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18 October 2017

Case No: B40BS249

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
BRISTOL DISTRICT REGISTRY

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

(1) RIVA PROPERTIES LIMITED **(2) RIVA BOWL LLP** **(3) RIVA BOWL LIMITED** **(4) WELLSTONE MANAGEMENT LIMITED**	**Claimants**
- and -	
FOSTER + PARTNERS LIMITED	**Defendant**

- -
- -

Ms Lucie Briggs (instructed by Ashfords Solicitors) for the Claimants
Mr Jonathan Selby (instructed by Fishburns LLP) for the Defendant

Hearing dates: 3, 4, 5, 6, 7, 10, 11, 12, 13, 24 & 25 July 2017
(Draft Judgment sent to parties 4th October 2017)

Approved Judgment

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JUDGMENT

Mr Justice Fraser :

1. This is a summary to give an overview of the proceedings. This action concerns a claim in professional negligence brought by four companies, all controlled by a businessman who is not himself a claimant, Mr John Dhanoa, against the defendant Foster + Partners Ltd, to whom I shall refer as simply Fosters. Issues also arise in respect of the identity of each of the claimant companies concerning potential loss (if any has been caused by any matters for which Fosters are in law responsible), which are dealt with in the section of the judgment entitled "The Scope of Foster's Duty" and "Heads of Loss and the Four Claimant Companies". However, for the purposes of considering the defendant's duty, potential breaches and resolving the issues of fact, there is no need to differentiate throughout the whole judgment between the four different claimant companies, and in order to make the other sections of the judgment more intelligible, and to avoid confusion, I do not do so. The four companies are controlled by Mr Dhanoa who, for whatever reason, used different corporate vehicles to conduct his business affairs. Essentially these proceedings are an action by Mr Dhanoa through these corporate vehicles, against architects retained for a particular project. This judgment is in the following parts:

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Introduction

2. Fosters are a sizeable practice of architects of world wide renown. It was established by its founder and chairman, Norman Foster, now Baron Foster of Thames Bank, who is an internationally acclaimed architect who has won numerous awards including the Pritzker Architecture Prize in 1999. This is an award that is sometimes referred to as the Nobel Prize of architecture. The Pritzker Prize is awarded once a year, and to give an idea of its prestige other recipients include Richard Rogers and James Stirling (from the UK), and internationally, Fumihiko Maki, Frank Gehry and Zaha Hadid. Fosters have designed many notable buildings and structures. To name but two in London, City Hall and the Millennium Bridge are Fosters' designs; in Europe, Fosters' buildings include the restored Reichstag in Berlin and the Commerzbank Tower in Frankfurt. The list of notable works could be very much longer. There will be few people with any idea of architecture who have not heard of Fosters.

3. The subject matter of this litigation concerns an allegation by Mr Dhanoa (by his various companies) that Fosters were in breach of the duty owed to exercise reasonable care and skill in their professional performance undertaken between 2007 and 2009 as his architects. Mr Dhanoa (by one of his companies Riva Properties Ltd) engaged Fosters to design a hotel at a site at London Heathrow on Bath Road. Mr Dhanoa had (again through one of his companies) bought this site in 2007, but he had first become interested in it in 2002, and had identified it as suitable for his plan for a hotel at about that time. The then-owners were not interested in selling it in 2002, and he became interested in, and successfully completed, other building projects including a hotel in Leeds in the intervening period. Finally, he was successful in purchasing the Bath Road site in 2007 for £14.5 million, together with the bowling alley that was situated upon it and operating at the time. He had identified the site as representing a potentially lucrative opportunity to construct a major 5 star hotel, very close to Heathrow Airport, in what he saw as a prime position, and he wanted Fosters to act for him on this project. He told the court that this idea came to him after he had flown over Bath Road numerous times on his way in to landing at Heathrow Airport. He realised that almost everyone flying into London would fly over this site. He also knew, as of early July 2007 when it was announced by the International Olympic Committee, that in 2012 the Olympic Games were to be held in London. Riva Bowl Ltd had in fact already purchased the site a couple of months before that. His timing was therefore favourable.

4. Mr Dhanoa contacted Fosters and explained to them what he wanted to achieve on this site. His first meeting with them was in July 2007. A contract was agreed with Fosters whereby Fosters would act as architect on the project. That contract was signed in 2007 and its terms are dealt with in the section of this judgment entitled "The Terms of the Appointment." Mr Dhanoa's case is that his budget for this project was £70 million and that he told Fosters this. Although there are subtleties in the way the case for the defendant is put, essentially and in summary Fosters deny that there was any budget. Fosters embarked upon the design process, and produced a scheme that was costed in February 2008 by EC Harris, the costs consultant engaged by Mr Dhanoa, at £195 million. Mr Dhanoa says that he then increased the budget to £100 million, in reliance upon Fosters telling him that the project could be

"value engineered" down to that figure. I will deal with the meaning of that term in the context of this case below. He also says that Fosters advised him to apply for planning permission for the scheme, notwithstanding its very high cost, and to have it value engineered downwards after permission was obtained. Planning permission was applied for in July 2008 and obtained in March 2009. However, Mr Dhanoa could not obtain funding for the scheme, which he eventually discovered could not possibly be value engineered downwards to as low a figure as £100 million. He could not therefore build the scheme which Fosters had designed for him, and which had cost him a total of approximately £4 million in professional fees alone, about half of that being paid to Fosters, and the other half to the other members of the sizeable professional team and in other fees.

5. As a result of this alleged breach, or these alleged breaches, or failures on the part of Fosters, it is said by the claimants that what should have been a profitable hotel, costing £100 million, was not built when it should have been. Accordingly, two of the claimant companies are said to "have lost, and will until completion of the project continue to lose, operating profit in respect of the bowling facility and the hotel as a result of the delay to the project". The claim for lost profits is very sizeable.

6. It should be noted here that there was a bowling alley present on the site when it was bought in 2007, and which is still operating there. The planning permission for the hotel as designed by Fosters – which I shall refer to as the Fosters' Scheme – has now lapsed, having been granted in 2009 and having only a limited life of three years in the absence of commencement of the works. Mr Dhanoa (through one of his companies) still owns the site. At least so far as hotels are concerned, the site remains undeveloped, and no hotel has yet been built there. These proceedings were commenced on 27 March 2015, initially seeking damages from Fosters for misrepresentation and rectification (in an unspecified way) as well as damages for negligence. It is said by the claimants that Fosters failed to design a scheme within the budget provided to it of £70 million, later increased to £100 million. Fosters vigorously dispute the allegations made against the practice, deny that any budget was provided by Mr Dhanoa, rely upon the fact that no quantity surveyor/cost consultant was appointed at the very beginning of the project, deny giving value engineering advice, deny causation, allege contributory negligence by Mr Dhanoa, and deny loss. Limitation was also raised as a defence in respect of any claim by the Fourth Claimant, Wellstone Management Ltd. Standstill agreements had been entered into between Fosters and the other three claimant companies.

7. Fosters was obliged to have professional indemnity insurance as a term of the appointment, and this was agreed with a limit of £10 million. Although the claim was originally extra-contractual (perhaps in an attempt to avoid that contractual limit) the claimed loss of profit alone is in excess of that capped amount and stands at £16.327 million. As sometimes happens in the period immediately before trial, there was some sensible refinement of the claims, and the rather vague claim for rectification was quietly and sensibly abandoned by Ms Briggs (who had not pleaded the original Particulars of Claim). It was also accepted by the claimants that there was a contract between the First Claimant, Riva Properties Ltd and Fosters, thus engaging the limit on liability of £10 million. Mr Dhanoa has had a further hotel scheme for the site designed by alternative architects, which is referred to as

the Acanthus Scheme. The claimants maintain that this scheme, or something similar to it, could have been constructed for £100 million in 2009. Fosters deny this too. Planning permission has not yet been obtained for this alternative scheme.

8. Finally by way of introduction, this case was issued in the Bristol District Registry, and an application by Fosters that it be transferred to London was dismissed. As part of the Business and Property Courts approach to specialist judges from the Rolls Building being dispatched to the circuits to try suitable cases, the trial was to have taken place in Bristol. However, one working day before the trial, the Bristol Civil Justice Centre was flooded and lost all power. The case was therefore transferred to the nearest suitable facility for the trial, which happened to be in Weston Super Mare.

9. As well as a high number of factual witnesses (ten in total, although two of them were not cross-examined) there were a total of six expert witnesses. These were two each in the following disciplines: architects; quantity surveyors; and accountants. A measure of agreement was reached between each discipline of expert witnesses, for which I am very grateful. There was no order that liability and quantum be dealt with separately, although it was agreed by the parties, so far as quantum was concerned, that the principles upon which quantum of loss (if any) should be resolved in this trial, but not necessarily all of the figures. Any further detailed calculations that might be required could, if any were necessary, be performed by the parties and/or their expert accountants after judgment was handed down. I have not recited in this judgment every single document that was relied upon at trial, nor every single part of the evidence, nor every single submission one each different matter. The latter in particular were very far ranging, and were also made on a number of different alternative bases depending upon my findings upon the different factual disputes. Were I to do so, this judgment would be very much longer and would also take far longer to provide to the parties. If I have not specifically identified any particular item, this does not mean that I have overlooked it. It means that I did not consider it sufficiently important in assisting me to decide any particular point or issue.

II *The Issues*

10. The parties agreed the issues that required resolution in this judgment. They are as follows. Some of the agreed issues appear to be simply differently worded versions of each other. It appears as though some of the issues may have been arrived at by simply merging two different lists together. Given that the issues were agreed, I will reproduce the entire list. The headings to each group of issues were part of the agreed list of issues and so I include those too. Two of the issues fell away due to the way that the claimants refined their case prior to the trial commencing. After providing the list of issues, I will turn to the witnesses.

Duties/Causes of Action

1. It being accepted that there was a contract between Riva Properties Limited and Foster, whether Riva Properties Limited (as contracting party) can recover losses suffered by Riva Bowl LLP and/or Riva Bowl Limited.
2. Whether Foster owed a duty of care in tort to Riva Bowl LLP and Riva Bowl Limited.

3. Whether Riva Properties Limited transferred its cause of action against Foster to Wellstone Management pursuant to an Asset Purchase Agreement dated 17 December 2014. This issue fell away.

Factual Issues

4. Whether Foster was told (or otherwise had knowledge of) Riva's budget for the Development (whether that be £70 or £100 million) between July 2007 and January 2008 and, if so, what did that budget relate to?
5. Whether Foster knew (in or by February 2008) that Mr Dhanoa intended to value engineer the Foster Design to within a budget of £100 million.
6. Whether Foster warned Mr Dhanoa (at any time) that it was not possible to value engineer its design to within a budget of £100 million.
7. Whether, in a meeting on or around 10 March 2008 Hugh Stewart told Mr Dhanoa that the Foster Design could be value engineered to within a budget of £100 million and advised him to put the Foster Design through planning and value engineer it afterwards.
8. What advice, if any, did Foster give Mr Dhanoa in relation to costs and how did Mr Dhanoa react to it?

Breach

9. What was the scope of Foster's retainer and duties? In particular:

9.1 Was Foster obliged to advise Riva on costs at all? If so, in what respects?
9.2 Was Foster obliged to ascertain and consider Riva's budget during Work Stages A/B?
9.3 Was Foster obliged to design the Development within any particular budget?
9.4 By reference to its email dated 15 February 2008, did Foster have a duty to advise Riva that its design could not be value engineered to £100 million?

10. Is Foster in breach of its duties in any of the respects alleged at paragraphs 34 to 43 of the Re-Amended Particulars of Claim?

Causation/Loss

11. Of the sums said to have been expended on the abortive project (set out in the Schedule of Loss to the Re-Amended Particulars of Claim):

11.1 Which (if any) were caused by any breaches that may be proven against Foster?
11.2 Were each of those sums truly abortive?
11.3 To what extent have those sums actually been incurred?
11.4 Will additional fees and expenses be incurred in completing the Development? If so, to what extent do the sums said to have been expended on the abortive project reflect additional fees and expenses that will be incurred in completing the Development?

12. To what extent, if any, are the Claimants entitled to repayment of Foster's fees in restitution?

13. As regards the Claimants' claim for lost profit:

13.1 To what extent, if at all, has the delay in constructing and opening the hotel been caused by any breaches that may be proven against Foster?
13.2 Does the Acanthus Scheme accord with the brief given by Mr Dhanoa to Foster and, in any event, would it have been possible to design and build a 5* hotel in accordance with the brief given by Mr Dhanoa to Foster for £100 million or less?

13.3 Would such a hotel have been built? If so, when would it have opened and how much would it have cost to finance and build?

13.4 In light of the answers above, had such a hotel been opened, what profit (if any) would have been made and by which of the Claimants?

13.5 What credits, if any, should be given against this claim for costs that would have been incurred in any event?

14. Have any of the Claimants been contributorily negligent in any of the respects alleged at paragraph 67 of the Amended Defence?

Limitation

15. Whether any claims made in this action are time-barred. This issue too fell away.

Overall

16. In light of the above, what sums (if any) is each of the Claimants entitled to recover from Foster?

III *The Witnesses*

Witnesses of Fact

11. Mr Dhanoa is a successful businessman. He was subjected to something of a sustained personal attack in the written Opening Submissions for Fosters. There were also sustained criticisms of him in Fosters' witness evidence. As an example of this attack, the Opening Submissions for Fosters stated the following:

> "1. These proceedings are a retrospective construct designed by or on behalf of the guiding mind of the Claimants, Mr Darbara Singh Dhanoa (otherwise known as John Dhanoa), who belatedly realised the excesses of his own hubris when he was unable to achieve what he wanted.
>
> 2. Rather than take the failure of his venture on the chin, Mr Dhanoa seeks to recover from the Defendant ("F+P") his costs of the venture and the lost profits he wishes he would have made if only he had opened a 5-star hotel in September 2012. This is in circumstances where Mr Dhanoa has never got near to putting a spade in the ground to start the construction of the hotel.
>
> 3. Indeed, despite the fact that Mr Dhanoa obtained planning permission for his desired hotel (which F+P designed), over 8 years ago, on 19 February 2009, no planning permission has been applied for, let alone obtained, for the scheme which Mr Dhanoa now says F+P should have designed ("the Acanthus Scheme"), a scheme which even now has very little detail.
>
> 4. Mr Dhanoa has no case at all. Instead, having instructed solicitors on a CFA and taken out ATE insurance, he is playing with other people's money trying to bluff his way through the Court as if civil litigation were some game of high stakes poker. At trial, F+P will expose Mr Dhanoa's claim for the bluff that it is."

12. This approach to Mr Dhanoa by Fosters and its legal advisers in these proceedings has two elements, namely one concerning his approach to the project, and the second separate one concerning his involvement in issuing proceedings and taking

these through to trial. It is rather stretching things to describe the design of the Fosters Scheme as his "desired hotel" given the factual issues in the case. The whole basis of Mr Dhanoa's claim is that Fosters did *not* design the hotel he desired, because he desired one that could be built for a far lower cost than £195 million. The general approach to attacking Mr Dhanoa continued during the trial in his cross-examination, but also into Fosters' Closing Submissions. It was said that some of his evidence was "demonstrably untrue" and it was submitted that "anything which Mr Dhanoa says needs to be treated with the utmost suspicion". The written evidence of Mr Stewart and Mr Brooker (two of the Fosters' architects) could hardly be said to be complimentary of him either; rather to the contrary, he was widely disparaged by them too.

13. There is, of course, no legal requirement for Mr Dhanoa to have put a spade into the ground to start construction, not least because one of his heads of loss is for fees paid to his consultants, including Fosters, on the Fosters' Scheme, which on Mr Dhanoa's case have been entirely wasted as that scheme could not be built. This is said to be due to its very high expense, well in excess of what Mr Dhanoa says was the budget (as later increased). In those circumstances, it seems rather strange to criticise him for not having built the hotel.

14. Additionally, if Conditional Fee Agreements and After The Event insurance are legal and acceptable mechanisms which Parliament has decided should be available to fund civil litigation – which they are, and which Parliament has – then the fact that a claimant (or his companies) avails himself of these mechanisms to bring proceedings does not, in my judgment, mean that they are to be characterised as playing with other people's money or bluffing, or treating litigation as though it were a game.

15. One example of the unwarranted nature of the attack upon Mr Dhanoa's character or business nous in the evidence was the presence of the ten pin bowling alley on the site when it was acquired, and the fact that Mr Dhanoa required this to be retained as part of the hotel project. Mr Stewart's witness statement stated the following, when dealing with Mr Dhanoa's "base requirements" which Mr Stewart said could not be compromised upon:

> "These were the size and number of rooms [etc] ... and (slightly bizarrely) the retention of the existing bowling alley which we understood his wife liked managing."

Mr Stewart also stated further in his written evidence:

> "Mr Dhanoa reaffirmed that it [the bowling alley] should be retained and must have separate access from the hotel, in order to allow his wife to continue running the bowling alley".

16. Another area in which he was attacked was his approach to engaging a quantity surveyor or costs consultant. Mr Brooker stated that Mr Dhanoa "appeared somewhat reluctant to engage our recommended cost consultant, Davis Langdon, and said that he would cost the building himself". Mr Brooker also said that he was told that Mr Dhanoa had "fallen out" with Davis Langdon. He also said that Mr Dhanoa "fired" EC Harris, the cost consultant whom Mr Dhanoa did appoint.

17. In fact, the truth of the matter was rather different to how it was portrayed by Fosters in the witness statements. Firstly, it was a planning requirement of the local authority, enshrined in its planning policy, that existing leisure facilities had to be retained in the borough. This meant that the bowling alley had to be included in the new scheme and retained, unless some exemption could be negotiated. It was nothing to do with the preferences or enjoyment of Mr Dhanoa's wife, or some bizarre whim on his part. The way this was portrayed by Mr Stewart in particular was to disparage Mr Dhanoa for this, as though he should be criticised for some excessive idiosyncrasy, or wished to placate his wife. It was nothing of the sort.

18. Secondly, it is correct that Mr Dhanoa did not want to engage Davis Langdon as the costs consultant. However, this was only because he wished to engage EC Harris, a different practice in the same field, to perform the same role. EC Harris had acted on the Sofitel Hotel project at Heathrow which Mr Dhanoa admired. In this, he rejected Fosters' advice (repeated often) to engage Davis Langdon, and he engaged EC Harris instead. EC Harris and Davis Langdon are both sizeable and well known practices. Davis Langdon had a close relationship with Fosters, EC Harris did not.

19. The degree to which Fosters, in the person of Mr Stewart, attempted to pressure him into using Davis Langdon was considerable. Mr Stewart was happy to use such measures as he could to achieve the appointments he personally desired; he did so not only for EC Harris, but other professionals too. In an e mail of 31 October 2007, for example, in relation to a proposed structural engineer (who again is a respected one, but whose name need not be repeated) he stated the following in order to influence the choice of appointment:

> "It is clear that [X] are a very competent fabrication and enabling works engineer. However, they are not in the class of design engineers which are required for this job. We need an engineer of proven design talent……they do not understand the commitment + talent we will require during the design process. No matter what people say at this stage, if they have under-priced the job, they will just not turn up when they start losing money…."

20. This sort of high-handed attitude by Mr Stewart seems to have been his modus operandi to dealing with others on the project. The suggestion that properly qualified professionals in a well-known firm did not have "proven talent" or would simply "just not turn up when they start losing money" are serious criticisms. This would be a serious matter in respect of any profession, in my judgment, but structural engineers are responsible for structural integrity; if they get things wrong, structures collapse. In my judgment, Mr Stewart was simply bandying around criticisms to get his own way. There was no evidence provided as to why this practice of structural engineers would simply "just not turn up" later in the job if they felt they were losing money.

21. There was never any question of Mr Dhanoa having "fallen out" with Davis Langdon; he simply wanted to engage a different practice to the one that Fosters wanted him to engage. Such independence of thought by a client did not go down well with Mr Stewart. EC Harris had performed the very same cost consultant role on the Sofitel Hotel construction project for the Aurora Hotel group, also at Heathrow, which Mr

Dhanoa saw as a success; this too was a five star hotel. There were e mails to and from Fosters about this, and Mr Brooker simply cannot have believed that Mr Dhanoa ever intended "to cost the building himself"; the suggestion is completely fanciful, given the correspondence and e mails that were produced during the trial.

22. Fosters recommended Davis Langdon, and recommended them very highly, and were rather surprised (if not affronted) when EC Harris were engaged. It was EC Harris who costed the scheme at £195 million in February 2008, having given a preliminary indication in January 2008 (after having been given the design at about Christmas 2007 by Fosters). Nor is it correct to say that EC Harris were "fired". The different accounts about that and my findings are dealt with in the section "Subsequent developments" below.

23. In my judgment Mr Dhanoa is an astute businessman. He was a broadly honest witness, although he is also someone who is, for example, perfectly capable of adding spin of his own where it suits him. For instance, he added German to the list of his languages listed in his CV because he had studied it at school. He did that in this case in one of the CVs he produced as part of a package of information available for funders, in an obvious attempt to bolster his international business credentials. However, that sort of gloss is something that is of a far less significant nature, in my judgment, than the exercise in business-character assassination to which he was subjected in this litigation.

24. Mr Selby for Fosters put to him in cross-examination that he had previously been made bankrupt, which Mr Dhanoa accepted that he had, in 1990. This passage of evidence was described in Mr Selby's Closing Submissions as "shifty evidence". I reject that categorisation of it. The earlier bankruptcy in 1990 was easily established in cross-examination, and in my judgment it is overstating it to a considerable degree to describe this as "shifty evidence". Mr Dhanoa was a reasonably successful businessman in the years following that event up to his involvement with Fosters in 2007, and he had done a variety of smaller scale projects before 2007, such as a hotel project in Leeds, and made many millions of pounds in profits. Having bought the site in question at Heathrow, he was offered £21.5 million at one stage simply for the land, which would have given him a sizeable profit, again measured in the millions. He had borrowed £11.5 million from the Allied Irish Bank to buy the site on Bath Road, and spent £4 million of his own in doing so too. He plainly had access to seven figure sums of his own, in addition to having the ability to raise money through bank funding. There is no disrespect intended in my calling him an entrepreneur. For some entrepreneurs, bankruptcy may not be viewed as quite so reprehensible as other people may consider it to be.

25. In any event, simply because he had previously been made bankrupt 17 years earlier does not, in my judgment, damn him for all time in business. As with many successful entrepreneurs, he would not necessarily approach business transactions in the same way as other business professionals might do, such as bankers or lawyers. However, few bankers or lawyers risk their own personal funds in the projects in which they are involved.

26. In my judgment, Mr Dhanoa was prepared to take a certain amount of risk in order to generate business returns on his different projects or deals. He could also be prone to

exaggeration. He also was, understandably, looking back on the events of 2007 and 2008 with hindsight. However, on the crucial disputes of facts I found his account to be broadly accurate, to be consistent with the documents, and certain important elements of what he told the court simply had the plain ring of truth.

27. One example of this was the things that he said that Mr Stewart and Mr Brooker both said and did during this crucial period. I deal with this further below. His account generally has been consistent, and although there were some isolated instances of his being wrong (saying he had not received a particular letter, for example) these were very minor and did not come close to demonstrating a wholesale or any disregard for the facts. It should be recorded that he had a heart attack in the spring of 2008 but this does not seem to have interrupted his involvement in the project very much.

28. Notwithstanding the earlier business success that he had enjoyed in the years running up to 2007, this project represented a very sizeable step up for him, both in terms of the stakes, and the overall size of the project. I consider that Mr Dhanoa was broadly honest, as I have said, although as he was looking back on the project with a considerable amount of hindsight I have taken particular care in examining contemporaneous support for what he said in his evidence. These are after all allegations of professional negligence. Fosters are an architectural practice of considerable worldwide reputation as I have explained, and Mr Dhanoa, although successful in most ordinary people's financial terms, was simply not a businessman on the international scale (although I doubt he would agree with that description himself). Whereas some of Fosters' clients might be able to wave through increases in budget of, say, £25 or £50 million (or even far more) here and there without a moment's thought, Mr Dhanoa was just not in that league and did not have that financial depth. He owned a valuable site and had invested £4 million of his own funds to buy it. He had access to further funds. He had the ability to raise significant further funds by way of bank borrowing (and had done so before on other projects). He had a vision of a major five star hotel project at London Heathrow, one of the busiest and best known airports in the world serving a major world capital. He was not, however, a worldwide international businessman, and he was not (then or now) worth hundreds of millions of pounds. The impression that the Fosters attack upon him sought to portray to the court was that he was boastful and incompetent in business terms. He may have been the former, but in my judgment he was not the latter. However, he did not realise that he was stepping into a completely different world of business scale when he contacted Fosters.

29. The only other witness of fact who was called for the claimants was Mrs Grewal, who at the time was called Pushpinder or Jeet Dhanoa, and who is Mr Dhanoa's daughter. She was married in 2008 and Mr Stewart and Mr Hammerschmidt of Fosters attended her wedding. I shall refer to her in this judgment as Ms Dhanoa, as that is the name that was used at the time and appears on her emails and so on. She had attended some design team meetings with Mr Dhanoa following the appointment of Fosters in the summer of 2007. On 11 April 2008 Mr Dhanoa suffered a heart attack, and Ms Dhanoa took over in terms of the administration of the project as he was then in hospital and unable to deal with matters. In fact, he continued to be involved from hospital and was only there for two weeks, so even though Ms Dhanoa was both sending and receiving emails he remained involved too. Her evidence was of a very limited compass, but did involve some substantiating evidence about the value

engineering issue, as her father told her that after his meeting with Mr Stewart and Mr Hammerschmitt the former had told him that the project could not be value engineered to a budget of £70 million, but could be value engineered to a budget of £100 million. Ms Dhanoa was not cross-examined on this account at all. I find that Ms Dhanoa was also a truthful witness and I find that this conversation between her and her father did take place at the time.

30. Fosters invites me to draw adverse inferences from the absence of other witnesses to support Mr Dhanoa's evidence. The court is entitled in some circumstances to draw adverse inferences when witnesses might have given evidence: ***Wisniewski v Central Manchester Health Authority*** [1998] PIQR 324. Mr Selby relies upon that case as authority for the proposition, and criticises the Claimants' failure to call anyone else other than Mr Dhanoa's daughter. That case concerned the failure of a health authority, in a clinical negligence case brought on behalf of a plaintiff who had suffered irreversible brain damage at birth, to call the relevant doctor as a witness. Having extensively considered all the relevant authorities from 1875 onwards, Brooke LJ stated the following:

> "From this line of authority I derive the following principles in the context of the present case:
>
> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in the action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably be expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

31. That case was considered and applied by the Court of Appeal in ***Society of Lloyd's v Jaffray*** [2002] All ER (D) 399 [2002] EWCA Civ 1101, which concerned the well-known Lloyd's litigation, when Lloyd's Names (who were underwriting members of the Society) inherited massive losses from earlier accounting periods. The Names brought proceedings alleging deceit, and in summary their case was that Lloyd's had known about the unquantifiable but massive looming losses, whilst giving the Names the impression that all was under control and that proper reserves had been made. At the trial of what was called the threshold fraud issue, and although witness statements had been served from individuals at Lloyd's whom the Society might have called as

witnesses, a number of them were not in fact called. The Court of Appeal held, applying the principles of Brooke LJ in ***Wisniewski***, the following:

> "It seems to us that on aspects where the evidence points in a direction against Lloyd's in an area which could have been dealt with by Mr Randall the judge should have drawn an adverse inference from Lloyd's failure to call Mr Randall to deal with it. This does not mean that any allegation that the Names make against Mr Randall must be accepted because he did not give evidence. It simply means that where the evidence points in a certain direction an adverse inference can be drawn from a failure to call the witness to deal with it."
>
> (at [406] and [407])

32. It has also been considered and applied by the Court of Appeal in ***Benham Limited v Kythira Investments Ltd*** [2003] EWCA Civ 1794 at [26], which concerned a successful appeal against a first-instance judge's acceptance of a "no case to answer" submission in a civil trial. I considered and applied those authorities in ***Energy Solutions v Nuclear Development Authority (No.2) Liability*** [2016] EWHC 1988 (TCC) in the context of a procurement challenge. The principles are dealt with at [319] to [330] and I drew certain adverse inferences in that case at (inter alia) [393] and [790]. However, I stated in that judgment at [323] that it should be noted:

> "…..without in any way departing from the statements of principle that apply in this situation generally or applying a different standard, that procurement proceedings have a particular aspect to them that should be borne in mind. This is that there is an express obligation of transparency upon the contracting authority. On occasion, and without in any way shifting the burden of proof, contracting authorities and their evaluators may be required to justify or explain what has been done when evaluating tenders, particularly if a score given on a particular requirement has been changed by the SMEs themselves during the evaluation process. Reasons have to be recorded and the record is important; it helps compliance with the obligation of transparency. Such explanation is made far more difficult for a contracting authority if the directly relevant personnel who were centrally involved in that process are not called as witnesses. This justification or explanation is something that will or may arise if the material available shows a prima facie manifest error. That is probably simply a different way of stating the third of Brooke LJ's principles in ***Wisniewski***."

33. I do not consider that the requisite ingredients are present in this case for me to be justified in drawing adverse inferences from the absence of other professional advisers, or other witnesses, who were not called to give evidence on Mr Dhanoa's behalf. A witness statement was served from Mr Tiplady, yet he was not called as a witness. Ms Briggs submitted that his evidence as contained in that statement did not really take the case particularly much further, and in any case he had booked a

holiday and that is why he did not attend the trial. However, I am unpersuaded that the evidence points in a particular direction against Mr Dhanoa such that I should draw an adverse inference from anyone's absence in any event, let alone that of Mr Tiplady.

34. On the two crucial points, namely the budget dispute (the subject of what is called "Breach 1" by Ms Briggs) and the Value Engineering dispute (the subject of "Breach 2") it is essentially Mr Dhanoa's evidence on the one hand, partly supported by some contemporaneous e mail references, against that of Mr Stewart, and to a lesser extent Mr Brooker and Mr Hammerschmidt, on the other. This is not a situation where, in my judgment, adverse inferences are required or justified. In any event, the evidence even of the Fosters' witnesses on these two points moved far closer towards the account of Mr Dhanoa by the time their cross-examination had been completed.

