly earlier. HNA's letter of intent of 11 January 2017… set exchange after 10 days of exclusivity and completion at 30 days from exchange with an option to extend by 15 days. For this kind of high prestige property acquisition, the 30-day completion timeframe was typical for HNA and in my experience was almost always achieved. Therefore, if Capco had been willing to accept our offer on 11 January 2017, this would have fixed completion sometime between 20 February and 7 March 2017."

256. HNA went into print as to their timing in their offer letter of 3 April 2017. Mr Liao was clear in oral evidence that HNA were prepared to move "very fast" on the Olympia deal, and that he had a direct line of communication to the chairman for this purpose. Mr Liao said:

> "I have to get the deal, otherwise, at that time, I feel I have a very bad face to the board."

257. The work would include the agreement of the joint venture between Bugsby and HNA but the Bugsby/HNA JV Heads of Terms had advanced this, and (as further referenced below) they had been agreed within HNA (even though not agreed between HNA and Bugsby). As L&G point out, in March Mr Marcus mentioned the importance of HNA and Bugsby concluding agreement on the joint venture, but here too it is important to emphasise that HNA wanted Olympia very much: having heard Mr Liao I have no doubt it would do what needed to be done, quickly.

258. As is well known, in time the HNA Group was to face major difficulties itself. However, in the first part of 2017 things were and were seen to be very different.

259. HNA required exclusivity before starting its due diligence, but I am persuaded on the evidence from HNA, both on the documents in April 2017 and from Mr Liao, that it could if necessary achieve completion in 45 working days and could do better than that if it was crucial to do so. These types of timescale allowed very short periods for due diligence and exchange of contracts even with third party involvement (especially PwC and Ernst & Young) in the due diligence.

260. CapCo was not ready to provide exclusivity, to anyone, after the end of February 2017. It did offer a short "lock-out" to Bugsby/HNA. However, in my judgment whilst CapCo's position might cost time, it did not risk the involvement of HNA and a solution was bound to be found. In my judgment neither CapCo nor HNA would in the end allow the question of exclusivity for a very short period to stand in the way of an acquisition of Olympia.

(2) Goldman Sachs

261. As for debt finance, L&G emphasises that Bugsby pleads only Goldman Sachs as the source of acquisition debt finance that would have been available to Bugsby.

262. But the material point is that there were no issues with Goldman Sachs. Mr Marcus stated that:

> "… we were 99% certain of their lending on the deal."

He had good reason to think so.

263. Goldman Sachs had already provided initial terms (which had obtained preliminary approval from its credit committee) as early as 21 December 2016. Ms Torriani of Goldman Sachs told Mr Marcus at the time that:

> "Goldman Sachs issues term sheets for virtually all transactions in respect of which it gives an early indication of this sort; and goes on to complete '99% of the transactions for which it issues term sheets.'".

264. A draft term sheet on 10 January 2017 was substantively agreed on 15 January 2017 and put into final form on 20 February 2017. Prior to this, on 15 February 2017, Goldman Sachs had already produced a timeline to completion (which was updated on 1 and 30 March 2017). The first two of these timelines envisaged completion by early April 2017.

265. Goldman Sach's enthusiasm for the acquisition is also apparent on the evidence. On or around 24 March 2017, Mr Johannes Fritze, Head of Real Estate for EMEA at Goldman Sachs contacted CapCo to express his support for the Bugsby/HNA bid. On 30 March 2017, Goldman Sachs provided Bugsby with an unequivocal support letter for provision to CapCo,

(3) Bugsby's equity contribution

266. HNA had already conducted their own due diligence on Mr Marcus and his background.

267. Goldman Sachs too had already conducted extensive due diligence on Bugsby and Mr Marcus personally. Mr Mastrovich reported Goldman Sachs as saying they were:

> "… highly confident and 'impressed' with Bugsby's knowledge of the asset, thoroughness of due diligence and ability to assemble a team to operate and manage the asset and create value".

268. In cross-examination, L&G suggested to Mr Marcus that:

> "Your and Bugsby's credibility on Olympia, was dependent on, one, the association with Alexandria and, two, the advisory board.
>
> …
>
> Without those two things, you had very little indeed".

269. Mr Marcus did not accept this, and in my judgment he was right not to. But even if it was correct, the fact is that Bugsby did have both these (what Mr Marcus called) "significant pluses" to its bid.

270. In oral evidence Mr Liao recalled Mr Kimble of Clarion (Olympia's biggest customer and a member of the Advisory Board) had been present when HNA toured Olympia.

271. Bugsby's ability to achieve its own contribution to the purchase price was challenged by L&G. I thought there was nothing in this challenge. The contribution was small and there were multiple possible sources. In an email to UBS on 29 March 2017, Mr Marcus wrote:

> "As for the Bugsby portion, we have received indications that this would be sufficiently covered / over subscribed by the following sources:
> -personal wealth
> -fees from HNA on the deal due Bugsby
> -family wealth / my father
> -Marsiaj family
> -Borletti group
> -Saranac partners"

272. As Mr Marcus pointed out in oral evidence, UBS were very familiar with his and his family's financial position. If they had had any doubts that this was feasible, they would have said so; but they did not. There was no sign of concern from Goldman Sachs or from HNA that the acquisition would falter on account of Bugsby's ability to achieve its own contribution.

273. Here too even if Bugsby had not been able to fund its equity stake, Mr Marcus and Mr Liao were clear that HNA would have funded this initially. As Mr Liao said in his oral evidence (as Bugsby accepts, in a different context, but the point is equally applicable here):

> "… 6 million, or 7 or 8 million price difference to HNA, on the leverage side, is not so big. The difference is not so big. And the more importantly, we want to get a deal. That is the most goal."

(4) Overall

274. On the balance of probability Bugsby would have done all that was required of it to the end of achieving finance for its bid. In my judgment there was a real and substantial chance that Bugsby would have been able to finance its bid.

275. When it comes to quantification, I would evaluate the chance of Bugsby being able to finance its bid as a near certainty.

Yoo's ability to finance its bid other than with debt finance from L&G

(1) Introduction

276. Without the "important piece of the jigsaw" of debt from L&G at the necessary time, Bugsby says it is "a racing certainty" that the Yoo bid would have foundered. I respectfully disagree.

277. It may be convenient to take debt finance first, then alternatives to debt finance or debt finance alone, and then timing.

(2) Debt financing

278. This part of the financing required £150 million. To Yoo, L&G was a source of debt finance. In principle, alternative lenders of debt finance would be acceptable to Yoo because what mattered was the finance rather than the identity of the particular lender.

279. To L&G, led by Mr Goldblatt, this particular lending was more important than routine lending. It was an opportunity to highlight L&G in the market in a way that L&G was looking for, after some time of hoping for greater market presence than it had achieved. The same was not necessarily true for alternative lenders.

