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Claim No: CC-2023-MAN-000094

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN MANCHESTER

CIRCUIT COMMERCIAL COURT (KBD)

Manchester Civil Justice Centre,

1 Bridge Street West,

Manchester

M60 9DJ

Date: 13 December 2024

Before His Honour Judge Pearce sitting as a Judge of the High Court

BETWEEN:

MILFORD INVESTMENTS LIMITED

Claimant

-and-

LANYON BOWDLER LLP

Defendant

- -

- -

Mr OLIVER PHILLIPS instructed by **BILLY HUGHES & CO** for the **Claimant**

Mr NICHOLAS BROOMFIELD instructed by **KENNEDYS LAW LLP** for the **Defendant**

Hearing dates: 11, 12, 13, 14, 15 March 2024

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Approved Judgment

This judgment was handed down remotely at 10am on 13 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

HIS HONOUR JUDGE PEARCE

INTRODUCTION

1. This is my judgment on the Claimant's claim for damages arising from the alleged negligence of the Defendant when acting for the Claimant in respect of a property development.

2. During the course of this judgment, reference is made to pages in the Trial Bundle in the format B***, where the asterisks represent the page numbers, save in the Agreed Chronology (which as I note below is the work of others) – in that document, the page numbers in the right hand column appear without the prefix "B".

THE PARTIES AND OTHER RELEVANT PLAYERS

3. The Claimant is a company involved in property development. It is owned by a married couple, Mr Christopher Shaw ("Mr Shaw") and Mrs Judith Shaw, Mr Shaw being its sole director.

4. The Defendant is a firm of solicitors, whose members included at the relevant times, Mr Ian Glenister and Mr Alan Gittins, both solicitors.

5. Mr Evans, Mrs Whitelaw, and Mr Whitelaw (collectively "the Owners") were the registered proprietors of land lying to the south west of The Stores, Kinnerley, Oswestry registered under title number SL187487. At the southern end of this land was a plot of approximately 1.88 acres which the Owners intended to develop. Where there is any potential in which land is being referred to, I shall refer to this plot as "the Development Land."

6. In their dealings with the Development Land, the Owners instructed Halls Estate Agents. Mr Giles of that firm acted for them and was involved in some of the relevant dealings.

THE FACTS IN SUMMARY

7. I have been greatly assisted by the agreed schedule of facts prepared by counsel on behalf of the parties. It is valuable both for the detailed references to the relevant history and for the cross references to material parts of the bundle, including witness statements. I have annexed it to this judgment. I have however removed references to events after the issue of proceedings on 31 October 2018. Whilst those later matters may have procedural significance, they are not relevant to the issue of liability and quantum with which I have to deal.

8. In February 2014, the Owners applied for outline planning permission for a development of 12 homes on the Development Land.

9. In Autumn 2014, the Owners and Mr Shaw discussed a proposal by which the Owners would enter into a developer/landowner agreement with the Claimant. The Claimant would construct a development of 16 dwellings, financed by a bank loan, realising sales of approximately £3,755,000 of which the Owners would receive approximately £751,000. I shall use the term "the Development" for this proposal and the term "the Joint Venture" for the broad plan of the Owners and Mr Shaw together with the Claimant to pursue the Development.

10. Both the Claimant and the Owners were established clients of the Defendant, the Claimant having previously worked with Mr Glenister, and the Owners with Mr Gittins. They each agreed to instruct the Defendant to act for them. There is no dispute that, at the time relevant to the matters complained of by the Claimant, the Defendant was retained by the Claimant to advise and act for it in respect of the Joint Venture and that the Defendant owed to the Claimant the usual duty to take reasonable care in the services provided pursuant to that retainer.

11. In March 2015 the planning authority, Shropshire Council ("the Council"), granted outline planning permission for a development of 12 homes at the Development Land. It was clear that the grant of permission would be subject to a satisfactory agreement under Section 106 of the Town and Country Planning Act 1990 being entered into by the Council and the Owners[1].

[1] Such an agreement, usually called a "section 106 Agreement," is for the imposition of legal obligations on the developer as part of the grant of planning permission which act to mitigate the effect of the proposed development. For example, planning permission for a housing development may oblige the developer to construct affordable houses as part of the scheme.

12. In Autumn 2015 the proposed structure of the Joint Venture was changed. Instead of a developer/landowner agreement between the Claimant and the Owners, it was agreed that they would form an LLP (ultimately called Wallace (Kinnerley) LLP, but referred to in this judgment as "the LLP") which would develop the land. The Owners would retain the Development Land. The LLP would obtain the finance for the Development and would commission the Claimant to manage the Development. This was a structure which Mr Shaw had previously used in another development (known as "the Cholmondeley development"), and on which Mr Glenister had been instructed to act for him.

13. From October 2015 to March 2016 Mr Glenister and Mr Gittins drafted the agreements for the new form of the Joint Venture. They consisted of (a) the LLP Agreement, (b) the Development Agreement, (c) the Development Management Agreement, (d) a Legal Charge, and (e) a guarantee by Mr and Mrs Shaw in favour of the Owners. Together, these agreements are called "the Agreements." However, it becomes important for what happened hereafter to distinguish between the LLP Agreement and the other agreements, and I therefore use the term "the Other Agreements" to refer to the Agreements other than the LLP Agreement.

14. The Development Agreement was a central part of the arrangements between the parties, providing for the core terms of the Joint Venture between the Owners and the LLP. Amongst other things, the Development Agreement provided that the Owners were to enter into a Section 106 agreement promptly on request by the LLP provided that it was in a form approved by them (acting reasonably), and that, if the Council had not issued a 'decision notice' granting planning permission by the end of the 'Application Period' (which in the event expired on 10 September 2017), then either party was at liberty to rescind the Development Agreement.

15. Once final versions of the Agreements were ready, the parties signed them in early March 2016. The LLP Agreement was signed by the Owners and the Claimant as "partners," the LLP and Mr Shaw and his wife as guarantors. The Other Agreements were signed by the Owners of the one part and Mr Whitelaw on behalf of the LLP of the other part.

16. On 11 March 2016, Mr Glenister and Mr Gittins applied to incorporate the LLP by sending the relevant form to Companies House. The form was received by Companies

House on 12 March 2016, and in due course a certificate of incorporation was issued recording that the LLP had been incorporated on 25 March 2016.

17. Separately, in the spring/summer of 2016 another business connected with Mr Shaw acquired a separate development site at Argoed Road, Kinnerley, Oswestry. This site, known as "Willow Grove," is situated very close to the Development Land. The Willow Grove site was acquired by another LLP, MW2 Kinnerley LLP, which is a joint venture between the Claimant (which holds a 50% interest) and a number of third-party investors who provided development funding.

18. On 6 June 2016, the Owners made a 'reserved matters' planning application to amend the existing outline planning permission to increase to 18 the number of homes that could be built on the Development Land. In July 2016, the Council advised that it would not be possible to use a 'reserved matters' application to increase the number of homes in this way.

19. On 13 October 2016, the Claimant made a full application for planning permission for a development of 18 homes. That application was considered by the Council on 28 February 2017 and deferred for one month. The Council then resolved to grant full planning permission for 18 homes on 28 March 2017, subject to (amongst other things) the conclusion of a Section 106 agreement with the Owners.

20. From April 2016 onwards, there had been various discussions and correspondence concerning a potential outright purchase of the Development Land by the Claimant or Mr Shaw, as an alternative to continuing with the Joint Venture. Mr Shaw made an offer to purchase in May 2016. This was not accepted. By February 2017, Mr Shaw had learned that the Owners were offering to sell the Development Land to third parties, notwithstanding that they had not pulled out of the Joint Venture. After the Council deferred the decision on the full planning application in February 2017, Mr Shaw made a further offer to buy the Development Land for £400,000, with an option to buy additional adjacent land for £100,000. In the meantime, the Claimant continued to try to negotiate the terms of a fresh section 106 agreement with the Council.

21. In April 2017, the Claimant and the Owners reached agreement in principle for the Claimant to purchase the Development Land from the Defendant for £512,000. Mr Glenister and Mr Gittins were instructed to prepare the necessary contracts and transfers.

22. However, by mid-July 2017 the purchase had not completed and the Section 106 agreement had still not been agreed with the Council. Mr Shaw expressed his frustration to Mr Whitelaw in an email of 17 July 2017:

> "*The Planners have seemingly become no less frustrating or incompetent.*
>
> *We still await a draft S106 and our most recent chase to them provoked a response seeking any proposal for us to extend the School parking provision as a consequence of the increase in numbers. We therefore anticipate a potential further delay negotiating the draft when it eventually arrives should they try to sneak through some extra conditions.*
>
> *Not only does this delay compromise our position as the 10th September deadline for securing the S106 under the terms of the JV agreement looms closer but we are further frustrated by having had to set aside and earmark the purchase money which is in-effect our business and group working capital.*
>
> *We are clearly in a precarious position where we may not be able to satisfy the terms of the JV agreement having invested in excess of £65,000 on legal fees, the JV fee, planning fees and the application fee.*
>
> *In the circumstances, we have decided to reluctantly commit our capital elsewhere for now where it can immediately be put to more effective use. This will prevent us spending more money on abortive legal fees and compounding our loss should, as it would appear likely, we are not able to satisfy the terms of the agreement.*
>
> *[Clearly][2] if the S106 does appear before the 10th September and in a form acceptable, then we will continue to rely of the terms of the LLP agreement and of course it may be that we can resurrect the revised and preferred proposal by the landowner to sell the land to us when our capital becomes available."*

23. On 19 July 2017, Mr Shaw confirmed his withdrawal from the potential purchase, putting his position in this way in an email to Mr Giles of Halls Estate Agents:

[2] The word is not visible in the bundle before me, but I am told it is "clearly."

> "*I can no longer starve my companies waiting for this deal which is dragging on too long and it now appears I will lose in the long run in any event due to the timings in the JV LLP not being met. I am also eager for the mounting legal costs to be halted!! I have therefore had to commit my funds elsewhere and in the unlikely event that the 106 lands in time then we will rely on the JV for now and may be able to resurrect an outright sale when these funds come back in."*

24. In mid-August 2017, the terms of the Section 106 Agreement were finalised, and Mr Glenister provided engrossments to Mr Gittins for the Owners to sign. However, Mr Whitelaw informed Mr Gittins that he did not wish to continue to pursue the Joint Venture. Mr Gittins therefore informed the Owners that the Defendant would cease acting for them because of the conflict of interest with the Claimant.

25. The Owners instructed new solicitors, DTM, who wrote to Mr Glenister on 31 August 2017 stating that the Other Agreements were invalid and unenforceable because the LLP had not been incorporated on 11 March 2016 when the Other Agreements were executed. The Owners did not execute the Section 106 Agreement prior to the 10 September 2017 deadline in the Development Agreement and declined to proceed with the joint venture with the Claimant.