35. Turning to the witnesses who appeared for Fosters, these were numerous. The first was Mr Hugh Stewart, a partner at Fosters who reported to Mr Brooker, the partner in charge of the team dealing with the project called Group One. Mr Stewart was not exclusively involved in this project, and he told the court that he had about four or five projects running at one time. Mr Hammerschmidt, who was an Associate Partner, was exclusively engaged on this project and reported to Mr Stewart. Mr Stewart's evidence demonstrated the gulf between the two contracting parties. The first meeting which Mr Stewart attended, for example, was at Mr Dhanoa's semi-detached property in Hayes, somewhere that Mr Stewart explained in his written evidence in these terms:
"We met in what appeared to be Mr Dhanoa's home, in a semi-detached house near the site in Hayes. We discussed the scope and ambition of the project, in which John Dhanoa used the hackneyed phrase "world class architects" and how the Foster brand would enable him to gain credibility with both operators and investors".

36. Given that Fosters do consider themselves, and almost certainly are "world class architects" – and Mr Stewart certainly gave the impression that he considers himself a world class architect who has led the design of numerous major projects – it is not clear why Mr Dhanoa's use of that phrase should be described as "hackneyed". Certainly the image of three of Fosters' international architects meeting Mr Dhanoa in a room in his semi-detached house in Hayes is an incongruous one. I doubt that any of the Fosters partners in question were used to meeting anyone in such surroundings, and Mr Stewart frankly accepted that this was not the sort of meeting that would normally be held with Fosters' clients, describing it as an unconventional setting. Mr Stewart was sceptical that matters would proceed.

37. Fosters decided that they would seek a substantial (non-refundable) deposit prior to starting work, and also discussed that the fee was to be a "relatively high lump sum". However, to Mr Stewart's surprise, the deposit of £150,000 requested was paid and Fosters were engaged. The terms upon which the written appointment was agreed are dealt with in the next section of this judgment headed "The Terms of the Appointment".

38. The other architects who were called from Fosters were Mr Grant Brooker, the partner in charge of Group One (now called Studio One), and Mr Hammerschmidt,

who was exclusively engaged on this project as he was the most junior. Mr Brooker has been a member of Fosters since 1987 and is a Senior Partner and Director. He is also a member of the Partnership Board. He attended few meetings, although he did attend the one that took place at the semi-detached house, and he was not copied in on all the correspondence. Fosters is split into six studios or teams; what was then called Team One is now Studio One.

39. Unlike Mr Brooker and Mr Stewart, Mr Hammerschmidt no longer works for Fosters and has relocated to his native Germany and practises as an architect there. He is qualified in both Germany and the United Kingdom, and joined Fosters when he graduated from Bauhaus University in 2000. He gave evidence in English by video link from Frankfurt-am-Main where he now lives.

40. I did not find either Mr Stewart's or Mr Brooker's approach to giving evidence particularly helpful, or their evidence even accurate when considered against contemporaneous documents. Rather ironically, given their criticisms of Mr Dhanoa, their evidence during their cross-examination painted a wholly different picture than that contained in their written witness statements. However, that is not to say that their actual evidence itself was unhelpful in terms of assisting me to decide the issues. On the contrary, on some very important and headline points – for instance whether there was a budget – they entirely shifted their position under moderate cross-examination and simply accepted the claimants' case. Mr Stewart, for example, said orally in cross-examination that he "repeatedly asked" Mr Dhanoa for the budget, again and again. When this was followed up with another question on the same subject, he simply accepted a main plank of the claimants' case, and one upon which the pleaded positions of the parties had been, pre-trial, diametrically opposed:

MS BRIGGS: Did you ever ask Mr Dhanoa for his budget?
A. I'm sure I did, yes.
Q. And did he answer you?
A. I'm sure he did.
Q. And did he say 70 million?
A. I think he said 70 to a hundred million.
Q. So your evidence is you think he said his budget was 70
to a hundred million?
A. Yes.

41. In my judgment this was rather a pivotal moment in the case. For over two years since March 2015 when proceedings had been issued, and during the letter of claim period before that, Fosters had steadfastly refused to accept that there was any budget at all. It was a central part of their case that there had not been. Mr Stewart accepted the point about 30 minutes into his cross-examination.

42. Both Mr Brooker and Mr Stewart's written evidence was entirely self-serving, and seemed to have been drafted regardless of the facts. Their oral delivery was halting and they each seemed carefully (and on occasions ponderously) to weigh up the potential ramifications of any answer before they delivered it, and would swerve away from giving answers that might damage the Fosters' cause. Lengthy rambling answers that were entirely off the point were commonplace during the evidence of these two architects, and also appeared to me to be part of an attempt by them to

keep the oral evidence, and what the court was told in answer to questions, on a very tightly controlled course. It was highly unsatisfactory. In particular, however, two passages of Mr Stewart's cross-examination were notable and this is addressed further in the section "The breaches". The passage above about "repeatedly asking" Mr Dhanoa for the budget was wholly at odds with the Fosters' case that had been advanced for a very long time prior to the trial. In that respect their evidence was important in resolving the factual disputes between the parties, but perhaps not in the way these two witnesses intended. Some of Mr Stewart's more impromptu answers, such as "that's what we do" and "we are Fosters" were very similar to the actual phrases that Mr Dhanoa had said that Mr Stewart had used in 2007 and 2008. Further, Mr Brooker's rather autocratic dismissal of the option for the design initially chosen by Mr Dhanoa, and the imposition upon the scheme of the biosphere (which Mr Dhanoa told me he did not really like, evidence which I accept) are entirely at one with what I observed during his evidence about his approach to Mr Dhanoa generally. The biosphere was a structure or glass envelope within which the hotel was to sit, the entire hotel being contained within it. It was to be a very impressive and innovative feature. It was also extremely expensive.

43. I would not describe it as a clash of personalities between these Fosters' partners and Mr Dhanoa, rather that Mr Brooker and Mr Stewart seemed to see Mr Dhanoa as somewhat beneath them as a client. He frankly told the Fosters' team that he wanted their brand for credibility. They not only knew that, but were of the unshakeable (and correct) view that, as Fosters, they could bestow that credibility. There is no doubt that the Fosters "brand" is of great value, and the practice is a worldwide leader in the field, and they were right that having Fosters design a scheme for Mr Dhanoa did bestow credibility upon it. This did however mean that with them, Mr Dhanoa simply had no credibility at all, although he plainly did not realise that at the time. The fact that the initial briefing was given in his semi-detached house in Hayes hardly helped, nor did the retention in the project of a ten-pin bowling alley. This planning requirement was seen by them, even during the trial, as a point almost of mockery. Mr Dhanoa's other projects, which had led to his making profits of several million pounds, were hardly likely to impress them, although Mr Dhanoa did try to impress with his achievements, such as they were. A small hotel in Leeds, or 24 flats in a modest residential housing development, are not projects that will cut much ice with people who have been involved in designing iconic buildings across the major cities of the world. Mr Dhanoa on the one hand, and Mr Brooker and Mr Stewart on the other, were literally poles apart.

44. All of the instances I have identified in the paragraphs dealing with Fosters' criticism of Mr Dhanoa demonstrate, in my judgment, how both Mr Stewart and Mr Brooker were extraordinarily enthusiastic in these proceedings to twist the facts. The whole tenor of their evidence was to disparage Mr Dhanoa. In my judgment both those gentlemen viewed Mr Dhanoa with a degree of superiority; he was not the sort of client for whom Fosters was used to acting, and Mr Stewart in particular gave me the impression that he was not the sort of client that Fosters really wanted. They certainly wished to portray him to the court as entirely lacking basic business common sense. The more that Mr Dhanoa at the time in 2007 and 2008 believed he was impressing upon his professional team his own (to him) impressive international business credentials, the more this was likely simply to have re-emphasised to Fosters quite how lacking in those he was. There were two other

instances that demonstrate how Fosters' attitude to Mr Dhanoa continued past the events of 2008. I deal with these further in the section "Subsequent developments". They involve attempts by Mr Dhanoa, through a company authorised by him to do so called Sparc, to obtain what are termed "deliverables" from the Fosters' Scheme. The internal emails at Fosters discussing how to deal with this are most illuminating of their continuing attitude to him. Also, in this case I found the contemporaneous references in the period 2007 to early 2008 to budget of particular assistance in resolving the factual issues. The way that subject – strongly contentious at the trial - was dealt with at the time in different emails supported the evidence of one of the parties to the litigation (Mr Dhanoa), and was entirely at odds with the evidence of the other (Mr Stewart and Mr Brooker). It is not necessary for the court to resolve why things happened as they did, just to resolve what in fact happened. However, in this case the reason may well have been that the attitude of Mr Stewart and Mr Brooker towards Mr Dhanoa included the same attitude towards his budget. It just did not matter.

45. Mr Hammerschmidt, on the other hand, as a witness was of a completely different calibre to the other two architects, and of great assistance to the court. He answered sensibly, readily and, in my judgment, wholly truthfully. He had a great deal more involvement with Mr Dhanoa during the project than either Mr Stewart or Mr Brooker did. Those two latter Fosters partners were however the ones taking the decisions. Importantly, in my judgment, both those two were at the meeting held at Mr Dhanoa's semi-detached house in July 2008. Mr Stewart was adamant that, although he was at that meeting at the house, it was the second meeting held between Fosters as a practice and Mr Dhanoa. Whether it was the first or second meeting in my judgment is not material. There was at least one meeting in that location and Mr Stewart attended it, and whether it was also the first meeting between Fosters and Mr Dhanoa or the second does not affect my findings. Mr Stewart may either have simply been mistaken that there had been an earlier meeting (which he had not attended) before that, or he may be attempting to distance himself from the very first face to face contact with Mr Dhanoa. I find as a fact that there was a meeting in July 2007 and this was attended by all three of the Fosters' architects to whom I have referred and Mr Dhanoa. It was held at his house in Hayes. The budget was discussed at that meeting. Mr Stewart's attempts to minimise his involvement in the early discussions between Fosters and Mr Dhanoa are not to his credit.

46. Mr Hammerschmidt, at the end of his evidence, told me about the Fosters' reaction to the costing of £195 million of the Fosters' Scheme in early 2008. This was, in summary, that there was considerable shock and they realised it was "almost twice" the figures they had been given (which in this context meant a budget of £100 million). Such evidence is entirely at odds with the Fosters' pleaded position, that there was no budget. He also said that there had been concern prior to the actual number being produced because it was felt that the Scheme would be an expensive one. Such evidence would make no sense had there been no budget, as both Mr Brooker and Mr Stewart would have had those who read their written statements believe.

47. There were other witnesses who appeared at the trial for Fosters too. Mr Michael Gardner of Fosters was called; he is a management consultant and not an architect.

He had negotiated the contract terms and the Fosters' fee with Mr Dhanoa. I found him as a witness open and accurate; he no longer works for Fosters. Mr Richard Sugg of EC Harris was called too; he retired from EC Harris about 5 years ago, but provided consultancy services thereafter. He was, in supplementary evidence given by way of oral examination in chief, asked about the circumstances in which EC Harris came no longer to be retained or engaged by Mr Dhanoa. Fosters' case was that EC Harris had been "fired" by Mr Dhanoa. He gave an account wholly consistent with the challenge put to Mr Dhanoa in his cross-examination, and directly contrary to Mr Dhanoa's account. However, this evidence by Mr Sugg (which was to the effect that Mr Dhanoa had not given the court an accurate account of EC Harris' termination, and that EC Harris had been asked to do something by Mr Dhanoa that professionally they were not prepared to do in a proposed letter for funders) was proved simply to be wrong in fact in cross-examination by Ms Briggs. She produced a letter from EC Harris to Mr Dhanoa at the time that demonstrated that Mr Dhanoa's account was true (although his explanation that they had sought to hold him "to ransom" was simply colourful language). Contrary to what Mr Sugg had told the court in supplementary evidence in chief, EC Harris *had* been prepared to provide such a letter, had even expressly offered to do so, but had indeed sought a fee for this. This evidence demonstrated to me that Mr Sugg was an enthusiastic adherent to the attack on Mr Dhanoa's business acumen and credibility led by Mr Stewart and Mr Brooker, and that his evidence on this subject was simply not true.

48. Mr Steven Lacey of Davis Langdon was also called for Fosters. He was in an interesting position on this project. Fosters wanted him appointed as the costs consultant, and had worked with him before. Mr Stewart went to considerable lengths to have him appointed, including making criticism of EC Harris (Mr Dhanoa's preferred option). He made strong efforts to persuade Mr Dhanoa to appoint Davis Langdon. Mr Lacey was even told by Mr Hammerschmidt in December 2007 that Davis Langdon *had* been appointed, and they were included on the project professional team list as the costs consultants. Mr Dhanoa was clear in 2007 that he had never appointed Davis Langdon, and would not be doing so. He never agreed to do so, and at all times pointed out to Fosters that he was interested in EC Harris. This is a good example of Fosters' behaviour to Mr Dhanoa. For some weeks they simply ignored Mr Dhanoa's views about Davis Langdon and proceeded as though he agreed with them, even though specifically he told them more than once that he did not. Fosters told Mr Lacey that he had actually been appointed. Mr Lacey explained that he went to a meeting on 3 December 2007 thinking he was appointed, and was attending as a member of the professional team. This was all due to how Fosters had behaved. He does not appear on the list of attendees of the meeting. His explanation for this was that he was late in arriving. He said that he told the meeting that the project could cost £250 to £300 million. This statement is not minuted. Further, the meeting minutes show that they were to be distributed to EC Harris, and not to Davis Langdon. Any involvement Davis Langdon had in this project ended after that.

49. I accept that Mr Lacey attended that meeting, although he arrived late and there is no evidence that he was introduced to the meeting at all, which was well underway when he arrived and which had very many attendees. He is certainly not noted as attending, which means the person keeping the minutes or note of the meeting had no idea who he was, or that he was even there. His statement of potential cost

cannot have been made to the meeting as a whole, as it would have been minuted, and it would have been realised that he was there. It can, at best, only have been a casual comment to someone in the meeting, and would in any event have been coming from someone who was not formally involved in the project at all and certainly not as the cost consultant, as EC Harris were included in that capacity in the distribution list. Even Mr Stewart, who relied upon that statement by Mr Lacey many times in his written evidence, described it as "off the cuff". Further, by that stage of the project the design was almost finished as it was given to EC Harris by Fosters at around Christmas time. I do not therefore consider that informal comment by Mr Lacey relevant to the issues that I have to decide. It was an informal or "off the cuff" comment; it cannot have been made to the meeting as a whole; it was made by someone who was not listed as an attendee, and who had no formal role in the project. I find that it was made privately to Mr Stewart, and perhaps one or two other people in the vicinity. It was certainly not made to Mr Dhanoa and I find that he did not hear it, and did not hear of it from any other attendee. In any event, the Fosters' Scheme had almost been completed by then anyway.

50. There were two other witnesses for Fosters whose evidence was read. They were Nathan Millar and Piers Heath. Piers Heath was in practice as Piers Heath Associates in 2007 and worked closely with Fosters, and his practice merged with Fosters in 2011. He is an energy engineer and Piers Heath Associates ("PHA") were appointed in this respect by Mr Dhanoa on Fosters' recommendation in 2007 as environment consultants. For the purposes of the fee estimate provided by PHA, the budget for the project that was used was £70 to £100 million. Mr Heath described Mr Dhanoa as a "committed and hands-on client". Mr Millar is an environmental designer who is employed by Fosters. He worked for PHA in 2007 and was the person with day to day responsibility for the project at the time. He described Mr Dhanoa as a "very proactive client" and was the person who chased Mr Dhanoa, unsuccessfully, for a modest level of outstanding fees. Their evidence was not controversial and they were not cross-examined. That practice did however know what the budget was in 2007.

Expert Witnesses

51. There were six expert witnesses in total, three for each side. Each side called an expert witness who was an architect. Mr John Rich was called for the claimants. He has been a Chartered Architect since 1982, founded Stubbs Rich LLP in 1992 and also founded its successor practice SRA Architects LLP in 2014. He is a practising architect and construction values range on projects on which he is involved up to about £35 million. His practice is currently designing projects with a combined value of about £550 million, which at over half a billion pounds is a sizeable sum. He is an experienced expert witness. Fosters called Mr Dexter Moren. He is a registered Architect and the founder of Dexter Moren Associates in 1992, a practice chartered with the RIBA that specialises in architecture and design in the hotel or hospitality sector. He is qualified (both as an architect, and with a MBA) from Witwatersrand University in South Africa, has an MSc in Architecture and Urban Design from Columbia University in New York, and has also been a RIBA member for over 30 years. As a matter of fact, his second day of cross-examination coincided with the celebration of 25 years in practice of his firm, Dexter Moren Associates. His list of clients, and the experience he has, in the hotel sector includes projects in the UK, Europe, the Middle and Far East, Africa and the Caribbean and

perhaps all the major worldwide hotel brands of the world. He therefore has a very impressive roster of clients. He had never acted as an expert witness before.

52. There were some difficulties with each of the architect experts. Mr Rich accepted in cross-examination that his terminology in some places in his reports was not accurate, and should be changed. Mr Moren had not included the CPR Part 35 declaration in his report at all, which is a mandatory requirement and which was corrected by him overnight (as his evidence went into a second day). He also did not really appreciate the correct approach to disputed evidence of fact, which can present some challenges for an inexperienced expert witness who must (of course) not decide which version of the facts they prefer. Mr Moren said he had simply disregarded facts that were controversial. This means that considering alternative opinions depending upon the facts did not arise in the conventional sense. He gave his extensive views on causation, which matters do not require expert opinions, qualifications or analysis and which are matters for the court. Such evidence from an expert is inadmissible. This was not entirely his fault, however, as the questions he was asked could potentially have been interpreted as inviting this. However, he would regularly give his views on the dispute as a whole, rather than confine himself to matters upon which expert architectural evidence arose.

53. However, notwithstanding these difficulties, it was clear to me that both experts were doing their best genuinely to assist the court, and both realised that they had to be independent of the party that had instructed them. Mr Moren is far more used to dealing with the sort of clientele, and projects, that Fosters is used to dealing with, than is Mr Rich. He has an international practice, and is extremely experienced in dealing with international clients. He told the court that some of his clients in Africa simply want to build wonderful hotels for which the cost is simply not a factor, regardless of that hotel's future profitability. Mr Rich, although widely experienced, has more limits on that experience in terms of hotels and the value of international projects. However, the scope of Fosters' duty is a matter of law, not a matter of an expert witness' experience, and in my judgment Mr Rich has more than sufficient experience of similar projects. It was very useful to understand the background to how this project could have unfolded the way it did, and Mr Moren was very clear about that. I found both the experts of great assistance. In particular, Mr Moren's evidence was that Fosters should have designed to the budget if there had been one, but a failure to do would be what he called at "architect's risk". By this he meant that Fosters could simply be required to do the design again, at their own cost, if they failed to comply with the budget first time around. This essentially came down to an acceptance by him that an architect must design to his client's brief. He accepted, as I imagine any architect exercising reasonable skill and care would, that if a client provides a budget to his architect, that budget should be taken into consideration by the architect in designing the project. It cannot be simply ignored. Also, his description of "architect's risk" rather ignored the components of the allegations against Fosters for breach of duty in relation to advice given after it was known that the Fosters' Scheme would cost £195 million. I deal with both these subjects further in this judgment in Part VII, the Breaches of Duty, below.

54. Their Joint Statement was also very useful. Both architects agreed that the Fosters' Scheme could never have been value engineered down to a value of £100 million. Mr Moren was asked about this many times. On each occasion, he was very clear,

and the expression upon which he finally settled (although there were many others that were synonymous) was "blindingly obvious".

55. The two expert quantity surveyors were Mr Wheeler (for the claimants) and Mr Hackett (for Fosters). They are both highly experienced and well known expert witnesses in a specialist field. Mr Wheeler is an Engineer and Quantity Surveyor and is head of the expert witness division at the Driver Group. He is a Fellow of the Quantity Surveying Institute, a Member of the Chartered Institute of Arbitrators, a Member of the Chartered Institute of Civil Engineering Surveyors and a Licentiate Member of the Chartered Institute of Building Services Engineers. The simple question that was posed for Mr Wheeler in his instructions was whether the Acanthus Scheme could be built for £100 million (at 2009 values). His conclusion was that it could be.

56. Mr Hackett has an MA in Quantity Surveying from Trinity College, Dublin, and is a Fellow of the Royal Institution of Chartered Surveyors, and also an Associate of the Chartered Institute of Arbitrators. He set up Mark Hackett Associates in 2009, but before that was the Managing Partner of Davis Langdon's Legal Support Group, having joined Davis Langdon in 1987. This means that he was employed by Davis Langdon during the period 2007 and 2009, which covers the period when Mr Lacey, also of Davis Langdon was involved in this project for a short time and attended the meeting in December 2007. However, it was not put to Mr Hackett that this caused him any conflict of interest and I do not consider that it did so. He was given far wider instructions than Mr Wheeler. This included matters such as how an architect "interacts with the Quantity Surveyor", certain features of the Fosters' Scheme and how that "bears upon the feasibility estimate of EC Harris" (which was £195 million), and also the issue of value engineering. His instructions also included the issue posed to Mr Wheeler, namely whether the Acanthus Scheme could have been constructed for £100 million using 2009 values. His conclusion was that it could not.

57. Mr Hackett's instructions included matters that either were not relevant, or became no longer relevant, given the issues in the proceedings. For instance, given that the expert architects agreed that the Fosters' Scheme could not be value engineered down to £100 million, comparing elements of the EC Harris feasibility estimate of £195 million and opining as to the cost of different elements simply did not go to any aspect of the case. I do not criticise Mr Hackett for this, as any expert witness addresses the instructions that they are given. As long as those instructions are clearly identified, which these were, then the scope and range of the expert evidence exercise can be considered (or politely put to one side).

58. However, on the very simple issue of whether the Acanthus Scheme could be constructed for £100 million in 2009 values, which undoubtedly was an issue in the case and which required expert evidence from both Mr Wheeler and Mr Hackett, I prefer Mr Wheeler's evidence. The reasons for this I deal with in the section of this judgment headed "Causation". Not least, Mr Brooker accepted that Fosters could have designed a 500 bedroom 5 star hotel in that location for £100 million, and also the Sofitel hotel was constructed at a cost of £200,000 per room (or "per key", as the contemporaneous documents expressed it). In my judgment, both those aspects of the facts demonstrate that in 2009 a 5 star hotel on that site could have been

designed with 500 bedrooms for a cost of £100 million. The suggestion that it could not – in other words that even if there were a budget of £100 million, this was unrealistically low – is, with respect fanciful, and demonstrably so after Mr Brooker's evidence and ready acceptance of the point.

59. The two expert accountants were Mr Hall (for the claimants) and Mr Barron (for Fosters). They dealt with the loss of profits claim and agreed almost everything between them in three Joint Statements. There were just three matters outstanding by the time they came to give their oral evidence. These were depreciation, the cost of fixtures, fittings and equipment (or "FFE") and finance cost. There were three factual matters concerned with invoices which were outstanding, but counsel for the parties agreed those matters too prior to closing submissions being delivered. The only outstanding point on invoices (which concerns two particular invoices) I deal with in the quantum section.

IV *The Terms of the Appointment*

60. Mr Dhanoa has a number of companies. He refers to them as the Riva Group. Riva Bowl LLP (the Second Claimant) was the one that purchased the land. Riva Properties Ltd (the First Claimant) was the one that contracted with Fosters. A sale and leaseback arrangement was entered into between Riva Bowl LLP and Riva Bowl Ltd (the Third Claimant) in 2008 whereby the freehold of the land was transferred to Riva Bowl Ltd. Riva also happens to be the name of a very high-end yacht company, established in the 19th century, but which became internationally famous when run by Carlo Riva, an Italian boat designer, in the 1950s. Mr Dhanoa's companies and his Riva Group have no connection with the Italian boat company.

61. Riva Properties Ltd and Fosters executed a document entitled "Appointment of Architect" as a Deed on 2 October 2007. It is accepted by both parties that this governs the relations between Riva Properties and Fosters.

62. By Clause 2.1 of the Appointment, Fosters agreed to "perform the Normal Services in relation to the Development". The Normal Services are defined in Clause 1 as the services described in Schedule 1.

63. It is accepted by Fosters that the Appointment required Fosters to exercise due skill and care in the performance of its duties. Fosters is referred to in the Appointment as the Consultant and Riva Properties Ltd is referred to as the Employer. The duty to use reasonable skill and care is provided in Clause 8.1 which states as follows:
"The Consultant warrants and undertakes that in the performance of its duties under this Agreement the Consultant has used and shall use all the skill, care and diligence to be expected of suitably qualified and experienced architects undertaking services the like of those undertaken by the Consultant in relation to projects of the scale and character of the Development and that it will observe and perform all the terms and obligations on its part to be observed and performed. For the avoidance of doubt, all duties and obligations of the Consultant under this Agreement are subject to the level of skill and care detailed in this clause 8.1 except where the Consultant is required to comply with any statutory requirements, permissions or law generally."

64. Other clauses which are relied upon as part of Fosters' "no loss" defence (which is deployed in respect of the loss of profits claim, and in respect of some of the

professional fees as these were paid by the Second and Third Claimants and not the contracting First Claimant) are as follows:

"18 Warranties for third parties

18.1 The Consultant shall, as the Employer may at any time or times require, deliver within 21 days of the Employer's request a Warranty or Warranties in favour of Funders and/or Purchasers and/or Tenants and/or any company appointed to manage or repair or keep in repair the completed Development.

18.2 From the date of the Employer's notice under Clause 18.1 and until and unless the Consultant enters into a Warranty in accordance with the Clause 18, the intended beneficiary of such Warranty shall be entitled, in accordance with the Contracts (Rights of Third Parties) Act 1999, to bring proceedings (other than for specific performance or injunctive relief) to enforce for its benefit any right or benefit of the Employer arising under this Agreement, but the parties to this Agreement may exercise any right which they may have to rescind, cancel and/or vary the terms of this Agreement without the consent of the intended beneficiary being required."

65. Returning to the Normal Services, Schedule 1 of the Appointment runs to seven pages. It has a facing page which states "SCHEDULE 1 SERVICES (Clause 2.1)" and is then headed "Services Supplement for a Fully Designed Project" and was described by Mr Stewart of Fosters as being a "Fosterised version" of the RIBA terms. There are three options on the first page, and against the first, "as designer for Work Stages" the parties have inserted "Full service A-L". These refer to the Work Stages used by architects, and are often described as the RIBA Work Stages. The different stages are briefly defined in Schedule 1, which states "The purpose of each Work Stage is to achieve the outputs described as the basis for the following stage". The Work Stages are then listed, identifying those outputs. Stages A, B and C are the most relevant for these proceedings, as Stage D is the submission of the application for planning permission. This project effectively stalled after Stage D.

66. Stages A and B come under the heading "Feasibility". Stage A is headed "Appraisal" and states "Identification of Client's requirements and of possible constraints on development. Preparation of studies to enable the Client to decide whether to proceed and to select the probable procurement method."

67. Stage B is headed "Strategic Brief" and states "Preparation of Strategic Brief by [or] on behalf of the Client confirming key requirements and constraints. Identification of procedures, organisational structure and range of Consultants and others to be engaged for the Project".

68. Stages C to H come under the heading "Pre-construction". Stage C is headed "Outline Proposals" and states "Commencement of development of Strategic Brief into full Project Brief. Preparation of outline proposals. Review of procurement route."

69. Stage D is headed "Detailed Proposals" and states "Completion of development of the Project Brief. Preparation of detailed proposals. Application for detailed planning approval".

70. There are some curiosities about the way that the Stages are referred to in the Schedule, however, which have given rise to some dispute between the parties about exactly what Fosters were contracted to do. On page 4 of Schedule 1 the following appears:

"Schedule 2 Architect's Design Services
Services supplement for a fully designed project
The following activities form part of the Architect's Services

Where appointed as designer
All commissions

1.1 Receive Client's instructions and carry out an initial appraisal.
1.2 Advise Client on the need to obtain statutory approvals and of the duties of the Client under the CDM Regulations
1.3 Where applicable, co-operate with and pass information to Planning Supervisor
1.4 Receive information about the Site from Client [CDM Reg.11, 12 and/or 15]
1.5 Visit the Site

A Appraisal

1. Carry out studies to determine the feasibility of the Client's requirements
2. Review with Client alternative design and construction approaches and provide information for the cost consultant to report on cost implications

B Strategic Brief

1. [Strategic Brief prepared by or for Client]

C Outline proposals

1. Receive Strategic Brief and commence development into Project Brief
2. Prepare outline proposals
3. Provide information for cost planning
4. Submit to Client outline proposals and provide the cost consultant with information to determine an approximate construction cost

D Detailed proposals

1. Complete development of Project Brief
2. Develop the detailed proposals from approved outline proposals
3. Provide information for preparation of cost estimate
4. Consult statutory authorities"

71. The use of "Schedule 2" does not seem to be relevant, as the document is part of Schedule 1. The Appointment does have a Schedule 2, which deals with Prohibited Materials. Due to the presence of square brackets against the text under Stage B on page 4 of Schedule 1, thus "1. [Strategic Brief prepared by or for Client]", Fosters argues that they were not required to prepare the Strategic Brief for the project at

all. Mr Selby also relies upon some text on page 6, which states under "Other services" that

"The activities identified [*] form part of the Services.

Activities not identified may be instructed as additional services when required.

Sites, buildings and related services

- Advise Client on the selection of other consultants

  Options appraisal

  Compiling, revising and editing:

  Strategic brief

  Detailed written brief

  Room data sheets

  Selection of sites and/or buildings

  Outline planning submissions

  Environmental studies

  Surveys, inspections or specialist investigations

  Accessibility audit…."

72. The lack of a bullet point against "Strategic brief" in the list under "Options appraisal" is something, Mr Selby submits, that means that properly construed the Appointment did not impose upon Fosters preparation of the Strategic Brief as part of their obligations.