280. Mr Priest and Mrs Freeman, the real estate finance experts giving evidence at the trial, each made a considerable contribution even if some of their reports cover areas of fact that did not need an expert. Mr Priest's work was very thorough. Mrs Freeman's independence and professionalism was striking: as I listened to her there was no sign of which party had instructed her.

281. They agreed that the acquisition of Olympia was challenging to finance. It would:

> "… appeal to only a relatively small sub-set of the real estate lending community".

Upon analysis of the available sources, Mr Priest concludes that:

> "… the total universe of potential lenders to Olympia comprised 14 to 21 lenders at most."

282. The complexities of Yoo's structuring of the acquisition were illustrated by a Structure Report from Deloitte. In that context, for debt finance, any structure involving debt that was more complicated than a single loan at 50% loan-to-value would have significantly delayed the process. That would in practice have ruled out lenders seeking a more complicated structure.

283. Of course, Yoo were in fact offered term sheets or indicative terms by a number of lenders in addition to L&G. However, there were difficulties and complications, the principal of which I summarise next.

284. BNP Paribas and Credit Agricole (£100 million), and Alpha Real (£85 million) did not evidence interest in lending at a sufficient level. AIG offered £147.5 million, but that is so close to requirements that it should not be ruled out, even though a number of the terms would require some negotiation.

285. Alpha Real and PGIM proposed financing based around ground rent. As Mrs Freeman said in oral evidence:

> "There are clearly a number of challenges in a ground rent financing, more challenges."

Mr Priest was of the view that a ground lease structure would have been unacceptable to VKB and BVK and a potential barrier to approval from the Olympia pension trustees. This is not least because, as Mrs Freeman accepted, by affecting the freehold to the Site it would affect freedom to redevelop and would have made it "more challenging" to raise development finance. As Mrs Freeman also accepted in cross-examination, a sale of the freehold would not leave collateral in the case of a default, and that would have been a position unacceptable to CapCo pension trustees.

286. La Salle and Societe Generale proposed a structure with senior and junior debt, with syndication of senior debt. This would present difficulty in obtaining Olympia pension trustees' approval.

287. With DRC there was uncertainty, on the limited evidence available, over its source of funds. The experts agree that Och-Ziff was not a viable option for Yoo.

288. It was emphasised that matters do not appear to have reached the stage of a credit approved term sheet in the case of a number of alternative lenders. But

this progress (or lack of progress) with term sheets is simply what happened in a context where L&G was present and very keen. It is no sure guide to the possibilities where L&G was not present and Yoo pressed the alternatives. To take an example, AIG might have been followed up much more seriously than it was, testing some of the more difficult terms through discussion, had L&G not been an option. AIG was, understandably, one of the lenders that Mr Gledhill QC particularly focussed on in his oral closing address.

289. Higher margins and fees were indicated by some of the potential alternative lenders, by comparison to the margins and fees sought by L&G. These features would not rule out all alternatives, and they should not be assumed to be the last word, but there were tolerance limits. Yoo received term sheets from ICG Longbow and Greenoak and ruled the former out as "way out on pricing" whilst the latter was "set aside".

290. Over and above those potential lenders who were in fact approached by Yoo at the time, Mrs Freeman identified a number of other lenders that Yoo "could have approached" and which she considered "may well have had appetite to lend" to Yoo to assist with the acquisition of Olympia. It is relevant that these lenders do not seem in fact to have been approached by Yoo, but that does not render them irrelevant in the counterfactual where Yoo had to look elsewhere because it did not have L&G.

291. Of these other lenders, Mrs Freeman accepted that Citibank, JP Morgan and Santander may well have been ruled out by the requirement of bearer bonds in the transaction. The exposure to operating assets would likely have ruled out AXA-IM Real Assets: Mr Priest's opinion, that the fact it had no reported exposure to operating assets like Olympia made it unlikely to have been willing to lend, is persuasive.

292. Some alternative lenders had been approached by Bugsby, without success. Citibank had declined to lend to Bugsby because of the operating nature of the asset. Metlife had been approached by UBS on Bugsby's behalf and declined on the basis that they were not interested in operating assets. Wells Fargo had told Bugsby that "the asset class is one that we would struggle to underwrite". M&G (who had also been approached by UBS on behalf of Bugsby) were reported as saying that "they'd probably be 'highly conservative'".

293. JP Morgan was another suggestion. But Mr Steven Mastrovich of UBS used to work at JP Morgan. Here I accept Mr Marcus' evidence, including the hearsay involved, that Mr Mastrovich:

> "… maintained excellent relationships with former JP Morgan colleagues including senior executives in their real estate lending group, and he did not think JP Morgan would have the relevant appetite in any way for the Olympia acquisition loan."

294. In their Written Opening and during cross-examination of Mr Priest, L&G pointed to notes of internal meetings of Yoo to seek to illustrate that there were no issues with debt finance. These are notes of updates provided by Yoo to BVK and VKB and they must be treated cautiously. As Mr Priest pointed out in oral

evidence, in these communications Yoo was in 'sales mode' seeking to sell the deal to their equity investors. Mrs Freeman accepted that one way of interpreting these communications was that Yoo was "putting a positive spin" on the position.

295. Mr Frank Roccogrande of DFI was later to tell PERE magazine:

> "… when we bought Olympia, we struggled with debt financing because few lenders really understood that business.".

Shortly after the acquisition Mr Dave Barry of BNP Paribas reported to Mr Marcus following a conversation with Mr Lee of Yoo that there was "only one lender" available to Yoo, that they had had "not much traction" in the debt market and that there was "never a second horse".

296. For all these points, I do not accept that debt finance would not have been achieved by Yoo had L&G not been available to it as a source of debt finance. The experience with lenders whilst L&G was offering what Yoo was looking for is not a sure guide to the experience that could have been seen if Yoo was following up energetically.

297. Mr Gledhill QC emphasised in his oral closing argument that Mr Priest accepted that some of the other lenders who had supplied term sheets could have lent to Yoo, although by a later date. That he suggested was the end of the case. It is not the end of the case, but that is not because it is wrong but rather because there are other things to consider before an assessment can be made of the prospects of lending at a later date resulting in success for Yoo.

298. It is notable that when Mr Jobanputra was describing Yoo's "U-turn on not requiring external funding" as "probably grounds for breaking exclusivity" CapCo did not in fact break exclusivity. That is some further indication that debt finance was credible. L&G showed that participation in this unique acquisition could appeal to a lender, but so too did Goldman Sachs in its willingness to support Bugsby.

(3) Alternatives to debt finance

299. L&G further argued that Yoo could have completed the transaction without debt finance if necessary. It is worth recalling that Yoo's December 2016 offer letter to CapCo had indicated that the offer was not conditional on third party finance.