26. Thereafter the Owners pursued an outright sale of the Development Land. They made a purported Part 36 offer to the Claimant on 11 October 2017, open for 7 days, which involved C being given first refusal to purchase the land for £500,000. However, in the event the Owners sold the Development Land to a third party, Village Artisan Ltd ("Artisan"). On 13 March 2019, Artisan entered into a Section 106 agreement with the Council pursuant to the full planning permission obtained in March 2017. Later Artisan obtained a variation of the permission (referred to as a Section 73 variation) to increase the size of some of the dwellings. Artisan completed the development of houses on the land with these variations.

THE CLAIMANT'S CASE

27. In summary, the Claimant's case is that the Defendant, in breach of its duty of care, failed to ensure that the LLP was incorporated prior to the Agreements being signed. The failure to ensure this enabled the Owners to withdraw from the various agreements and sell the Development Land to a third party, causing loss to the Claimant.

THE CLAIMANT'S ALLEGED LOSSES

28. The Claimant's claim as put at trial can be seen from the summary in the updated Schedule of Loss at B75. The figures as set out in that document are a little difficult to follow. In summary, that claims is:

    a. Loss of profit on the development

    £1,896,594

    b. Additional losses suffered by the Claimant by way of administrative costs and legal fees

    £235,000

    Total Loss £2,131,594

29. The figure for loss of profit on the development set out in the previous paragraph is made up as follows:

Assumed sale proceeds

Original plan	£6,260,000	
Section 73 variations	£531,750	
Total		£6,791,750

Less

Assumed Development cost

Original plan	£3,318,039	
Section 73 variations	£266,767[3]	
Distribution to landowners	£1,285,350[4]	
License fee	£25,000	
Total		£4,895,156

Development profit £1,896,594

30. The Defendant's counter schedule at B76 puts the loss of development profit as follows:

    a. Loss of profit on the development

[3] £212,767 plus £54,000.
[4] £1,179,000 plus £106,350.

£739,711[5]

b. Additional costs to the Claimant by way of administrative costs and legal fees that fall to be deducted

£235,000

Total Loss £504,711

31. The figure for loss of profit on the development is made up as follows:

Assumed sale proceeds

Original plan	£5,890,000	
Total		£5,890,000

Less

Assumed Development cost

Original plan	£3,945,289	
Distribution to landowners	£1,130,000	
Additional finance costs	£50,000	
Licence fee	£25,000	
Total		£5,150,289

Development profit £739,711

32. Unlike the Claimant, the Defendant's figures make no allowance for increased profits on Section 73 variations. However, this difference is commented on in paragraph 2.6 of the Experts' Joint statement at B648. In essence, if the variations pleaded by the Claimant are to be factored in, these can be costed on the same basis as the experts contend for in respect of the original development proposal.

33. It will be noted that there is a claim for "additional losses" said to be the Claimant's administrative costs and legal fees in the Claimant's Schedule and a deduction of the same fees in the Defendant's counter schedule. For reasons I shall identify, these are in

[5] Somewhat confusingly, a deduction of £50,000 for finance costs appears below the figure for the total development profit; but that is argued to be a putative cost of making the profit so should have been deducted above that line.

fact not relevant to the Claimant's loss, whether by way of addition to its loss of profits on the scheme or as a deduction on account of their being a cost of the scheme.

THE ISSUES

34. The following issues arise in the light of how the parties put their cases:

a. Issue 1 – Is the Claimant limited on the pleadings to advancing the case that Defendant's alleged negligence led to the situation that the Other Agreements were unenforceable, or is it also open to it to argue that the alleged negligence led to the position where the agreements were arguably unenforceable?

b. Issue 2 – Were the Other Agreements in fact unenforceable? This involves consideration of the law relating to section 5(2) of the Limited Liability Partnerships Act 2000 and pre-incorporation contracts.

c. Issue 3 – Was the Defendant in breach of a duty owed to the Claimant?

d. Issue 4 – Was any such breach of duty causative of loss to the Claimant?

e. Issue 5 – Did the Claimant fail to mitigate its loss by failing to buy the Development Land?

f. Issue 6 – Quantum – Overarching matters: Would the Claimant have developed the Development Land alongside Willow Grove? When would the development have occurred? Would the development have included the Section 73 variations contended for by the Claimant?

g. Issue 7 - Quantum – Had the Joint Venture proceeded to conclusion, what costs would have been incurred in the Development?

h. Issue 8 - Quantum – Had the Joint Venture proceeded to conclusion, what would have been the value of the Development?

i. Issue 9 – Quantum – The Additional Costs

j. Issue 10 – Quantum – Other matters

THE WITNESS EVIDENCE

35. During the trial, I heard from Mr Shaw on behalf of the Claimant, who had signed witness statements dated 23 January 2023, 12 July 2023, 15 September 2023, 8 December 2023, 19 January 2024 and 8 February 2024. Of these six statements, the

fifth, dated 19 January 2024, was the trial statement and other statements were prepared to deal with several interlocutory issues, particularly relating to disclosure, but I have read each of the statements. The third, fourth and fifth statements were confirmed by Mr Shaw as being true to the best of his knowledge and belief at the beginning of his evidence. I treat the contents of those statements as being his relevant evidence in chief for the purpose of this judgment. For the Defendant, reliance was placed on the evidence of Mr Glenister who signed a statement dated 29 November 2022.

36. The credibility of Mr Shaw is a central issue in this case. The Defendant mounted a full blooded attack on his evidence, arguing that he was dishonest in certain correspondence and that that dishonesty tainted his evidence more generally.

37. I found Mr Shaw to be an engaging witness who expressed passion about some of the matters of which he spoke, including his track record as a property developer. On the other hand, he acknowledged several times that what he had had to say in correspondence represented no more than a negotiating position or an attempt to create a favourable backstop position for his company. Some of what he had to say in correspondence did not reflect his true position and/or intentions. Whether that is correctly categorised as dishonesty or lying may be a matter of semantics as far as the present litigation is concerned. However, his evidence left me in doubt as to the extent to which I could place reliance upon what he had to say. I have no reason to doubt that he meant his oath before he gave evidence, but his acceptance that he had asserted matters that were not in fact factually correct calls me to be cautious about placing reliance upon those parts of his evidence as are unsupported by other material, the more so when other material contradicts such evidence.

38. The problem is exacerbated by the failure of his witness statements to comply with Practice Direction 57AC. His statements clearly contain many expressions of opinion, often involving commentary upon documents and at points involve simply advancing his company's case. The Defendant did not seek to attempt to argue that his evidence should not be admitted. That was a reasonable and pragmatic stance. Nevertheless, as Fancourt J said in *Greencastle v Payne* [2022] EWHC 438, non-compliance with the Practice Direction is not simply a matter between the parties. The result of witnesses ignoring not only the Practice Direction but also the proper ambit of witness evidence is to make the untangling of what is admissible evidence and what is simply comment, opinion, argument or hearsay evidence, substantially more difficult for the trial Judge.

Often the result of the failure of the parties to have regard to the proper role of the lay witness as someone who gives evidence of that which they have themselves witnessed (or occasionally evidence of what others have said to them, as admissible hearsay) is to put the court in the position in which it is liable to treat that evidence as simple argument rather than anything upon which reliance can be placed.

39. I have sought to distinguish in this judgment between that which can properly be considered as Mr Shaw's direct evidence of matters that he witnessed or other matters that he can speak to on the one hand and on the other matters of comment, unattributable hearsay or the similar. If in so doing I have erred on a side that is unfavourable to the reliability of Mr Shaw as a witness, that is a consequence of the manner in which his evidence was prepared, the obvious failure to comply with the Practice Direction and the difficulty in identifying at times whether he is speaking of matters within his own knowledge or matters that he has been told by others. He is, I am afraid, the author of his own misfortune in this respect.

40. At the beginning of his cross examination of Mr Glenister, Mr Phillips, for the Claimant, expressly made clear Mr Shaw's recognition that Mr Glenister had contributed to the success of his property development. That is to Mr Shaw's credit. Whilst what counsel says in the context of cross examination is not of course evidence in the case, I bear in mind as a feature of my assessment of Mr Shaw's credibility that he had the decency to express through counsel sympathetic views to Mr Glenister.

41. In any event, I did not find all of Mr Shaw's evidence to be implausible. For example, during cross examination as to the crucial role that adequate finance plays in his business, he put it at one point that this is a "*cash hungry business.*" The availability of funds is crucial to successful property development. He makes a similar point at paragraph 8.2 of his witness statement where he says:

> "*When running a successful development, it is essential to have a well thought out and pre-planned structure, in order to achieve efficiency and to manage expectations, which is effectively dictated by the ability and means of the parties involved, to bring what they can to the table. In circumstances where it has purchased the land itself (either outright, or through bank funding or private investment finance), the Claimant develops the land directly (with no third-party involvement), as its own project. Where the Claimant does not own the*

> *development land, the landowner's part of the bargain is to introduce encumbrance free land to the deal, which is very appealing to the Claimant and I but involves us undertaking a different and more complex development structure, which brings the significant advantage that the risks are spread and distributed between the parties (which does not happen in a developer owned land deal).”*

42. This evidence is consistent with the material that Mr Shaw put before the court as to how the Claimant carried on business. This approach is an important part of Mr Shaw’s strategy for property development both in the scheme with which this case is concerned and in other schemes. The use of a joint venture scheme with the landowner both spreads the risk and avoids the need for Mr Shaw’s own companies to fund the development, but brings with it complications, including as to the cooperation of the landowner in the scheme.

43. Mr Glenister gave his evidence in a clear and straightforward fashion. I found no reason to doubt that he was a witness who was trying to assist the court. In any event, little of what he had to say was controversial.

44. I heard from expert witnesses for both parties, as follows:

    a. For the Claimant:

        i. Mr Mark Morison, Registered Valuer/Chartered Surveyors;

        ii. Mr Steve Howe, Quantity Surveyor;

    b. For the Defendant:

        i. Mr Paul Raine, Registered Valuer/Surveyor;

        ii. Dr Ronan Champion, Quantity Surveyor.

45. All the experts sought to assist in this case. They all acknowledged that there might be a range of opinions on the issues before the court and sought to explain their positions within the range. In fact, the evidence of the experts and the reasons for the differences between them took up a limited amount of the trial and played a relatively small part in the parties’ submissions, reflecting their acknowledgement that there is a range of opinion on the issues before the court and that, save on certain narrow issues, neither side could show that the other side’s experts were obviously wrong.