73. I reject those submissions, which in my judgment are wholly misconceived. Fosters were clearly obliged to provide the "Full service A-L" which means all of the Work Stages. This includes the Strategic Brief. This is because Stage B is entirely focused upon the Strategic Brief, and Stage B is plainly part of "Full service A-L", as the letter B appears after A and before L in the alphabet. "Full service A-L" is what the parties expressly agreed as the first, and primary, entry in Schedule 1. The point is emphasised by the use of the word "Full". Further, although it is correct that there are square brackets around the sentence "Strategic Brief prepared by or for Client" on page 4, the meaning of those brackets is nowhere identified. It is equally possible that the brackets are there to indicate that the sentence might or could be deleted; Mr Selby's interpretation requires the presence of such brackets to mean not only that the text within them should be read as wholly deleted, but also this would override the clear statement of "Full service A-L" too. Absent deletion of the text in those brackets, the text remains, and that text matches the text in the first sentence under Stage B on page 1 of the Schedule, which explains the outputs that will be achieved. Yet further, the entry of "Strategic brief" on page 6 under "Options appraisal" and the lack of a bullet point should not override, in my judgment, the actual text against Stage B itself on page 1. Firstly, it is double-indented, which means it is plainly part of "Options appraisal", and does not define the scope of Stage B itself. Options appraisal is a separate service, as made clear by the italicised sentence that precedes the list of potential other services, namely "*Activities not identified may be instructed as additional services when required.*"

74. I also reject the argument that the Strategic Brief was to be provided by Knight Frank. Although terms are used in communications to and from Knight Frank, it is clear to me that the phrase is not being used in the same sense as Strategic Brief within the architectural services agreed to be provided by Fosters. In my judgment, Fosters' arguments that it was not obliged to prepare the Strategic Brief are rather

opportunistic, clearly incorrect, and entirely ignore what Stage B is and what it comprises. There is no doubt however that Fosters did not prepare a Strategic Brief, and the claimants maintain that no part of Stages A and B as defined in the Schedule were performed at all. I will return to this subject below.

75. However, even if preparing the Strategic Brief (which is the first part of Stage B) was no part of Fosters' obligations – which I find it is – Fosters would still have to comply with "confirming key requirements and constraints", the second part of the first sentence of the definition of Stage B on page 1 of Schedule 1, as Mr Selby accepts. Accordingly, even if I am wrong and Fosters did not have to prepare the Strategic Brief, there remained an obligation upon Fosters to confirm key requirements and constraints. The relevant key requirement and constraint upon which the claimants rely in these proceedings is the budget. Given that it is accepted that a Strategic Brief was not prepared – by anyone – then Fosters were, in my judgment, obliged to identify the key requirements and constraints in the absence of such a Strategic Brief.

76. Fosters are therefore responsible on either analysis for the identification of key requirements and constraints. A client's budget for a project is plainly a constraint (it could also be argued that it is a requirement too), and was in this case. If Fosters were obliged to prepare the Strategic Brief (which I have found they were), this would and should have included identification of budget as a key requirement and constraint (if the claimants' case that there was a budget is accepted), or that budget were not such a key requirement and constraint (if Fosters' case that there were no such budget is accepted). If Fosters were *not* obliged to prepare the Strategic Brief (contrary to my finding) then identification of the key requirements and constraints was still part of the scope of their obligations under Stage B in any event, and the same approach to budget should have been adopted upon receipt of the Strategic Brief from the client (or another professional). The lack of a bullet point on page 6, and the presence of one set of square brackets on page 4, do not relieve Fosters of the obligation to confirm or identify the budget, or confirm or identify the other key requirements and constraints. In neither scenario is Fosters entitled wholly to ignore the presence of a budget, and also fail to identify whether there is a budget or not, as that would plainly be a key requirement and constraint.

77. Further, the expert architects both accepted that in some if not most projects, budget can be a constraint. It was therefore necessary, in my judgment, for an architect in Fosters' position to establish whether there was a budget or not at an early stage, as that is the only way that all of the key requirements and constraints could have been identified. It simply could not be assumed by Fosters that there was no budget at all. There is another secondary reason that was not argued, but seems to me to support that analysis. This is that the requirement to use reasonable skill and care in Clause 8.1 uses the following words "…..the Consultant has used and shall use all the skill, care and diligence to be expected of suitably qualified and experienced architects undertaking services the like of those undertaken by the Consultant in relation to projects of the scale and character of the Development". The "scale and character of the Development" can only be established if the existence, or absence, of a budget is also established.

78. Notwithstanding Mr Stewart's oral evidence about repeatedly asking Mr Dhanoa for his budget, and being told it was "70 to 100 million", the case advanced by Fosters on this crucial central issue in these proceedings was that Mr Dhanoa had no budget, or at least none that he communicated to them; that they were not obliged to find out whether he had one or not; that Fosters were not engaged to provide costs advice; and that other of Mr Dhanoa's requirements (such as wanting an iconic hotel, with impeccable "green credentials") were more important to him than budget, and effectively overrode any budget that he may have had. I deal with these points below. Put shortly, however, I find that whether there was a budget (or lack of it), and if so how much it was, had to be established by Fosters. I also find as a fact that there was a budget. Even if I am wrong about that, then Fosters were obliged to find out if there was a budget, or to find out that there was not a budget. Fosters did none of these things. Fosters rely upon Mr Dhanoa's desire to have an "iconic" hotel as relieving Fosters of any concern or involvement in the budget for this project. I reject that argument.

V *The Factual Disputes*

79. There are many disputes of fact, and the evidence of the parties is not ad idem in many respects. However, there are three particular factual areas that are very important, and hotly in dispute. I will concentrate on these as they are the ones necessary to resolve the case. One is the question of the budget and whether this was discussed with, or communicated to, Fosters, and if so when. The second is the Value Engineering issue. The third is what were Mr Dhanoa's subjective intentions, and how realistic objectively they were. I have given my views of the main witnesses to these discussions, namely Mr Dhanoa, Mr Stewart, Mr Brooker and Mr Hammerschmidt above. I have also explained that I found the contemporaneous e mail communications of considerable assistance. I will now identify the most important of these and what they state.

The Budget

80. Firstly, however, it is necessary to identify certain features about what was referred to during the proceedings simply as "the budget". This term can, in the construction industry and in fact in general, have different meanings depending upon its context. In the context of this case, and this project (if not in all or at least most construction projects) it connotes an approximate outturn cost for the project; it can also mean the approximate level of the funds available to the developer or employer. I find that the meaning given to that phrase by the parties during 2007 and 2008 was the approximate outturn cost for the project. It could only be an approximation, certainly in the early stages of any project. A main plank of Fosters' defence to the claim was that they are architects, not costs specialists, and cannot give costs advice. That is true, but that does not mean that "budget" in the sense that it was used by these parties throughout this project has no relevance to Fosters at all (which is effectively what Fosters were arguing in this case). Indeed, budget is used in the industry in general, and in society in general, as the amount of funds available or the amount which one wishes to spend.

81. There is a further point that arises in terms of "the budget", which arises even accepting that it means approximate outturn cost for the project. This is what is included within "outturn cost". Mr Dhanoa described it as an all-in figure, which given the project was to be an hotel means not only construction cost but including

professional fees, contingency, and also fixtures fittings and equipment ("FFE"). Professional fees can be sizeable, and are likely to be higher the more complex a building is to be. They can run to many millions and are usually (but not always) calculated by the professional firms as a percentage of construction cost. Contingency is often calculated as a percentage; it may never be spent (hence the name) but ought to be included in order to provide a more accurate figure for the approximate outturn cost for the project. Finally, for any hotel, but particularly a 5-star hotel, FFE can be a very sizeable figure indeed. As a very basic and obvious point, with 500 (or 600) rooms, every item in such a room will have its cost multiplied 500 times (or 600 times). 5 star hotels attract demanding clientele who pay much higher rates and expect more luxury in their accommodation (or accommodations, as an American business traveller might put it). Also, most international style hotels are run by international hotel companies, who enter into management agreements with the owners. The owner will be paid sums subject to a complex formula; the hotel is branded with the international brand, which will have built up a loyal following throughout the world, and which will run (as an example) a client loyalty scheme and which markets the hotel. The quid pro quo for this is that the hotel's owner must comply with what that brand's requirements are, before the brand will agree to operate the hotel. The major international brands are well known, and travellers know if they book into a hotel of Brand X what they will receive by way of standards. The brand requirements affect the budget too, but in particular will have an effect upon the cost of FFE.

82. In this case, Mr Dhanoa told the court that by "budget" he meant outturn cost for the project including everything, namely professional fees, FFE, planning application fees and any other costs. The expression he used was "all in" and sometimes "everything". I do not doubt that this is what he meant by that. I do not however accept that he ever told Fosters that the figure he indicated for budget was to include contingency, which was never separately addressed by him, or communicated to Fosters as being included within what he meant by "budget". However, with that exception, I accept his evidence and the figures that were discussed by him for budget were for everything that was to be spent. Contingency was not to be included, but professional fees and FFE were. The budget was initially set at £70 million in July 2007. It then became more fluid and was expressed as a range, namely £70 to £100 million. It was clear that the upper limit of the range was to be £100 million. The budget was never, in my judgment, to be in excess of £100 million, and it was always made clear that the upper limit was to be £100 million (after it was increased to that in late August/early September 2007).

The Contemporaneous e mails

83. Mr Dhanoa met personnel from Fosters in July 2007. He had spoken to Mr Brooker before that by telephone. Mr Dhanoa proposed an architectural competition in which Fosters might participate. Mr Brooker told Mr Dhanoa that Fosters would not participate in such a competition. There is no reason why they should; such competitions are speculative (in that the practice might not win the commission) and take much resource in compiling an entry. There are some notes of the meeting in July 2007 – it would be more accurate to describe them as rough sketches by Mr Hammerschmidt – in his sketch book headed "Client meeting 12 July 07". At that stage it was intended to have a casino in the hotel. There are some points noted down the left hand side of the page. These include the following, the text of each

being quotations from the notes but the numbering being provided for the purposes of this judgment:

1. 500-600 bedrooms;
2. bowling centre, alley;
3. casino underneath;
4. 5 star hotel;
5. 5 storey high doable;
6. 6 storeys possible for F+P?;
7. Icon building;
8. Planning - 9 months to consent 6 months to work on it.
9. Ascendant operator;
10. Bedrooms $28m^2$ each;
11. Noise, next to runway."

84. No budget is recorded. There are other points in the notes of Mr Hammerschmidt but they are not relevant to the issues. Suffice to say that some of Mr Dhanoa's requirements inevitably changed; the idea of the casino was discarded rather early on in the life of the project, as was the idea that he might have an office on the top storey of the hotel.

85. On 1 August 2007 Mr Hammerschmidt sent an e mail internally at Fosters which was copied to Mr Stewart. It stated "we are in the process of getting a fee proposal together for a Hotel Project in Heathrow……Hotel 5*………max 7 storeys might come in at £150k per room so it its 500 rooms = 75 million pounds total." The approach of taking a figure of £x per room, and multiplying it by the number of rooms, is a common one in the hotel sector as a rough guide of construction cost. It features in a great deal of the evidence and also in the documents at the time. Mr Hammerschmidt could not remember where he got the figure of £150k per room from; he was fairly sure it was not his figure, and thought it could have been from the management team. The obvious point about this e mail is the figure of £75 million.

86. In another e mail of the same date, from Mr Hammerschmidt to Mr MacLeod of Fosters, he stated "500 is the brief (could go up to 600 max)". This plainly refers to the number of rooms. He also said "Fitout – we don't know if it is included (let's assume it is)." By "fitout" I find he was referring to FFE. By posing the question of whether it was included, he can only have been referring to whether it was included in the figure given to Fosters by Mr Dhanoa as the budget. There is no other sensible context in which the word "included" could be placed.

87. In a memorandum of 2 August 2007 from Mr Sutcliffe, the Senior Partner of the Management Group of Fosters to Mr Stewart, copied to Mr Brooker and Mr Hammerschmidt, Mr Sutcliffe stated:

> "Project
>
> Direct approach for 500 room 5* hotel ($50,000m^3$) including fit-out.
>
> Cost about £75 million based on £150k/room.

Fee Proposal

£6.5m (= 9.3% Resource £4m) for full service.

Terms and Conditions

Propose F+P Memorandum

Non refundable mobilisation fee

Propose £150k.

Expenses

Plus 10% including travel and presentation…..”

88. Ms Briggs made the point that if £6.5 million were 9.3% of the budget, the budget must have been £70 million (which precisely matched Mr Dhanoa’s evidence). As a matter of arithmetic that is correct. However, the figure in this memorandum expressly states £75 million. I take that as the figure, rather than working out what the figure was to give a product of £6.5 million. This is because it is the figure that is expressly stated. It also matches the other previous references to £75 million. However, given the later increase in the budget to the range of £70 to £100 million, in my judgment it does not much matter whether the budget was originally set as £70 million, or £75 million.

89. In the fee proposal of 8 August 2007 to “Riva Properties – John Dhanoa” from Fosters, the fee proposed is “an overall lump sum fee of £7,000,000” plus expenses. Costs advice and measurement of areas were not included in the Scope of Services.

90. A meeting was then held on 24 August 2007 between Mr Dhanoa and Mr Hammerschmidt. The latter reported back in an e mail at the end of the afternoon to Mr Gardner, Mr Stewart and Mr Brooker. This states “a brief summary of what was discussed” in the meeting and included a number of bullet points. They included:

1. “criteria/his brief to be included in the contract in more detail”.
   I note here that this simply was not done by Fosters who ignored this request.
2. “What rate/budget are F&P assuming?”
3. “Fee to be £6.5 mio + expenses”.

Mr Stewart said he could not remember the question about rate/budget being asked of him. It plainly was asked of Fosters, however, as this e mail shows. Given the Fosters fee was to be calculated as a percentage of construction cost, it was an obvious question. The budget Fosters were using was £75 million as the earlier internal e mails show.

91. Mr Dhanoa appointed a solicitor to act for him in relation to the execution of the Fosters’ Appointment. This was Mr Richard Brookes of Geldards LLP. A discussion took place in late August/September 2007 about the amount of Professional Indemnity (“PI”) insurance cover that Fosters would obtain for the project. There was a cap on liability and a net contribution clause in the proposed

Appointment, and Mr Brookes pointed out to Fosters (in the person of Mr Gardner, but copied to Messrs Brooker, Stewart and Hammerschmidt) in an e mail of 10 September 2007 the following:

"Also, in relation to PI insurance, I understand that the build cost could possibly reach 100 million, and therefore an appropriate level of cover will need to be put in place….."

This e mail refers to "build cost" and not budget, but shows that the figure of £100 million was at that stage being discussed with Fosters as a potential higher figure.

92. Mr Gardner sent an e mail in relation to PI cover to the solicitors acting for Fosters. These are the same solicitors as those acting for Fosters in this litigation. In that e mail, of 18 September 2007, Mr Gardner stated "We originally proposed £5 mill, then £10 mill <u>when they advised the Scheme might be £100 mill</u>." (emphasis added)

93. In another e mail from Mr Hammerschmidt, this time to PHA dated 2 October 2007 and copied to Mr Stewart, he attached an information pack and "summary of the verbal brief from the client. <u>Value of the project about £75 to 100 million</u>" (emphasis added). In a letter from PHA to Mr Dhanoa dated 15 October 2007 from Mr Heath, copied to Mr Stewart, under "Project and Programme" the letter stated "We understand that the construction value is likely to be in the region of £70 to £100 million".

94. In an e mail of 31 October 2007 from Mr Ridsdill-Smith of Arup, another proposed member of the professional team, to Mr Hammerschmidt and copied to Mr Stewart, Mr Ridsdill-Smith explained that he had provided Mr Dhanoa with the Arup fee proposal and also stated "My view is that he will reach his S+C budget of £70m only if the overall area comes down, although that might be possible by adjusting the basement layouts…" S+C means shell and core, so excludes FFE. There are other communications in similar vein. Buro Happold, a member of the professional team, stated "Assumed Construction Budget £75,000,000" in their fee proposal; the subject line of an e mail dated 27 November 2007 from Mr Hammerschmidt to Ms Dhanoa stated "£70 million budget", explaining that the structural engineer would not include a condition in their contract that the building would be constructed "within" a £70 million budget, which was interpreted by Mr Hammerschmidt as being too high a risk for a structural engineer because of potential "design and brief changes". All of the figures being discussed for budget were £70 million, £75 million, or £100 million. The budget was plainly in that range, and this must have been known by Fosters, and I find as a fact that it was.

95. In the presence of such clear contemporaneous communications that refer to the budget figure for the project, I simply cannot accept the position advanced by Fosters in these proceedings that no budget was indicated to Fosters by Mr Dhanoa in 2007. There is but one entry in an e mail at the time that is not in the range above, when EC Harris stated "£130 million". That is clearly, in my judgment, a typographical error and not matched by any of the other entries. The figures for a budget were clearly discussed and notified to Fosters and these ranged from £70 million to £100 million as can be seen above. However, this point was put beyond doubt when Mr Stewart was cross-examined on this issue which I have already addressed in paragraph 40 above. In his witness statement he had said that no "fixed budget of £70 million" was communicated to Fosters. The existence of what Mr

Stewart described as a "fixed budget" was described by him as a "false premise" and something that he expressly said was "untrue". I do not know if the use of the word "fixed" by Mr Stewart was adopted as a gloss in his witness statement to avoid accepting that a budget *was* provided by Mr Dhanoa. This is because the use of "fixed" was not pursued or raised in cross-examination. The point that was raised and pursued was whether a budget (as opposed to a "fixed budget") was communicated by Mr Dhanoa. This was probably because Factual Issue 4 is in the following terms:

"Whether Foster was told (or otherwise had knowledge of) Riva's budget for the Development (whether that be £70 or £100 million) between July 2007 and January 2008 and, if so, what did that budget relate to?"

Fosters' position on this in the Opening Submissions was that there was no such communication to, or knowledge on the part of, Fosters. It should be noted that the phrase used in the issue is "budget", not "fixed budget".

96. However, and in any event, Mr Stewart when questioned about this matter finally accepted that it was. He expressly said that he asked Mr Dhanoa for the budget, and asked him repeatedly. This means that the entire defence Fosters adopted on this point was simply factually wrong. I find as a fact that the budget of £70 million was known to Fosters in the persons of each of Mr Hammerschmidt, Mr Stewart and Mr Brooker from July 2007 onwards. From August 2007 it was known to those three gentlemen that the budget was £70 to £100 million. It was also known that £100 million was the upper limit.

97. Mr Selby seeks to draw a distinction between a budget used by a professional firm to calculate fees, and a budget for the approximate outturn cost. In other words, he seeks to justify Fosters using £75 million to calculate its fees, but to distinguish that from Fosters having to design a building to within even approximate touching distance of that figure as a budget. I reject those submissions.

98. It is however correct that Fosters embarked upon designing the project with no thought or consideration for the budget at all. Both Mr Stewart and Mr Brooker in their evidence seemed to express surprise, if not astonishment, that any client would use Fosters if they needed a project designed to a budget. They obviously do not see Fosters as "budget architects", and I accept Fosters are not, in the sense that the word might be interpreted as meaning inferior or cut price. They are world-wide leaders in the field. Mr Dhanoa did not want "budget architects" in that sense either. However, that does not mean that he did not want the project designed to a budget, or that budget was not a key requirement or constraint. The expert architectural evidence was to the effect that a project can either be what was called "brief led" or it can be "budget led". The former means you start with the type of building you want, design it ("fulfilling the brief"), and then work out how much it will cost. The latter means you consider the budget, and design the building or project to match that. In a sense, it does not matter which of those two routes is adopted for any particular project, but what cannot and should not be done by an architect exercising reasonable care and skill is that a key requirement and constraint of the client is simply wholly ignored. In this case, Mr Brooker and Mr Stewart did that.

99. The brief from Mr Dhanoa was really remarkably simple. He wanted a 500 bedroom 5 star hotel that could be built within the budget on the site he had acquired at Heathrow.

100. There were other requirements that Mr Dhanoa had, and one of them was he wanted an iconic hotel. This was his word, which he used when he met Fosters at his house in Hayes. There was some discussion in the trial about what this meant. Mr Dhanoa wanted something of great significance, partly because it would create business and demand, and in my judgment, also partly because of his ambition. He also had ideas of his own about how this iconic status might be achieved. He thought that the hotel could be the world's largest clock, so the time could be read from those in approaching aircraft, and it could change colour every hour. These ideas did not match what Fosters considered would qualify as an iconic building. They accepted and understood that he wanted a scheme that would be deserving of acclaim, would be a talking point, and also be of architectural merit. Buildings in London such as the Swiss Re Building (also known as the Gherkin) and the Shard were used to illustrate this point during the trial, although that latter building was not built at the time. An enormous colour-changing digital clock will not necessarily be seen by many as obviously falling into this category, or even by some as having any architectural merit. However, regardless of those different subjective views, Fosters designed something called a "Village Theme" with separate pavilions enclosed by a giant biosphere, or glass envelope, with seven levels of basement and a method whereby natural light could be filtered down to the subterranean levels by means of atria.

101. Mr Dhanoa also wanted a hotel that was highly energy efficient, a requirement that was described as the hotel having "impeccable green credentials". However, Fosters in this litigation have fastened upon the "iconic hotel" and "green credentials" aspects of the brief, and elevated them to the foremost priority over the other requirements (including budget in the event that I were to find that one was a requirement, which I have). It is effectively argued by Fosters that such matters are incompatible, and to comply with one (budget) means the others could not be achieved. I reject that for two reasons. Firstly, I do not accept that designing a scheme to a budget of £100 million means it could not be "iconic", which is a subjective measure in any event, or that it could not have energy efficient elements. Secondly, even if I am wrong about that, such incompatibility was never communicated to Mr Dhanoa at the time. If these requirements were really incompatible, rather than being relied upon ex post facto as a justification for ignoring the budget, then in my judgment Fosters should have advised Mr Dhanoa of this at the time. They did not do so. Mr Dhanoa had a budget and wanted a budget led process; Mr Brooker and Mr Stewart ignored that, and embarked upon a process to design an iconic building that would be amazing. Features of the buildings that were notable (and expensive) included the so-called village theme; the biosphere; and seven levels of basement. The village theme involved a number of different buildings being constructed, and all of these were to be enclosed beneath the enormous biosphere.

102. Finally on this point, Mr Dhanoa (through an earlier scheme that he had considered with his then business partner) was aiming for a 500 bedroom hotel. That was what he wanted. This during the design of the Fosters Scheme became a 600 bedroom

hotel. I accept that this occurred because, as Mr Dhanoa said in his evidence, Mr Stewart told him that "we can get you more rooms in there" and that Fosters "could do better than that". The requirement for 600 rooms therefore became part of the brief against which Fosters was working, but not because of anything that Mr Dhanoa required, rather because Mr Stewart decided that is what Fosters could and would achieve. The fact that increasing the number of rooms by 20% would have an inevitable increase in the cost of the Fosters Scheme was not of any particular concern either to Mr Brooker or Mr Stewart. This demonstrates their approach to the budget generally; they simply ignored it.

103. I find that the budget that was given to Fosters by Mr Dhanoa in July was £70 million, although very shortly after that it rose to £75 million. Mr Brookes the solicitor knew, and communicated to Fosters, that it could potentially rise to £100 million, therefore after his e mail of 10 September 2007 the budget that had been communicated to Fosters by Mr Dhanoa and his solicitor was the range of £70 to £100 million. That was a key requirement and constraint on the project. The lower figure was potentially optimistic, certainly if it was to include professional fees and FFE, but this was accepted in the sense that a range of some £30 million above that was provided. The upper figure of £100 million included these items, and was to be the total outturn cost. Mr Dhanoa at trial was very certain that the budget was £70 million "to include everything". If that is what he thought at the time, he did not communicate that to Fosters, and indeed that position is rather undermined by his own solicitors stating in an e mail of 10 September 2007 that "the build cost could possibly reach 100 million". By build cost, those words were intended to mean everything, that is professional fees and FFE, that was to be spent. However, there is no doubt that following that e mail, everyone involved in the project knew what the range was, and it was £70 to £100 million. I find as a fact that Fosters knew this was the client's budget. Mr Dhanoa described budget to me as a priority in his written evidence, and I accept that it was. However, even if it were not, it was incumbent upon Fosters to have found out what the budget was and how flexible that was.

104. The budget was not specified in the Fosters' Appointment. The request from Mr Dhanoa to include his brief and requirements in the Appointment with more clarity was simply ignored. However, in my judgment that does not matter because Stage A required Fosters to identify their client's requirements and possible constraints in any event. This included the budget. The range of figures for the budget was information known to Fosters at the time and communicated to them not only by Mr Dhanoa, but also by his solicitor. The other members of the professional team knew too, and used figures in that range in calculating their own fees. Fosters were on notice given the communications copied to them by the other professionals. Given my findings on Fosters' Appointment (in "The Terms of Appointment" section), even had the budget not been communicated to Fosters by Mr Dhanoa, they had an obligation to enquire of their client whether there was a budget, and if so, what it was. It is not reasonably arguable, based on the content of Stage A of the Scope of Services, that Fosters had no obligation to enquire whether there was a budget or not, if one had not been communicated to them. However, on the evidence, I am satisfied that one was, and it was stated to be £70 to £100 million as I have found. This is clearly substantiated, in my judgment, by the internal Fosters e mail of 2 August 2007 using a figure within that range to calculate its own fee. The Fee Proposal sent to Mr Dhanoa included a higher fee - £7 million – but that was a

commercial proposal and I find that Fosters expected Mr Dhanoa to negotiate on the fee, which in fact he did.

105. By far the most accurate factual evidence on this area of the project (if not all areas of the project) from Fosters came from Mr Hammerschmidt. After the design had been produced by Fosters, it was given by them to EC Harris around the time of Christmas 2007 so that the cost of the scheme could be calculated. This exercise produced a figure of £195 million, obviously far higher than the top end of the budget. In cross-examination, Mr Hammerschmidt had said that this surprised him. At the end of his evidence I asked him a question as follows:

MR JUSTICE FRASER: You were asked by Ms Briggs if you were surprised when the ECH figure of £195 million was produced and you said you were. Do you remember that question and answer?

A. Yes, absolutely.

MR JUSTICE FRASER: What sort of figure were you expecting? If you can remember.

A. It's difficult because it's more a gut feeling that we -- it's not -- we were nervous and we were worried that it's more than, let's say, in the hundreds, the 75…..or higher than that, because the basements have become really, really complex, more and more. But—195? It is doubling the start -- from where we started from. And this is something that I think we all didn't expect.

We felt maybe it's -- I don't know -- difficult to say -- I don't have a number that we said, well we were all thinking it would be 130/140. It wasn't that. And we've never had that discussion. But we had a feeling that actually the complexity was too high and there must be a result in the cost that slowly emerged that feeling. But then it would be really doubling what we at some point discuss that was something that I think we all really hadn't anticipated.

106. This is important evidence. Firstly, it comes from the Fosters' architect who was most involved with Mr Dhanoa (and who had himself written e mails either to, or copied to, both Mr Stewart and Mr Brooker, expressly identifying figures for the budget). Secondly, it explained how Fosters were "nervous" and "worried" that the figure that EC Harris would provide would be "in the hundreds" which means in excess of £100 million. Thirdly it expressly refers to £75 million, and also "the start". Fourthly, Fosters themselves were surprised at such a high figure which was "really doubling" – which may have been spoken as "nearly doubling" – the figure that had been discussed. It does not matter whether Mr Hammerschmidt said "really" or "nearly" as the court can compare £195 million with £100 million in any event. The former is almost twice the latter. The latter was the upper end of the range of figures provided by Mr Dhanoa and his solicitor to Fosters. Finally, the only reason that Fosters would have been either nervous, worried (before the EC Harris figure was available) and/or surprised (after it was) was precisely because Mr Dhanoa had given them a budget for the project. If this really had been a "brief led" project, or had there never been a budget at all (both points that Mr Stewart and Mr Brooker would have had me believe) then such a situation would never have arisen and this evidence by Mr Hammerschmidt would make no sense. Given Mr Dhanoa did give Fosters his budget, it makes perfect sense. The personnel at Fosters knew that there was a real likelihood that the estimate of their scheme being calculated by EC Harris would exceed £100 million, and this made them nervous and worried.

Once the figure of £195 million was produced, the same personnel were surprised that it was as high as nearly double £100 million.

107. I find that both Mr Stewart and Mr Brooker knew that the budget was in the range I have indicated. Their attempts in their witness statements to distance themselves, or steer away, from such an important element of the instructions from their client are difficult to explain.

108. I reject the attempt mounted by Fosters to explain these events as being caused by the absence of a properly appointed quantity surveyor. Mr Dhanoa did appoint a quantity surveyor in December 2007. He was not advised by Fosters that such an appointment was necessary as a matter of urgency, or was required in order for the Fosters Scheme to be designed within his budget. In my judgment, it was not in any event. This is in contrast to the advice he was given about appointment of the structural engineer, for example, whom Fosters *did* advise Mr Dhanoa was urgently required. If the appointment of a quantity surveyor was necessary in order to design a scheme that complied with the key constraint of budget, Mr Dhanoa should have been advised to this effect. In reality, however, this is just a misconceived excuse by Fosters.

109. However, given what then occurred, the fact that this factual issue is resolved in favour of the claimants is but a step along the road to recovery of damages, and not of itself wholly determinative of the claim.

Value Engineering

110. Once the costing exercise had been done by EC Harris, the figure of £195 million was produced and Mr Dhanoa knew that the Fosters' Scheme was well outside the range of his budget of £70 to £100 million. He met EC Harris and Mr Hammerschmidt on 28 January 2008 just before the main design team meeting which was also held on that day. Initially he did not want the entire professional team to know the figure, and the knowledge of the outturn cost was not widely distributed at that stage. Whether that was done because he was worried that they would all increase their fees, or because they might doubt the viability of the project, or for some other reason, was not really explored but does not in my judgment matter. Mr Dhanoa was very angry at the high cost, but regardless of the emotion of the occasion, his evidence is that he was advised by Fosters that the cost of the Fosters Scheme could be reduced by value engineering.

111. Value Engineering is a phrase that means reducing the cost of a scheme through changes in the method and type of construction, or specification, without making major reductions in scope. Accordingly, there were different changes considered to the project in order to attempt to do this. These included matters such as reducing the number of parking spaces, removing the deepest (and seventh) basement level, and making other costs savings, such as savings on the excavation and excavated material. Mr Dhanoa was involved in these. Another was a suggestion that was made by the professional team (not by Mr Dhanoa) of modular construction. However, the early attempts at value engineering that were made in the immediate aftermath of the EC Harris cost estimate of £195 million did not bring the overall total of the Fosters Scheme down to any appreciable degree.

112. A meeting was held on 10 March 2008 at Fosters' offices which Mr Dhanoa, Mr Stewart and Mr Hammerschmidt attended. At that meeting, Mr Dhanoa's evidence was that he asked Mr Stewart if the Fosters Scheme could be value engineered down to the budget that he had for the project of £70 million. He was told it could not. The same answer was given when he asked the same question, but instead of £70 million, used higher figures of £80 million and £90 million. However, he says that Mr Stewart told him it could be value engineered down to a figure of £100 million. It is now agreed by the architectural experts that this could not be done. This would have been a vast reduction in cost, and value engineering could not be expected to achieve this level. Mr Dhanoa did not know this at the time.