300. Bugsby points to Yoo internal documents and a presentation to lenders that envisage debt finance of 50% of the purchase price. It emphasises that Mr Goldblatt agreed that it was never suggested to him that more equity would be invested by Yoo than was in fact invested, nor that the debt would be any less than £150 million. However, this is not surprising as it was debt, at £150 million, that was sought from Mr Goldblatt and L&G.

301. Further, these materials do not really help with the question whether if needed Yoo could have completed without debt finance, or with a combination of reduced debt finance and increased equity. It will be recalled that BNP Paribas (although in the event declining the proposal) and Credit Agricole outlined debt finance terms for £100 million, Alpha Real for £85 million, and AIG for £147.5 million.

302. Mr Priest explained in detail why closing the deal entirely with equity finance was not a viable option for Yoo. BVK and VKB appear to have been ready to contribute over £131m for 85% of the overall equity where there would be debt of £150 million. On the evidence I heard I can accept that it was very unlikely that BVK and VKB would have been ready to complete the acquisition entirely in equity. There was, further, evidence that there were German regulations and internal restrictions that would be challenging where any part of the Olympia operating business was involved.

303. However, the evidence of Mr Liao of HNA, which I accept, was that HNA could have provided the entire purchase price if for any reason debt finance was not immediately available. Mr Liao mentioned HNA's willingness and ability to fund the entire acquisition, with debt finance to be procured after completion.

304. The sums involved were large, but not that large by HNA's standards at the time. Mr Liao illustrated the position by reference to a far larger purchase in New York in May 2017. Of course, HNA were with Bugsby, but I do not accept HNA were unique in being able to take the position described by Mr Liao, especially where an acquisition of this nature and profile was involved. Their approach shows the possibility of alternatives.

305. It is true that Yoo was at the time a relatively untested leader of an acquisition of this nature and scale. That would be relevant to the possibility of achieving finance in place of L&G. But, with differences, Bugsby too was a relatively untested leader of an acquisition of this nature and scale. Yet, Goldman Sachs and HNA were not deterred. In the case of Olympia, it was the asset rather than the leadership of the acquisition that drove interest.

(4) Overall

306. In my judgment there was a real and substantial chance that Yoo would have been able to finance its bid without L&G, and given enough time.

307. When it comes to quantification, I would evaluate this chance of Yoo being able to finance its bid as a near certainty.

Timing

(1) The importance of timing

308. However, it is not enough to look simply at the chances, given enough time, of Yoo procuring debt finance from a lender other than L&G, or securing a suitable alternative to debt finance (or a combination). A central focus has also to be on the chances of any other lender (or alternative) providing Yoo with the timing it needed to secure CapCo's acceptance in preference to Bugsby's bid.

(2) To 7 April 2017

309. In the counterfactual, Yoo keeps the advantage of the exclusivity period in the Yoo/CapCo Exclusivity Agreement until the end of February 2017 because it had that regardless of L&G.

310. L&G moved quickly enough for the acquisition date achieved by Yoo of 7 April 2017. However, 7 April 2017 is not a fixed point for the counterfactual. The possibility of neither Yoo (without L&G) nor Bugsby being quite able to meet 7 April, yet one still achieving the acquisition, has to be included, together with what CapCo would make of the situation as it developed.

311. Mr Priest's opinion as a real estate finance expert was that it would have been highly unlikely that debt financing could have been completed by Yoo by 7 April 2017 with any lender other than L&G. Mrs Freeman accepted with her real estate finance expertise that 7 April 2017 was "impressively quick" by L&G, and that matching that speed "certainly would have been challenging". No other lender "would have done it any quicker". Mrs Freeman's Second Report said that the "typical" time between signed terms and completion would have been eight weeks. The Olympia transaction was not the "typical" transaction.

(3) Timing, and events, without L&G

312. In the course of their expert evidence Mr Priest and Mrs Freeman joined each other in the witness box to address the subject of whether, with pressure of only a finite amount of time being available, one or more alternative lenders could have met the timelines involved:

> "… if we throw everything at it, if we burn the midnight oil, if we work weekends, if we get more people in".

The interdependency of events, and of reactions to events, comes out from their evidence.

313. Mrs Freeman referred to a Goldman Sachs term sheet where:

> "…they have a timeline I think they condensed down to about five weeks in the end …"

That is, five weeks from term sheet. She said that this:

> "… feels, you know, as tight as you can do, and I think Mr Priest has suggested, you know, that's throwing all your resources at it".

314. Importantly and fairly, Mrs Freeman brought out the things that the prospective alternative lender could not control, or fully control:

> "And I think the reason why we've not been so specific, you can't, for example -- neither of us knows how complex [were] the title issues, how complex were various bits that needed to be explored which fit in that timeline. So, you know, five weeks feels very tight to eight weeks to me felt comfortable, and somewhere in between the two is where it would depend on, you know, does your valuation arrive on time, does the bits of the jigsaw that you need to get your whole together come together.
>
> So that's timelines vary and timelines can be condensed and things can run in parallel when they need to. But I would suggest that, sort of, you know, that Goldman Sachs inner boundary is probably is a tight as things could get."

315. I invited Mr Priest to build on that. He said:

> "I think here as -- it's always the case that the lender doesn't control the whole timetable. So it doesn't matter how much a lender throws at -- what resource the lender throws at a situation, the lender is still dependent on lots of other parties doing their bit. And here – and I alluded to it as the spinning plate syndrome – here you have a situation where the equity is not settled, you're running things in parallel, but you're running the debt and the equity in parallel.
>
> … You've got Capco … You've got the pension trustees. So you've got a whole -- and then you've got all the due diligence experts who are busily preparing reports. … So in some senses we can look at what a lender might be able to do, but I think you have to look at the total -- the total picture. And in this case the total picture is complicated. … So in some senses it is obviously right to ask the question what a lender can [on] their own [] do, but actually in the round here that's a necessary but insufficient requirement.
>
> But if we come back to the Goldman Sachs five weeks, I think, my Lord, that's slightly misleading, because Goldman had been working on the transaction for a long time. This wasn't comparable to a situation where you say you sign one of the alternative lender term sheets and you've got five -- you can do it in five weeks from there. I simply don't believe that was the case. It was because Goldman had done quite a lot of work before that five-week period started.
>
> So I think it is a useful touch point, but it is not a -- you can't, in my view, read directly across from the alternative lenders to Goldman Sachs. … And I think where you have a niche asset, a complex structure, … You've got a complex set of dramatis personae, all of whom are kind of interdependent. So that's why I really think -- as I've said 11 weeks is a -- I would say that this would be a – an 11-week period almost whatever."