ISSUE 1 – THE PLEADINGS

46. The Defendant takes a preliminary issue on the pleadings. At paragraph 20 of the Particulars of Claim, the Claimant pleads the following in respect of the enforceability of the Development Agreement:

> *"As the Defendant knew or ought to have known:*
> *(a) a contract purportedly entered into by a limited liability partnership prior to its incorporation is of no effect, save that:*
> *(i) by section 51 of the Companies Act 2006 (as applied to limited liability partnerships with relevant modifications by Reg. 7 of The Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009), subject to any agreement to the contrary, such a contract would be deemed to be made with the person purporting to act for the limited liability partnership or as agent for it;*
> *(ii) by section 5(2) of the Limited Liability Partnerships Act 2000 (s. 5(2)), an agreement made before the incorporation of a limited liability partnership between the persons who subscribe their names to the incorporation document may impose obligations on the limited liability partnership (to take effect at any time after its incorporation);*
> *(b) since the Development Agreement was purportedly entered into by the LLP prior to its incorporation, there was no binding contract between the Owners and the LLP. There was at best a contract between the Owners and Mr Whitelaw as purported agent of the LLP;*
> *(c) since the LLP Agreement was purportedly entered into by the LLP prior to its incorporation, the LLP could be subject to obligations upon incorporation pursuant to s. 5(2), but could not acquire any rights. In particular, the LLP could not acquire the right to require the Owners to enter into the Development Agreement."*

47. The Claimant pleads its case on breach of duty at paragraph 31 of the Particulars of Claim. There are six pleaded allegations of negligence, namely:

> *"(a) Failing to have the LLP incorporated prior to the execution of the Agreements.*

(b) Permitting the parties to the Agreements to execute them when the Defendant knew or ought to have known that the LLP had not been incorporated, alternatively without first checking that the LLP had been incorporated.

(c) Failing to appreciate at the time of execution of the Agreements or subsequently that the LLP had not been incorporated when those agreements were executed.

(d) Failing to advise the Claimant at the time of execution of the Agreements or subsequently that the effect of the LLP not having been incorporated at the time of execution was as set out in paragraph 19 above.

(e) Failing to advise the Claimant in the circumstances set out in the foregoing sub-paragraph that:

(i) it should insist upon the Agreements being re-executed following the incorporation of the LLP; and

(ii) in the event that the Owners would not agree to the re-execution of those agreements, that it should not do anything in reliance upon them."

48. The Claimant's pleaded case on causation is at paragraph 32 of the Particulars of Claim:

"(a) Had the Defendant ensured that the Agreements were executed after the incorporation of the LLP then they would have been binding on the Owners for the benefit of the LLP and the Owners would not have been able to refuse to execute the s.106 Agreement without being in breach of the terms of the Development Agreement.

(b) Had the Defendant advised the Claimant of the invalidity of the Agreements in or around March 2016 or at any subsequent time prior to April 2017, there is no reason to doubt that the Owners would have been willing to re-execute those agreements, which would have then have been binding upon the Owners for the benefit of the LLP. The Owners and the Claimant were on friendly terms. But for the intervention of the estate agent in April 2017 and the subsequent advice of DTM (which could not have been given but for the Defendant's breaches of duty), the Owners would have been happy to allow the LLP and the Claimant to proceed with the Permitted Development through to completion.

(c) Had the Agreements been binding upon the Owners, then the Permitted Development would have been completed and the Claimant would have made a substantial profit therefrom. For the avoidance of doubt, the Claimant would have been able to comply with its obligations to obtain bank funding for the Development and provide the balance of any funding required."

49. It is apparent that the Claimant's case in the Particulars of Claim proceeds on the basis that the agreements signed before the incorporation of the LLP, specifically the Development Agreement, were not enforceable by reason of their being signed before the LLP Agreement. However, I note in passing that the pleading does not expressly plead this as a part of the causation case.

50. In its Defence, the Defendant pleaded that the Development Agreement was in fact enforceable, relying on the terms of Section 5(2) of the Limited Liability Partnerships Act 2000 ("the 2000 Act").

51. The Claimant, in its Reply, joins issue with this, pleading at paragraph 11(2) that, "*Even if the Defendant's construction is correct (which is denied), the Claimant avers that a solicitor taking reasonable skill and care would have advised that the LLP should formally join the LLP Agreement after its incorporation and/or drafted the LLP Agreement in such a manner to achieve this*." During closing submission, the Defendant contended that the argument pleaded in the Reply was not open to the Claimant since it had not been pleaded in the body of the Particulars of Claim, whether as originally drafted or by way of amendment.

52. The law in this regard was considered and helpful summarised by Pepperall J in *Martlett Homes Ltd v Mulalley & Co Ltd* [2021] EWHC 296 (TCC):

"*17. Particulars of Claim must include, among other matters, "a concise statement of the facts on which the claimant relies": r.16.4(1)(a). Where a defendant denies an allegation in the Particulars of Claim, r.16.5(2) provides that:*

> *"(a) he must state his reasons for doing so; and*
>
> *(b) if he intends to put forward a different version of events from that given by the claimant, he must state his own version."*

18. Pleading a Reply is, however, optional: rr.15.8 and 16.7, and (in this court) paragraph 5.5.3 of the TCC Guide. Indeed, a claimant who does not file a Reply is not taken to admit the matters raised in the Defence: r.16.7. While the rules

give little guidance to what can be pleaded in a Reply, paragraph 9.2 of Practice Direction 16 provides:

> *"A subsequent statement of case must not contradict or be inconsistent with an earlier one; for example, a reply to a defence must not bring in a new claim. Where new matters have come to light the appropriate course may be to seek the court's permission to amend the statement of case."*

19. *No party may serve a statement of case after a Reply without the permission of the court: r.15.9. While a Reply is reasonably commonplace, the editors of the 2020 edition of Civil Procedure (the White Book) rightly observe, at paragraph 15.9.1, that permission to serve subsequent statements of case will only be appropriate in the most exceptional circumstances and that the court is more likely to permit amendments to earlier statements of case.*

20. *In my judgment, the terms of r.16.4(1)(a), the optional nature of the Reply, the rule restricting subsequent statements of case and the terms of the Practice Direction all point to the clear conclusion that any ground of claim must be pleaded in the Particulars of Claim. New claims must be added by amending the Particulars of Claim and cannot simply be pleaded by way of Reply. I reject Mr Selby's submission that such view would deprive the Reply of all purpose. A Reply can be particularly useful in order to refute a ground of defence. For example, a Reply can properly plead:*

> *20.1 a later date of knowledge pursuant to ss.14 or 14A of the Limitation Act 1980, or that the court should disapply the primary limitation period pursuant to ss.32A or 33 of the Act, in answer to a plea in the Defence that the claim is statute barred;*
>
> *20.2 that an exemption or limitation clause was not incorporated into the parties' contract or that it was of no effect in excluding or limiting liability because the clause did not satisfy the condition of reasonableness within the meaning of the Unfair Contract Terms Act 1977; or*
>
> *20.3 that the defendant is estopped by some earlier judgment or representation from relying upon a particular defence.*

21. *In each example, the claimant would be pleading new facts in order to refute a defence, but it would not be pleading a new claim. Equally, while there is no obligation to respond upon the facts, a Reply can usefully admit a fact alleged in the Defence (thereby avoiding the cost and trouble of needing to prove the fact and allowing the court and parties to focus on the real issues) while explaining why such admitted fact does not provide a defence to the claim. Or a Reply can deny an allegation of fact and usefully explain why such allegation must be wrong.*

22. *Not only is the proposition that one can advance a new claim in a Reply contrary to the clear terms of the Practice Direction, but it is also inherently undesirable*

> *and contrary to the overriding objective of dealing with cases justly and at proportionate cost. If such practice were to be condoned, claimants would not need to be precise in their formulation of the Particulars of Claim since they could always have a second bite of the cherry when pleading the Reply. Defendants would have to seek permission from the court in order to answer by way of Rejoinder any new claims pleaded in the Reply, which might in turn call for a Surrejoinder from the claimant. Further, a claimant seeking to bring a new claim after the expiry of the limitation period could sidestep r.17.4 altogether (although possibly not s.35 of the Limitation Act 1980) by avoiding the need to make any amendment."*

53. These principles apply with the same force in the Circuit Commercial Court as they do in the Technology and Construction Court. But it is important to look at the detail of what the Claimant is seeking to argue across the pleadings. The argument within the Particulars of Claim may seem to be that the Development Agreement should not have been signed before the LLP was incorporated on the grounds that such an agreement was inevitably and as a matter of law unenforceable. But the pleaded case at paragraphs 31 and 32 in particular does not rely upon it being so. It is also open to the Claimant on the pleading in the Particulars of Claim to contend that the Defendant was in breach of duty if it brought about a situation in which the Development Agreement was arguably unenforceable because the LLP was not incorporated in advance. That seems to be the intention behind the pleading at paragraph 11(2) of the Reply and certainly the paragraph is capable of bearing that meaning. In that event, the Reply does not plead a new case.

54. That is not necessarily the end of the issue. If a party pleads a case that is misleading as to the true case that it is advancing, the court may exercise case management powers to prevent any unfairness to the opposing party. As I have indicated already, the Particulars of Claim were a clear pleading of a case based upon the argument that, as a matter of law, the Development Agreement was in fact unenforceable, even if they were in fact capable of bearing the separate meaning identified in the previous paragraph above. In closing submissions, the Claimant argued that the enforceability of the Development Agreement was not something that the court needed to determine, since it was sufficient that the result of the Defendant's putative negligence was that it created a situation where the enforceability of the agreement was arguable. But this issue was pre-figured in the Reply and to some extent in the Claimant's skeleton argument[6]. In any event, it

[6] The skeleton argument is not entirely unambiguous as to the position being taken. Paragraph 47 expressly asserts that the Development Agreement was unenforceable because of the failure to incorporate in advance of its

was competently and comprehensively addressed in closing submissions by both parties.

55. In my judgment, the Defendant was sufficiently on notice of the point being taken and had sufficient opportunity to deal with it as to lead me to decline to exercise any case management power to prevent it being argued now. To put the same point another way, I do not see that this trial would have taken any different course if the contents of paragraph 11(2) of the Reply had been pleaded in the Particulars of Claim and in particular the Defendant has not been prejudiced by the manner of the case being pleaded. In such circumstances, it is open to the Claimant to argue the case based on the arguable unenforceability of the Other Agreements and if my permission were required for this, I would have permitted it.