113. Mr Stewart denies that he gave such advice. In his written evidence he said that he had not done so. His oral evidence was that Fosters never thought value engineering the cost of the scheme down to £100 million was ever a possibility. However, his oral evidence also went rather further in terms of advice at the time.
Q. And you had a design which included -- well, it was very
progressed and included a biosphere, a village theme,
six to seven basements, glass walkways, water features,
it was fairly complete and it was a very impressive
design; was that your assessment of it?
A. Yes, it was one of the best we did.
Q. And you have a costing at £195 million in circumstances
where you acknowledge that you knew your client's budget
from the outset was in the region of 70 to a hundred [million pounds].
So you have a difficult situation, if I put it like
that?
A. No, we had a very clear situation where we'd been
instructed, contrary to our expectations, to proceed
with the design that had been costed at the level you
described.
Q. You have a situation where you knew your client wanted
to reduce the cost of that scheme to £100 million?
And at that stage you had a decision to make because do
you accept that it was clear to the professionals
involved at that stage that your design could not be
value engineered to £100 million or did you think that
was a possibility?
A. <u>No, we never thought it was a possibility.</u> The
discussion would have run that you would proceed to
planning with the design as we had it and economies
could be made in the scope of principally the below
ground areas, which are not relevant to planning. That
would have been how the project could have been brought
closer to the client's aspirations. You have to remember
that at this time he hadn't declared or was only just
had seen the TRI report, which we had understood all
along in the discussions such as we'd participated in
them was crucial to finalising the client's business
case.
Q. And you were in a situation whereby if your client had

said, "No, I need to build this building for £70 million
or £100 million", the only option then really would have
been to go back and start again, re-do stages A and B,
to reassess these priorities and then progress through
stage C with effectively a totally different design?
A. Completely.
Q. And, Mr Stewart, what you did not do at that time was
you did not tell your client "if you want to build this
building for a hundred million, we need to start again"
you did not tell him that, did you?
A. I'm sure I didn't use the words you've just used. But
it was -- there were certainly discussions about how
costs could be reduced, the extent of cost reductions
with the design or the scope of the project as it then
was, we would have discussed as being limited to
probably no more than ten or 15 per cent at the outside
and that any significant savings in the cost of the
scheme would have required reductions in scope, as
I said in answer to your previous question, that would
have involved non-planning contentious issues during the
course of the time that followed.
Q. You are saying that these are things you would have
said?
A. Yes.
Q. <u>But what I'm saying to you is that you did not in fact
say to Mr Dhanoa, "Mr Dhanoa, it will not be possible to
value engineer our scheme, the scheme that we're going
to put through planning, to £100 million, that will not
be possible". You did not tell him that, did you?
A. That's not the case.
Q. So you say you did tell him in terms that it cannot be
value engineered to £100 million?
A. Yes."</u>
(emphasis added)

114. The point was then quite properly and fairly put to him that the very first time in the case that Mr Stewart had ever given such evidence, namely that he had positively advised Mr Dhanoa that the Fosters Scheme could *not* be value engineered to £100 million, was in this cross-examination. It had not been raised in the Defence, which Mr Stewart had been involved in preparing, and had not been referred to in any of his three written witness statements. There is, in my judgment, a world of difference between not giving alleged advice to a client that the scheme could be value engineered to £100 million, and giving positive advice that it could *not* be value engineered to £100 million. This absence in his witness statements was described by Mr Stewart as an omission. Even the Opening Submissions served by Fosters stated that the alleged advice was never given, and not that advice to the direct contrary had in fact been given. The importance of this evidence would have been obvious to anyone with any knowledge of the case, and could even, potentially, have been dealt with by supplementary evidence in chief from Mr Stewart.

115. Fosters undoubtedly knew that Mr Dhanoa was intending to have the Fosters Scheme value engineered to a figure of £100 million. This is clearly shown in an e mail of 15 February 2008 from Mr Hammerschmidt to Mr Brooker. In that e mail the following is stated:

> "Subject: Update – Riva Hotel budget
> Grant
> John intends to reduce the cost down to ~ 100mio.
> We will be optimising basements and construction methods
> (steel containers as an option to save 40% on the hotel above
> ground) etc.
> Let's see how we are doing with this but it could bring the
> budget back
> to where we assumed it would be for fees.
> Chris"

Although that e mail uses the phrase "reduce the cost" this was, in my judgment, plainly in the context of (and in fact meant) value engineering, as that was being widely discussed at the time. This e mail is in my judgment important. It shows that everyone at Fosters knew that Mr Dhanoa wanted and intended the value engineering exercise to bring the cost down to approximately £100 million. That knowledge was being shared internally at Fosters – and this e mail is an example – before the meeting of 10 March 2008.

116. Upon distributing my draft judgment, Mr Selby submitted that certain parts of the evidence had not been addressed on this subject, and should have been. His submission was that because Mr Hammerschmidt was at this meeting, and had been found to be a reliable witness, his evidence on the subject should have been specifically addressed in the judgment. I am happy to amplify and/or clarify my views on Mr Hammerschmidt's evidence about this meeting, and this subject. The first and most important element of it is that Mr Hammerschmidt did not corroborate or support Mr Stewart's claim in cross-examination that Mr Stewart had positively advised Mr Dhanoa that the project could *not* be value engineered down to £100 million. He also said he would have remembered if Mr Stewart had "basically agreed to a certain budgetary limit" but in terms of what he called "the cattle market" he said "I don't think so at all". He said that neither he nor Mr Stewart would ever have "guaranteed for a price or a costing for the project" but that Fosters were very motivated "to do value engineering, to find intelligent solutions". He said that "we would never have agreed to any guaranteed budget from our side and therefore if there was a nodding of Hugh Stewart's head while he was sitting behind me or something, I don't know, that little subtlety, but apart from that, no way." I will reproduce the next passage of his cross examination.

Q. Okay. So you accept that at the time of this meeting
you knew that Mr Dhanoa wanted the cost of the scheme to
come down to a hundred million, so we've seen that from
your email of 15 February. Do you --
A. But this also -- yes, okay.
Q. So do you accept that during the meeting you or
Mr Stewart or both of you advised Mr Dhanoa that in the
next stage of design development you could carry out
value engineering exercises in conjunction with

EC Harris and the rest of the design team by which it
should be possible to reduce the construction cost of
your design?
A. Of course.
Q. And in relation to the level to which that could be
reduced, do you accept that given your, let's say,
optimism in your email of 15 February 2008 to
Mr Brooker, it is possible that when Mr Dhanoa said,
"Can this be brought down to a hundred million?",
yourself or Mr Stewart indicated that it could?
A. There is an important difference, I think, which I think
at that point also was clear and I think that I guess
was also must have been discussed, and it is the design
as it is to a hundred per cent to bring that down to 100
or 70 million, it's impossible to agree to it because we
can't calculate it, we don't know whether all these
savings would really in the end bring these results.
But, as we've seen in the email before, for example we
take out a level of basement and by doing that the
number of car parking spaces will slightly reduce, which
means there was a slight modification to the client's
brief possible or all of a sudden columns are possible
in the spaces below ground. These are all measures that
are not the identical design for less money but to
really also change slighty -- allow modifications to the
brief and with that you can definitely bring any budget
to where it needs to be. And this is part of value
engineering. And so we wouldn't -- we have always
signalled to John Dhanoa we are ready to do value
engineering with you to whatever level you need to go
to, but we would have never guaranteed that exactly the
design you have there you can get for a hundred million.
We wouldn't have done that."
emphasis added)

I do not consider that this evidence is contrary to the case advanced by the claimants, or the evidence of Mr Dhanoa. Firstly, the allegation is that advice was given by Fosters that the project could be value engineered down to £100 million (when the experts are now agreed that could not possibly be achieved). It is not a complaint that there was a "guarantee", a "guaranteed budget" or "a hundred per cent" by Fosters that this could be done, or that a guaranteed price was sought. Secondly, Mr Hammerschmidt said that "we don't know whether all these savings would really in the end bring these results" which is an aspirational statement, whereas the experts are agreed that it should have been obvious that the value engineering exercise could not reduce the cost down that much. Thirdly, Mr Hammerschmidt knew that Mr Dhanoa wanted the project value engineering down to £100 million, and on his evidence Mr Dhanoa was told "we are ready to do value engineering with you to whatever level you need to go to". If that level was £100 million, that rather supports Mr Dhanoa's evidence, in my judgment. It is certainly not contrary to it. Finally, Mr Hammerschmidt rather skirted a clear answer to the

question "do you accept that given your…optimism in your email of 15 February 2008….it is possible that when Mr Dhanoa said "Can this be brought down to a hundred million?" yourself or Mr Stewart indicated that it could?" He certainly did not answer in positive terms that neither he nor Mr Stewart did so. He denied that there was ever a guarantee given that "exactly the design you have there you can get for a hundred million" but that was not the essence of the allegation.

117. I accept Mr Dhanoa's evidence that Fosters, in the person of Mr Stewart, advised him that the Fosters Scheme could be value engineered down to £100 million. I reject Mr Stewart's evidence that he gave positive evidence to the contrary. His account was unconvincing, was not supported by Mr Hammerschmidt, and until Day 4 of the trial, such an important point had appeared nowhere, not least in none of Mr Stewart's own witness statements. Mr Selby relied upon the fact that this complaint appeared in the Particulars of Claim as an amendment, made after the third witness statement. However, Mr Dhanoa had included his evidence on this important point in his very first witness statement, even attributing an actual quotation from Mr Stewart on the subject in paragraph 87 of that document. Mr Stewart had responded to that in his supplementary evidence. Had he really given positive advice to the contrary, this would have been included in his first supplementary statement, and there is no sensible explanation for its absence. I also reject Mr Stewart's written evidence that he did not give such advice at all. His evidence on this factual dispute is simply not reliable in the least, and is an attempt to duck responsibility for what occurred. Even though Mr Hammerschmidt said that the "cattle market" did not happen, I find that the broad thrust of his evidence was that Mr Dhanoa was told that value engineering could be done to the level Mr Dhanoa required, namely the budget figure of £100 million. Mr Selby's points, as to why the Fosters' version of events should be preferred on this subject, are rather partisan. For example, it is said that "there is not a single contemporaneous document in these entire proceedings in which important advice is recorded". That rather overlooks three things. Firstly, Mr Stewart's shifting account of this meeting and Mr Hammerschmidt's failure to corroborate Mr Stewart's claim that positive advice was given to the contrary. Secondly, Mr Dhanoa's desire to reduce the cost to £100 million by value engineering is recorded in numerous e mails, both before and after the meeting of 10 March 2008. Thirdly, Mr Hammerschmidt's evidence is that Mr Dhanoa was told, broadly, that the project could be value engineered "to whatever level you need to go to".

118. I find that Mr Stewart did give Mr Dhanoa advice that value engineering could reduce the cost of the Fosters Scheme down to £100 million. However, even if I am wrong about that, the e mail from Mr Hammerschmidt to Mr Brooker shows that Fosters knew that Mr Dhanoa intended to value engineer the scheme down to £100 million. If that really were impossible – and Mr Moren said it was blindingly obvious that it could not be done – then Fosters had a duty, in my judgment, positively to advise Mr Dhanoa of that fact. However, they did not do so. Given this lack of advice, it was entirely reasonable of Mr Dhanoa to continue with the project throughout 2008 and onwards, and I find that he was acting reasonably when he did so. He did not know that the seeking of planning permission, and further work on the Fosters Scheme, was going, at best, to lead to the grant of permission for a design that would cost far higher than the budget, and remain way higher than that, even after the value engineering exercise.

Mr Dhanoa's intentions

119. Mr Dhanoa, as I have said, is an entrepreneurial businessman. He had raised funding of £11.5 million from the Allied Irish Bank in 2007 to purchase the site, using £4 million of his own funds (or at least, funds of one of the companies controlled by him). His evidence is that he intended to build out the project, that is to say, have a scheme designed that could be built within the budget; obtain planning permission; raise the necessary funding; and build the hotel. It was for this reason that Fosters were engaged, other members of the professional team appointed, and planning permission sought (and obtained).

120. Fosters do not accept this. The genuineness of his intentions to build out the hotel are challenged. It is relied upon, in this respect by Fosters, predominantly as a defence to the loss of profits claim (in respect of which there are other issues, which I deal with in the section of the judgment "Heads of Loss"). Mr Moren, the architectural expert witness called for Fosters, also gave me the benefit of his views on loss in that he attributed value to the work that Fosters had done. He explained that a site with planning permission for the Fosters Scheme, which is what this site had for the period March 2009 to March 2012 when it lapsed due to passage of time, had a higher value than a site with no such planning permission. That is not directly relevant to damages that are recoverable for breach of contract, given that Mr Dhanoa contracted to obtain a scheme that could be built within the budget so he could build it.

121. Mr Dhanoa explained that his intention was to obtain planning permission, build the hotel, and then sell the hotel, which he accepted might require the hotel to be run for two or three years first. It could be by way of what he called a "pre-sale". He also stated that if someone made him a ridiculous offer, prior to building out the hotel, he would have sold it. As he put it:

A: … In 2007, my intention has been always to build out. In
between, if somebody had come -- before we could build
out, if somebody had said, "Come on back, we'll give you
a hundred million pounds", would you not sell?
Q. Mr Dhanoa, I understand the business logic, but I just
want to --
A: It has to be business logic. It can't be -- it's not
sentimental.
Q. But Mr Dhanoa, what I also want to understand is you
don't make that qualification in your witness statement.
In your witness statement -- if you could, for example,
look at paragraph 88, it follows on, at paragraph 87,
you talk about your meeting with Fosters on 10 March
2008, and we will come back to that. At 88, you say:
"If I had been told at this stage that achieving the
scheme for my budget would not be possible, I would have
immediately changed to a more modest scheme."
And so on. And then the you see two lines from
bottom:

"I always intended to building out the scheme?"

A. Yes, it was --

Q. There is no qualification there along the lines of
"unless someone made me a stupid offer".
A. When I started the scheme, I always intended to build
this out. And I'm going to build it out even now. It's
not a question that I'm not going to build it out now.
I'm going to build it now as well. So the point is if
somebody in their right mind -- somebody comes along and
gives you a ridiculous offer, you're not going to turn
it down; say, sorry, I'm going to build it out.
Q. Could you turn to page 44 of that statement as well,
please. Paragraph 162:

> "As stated above, I always intended to obtain
> planning permission, build out the scheme and then
> sell."

A. Yes.
Q. That's not correct.
A. No, that is correct. Because that has been the
intention from the beginning but in -- somewhere in the
middle, somewhere along the line you obtain planning
permission, you want to build out the scheme and
somebody comes with a ridiculous offer, what do you do?
Q. All right. You say you would have commenced
construction by February 2010 for the 30-month build
period to complete in September 2012?
A. Yes.
Q. That's at paragraph 183. So I think your evidence to
the court now is all things being equal you would have
sold the hotel as soon as it was built unless you got
a stupid offer.
A. (Pause) I think this is asking when I started this
project, what did think at that point in time. And for
that, your Honour, I had no intention of selling it. It
was actually pre-sell it and what would happen is that
you build out and, you know, and you might have to run
it for two or three years at least to sell out. Because
what the intentions are and what actually happens is
not -- is normally two different things. And in
between, if somebody comes up -- because you got
planning permission, and somebody comes to you and says
you know what, I'm going to buy this off you at this
price, and if that price is a ridiculous offer, why
wouldn't you sell? I can't see -- there's no logic in
it.

122. I do not accept that this evidence is inconsistent with an intention on the part of Mr Dhanoa to build out the hotel project. As I have explained above, I found Mr Dhanoa as a witness to be honest, and also his evidence - as demonstrated from the passage I have reproduced – shows that his interest in this project, for the most part, was a business one. Any sensible businessman, if faced with what Mr Dhanoa described as a ridiculous offer (but some people would describe the same thing as

an offer too good to refuse) would accept it. That does not mean that, absent such an offer, Mr Dhanoa was not genuine in his intention to build out the hotel. He told the court that he would seek to remove as much risk as possible, for example by letting the construction contract on a design and build basis. But this project, although it represented a considerable step up in scale from the projects he had been involved in before, represented for him the opportunity to make a very large amount of money. He had personally identified the site many years before; he had identified a gap in the market near Heathrow for a five star hotel, something which Mr Moren agreed was as an area crying out for a luxury hotel of this type. He had engaged one of the world's leading architectural practices to design the scheme for him. Further, and fortuitously shortly after Mr Dhanoa bought the site on Bath Road, in July 2007 London was chosen as the host of the 2012 Olympic Games. He was in a very strong position in terms of economic opportunity.

123. I find that Mr Dhanoa intended to build the hotel, and operate it for a period of time – he said two to three years – before selling it. However, that alone does not mean that the claimants are entitled to recover loss of profits. I address this further when I deal with Mr Dhanoa's attempts to obtain funding in the section of the judgment headed "Causation" below.

VI *The Scope of Fosters' Duty*

124. Issue 9, which comes under the heading of "breach", addresses the scope of Fosters' retainer and duties. It raises four sub-issues, which merge advice on costs with the claimants' budget for the project.

125. Fosters' duties in respect of Stages A and B involved, as I have found above, identification of key requirements and constraints. Whether they were to be provided by being included in the Strategic Brief by others, or by Fosters, does not in my judgment much matter, because either way by Stage B Fosters would and should, one way or the other, have identified and been aware of the key requirements and constraints. In this case, that included the budget.

126. What Fosters have done in these proceedings, and this continued right through into the stage of Closing Submissions, is to elide "advice on costs" with "designing the project to match the constraint of budget". They are entirely different in character. No part of Stages A to D requires Fosters to provide costs advice, properly so called, to Mr Dhanoa; such advice was to be provided by the separately appointed quantity surveyors. However, what Fosters cannot do is excuse itself from performing the services required in Stages A and B by saying the budget equates to costs, and costs are nothing to do with them as architect. That rather superficial summary is the essence of Fosters defences on "costs advice".

127. I do not consider, for these purposes, that value engineering is costs advice as I have defined it. Value engineering is making changes to a design to reduce the cost of building it. For example, if any change to a scheme to reduce its costs was properly classified as costs advice - which is how Fosters interprets it - and an architect says "we can reduce the cost of this by value engineering", then that by definition would be costs advice. But it is not costs advice which requires a quantity surveyor. Simple examples that demonstrate this point are the biosphere, and the seventh level of basement. Removing either would reduce the costs of the scheme. The former

would not affect the occupancy levels – there would be no reduction in the number of bedrooms. It would however affect the appearance. The latter would not affect the appearance, but would reduce the number of bedrooms (as it would reduce parking spaces, with a direct or indirect impact upon the way the planning authorities approached the number of bedrooms). Either could arguably be said to be value engineering, but neither requires a quantity surveyor's specialist input to conclude that the costs of the Fosters Scheme would be reduced if either was adopted.

128. The extent to which Fosters seek to elevate this issue to a catch-all defence is shown in paragraph 18 of its Opening Submissions, which are maintained in paragraph 93 of its Closing Submissions, which state the following after submitting at length that anything that concerned cost was the province of the quantity surveyor:
"There was nothing in the Appointment which required [Fosters] to design the hotel within a stipulated budget".
In my judgment, that submission is untenable. Budget was a key requirement and constraint.

129. Fosters did not have a free-standing obligation to provide detailed advice to the claimants on cost. However, the cost implications of Fosters' compliance with its obligations to provide the Normal Services did have to be taken into account by Fosters when preparing the design. If any particular element, and the biosphere is again a good example, would increase the costs substantially, then Fosters had an obligation to advise the claimants of that. Further, Fosters did have an obligation under Stage C to design the project taking account of what had been produced in Stages A and B. One stage flowed into the other. This is made clear on page 1 of Schedule 1 which stated "the purpose of each Work Stage is to achieve the outputs described <u>as the basis for the following stage</u>." (emphasis added).

130. Mr Selby relies upon a number of authorities in an attempt to dilute the scope of Fosters' duties to the claimants based upon how Mr Dhanoa presented himself to Fosters, namely as vastly experienced in construction projects. In ***Carradine Properties v D J Freeman*** (1982) [1955-95] PNLR 219 Donaldson LJ gave guidance in a solicitor's negligence case concerning whether a solicitor had a duty to ask its client (who was "*very experienced and knowledgeable in property and insurance matters*") whether the client might have had an alternative claim under any insurance which the client might have had in place. At paragraphs 12-13, Donaldson LJ stated:
"A solicitor's duty to his client is to exercise all reasonable skill and care in and about his client's business. In deciding what he should do and what advice he should tender the scope of his retainer is undoubtedly important, but it is not decisive. If a solicitor is instructed to prepare all the documentation needed for the sale or purchase of a house, it is no part of his duty to pursue a claim by the client for unfair dismissal. But if he finds unusual covenants or planning restrictions, it may indeed be his duty to warn of the risks and dangers of buying the house at all, notwithstanding that the client has made up his mind and is not seeking advice about that. I say only that this *may* be his duty, because the precise scope of that duty will depend *inter alia* upon the extent to which the client appears to need advice. An inexperienced client will need and will be entitled to expect the solicitor

to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client."

131. This case of ***Carradine*** was been applied in the case of architects by the Court of Appeal in ***J Jarvis v Castle Wharf Developments*** [2001] EWCA Civ 19 at [94], in which Gibson LJ stated: "*when dealing with a client with experience in the relevant area... there is only a duty to advise if advice is sought*". Also, in ***Minkin v Landsberg*** [2016] 1 WLR 1489 (also a solicitor's negligence case) Jackson LJ, having referred to ***Carradine*** and subsequent authorities, summarised the relevant principles as follows at [38]:
"(i) A solicitor's contractual duty is to carry out the tasks which the client has instructed and the solicitor has agreed to undertake.
(ii) It is implicit in the solicitor's retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out.
(iii) In determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client.
(iv) In relation to (iii), it is not possible to give definitive guidance, but one can give fairly bland illustrations. An experienced businessman will not wish to pay for being told that which he/she already knows. An impoverished client will not wish to pay for advice which he/she cannot afford. An inexperienced client will expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client."

132. However, these authorities do not avail Fosters for the following reasons. Firstly, Mr Dhanoa's evidence, which I have accepted, is that he did seek Fosters' advice specifically on the value engineering point. His apparent expertise or otherwise on projects of this kind is not therefore relevant. As Gibson LJ said, "there is only a duty to advise if advice is sought". Here, advice was sought, and a duty to advise arose. Secondly, even now I am not sure in what circumstances Fosters could avoid the obligation to identify key requirements and constraints, expressly included as parts of Stages A and B, and then design taking them into account, simply because they were dealing with an experienced client. The notion is, with respect, more than a little far-fetched. An experienced businessman who engages an architect to perform Stages A to L for a hotel project to be constructed within the budget of £70 to £100 million is no less entitled to have that engagement or retainer fulfilled, and to have the scheme designed within that budget, than a complete novice who does the same, and who has never been involved in constructing a building before. In each scenario the project is to be designed within the budget; in neither scenario is the architect entitled to design a project costing nearly twice the budget, then avoid any responsibility when or if they are asked if the cost can be reduced.

The Second and Third Claimant

133. Although the identity of the Second and Third Claimants is very much a live issue, or a number of live issues, it could be said to arise at different stages in the analysis, both in terms of scope of duty, causation and heads of loss. Mr Dhanoa operated through a series of different companies. Riva Properties Ltd was the party that contracted with Fosters. Riva Bowl LLP bought the freehold site. This was in 2008 transferred by way of sale and leaseback from Riva Bowl LLP. All three of those companies are claimants, together with a fourth company, also controlled by Mr

Dhanoa, called Wellstone Management Ltd. That company entered into what was called an Asset Purchase Agreement with Riva Properties Ltd on 17 December 2014. At one point there was a live issue about this, namely issue 3, but during the trial that was resolved due to Fosters' legal advisers' attention being drawn to an entry in the publicly available accounts of those companies making clear exclusions in that agreement. It had been argued by Fosters that Riva Properties Ltd's cause of action against Fosters had been assigned to Wellstone but that contention is no longer maintained.

134. However, there are still issues in respect both of an alleged duty of care owed to, and "no loss" arguments in respect of, the Second and Third Claimants. These arise in the following circumstances.

135. The claimants aver that Fosters owed a duty of care to each of the Second and Third Claimants, notwithstanding the contractual arrangement between Fosters and the First Claimant. If that is correct, then there is no question of a "no loss" (or what was termed during argument as the ***Panatown*** point, after the decision in ***Alfred McAlpine Construction Ltd v Panatown Ltd*** [2001] 1 AC 518) argument arising, as losses suffered by each or either of Riva Bowl LLP and/or Riva Bowl Ltd would be suffered by the party to whom Fosters owed a duty of care.

136. It is necessary therefore to consider whether Fosters owed either or both of the Second and/or Third Claimants a duty of care. It cannot be controversial that if such a duty were owed, it could not be any wider than the duty Fosters owed to the contracting party, Riva Properties Ltd.

137. The correct starting point is ***Caparo Industries plc v Dickman*** [1990] 2 AC 605, the modern seminal case which set out the approach to be adopted. In that case the House of Lords considered the scope of the law of negligence in an action brought by a public limited company against, amongst others, its auditors. This authority is the principal modern statement of the approach necessary when considering the question of whether a duty of care is owed by one party to another.

138. Lord Bridge, at 616 to 618, expressed the views of the House concerning negligence and duties of care generally. His statements include the following at 616H:
"Yet Lord Atkin [in *Donoghue v Stevenson*] himself sounds the appropriate note of caution by adding, at p580:

> 'To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials'."

139. After referring to the development of the principle that emerged in ***Anns v Merton v London Borough Council***, Lord Bridge continued at 617G:

> "But since the *Anns* case a series of decisions of the Privy Council and of your Lordships' House, notably in judgments and speeches delivered by Lord Keith of Kinkel, have emphasised the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope……<u>What emerges is that, in addition to foreseeability of damage, necessary ingredients in any</u>

> situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other……I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes." (emphasis added)

The emphasised passage contains what is known as the three-fold test.

140. He described at 681C "the wisdom" of the influential statement by Brennan J in the High Court of Australia in ***Sutherland Shire Council v Heyman*** (1985) 60 ALR 1, 43-44 when it was stated:

> "It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinably "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of persons to whom it is owed."

141. Although Lord Bridge then continued to consider the different approach in cases concerning different damage – namely pure economic loss, which ***Caparo*** concerned, rather than physical damage – the statements that he made are of general principle and apply to negligence generally.

142. The headnote at 606H provides the following summary, which demonstrates the majority expressly agreed with the statements of Lord Bridge:

> "Per Lord Bridge of Harwich, Lord Roskill, Lord Ackner and Lord Oliver of Aylmerton. Whilst recognising the importance of the underlying general principles common to the whole field of negligence, the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes."

143. Lord Bridge also said, having considered and approved the dissenting judgment of Denning LJ (as he then was) in ***Chandler v Crane, Christmas & Co*** [1951] 2 KB 164, 179, 180-181, 182-184 – which he described as a "masterly analysis" at 623A – that the concept of a voluntary assumption of responsibility on the part of the maker of a negligent statement did not, in the context of the appeal in ***Caparo***, make any difference.

144. Lord Oliver, said, dealing with "proximity" at 633:

" 'Proximity' is, no doubt a convenient expression so long as it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances from which, pragmatically, the courts conclude that a duty of care exists".

145. The three-fold test therefore requires the following elements to be satisfied:

1. The damage should be foreseeable;

2. There should exist between the party owing the duty and the party to whom it is owed a relationship of proximity or neighbourhood;
3. The situation should be one in which it is "fair, just and reasonable" to impose a duty of a given scope upon the one party for the benefit of the other.

146. Although imposing a duty of care upon Fosters would not potentially impose "liability in an indeterminate amount, for an indeterminate time, to an indeterminate class", to apply the classic expression of Cardozo CJ in ***Ultramares Corporation v Touche*** (1931) 174 NE 441, 444, that is not determinative. I consider this a compelling factor were liability so to be imposed to such a broad category or class. However, its absence does not, in my judgment, mean that the three fold test is satisfied.

147. Turning to the second part of the test, I do not accept there is a relationship of proximity or neighbourhood between Fosters and other members of what Mr Dhanoa referred to as "the Riva Group". It is correct that Mr Stewart said he did not pay much attention to the company through which Mr Dhanoa wished to contract; there is no reason why he should have been interested. He did, however, know that a contract would be entered into, and that this would be (and was) dealt with by a different part of the business. An architect, whose skill is designing and being creative, who is part of a sizeable practice, would not normally care about the legal identity of the client. As far as he was concerned, Mr Dhanoa was the client. That does not mean that Fosters would owe a duty of care to all and any companies controlled by Mr Dhanoa. In my judgment therefore, the second part of the test is not satisfied.

148. However, even if I were to be wrong about that, I do not begin to see why it should be fair, just and reasonable to impose a duty of care of the nature alleged upon Fosters owed to the Second and Third Claimants. The Appointment itself has, in clause 18, a mechanism whereby Fosters could be required by the contracting party to enter into a direct warranty with another legal entity. Clause 19 also includes an assignment mechanism too. Neither of those two mechanisms have ever been operated, but given their existence, I conclude that on the contrary to the case being argued by the claimants, it would specifically not be fair, just and reasonable to impose a duty of care of the nature alleged upon Fosters in respect of the non-contracting parties. As the headnote to ***Caparo*** states, "the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes". In my judgment, that "traditional categorisation of distinct and recognisable situations" in this case is the contract, negotiated between solicitors acting for both Mr Dhanoa and Riva Properties Ltd, and Fosters. Given that within the contract there are the two mechanisms to which I have referred, there is simply no need for the law to impose a duty of like scope upon other companies who were not parties to that contract. Indeed, given those mechanisms, it could be said that Fosters would (had anyone asked them the question) have sensibly assumed that no wider duty would be owed to other companies or entities other than to the contracting party, or recipients of direct warranties or assignments.

149. There is a further reason that militates against the imposition of a duty of care being fair that arises from the contractual terms themselves. Neither of the parties before me seemed to consider this point of particular importance, but I consider it to be highly relevant and important. Recital A of the Appointment states the following: "The Employer is the owner of land at Bath Road and shown edged red on the plan contained in Appendix 1 (the "Site").".