316. Mrs Freeman responded:

> "So my point was eight weeks from issue of term sheet and the important factor for me is not the credit approval point, it's the issue of term sheet because of the ability to run things in parallel and tandem if your borrower wants to. If you've got your costs underwritten by the borrower, which we've seen many of these lenders are asking for, which implies to me they are wanting to run things in parallel, you can get those -- that work started and ongoing. I agree with Mr Priest that Goldman Sachs had done a lot of work, but they hadn't done any external due diligence, because Bugsby HNA had not signed off on the third party costs. So all of that same external work that needed to happen for the DFI-Yoo Consortium still had to happen for Goldman Sachs, and yet they were saying five weeks. I think five weeks is very short and it's, you know, something Goldmans could throw resources at and maybe hit, which is why I was back to this eight-week point, and somewhere between five and eight weeks we, you know, I agree, with, you know, things working out as they should do, the valuation arriving, no issues on legal title coming up, which you'd have to assume that they didn't, because L&G were able to achieve the date that they did."

317. In the present case, having listened closely to the experts, including under cross examination, and with the benefit of their reports and meetings, and against the matrix of the acquisition in question, I think the better view is that a lender other than L&G would enable Yoo to achieve the debt finance it needed by about 9 weeks from a term sheet that the lender was prepared to sign. Asked to estimate in advance, Mr Priest's 11 weeks would be the more responsible estimate. But in practice when under pressure of time against the deadline, around 9 weeks would be achieved.

318. I have taken the 9 weeks from a starting point of a term sheet that the lender was prepared to sign. I accept and acknowledge what Mr Priest says in his First Report:

> "In my experience lenders differ in their approach and a term sheet from one lender is not necessarily equivalent in strength of interest to that from another. For one it could be a preliminary and contingent indication and for another it could represent a more informed and genuine interest in progressing the transaction. It also depends how much work has been done to obtain internal credit committee buy-in to the opportunity. Execution risk is therefore difficult for a borrower to assess: it would require knowledge of the individual lender and their approval and transaction process."

319. I consider the better view is that the date from which the 9 weeks would run was about 17 February 2017. 8 weeks from there was Friday 14 April 2017 or Good Friday, which further supports recognising 9 weeks as more realistic.

(4) L&G's timing

320. Overall, this is longer than the time it took L&G. But L&G's timing itself does not offer a sure guide. It achieved the timetable it did in large part because it did not dwell on due diligence, and by offering very favourable terms it enabled Yoo to move quickly including internally within the consortium.

321. Mr Goldblatt accepted that "no due diligence was done on the individual entities" that made up the consortium that was Yoo until very late in the day, or on the relationship between them. Mr Goldblatt did not know the experience of key individuals at DFI, and the limits to that experience. He had not carried out any checks as to the transactions which Yoo cited in their promotional materials. He was not aware of a related insolvent liquidation leaving a judgment debt unpaid, which he accepted would have concerned him. L&G did no independent research of its own, relying on materials provided by the prospective borrower.

322. As an example, the paper which Mr Goldblatt drafted for the RDIRM committee on 7 February 2017 was not searching. It copy-and-pasted large amounts of information directly from the Yoo lender presentation. It contained the statement that:

> "The borrower is an SPV representing beneficial interests of Yoo, DFI and certain German institutional investors. We are advised that there is formal documentation detailing the roles and responsibilities of the respective parties."

although the SPV was yet to be formed and the formal documentation was yet to be signed. It is likely that other lenders would have done greater due diligence than L&G did, and this would have taken time, and in some cases might have led to a decision not to lend.

323. The choice of comparators against which to compare the proposition that was the Olympia transaction would admittedly not be easy. But Mr Goldblatt proposed IHG (the International Hotels Group) as a comparator when seeking internal approval within L&G for the debt financing. The IHG model involved earning revenue as franchise fee income from hotel operations. The structure, sources of revenue and profits were quite different to the point that IHG was in fact not, in my judgment, a true comparator with the acquisition of or the ambitions for Olympia.

324. The favourable pricing of L&G's offer seems to have been a result of the way in which it priced the deal with reference to the comparator. As Mr Goldblatt accepted, whilst insurers investing annuity money would have adopted this method of pricing, banks and debt funds would not. The terms from alternative lenders would have needed more.

(5) Yoo's consortium

325. In the course of negotiation with an alternative lender, Yoo would likely have had to go back to BVK and VKB for approval and perhaps further negotiation amongst members of the consortium. Mr Priest gave evidence of the relatively

rigid and slow-moving way in which institutions like BVK and VKB can work. Again, not only would such negotiations (between Yoo and lenders and within the consortium itself) take time, there is also a chance that the negotiations would fail, as Mrs Freeman accepted in her oral evidence.

326. The contribution of L&G to Yoo was not limited to its direct role in lending. Bugsby contends that the timing and terms of L&G's support were also instrumental in enabling Yoo "to hold [Yoo] together and keep its bid progressing" in two respects that Bugsby says are key.

327. First, as at 10 February 2017 BVK was delaying making a formal commitment to Yoo including signature of the "cost cover" letter extending to due diligence costs. Its eventual provision of the "cost cover" letter on 16 February 2017 was (argues Bugsby) influenced by positive news of L&G's credit committees on 7 February or 15 February 2017.

328. Second, L&G's termsheet was capable of being signed by Yoo, without the need for VKB or BVK to commit to pay lender costs or termination fee if the acquisition did not proceed; and without the need for funds to be paid into escrow to cover such costs and fees.

329. Relatively speaking and in the overall context of this potential acquisition I do not regard these points as substantial, although I take them into account alongside everything else. L&G's involvement confirmed the seriousness of Yoo's intent at crucial times in the bid process. It was not just the money. But I do not think L&G supplied non-financial support that would not otherwise have been available to Yoo. This includes from any provider of finance in place of L&G.

(6) Overall

330. I go back again to the paper submitted to the CapCo Board on 5 April 2017, and the Board's acceptance of its recommendations on 6 April 2017. Even without L&G, Yoo would have had, on my findings earlier in the judgment, the near certainty of an alternative source of finance, but on my findings in this section would need another two weeks or so to be ready. Bearing in mind that contract documents for the acquisition still required finalisation, I consider the greater chance, on balance, is that CapCo would have waited rather than changed to Bugsby.

331. The position is complicated because Yoo's terms with a lender other than L&G might have changed and might not have been so attractive to CapCo as they were with L&G as lender. However it is still relevant that Bugsby's state of readiness as at 6 April 2017 was not enough for CapCo's Board to promote it to first preference at that point. CapCo had been prepared to wait for Yoo following the expiry of the exclusivity period, and although a way through would in my view have been found, time would be taken to resolve HNA's desire for a short exclusivity period even if HNA would ultimately have decided to proceed without exclusivity.

332. The position is however very close because on the balance of probability Bugsby would have done all that was required of it. HNA and Goldman Sachs were well able to move rapidly. If Yoo was partnered with a slower lender than L&G, then CapCo's interest in Bugsby can be expected to have increased, and also Bugsby's drive to complete, as with that of all those associated with its attempt. The time Bugsby needed would reduce and the time available to Yoo would reduce. Here, and overall, there was a real and substantial chance, but not the greater chance, that Bugsby would have won the race.