ISSUE 2 – THE LAW RELATING TO SECTION 5(2) OF THE LIMITED LIABILITY PARTNERSHIPS ACT 2000 AND THE ENFORCEABILITY OF PRE-INCORPORATION CONTRACTS

56. For reasons identified below in respect of Issue 3, I do not consider the determination of whether in fact the contracts between the LLP and the Owners were binding, notwithstanding that they were executed before the LLP Agreement, to be decisive of liability issues in the case. Nevertheless, whether it is arguably unenforceable is clearly relevant to those issues. Further, if I am wrong on the pleading point identified at Issue 1 above, such that the Claimant were limited to arguing that the pre-incorporation agreements are actually unenforceable, rather than merely arguably so, the enforceability of the contracts would be a relevant issue that I would have needed to determine. Yet further, the Defendant raises an issue of causation (dealt with at Issue 4 below), asserting that the Development Agreement was in fact enforceable and that the Claimant's loss flowed from its failure to seek to enforce the agreement rather than any problem relating to the date of its signature. For these reasons, it is desirable that I deal with the law relating to the enforceability of the Other Agreements.

57. The procedure in respect of the incorporation of an LLP is set out in Sections 2 and 3 of the 2000 Act. It is common ground that the LLP was registered by certificate that states the date of incorporation to be 25 March 2016. It has not been argued that the

execution; on the other hand, paragraph 59, speaking of the "*risk of a document having been executed by an LLP prior to incorporation"* seems to be suggesting that it was sufficient for the Claimant's case that the enforceability of the Agreement be arguable. It is probably best seen as arguing these as alternative cases.

true date of incorporation is other than the date on this certificate. It is further not in dispute that the Agreements were signed before this date and that therefore they pre-date incorporation of the LLP.

58. In arguing that the LLP was in fact bound by those contracts entered into before its incorporation, the Defendant relies on Section 5(2) of the 2000 Act. Section 5 in its entirety provides as follows:

"*5 Relationship of members etc*

> *(1) Except as far as otherwise provided by this Act or any other enactment, the mutual rights and duties of the members of a limited liability partnership, and the mutual rights and duties of a limited liability partnership and its members, shall be governed—*
>
> > *(a) by agreement between the members, or between the limited liability partnership and its members, or*
> >
> > *(b) in the absence of agreement as to any matter, by any provision made in relation to that matter by regulations under section 15(c).*
>
> *(2) An agreement made before the incorporation of a limited liability partnership between the persons who subscribe their names to the incorporation document may impose obligations on the limited liability partnership (to take effect at any time after its incorporation).*"

59. The Defendant contends that the effect of Section 5(2) is that the Development Agreement was binding on, and enforceable by, the LLP and was additionally enforceable by the members.

60. The Defendant's analysis involves first looking at the position in respect of companies. Until the introduction of Section 36C of the Companies Act 1985[7] ("the 1985 Act"), introduced by way of amendment of the original statute by Section 130(4) of the Companies Act 1989, the position at common law was that a person purporting to act on behalf of a non-existent company could not bind the company before its

[7] Replaced in identical terms by Section 51(1) of the Companies Act 2006.

incorporation (see *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 QB 41). Thus a pre-incorporation contract would, without more, be unenforceable.

61. The amended provisions of Section 36C of the 1985 Act state:

"*36C. Pre-incorporation contracts, deeds and obligations.*

(1) A contract which purports to be made by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary as one made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly.

(2) Subsection (1) applies –

(a) to the making of a deed under the law of England and Wales or Northern Ireland, and

(b) to the undertaking of an obligation under the law of Scotland as it applies to the making of a contract."

62. In *Braymist Ltd v The Wise Finance Co Ltd* [2002] Ch 273, the Court of Appeal held that, in the words of Judge LJ, "*[77] …section 36C(1) of the Companies Act 1985 not only provides a remedy for a person A, who has purported to enter into a contract with a company when it was unformed (the narrow view) but also imposed obligations enforceable against A's wishes by the person purporting to act for or agent of the unformed company, B…"* In so holding, Judge LJ explained at [84], "*The insurmountable difficulty with the narrow view is that it requires section 36C(1) to be read as if it created a complete option for someone in A's position, but never someone in B's position, either to adopt or reject the contract, a choice to be made unilaterally by him, for good, or bad, or no reason. The statutory language could, of course, have been drafted so to provide. Instead section 36C(1) specifies that the contract has "effect", language remote from the concept of an "option" or, as here, the wish of the party in A's position to be protected from the consequences of the deemed contract simply because the bargain is no longer as commercially attractive as it once was*."

63. The Defendant contends that the 2000 Act borrows heavily from the Companies Act but in respect of pre-incorporation contracts goes further by expressly permitting the

members of the partnership to enter into pre-incorporation contracts that bind the LLP following its incorporation. This is said to be consistent with:

a. The express words of Section 36C of the 1985 Act;

b. The explanatory notes to section 5(2) of the 2000 Act which state, "*Subsection (2) provides that when an LLP comes into being it is bound by any agreement that is entered into by the subscribers to the incorporation document*";

c. The editors of Palmer's Company Law who at [1.208.1] state, "*Pre-incorporation contracts may become binding on the LLP (s.5(2))";* and

d. The editors of Treitel's The Law of Contract (15th Edn) at [16-075] who state, "*By statute, this problem is now in part resolved in the case of an agreement made before the incorporation of a limited liability partnership between the persons who subscribe their names to the incorporation document. Such agreement "may impose obligations" on the partnership to take effect after its incorporation. But even this provision does not extend to agreements made with other persons before the incorporation of the partnership and purporting to impose liabilities on it*."

64. To construe the words of Section 36C as being capable of imposing obligations on the LLP but not of creating rights that are enforceable by the LLP would, the Defendant contends, create the very difficulty that the decision in *Braymist* resolved in the context of limited companies and would be inconsistent with the reasoning of that judgment in that it would take the *"narrow view*" that Judge LJ rejected and create the very same problem as he noted in his judgment in that it would create an option in favour of the opposing party as to whether it sought to enforce obligations against the LLP without giving any corresponding right in the LLP itself to enforce its rights under the agreement, a result that was probably not the intention of the drafting and that would require express wording to bring about.

65. In response, the Claimant contends that Section 5(2) of the 2000 Act is concerned with a different situation than that dealt with by Section 36C of the 1985 Act and considered in *Braymist*. It is concerned not with rights and obligations between the (intended) LLP and third parties but rather the rights and obligations as between the LLP and its members. The relevant agreements to which Section 5(2) relates are agreements made before incorporation between the intended members ("*the person who subscribe their*

names to the incorporation document") not between the intended LLP and the world at large. Thus, *Braymist* provides no assistance as to the proper construction of Section 5(2) of the 2000 Act.

66. On its true construction, the Claimant contends that Section 5(2) could not have availed the LLP here because:

    a. The terms of Section 5(2) refer to the LLP acquiring obligations but not rights;

    b. In any event, since the Claimant was not a party to the Development Agreement, it was not an agreement entered into "*between the person who subscribe their names to the incorporation document"* since it is only an agreement between some of those persons.

67. In my judgment, it is clear that there is legitimate debate about the proper construction of Section 5(2) of the 2000 Act. A solicitor who wished to give effect to the Claimant's intention that a binding agreement be entered into between the LLP and the Owners could not with any confidence have concluded in 2016 that the true construction of Section 5(2) was undoubtedly that the Other Agreements, specifically the Development Agreement, would be enforceable in the event that it was signed before the LLP Agreement was signed. Rather they would have recognised that this was a ripe area for dispute and one that was best avoided by ensuring that the LLP Agreement was entered into first.

68. Given my conclusion on Issue 3, my conclusion on the true construction of Section 5(2) is strictly *obiter*. Had it been necessary to rule on its construction, my conclusion would have been:

    a. The reasoning in *Braymist* supports the conclusion that, if possible, Section 5(2) should be read as capable of giving rise in a pre-incorporation contract entered into by the members of an LLP to rights for the intended LLP as well as obligations on the part of the intended LLP;

    b. Since the language of Section 5(2) does not say that such an agreement <u>only</u> gives rise to obligations and the language of the sub-section is not of a one-sided option on the part of the person(s) contracting with the LLP to avoid its liabilities in the event they chose to do so, it is better read, as in *Braymist* and arguably as in the Explanatory Notes to the section, as being capable of giving rise to both rights and obligations on the part of the contracting parties;

c. However, the express words of Section 5(2) and the logic of the contracts to which it is liable to apply mean that only contracts entered into by all members could be binding pursuant to that section, since to hold otherwise would give rise to the difficulty of identifying how some but not all of the intended subscribers had the power to bind the LLP even before it had acquired legal personality.

69. As the Defendant pointed out, this leaves the further question as to whether the Other Agreements were in fact agreements made by the parties who subscribed to the LLP such that they could be enforced by the members of the LLP. The Defendant does not dispute the Claimant's contentions that the proper reading of Section 5(2) is that, for the provision to apply, the relevant agreement needs to be one "between" all of the parties who subscribed to the LLP. Further, they accept that the Claimant is not named as a party to the Other Agreements. But the Defendant points out that all of the subscribers to the LLP, including the Claimant, clearly intended the LLP to be bound by the Other Agreements, especially the Development Agreement, as demonstrated by the words of the LLP Agreement itself (see for example clauses 7.1 and 7.3). Further, both the Claimant and the Owners behaved as though both the LLP and the Owners were bound by the Development Agreement. The Defendant contends that the court should draw from this the conclusion that the Other Agreements were in fact made by the subscribers to the LLP.

70. Accepting that the relevant contracts need to be entered into by all the subscribers, I am unpersuaded by the argument that the Other Agreements can be said to have been entered into "*between the persons who subscribe(d) their names to the incorporation document*" where the Claimant was such a subscriber but was not a signatory to the Other Agreements. Whilst it certainly wished the Other Agreements to be binding, if it cannot in fact be shown to have signed those agreements and since they related to obligations between the (at the time) non-existent LLP and the Owners, I cannot see a basis for concluding that it could be said to have intended to be a party to those agreements. In the absence of such intent and some objective evidence that he became a party to the agreements, I conclude that the Other Agreements are not contracts to which Section 5(2) is capable of applying and that accordingly the Claimant could not have enforced the Development Agreement.

71. The Defendant further argues that, if Section 5 of the 2000 Act does not avail the Claimant, then the members or some of them could have argued that the Other Agreements were enforceable as agreements entered into before incorporation under Section 51 of the Companies Act 2006.

72. However the Defendant's case does not adequately explain how a document signed by Mr Whitelaw on behalf of the LLP is enforceable by another member of the LLP who did not sign the agreement. Such an argument could only succeed if it were shown that Mr Whitelaw was acting as agent for the other member, presumably in this case the Claimant. But that is not the basis on which Mr Whitelaw purported to sign the agreement; rather he was signing as agent for the unincorporated and therefore, as of then, non-existent LLP. I see nothing in agency law in general or Section 51 in particular that could make him the Claimant's agent.