150. In fact, the Employer, Riva Properties Ltd, was not the owner of the land at Bath Road, Riva Bowl LLP was at that point the owner, having been the company that acquired the site in August 2007. Riva Properties Ltd never owned the site, so far as I can tell from the evidence. This recital in the Appointment therefore was simply and factually incorrect; Mr Dhanoa described this in his written evidence as a mistake, but if it is a mistake, it is one made either by him or by his solicitor. The claimants rely upon Fosters' knowledge in 2008 of the intended, and then actual, change of ownership between Riva Bowl Ltd and Riva Bowl LLP as one of the factors that ought to encourage or lead to the imposition of a duty of care to parties other than the contracting party. However, Fosters were expressly told, wrongly, in the Appointment itself that neither of these companies had any interest in the land, and that Riva Properties Ltd owned it. Although the ownership of land is a matter of public record, there would have been no reason for Fosters to doubt what was included in the Appointment when it was being discussed and agreed; Mr Dhanoa was, after all, being represented by a solicitor. In those circumstances, I do not see how it can possibly be said to be "fair, just and reasonable" to impose a duty of care on Fosters towards the two other companies.

151. In all the circumstances of the case, therefore, I consider that no duty of care was owed by Fosters to either of the Second or Third Claimant. The "no loss" argument therefore arises and will be addressed in the section of the judgment entitled "Heads of Loss" below.

VII *The Breaches of Duty*

152. There are ten different breaches alleged against Fosters in the Amended Particulars of Claim. Some of them are simply different ways of expressing the same failure. In the claimants' Opening Submissions, these were refined down to two, which were termed Breach 1 and Breach 2. The others were not expressly abandoned, but these two breaches were described by Ms Briggs as "key failures".

Breach 1 – The failure to carry out Stages A and B

153. The Appointment sets out the Services Fosters were obliged to perform in Schedule 1. These include being "*designer for Work Stages – Full service A-L"*. It is Mr Rich's opinion that Fosters failed to carry out Work Stages A and B. Most importantly Fosters failed to identify (in Stage A) and thereafter confirm (in Stage B) one of (if not the key) constraint on the development - the budget. The expert architects disagreed in their written reports as to whether 'cost' or 'budget' was a constraint that should be identified and confirmed in Stages A and B. However, by the end of his cross-examination, Mr Moren accepted that it could be a constraint. I consider that whether it is or not should always be identified by an architect exercising reasonable care and skill. Indeed, constraints can only be identified if the existence or otherwise of a budget is established. Mr Rich stated that in relation to most projects (particularly commercial projects) cost is almost always

"fundamental" and a "critical and key" constraint, but that is essentially common sense in any event. Constraints must be ascertained and considered by the architect in Stage A, and confirmed in Stage B. Mr Rich supported his opinion by reference to the RIBA Architect's Job Book, to which both experts referred in their reports, using the version current in 2007. This confirms that budget is a key constraint that the Architect must identify at Stage A. It states:
"Obtain from the client the project requirements, budget and timetable. Check these carefully, question incompatibilities and agree priorities".
This was simply not done in this case by Fosters.

154. There are many references in the RIBA Job Book to cost being a key constraint that must be identified and considered at Stage A and B. In my judgment the exercise of reasonable skill and care requires an architect to have regard to the RIBA Job Book. Mr Rich also stated that the importance of adhering to the RIBA Work Stage progression and "*getting such matters right at the outset*" is amplified on a project such as this where *"a client can find itself incurring high fees by the end of Stages C and D to produce a design that has failed to take into account of such basic constraints as budget".* This is, in my judgment, also entirely supported by common sense.

155. Here Fosters did not comply with any of the obligations under either of Stages A and B at all. Fosters appear to have jumped straight into Stage C. Mr Moren explained that Stages A, B and C are often done iteratively and it may be difficult to see where one stage ends, and another one begins. Putting to one side that Schedule 1 of the Appointment states that each stage "is to achieve the outputs described as the basis for the following stage", which would be difficult to do if Mr Moren is right about this, even Mr Moren did not suggest that Stages A and B could be entirely omitted by an architect exercising reasonable care and skill. His evidence went to the sequence in which the different activities under Stages A to C were to be done, not whether they should be done at all. Again, even if I am wrong about that, the Appointment itself clearly expresses an obligation upon Fosters to do Stages A and B. A failure to perform Stage A, and a failure to perform Stage B, are both in my judgment breaches of duty by Fosters.

156. Here, I find that there were such failures and neither of Stages A nor B was performed by Fosters. Breach 1 is therefore established in the claimants' favour. The history of the situation concerning Sparc, dealt with in "Subsequent Developments", demonstrates in my judgment that Fosters knew before this litigation that they had not performed any of the Stage A and Stage B work. I do not take that into account at all, but I doubt that my findings as to what they should have done will come as a surprise. I do not believe that Fosters' modus operandi is to design projects such as this without any consideration for the client's budget.

Breach 2 – negligent advice/failure to advise

157. The factual elements of this relate to February 2008 when EC Harris formally issued its costing of the Fosters Scheme in the sum of £195 million. By this stage Mr Dhanoa had already incurred over £1.24 million in fees, including over one million pounds to Fosters. He had paid Fosters by that point of the project approximately £930,000, plus the mobilisation fee of £150,000 which was paid at the beginning of

Fosters' involvement. Although this was expressed as being "non refundable" in one of the pieces of correspondence, in fact it was spread out to be recovered as a credit over the intended 30 months of the project. The Fosters Scheme was seen as being an outstanding design, save for its extremely high cost. Ms Briggs submits that Mr Dhanoa did what any reasonable person in that position would, namely asking his consultants (Fosters and EC Harris) to look at making costs savings and to try to bring the Fosters Scheme back within his budget.

158. I have accepted Mr Dhanoa's account of what occurred in March 2008 and what Mr Stewart told him, namely that the Fosters Scheme could be value engineered down to £100 million. Both architectural experts agree that if such advice was given it was negligent.

159. I have also found that Fosters knew that Mr Dhanoa expected and intended this to be achieved by value engineering, so that even had Mr Stewart not given such advice Fosters were under an obligation to advise him that it could not be done. The internal email between Mr Hammerschmidt and Mr Brooker of 15 February 2008 makes it crystal clear that Fosters knew this was Mr Dhanoa's intention. Mr Rich, the claimants' expert witness, gave evidence that in failing to warn Mr Dhanoa that this was not possible Foster failed in its duty to him. Paragraphs 7.10.1 and 7.10.2 of his report deal with this and state *"It* [the email] *shows knowledge on the part of* [Fosters] *that should have led it to warn Mr Dhanoa that it was impossible to cut costs so dramatically without losing value"* and that *"in failing to advise Mr Dhanoa that this cost reduction could not be achieved without substantially changing their design and/or reducing the amount and/or quality of the accommodation, F+P failed to use reasonable skill and care"*.

160. Mr Moren rather curiously dismissed the e mail of 15 February 2008 as "*nothing more than helpful commentary"*. However, Mr Moren also stated during his oral evidence that he was "not prepared to discuss the merits or demerits of another architect". That is not a helpful approach from an independent expert architect witness, when the main issues in the case concern the alleged professional negligence of architects. An expert architect witness will not get far in assisting the court without discussing the merits and demerits of the defendant. He also posed the rhetorical question "why take something to planning that is too much for the budget?" This went rather further than giving expert evidence on what Fosters had done, or failed to do, and whether it was negligent.

161. In any event, the answer to the question posed by Mr Moren was that Mr Dhanoa understood that the Fosters Scheme could be brought back to within the budget. In my judgment, breach 2 is made out on the facts.

162. My findings on these two breaches encompass all the different ways that breach is put in the Amended Particulars of Claim for the purposes of recovering loss. It is not therefore necessary to analyse those other breaches, which were not identified as "key failures" and which do not, in my judgment, give rise to any greater liability on the part of Fosters so far as loss is concerned.

VIII *Subsequent Developments*

163. There are three other factual matters that are, in my judgment, also relevant in terms of the credibility of Mr Dhanoa and also Fosters' attitude towards him. One concerns the circumstances in which EC Harris came no longer to be involved. The other two concern Fosters' conduct after the project had effectively stalled. I shall deal with them in chronological order.

164. Mr Dhanoa gave evidence that he fired EC Harris in December 2008. This was put to Mr Sugg of EC Harris in supplementary evidence in chief in the following terms, which includes his explanation. I shall set his answer out in full.
Q: …..on Day 2, page 17 of the transcript Mr Dhanoa,
gave evidence to the court that he fired EC Harris and
it was he said because EC Harris wanted to be paid
£10,000 for a letter to the council. Are you able to
explain to the court anything about that?
A. I can recall the request. I think it came quite late in
2008, if I'm right. It was a letter to be addressed on
EC Harris letterhead to the council. Ten years gone by,
I can't remember the exact nature of what the letter was
but I can clearly recall that it was not a letter that
EC Harris felt we should be writing. I think we believe
it should be written by possibly the planning
consultant.
Mr Dhanoa was very insistent that the letter should
be written. It contained, I believe, some figures as to
the estimated cost of the project which were not figures
that we could recognise as having been provided to
Mr Dhanoa. Our concern was that it would go on the
public record, going to the planning authority or the
council, and on that basis we had quite extended
discussions with Mr Dhanoa about whether we should send
it or not.
I don't believe we were fired, because I think by
that time our services, as had been agreed with
Mr Dhanoa, had indeed completed. We'd rendered our last
invoice, I believe in May of that year, and had been
paid.
So I'm not sure we could have been fired if we
weren't actually employed at the time.

165. The import of this evidence is clear. Mr Sugg was stating that Mr Dhanoa wanted EC Harris to write a letter, which professionally EC Harris were not prepared to do. EC Harris were no longer involved after that and were not fired. He had also given evidence in his written statement that said "When planning permission had been attained in February 2009 our appointment came to an end."

166. Before she cross-examined him on this point, Ms Briggs summarised what Mr Sugg had said in the following terms.
"…..Now this morning in examination-in-chief you were
asked a question about how your employment came to
an end, and it was put to you that Mr Dhanoa had

suggested you'd been sacked because you refused to
provide a letter in return for payment -- well, he'd
wanted you to provide a letter and he says you wanted
payment and he refused so you were sacked. And your
account was effectively you were asked to provide
a letter, but you didn't think it was the sort of letter
you ought to provide and that's why the relationship -- you
say the relationship had ended by then, and effectively
you weren't prepared to provide that letter.
A. Correct."

167. There could therefore be no doubt as to what Mr Sugg's evidence on this point was. It was that Mr Dhanoa had asked EC Harris to write a letter, EC Harris were not prepared professionally to do that, and his account that EC Harris wanted further payment (which he refused) was not correct. She then put a document to him.
"Q. Could you please be given bundle C3 and could you turn
to page 1135A. Mr Sugg, this is an email from yourself
to Mr Dhanoa on Wednesday, 17 December 2008, about
a letter. Is this the letter to which you were
referring in your examination-in-chief?
A. Yes.
Q. And you say:
"John, following our discussion yesterday evening
I now understand what you need from us and will be
sending a draft to you and Lindsey Jones later this
morning."
And you say:
"Given the circumstances around this letter I need
your written confirmation to the following points before
issuing the draft."
You then make a number of points which I don't
intend to read out but please take your time to read
them. (Pause)
A. Uh-huh.
Q. And at the end you proposed that on receipt of
a conditional consent or minded to approve motion you
will be paid a success fee of £20,000 plus VAT.
A. Uh-huh.
Q. And you ask Mr Dhanoa to email you back confirming his
agreement to the above and you'll then work on the
draft. And it's correct, isn't it, that Mr Dhanoa
refused to pay the monies you were seeking.
A. In the first instance Mr Dhanoa agreed to pay,
subsequently then called me to say he was not going to
pay.
Q. And you therefore refused to provide the letter.
A. Correct."

168. Once faced with the document, Mr Sugg's account completely changed. EC Harris were prepared to write the letter – they even offered a draft of it. However, they

sought a success fee of £20,000 in respect of doing so (the success being based on the planning permission outcome) which Mr Dhanoa would not pay. This account, eventually, almost entirely matched that of Mr Dhanoa, although he used the word "ransom". Mr Dhanoa had been challenged on the veracity of his account in cross-examination, and that challenge had been specifically supported by Mr Sugg in his supplementary evidence in chief. However, Mr Dhanoa had been accurate on this subject all along.

169. I take a very dim view of this aspect of the case. I fail to see how a professional person, Mr Sugg, can give the High Court evidence that is so diametrically opposite to the facts. The evidence in chief that Mr Sugg gave would, if accepted, have painted Mr Dhanoa in a poor light and someone whose evidence was unreliable. As it is, it paints Mr Sugg in a poor light and someone whose evidence is unreliable, and it substantiates Mr Dhanoa's account in this respect.

170. Turning to the next matter, I have made findings that no part of Stages A and B was performed by Fosters. As a footnote to that finding, which I consider to be an inevitable one on the evidence (as there is simply nothing to suggest that Stages A and B were done by Fosters at all) in April 2010 Mr Dhanoa was introduced to a company called Sparc Group Ltd ("Sparc"), who he engaged to undertake, or become involved in, a value engineering exercise. Planning permission had been obtained a year earlier, and by this point he had been involved in various attempts to obtain funding, and also was in detailed discussions with Hyatt International (the operator of the well-known brand of hotels) which eventually led to a formal agreement with that company. Mr Dhanoa was making strenuous efforts to keep the project alive. Sparc were introduced to Mr Dhanoa by Knight Frank, and were a project management company. Discussions and meetings between Mr Dhanoa, Sparc and Hyatt commenced and as a result of this, Sparc contacted Fosters to obtain copies of what were called "deliverables" – which means what is also called "work product", or actual items – that Fosters would or should, in the ordinary course of their Appointment, have produced.

171. It may have been the case that certain individuals at Fosters felt exposed or vulnerable in 2010, as the project had been stalled for some time by then. However, whether they did or not, Fosters' reaction to the requests from Sparc are very difficult to understand. Fosters simply avoided doing so, and in a great many instances, the items being sought by Sparc just did not exist because Fosters had not produced them. Fosters attempted to disguise this fact.

172. The chain of correspondence on this between Sparc and Fosters, and internally at Fosters, makes illuminating reading. On 3 August 2010 Mr Mills, the CEO of Sparc, sent Mr Stewart (who had been uncooperative up to that date) notification from Mr Dhanoa and asked "if you could send by pdf copies of your final contract plus any agreed variations also plus minutes of any meetings you have conducted or attended where instructions have been given to modify the building from the signed off brief." There was a contract; there were no agreed variations; there were no minutes (only notes of meetings); there was no signed off brief; there were no written instructions that modified such a brief. This was because Fosters had not performed any of the functions necessary to create such documents, although they had attended meetings.

173. Mr Stewart replied, saying it would be quicker if Mr Mills sent Fosters the signed off brief, and saying it was proving hard to get consent from his contracts department to release the contract to a third party. He also said that this would be easier than him "trawling through the minutes for any variations". There were no such minutes, as he must have known. He also confirmed the Fosters' fee account was up to date, save for £7800 for visualisations (which had not been done).

174. On 11 August 2010 Mr Mills tried again, and also sought in addition to the items in the earlier e mail, to obtain copies of weekly reports to the Employer. Again, there were none, as no such documents had been created by Fosters. Mr Mills explained that he could not get through to Fosters by phone, and asked for the matter to be dealt with urgently. Mr Stewart sent back an answer that glibly asserted:
"…the Brief as contemplated by the Contract became the design as shown on the drawings, which were submitted after microscopic scrutiny by the Client and his Lawyer for Planning. We then successfully obtained a Planning Consent for the Client, which was at the time to his entire satisfaction".
Again on 17 August 2010 Mr Mills tried again, pointing out that nothing had yet been received from Fosters, that there was a client instruction from Mr Dhanoa to Fosters to provide the documents to Sparc, and seeking them again.

175. Mr Brooker, Mr Gardner and Mr Stewart exchanged e mails internally about this. Mr Brooker said he did not like Sparc's tone, and that Sparc were "just on a fishing trip looking for holes to torture us with and they have no intention of appointing us – so let's see how they get on without us…. the only conversation I am interested in is a new appointment for full architectural services at a full fee". (emphasis added). Given Sparc were seeking deliverables under the existing appointment for which Fosters had been paid, this attitude by Mr Brooker at the time is most puzzling. Mr Brooker told Mr Gardner in an e mail of 11 August 2010 "I am very uneasy with the way this is developing….I certainly don't like the reference to all minutes etc…." Mr Gardner was even more blunt; he said in his e mail of reply "the words of WC Fields came to mind". I had to ask him what these words were, as it was not clear to me. He said:
A: Sparc rocked up on the scene, and there are people in this
industry who lead a largely parasitic existence and
I sort of put them in that category straight away. They
had a rather -- I think I saw one email where they had
a rather hectoring tone, and they were asking loads of
questions. I think what they wanted to do was a fishing
expedition to pick holes in what we'd done by going to
-- if you look at this minute, "you hadn't quite done
this" and perhaps I was a bit exasperated. So the words
of WC Fields:
"Can't we tell them something non-committal, can't
we tell them to fuck off."

Mr Brooker, Mr Gardner and Mr Stewart then sought to draft a response to Sparc which would be, as they put it at the time, "a holding ploy." This involved asking Sparc to confirm Fosters were appointed going forwards, upon which "we can then

devote a resource to this project and undertake the tasks you are asking of us". This was drafted by Mr Stewart, who was congratulated by Mr Sutcliffe of Fosters who told Mr Stewart, Mr Brooker and Mr Gardner that Mr Brooker should "have the main say …. but you have managed to capture the disingenuous approach which I suggested."

176. Mr Selby sought to justify this behaviour by Fosters in a number of ways. He submitted that what he called this "reticence to work with Sparc" was understandable. He pointed out that Sparc's involvement had come "long after" Fosters had done any meaningful work on the project, and that Sparc had been critical of Fosters. However, I do not consider that the few isolated references in the contemporaneous documents to Fosters that were made by Sparc are sufficient to justify Fosters' reaction to requests for what were called deliverables, nor do they justify a policy decision being taken by Fosters to be disingenuous. Nor do I consider the passage of time to be relevant, which was not in any event particularly long when one considers the scale of the project.

177. The following points are in my judgment relevant. The deliverables which Sparc, on Mr Dhanoa's behalf, were seeking should have already been prepared by Fosters as part of the performance of the duties under the Appointment at Stages A and B. Fosters had been paid about £2 million in fees for this work. It was work to which Fosters' client, either Mr Dhanoa or his company, was obviously entitled. Fosters plainly knew that they had not prepared whole classes of documents at all, such as the Strategic or Project Brief, minutes of meetings, weekly reports and so on. They were not prepared to provide to Sparc what little they had produced, or indeed anything at all, at this stage, and sought to obfuscate and hide their non-performance. Fosters certainly did not explain that they could not provide these because they did not exist. There was a concerted and agreed attempt by Fosters to disguise their own non-performance. They were planning to be, and were, disingenuous with Sparc, who was acting on the express authority of Mr Dhanoa. This is, in my judgment, rather grubby behaviour, and wholly unprofessional conduct by Fosters. The points upon which Mr Selby relies cannot disguise the fact that Fosters had been appointed as the architect for Mr Dhanoa (or rather, for one of his companies) and that entitled him, as Fosters' client, to certain things, which were termed deliverables in the requests. The passage of time does not justify Fosters' attitude to these requests, nor in my judgment does the fact that there may have been an element of professional rivalry behind the scenes justify or excuse that attitude or behaviour either. Some of the matters relied upon by Mr Selby to excuse this conduct were not even known about by Fosters at the time. Members of many different professions may find their judgement questioned (as, for example, where a client decides to obtain a second opinion) or may find themselves, on occasion, even replaced. This may even be by those whom the first professional may consider to be less well-qualified. Part of acting professionally should, in my judgment, include a professional and grown-up reaction to such turns of events. Being disingenuous, obstructive, seeking to obfuscate and/or being awkward are hardly professional reactions.

178. The third matter also concerns Fosters. Planning permission had been obtained for the Fosters Scheme but Mr Dhanoa could not build it. On 12 May 2011 Gary Taylor of the Management Group within Fosters sent an e mail to Michael Petsas, an

Assistant Project Manager at Fosters, and Mark Klimt, Fosters' solicitor, to ask the following:

"The backdrop is that Grant Brooker has asked if we can control the design and planning permission to get the development going with someone else (thereby retaining our involvement in the job) as the current Client owes us money and is not likely to proceed with the development.

The question is therefore related to our question about Copyright, which is how do we take control of our design to enable another developer to pick up from the current client without being in breach?"

179. At this point, Fosters had been paid in excess of £2 million. The only invoice outstanding was for £7,800 for "visuals", which Mr Dhanoa would not pay because this had not been done. Mr Taylor did not give evidence, but Mr Brooker was asked about this e mail. Mr Brooker, in his evidence, said he "couldn't be absolutely certain" about the figures but I find that he did know the figures. Mr Brooker obviously wanted to try and "take control of" the design and use it for another client, that design having been paid for by Mr Dhanoa.

180. This, again, clearly demonstrates the dismissive attitude Fosters had to their own client. It also demonstrates a degree of flexibility in accuracy in the information provided to their own solicitors by the personnel at Fosters. Stating that "the current client owes us money" was not, in my judgment, even remotely an accurate statement. There was a single modest outstanding invoice, but for work which had not been done. That can hardly truthfully be characterised as "the client owes us money". There was no question of Fosters being owed outstanding fees for work they had done, and for which Mr Dhanoa refused to pay. Mr Dhanoa had paid Fosters their fees for their architectural services.

181. These three matters do not stand alone, and I have not made any findings based on any one of them in isolation. They do however match the general picture of behaviour by Fosters towards Mr Dhanoa. I provide them as illustrations of the type of attitude that Fosters had towards him, and his project. I have made specific findings in respect of Breaches 1 and 2 in his favour based upon the evidence in the case, including the oral evidence of the witnesses. Identification of and findings in respect of breaches being made against Fosters do not however establish an automatic recovery by the claimants of all the sums claimed. There are issues of both causation and loss that need to be addressed.

IX *Causation*

The Financial Crisis

182. As a result of my findings on breach, it is necessary to consider causation in order to determine what consequences were caused by the breaches of duty (as I have found them) on the part of Fosters in respect both of Breach 1 and Breach 2. Mr Dhanoa's evidence was – and despite some lengthy cross-examination he remained steadfast on this point – that he always intended to build out the hotel.

183. There were, however, in 2007 and 2008 some fairly cataclysmic financial events that led to the global financial crisis, which is also referred to as the credit crunch. This was referred to in various e mails from about 2009 onwards arising out of Mr Dhanoa's efforts to raise funding to build the hotel. Different phrases were used, but

the overall gist was known to all involved. As a result of the crisis, financial institutions became more cautious in lending. I raised with both counsel during closing submissions the issue of my taking judicial notice of the dates of what was an obvious historical development, and the parties identified the following events and dates, and I would have taken judicial notice of them but the parties agreed them in any event. I have re-ordered them so that they are in chronological order:
1. On 14 September 2007, Northern Rock sought and received a liquidity support facility from the Bank of England, which led to a "bank run" on Northern Rock at that time.
2. On 22 February 2008, Northern Rock was nationalised.
3. Bear Stearns collapsed on 17 March 2008 and merged with JP Morgan Chase.
4. On 10 April 2008, the Bank of England Base Rate was reduced by 0.25% to 5%. There then followed a series of rate reductions so that by 5 March 2009 the Bank of England Base Rate was 0.5%.
5. Lehman Brothers filed for Chapter 11 bankruptcy protection on 15 September 2008.
6. On 25 November 2008, the US Federal Reserve commenced a programme of quantitative easing.
7. From 5 March 2009 onwards, the Bank of England commenced a programme of quantitative easing.

184. There are, amongst economists, historians and commentators, different causes discussed for the global financial crisis. There is no need to embark upon a detailed, or any, analysis of that in this judgment, and the degree to which freely available borrowing may or may not have contributed to it. However, the crisis itself is relevant. Certainly, it is generally accepted that prior to the financial crisis, it was possible for both businesses and private individuals to borrow very sizeable sums from financial institutions, sums far greater than was the case afterwards. No-one was immune from the effects of the financial crisis; individuals seeking mortgages were not able to borrow such sizeable multiples of their salary, and even sovereign nations such as Iceland found themselves embroiled. All three of that country's major privately owned commercial banks defaulted in late 2008, and Iceland suffered a systemic banking collapse, which relative to the size of its economy was the largest experienced by any country in economic history. As a single example of how long the acute phase of the crisis lasted, the International Monetary Fund bailout support programme for Iceland as a nation (which was co-funded by the Nordic nations) did not end until 31 August 2011. Some sizeable companies across the world, including major banks, simply failed. One financial institution that failed was the Anglo Irish Bank, which had lent Mr Dhanoa (through his companies) £11.5 million of the purchase price of the site so that he could buy it. The debt he owed to that bank was sold on to a rather voracious financial predator, who had purchased the debt at a discount from the Irish state institution, the Irish Bank Resolution Corporation or IBRC, that dealt with the fall out from Irish banking failures.

185. It was during this period, from 2008 onwards, that Mr Dhanoa was seeking funding to build his hotel. This period almost precisely matches the dates of the specific events identified above that were part of the crisis. Mr Dhanoa had in 2007 and earlier found that funding was readily accessible to him. A great deal of his cross-examination focused on his attempts to obtain funding for the Fosters Scheme, and

shone a light on a practice that may not be widely known, namely the payment of sizeable "introduction fees" or what was also called commission, to individuals or companies that act as brokers. The reason I refer to this is the majority of Mr Dhanoa's communications were with these brokers, and relatively less contact directly with the institutions themselves (although he did have some direct communications too). Essentially, brokers would identify a charge to be paid to them as a modest percentage of the loan by way of fees, simply for introducing a borrower to a lender who wished, or was able, to lend money. Given the amount of the loan sought was £100 million, a percentage of (say) 0.75% would amount to £750,000 if that loan was granted. In the age of e mails, this introduction or "placing of business" – which is one of the phrases used – seems on occasion to have involved little more than these brokers sending some e mails and introducing Mr Dhanoa to "contacts". The amount of work seems to be so far out of proportion to the potential fees as to be astonishing. They also proffered advice from time to time. One piece of advice Mr Dhanoa received was that he (and not the broker) should himself get on a plane and "fly to the Gulf", and try to raise interest amongst the Gulf States (which must have meant the sovereign funds of the Gulf States). Whether that broker would expect commission for such a sophisticated and helpful professional service remains to be seen, because Mr Dhanoa did not succeed in raising the funds despite his best efforts.

186. There is nothing wrong in using such brokers and the practice seems to have been widespread. I find that Mr Dhanoa was entirely genuine in his efforts to find funding to build the Fosters Scheme. He expended very considerable time and energy in doing so, but was unable to raise the funds. At the beginning of the process, the most likely source of funding was Anglo Irish Bank (a bank that failed) or Royal Bank of Scotland (another bank that spectacularly failed, and required intervention and ultimate ownership by the UK Government). That latter institution announced the largest rights issue in British corporate history in April 2008 (which led to separate litigation in the Chancery Division that was recently settled) and in October 2008 the bank was recapitalised when HM Treasury injected £37 billion into the bank to avert a banking sector collapse. These were hardly promising financial conditions for Mr Dhanoa or his companies to obtain a loan of £100 million.

187. I find that there were three reasons that Mr Dhanoa and his companies were not able to build the Fosters Scheme. They are as follows:

1. The financial crisis led to what had been, previously, widely available borrowing of very sizeable sums in the tens of millions of pounds (and certainly £100 million) becoming far less widely available.

2. The Fosters Scheme was very expensive – EC Harris had costed it at £195 million – and so formal documents available from the professional team, which potential lenders wished to study, showed that the numbers simply could not be made to work. Mr Dhanoa remained convinced that he could get the numbers to work, and that he could get the Fosters' Scheme cost down towards £100 million, but the institutions were hesitant.

3. The new lending approach post-financial crisis meant that funders required a much greater contribution from the borrower. I use approximate numbers to make the point but whereas before a lender might, prior to the financial crisis, have been prepared to advance £100 million with the borrower's contribution being land value

and/or the £4.5 million in cash already invested into the scheme by Mr Dhanoa (through his companies), this was no longer the case. One of the features of the financial crisis, as demonstrated by the fall in the Bank of England interest rate to extremely low levels which is still the case today, is that the cost of borrowing became far lower than it had before. A base rate of ½ of a single percent leads, self-evidently, to far lower rates of interest than when the base rate was 5%. However, the fact remains that a borrower had to obtain a loan in the first place in order to benefit from these far lower rates. This became far more difficult.

188. Eventually in 2011 Mr Dhanoa was advised by Sparc and Ward Williams, another professional adviser, that the Fosters Scheme could not be value engineered down to £100 million, and he accepted this. His enthusiasm for building a hotel on the site costing £100 million remains undimmed, however, and he remains convinced that he can do so. An alternative scheme, referred to as the Acanthus Scheme, has been produced by alternative architects in outline only. One of the issues in this case is whether that scheme, which has very little detail, could be built for £100 million. In view of Mr Brooker's acceptance in his cross-examination that Fosters could in 2007 have designed Mr Dhanoa a 5-star hotel with 500 bedrooms on the site keeping to a budget of £100 million, that issue concerning the Acanthus Scheme becomes of less relevance. However, the fact remains that Mr Dhanoa has not obtained planning permission for the Acanthus Scheme and funding for it has not yet been obtained. He is genuinely of the view that he would be able to raise funding and build this hotel, even in the financial climate of 2017. In my judgment, a feature of successful entrepreneurs is sometimes their absolute refusal to be daunted by obstacles that may appear, to others with lower aspirations, insurmountable hurdles. Mr Dhanoa certainly refuses to be daunted by his previous experiences to date on this site.

189. The expert quantity surveyors considered the Acanthus scheme. I prefer the evidence of Mr Wheeler to that of Mr Hackett in all respects. The first reason for this is simple. In the first Joint Statement of these expert witnesses on 23 February 2017, they both agreed that an exercise would be performed by each of them, building upon the areas agreed by them in an appendix to their first statement and using the cost source materials identified in that agreement for the cost information. That exercise was to be the costing of the Acanthus Scheme to arrive at a conclusion as to whether it could be built for £100 million or not. Mr Wheeler did so, making and identifying relevant assumptions as part of that exercise. Mr Hackett simply changed his mind – notwithstanding the experts' agreement, and indeed contrary to it – and decided not to do this at all. No satisfactory explanation was given for this.