333. When it comes to quantification, I would evaluate that chance as 40%. The greater chance, on balance, is that CapCo would have waited for Yoo and that Yoo would have won the race; an evaluation of 60% does justice to that greater chance.

Olympia under Bugsby

334. Having considered the evidence and argument at this trial, in my judgment the best evidence of what would have happened with Olympia under Bugsby rather than Yoo is to be found in what has happened with Olympia under Yoo.

335. This is Bugsby's submission, expressed as:

> "the best proxy for what it would have done is what [Yoo] has done in the real world".

L&G argues that Bugsby would have adhered to the scheme Bugsby envisaged prior to acquisition.

336. At one point, L&G argued that Bugsby would have failed to get planning permission and would not have been able to raise the development finance required. I reject both arguments on the facts.

337. I take the view I do in these circumstances. First, both Bugsby and Yoo were to develop Olympia, and with considerable external expert assistance. Second, Bugsby retained the flexibility on acquisition to pursue a development path for Olympia that was commercially sound. Third, the path pursued by Yoo meets that description and, importantly, absorbs or reflects the events that have happened, including in terms of planning and including the pandemic.

338. Consistently, it is unsurprising to find that architects' pre-acquisition drawings prepared for Bugsby contained major elements to be found in due course in the Yoo design. Fundamentally I accept Mr Mackie's expert opinion given in these terms in the course of his cross-examination when Mr Orlando Gledhill QC fairly and properly put the point directly to him, and recognising that the exchange continued beyond that quoted below:

> "Mr Mackie: … One thing I am saying is that I do not believe that the Bugsby scheme as drawn up pre-acquisition, high level, I do not believe that that scheme in isolation would have been the scheme that would be

developed, as I state in my report, because I find it – I do not believe, based upon my experience, that a scheme would stop still from pre-acquisition without design development going through a two year planning process that would inevitably develop it.

So I do not believe that that Bugsby scheme as drawn up by TP Bennett pre-acquisition would have been the scheme that would have been developed, because I don't think it would have existed.

Mr Gledhill QC: I am not saying that the Bugsby scheme wouldn't have been refined and changed, because I also think it would have been, but there is no reason to think it would have developed in the same way as the Yoo scheme, is there?

Mr Mackie: I disagree with that. I think there was every reason to believe that that would have happened, that that would indeed have been the case. The key issue here in many ways is planning. No planning no development. And planning is not just about what the developer wants. Planning is a process that very much revolves around all the stakeholders in it, and in this case a large stakeholder is the London Borough of Hammersmith and Fulham. And it was very clear with the planning consent that had been granted that that would only have been granted with a desire from the planning authority for a scheme of that size, scope, prestige, that is what they want, that is what they were prepared to consent.

Mr Gledhill QC: The planning consent that's granted, that's a response to what scheme is put in, isn't it?

Mr Mackie: No, it is, for a scheme of this size, it is very much a negotiation in many ways between the developer, the advisers, the specialist planning advisers, the architect, but particularly the planning authority. Bluntly they want the best scheme. …

…

Mr Gledhill QC: … But the point I'm putting to you is that there's no reason to think it would have developed in the same way as the Yoo scheme. …

Mr Mackie: … I take the point that different individuals are involved, the design – it would look different, and the make-up of it may be different. But that – but nevertheless I do feel that the movement through the planning, the progression through the planning process, would have been the same – along the same lines and, therefore, as I say, the best proxy scheme that I have to value with planning is, in my opinion, the DFI-Yoo scheme.

…"

339. It is also reasonable to conclude that Goldman Sachs would have been as ready to provide the substantial development finance to Bugsby as it was to Yoo, especially where Bugsby had secured acquisition finance from it ahead of Yoo.

340. Fundamentally, both Yoo and Bugsby were in as good a position as each other, motivated to take the best advice and to carry out the scheme that was most compelling commercially.

"Near certainty" and ultimate percentages on quantification of loss

341. As will be seen, and leaving aside property investment funds at the moment, I have reached conclusions that a number of matters are near certainties, but the chance of one matter (timing) is to be evaluated at 40%.

342. I have in this judgment separated out a number of questions to assist in examining the chances, and the arguments of the parties. However where, as here, the facts are interlocking and interdependent it is more realistic to reach an overall single percentage applying to the combination of all the matters that are near certainties than it is to multiply percentages across each such question.

343. The latter method would take me closer to 100% for each question and present the issue whether, because this is not a precise exercise, the figure I should take should be 100% on each question. (In calculating the overall loss of a chance, the approach of the Court of Appeal in AssetCo plc v Grant Thornton UK LLP [2020] EWCA Civ 1151 at [117], [199]-]201], [206]-[210] deals with chances at or towards 100%.) Yet that would not reflect the presence of some uncertainty and risk overall.

344. In the present case I propose to attribute an overall single percentage of 90% to the combination of all the matters that I consider near certainties. That overall single percentage for the combination of all the matters that I consider to be near certainties is then to be multiplied by the percentage (40%) that reflects the chance that Bugsby would have won on timing.

345. The size of the reduction in Bugsby's chance of succeeding with its bid for Olympia is therefore 36% (90% x 40%), which I round to 35%.

Exit for Bugsby

346. It is common ground that Bugsby would have exited the entire project, including its investment, at some point.

347. Bugsby identified a proposed exit date of April 2024. This assumed that it would exit after planning permission had been obtained, finance had been raised for development, and construction had ended. I accept this as the likely date.

348. L&G argued that Bugsby would have exited in February 2020, because (as is well known) HNA as a group encountered major difficulties requiring a restructuring. It appears that in early 2020 HNA was placed under the control of the government of Hainan Province in the People's Republic of China.

349. The evidence of Mr Liao, which I accept, was that HNA nonetheless continued to hold rather than sell a number of strategically important overseas assets, including property development assets. Olympia certainly met that description in HNA's eyes and those of others. I was not to any degree persuaded that HNA would have needed to sell its position in respect of Olympia or that it would have done so.

350. Nor was I persuaded that if HNA did sell its position, Bugsby would have needed to exit too, rather than continue with the new purchaser of that position. Mrs Freeman, with her real estate finance expertise, accepted in principle that if between them the new investor and Bugsby had suitable experience then:

> "… there's no reason, if that equity investor came in and joined with Bugsby, that it wouldn't have been possible to get redevelopment finance for Bugsby and the new investor".

Fees

(1) Generally

351. The fact that Yoo acquired Olympia left Bugsby with wasted cost and work in the period to April 2017. That is not the target, or principal target, of Bugsby's claim. However, it does claim loss of the fees that it says it would have earned.