73. It follows from this that:

    a. The Other Agreements were not binding on the Claimant and the Owners and hence the Claimant could not have enforced those agreements;

    b. Even if I am wrong on that issue, the Other Agreements were arguably unenforceable by reason of their having been signed before incorporation of the LLP.

ISSUE 3 – BREACH OF DUTY

74. The Defendant argues that it was not negligent in failing to ensure that the LLP was incorporated before the Other Agreements, specifically the Development Agreement, were entered into. The case is put baldly in the Defendant's skeleton argument:

> "…*not all mistakes are negligent. The statutory provisions of the LLP Act 2000 and their effect has been the subject of considerable uncertainty (even now there is very little guidance on the operation of s.5(2) of the LLP Act 2000). A timing mistake made by a solicitor on the particular facts of this case does not amount to a breach of the reasonable skill and care expected of a competent transactional solicitor."*

75. Within his witness statement, Mr Glenister does not explain the reasoning behind not ensuring that the LLP was incorporated before executing the Other Agreements on behalf of the LLP. During cross examination, he was asked about this. In particular, he

was taken to an email dated 21 January 2016 from Mr Shaw to Mr Simon Haynes, an accountant at Colin F Whitfield & Co, accountants instructed by the Claimant. In that email at B1100, Mr Shaw refers to the intention of the parties to sign all agreements before the end of that month and Mr Shaw adds the comment "*before signing the NEW CO LLP will need to be established."* Of this comment, Mr Glenister said that it would be "*logical"* to incorporate the LLP before signing the Other Agreements. As the Claimant points out, the implication of Mr Glenister's email of 9 October 2015 at B2149 is that the LLP would be incorporated before the Development Agreement was signed.

76. In closing submissions, the Defendant doubted that the risk of the Other Agreements being unenforceable as a result of the later signing of the LLP Agreement was foreseeable and was a risk that a reasonably competent solicitor would have had in mind when dealing with the sequence and timing of execution of documents.

77. If the law in respect of pre-incorporation contracts relating to LLPs had been clear to the effect that a contract entered into in the name of the LLP before the LLP was incorporated was binding on the LLP once incorporated this might be so. For reasons that I have already identified, it is not.

78. Equally, had Mr Glenister been able to give a clear account as to why he had concluded that the pre-incorporation contract here was enforceable, there might be force in the argument that it was not negligent to execute the Other Agreements before the LLP was incorporated, although even then it would appear to have been an unnecessary risk to take. However, there is no evidence that Mr Glenister gave any consideration to this issue. Rather, his advice and conduct of the case left the Claimant in the dilemma that the Owners had available to them an argument as to the effect of the law on pre-incorporation contracts, allowing them to advance a persuasive case that in fact the LLP was not bound by the Other Agreements, putting at risk the whole development scheme. As I have indicated above, such an argument is certainly not doomed to failure.

79. The proper approach to be taken where a solicitor is dealing with matters that might involve legal uncertainty and the creation of an unnecessary risk is considered in Jackson and Powell on Professional Liability, 9th Edn, at [11-104]:

> *"Where the solicitor creates, or incurs, unnecessary risks, he is likely to be held liable for any consequential loss, however carefully he may have handled those risks and however skilfully he may have calculated the prospects of success at*

> *the outset. In CW Dixey Sons Ltd v Parsons (1964) 192 E.G. 197, the defendant solicitors acted for the plaintiffs in granting a sub-lease of premises. Clause 2(10) of the head lease provided that the premises should not be used as a medical or quasi-medical establishment. The sub-lease as drafted by the defendants allowed the sub-lessee to use the premises for the purposes of a psychologist's consulting room. The head landlords took the view that this use infringed cl.2(10) of the head-lease and brought forfeiture proceedings, which were compromised. Salmon LJ (sitting as an additional judge of the Queen's Bench Division) held that the defendants were negligent, and would have been negligent even if the use in question did not infringe cl.2(10):*
>
> > *'In the present circumstances the solicitor owed a duty to his client to take reasonable care, not only to protect his client against committing a breach of the law but to protect him against a risk of being involved in litigation … In preparing a lease, as in the present case, a solicitor was presented with what was an obvious danger. It would not do for him to say that in his view it was all right. There was an obvious danger that a different view might be taken. In the present circumstances the ordinary careful solicitor would have gone to see his clients and advised them not to sign'."*

80. On the available evidence, I am left in no doubt that the execution of the various agreements before incorporation of the LLP led to the risk that came to pass of one of the parties to the LLP Agreement arguing that the Other Agreements were not binding on the LLP. That was an obvious danger and the order of executing documents was, as Mr Glenister acknowledged, not the logical sequence of events. This is a classic example of the conduct of the solicitor creating a risk that the validity of the Other Agreements might be challenged.

81. Further, it was foreseeable that, if a technical point could be taken about the validity of the Other Agreements, it might be. The very point of entering into a written contract, rather than simply acting on trust, was to ensure that the parties were committed to a particular course of action. As Warren J said in *Youlton v Charles Russell* [2010] EWHC 1032 (Ch) at [262], *"a client cannot expect an agreement to be 100% watertight and to be incapable of challenge. But the need to accept seepage from the water-container does not excuse a failure to plug a leak."* The failure to ensure that the LLP was incorporated before the Other Agreements was an obvious "*leak*." A reasonably competent solicitor would have sought to ensure that the LLP was incorporated first and were it to appear that this was not going to happen, would have advised of the consequent risk of unenforceability.

82. Of course, the solicitor's client might have chosen to run the risk of documents being executed in a different order, perhaps because the exigencies of the situation and the risk of a deal falling through meant that the client judged it to be worth the risk of executing documents in a different order. There is however no logical reason here why the Claimant would have done this, nor does the Defendant allege any facts or matters that might have justified the risk being taken.

83. In those circumstances, I am satisfied that, in failing to take steps to ensure that the LLP Agreement was incorporated before the Other Agreements, or at the very least advising the Claimant of the risk of executing those documents before incorporating the LLP, the conduct of the Defendant fell below the standard of the reasonably competent solicitor and was a breach of its duty of care to the Claimant and/or was a breach of the implied terms of its retainer to exercise reasonable care in advising and acting for the Claimant.

ISSUE 4 - CAUSATION

84. The legal approach to causation in negligence is set out in *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20 at [6] by reference to a six-part test:

(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)

(2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)

(3) Did the defendant breach his or her duty by his or her act or omission? (the breach question)

(4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)

(5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question)

(6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has

mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question)

85. It is common ground that the Claimant's claim is one for the loss of a chance to develop the land. Such loss is actionable in negligence. Given that the purpose of the retainer was that the Defendant should advise the Claimant in respect of that development and carry out services ancillary thereto, I see no difficulty in the Claimant satisfying the scope of duty requirement. I have found breach of duty to be established and there is a clear and obvious nexus between the duty and the loss sought. That then leaves questions of factual causation and legal responsibility.

86. To succeed in its claim the Claimant needs to show that its failure to develop the Development Land flowed in whole or in part from the Defendant's breach of duty not from some other cause. Determination of the factual causation issue involves consideration of:

a. Whether, but for the Defendant's breach of duty, the LLP and the Owners would have entered into an enforceable Development Agreement;

b. Whether, had they entered into an enforceable Development Agreement, the land would have been developed. This itself involves questions of why the Claimant did not in fact proceed with the development of the land and hypothetical questions about whether it would have done so but for the Defendant's breach of duty.

87. However, the Defendant raises prior issues of legal responsibility, namely that the failure of the Claimant to develop the land was in fact caused by the Claimant's failure to enforce the Development Agreement rather than any problem flowing from it being a pre-incorporation contract.

88. I have rejected the argument that the agreement was enforceable from the outset or at least from the date of incorporation of the LLP, whether by the LLP itself or its members pursuant to Section 5 of the 2000 Act and/or Section 51 of the 2006 Act. It follows that the Claimant could not have enforced the Development Agreement and that the failure to serve notice of termination (a causation defence pleaded at paragraph 32.2 of the Amended Defence) is irrelevant since there was no valid agreement to terminate.

89. Even if I had found that the Development Agreement was in some way enforceable, I do not accept that the failure to seek to enforce it would have been a new intervening

cause or in some other way have been a bar to recovery on legal responsibility grounds. I have noted the judgment of Salmon LJ in *CW Dixey Sons Ltd v Parsons* above. He held that the creation of the risk of the lease being forfeited on the grounds of the use of the premises in infringement of clause 2(10) was actionable even if the use had not been a breach of clause 2(10). This accords with the more general point made in the passage cited from Jackson and Powell above that the breach of duty consists in the creation of the risk of uncertainty. The legal responsibility that the solicitor in the position of the Defendant here bears is not simply the responsibility for loss caused if the Development Agreement was not in fact enforceable; it is also the loss caused by the risk of a contracting party arguing that it was not enforceable. If the risk itself were not foreseeable such a claim would fail on grounds that the solicitor had not acted in breach of duty where one could not have anticipated that the point about the enforceability of the agreement would be taken. But, as I have indicated above, on the instant facts it was clearly foreseeable that the Development Agreement might be challenged as a pre-incorporation contract and it follows that the legal responsibility test for liability is met. This does not of course prevent the Defendant from arguing that the breach was not in fact causative on the ground that the Claimant's failure to take any steps to seek to enforce the Development Agreement is evidence that it had no desire to enforce the agreement and that it would not have done so even if it could have. I deal with this argument below.

90. In the alternative, it might be argued that the failure to seek to enforce the Development Agreement was a failure to take a reasonable step to mitigate loss. This argument falls within the case on mitigation pleaded at paragraph 32A.7 of the Amended Defence. I deal with mitigation more broadly under Issue 5 below. However, given my finding that the agreement was not in fact enforceable, it is not arguable that the Claimant should nevertheless have argued that it was. Such a course of action would have exposed the Claimant to costs on an issue upon which, given my finding, it would not have succeeded. Whilst it may have been reasonable to incur some cost in arguing the point, it was equally reasonable (or at least cannot be said to be unreasonable) not to have argued a point that was in fact wrong in law.

91. As alternative arguments, the Defendant contends in its pleading that those agreements became binding following incorporation of the LLP by ratification and/or that the Owners were estopped from denying that the LLP was bound by them.

92. The first of these arguments is pleaded at paragraph 31.2 of the Amended Defence. This argument was not however developed in the Defendant's skeleton argument or in oral submissions and it was indicated on the Defendant's behalf that this argument was not being pressed. This is perhaps unsurprising since the Defendant has not been able to identify when and by what means this ratification is said to have taken place, nor what in fact the legal effect of the alleged ratification is said to have been. The concept of ratification is usually a concept applied to the situation where an agent's authority to bind its principal is in doubt. The position where the principle did not exist at the time of the alleged agency is somewhat different. The argument presumably is that the principal that comes into existence later adopts the contract and becomes a party thereto. Ratification in that sense would amount to varying the terms of the contract by the introduction of a new contracting party. It would need to be dealt with on conventional contractual principles about contract variation. It is unclear how those principles would apply on the facts of this case, and I am unpersuaded that the ratification argument could have assisted the Claimant in enforcing the Development Agreement.