190. Further, Mr Hackett also told the court that when he wrote his reports he believed that the Acanthus Scheme was being relied upon by the claimants as an example of how the Fosters Scheme could be engineered down to £100 million. That was a fundamental misconception by him, and the basis of that complete misunderstanding (if genuine misunderstanding it was) was not explained. Also, the price "per key" (which means per room) that Mr Hackett arrived at using his different methodology for the Acanthus Scheme was £343,000 per room, a sum wildly out by comparison with the contemporaneous data compiled by EC Harris in 2008 even for the Fosters Scheme itself, let alone the far simpler and more conventional design of the Acanthus Scheme. It is also wildly in excess of the

amount per room or per key that was calculated by EC Harris at the time for the 5 star Sofitel at Heathrow, that was actually constructed for £200,000 per key. Mr Hackett had no satisfactory explanation for this either.

191. Finally – and in my judgment crucially – Mr Hackett refused to make any assumptions that would have allowed him to cost the Acanthus Scheme in the way that Mr Wheeler did. He said making assumptions was "unsafe" because he was not the designer. This approach has no intellectual justification whatsoever and as an approach by an expert witness is wholly flawed. If taken to its logical conclusion, it would mean that no outline design that had not been fully designed could ever be costed, which is verging on nonsense in my judgment. If an outline design such as the Acanthus Scheme is to be costed – and in this case this was required, because it was an issue in the case as to whether it could be built for £100 million, and it was also agreed in the Joint Statement that the experts should do this – assumptions have to be made. Mr Hackett was somewhat obstinate that he would not do so, and that the design needed expanding before he could do this. I do not accept that evidence. I cannot avoid reaching the conclusion that he chose not to do so because he feared the answer to the exercise would harm the case being advanced by Fosters.

192. Assumptions are made by all sorts of construction professionals at all stages of projects, and by many different disciplines of expert witness. Mr Hackett could have agreed assumptions with Mr Wheeler if he thought they could be agreed; he could have chosen different ones to Mr Wheeler, if he thought Mr Wheeler's were not sensible or unrealistic; or he could have adopted a middle course, agreed some and used others of his own. What is wholly unhelpful to the court is for him to have simply refused to make any assumptions, on grounds which in my judgment simply do not stack up.

193. Mr Wheeler and Mr Hackett in the Joint Statement agreed that the Acanthus Scheme would be costed, agreed the format for doing so (contained in an appendix to the Joint Statement) and agreed the sources that would be used in doing so (in paragraph 2.3 of the Statement itself). However, because Mr Hackett unilaterally changed his mind and did not complete that exercise, the only evidence available on the matter from these experts is that of Mr Wheeler. The exercise performed by Mr Wheeler led to a conclusion that was wholly consistent with the benchmarking exercise done by EC Harris in 2008, at approximately £200,000 per key. Mr Wheeler's conclusion, which I accept, is that the Acanthus Scheme could have been constructed for £100 million in 2009 money. This was matched by Mr Brooker's entirely frank acceptance that Fosters could have designed a 500 bedroom 5 star hotel in 2007 for that sum. Mr Hackett's obstinacy does not therefore have any material impact upon my findings. However, that does not of itself entitle the claimants to loss of profits. London Heathrow is currently an airport experiencing a great deal of uncertainty, not least in terms of the controversial plan for the construction of a third runway. It is simply not known how the Heathrow Master Plan will unfold, and how that will affect the area in the immediate vicinity of the airport. This point was not explored at the trial and so I do not consider it.

194. Returning to the difficulty that Mr Dhanoa had in raising funding, the idiomatic (and rather unattractive) phrase "skin in the game" was deployed in Mr Dhanoa's cross-examination to refer to the amount of equity that a borrower has in any

particular project. This is another way of discussing in general terms what is also called Loan to Value or LTV. This is a reference to a lender's criteria for how much can be advanced by way of loan, in comparison to the overall value of the project, and how much is to be contributed by the borrower. Different lenders have different criteria, and these also vary for different types of project. To use a very simple and obvious example, if a lender is prepared to advance 90% of a project value, the other 10% must be provided by the borrower. Where a lender is, for example, a residential occupier who seeks a mortgage to buy a house, the 10% is often referred to as a deposit. In reality, it is the borrower's contribution to the purchase price. If the lender is a company with a project such as constructing a new hotel, the situation is slightly more complicated, but not a great deal in conceptual terms. There is no purchase price, because the hotel in question has not yet been built. In Mr Dhanoa's case, he already owned the land. The funds he was seeking to borrow were to be used to pay for the construction of the hotel itself.

195. This meant the valuation of the project itself became a central and relevant feature of any funding proposal. Mr Dhanoa wished to borrow £100 million. He already owned the site, and wished this to form his equity contribution in the LTV ratios being discussed. The illustration that I now provide is a very broad brush summary using approximate figures of the different discussions that took place. If a lender were to advance £100 million to Mr Dhanoa or to one of his companies, and all of that were to be spent in constructing the hotel, that lender would have advanced about 86% of the cost of the hotel (£100 million as a percentage of the £115 million cost, which would be made up of £100 million construction cost and £15 million purchase price). However, no lender would advance such a sum and allow the £11 million loan from the Anglo Irish Bank to remain in place, as this would take priority and was already secured on the actual land itself. Accordingly, £11 million of any funding would have to be used to pay off the Anglo Irish Bank loan. This means either that the further funds required would be £111 million (£100 million to construct the hotel plus £11 million to pay off the Anglo Irish Bank loan) or the hotel would have to be constructed for £89 million (so that the £100 million borrowed would be sufficient to construct the hotel and pay off the Anglo Irish Bank). On either analysis, Mr Dhanoa's plan was that his actual equity contribution would remain at the £4.5 million he had paid to purchase the land. If £111 million were borrowed, the lender would have advanced 96.5% (£111 million as a percentage of £115 million); Mr Dhanoa appointed a broker on 6 March 2009 seeking to obtain £110 million so that the earlier loan could be repaid. The way that the arithmetic works, if only £100 million were borrowed, the hotel would have to be constructed for £89 million if the Allied Irish Bank were to be repaid. In that scenario, the lender would have advanced 96.1% (£100 million as a percentage of £104 million). All of these illustrations use figures in round millions, and exclude a number of items, but are sufficient in approximate terms to demonstrate that the LTV ratios which Mr Dhanoa wanted to achieve were very high, when looked at from a lender's point of view.

196. Mr Dhanoa was challenged on the precise figures. For example, the fact that the broker was appointed to seek £110 million demonstrates, on simple arithmetic, that the amount available to construct the hotel could only have been £98.5 million, not £100 million, because 110 million minus 11.5 million (to repay the Anglo Irish Bank) is 98.5 million. However, this very precise approach ignores that this is not

the way that Mr Dhanoa looks at figures, and I doubt it is the way that many entrepreneurs do either. To many people, the fact that those figures might be "out" by one and a half million pounds could be rather startling. However, one and a half million pounds is, in the context of a £100 million project, not a sizeable sum. Further, to an entrepreneur who has made many millions over the years, and who expected to continue to do so in the future, such a difference is not particularly notable. This point is well illustrated by Mr Dhanoa's answer to the question:

"Q: Was it a hundred [million pounds] or 98.5?

A: No, it's – sorry, I see what you mean. Well, it's all right, okay. 98.5. It's a million and a half difference at the end of the day."

He was completely unperturbed by this, and I can see why. It was only a difference of 1.5%. Had he been able to borrow £100 million and construct the hotel for that sum, he would have put in £4.5 million of his own money to buy the site in 2007, another £4 million in professional fees, and could potentially have been the owner of a highly profitable hotel with a value if successfully trading (again, potentially) of £200 million or so. This is the way that successful entrepreneurs can make sizeable amounts of money; they do not, so far as I can tell, worry particularly about the odd million pounds or so here and there. I do not consider that Mr Dhanoa can be criticised for this approach to project finance, nor do I believe that it harms his credibility. However, even this rather superficial analysis of the financial components of the project demonstrate that the Fosters Scheme, costed at £195 million, was simply too expensive in every respect.

197. There is another way of valuing a project such as a hotel in addition to land cost and construction cost. This is to analyse the "value" of the finished hotel in terms of its income generating potential. However, even though this would usually (and in this case did) give rise to higher potential figures for value than compared to land cost and construction cost, it has more risk for a lender. This is because the projected trading profit may not be achieved. However, after two or three years trading, it would represent an opportunity for refinancing, particularly if an agreement were reached with a notable hotel brand. All of these different factors were being considered at the time that Mr Dhanoa was seeking funding from about 2008 onwards. Different outline approach to finance, including mezzanine funding and potential refinancing after two or three years trading, were both postulated and predicted. However, those lenders who were interested required more liquid funds injecting than Mr Dhanoa had available. Some lenders had simply withdrawn from the market entirely. In his cross-examination, Mr Dhanoa was adamant that he could have provided further liquid funds "from elsewhere" if the lenders required more of him than the £4.5 million already invested in the land purchase, and his confidence on this point was undimmed. However, at the time he produced no evidence to the potential lenders (such as bank statements or other documents) to demonstrate that this was the case.

198. Mr Dhanoa, after the financial crisis and the collapse of Anglo Irish Bank, found himself with far less equity (or available cash reserves) to conduct his business affairs. He still had reasonable sums available; in one proposal that was prepared on his behalf in 2009, it was identified that Riva Properties had £1.7 million available "in liquid cash" with a further £1 million coming due in July 2009. However, although, again, these are sizeable sums, in terms of the business he was seeking to transact, they were not, and they were certainly not sufficient. Funding proved not to be available, or at least if it was available Mr Dhanoa and his companies could

not borrow it. The project, which had already stalled, simply seems to have lapsed into a dormant state.

199. Mr Selby also relied upon a separate causation point concerning the date after which Mr Dhanoa had his own separate costs advice from EC Harris, and the degree to which Mr Dhanoa could be said to have relied upon Fosters at all. Mr Dhanoa did say that from February/March 2008 he expected to receive detailed costs advice from EC Harris. This acceptance is elevated by Fosters in these proceedings as breaking the chain of causation. The reason for this is as least partly explained by Fosters constant retreat, in the context of allegations of breach concerning value engineering, to a position of "nothing to do with us, we are only architects". There are different problems with this approach. Firstly, I have dealt in paragraphs 126 to 129 above with the subject of costs advice on the one hand, and value engineering on the other. They are not the same. Secondly, the evidence of Mr Dhanoa is not to the effect contended for by Fosters. In the context of a passage dealing with value engineering, Mr Selby put the following points:

"And if Fosters had told you at this time that the scheme could not be brought down to £100 million, you would have said that's not your watch, EC Harris are working on this.
A. No, that's not what happened, because Fosters -- first, it was actually agreed with myself and EC Harris for them to try and value engineer it then with -- and Chris Hammerschmidt wrote to EC Harris asking them to be involved in that value engineering exercise, which was actually then -- that's the two main reasons – people actually who could value engineer it down. It wasn't the rest of the team that could value engineer it.
Q. But once they're working together the people you'd expect to give you the cost figures are EC Harris?
A. Yes. On the scheme itself they would be the ones who would give me the cost figures."

200. In my judgment, this cannot be elevated to the status of breaking the chain of causation or constituting evidence that Mr Dhanoa was not rely upon the advice he was given by Fosters about value engineering. I have made findings of fact about the advice given to Mr Dhanoa by Mr Stewart. This cross-examination is predicated on the hypothesis that the Fosters advice was exactly the contrary to what I have found was given. Further, just because EC Harris were providing "the costs figures" does not mean that Fosters can escape the consequences of the breach of duty in respect of value engineering. The factual content of this evidence from Mr Dhanoa, when read in context, simply does not mean what Fosters argues it means, namely that the chain of causation was broken. Finally, the argument contended for by Mr Selby entirely ignores the factual content of Mr Hammerschmidt's evidence, to the effect that Mr Dhanoa was told, in broad terms, that value engineering was possible to the level sought, although the exact design was not guaranteed in that event. By way of secondary support, rather than invoking an expert's views on a question of law, Mr Moren, Fosters' own architectural expert opined that Fosters had a duty to warn Mr Dhanoa that the value engineering exercise could not succeed. Mr Selby, in his closing submissions, listed a high number of factors (in paragraph 223) identifying that Mr Dhanoa was receiving "lots of costs advice and/or relevant evidence about likely costs but continued with the project in any event". These arguments fail to take account of the fact that these separate pieces of costs

information were obtained in parallel with the value engineering exercise, and also fail to take account of the findings that I have made concerning what Mr Stewart's advice was.

201. It is also contended by Mr Selby that reliance by Mr Dhanoa upon Fosters' advice in this respect was so unreasonable as to break the chain of causation. I reject that submission. The parties in this litigation do not agree on very much, but they are agreed that Fosters are a world leading architectural practise, and a name in the industry of great renown. In my judgment, advice from Fosters that value engineering of the Fosters Scheme could, as Mr Hammerschmidt put it, "bring the budget back to where we assumed it would be" (namely £100 million) is exactly the sort of advice that would be relied upon by a client, and was relied upon here by Mr Dhanoa. The other factual matters relied upon by Mr Selby do not come close to rendering its effect nugatory in causative terms. It was because of this that Mr Dhanoa continued to expend funds on professional fees. However, this advice was not causative of Mr Dhanoa (or rather, his companies) failing to secure funding to build either the hotel as designed by Fosters (which was simply too expensive) or an alternative scheme for £100 million. As time unfolded, Mr Dhanoa had difficulty in fighting off creditors, predominantly in the identity of the ultimate owner of the loan originally obtained from Anglo Irish Bank, who had bought the debt at a discount, and proceeded to enforce repayment at full value. This lack of any substantial cash reserves, together with the financial crisis were, in my judgment, factors that would have been present regardless of whether the Fosters Scheme had been designed in accordance with Mr Dhanoa's indicated budget of £100 million. It was these financial factors that caused the hotel scheme not to be built.

202. In the well know case of ***Galoo Ltd v Bright Grahame Murray*** [1994] 1 WLR 1360, a case which concerned the negligent auditing of two companies' accounts, Glidewell LJ stated the following:

"The passages which I have cited from the speeches in *Monarch Steamship Co Ltd v Karlshamns Oljefabriker A/B* [1949] AC 196 make it clear that if a breach of contract by a defendant is to be held to entitle the plaintiff to claim damages, it must first be held to have been an "effective" or "dominant" cause of his loss.

The test in *Quinn v. Burch Bros. (Builders) Ltd* [1966] 2 Q.B. 370 that is necessary to distinguish between a breach of contract which causes a loss to the plaintiff and one which merely gives the opportunity for him to sustain the loss, is helpful but still leaves the question to be answered "How does the court decide whether the breach of duty was the cause of the loss or merely the occasion for the loss?"

The answer in my judgment is supplied by the Australian decisions to which I have referred, which I hold to represent the law of England as well as of Australia, in relation to a breach of duty imposed on a defendant whether by contract or in tort in a situation analogous to breach of contract. The answer in the end is 'By the application of the court's common sense'."

203. In the more recent case of ***Borealis AB v Geogas Trading SA*** [2010] EWHC 2789 (Comm), Gross LJ considered causation, amongst other things. Borealis claimed damages from Geogas, arising out of the supply by Geogas to Borealis of a quantity of butane as feedstock for Borealis' integrated olefin plant in Sweden. Borealis' case was that, in breach of contract, Geogas had supplied butane that was heavily contaminated with fluorides that cracked under normal processing conditions to

produce, amongst other substances, hydrofluoric acid. This in turn caused serious and extensive physical damage to the plant and equipment, together with interruption to Borealis' business. It was common ground that the goods were contaminated with fluorides. Geogas also admitted that it was in breach of contract in that the goods were contaminated. However, the claim was resisted on a variety of grounds, and as the judge stated at [3] the trial was essentially about causation, remoteness, mitigation and quantum.

204. He stated at [43] to [45] the following, which are of wide application, which were stated in the context of considering the claim that the chain of causation was broken:

> "43. First, although an evidential burden rests on the defendant insofar as it contends that there was a break in the chain of causation, the legal burden of proof rests throughout on the claimant to prove that the defendant's breach of contract caused its loss.
>
> 44. Secondly, in order to comprise a novus actus interveniens, so breaking the chain of causation, the conduct of the claimant "must constitute an event of such impact that it 'obliterates' the wrongdoing…" of the defendant: *Clerk & Lindsell on Torts* (19th ed.), at para. 2-78. The same test applies in contract. For there to be a break in the chain of causation, the true cause of the loss must be the conduct of the claimant rather than the breach of contract on the part of the defendant; if the breach of contract by the defendant and the claimant's subsequent conduct are concurrent causes, it must be unlikely that the chain of causation will be broken. In the circumstances where the defendant's breach of contract remains *an* effectiv*e* cause of the loss, at least ordinarily, the chain of causation will not be broken: *County Ltd v Girozentrale* [1996] 3 All ER 834, at p.849 b-c, *per* Beldam LJ and at pp. 857 f-g and 858 b-c, *per* Hobhouse LJ (as he then was). Other examples can be found in the area of shipping law. Where, in breach of charterparty, charterers order a vessel to proceed to an unsafe port, the conduct of the vessel's master in obeying the order (placed as he well may be, on the horns of a dilemma) will be judged sympathetically, in context and will not lightly be treated as unreasonable: *Compania Naviera Maropan v Bowaters (The "Stork")* [1955] 2 QB 68. But even negligent navigation following the charterer's order to proceed to an unsafe port will not necessarily break the chain of causation: see, for example *The Polyglory* [1977] 2 Lloyd's Rep. 353, at p.366. Conversely, where the negligence of vessel X caused vessel Y to run aground, vessel X was not liable for such damages as were attributable to the subsequent, clearly separate and negligent re-floating of vessel Y: *The "Spontaneity"* [1962] 1 Lloyd's Rep 460; the negligence of vessel X had ceased to be operative.

> 45. Thirdly, it is difficult to conceive that anything less than unreasonable conduct on the part of the claimant would be capable of breaking the chain of causation. It is, however, also plain that mere unreasonable conduct on a claimant's part will not necessarily do so - for example where the defendant's breach remains an effective cause of loss, albeit in combination with the claimant's failure to take reasonable precautions in its own interest: see, for example, *County Ltd v Girozentrale, per* Beldam LJ *(loc cit).* By its nature, reckless conduct by the claimant would or would ordinarily break the chain of causation, though there is no rule of law that only recklessness on the part of the claimant will do so: *Lambert v Lewis* [1982] AC 225, *per* Roskill LJ (as he then was) in the Court of Appeal, at p.252; *County Ltd v Girozentrale (supra), per* Hobhouse LJ at p.857, more conveniently discussed below, when dealing with the claimant's knowledge or lack of it."

205. Causation is often referred to, or expressed as, being a matter of common sense. The chain of causation can be "broken" by unreasonable acts of the claiming party. However, "common sense" as a concept is not always seen judicially as being an entirely universal measure, in the sense that common sense can sometimes be deployed as a concept by a party rather subjectively. It is accepted by Ms Briggs for the claimants that the loss of profit claim is entirely dependent upon delay. That delay could, on one analysis, be simply six months. This is the length of time that it would have taken the claimants to obtain a different scheme if, in February 2008, either Fosters had "started again" and produced a scheme that could have been constructed for £100 million, or if Mr Dhanoa had gone to another architect at that point. Although that period of time could readily, and in common sense terms, be said to have been caused by Breach 1, it was actually caused by Breach 2. It can even be said to have flowed from both, as had Breach 1 not occurred, Breach 2 would not have occurred either. Breach 2 was the effective cause of Mr Dhanoa believing that the Fosters Scheme could be constructed for £100 million by value engineering the scheme down to that figure. Mr Dhanoa and the claimants advance the argument that it was the failure to design the scheme for £100 million (and/or the advice that it could be value engineered down to that figure) that caused his failure to obtain funding. The claimants and Mr Dhanoa are entirely comfortable that this accords with common sense. I do not agree.

206. However, so far as the loss of profits claim is concerned, even if the conduct of the claiming party must be reasonable, which I accept that in this case it was, both or either of those analyses in respect of Breaches 1 and 2 require me to accept those breaches (or at least one of them) by Fosters as an effective cause of Mr Dhanoa (again, through his companies) failing to construct the hotel such that it could be built, opened and start to generate profits. On the evidence in this case, the application of common sense leads me to the conclusion, and I find, that they were not. The effective causes of the failure to construct the hotel, and the failure of it to open for business such that it could generate profits, were the unavailability or restriction of what had previously been widely available borrowing from a variety of institutions (the so-called "credit crunch"), together with Mr Dhanoa's lack of other available liquid funds to satisfy the new more stringent LTV ratios being

demanded by lenders. This would have been the case, even had Fosters produced a design for a hotel that was costed at £100 million in early 2008. In the more cautious lending market from about mid-2008 onwards, although borrowing costs were cheaper, banks were no longer prepared to be almost the sole funders in respect of projects. The amount of equity which Mr Dhanoa had already injected into the project was not sufficient to match the amounts required by borrowers under the more stringent LTV ratios. Accordingly, given these effective causes, the claimants cannot, in my judgment, recover any loss of profits from Fosters. Mr Dhanoa's expenditure on other professional fees is rather different, in the sense that those sums were expended during the period that value engineering was being performed, and prior to the point when he realised (because he was advised by another professional firm, not by Fosters) what the architectural experts agree was the case all along, namely that the Fosters Scheme could not be value engineering down in cost by such a large amount. I deal with these separate items of expenditure in Part XI below, Heads of Loss and the Four Claimant Companies.

207. An identical result is obtained, in my judgment, if one analyses the claim for loss of profits in this case by posing an entirely different question, namely whether the inability to obtain funding, caused by the financial crisis, was a type of harm from which Fosters had a duty to keep the claimants' harmless? In ***Hughes-Holland v BPE Solicitors*** [2017] 2 WLR 1029 Lord Sumption JSC considered the question of the measure of damages in a negligent mis-statement case. The claimant was a business with knowledge of property dealing, who agreed to lend a builder and developer sums in connection with a disused building, in the mistaken belief that it was to be used to convert the building into office premises. The negligence was the drafting of documents by solicitors for a loan agreement, also mistakenly believing that the loan was for site development. In fact, the loan was for the purchase, not the development of, the site. The transaction was a failure, and the site had to be sold for a fraction of the value that would otherwise have been the case, with the entire sale proceeds being absorbed in the costs of the sale. As a result of this, the judge at first instance awarded the claimant damages representing the entire loss which he had suffered as a result of entering into the transaction, which he found was not an inherently doomed venture. The defendant solicitors won on appeal, the Court of Appeal finding that the development project had never been viable and the whole loss was attributable to the claimant's misjudgements. By the time of the appeal to the Supreme Court, the claimant was the trustee in bankruptcy. The appeal failed. This is an example of what is often called a "transaction/no transaction" case, of the same type as ***South Australia Asset Management Corp v York Montague Ltd*** [1997] AC 191. That latter case, which was decided in the House of Lords but was called ***Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*** [1995] QB 375 and [1995] 2 All ER 769 below (one of the cases being given a so-called "leap-frog appeal" certificate by the first instance judge, Philips J as he then was), involved a well-known illustration of the principles of recovery of damages by Lord Hoffman using the analogy of a mountaineer and a knee injury.

208. However, some passages of Lord Sumption's speech are of wide application in ***Hughes Holland*** and Mr Selby expressly relies upon them.

> "20. Courts of law, said Lord Asquith of Bishopstone in *Stapley v Gypsum Mines Ltd* [1953] AC 663, 687, "must accept the fact that the philosophic doctrine of causation and the juridical

> doctrine of responsibility for the consequences of a negligent act diverge." What Lord Asquith meant by the philosophic doctrine of causation, as he went on to explain, was the proposition that any event that would not have occurred but for the fact of the defendant must be regarded as the consequence of that act. In the law of damages, this has never been enough. It is generally a necessary condition for the recovery of a loss that it would not have been suffered but for the breach of duty. But it is not always a sufficient condition. The reason, as Lord Asquith pointed out, is that the law is concerned with assigning responsibility for the consequences of the breach, and a defendant is not necessarily responsible in law for everything that follows from his act, even if it is wrongful. A variety of legal concepts serves to limit the matters for which a wrongdoer is legally responsible. Thus the law distinguishes between a mere precondition or occasion for a loss and an act which gives rise to a liability to make it good by way of damages: *Galoo Ltd v Bright Grahame Murray* [1994] 1WLR 1360. Effective or substantial causation is a familiar example of a legal filter which serves to eliminate certain losses from the scope of a defendant's responsibility. It is an aspect of legal causation. So too is the rule that the defendant cannot be held liable for losses that the claimant could reasonably have been expected to avoid: *Koch Marine Inc v d'Amica Societa di Navigazione* ARL *(The Elena d'Amico* [1980] 1 Lloyd's Rep 75. But the relevant filters are not limited to those which can be analysed in terms of causation. Ultimately, all of them depend on a developed judicial instinct about the nature or extent of the duty which the wrongdoer has broken."
>
> (emphasis added)

209. Lord Sumption went on to consider what had been said in the ***South Australia*** case, which he referred to as *SAAMCO*.

> "25. The *SAAMCO* litigation involved a number of actions which had been decided together in the High Court by Phillips J under the title *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769. He held that the valuer was not liable for that proportion of the lender's loss on the loan which was attributable to the fall in the market after the valuation date, even though (i) the lender would not have entered into the transaction but for the valuer's negligence; (ii) in some of the cases the lender would not even have lent a lesser sum, either because a lesser loan would have fallen outside its lending guidelines or because it would have been of no interest to the borrower' and (iii) adverse market movements were foreseeable. The reason, as expressed in the submission of counsel which Phillips J accepted, at p.805, was that the lender

'deliberately assumed the risk that they might suffer loss as a result of a fall in the property market. They did not rely upon John D Wood's valuation to protect them against that risk. In these circumstances John D Wood owed no duty to protect BBL from this type of loss'.

At pp 806-807, Phillips J stated the principle as follows:

'Where a party is contemplating a commercial venture that involves a number of heads of risk and obtains professional advice in respect of one head of risk before embarking on the venture, I do not see why negligent advice in respect of that head of risk should, in effect, make the adviser the underwriter of the entire venture. More particularly, where the negligent advice relates to the existence or amount of some security against risk in the venture, I do not see why the adviser should be liable for all the consequences of the venture, whether or not the security in question would have protected against them.'

26. The Court of Appeal [1995] QB 375 reversed Phillips J's decision on damages and rejected the principle which he had applied. They distinguished between "no transaction cases", in which the transaction would not have proceeded but for the defendant's negligence and "successful transaction" cases in which it would have proceeded but possibly on different terms or for a different amount. The Court of Appeal held that once it was proved that the lender would not have made the particular loan but for the valuer's negligence, the valuer was liable for the entire loss flowing from the transaction so far as it was foreseeable.

27. The House of Lords allowed the appeal. They accepted the principle underlying Phillips J's decision, but their reasoning was more elaborate and the way in which they applied it was different. The leading speech was delivered by Lord Hoffmann, with whom the rest of the Appellate Committee agreed. The essential distinction which underlies the whole of his analysis is between the assessment of the loss caused by the breach of duty and the extent of the defendant's duty to protect the claimant against it. Referring to the principle applied by the Court of Appeal, that damages should be such as to put the claimant as nearly in the position that he would have been in had the breach not occurred. Lord Hoffmann said, at p 211:

'I think that this was the wrong place to begin. Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the valuer is liable must precede any consideration of the

> measure of damages. For this purpose it is better to begin at the beginning and consider the lender's cause of action'.
>
> 28. He then referred to the nature of the valuer's duty in the case before him. The purpose of the valuation was to form part of the material on which the lender was to decide whether, and if so how much he would lend, what margin, if any would sufficiently allow for foreseeable valuation errors or a future fall in the market, accidental damage to the property and any other contingencies that may happen.
>
> 'On the other hand, the valuer will not ordinarily be privy to the other considerations which the lender may take into account, such as how much money he has available, how much the borrower needs to borrow, the strength of his covenant, the attraction of the rate of interest or the other personal or commercial consideration which may induce the lender to lend'.
>
> Referring to the decision in *Caparo,* he said:
>
> "A duty of care such as the valuer owes does not however exist in the abstract. <u>A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered.</u>"
>
> (emphasis added)

210. At [34] Lord Sumption explained that:

> "the decision in *SAAMCO* has often been misunderstood, not least by the writers who have criticised it. The misunderstanding arises, I think, from a tendency to overlook two fundamental features of the reasoning".

He then explained that the first fundamental feature was where the contribution of the defendant was to supply material which the client will take into account in making his own decision on the basis of a broader assessment of the risks. In such a situation, the defendant has no legal responsibility for the client's decision. It was for this reason that in *SAAMCO* itself the distinction that had been made by the Court of Appeal in that case between what was called "no transaction" and "successful transaction" cases was rejected by Lord Hoffman. He stated that it was 'irrelevant to the scope of the duty of care' at [35]. When such leading jurists as Lords Hoffman and Sumption explain that such a distinction is irrelevant, the point can be seen as being very firmly decided. The second fundamental feature flowed from the first, and was "that the principle has nothing do with the causation of loss as that expression is usually understood in the law". It is, in my judgment, entirely concerned with the scope of the duty.

211. It is also clear that there is a distinction to be drawn between information provided to a party, and advice. This is dealt with at [39] to [44] in particular in the speech of Lord Sumption. I do not consider that the professional service provided by Fosters here, which was the design of the hotel scheme, falls into either category. In my judgment, the professional services encompassed advice in some respects (such as the advice in respect of value engineering) but the scope of the retainer was to design the scheme and provide the architectural services. Advice that arose incidental to the performance of those services does not, in my judgment, take the provision of architectural services into the realms of Fosters being engaged to give professional advice to the claimants in the terms that the word is used in Lord Hoffman's speech, as explained by Lord Sumption. As he said at [39] "Information given by a professional man to his client is usually a specific form of advice, and most advice will involve conveying information. Neither label really corresponds to the contents of the bottle".

212. Fosters were not engaged to give advice on the business viability of the hotel scheme. That conclusion can be tested by considering the sort of information that any professional adviser would need, were they to embark upon the giving of such professional advice. It would undoubtedly include (but not be limited to) the financial resources available to the client, the credit risk they would represent to any lender, and other relevant information. Such advice formed no part of the architectural services which Fosters agreed to provide.

213. I do not consider these cases are of application to the situation before the court concerning the Fosters Scheme. However, even if they are, I am not persuaded that the instant case is one where Fosters were supplying part of the material which the claimants would take into account in making their own decision on the basis of a broader assessment of the risks. Here, the hotel being designed by Fosters was the central feature of the project; the project was the construction of that hotel. The Fosters Scheme was not part of the information being considered by Mr Dhanoa when deciding whether to enter into a wider transaction (such as the advice or information in a property valuation in ***South Australia)*** nor was it analogous to an agreement used as part of the funding arrangements for the wider transaction (such as the loan documents in ***Hughes-Holland).*** The Fosters Scheme *was* the project itself. However, if the principles stated by both Lord Hoffman and Lord Sumption are applied to this case, then the question posed for the court would be whether the inability to obtain funding, caused by the financial crisis, was a type of harm from which Fosters had a duty to keep the claimants harmless? In my judgment, the answer to that is in the negative too.