352. As recorded above, Bugsby accepts that the Bugsby/HNA JV Heads of Terms document was not legally binding. It is clear on the expert evidence that fees would have been payable whether it was binding or not. I agree with Bugsby that the Bugsby/HNA JV Heads of Terms provides the best evidence at this trial of what those fees would have been.

353. They include an acquisition fee and a debt arrangement fee. Although calculated as percentages of acquisition cost and debt arranged, it can readily be understood that these two fees would include a reimbursement to Bugsby of the cost it had incurred and a payment to Bugsby for the work it had done by April 2017. The two fees would also include an element for further cost and work towards acquisition and securing debt finance that Bugsby did not in the event have to incur.

354. Bugsby's principal target is damages based on the chance of its earning from Olympia in the years ahead. In terms of fees, this includes the chance of investment management fees at an annual percentage. (It also includes the chance of an investment return on the investment it would have made at or after acquisition, but this is considered separately below, as is the final part of its claim for damages, focused on the chance of "the 'track record' established by Olympia" enabling it to establish a property investment fund and of that fund being successful.)

(2) The acquisition fee

355. Under the Bugsby/HNA JV Heads of Terms the acquisition fee was 1% of the acquisition price. Although L&G suggested that Bugsby would have sought to lower the acquisition price in the closing stages, I accept the evidence of Mr Marcus and Mr Liao to the effect that the risk involved, including to reputation, ruled this out. The acquisition fee would therefore have been £3.03 million.

356. I consider that had Bugsby acquired Olympia this figure would have been achieved. Bugsby has however not incurred the work and cost that would have been involved after April 2017 to completion. I have little to go on in making the necessary adjustment, but consider a reduction to £2.5 million is fair and reasonable.

357. The value of the lost chance to earn the acquisition fee is 35% of £2.5 million or £875,000.

(3) The debt arrangement fee

358. Mrs Freeman did not accept that a debt arrangement fee was market standard, but its inclusion is supported by the fact that HNA did not raise any objection to its introduction in the Bugsby/HNA JV Heads of Terms.

359. Under those Heads of Terms the debt arrangement fee was 0.5% of the debt secured for the acquisition. Taking the debt figure at £197 million from the loan offer by Goldman Sachs, the debt arrangement fee would have been £985,000.

360. I consider that had Bugsby acquired Olympia this figure would have been achieved. Again, Bugsby had however not incurred the work and cost that would have been involved after April 2017 to finalisation of the arrangement of the debt finance. I have little to go on in making the necessary adjustment, but consider a reduction to £800,000 is fair and reasonable.

361. The value of the lost chance to earn the debt arrangement fee is 35% of £800,000 or £280,000.

(4) Annual investment management fees until exit

362. The claim to investment management fees involves questions of the further costs and work that would be involved to earn or achieve them. This claim is distinct from a claim concerned with Bugsby's own investment or loss of a chance of investment in Olympia.

363. The annual investment management fees contemplated by the Bugsby/HNA JV Heads of Terms were at 2% of "drawn equity capital commitments", a phrase agreed to mean the total equity invested in Olympia. Of this 1.75% was for Bugsby.

364. Bugsby accepts that staff and administrative costs fall to be deducted, and claims for each year to its exit in April 2024. On its calculation, which I prefer to that of L&G, the net figure (after also allowing for accelerated receipt of fees in the later years) is £9,670,516 which I will round down to £9.5 million.

365. I consider that had Bugsby acquired Olympia this net figure (effectively loss of profit on investment management) would have been achieved. That is not to say the underlying figures are certain, but it is to say that a figure approximating this net figure is the best available estimate.

366. The value of the lost chance to earn annual investment management fees is 35% of £9.5 million or £3.325 million.

Investment return

(1) The investment value of the acquisition

367. Where there is no difference between the price of the investment in Olympia and the value of the chance that Olympia would make or lose money, Bugsby would not suffer a loss.

368. The competitive position between Yoo and Bugsby as prospective purchasers, combined with the commercial requirements of CapCo as sellers, suggest that on the face of it what Olympia was worth was what was paid for it. Olympia has been put on the open market, allowing competition that would price it objectively.

369. This is a case of loss of a chance to make a purchase, not to enter a competition for a prize or to retain something or gain something. A purchase is the exchange of money for money's worth. A case of a purchase at a special price (below market) would be different, because the loss would also reflect the loss of the advantage that was the special element of the price.

370. Thus, in the case of Olympia around £300 million would have been paid by the Bugsby/HNA joint venture company for an asset worth around £300 million. Priced into the "worth" of the asset are the possibilities that the asset would make or lose money, in particular after applications for planning permission had been decided and (a great deal) more money and time had been spent on it.

371. To put it another way, the chances of the asset succeeding or failing and to what extent were valued at that figure.

(2) Bugsby's special or enhanced position

372. The Bugsby/HNA JV Heads of Terms again provide the best evidence; this time of the terms of Bugsby's equity investment in Olympia, or rather the joint venture company that would develop Olympia.

373. However the Bugsby/HNA JV Heads of Terms contemplated that Bugsby would invest £7 million or 5% of equity, then might increase that by £9 million, but might (after various prior stages under paragraph 11 of those Heads of Terms) then reach a point where it was enjoying an enhanced share amounting to 20% of equity returns.

374. Paragraph 11 of the Bugsby/HNA JV Heads of Terms provided that "Bugsby shall earn a Promoted (or Carried) Interest over the Investor return" with cash flows distributed first, "to reasonable reserves and debt service", second, "100% to all Shareholders pari passu until they have received a return of equity capital invested and an 8% IRR, compounded annually", third, "80% to Bugsby / 20% to Shareholders until Bugsby has realized a 20% share of total distributed profits", and "thereafter, 80% to Shareholders / 20% to Bugsby."

375. At paragraph 6 the Bugsby/HNA JV Heads of Terms further provided that any additional equity contributions from HNA would be in the form of "Priority Equity" which would have "same economic rights as other common equity" with "priority repayment rights" but would be "non-dilutive" of Bugsby.

376. In these particular circumstances, Bugsby's equity investment of £7 million did not simply provide 5% of equity in the joint venture company which held an asset worth around £300 million, but which had borrowed £197 million. But its investment would not have a value greater than 20% of around £300 million, or £60 million (where, again, £300 million was the value of the chances of the asset succeeding or failing).

377. Allowances also or then need to be made for the initial cost of the equity investment, the prior stages under paragraph 11 of the Bugsby/HNA JV Heads of Terms, costs and repayment of the debt, and the possibility of further equity contribution of up to £9 million. Here as elsewhere it is important to keep in mind that there can be no certainty or precision.

378. Taking all of this into account, I consider 10% of £300 million or £30 million a just figure to reflect the net value of Bugsby's investment "share". The value of the lost chance to acquire that "share" is £30 million x 35% or £10.5 million.