93. The second argument, that of estoppel, may seem somewhat more promising. The evidence of Mr Shaw is that the parties behaved as though the Development Agreement were binding and I accept that counsel for the Defendant is probably correct in paragraph 90(c) of the skeleton argument to say that "*it is apparent that the Owners believed themselves to be bound by the Agreements until they received advice from DTM to the contrary on or about 31 August 2017."* It is however difficult to judge whether an estoppel argument would have succeeded against the Owners.

94. As was noted during submissions, the decision of Harman J in *River International Ltd v Cannon Film Sales Ltd* [1987] BCLC 540 supports the argument that the Claimant could not have argued an estoppel by convention preventing the Owners from denying liability on pre-incorporation contracts where the convention relied on, the assumption of the existing of a binding contract, necessarily arose after the incorporation of the LLP. The authors of Chitty on Contracts, 35th Edn, doubt the correctness of the decision at [13-014]. But there is insufficiently clear material before the court to conclude that an estoppel argument would have succeeded. It might have persuaded the Owners to proceed with the Development, but the court could not conclude that, if the point had to be taken in litigation, the Claimant would necessarily have succeeded in the

argument. In those circumstances, it cannot be said that the Claimant's failure to advance the estoppel argument was the true cause of its loss. At best, the failure to do so might be argued to be a failure to take reasonable steps in mitigation of its loss. I deal with this issue further below.

95. Accordingly, I am not persuaded that there is any bar to recovery for the Claimant on "legal responsibility" grounds.

96. That therefore leads to the factual causation question. In determining causation in a solicitors' negligence claim such as this, the court is concerned with a consideration of the counter factual: what would have happened but for the breach of duty? On this issue, the proper approach is to determine whether the chance of the Claimant having achieved a more favourable outcome but for the solicitor's breach of duty was more than negligible and then for the court to assess that chance. Where, as here, the assessment of the chance depends at least in part on hypothetical matters, the court's task was explained by the Supreme Court in *Perry v Raleys Solicitors* [2020] AC 352 at [20]:

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

97. The rationale for this bifurcated approach is in part the difficulty for the court in assessing counterfactual outcomes where the person whose actions or decision would have determined those outcomes is not before the court. In the instant case, the Owners' actions but for the breach of duty that I have identified are inevitably a matter of speculation. They have not been called to give evidence nor have they given disclosure on matters that may be relevant to those issues. Neither party was duty bound to call them or to seek disclosure from them and it is hardly surprising that neither party did so. This leaves the court in the position of having to make the best judgment it can informed by the limited material that is available.

98. The Defendant points out that, in assessing loss of a chance, the court will disregard chances which are negligible. In *Thomas v Albutt* [2015] PNLR 29, Morgan J said the authorities support the conclusion that a chance of a more favourable outcome that was less than 10% should be considered to be negligible. Whilst this threshold is not an absolute rule, it provides a useful rule of thumb for judging what is a negligible risk in a particular case.

99. The first issue to consider is whether, but for the breach of duty, the Claimant and the Owners would have entered into binding agreements for the Development. This issue needs to be judged on the balance of probabilities in so far as it relates to the Claimant's actions and a loss of a chance basis in so far as it relates to the actions of the Owners. However the evidence overwhelmingly supports the inference that the parties would have entered into binding agreements. As I indicated earlier, it is clear that both Mr Shaw on behalf of the Claimant and the Owners acted as though the Other Agreements were in fact binding. This no doubt was because they wanted to develop the Development Land through the intended joint venture. There is no reason to think that, had the Defendant acted appropriately, the parties would not have signed enforceable contracts immediately after incorporation of the LLP rather than shortly before. The Claimant easily proves this on the balance of probabilities and any argument that the Owners would for some reasons have taken objection to signing the Other Agreements a few weeks later is so implausible as not to merit a discount for the chance of it having come to pass.

100. The more difficult question is whether the Claimant and the Owners would, but for the Defendant's breach of duty, have proceeded to develop the land. This is rather less straightforward and involves considering both the position of the Claimant (on the balance of probabilities) and the position of others, including the Owners (on an assessment of a chance basis).

101. Dealing first with the position of the Claimant, the Defendant raises two interrelated arguments as to why the Claimant would not have proceeded with the Development in any event:

    a. That the LLP could not have raised the funds for the Development and accordingly could not perform its side of the Development Agreement;

    b. That Mr Shaw had in fact lost the appetite for the Development;

102. In his first witness statement dated 23 January 2023, Mr Shaw deals at some length with the finances of the Claimant company and its associates. The purpose of that statement was to respond to an application by the Defendant for security for costs. In that context, it is unsurprising that the statement should seek to play up the assets of the Claimant and its associates. At paragraph 23, Mr Shaw refers to the Claimant and several associated businesses (four are named) in which, it is said, the Claimant "*has a financial interest."* The statement goes on, "*The Claimant and its associated businesses provide financial assistance to one another from time to time, in order to facilitate the Claimant's developments, which is dependent on sales and revenue generated from on-going development schemes."* Mr Shaw identifies that the Claimant has two general bank accounts and other site-specific accounts.

103. Mr Shaw explained the finances of the Claimant and associated companies further in his oral evidence. The companies named in paragraph 23 of the first statement are companies in which either the Claimant has a shareholding or with which the Claimant has acted as a partner. Each development would have a particular bank account through which monies relating to the particular development would pass. By this means the finances of the companies are, in Mr Shaw's phrase, "*micro-managed*." Capital to fund the developments might come from bank lending or from moving monies around the companies. However, the latter course requires consideration and justification. It was not simply possible to move money from one company to another to fund a short term cash need without considering whether it was in the interest of the lender to advance the money and, where the particular development involved partnership with others (the majority of the developments), consulting those others about the transfer of the money. The Claimant and associated companies might on occasions buy land, funding that from their own resources, bank funding or private investors.

104. As Mr Shaw explains at paragraph 32 of his statement of 15 September 2023, the Owners' failure to proceed with the Joint Venture meant that the exact basis of the funding of the project was never determined. However, the Claimant sets out an analysis of the Development in a document at B1866 and, within his statement, Mr Shaw explain how he says the construction costs would have been funded.

    a. The total costs for the Development were estimated at £3,040,000 – see B1866;

b. The Development would have taken place in two phases over 26 Months - [30.1] on B299;

c. The sale of 9 houses in the first phase of the development would have part funded the later phase of development – see [20.2] on B300;

d. The Claimant[8] had an offer of funding in principle from the NatWest Bank, its preferred source of funds – [31.2] on B300;

e. However, if NatWest had declined to fund the scheme, there were other potential lenders such as Lloyds Bank plc or other investors - [33.1] on B301;

f. If no other funding was available, Mr Shaw himself would have funded the development – [33.1] on B301.

105. Mr Shaw summarises his position in paragraph 33.2 of the statement of 15 September 2023:

> "*I wish to make it completely clear, that I never had any concerns whatsoever regarding the Claimant funding the Joint Venture because:*
>
> *(a) NatWest had already confirmed its willingness to fund the project, having expressed its satisfaction that the transaction fell completely within its lending parameters;*
>
> *(b) Due to the well-planned structure of the Joint Venture transaction, the loans required were relatively small. The Claimant had already paid the costs of the Initial Administrative Works and discharged the upfront payment of the License Fee to the Owners;*
>
> *(c) The majority of the construction costs for both Phase 1 and Phase 2 would have been paid from the Bank Facility and the entire Joint Venture project was therefore effectively self-funding; and*
>
> (d) *As I have indicated above, I am confident that Lloyds, Close Brothers or Edward Fox-Davies would have funded the Joint Venture as an alternative*

[8] Pursuant to the Development Agreement, it was the obligation of the LLP to obtain the funding – see clause 6. But it appears from Mr Shaw's evidence that the reality was that it was the Claimant who would have arranged the funding.

> *option and if not, I would have ultimately stepped in and funded it personally*."

106. But in cross examination, Mr Shaw volunteered that he would not have risked his own assets on the Development. He stated that he did not have the cash reserves to fund the Development himself, that his wife would have been "*seriously against it*" and that to do so would have "*broken a golden rule*." He was pressed on how this evidence lay with his comments in the statement about funding the development if necessary. He denied that he had changed what he was saying on this issue, asserting that he would not have wanted to fund the Development himself but it would have been a "possibility."

107. I found it impossible to reconcile what Mr Shaw had to say in his witness statement with what he said in the witness box. The statement in court that he would not have risked his own assets to fund the development seemed a spontaneous comment that was not aimed at achieving any particular impression in the mind of the listener. On the other hand, the passage in the statement that he would if necessary have used his own assets appears as part of a carefully drafted account as to why funding would not have been a problem on this development. I consider it highly improbable that he would have introduced his own personal funding to complete the development. Further, Mr Shaw's reasoning, dealt with in respect of Issue 5 below, as to why the Claimant itself did not purchase the Development Land is, whilst persuasive on that issue, suggestive that Mr Shaw did not have readily available the necessary assets to purchase the land, whether in his own name, or though companies that he controlled. Accordingly I conclude that the completion of the joint venture would only have taken place with funding from a third party.

108. Whilst the willingness of the Claimant to proceed with the project is a matter to assess on the balance of probabilities, the ability of the Claimant to raise funding for the project was not a matter within its control, in so far as it depended on third party funding. It follows that the possibility that the proposed joint venture would have failed for lack of third party funding is to be assessed on a loss of a chance basis.

109. The likelihood of such funding being obtained is not easy to assess. Mr Shaw himself was confident that he would have been but my concerns as to his reliability identified above cause me to be cautious about accepting his uncorroborated word on this issue,

especially when it is inevitably a statement not of what actually happened but what he believes would have happened.

110. Whilst I have expressed some doubt about placing reliance on the detail of Mr Shaw's evidence about funding, I am satisfied from his evidence that he is a successful property developer who has been able to ensure that previous projects have obtained the necessary funding. His assertion that he has a "*successful and unblemished track record of delivering profitable development projects with landowners using my tried and tested joint venture development model*" ([9.5] of the witness statement of 15 September 2023) was not challenged. Such success in the property development market supposes a good record of being able to raise the necessary finance and is consistent with Mr Shaw's assertion that he would have been able to raise the necessary finance here.

111. On the other hand, the evidence on this issue is not unequivocally in favour of the position asserted by Mr Shaw. There is evidence of potential difficulty in lending for the scheme, for example in Mr Shaw's email to Mr Whitelaw of 14 July 2015 at B1219. As I have already identified, the Claimant is not able to demonstrate that it had a commitment to lending from any institution.