214. On either analysis – and in my view the correct approach is the first one, that of effective cause – the claimants fail in their claim for loss of profits, notwithstanding other potential obstacles to recovery which I do not in these circumstances have to decide, namely the amount of delay that was in fact caused to the project, and mitigation. Loss of profits is the most sizeable head of loss, and I find that the claimants fail on that, but it is not the only one. However, before turning to the others, I will deal with the defence raised of contributory negligence.

X *Contributory Negligence*

215. Fosters plead contributory negligence on the part of the claimants, or more particularly Mr Dhanoa. There are 14 different matters relied upon in this respect, and they are as follows:

(a) Failing to inform Fosters that a design with a construction cost of £70 million and/or £100 million was required at the July Meeting.

(b) Repeatedly changing the instructions given as to the required contents of the design, including on or around 5 October 2007, 11 October 2007, 7 November 2007, 27 November 2007 and 3 December 2007.

(c) Failing to advise Fosters that there was to be a £70 million budget for construction costs until 27 November 2007.

(d) Failing to have any or any proper regard to Fosters' advice that no engineering firm would be prepared to take on the project with a construction budget of £70 million.

(e) Failing to have any or any proper regard to Fosters' advice that a quantity surveyor should be appointed and/or failing to appoint a quantity surveyor or cost consultant until on or around 3 December 2007.

(f) Failing to have any or any proper regard to Fosters' advice that cost control was the responsibility of the quantity surveyor.

(g) Failing to instruct EC Harris to provide a costing for the project until on or around 14 January 2008.

(h) Instructing Fosters on or around 28 January 2008 that Properties was in a position to construct the hotel complex envisaged by the Design.

(i) Failing to instruct Fosters that the costing provided by EC Harris on 11 February 2008 indicated that the construction cost of the Fosters Design exceeded the available budget, and instead instructing Fosters that no further savings were required in the design

(j) Failing to have any or any proper regard or to respond to Fosters' email dated 4 March 2008 seeking clarity as to the available budget.

(k) Instructing Fosters to cease work on the project save in relation to the application for planning permission.

(l) Failing to instruct Fosters to cease work on the application for planning permission in circumstances where the Claimants did not intend, alternatively were unable, to realise the scheme forming the subject of the application.

(m) Failing to secure the necessary financing for the construction of the project.

(n) Failing to proceed with the project regularly and diligently or at all following the cessation of Fosters appointment.

216. Given this is a contractual claim, it is first necessary to consider the nature of Fosters' liability. This is because the defence of contributory negligence can only be raised where a defendant's liability in contract is the same as the liability would have been in tort. This is well established and the authority for it is the well known case of ***Forsikringsaktieselskapet Vesta v Butcher*** [1989] AC 852, 860-867, 875, 879. The Court of Appeal adopted the three categories of breach described by Hobhouse J as he then was in the first instance judgment ([1986] 2 All ER 488, 508):

> "(1) Where the defendant's liability arises from some contractual provision which does not depend on negligence on the part of the defendant.

> (2) Where the defendant's liability arises from a contractual obligation which is expressed in terms of taking care (or its equivalent) but does not correspond to a common law duty to take care which would exist in the given case independently of contract.
>
> (3) Where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract."

217. For the first category, the defendant cannot utilise the defence of contributory negligence. In respect of the second, it may only avail itself of the defence if there is a *Hedley Byrne* type relationship between the parties. Fosters and the claimants accept that Fosters Appointment falls into the third category, which means that contributory negligence is conceptually available to Fosters as long as it is made out on the facts. It is therefore necessary to consider the different particulars identified at (a) to (n) above to consider whether these are made out on the facts.

(a) Failing to inform Fosters that a design with a construction cost of £70 million and/or £100 million was required at the July Meeting.

218. I have made findings of fact on this subject in respect of what the claimants termed Breach 1. For the reasons explained in that section of the judgment above, I reject this on the facts. There was no such failure.

(b) Repeatedly changing the instructions given as to the required contents of the design, including on or around 5 October 2007, 11 October 2007, 7 November 2007, 27 November 2007 and 3 December 2007.

219. This allegation of contributory negligence is, on the facts, not only misconceived, but demonstrates in my judgment just how important Stages A and B of the Work Stages are. The "required contents" of the design were to be considered in the light of key requirements and constraints, of which the budget was one. I reject this on the facts.

(c) Failing to advise Fosters that there was to be a £70 million budget for construction costs until 27 November 2007.

220. This falls into the same category as that at (a), and on my findings of fact does not arise.

(d) Failing to have any or any proper regard to Fosters' advice that no engineering firm would be prepared to take on the project with a construction budget of £70 million.

221. This is a mis-characterisation of the exchange of e mails to which the advice from Mr Hammerschmidt relates. This head of alleged contributory negligence does not pay attention to what the e mail in question was actually about, and what it states. Ms Jeet Dhanoa had met Mr Hanif Kurati of AKT UK, a structural engineering

practice, in late November. She sent him an e mail on 27 November 2007 saying what a pleasure it was to have met him, and explaining some features of the project. That e mail was copied to Mr Dhanoa, Mr Hammerschmidt and Mr Stewart. She followed that up with another e mail later that same day, copied to the same people, which stated the following:

> "Dear Hanif
>
> I failed to mention in my earlier e mail that another condition would [be] to construct the building within a £70 million budget".

222. Mr Hammerschmidt responded about one hour later at 1504 hrs on 27 November 2007 and stated the following:

> "Only as a little remark from my side on this one:
>
> No engineer will sign up to this as the risk is too high with regards to design and brief changes.
>
> Also costs control is the responsibility of the QS together with the whole design team and can not be ensured by the engineer on his own.
>
> Of course we will all together push for the most efficient structure and in a joint effort we will ensure that you 'buy' the building you want to a price you think is adequate. But all decisions with regards to costs are yours anyway. We can only propose elements and options that will have different price implications that are evaluated by the QS".

223. Firstly, that is not in my judgment advice from Fosters "*that no engineering firm would be prepared to take on the project with a construction budget of £70 million.*" It is advice that no engineer "will sign up to this", the reference to "this" being a *condition* in that engineer's engagement that the building would be constructed within a £70 million budget. Secondly, the advice, such as it was, was categorised as a "little remark from my side on this one" and not in any way stated to have any importance. Thirdly, the advice expressly within the same e mail provided assurance that Fosters would "ensure that [the claimants] 'buy' the building [the claimants] want to a price [the claimants] think is adequate" – in other words, Fosters would keep to the budget.

224. This allegation of contributory negligence fails for those reasons. Mr Dhanoa was not negligent in failing to have proper regard to the advice. The advice, such as it was, provided reassurance that the budget would be observed by Fosters.

(e) Failing to have any or any proper regard to Fosters' advice that a quantity surveyor should be appointed and/or failing to appoint a quantity surveyor or cost consultant until on or around 3 December 2007.

225. Fosters advised that a quantity surveyor be appointed, and did not stress in any respect that this was urgent or something that had to be accomplished immediately. This is in distinction to the advice given by Fosters in respect of a structural

engineer, for example, where words were used by Fosters stressing the urgency of the early involvement of structural engineers.

226. In any event, Mr Dhanoa did appoint a quantity surveyor at a relatively early stage, in the sense that he did so prior to the completion of Stage A by Fosters. Stages A and B were not completed by Fosters and prior to the completion of either of those stages a quantity surveyor had been appointed.

227. Also, Fosters did not advise Mr Dhanoa that the exercise in design that they were undertaking needed to be done after the appointment of a quantity surveyor, or that the budget could only be complied with if a quantity surveyor were appointed. Mr Dhanoa complied with the suggestion made by Fosters that a quantity surveyor be appointed. He authorised them to do this in early October. In the notes of the meeting on 11 October 2007, this is recorded under "Cost Consultant" as "[Fosters] to contact Davis Langdon" and under "Action" is listed F+P, meaning Fosters. Despite this, Fosters did not do so until mid-November. This would be dilatory if appointment of Davis Langdon or any costs consultant were as urgent then, as Fosters now maintain. This allegation again fails on the facts. The delay before Fosters approached Davis Langdon makes it clear, and substantiates, that this was not seen as urgent at the time, nor do I find that it ought to have been done earlier than 3 December 2007, or that Mr Dhanoa was negligent in failing to do so earlier.

228. This allegation of contributory negligence also overlooks a rather important element of the costs advice that was available. Mr Gardner explained that the figure that Fosters used for their fee proposal was obtained by Fosters from Davis Langdon, who at that point were not instructed by Mr Dhanoa. Indeed, at no point were Davis Langdon instructed by Mr Dhanoa. Davis Langdon provided the figure of £150,000 per room direct to Fosters, on request from Fosters. This provision of advice to Fosters was something Davis Langdon would do from time to time (and not charge for) to enable Fosters to calculate the architectural fees. This had nothing to do with Mr Dhanoa, but demonstrates that Fosters had their own separate costs advice on the budget from Davis Langdon. Further, this cannot have just been "think of a number" by Davis Langdon. As early as 3 August 2007 Mr Hammerschmidt sent an internal e mail to amongst others Mr Gardner, copied to Mr Stewart, that stated "DLE cost advice will land on Monday". This was referring to this provision of information from Davis Langdon to Fosters. It is clear that Fosters obtained a budget figure from Davis Langdon, and/or "sanity checked" the figure that was at that stage provided to them by Mr Dhanoa of £70 million.

229. In those circumstances, there can in my judgment be no sensible basis for this allegation, which I reject on the facts.

(f) Failing to have any or any proper regard to Fosters' advice that cost control was the responsibility of the quantity surveyor.

230. This allegation is muddled. It is no different, in reality, than the preceding one. It also elides what Fosters' duty was, namely to provide a design that accorded with the budget that was a key requirement and constraint, with "cost control" which is an entirely different subject. It does not arise and there is no contributory negligence on Mr Dhanoa's part in this respect on the facts.

(g) Failing to instruct EC Harris to provide a costing for the project until on or around 14 January 2008.

231. EC Harris were not provided with the Fosters Scheme until about Christmas time 2007. The witnesses could not remember whether this was done just before, or just after Christmas. The design could not be considered for the purposes of being costed by EC Harris until it was provided to them by Fosters. Nothing could be costed by EC Harris before the Fosters Scheme was available. This allegation is also misconceived, and I find that Mr Dhanoa was not negligent in any respect regarding his dealings with EC Harris, or his appointment or instructions to EC Harris.

(h) Instructing Fosters on or around 28 January 2008 that Properties was in a position to construct the hotel complex envisaged by the Design.

232. This allegation does not constitute negligence by Mr Dhanoa at all. Mr Dhanoa believed that he was in a position to have the hotel constructed. It was not negligent of him to inform Fosters that Properties wished to construct the hotel. That was the whole intention of the project. This allegation reads as though someone had read through the minutes of meetings and elevated any statements by Mr Dhanoa to the status of acts of contributory negligence. Further, whatever Mr Dhanoa did instruct Fosters in early 2008 was on the basis that he believed the design would comply with the budget, and when it did not, that it could be value engineered downwards in cost to the budget of £100 million, in respect of which I have made findings adverse to Fosters on Breach 2.

(i) Failing to instruct Fosters that the costing provided by EC Harris on 11 February 2008 indicated that the construction cost of the Fosters Design exceeded the available budget, and instead instructing Fosters that no further savings were required in the design

233. This category does not arise, given my findings on the facts. Everyone knew that the design exceeded the budget; a young child could have spotted that £195 million was in excess of £100 million. Fosters knew the budget and had done since July 2007. Given Mr Hammerschmidt's evidence about the worry, surprise and shock that different personnel at Fosters felt when the EC Harris figure was produced, this allegation of contributory negligence is, again, wholly misconceived. Mr Dhanoa's instructions were to bring down the cost of the Fosters Scheme. He was advised by Fosters that this could be done, and if I am wrong about that, he was certainly not advised by Fosters that it could not be done (as I have found he ought to have been on that alternative scenario). Given my findings on both Breach 1 and Breach 2, the question of contributory negligence as framed in this part of the particulars does not arise.

(j) Failing to have any or any proper regard or to respond to Fosters' email dated 4 March 2008 seeking clarity as to the available budget.

234. In this e mail, which was addressed to Mr Dhanoa and Mr Hanif Kurati of AKT UK, Mr Hammerschmidt stated the following:

> "As discussed on the phone this week I suggest we get together for a brief session early next week to go through the budget costs for basements etc. We can do this with Knight Frank and EC Harris, but I think that it might be better in a really small group.
>
> Issues to discuss:
>
> Real budget? We need clarity with regards to what we need to achieve to not waste time on an unrealistic scheme.
>
> Planning: date moves back due to slow response times from Hillingdon….should we start with cost saving exercises now if they are needed? What are the options? Optimising the scheme? Redesigning? Can the budget be adjusted?
>
> Proposed time: 11:00 – 12:30 h on Monday 10.11.2008 we can then for lunch near F&P."

235. It was this e mail that led to the meeting of 10 March 2008. For some reason this e mail records that meeting as being planned to take place on 10 November 2008, using 11 instead of 3 for the month. That must be a typographical error. There is no dispute that it took place on 10 March 2008. At that meeting, there was a continuation of the efforts at value engineering. I have made findings about what Mr Dhanoa intended in terms of value engineering, and also about the breach of duty by Fosters in this respect. In the light of those findings, there is nothing in this allegation of contributory negligence at all.

(k) Instructing Fosters to cease work on the project save in relation to the application for planning permission and *(l) Failing to instruct Fosters to cease work on the application for planning permission in circumstances where the Claimants did not intend, alternatively were unable, to realise the scheme forming the subject of the application.*

236. I deal with these two particulars together. These do not constitute contributory negligence on the facts. Mr Dhanoa was advised by Fosters to seek to obtain planning permission on the Fosters Scheme and to seek to value engineer the cost downwards after that. I have found that the claimants did intend to realise the scheme, that is to build it out. The fact that this proved not to be possible due to events that unfolded including the financial crash across the global economy does not, and cannot in my judgment, constitute contributory negligence. If Mr Dhanoa had known that the Fosters Scheme could never be brought down to his budget level, instructing Fosters to cease work would have been one of his options. However, he did not know that and Fosters did not tell him this either.

(m) Failing to secure the necessary financing for the construction of the project

and

(n) Failing to proceed with the project regularly and diligently or at all following the cessation of Fosters appointment.

237. I deal with these two particulars together. Neither constitutes contributory negligence in my judgment. I have considered the facts, and applied the principles, in assessing causation. The failure to secure the necessary funding I have considered in some detail in my findings on loss of profits. Failing to proceed with the project regularly and diligently does not arise, as delay only arises in the context of the claim for loss of profits, which I have dismissed.

238. None of the allegations of contributory negligence are therefore made out and the issue of a reduction in recovery in any losses as a result does not arise.

XI *Heads of Loss and the Four Claimant Companies*

239. I have dismissed the claim for loss of profits for reasons identified in section IX "Causation". There were other legal matters that potentially arose in respect of the claim for loss of profits, in that these were claimed by the Second and Third Claimant, and not by the contracting party, which is the First Claimant. However, given my findings on causation, the question of recovery of lost profits by the Second and Third Claimants does not arise.

240. There are other heads of loss claimed in addition to loss of profits. Paragraph 45 of the Particulars of Claim set out the three heads of claim, with the third being loss of profits which I have dealt with. The first two are pleaded at paragraphs 45.1 and 45.2 of the pleading. They were for additional fees and expenses that would be incurred in procuring a design for a scheme capable of construction within the original or revised budget; and fees that had been incurred on the Fosters Scheme "which were abortive", and which "included wasted or additional fees incurred seeking to value engineer and re-cost the project".

241. There was an alternative claim in paragraph 46 of the Particulars of Claim which does not arise. The second alternative claim was one in restitution which stated that Fosters' "performance was of no value and the consideration provided by [Fosters] in return for the sum of £2,107,699 paid" to Fosters under the appointment "wholly failed such that [the First Claimant] and/or [the Second Claimant] is entitled to restitution of the same". That alternative claim would only arise if the claim for additional architectural fees and expenses for the successor scheme did not succeed. Although a great deal of law was cited by the parties on this second alternative claim, and the question of restitution and total failure of consideration (which is also called a total failure of basis) is complex legally, because of my findings of damages for breach of contract it does not arise for decision. I do however, out of deference to the parties' submissions on this point, make some comments upon it below.

242. Ms Briggs did not settle the original Particulars of Claim although she did settle an amendment. By the time of Closing Submissions, the case on loss had become more refined and was as follows. Mr Selby, sensibly, did not take any point that the way that the claim was put by the end of the trial required amendment to the pleadings. Had he done so, I would have allowed any necessary amendment in terms of the way that the losses that were claimed were pleaded. This is because the changes, if they were changes, related to how those claims were framed in law. All of the relevant facts had been dealt with at the trial and the only differences were the legal characterisations of how the claimed sums could be recovered. In fact, the differences were of refinement rather than wholesale changes.

243. These refinements led to the claims being advanced in a more coherent way. The minutiae of the quantum claim did not feature to any appreciable, or indeed any, degree during the trial. Although this is understandable, given the range of the liability issues that had to be dealt with, it meant that different issues that arose on some of the fees and expenses were simply not explored or ventilated at all. With hindsight, this trial might have been more cost effective if a split trial had been ordered at the case management conference, and liability and quantum been decided separately. However, hindsight is a wonderful thing and it would not have been fair to the parties to have introduced this at a late stage, given they had prepared to deal with both at the hearing. It did however mean that the time available for what might be termed "pure quantum" matters arising on the invoices was limited. The first solution suggested by the parties to this during their closing submissions was that I trawl through the different files of invoices that were in the trial bundle, in order to identify the different factual matters that arose between them in relation to each one, so that I could make findings. This did not seem to me to be a proportionate or sensible use of time of a specialist, or indeed any, judge. Parties must understand that they are only entitled to their fair share of judicial resources in resolving disputes. Some of the different invoices are for amounts of less than ten thousand pounds. Even ten times that amount of money is not significant in the context of a commercial trial. It is essential that parties take a realistic approach to disputes of fact on quantum matters that do not affect sizeable sums; apart from the obvious strain on the justice system that a failure to do so imposes, being realistic and sensible also has a benefit to the parties themselves. They will not expend such sizeable legal costs fighting over minor matters. It is because of the approach to quantum that my factual comments are sparse on the different groups of invoices advanced by the claimants, and challenged by Fosters.

244. There are however some points of principle and one of them is the multiplicity of claimants. The reason for the involvement of the Second Claimant (and to a far lesser extent the Third Claimant) was that Mr Dhanoa, who used all three of the First, Second and Third Claimant companies in this way, would have invoices received by him paid by whichever company suited him. He did not seem to differentiate between payments from any of these companies. In his first witness statement, he used the first person singular in respect of such payments and stated numerous times "I paid….."; or "I arranged a cheque….."; and other indications that show that the concept of different legal personalities of his companies was not foremost in his mind. Despite this use of language, he made no payments personally, so his descriptions were not exactly precise. Exhibit DSD1 to his first witness statement did not even identify the different paying party for each invoice. In the Amended Particulars of Claim, an amended "Appendix 2 – Schedule of Loss" was provided that split the payments made as "Sums Expended on Abortive Project" into two parts. The first was "Invoices paid by [the First Claimant] on behalf of and by way of loan to [the Second Claimant]"; the second was "Invoices paid by [the Second Claimant]". The second part was a far lower total, £356,222, than the first, which was £3.398 million. Given the First Claimant was the party that contracted with Fosters, this is a curious way of expressing it, to say the least, and again, not at all precise. The matter of loans between the different companies was not seriously pursued during the trial. If the contracting party, the First Claimant, received an invoice addressed to it from Fosters for professional services, then that invoice represented a legal obligation upon the

First Claimant to pay that sum. That legal obligation could be discharged by payment to Fosters from a third party. If the payment came from another company, in this case the Second Claimant, then the legal obligation would or could (depending upon the terms inter-claimants by which the Second Claimant agreed with the First Claimant to make that payment) change in character. There would no longer be any legal obligation upon the First Claimant to pay Fosters – that would have been discharged by the payment to Fosters. The First Claimant may then have a legal obligation to pay the Second Claimant, which had made the payment on the First Claimant's behalf. If that were the situation, the "loan" would be from the Second Claimant to the First Claimant, not vice versa. However, whether it was a loan or not would depend upon the inter-group arrangements.

245. Reliance by the claimants was put on the fact that Fosters were asked by Mr Dhanoa to address invoices to the Second Claimant part of the way through the project. This Fosters were happy to do. However, the contract remained between Fosters and the First Claimant and this informal agreement to use a different company name on the invoices is, in my judgment, of no relevance.

246. The way that Ms Briggs put the claims for further and additional fees that would be expended, and also "abortive" costs, by the end of the trial was as follows. She submitted that "in order to place itself back in the position it would have been had Fosters performed the contract properly, Riva will need to repeat the entire design and planning process. Given that this process has not yet occurred the court must assess the cost of such process. It is submitted there can be no better evidence of what it will cost Riva to have designed and obtain planning permission for 500 bed 5* hotel on the site than the cost of that process the first time round." By "Riva" she meant the four claimant companies collectively, making that clear in paragraph 1 of her written Opening Submissions.

247. Putting to one side the four claimant companies/Riva point for a moment, the analysis of the way of calculating damages for breach of contract in this case in the preceding paragraph does at least have the benefit of being conventional. The general principle is that common law damages are compensatory for loss or injury. In a claim for breach of contract, the damages should be such as to place the claimant in the position he would have been in if the contract had been performed: *Robinson v Harman* (1848) 1 Exch. 850 per Baron Parke at 855.

248. The quantum of damages for breach of contract should reflect the value of the contractual bargain of which the claimant has been deprived as a result of the defendant's breach: *The Golden Strait Corporation v Nippon Yusen Kubishika Kaisha* [2007] 2 AC 353 (HL) per Lord Scott at [29], [32] and [36]. In a commercial contract, which this one between the First Claimant and Fosters was, the value of such damages is usually measured by reference to the additional amount of money that the claimant would require to achieve the financial value of the expected contractual benefit, such as lost profits, the cost of reinstatement or diminution in value ("the expectation basis"). Ms Briggs referred to this as the expectation loss.

249. A claimant may elect to claim damages on an alternative basis by reference to expenditure incurred in reliance on the defendant's promise, such as sums paid to the defendant or other wasted costs ("the reliance basis"): *Cullinane v British Rema*

[1954] 1 QB 292; *Anglia Television v Reed* [1972] 1 QB 60. However, it is clear that this is an alternative way of having damages assessed. A claim for reliance losses uses a different method of measurement from that used to calculate expectation losses, but both provide compensation for the same loss of the contractual bargain in accordance with the *Robinson v Harman* principle: *Omak Maritime Ltd v Mamola Challenger Shipping Co* [2010] EWHC 2026 per Teare J at [42], [55] and [57]; *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 per Leggatt J at [186]. The main point of either method of calculation, to use a rather inelegant term, is to put the claiming party in no worse a position than if the contract had been properly performed. Recovery of wasted costs is not a claim in restitution in the sense of recovery of those sums by way of equitable relief. The sums paid to the defendant are used as the measure of the sums recoverable from the defendant on the reliance basis. This is different, in terms of legal concept, to recovery in restitution of the sums paid to a defendant. In some cases, it is possible that the two different approaches, the expectation basis and the reliance basis, may lead to the same monetary outcome. However, if a claimant (as here) seeks damages on the expectation basis, it is not necessary to analyse with precision what the measure would be on the alternative reliance basis.

250. The First Claimant contracted with Fosters in 2007 to have a project designed that would be a 500 bed 5* hotel on the site at Bath Road that could be built for £100 million. In breach of its duties, Fosters failed to do that, producing a design that would cost £195 million (prior to some value engineering that brought it down to nearer £170 million). If the best evidence of how much it would cost the contracting party to have such a design produced by an alternative architect is the cost Fosters were charging to do this, then that amount prima facie can and does represent the measure of damages for breach of contract, calculated on the expectation basis. It is not recovery of the sums paid to Fosters (and the other professionals) as such, it is using the sums paid to Fosters (and the other professionals) as the appropriate measure of the damages payable to the claiming party, to put it in the position it would have been in, had Fosters complied with their obligations under the contract. Although the sum is the same in terms of numbers, it is not recovery of the same sums in fact paid out in 2007 and 2008. It is using those sums as the measure of the expectation loss.

251. As was accepted in oral argument, this analysis requires a finding that Fosters' design – indeed, the whole of the work done by Fosters *and* the other professionals at the time – would have to be put to one side, and the claimants would have to start again. This is because nothing had been done under Stages A and B; and Stage C was the design that was costed at £195 million. If, say, sums that were paid for a particular professional discipline in 2008 would not have to be paid again for the same services for the next project, then such an item could not form part of losses caused by Fosters, and would not be recoverable in these proceedings. This is because such a head of expenditure would always have been required as part of completing the project. Unless the particular step was required again, and expenditure required a second time, then such an item of expenditure would not be a loss caused by the breach or breaches by Fosters.

252. Mr Moren made an attempt to persuade the court that some of Fosters' work in 2007 and 2008 could in fact be used by another architectural practice for the successor scheme, but I reject that evidence. I find that it could not be reused in this way. I find

that the claimants would indeed be required to start again from scratch. Accordingly, the expectation loss in this case is the amount of fees (professional and others) in fact expended on the Fosters Scheme. Some of those professional fees were expended in attempting to value engineer the Fosters Scheme down to one that could have been built for £100 million. However, even though fees for value engineering may arise on the next project, in any event these fees arose as a direct result of the breach of contract by Fosters, and in an attempt to arrive at a design that could be built in compliance with the budget. It was reasonable for this expenditure to be spent, given the circumstances. Based upon my findings, Fosters specifically advised Mr Dhanoa that value engineering would result in the cost of the Fosters Scheme being reduced to £100 million. In my judgment therefore, such fees are also recoverable in this case as damages for breach of contract. Simply because expenditure on value engineering was incurred, does not mean that the expectation basis cannot be used for calculating how much will be incurred in the future in arriving at a design that can be constructed for £100 million.

253. In those circumstances, the question of the alternative claim in restitution for the fees paid to Fosters does not arise. It is accepted by Ms Briggs that this is an alternative claim, and would only fall for consideration if the expectation basis failed. There was a great deal of authority cited to the court on the restitution claim; I am grateful to both counsel for their diligence, and their helpful submissions. Traditionally, restitution in a contractual context is seen as only being possible if there is a total failure of consideration, or total failure of basis. This was submitted as being "well established", although Mr Selby maintained that in this case the failure of consideration was not total. Given my findings on the applicability of the expectation basis, it is not necessary to come to a concluded view on that point in this case. Fosters had purported to perform Stages A-D, and there can be no argument whatsoever that Stages A and B were not even remotely performed by Fosters. As to whether what was done under Stages C and D were so inadequate as to be correctly classified as a total failure is potentially more arguable. My provisional view is that the failure of consideration was total, given the budget was such a key requirement and constraint, and given the Fosters Scheme so spectacularly ignored this point entirely. Were this alternative basis to have been the one adopted, there would also have had to be some analysis of whether the claimants had obtained a collateral benefit in respect of the increase in value to the site of the grant of planning permission. This point was not really explored at all, either in fact or in law. The planning permission in any event, by the time of the trial, had lapsed. A correct analysis on the restitutionary basis would require credit for any collateral benefit. However, as this head of loss was in the alternative which does not arise, to consider such points further would be otiose.

254. One point of principle that does arise, however, is whether the Second and/or Third Claimant can recover anything at all, given that neither was a contracting party. This was referred to in argument as the *Panatown* point, after the authority ***Alfred McAlpine Construction Ltd v Panatown Ltd*** [2001] 1 AC 518. This point was of far greater import if the loss of profits claim were otherwise made out on the facts, as it was to be one of these parties (and not the First Claimant, the contracting party) that was to have incurred the loss of profits. Also, some of the fees paid out from 2007 onwards were in fact expended by each of the Second and Third Claimant. I propose

to deal with all of the different items in the claim first, and then return to the *Panatown* point.

255. On a project such as this, there will always be a large number of other professionals and suppliers of professional services as well as the architect (and the other obvious professionals such as structural engineers and quantity surveyors). A schedule was submitted by the parties after closing arguments whereby comments (either agreement, or points of arguments) were added by the claimants to a most helpful schedule prepared by Mr Selby. This was a particularly important document, as the source documents compiled in the two lever arch files of the D volumes of the trial bundle were described thus, most aptly, by Mr Selby. "It's a muddle".

256. Mr Selby's schedule set out, in a number of different columns, the identity of the payee, a summary of the arguments, and also (importantly in this case) the entity that incurred the liability. This was in a column headed "liability incurred by". Although Mr Selby challenged Mr Dhanoa in his cross-examination in terms of further expenditure, after it was said that Mr Dhanoa ought to have realised that value engineering down to £100 million could not be achieved, that was not advice given at the time by Fosters. It is somewhat contradictory, and unreasonable, for Mr Selby to criticise Mr Dhanoa for not realising in 2008 (or later into 2009) something that either Fosters did not then realise, or if they had realised, not telling Mr Dhanoa that. Due to the extremely productive experts' agreements by the accountants, there were only three invoices that were disputed, and after one of those was conceded, there were only two actual invoices that require findings of detailed fact (rather than principle) as to whether they had been incurred. I shall deal with the disputed invoices first, and then the categories of what are called "Suppliers" in the schedule to which I have referred.

The disputed invoices in fact

257. Originally there were three of these, but one category was conceded by Ms Briggs. The other two were invoices from Berwin Leighton Paisner totalling £22,822.50 and Piers Heath Associates, of which £34,652 was disputed because it was said not to have been paid.

258. Berwin Leighton Paisner issued two invoices on the same day, in the same amount, one addressed to the First Claimant and the other addressed to the Third Claimant. One of these was challenged by Fosters because, it was said "the likelihood is that BLP has issued double invoices by mistake and/or that the Claimants have mistakenly paid twice for the same work". I reject both of those speculative challenges, in relation to which there is no evidence at all. Mr Dhanoa was not asked about this subject at all. The likelihood is that BLP simply split their bill 50:50 between the two entities because they were asked to, which is understandable because of the way that Mr Dhanoa set up the project (with the land ownership being in one company, and the professional contract with the architects in another). I find that the services provided by Berwin Leighton Paisner were on this project, and the fees incurred were £45,645, (£22,822.50 times two) split for the purposes of invoicing on an equal basis between the First and Third Claimant.