379. I consider this to be the correct approach to investment return.

380. However argument and evidence was advanced for a different approach, based on operating return until exit and development return. Although I do not consider these arise, in case it is useful to the parties or the matter should go further I address and make findings in relation to their essential elements at (3) and (4) below. In the course of closing argument the possibility of further calculations being addressed and undertaken in light of (rather than in) the judgment was canvassed by Mr Gledhill QC.

(3) Operating return until exit

381. There are these stages to Bugsby's argument on operating return: (a) value Olympia at 31 March 2024, on Bugsby's exit; (b) deduct for selling costs and for repayment of acquisition debt; (c) deduct for any illiquidity discount; (d) add free cashflows for 1 April 2017 to 31 March 2014; (e) calculate 20%; (f) discount back to the date of the trial.

382. EBITDA figures from the Final Business Plan provide the best available starting point for the valuation at (a). I accept the evidence of Mr Ryan that a figure should be added from April 2025 for sponsorship earnings, and that £10 million p.a. (a figure found in the Final Business Plan and in a model by CBRE) is the best estimate available of achieved rather than target income. I was not persuaded that exhibition venues (such as Excel, or the National Exhibition Centre, Birmingham) rather than exhibition and entertainment venues, with the differences in footfall, provided a reliable comparator.

383. On the other hand, I was also not persuaded that Mr Ryan's addition of £2 million p.a., indexed, of enhanced income on an assumption that the business would perform beyond the rate assumed in the Final Business Plan (being the rate of inflation) was appropriate. The presence of the Advisory Board intended by Bugsby and HNA (at a cost of £320,000 p.a.) reassures me about the EBITDA figures and the addition for sponsorship earnings, but not beyond.

384. The relevant experts were agreed on valuation methodology. Specifically, they would take the mid-point between two alternative discounted cash flow valuation methods. They agree that the discount rate used in one of those two methods (the "Perpetuity Method") should be the weighted average cost of capital of the business (the "WACC") but they do not agree what the WACC is.

385. Here and on the further points of multiple, perpetuity growth rate, illiquidity discount and sale costs, I would accept the evidence of Mr Ryan over Mr Cornmell. Mr Ryan had the greater valuation experience, and this came through in the very technical cross examination that was possible in this area.

386. As to multiple, Mr Cornmell proposed a multiple for the first of the two alternative discounted cash flow valuation methods (the "Multiples Method") that was notably out of line with those used variously by each of CBRE, Savills and Colliers in valuations at the time. Mr Ryan's multiple is in line, and Mr Cornmell could not offer a convincing explanation why his was not. If the multiple is in the region of those used by CBRE, Savills and Colliers then Mr Cornmell's WACC of 12.3% does not bear the broad relationship to multiple that one would expect.

387. As to perpetuity growth rate, Mr Ryan's choice of perpetuity growth rate (at 2%) is appropriately in line with inflation whereas Mr Cornmell's is not.

388. As to illiquidity discount, Mr Cornmell would apply a 10% illiquidity discount. Mr Ryan would not. It was clear that Mr Cornmell's decision to use an illiquidity discount was simply a matter of general approach. It did not properly take into account the individual features of the proposition that Olympia was and is.

389. As to sale costs, Mr Cornmell allowed sale costs of 4% while Mr Ryan allowed 2%. Mr Ryan's approach is closer to that used by Colliers in their valuation. Mr Cornmell was able to point to the use of 4% sale costs in a Bugsby model, but it does not follow that that model was correct in that respect. Again here I prefer the evidence of Mr Ryan, informed by his greater experience.

(4) Redevelopment return

390. Bugsby and L&G are substantially apart on redevelopment return. L&G rely on the expertise of Mr Tyler, and he arrives at a substantial loss.

391. Yet Olympia is being developed. As Mr Twigger QC summarises, for Bugsby:

> "[In early 2021] the members of [the consortium, Yoo] have committed to deploy hundreds of millions of pounds of further equity and debt; and [Goldman Sachs] have committed to provide that debt. As a result, main works are underway. This would not be happening if the [consortium] members and [Goldman Sachs] (and their respective armies of professionals) did not have a good basis to anticipate substantial profit."

392. Not inconsistently, Mr Tyler accepted in cross examination that:

> "… other things being equal, it's very unlikely that the Yoo Consortium are investing this money and committing this debt if in fact they are likely to make a large loss at the end of the day."

393. Bugsby relies on Mr Mackie's expertise, and he arrives at a profit of £162,098,072 on gross development costs of £1,193,262,858. This is in line with the point Mr Mackie and Mr Tyler agreed in these terms:

> "… generally, a developer only develops a property if it can make a suitable level of profit. What is suitable may be different for different developers, but is generally understood to be between 15% and 25%".

Although I found Mr Tyler (who was cross examined by Mr Thomas Munby QC) to be experienced and knowledgeable, I preferred the evidence of Mr Mackie. A more intricate calculation on this element is possible, but not more satisfactory. This is because parts of this element, and other elements combined, are not capable of precision.

Launching property investment funds

394. On Bugsby's case, at some level of success for Olympia, the chance of establishing a property investment fund comes in. Bugsby argues that success in the acquisition would have given it the opportunity:

> "… to raise and manage a property investment fund, earning fees and returns thereby".

395. Bugsby says that:

> "Olympia was a trophy transaction which would have dramatically elevated the stature of anyone associated with it."

Mr Scardovi (one of the investment fund management experts) opined:

> "From investors, I think [the acquisition of Olympia] proves something, which is you are able to arrange and set up a JV. You are able to close a deal which was major, fighting your own competition with other credible counterpart. So to institutional investors it means you can make it. And, in my view, it would have been positioning Bugsby and Mr Marcus amongst the few winners [of] the private equity industry specifically in the opportunistic sector".

396. Bugsby points out that Yoo and DFI each launched property investment funds. Then there is the fact that Mr Marcus had "a good book of contacts". It is suggested that cashflow and prestige from Bugsby's involvement in Olympia would have made it easy to build an impressive team during the years leading up to the relevant fund-raising.

397. And the timing was auspicious: it is common ground between the relevant experts that 2019 was a good year for fundraising. There is data suggesting that first time fundraising in 2020 had only been a little behind 2016-2018. A period of recent financial shocks brought cash into the global markets and I accept the expert evidence to the effect that that is the type of period when so called "opportunistic" real estate funds can be seen by some as an attractive investment.

398. Bugsby also points to an episode in 2015 (before the Olympia acquisition) when UBS had regarded it as a viable proposition for Bugsby to raise a permanent capital vehicle alongside one of the property purchases which it was then pursuing. Of this Mr Jenkin said:

> "So I'm not surprised that Bugsby were trying to do a series of transactions of funders but ultimately with an aspiration of trying to put it altogether in a fund, that would seem to me a natural thing to do."