112. Doing the best I can on the limited evidence, I conclude that the Claimant was at a real but small risk of failing to find the relevant lending. I would put that risk at 20% and the corollary is that the Claimant had an 80% chance of being able to fulfil its side of the bargain in terms of developing the land.

113. The second issue relating to the Claimant's side of the transaction was whether in fact the Claimant still wished to proceed with the scheme by 2017. There is evidence pointing both ways on this issue.

114. In favour of the argument that, but for the Defendant's breach of duty, the Claimant would still have endeavoured to develop the scheme, the following matters are of particular note:

    a. Mr Shaw's enthusiasm for the Development, as expressed both in his witness statement and his oral evidence. However, given my concerns about the reliability of some of what Mr Shaw had to say, I treat this with some caution.

    b. The fact that the Claimant had invested considerable time and money in the project (see for example the email of 17 July 2017 referred to above) and was continuing to do so as the potential deadline was approaching and whilst the

Owners were engaged in offering the Development Land to others as Mr Shaw knew. This is rather more persuasive since it is supported by contemporaneous evidence of efforts by Mr Shaw to ensure the Section 106 Agreement was put in place.

c. The Claimant's continued engagement with the Development, even having expressed concerns about delays in the planning process and the effect that the project was having on the Claimant's working capital, as expressed for example in Mr Shaw's email of 17 July 2017 at B937.

d. The Claimant's development of Willow Grove, a neighbouring site. It was in the Claimant's interest to ensure that the Development Land was developed to a similar high standard as Willow Grove to ensure that this remained a desirable neighbourhood in which to live. The joint development of the sites would also allow the Claimant to control the timing of the release of new houses on to the market and avoid prices being depressed in a flooded market.

115. Against the Claimant wishing to proceed with the project are the following main points:

a. There had been considerable delays in the planning application as noted in the correspondence of Mr Shaw in July 2017 referred to above.

b. Delay in the Development had caused cashflow issues for the Claimant.

c. The Claimant's failure to take a more aggressive line in response to the Owners' contention that the Other Agreements were not binding suggests that his enthusiasm for the scheme had waned. As this judgment shows, there is a clear debate about whether the effect of Section 5(2) of the 2000 Act renders the Other Agreements enforceable notwithstanding the timing of incorporation of the LLP. In addition, there are prospective arguments that the Other Agreements were impliedly varied so as to make the LLP a party to them and/or that the Owners were estopped from denying that the LLP is bound by the Other Agreements. Whilst I have not resolved any of these issues in favour of the Claimant, one might have expected that, if it was keen to proceed with the Development, the Claimant would more aggressively have pursued the Owners to accept their obligations under the Development Agreement rather than speedily to move the target of attack from the Owners to the Defendant. It must be said however that some of this argument relies on the benefit of hindsight.

At the time, the Claimant was faced with a Development Agreement containing a long stop date that expired at around the time when the issue as to the enforceability of the agreement arose. The Claimant was therefore faced with a position where, even if it had been able to advance a persuasive case as to the enforceability of the Development Agreement, the Owners could simply have served notice under the Development Agreement terminating it forthwith. Given that I accept that the Owners were, by September 2017, looking to get out of this agreement in any way that they could, the Claimant would likely then have had a further battle on its hands. In order to drive forward the joint venture scheme any further, the Claimant would have had to advance some new argument as to how the Owners were in breach of their contractual obligations by failing to ensure that a Section 106 Agreement was in place. Such an argument may not have been hopeless but was not obviously bound to succeed. Looked at in this light it is rather less surprising that the Claimant chose not to pursue an argument that the Owners were committed to the scheme pursuant to the Development Agreement.

d. The decision not to buy the Development Land itself. If the Claimant was so committed to this venture, one might have expected it to proceed with a similar development by itself buying the land. However, for reasons that I deal with in respect of Issue 5 below, the purchase of the land by the Claimant was probably never a realistic prospect, notwithstanding Mr Shaw's communications on this issue. The corollary of this is that his failure to purchase the land was probably not evidence of a lack of enthusiasm for the scheme.

e. The so-called brokering of the sale of the Development Land to Artisan. If Mr Shaw wished the Claimant to be involved in the development of the land, one might not have expected him to have assisted the Owners by later assisting in the sale of the land to Artisan. Mr Shaw's evidence on this issue is that he knew the person behind the purchase of the land, who was a friend of his mother. He considered the sale of the land to Artisan to be beneficial to him because the purchaser wanted to hold the land as an investment. This would have assisted Mr Shaw in maintaining the value of Willow Grove. He had therefore assisted in the obtaining of planning consent by Artisan, though he said that he had not recovered any broker fees. This evidence is not contradicted by any other

material and I accept that Mr Shaw's involvement in the ultimate sale of the land was not indicative of any lack of enthusiasm for developing the land himself, but rather reflected the potential benefit to him of Artisan being the purchaser.

116. As I have indicated, this is an issue that falls to be determined on the balance of probabilities, albeit as a hypothetical rather than as an established fact. I have noted that several of the arguments that might appear to indicate that the Claimant did not wish to develop this land in any event are in fact not persuasive points. On the remaining issues, the court has relatively little to go on and inevitably, a judgement of this kind is somewhat impressionistic in nature. On balance, the evidence, in particular the enthusiasm for the scheme expressed by Mr Shaw, leans in favour of the finding that the Claimant still wished to proceed with the scheme at the time that the Owners pulled out and probably would have done so but for the problem with the enforceability of the Development Agreement.

117. I turn to the issue as to whether, but for their ability to argue the lack of enforceability of the Development Agreement, the Owners would have proceeded with the Development.

118. In favour of the argument that they would do so is that, like the Claimant, they had committed considerable time and money to this project. The full extent of that time and money is unknowable since the Owners neither gave disclosure nor appeared as witnesses in this case. But I have little doubt from reviewing the history of this matter as set out in the agreed chronology appended to this judgment that the commitment by the Owners must have involved hard work and expense on their side. Further, the Claimant makes the point that the LLP had been named after a relative of the Owners who used to own the land (see email at B1058). This is suggestive of some reasonable commitment to the project, though of course the decision to name the LLP after a relative preceded the very considerable delays that later beset the project and may therefore be a weak indicator of the Owners' wishes by the time the issue as to the enforceability of the LLP Agreement arose.

119. Against the argument that the Owners would have proceeded with the Development had they been obliged to do so is their very clear desire to pull out of this deal and to sell the land rather than being involved in the Development. Whilst again, the lack of

participation by or disclosure from the Owners prevents the court from having a full understanding of their position, it is understandable why they might want this. As Mr Shaw himself explained in oral evidence, the advantage to his company of development through the Joint Venture was that it diverted risk to others, particular the Owners. When asked about the risk that the Owners were bearing in the Joint Venture, he identified that, assuming the Development was funded by a loan, the loan would have been secured on the land and if the Claimant defaulted on the loan, the bank would have enforced against the land. Thus the Joint Venture model involved the Owners taking risks that would be avoided by the outright sale of the land before development.

120. Further, on any version of events, the Development was taking some considerable time to come to fruition. Mr Shaw himself raised the point about the length of time that the planning process was taking, for example in his email of 26 April 2016 at B2113. He said in oral evidence that the Owners had expressed concern about the slow progress and there was, as he put it, "*a lot of frustration on both sides."* At paragraph 21.6 of his statement of 15 September 2023, Mr Shaw acknowledged that the delay in the planning process was causing the Owners to make what he describes as "*unwarranted criticism*".

121. It would appear to be the delay in securing planning permission and therefore bringing the Development to fruition that lad to a series of communications between the Claimant and the Owners about the possibility of a sale of the land to the Claimant. It is necessary to deal with this issue as a discrete point of mitigation below but what is clear from Mr Shaw's evidence is that, whether the Claimant or Mr Shaw in fact had any interest in buying the land and developing it on their own, Mr Shaw perceived that the Owners were showing some reluctance about proceeding with the Development from mid-2016 and that he thought it was desirable to make offers to buy the land. In paragraph 22.4 of his statement of 15 September 2023, he speaks of this being "*a means of keeping the Owners on my side during the further period of delay"* and *"buying myself extra time to enable the Joint Venture to proceed."*

122. Mr Shaw explains in his statement at paragraph 24.1 that he became aware in February 2017 that the Owners were offering the Development Land for sale. He spoke to Mr Giles about this who said that the Owners "*wanted to realise their capital from the Development Land as soon as possible."* There were several subsequent occasions on which Mr Shaw speaks of being aware that the Owners were trying to sell the land and

he ultimately became concerned that they were looking for a way of getting out of the Joint Venture.

123. This led Mr Shaw to re-engage with the Owners about the possibility of an outright sale of the land to him. In cross examination, Mr Shaw asserted that "*he knew*" that the Owners were bound to proceed under the Development Agreement but that he wanted "*a fallback plan"* should the Development not go ahead under the Joint Venture. Of course, the deadline date in the Development Agreement meant that there was always a possibility that, even on the assumption that the agreement was binding, the Owners might rescind the agreement if a Section 106 Agreement was not entered into. But the sequence of events from early 2017, well before the imminent expiry of the deadline, shows a distinct lack of enthusiasm from the Owners in developing the land pursuant to the Joint Venture as opposed to selling it. Following negotiations in April 2017, the Owners accepted in principle an offer from Mr Shaw to buy the land for £512,500. Later, in July 2017, Mr Shaw said that he did not have the resources to proceed (see email from Mr Shaw of 17 July 2017 at B937). In cross examination, he said of the proposed purchase that the offer to buy was in fact an attempt to "*keep the Owners warm*" if the Joint Venture appeared to be falling through and that he was using it as a position from which he might negotiate. Regardless of whether this is correct, the willingness of the Owners to negotiate on a sale is consistent with Mr Shaw's discovery that they were talking to other potential purchasers. Taken together, this evidence gives a strong impression that, by mid-2017, the Owners did not wish to proceed with the Joint Venture but rather were keen to sell the land outright. That of course is what ultimately happened with the sale to Artisan.

124. By August 2017, Mr Shaw had formed the view that the Owners were deliberately delaying signing the Section 106 Agreement and that the appointment of new solicitors to act for them was part of this plan. He expressed concern that the Owners were frustrating the Claimant's ability to proceed with the Joint Venture (see for example the email of 25 August 2017 at B910). He later formed the view that the Owners were "*generally untrustworthy and intent on satisfying their own personal gains, because they had inter alia:*

    (i) offered the Development Land for sale elsewhere, whilst deliberately ignoring the existence of the Agreements they had signed in good faith, to

seek a potentially more lucrative deal for themselves, with total disregard to the ongoing consequences for the Claimant;

(ii) allowed the Claimant to waste very significant time, costs and resources; and

(iii) deliberately protracted the matter, to attempt to cause the long-stop date in the Development Agreement to expire, which they did blatantly when refusing to execute the Section 106 Agreement that the Defendant had approved, causing their own solicitor Alan Gittins to resign due to his uncomfortableness and conflicts of interest – the conduct was also pre-meditated as the disclosure reveals that the Owners had been looking at a way to get out of the Agreements for some time." (see paragraph 28.5(d) of his statement of 15 September 2023.