259. So far as Piers Heath Associates are concerned, Mr Heath's unchallenged evidence was that £35,377.25 was outstanding on a fee account that was in the higher sum of

£265,415. Although Mr Selby invites me to conclude that this means that only £200,000 was in fact paid, because his expert accountant hypothesises different reasons why less than Mr Heath said has been paid might have been paid, I accept the evidence of Mr Heath on this point and I find that £234,652 has been paid to PHA by the First Claimant. The fact these fees were incurred by the First Claimant, rather than the Second or Third Claimant, is agreed.

260. That deals with issues of fact about the value of the payments that were in fact made at the time. I will now deal in the next section with whether the claimants can recover these and the other sums in any event.

The different "Suppliers"

261. I shall deal with these in the order they appear in the schedule, which is alphabetical. Where I use the phrase "these fees are recoverable" I use that as shorthand to mean that the correct measure of the expectation loss is the amount of these fees in question.

AKT

262. This is in the agreed amount of £150,000. The liability was incurred by the First Claimant. AKT was the structural engineer and this work will have to be entirely redone on the successor scheme. It is recoverable in these proceedings.

Anglo Irish Bank

263. This is in the agreed amount of £3,000. The liability was incurred by the Second Claimant. Anglo Irish were a potential funder and this was in relation to a report and valuation. This relates to the way that the claimants sought to fund the project. This was done at the application or request of the Second Defendant. There are other funding-related costs incurred to other companies too. This raises the issue of whether costs associated with funding arrangements are recoverable in these proceedings from Fosters.

264. I have concluded that they are. Even if Fosters were not given, prior to the execution of the Appointment, precise or even outline information to the effect that funding would be sought from a bank, or other lender, to fund the construction costs (and the point is not entirely clear) then in my judgment such losses would fall to be recovered under the second limb of ***Hadley v Baxendale*** in any event. Such high value projects usually use funding, and even on the lower budget initially set by Mr Dhanoa of £70 million (before it rose to £100 million) this amply qualified as a high value project. Mr Dhanoa did not pretend to Fosters that he had such a sum sitting in the bank waiting to be spent on the project, and it was not put to him in cross-examination that he did. Funders are specifically referred to in the Appointment – for example in Clause 18.1, to which I return when dealing with the *Panatown* point below, funders are a category of person (as are purchasers and tenants) in whose favour direct warranties may be provided by Fosters if required to do so by the First Claimant. The use of funding was therefore in the expectation of the parties.

265. Therefore, subject to the *Panatown* point, in my judgment costs associated with funding – and this sum is one – are recoverable in these proceedings.

Berwin Leighton Paisner

266. These were legal expenses incurred by both the First and in this case Third Claimant. They are agreed in the sum of £131,970. They relate to negotiations with hotel operators and a management agreement entered into with Hyatt. I find that these are recoverable. Such further legal fees are likely to be incurred again. The reason that they were incurred when they were (and in the amount they were) was part of Mr Dhanoa's arrangements for the project in that a hotel operator was needed. Although he needed a management agreement in place to raise funding to build the project for £100 million, such a hotel would always need an operator, and such an agreement will be required for the successor scheme. These fees will therefore be incurred again. In my judgment they are recoverable in this case. Even though one half of them were invoiced to the Third Claimant, the amount is recoverable in full because it will be incurred in full by the First Claimant. In my judgment, the *Panatown* point does not arise for these fees. There is nothing to suggest that the Third Claimant would contribute one-half of such fees for the successor scheme.

Bevan Brittan

267. Again, these are legal fees. They were incurred by the First Claimant and are agreed in the sum of £7,502. They relate to the negotiation of what is called the section 106 agreement with the London Borough of Hillingdon as part of obtaining the planning permission. Such fees (although not in this precise amount) would be incurred as part of obtaining planning permission on the successor project. Accordingly they are recoverable, and the best evidence of amount advanced by the claimants for future expenditure is this sum, as that was what was incurred on the Fosters Scheme. It may be that since 2007 planning application fees have risen (and it is likely in my judgment that they have) but there is no evidence to this effect and the way the case is put means that the First Claimant is limited to the amount paid in 2008 for the Fosters Scheme.

Capita Symonds

268. These are agreed in the sum of £81,071. Capita Symonds were appointed to advise the First Claimant in relation to transport and planning issues and to produce a design access statement, including work done as part of the value engineering exercise. Although Mr Selby submits that there is no evidence that their work was specific to the Fosters Scheme, in my judgment it plainly was. This work will have to be done again. I consider that these sums are recoverable in this case.

Cushman & Wakefield

269. These are valuation fees. They relate to the claimants' funding arrangements for the construction of the hotel. In my judgment, fees paid to secure funding are recoverable for the reasons I have explained above in relation to the Anglo Irish Bank. They are agreed in the sum of £6,500 and were incurred by the First Claimant. I consider that they are recoverable.

Cyril Sweett

270. These are agreed in the sum of £10,000 and relate to quantity surveying services. Fosters query why a further quantity surveyor was needed given EC Harris were also engaged, however these fees arose in August and September 2010 and were part of the claimants attempting to value engineer the Fosters Scheme. Given my findings, that arose specifically because of the Breach 2 behaviour by Fosters and before Mr

Dhanoa realised this was hopeless. They were incurred by the Second Claimant and are recoverable subject to my findings on what I have called the *Panatown* point.

David Bonnett Associates

271. This is agreed in the sum of £2,500 and was for advice on disabled access for the Fosters Scheme. The services were provided to the First Claimant. They are recoverable.

DJH Associates

272. This is agreed in the sum of £7,044 and I find that these services were provided to the First Claimant, whom it was agreed paid these fees. It relates to marketing and production of brochures on the Fosters Scheme to the residents and Site Ward councillors. It was part of seeking planning permission and I find that these sums are recoverable. Planning permission will be required on the successor scheme and so will the provision of such services as part of applying for, and obtaining, such permission.

Donald Butler

273. This is agreed in the sum of £9,375 and concerned advice on aircraft related issues, given the location of the site at Heathrow. It is agreed that these services were provided to the First Claimant who paid the fees. New advice will be required on the same issues for the successor scheme and I find that these sums are recoverable.

DP9

274. This practice are planning consultants and this sum is agreed at £112,228. The services were provided to the Second Claimant. Fosters submit that not all of the work would have been specific to the Fosters Scheme. I reject that submission; it is agreed by Fosters that the work would have been generally specific to the Fosters Scheme, and I find that such work will have to be done again as part of the successor scheme. These fees are recoverable, subject to my findings on the *Panatown* point.

EC Harris

275. I have explained EC Harris' involvement in the body of this judgment. The fees are agreed in the sum of £25,604. They were invoiced to and incurred by the First Claimant. Quantity surveying services will be required on the successor scheme and they will be incurred again. They are recoverable in this litigation.

Fosters

276. These fees were paid by the First Claimant, or on behalf of the First Claimant, in the sum of £2,099,999. I have explained in the body of this judgment why Fosters were in breach of contract, and also that it will be necessary to start again (or "from scratch" as Ms Briggs put it) to obtain a design for a 500 bedroom 5* hotel on this site that could be built for £100 million. The best evidence for the measure of expectation loss for architects' fees is this sum. I find that this sum is recoverable in this litigation.

277. A separate point arises in respect of what was called a "non-refundable" deposit or mobilisation fee by Mr Stewart. This was basically a large upfront payment required before Fosters would consider the appointment crystallised. However, analysis of the terms of the Appointment shows that this was in fact an advance payment of fees, programmed or planned to be "recovered" (or more accurately, credited against fees

due) during the length of Fosters' involvement. I therefore reject Fosters' submission that £150,000 of this is not recoverable. In any event, there is nothing to suggest that an alternative architect would not require a similar payment. Similarly, there is no justification for disallowing recovery in the measure of the success fee, payable when planning permission was obtained. Mr Dhanoa was advised by Mr Stewart to apply for planning permission and value engineer the scheme afterwards. He thought that the cost could be reduced to £100 million.

Four Communications

278. These fees are agreed in the sum of £31,936. The fees were invoiced to the First Claimant, paid by the First Claimant and the services that were provided were PR services. The same points arise as with the fees of DP9 and I find that these are recoverable.

Freeth Cartwright

279. This firm of solicitors acted for the bank that lent Mr Dhanoa the funds to purchase the site. These fees arise out of a restructuring attempt in respect of that finance. They were incurred by the Second Claimant. I find that they are not recoverable in this litigation as they relate to the wholly separate arrangements concerning restructuring of the site acquisition.

Geldards

280. Again, this is a firm of solicitors and relates to work done on agreeing the terms of Fosters' Appointment. I accept that such fees are recoverable in the sense I have explained that they represent the measure of recoverable loss, because a replacement architect would have to be appointed and it would be reasonable for legal advice to be taken on the terms of the appointment. They are agreed in the sum of £1,978.

GIA

281. This practice deals with rights to light and the fees are agreed in the sum of £34,432. They were incurred by the First Claimant, and such services would also be required for the successor scheme. In my judgment they are recoverable.

Gleeds

282. This again is another firm of quantity surveyors and relates to attempts to value engineer the Fosters Scheme. They are agreed in the sum of £10,000 and were incurred by the Second Claimant. I consider that they are recoverable, subject to my findings on the *Panatown* point.

GVA Grimley

283. These are agreed in the sum of £3,000 and were for a valuation of the site provided on 31 March 2009. Again, it relates to funding arrangements and I consider it to be recoverable for the reasons explained above concerning the Anglo Irish Bank.

Hyatt

284. This figure is agreed in the sum of £33,333 and was incurred by the Third Claimant. It relates to a technical services review by the well-known hotel operator, that review being specifically of the Fosters Scheme. It was done in December 2009. Such a review would be required again for the successor scheme, either by Hyatt or an

alternative operator who would probably charge a similar amount. It is recoverable in my judgment, subject to the *Panatown* point.

Knight Frank

285. This is agreed in the sum of £53,214. This firm was providing valuation advice and guidance on operators. Advice was also provided in respect of planning. The fees were incurred by the First Claimant. I accept that such advice will be required on any successor scheme, and whether Knight Frank or one of its competitors provides it, the fees are likely to be similar. I consider these fees in this sum to be recoverable.

London Borough of Hillingdon

286. This relates to the planning application fee of £102,543 for the Fosters Scheme. It was paid by the Third Claimant, but I find that the identity of the paying party is not relevant in any event whether I am right or wrong about my findings on the *Panatown* point. The fee, or one very like it, will have to be paid again for the successor scheme given my findings. This sum is recoverable from Fosters.

Piers Heath Associates

287. This practice are environmental consultants and were paid the sum of £234,652 as I have found above. This sum has been paid to PHA and would be incurred again under the successor scheme. I find that this sum is recoverable in this litigation from Fosters.

Portcullis

288. These fees were incurred in this practice negotiating the management agreement with Hyatt. The same comments arise as those in relation to Berwin Leighton Paisner's fees, and given I have allowed those, I allow recovery of these for the same reason. They were agreed in the sum of £71,175 and were incurred by the First Claimant. No *Panatown* point therefore arises in respect of these.

RBC

289. This is said to relate to "arrangements for pre-construction consultancy meetings". It does not feature in the Claimants' Amended Schedule of Loss. There is no information about how or why these fees arose. In the absence of even such basic information, I find that it is not recoverable.

Roger Preston Sandy Brown

290. These sums are agreed in the amount of £35,000 and £9,000 respectively, and it is accepted by Fosters would require to be done again in its entirety, and these sums are therefore recoverable. They were both incurred by the First Claimant.

Savills

291. These fees were £2,702 for a desktop valuation, and are said to relate to a valuation required for funding arrangements. However, there is very little detail and other fees that I have allowed include valuations. It is not clear why more than one valuation would be needed. For that reason, I do not consider that they are recoverable.

Sparc

292. I have dealt with Sparc's involvement above. The sum is agreed at £258,723 and was incurred by the Third Claimant (according to Fosters) or the Second Claimant (according to the claimants). On either analysis, the *Panatown* point arises. Sparc

provided services in relation to investments, managing procurement strategies and discussions with hotel operators for the Fosters Scheme. They are therefore, in my judgment, recoverable for the reasons I have explained in relation to other funding and Hyatt-connected claims above. This is however subject to the *Panatown* point which I deal with in the next section.

Studio Aria

293. These fees are agreed in the sum of £10,000 and were for interior design, the actual fee being for attending what is called a "kick-off meeting" with Hyatt. Such interior design fees would be incurred for any future project. They were incurred by the Second Claimant. I consider that they are recoverable subject to the *Panatown* point.

TRI

294. This company prepared detailed financial projections to underpin valuations on likely trading performance, and were incurred by the First Claimant. They are agreed in the sum of £32,303. These projections were part of Mr Dhanoa's attempts to obtain funding and in my judgment are recoverable for the same reason as other costs associated with funding are recoverable.

Ward Williams

295. These fees are agreed in the sum of £4,000 and were incurred by the First Claimant. They relate to attempts made to value engineer the Fosters Scheme. They arose as a direct result of Breach 2 by Fosters and I consider that they are recoverable.

Wedlake Bell

296. These are for another firm of solicitors and were in respect of a sale and leaseback agreement between the Second and Third Claimant, and are agreed in the sum of £109,538. Mr Dhanoa accepted in cross-examination that they were not "abortive" or wasted, but regardless of that I do not consider that these arose as a result of any breach or breaches by Fosters. Mr Dhanoa's evidence was that this transaction was entered into as a tax saving or tax efficiency measure for the companies involved. Such arrangements had nothing whatsoever to do with Fosters. Further, even if I am wrong about that, there is no reason why such costs would or should be incurred again because there is no reason why such a further arrangement would or should be entered into. They are not recoverable.

White Young Green

297. This relates to funding for the successor scheme. This relates to another desk top valuation study. It is agreed in the sum of £1,800 and was incurred by the First Claimant. There is precious little information about this and I do not consider that it is recoverable for the same reason I have explained concerning the Savills' claim.

Whitelaw Turkington

298. This sum is agreed in the amount of £10,839 and is in relation to landscape consultancy for the Fosters Scheme. They were incurred by the First Claimant. Landscape consultancy will be required again for the successor scheme and in those circumstances I consider this sum to be recoverable.

XCO2 Energy

299. These fees are agreed in the sum of £9,150 and were for energy and sustainability statements for an abandoned application to renew the planning permission for the Fosters Scheme. It is submitted by the claimants that this was reasonable mitigation. However, one invoice was for £3,950 plus VAT in March 2012 and another for £5,200 plus VAT in May 2014. By that latter date, it was known that the Fosters Scheme could not be value engineered down to £100 million. Accordingly therefore, the only amount that is recoverable is the first sum which is £3,950 plus VAT on invoice 8.234.01.

The Panatown point

300. It can be seen from my findings above that in respect of some categories of loss, these were incurred or paid by either the Second and/or Third Claimant. Mr Selby argues these are not recoverable as damages in the proceedings. He argues they cannot be recovered by the First Claimant, as the First Claimant did not expend such sums. He relies upon what is usually termed a "no loss" argument in relation to losses not incurred by the First Claimant, the contracting party. These submissions were made on the contingent basis that I may find that Fosters owed no duty of care to either of the Second and/or Third claimant companies. Given that I have indeed made such a finding, the losses that are recoverable are only ones for breach of contract. The contract was between the First Claimant and Fosters, and accordingly Mr Selby submits that the First Claimant is the only entity that can recover damages for breach of contract. To be recovered, he argues that losses must have been suffered by the First Claimant, and if sums were paid by either of the Second and/or Third Claimant then they were not. He put these points very attractively, and his task was not made particularly straightforward given the way that both parties concentrated at the trial on the issues of fact.

301. His task was also not helped by the way the case was pleaded in the Amended Particulars of Claim. As an example, it was pleaded in paragraph 45 that "the claimants intend that the project shall be completed by the procuring of a design for a scheme capable of construction within the original….budget" without differentiation between the different claimants. Ms Briggs adopted this glossed-over approach in her written Opening, using "Riva" to mean all the claimants, again without differentiating between them. However, by the time of the closing submissions, it was clear how the claimants put their case on loss and which companies had expended which sums.

302. There were also different corporate actions that made the situation somewhat less clear than if there had been simply only one claimant. These included the Second Claimant purchasing the site in March 2007 but entering into the sale and leaseback agreement with the Third Claimant (which was formed in March 2008) whereby that latter company became the freehold owner of the site in July 2008. Further, Wellstone Management Ltd, the Fourth Claimant, entered into an Asset Purchase Agreement with the First Claimant on 17 December 2014. Although the claimants' case was that this agreement did not transfer to the Fourth Claimant any cause of action that the First Claimant had against Fosters, it was included as a claimant (out of an abundance of caution). The point was, after cross-examination of Mr Dhanoa and production of certain company documents, conceded by Mr Selby, as it was clear from the company documents that the cause of action was not transferred.

303. Mr Selby also relied upon the existence of Clause 18.1 of the Appointment. Clause 18 is headed "Warranties for third parties". The clause as a whole states as follows:

"18 Warranties for third parties

18.1 The Consultant shall, as the Employer may at any time or times require, deliver within 21 days of the Employer's request a Warranty or Warranties in favour of Funders and/or Purchasers and/or Tenants and/or any company appointed to manage or repair or keep in repair the completed Development.

18.2 From the date of the Employer's notice under Clause 18.1 and until and unless the Consultant enters into a Warranty in accordance with the Clause 18, the intended beneficiary of such Warranty shall be entitled, in accordance with the Contracts (Rights of Third Parties) Act 1999, to bring proceedings (other than for specific performance or injunctive relief) to enforce for its benefit any right or benefit of the Employer arising under this Agreement, but the parties to this Agreement may exercise any right which they may have to rescind, cancel and/or vary the terms of this Agreement without the consent of the intended beneficiary being required.

18.3 The obligations contained in this Clause 18 shall continue notwithstanding termination of this Agreement for any reasons whatsoever, including breach by the Employer or novation of this Agreement. However, any such Warranty or Warranties given after such termination shall be amended by the Employer so as to refer to the fact and date of such termination or novation and (in the case of termination only) to omit any provision enabling a third party or parties to assume the position of the Employer."

For completeness, I should also include Clause 19, Assignment:

"19.1 The Employer shall be entitled to assign the benefit of this Agreement by absolute assignment to any person and the term "Employer" shall be construed accordingly.

19.2 The Employer shall be entitled to charge and/or assign by way of security the benefit of this Agreement to any Funder without the Consultant's consent".

304. There have been various authorities that have considered "no loss" arguments such as Mr Selby's over the years, or ones very similar to it, and Mr Selby relies upon ***Alfred McAlpine Construction Ltd v Panatown Ltd*** [2001] 1 AC 518. In that case, which is well known, the existence of what was called a duty of care deed in favour of the owner of the site (or "DCD" in the speeches) was a factor relied upon by the House of Lords in allowing the appeal by a contractor who had been found to have had a liability for substantial damages to the employer. This was not the entity which owned the office block and car park that had been affected by the defects, as that was another company. The House of Lords held that, since the duty of care deed provided the owner with a direct remedy against the contractor for the losses resulting from the contractor's defective performance of the contract with the employer, there were no grounds upon which the employer, having suffered no financial loss, was entitled to anything more than nominal damages.

305. Here, Mr Selby has considerable difficulties in relying upon this case. Firstly, even though clause 18 contains a mechanism for warranties for third parties, this

mechanism was never operated. It is not therefore analogous to the duty of care deed. In the instant case, there was no direct remedy. The only remedy in contract lies with the First Claimant.

306. In *Panatown* Lord Clyde stated that the principle of recovery of third party loss by a contracting party was "*a solution imposed by the law and not as arising from the supposed intention of the parties, who may in reality not have applied their minds to the point*". He also said that in that case "*there was a plain and deliberate course adopted whereby the company with the potential risk of loss was given a distinct entitlement directly to sue the contractor and the professional advisers. In the light of such a clear and deliberate course I do not consider that an exception can be admitted to the general rule that substantial damages can only be claimed by a party who has suffered substantial loss.*"

307. Ms Briggs submits that in this case the parties had not applied their minds to the issue of contractual privity or recoverability of loss despite being aware that one or more Riva entities was involved with the Project. I am not sure that is entirely correct, given the existence of Clause 18. In my judgment it is more accurately described that they had applied their minds to it, but had rather chosen a possible solution that could be operated at the First Claimant's election. Regardless of how it is characterised, however, absence operation of this mechanism, in my judgment this case is one of a type in which Lord Clyde opined the law should impose a solution.

308. There must be an actual alternative direct remedy for the *Panatown* solution to be available, in my judgment. If on the facts, the parties contemplated future arrangements to provide alternative contractual arrangement giving a right to a third party, but never in fact operated such arrangements such that the third party never obtained that direct right, the remedy is not excluded. This was the approach of HHJ Toulmin CMG QC in ***Mirant Asia-Pacific Construction (Hong Kong) Ltd v Over Arup & Partners International Limited*** [2007] EWHC 918 (TCC). It was held in that case that the contracting party (CEPAS) could recover damages in respect of losses caused to another group company (SCC) as a consequence of breaches of contract by Arup because it had not received from the defendants the performance of the bargain for which it had contracted (in that case Arup had failed to provide adequate designs for use by SCC on site). The judge stated at [628] that whilst *"it may have been the case that a further contract was contemplated (as occurred for the ground works)…it did not happen."* Absent those further contracts being formed, there was no direct right of recovery. He held that SCC did not have its own remedy and it would not therefore be just, taking all of the circumstances into account, to bar CEPAS for recovering damages suffered by SCC.

309. This principle has also been applied to situations in which the contract between the claimant and defendant provided an unqualified right on the part of the claiming party to require or put into place (without the need for consent) arrangements that would give the third party a direct cause of action. This was done in a Scottish case upon which Ms Briggs also relies, namely ***Axon Well Intervention Products Holdings AS v Michael Craig* [2015] CSOH 4.** In that case the Pursuer, Axon, was seeking to recover damages that had been suffered by an associated company, Axon FZE ("FZE"). The contract between Axon and Michael Craig contained a clause allowing Axon to assign its rights without qualification to FZE. Axon had not elected to grant

such assignment. That is very similar to the situation in this case. In ***Axon*** Lord Doherty stated as follows:

"I can deal quite shortly with the arguments concerning assignation. I am not persuaded that s10.5 of the AEPA prevented the pursuer from obtaining a Panatown claim. Section 10.5 enables the pursuer — if it wishes — to assign rights it has under the AEPA to any wholly owned affiliate such as FZE. It was — and is — under no obligation (either to the defender or to FZE) to do so. That is a very precarious foundation for the argument which Mr Lindsay seeks to advance. If the pursuer does have a Panatown claim, it was — and is — under no obligation to divest itself of that claim by assigning it to FZE."

310. Although this is Scottish, this authority is also persuasive. If the rationale applies to an assignment that has not been performed– and it clearly does, in my judgment – then there is no reason whatsoever why the situation should be any different for a warranty provision that has not been exercised either. There is an assignment provision in the Appointment in Clause 19. There is a provision for third party warranties in Clause 18. Neither was operated. In my judgment, neither the existence of one or the other terms assists Ms Selby, and the fact that certain sums were paid by the Second and/or Third Claimant does not prevent recovery of those heads of loss by the First Claimant. Here, the party that has suffered the substantial loss is the First Claimant. It is the First Claimant that contracted with Fosters, and it is the First Claimant that has a right to recover the sums that will have to be expended to put it in the position it would have been had Fosters produced a scheme that could have been built for £100 million.

311. There are two associated points that ought to be made. Firstly, this is not recovery by "the claimants" or by "Riva". The claimants can no longer gloss over the different legal personalities involved. It is recovery by the First Claimant. Secondly, and taking the Studio Aria fees of £10,000 as an example, these were paid by the Second Claimant for interior design services. Such services will be required again for the successor scheme. There is no reason to suppose that the First Claimant will be entitled to expect the Second Claimant to pay that fee on its behalf next time around. Given I am awarding losses on the expectation basis, the sums paid to Studio Aria by the Second Claimant are being used as the measure of loss that will be incurred by the First Claimant in engaging such services for the successor scheme. I am not entirely sure, given the expectation basis is being used for the calculation of loss, that the so-called *Panatown* point arises at all. However, both the parties in this case are of the view that it does, and if that is the case, I have provided what I consider to be the answer. On either approach, the First Claimant is entitled to recover all of the sums that I have otherwise awarded in the relevant paragraphs above.

Summary of quantum

312. It was agreed that the parties would calculate the financial consequences of my findings in terms of the overall total recoverable, if there were any sums awarded to the claimants. This was to be done as part of consideration of the draft judgment and the total provided. In the event, due to the request to clarify certain findings by Mr Selby, it was necessary for this exercise to be done on a contingent basis. That exercise has not led to any change in any substantive findings, although in three instances paragraphs of this judgment have been amplified. The financial consequences remain the same as they were calculated and agreed by the parties, namely the sum of £3,604,694.36 in favour of the First Claimant.

XII *Conclusion*

313. The answers to the issues are therefore in summary as follows. I will hear counsel further on any consequential matters, including interest and costs.

Duties/Causes of Action

1. It being accepted that there was a contract between Riva Properties Limited and Fosters, whether Riva Properties Limited (as contracting party) can recover losses suffered by Riva Bowl LLP and/or Riva Bowl Limited.
   Answer: Yes, such losses can be recovered as Fosters are not entitled to rely upon the "no loss" argument in this respect. However, given the expectation basis is the one used for the calculation of losses suffered by the First Claimant, the sums expended by each of the Second and Third Claimants are used as the appropriate measure of those sums that the First Claimant will need to expend itself on the successor scheme.

2. Whether Fosters owed a duty of care in tort to Riva Bowl LLP and Riva Bowl Limited.
   Answer: No such duty was owed.

3. Whether Riva Properties Limited transferred its cause of action against Fosters to Wellstone Management pursuant to an Asset Purchase Agreement dated 17 December 2014.
   Answer: This issue fell away.

Factual Issues

4. Whether Fosters were told (or otherwise had knowledge of) Riva's budget for the Development (whether that be £70 or £100 million) between July 2007 and January 2008 and, if so, what did that budget relate to?
   Answer: Fosters were told the budget. This was originally £70 million and increased to £100 million. It included professional fees and FFE but excluded contingency.

5. Whether Fosters knew (in or by February 2008) that Mr Dhanoa intended to value engineer the Fosters Design to within a budget of £100 million.
   Answer: Yes, Fosters did know.

6. Whether Fosters warned Mr Dhanoa (at any time) that it was not possible to value engineer its design to within a budget of £100 million.
   Answer: No, Fosters did not warn Mr Dhanoa of this at any time.

7. Whether, in a meeting on or around 10 March 2008 Hugh Stewart told Mr Dhanoa that the Fosters Design could be value engineered to within a budget of £100 million and advised him to put the Fosters Design through planning and value engineer it afterwards.
   Answer: Yes, Mr Stewart did so.

8. What advice, if any, did Fosters give Mr Dhanoa in relation to costs and how did Mr Dhanoa react to it?
   Answer: Fosters advised Mr Dhanoa to appoint a quantity surveyor, and he instructed them to do so.

Breach

9. What was the scope of Fosters' retainer and duties? In particular:
   9.1 Was Fosters obliged to advise Riva on costs at all? If so, in what respects?
   9.2 Was Fosters obliged to ascertain and consider Riva's budget during Work Stages A/B?
   9.3 Was Fosters obliged to design the Development within any particular budget?
   9.4 By reference to its email dated 15 February 2008, did Fosters have a duty to advise Riva that its design could not be value engineered to £100 million?
   Answers: Fosters was not obliged to advise "Riva" at all, as that term means all three of the First, Second and Third Claimants. Fosters was obliged to ascertain and consider the budget, which was a key requirement and constraint. Fosters was obliged to design the Development to the budget indicated to Fosters, which rose to £100 million in September 2007. Fosters did have a duty to advise the First Claimant that its design could not be value engineered to £100 million.

10. Is Fosters in breach of its duties in any of the respects alleged at paragraphs 34 to 43 of the Re-Amended Particulars of Claim?
    Answers: Yes, both Breach 1 and Breach 2 as set out in the Claimants' Opening are established in the Claimants' favour and made out and explained in VII The Breaches of Duty above.

Causation/Loss

11. Of the sums said to have been expended on the abortive project (set out in the Schedule of Loss to the Re-Amended Particulars of Claim):
    11.1 Which (if any) were caused by any breaches that may be proven against Fosters?
    11.2 Were each of those sums truly abortive?
    11.3 To what extent have those sums actually been incurred?
    11.4 Will additional fees and expenses be incurred in completing the Development? If so, to what extent do the sums said to have been expended on the abortive project reflect additional fees and expenses that will be incurred in completing the Development?
    Answers: All of the sums in fact expended have been agreed and the two exceptions have been determined, namely the fees for Berwin Leighton Paisner and for PHA. The Claimants sought sums from Fosters on the expectation basis and the sums that have in fact been expended are being used as the measure of sums that will be expended in the future by the First Claimant on the successor scheme. All of the sums that I have found to be recoverable will have to be incurred again, and hence those sums already spent on the Fosters Scheme are abortive.

12. To what extent, if any, are the Claimants entitled to repayment of Fosters' fees in restitution?
    Answer: this was an alternative claim and does not arise.

13. As regards the Claimants' claim for lost profit:
    13.1 To what extent, if at all, has the delay in constructing and opening the hotel been caused by any breaches that may be proven against Foster?
    13.2 Does the Acanthus Scheme accord with the brief given by Mr Dhanoa to Fosters and, in any event, would it have been possible to design and build a 5* hotel in accordance with the brief given by Mr Dhanoa to Fosters for £100 million or less?

13.3 Would such a hotel have been built? If so, when would it have opened and how much would it have cost to finance and build?
13.4 In light of the answers above, had such a hotel been opened, what profit (if any) would have been made and by which of the Claimants?
13.5 What credits, if any, should be given against this claim for costs that would have been incurred in any event?
Answer: For the reasons explained above in IX Causation, the loss of profits claims fail for reasons of causation.

14. Have any of the Claimants been contributorily negligent in any of the respects alleged at paragraph 67 of the Amended Defence?
Answer: No.

Limitation

15. Whether any claims made in this action are time-barred.
Answer: This issue too fell away.

Overall

16. In light of the above, what sums (if any) is each of the Claimants entitled to recover from Fosters?
Answer: £3,604,694.36.