399. L&G dismiss this part of Bugsby's claim on grounds of what they term remoteness. I do not consider that this avails L&G. This is because L&G had knowledge of Bugsby's actual fundraising plans. L&G had such knowledge because Bugsby told them so prior to contracting. Mr Marcus's recollection, which I accept, is that he discussed Bugsby's intended reliance on Olympia for its future plans to establish a real estate fund with Mr Boyle of L&G at the meeting on 18 January 2016. There is no suggestion that L&G disclaimed responsibility then or in the Bugsby/ L&G Exclusivity Agreement.

400. Moreover, in the relevant commercial context, it is no surprise that Mr Jenkin should confirm that it is a "commonplace option" for a sponsor of real estate deals to want to launch a discretionary investment fund.

401. There is in my view sufficient evidence in the present case to engage the second limb of Hadley v Baxendale. Alderson B in Hadley v Baxendale (1854) 9 Ex 241 at 354-355 said:

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered [1] either as arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or [2] such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated."

402. In the Privy Council in Attorney General of the Virgin Islands v Global Water Associates Ltd [2021] AC 23 Lord Hodge said:

> "28. In the common law tradition the phrases and expressions used by judges do not have and should not be accorded the status of the words of a statute. In the Board's view it is more important to identify what it is that judges have been trying to encapsulate in their choice of language. And that is whether as a question of fact the parties to a contract, or at least the defendant, reasonably contemplated, if they applied their minds to the possibility of breach when formulating the terms of the contract, that breach might cause a particular type of loss. In the context of contractual liability, the court is not concerned solely with the percentage chance of such an event occurring, although that is not irrelevant…
>
> 30. From this brief review of the main authorities, the position may be summarised as follows.
>
> 31. First, in principle the purpose of damages for breach of contract is to put the party whose rights have been breached in the same position, so far as money can do so, as if his or her rights had been observed.
>
> 32. But secondly, the party in a breach of contract is entitled to recover only such part of the loss actually resulting as was, at the time the contract was made, reasonably contemplated as liable to result from the breach. To be recoverable, the type of loss must have been reasonably contemplated as a serious possibility, in the sense discussed in paras 27 and 28 and above.
>
> 33. Thirdly, what was reasonably contemplated depends upon the knowledge which the parties possessed at that time or, in any event, which the party, who later commits the breach, then possessed.
>
> 34. Fourthly, the test to be applied is an objective one. One asks what the defendant must be taken to have had in his or her contemplation rather than only what he or she actually contemplated. In other words, one assumes that

the defendant at the time the contract was made had thought about the consequences of its breach.

35. Fifthly, the criterion for deciding what the defendant must be taken to have had in his or her contemplation as the result of a breach of their contract is a factual one."

403. Bugsby also alleges the wording of the Agreement reflects the parties' recognition that Bugsby's plans extended beyond the Olympia transaction itself by (for example) defining "Confidential Information" in Clause 1 (d) as "relating directly or indirectly to Project Victory" and including the "names of actual or prospective investors" and "information relating to actual or prospective property acquisitions, redevelopments, constructions projects and investments", but I think these references are weak for present purposes. However, Bugsby does not need them.

404. L&G also relied on an argument that there was no assumption of responsibility as an answer to this part of the claim. I do not think this takes things further in the present case. In the Privy Council in Attorney General for the Virgin Islands (above) Lord Hodge said at [26]:

> "The Board is not concerned in this appeal with the recoverability of damages caused by unusual volatility in the market or questions of market understanding, which the House of Lords addressed in [The Achilleas], and in which Lord Hoffmann and Lord Hope of Craighead sought to bring into play the concept of assumption of responsibility as a further limitation on contractual damages. It suffices in this appeal to consider what the House of Lords in The Heron II [1969] AC 350 stated more generally about the principles governing remoteness of damage."

405. I therefore take things to the next stage. Many things are possible, but the points that weigh most heavily with me are as follows. First, Bugsby and Mr Marcus would have had their hands full for years with the huge project that was and is Olympia. Second, it would take time to convince anyone that Olympia was a success, if it was. Third, it is one thing to launch a fund and it is another for the fund to be a success, both in terms of investment attracted and in terms of returns achieved for investors, still less for one fund to lead to another. Fourth, as Mr Jenkin said "all sorts of things happen in the market". Fifth, Bugsby's attempts in 2015 did not result in Bugsby raising a permanent capital vehicle at that time.

406. In Mr Scardovi and Mr Jenkin the Court had two thoughtful experts. Mr Scardovi was cross-examined by Mr Baiou and Mr Jenkin by Mr Munby QC. I respected Mr Scardovi's combination of experience of the financial world and academic approach, including his recognition that things do not always follow the rules, but I preferred the wider experience and expertise of Mr Jenkin informed by many years of discussion with private equity investors. Mr Scardovi was optimistic for Bugsby. He provided a detailed analysis of funds in the market over years, and modelled two follow-up funds, but what matters are the facts and circumstances of each case.

407. Mr Jenkin's view, which I prefer because of his wider experience, was that an onerous set of qualifications are generally needed before a party can hope to raise a discretionary investment fund. These include a track record of successful investment in numerous transactions, possession of that track record specifically by the principal of the fund upon whom investors will focus, and an experienced team which has worked together over a period of time.

408. I accept that Mr Scardovi's experience has been different and in fact both experts were essentially talking about what they had done (Mr Jenkin: "All I can say is my experience relates to the funds that I have raised"). But the essence was as he said:

> "you will need to demonstrate your role and how your input has created success".

409. In so far as an assessment on the balance of probabilities is required, I am not satisfied that Bugsby would have "raise[d] and manage[d] a property investment fund, earning fees and returns thereby" (ie succeeding). Insofar as the question is whether Bugsby had a real or substantial chance of doing so, the evidence also does not satisfy me it did; and any percentage evaluation would be negligible.

Outcomes

410. In my judgment Bugsby's claim is properly for the reduction in its chance of achieving the sums I have indicated and in the way I have indicated.

411. My evaluation totals £14,980,000, again acknowledging - despite the specificity of the figure - that this cannot be a precise exercise.

412. I do not consider that there was any sufficient evidence of other opportunities instead of Olympia available to Bugsby and that give rise to a reduction to the figures above.

413. I will deal with any incidental questions of calculation, interest, and costs, once this judgment is handed down.

414. Bugsby had an alternative claim to negotiating damages (see <u>One Step (Support) Ltd</u> (above) at [92]) but I understand that alternative to fall away given my conclusions on its main damages claim. It also raised the question of an asserted entitlement to elect an account of profits, but I anticipate that no longer arises given my conclusions. If I am wrong on these points going to relief, I will address them additionally.

Closing matters

415. I am very grateful to Counsel and to the legal and expert teams on both sides for their valued assistance.

416. There were a number of references, from many quarters, to what a unique, impressive and interesting asset Olympia is and can be. It was a privilege to try a case about it.