125. It is against this background that the loss of the chance of the Joint Venture proceeding to fruition has to be assessed. Of course this counterfactual analysis supposes that the Owners were legally obliged to perform their obligations under the Development Agreement. But, by the time the issue with the enforceability of the agreement came to light, the possibility of the Owners rescinding the agreement because a Section 106 Agreement had not been put in place was obviously a real and imminent risk. Had the deadline in the Development Agreement passed without a Section 106 Agreement being in place, there is a very real chance that the Joint Venture would have failed in any event.

126. In these circumstances, it would have been open to the Claimant to threaten to bring or actually to bring a claim based on the argument that the Owners' failure to sign the Section 106 Agreement was a breach of the Development Agreement (the argument probably being that there were implied terms of good faith or similar that prevented the Owners from deliberately frustrating the agreement in this way) but the prospects of success of such a case would have been uncertain. I have not heard argument on the issues that would have been engaged and one only has to state the basis for bringing such a claim in order to see the potential difficulties that such litigation would have had – in the commercial sphere, litigation based on implied terms of good faith or similar is rarely straightforward. Further, the Claimant would probably not have had the appetite to pursue that argument – after all, it did not pursue the argument that the LLP Agreement was in fact binding on the Owners, even though the vigour with which the

Defendant has argued the point in this case would suggest that such an argument had at least as reasonable prospects of success and is not obviously a weaker case than an argument based on breach of duty through failing to sign the Section 106 Agreement.

127. Weighing these matters in balance points towards the conclusion that it is more likely than not that the Owners would in any event have found some reason not to continue with the Development Agreement, probably by not signing the Section 106 Agreement. The Defendant in its skeleton argument puts the case on the basis that "*in reality, the Owners would never have executed the S106 Agreement."* In the language of loss of a chance claim, that supposes that there was no more than a negligible chance of the Owners in fact executing such an agreement. In my judgment, that overstates the strength of the Defendant's argument on this issue. The Owners had on the face of it an obligation to sign a Section 106 Agreement. The court will normally work on the assumption that contractual parties will deliver on their promises. But the evidence that the Owners were seeking to extricate themselves from the Joint Development is so strong and the possibility of success in their attempts so real that I am driven to the conclusion that this was the Owners' intention and that there was a real and significant risk that the Owners would have succeeded in their aim even if the Development Agreement had been enforceable.

128. The loss of a chance here is a somewhat technical analysis since, for any counterfactual argument that the Owners may have advanced to avoid a liability under the Development Agreement, one must consider how the Claimant would have responded (to be assessed on the balance of probabilities) and then conclude from that response what if any loss of a chance has occurred. In reality, such detailed analysis is impossible where the court inevitably has not had (and realistically could not have had) the potential scenarios fully argued out in front of it. It is therefore necessary to take an overview.

129. Given the compelling evidence that the Owners wished not to proceed with the Joint Development and the Claimant's lack of enthusiasm to try to force their hand when the Owners did raise an issue with enforceability of the Development Agreement, I would assess the chance of the Joint Venture being followed through, had the Defendant not been in breach of duty and had the Claimant been able to raise the necessary finance, at 40%.

130. It might be argued that there are other potential issues that might affect whether the Development would have gone ahead, but all are so improbable as not to merit any further discount for the loss of a chance. Certainly no other potential contingencies have been advanced and I do not further discount for other theoretical risks.

131. Given my finding that the Claimant's chance of raising the necessary finance to perform its side of the bargain and to achieve that loss of chance of profit was 80%, and given that the risk of the Claimant not obtaining the relevant finance is wholly independent of the risk of the Owners not proceeding with the Joint Development, the overall chance of the Claimant making the relevant profit was therefore the cumulative chance of the Joint Venture being followed through (40%) and the relevant finance being obtained (80%), that is 40% x 80% = 32%[9].

ISSUE 5 – MITIGATION – FAILING TO BUY THE LAND

132. The issue as to why Mr Shaw did not proceed with his offer to buy the Development Land has been examined in detail above. His evidence is that he made several apparently serious offers to do so before the difficulty with the enforcement of the Development Agreement came to light. His explanation for doing so seems to have been to try to ensure that the Owners did not sell the land to others. Since his negotiations were no doubt subject to contract, he was doubtless entitled to make offers even when he did not intend to be bound by them. The Defendant contends that this reflects adversely on his credibility, though when it was put to Mr Shaw that some of his communications were lies, he responded that he was not lying but was "*stringing the Owners along*" or "*establishing a fallback position*."

133. For reasons I have identified, I do not consider that the Claimant or Mr Shaw ever seriously intended to invest their own funds in this development. Their reasons for not doing so, explored above, are perfectly rational and reasonable – in essence, this is not the business model that Mr Shaw wished to pursue. Any suggestion that he might in fact have been willing to do so was merely a feature of his attempt to sustain his relationship with the Owners and to keep the Joint Venture on track. Given that his

[9] See the judgment of Robin Knowles J in *Bugsby Properties v LGIM* [2022] EWHC 2001 for a similar approach to a case where the judge considered that there were two unconnected contingencies that needed to be factored into the claim for a loss of a chance.

position was a reasonable commercial position to take, I am not persuaded that the Claimant can be said to have failed reasonably to mitigate its loss.

ISSUE 6 – QUANTUM – OVERARCHING MATTERS

134. The assessment of quantum for the Claimant's lost chance involves consideration of the profit (if any) that the Claimant would have made had the scheme at School Road proceeded. In turn that requires consideration as to the costs of the Development and the profit to be made from the sale of the properties. The former issue was addressed by Quantity Surveyors, Mr Steven Howe instructed by the Claimant and Dr Ronan Champion instructed by the Defendant. The latter issue was addressed by Valuers, Mr Mark Morison instructed by the Claimant and Mr Paul Raine instructed by the Defendant.

135. I have identified above three general points as to quantum that have been raised.

    a. Would the Claimant have developed the Development Land alongside Willow Grove?

    b. When would the Development have occurred?

    c. Would the Development have included the Section 73 variations contended for by the Claimant?

136. Within his first report, Dr Champion for the Defendant considered in section 5 whether the Claimant would in fact have developed Willow Grove at the same time as the Development land. If, as he suggests may have been the case, the Claimant would not have chosen to develop both sites concurrently, it is arguable that the Claimant has suffered no loss as a result of the failure to develop the Development Land or, at the very least, that the profit on Willow Road should be set off against any alleged loss of profit on the Development on the basis that, in the counterfactual scenario, Willow Grove would not have been developed.

137. This argument is by no means straightforward. Mr Shaw's evidence is that it would have been possible to develop the sites at the same time. Further, the counterfactual scenario may have involved considering whether, with the potential for developing both sites, the Claimant would have been able to do so sequentially rather than concurrently. But in the event, this was not a point pursued by the Defendant either in opening or closing submissions. I found Mr Shaw's evidence that he would have proceeded with

both developments (if he could) to be persuasive. The chance that funding problems would have prevented him from doing so is already reflected in the loss of chance assessment referred to above. Accordingly, I find that the counter factual scenario should be approached on the basis that both the Willow Grove and the Development Land would have been developed at around the same time.

138. Turning to the date of development, the original positions of the Quantity Surveying experts were as follows:

a. Mr Howe – that the construction would have commenced in June 2018 and taken 36 months, given a mid-point for costings of the end of 2019;

b. Dr Champion – that the construction mid-point would have been the end of 2021.

139. In their second joint statement, these experts agreed a Tender Price Index of 333. That appears to assume Mr Howe's mid-point of the end of 2019, given what is said at [4.2] of the first joint statement at B649 (though in his report of 12 January 2024, at [1.2.2] on B617, Dr Champion gives the same index for a mid point of mid-2020 – it is not clear whether there may be an error here). The agreement on the Tender Price Index is helpful to the calculation of quantum, though the difference on the date to which that relates may have a consequential effect on the dates for valuation of the various properties.

140. The valuers assume different valuation dates – those dates are staged as set out in Appendix A to the Second Joint Statement of the valuers, but in essence are in the range 2019 to 2021 in Mr Morison's opinion and in the range 2020 to 2022 in Mr Raine's opinion.

141. Given the myriad of other issues to address in the case and the fact that the difference of valuation date makes only a small difference to the figures, the parties did not address the issue in closing submissions. The obvious unpredictability of timings in contracts means that in reality it is impossible for the court to make findings of fact on the issue in the counterfactual scenario of this development having taken place. If one takes the approximate midpoint of the construction (which as I have noted is itself uncertain), the dates given by Mr Morison seem a little optimistic but the dates of Mr Raine a little pessimistic. I consider that the best approach to this issue is to take the midpoint of

dates contended for by the valuation experts and to base the valuation on the midpoint of their figures, adjusted to reflect other factors as appropriate.

142. The third preliminary issue is as to the inclusion of the Section 73 variations achieved by Artisan in the hypothetical costings and profits of the Claimant. The Defendant has not argued with any enthusiasm that these should be excluded from the calculation. This is unsurprising. It is clear that the Claimant was trying to seek variations to the planning permission. No doubt the purpose of those variations would have been to maximise profit on the development. I see no reason to think that the Claimant would not have sought and achieved the same variations as ultimately were achieved by Artisan. Accordingly I factor those variations into my calculations.

ISSUE 7 – QUANTUM - THE COSTS OF DEVELOPMENT

143. As I have indicated, both parties instructed Quantity Surveyors, Mr Steben Howe instructed by the Claimant and Dr Ronan Champion instructed by the Defendant. Their evidence was contained in the following documents:

a. Mr Howe:

First report	8 December 2023
Supplemental report	12 January 2024

b. Dr Champion

First report	8 December 2023
Supplemental report	12 January 2024
Erratum report	25 January 2024

c. Joint statements:

First joint statement	22 December 2023
Supplemental joint statement	13 February 2024

144. Each expert answered questions carefully, making appropriate concessions. The methodology used by the two experts differed. For reasons that I will identify, I found both strengths and weaknesses in each of their approaches. In light of this, I am satisfied that there is no single true answer to the question as to what the costs would have been, but rather that there is a range within which the best estimate lies. Having examined the

methodology of each of the experts, I shall identify the range and indicate where within the range, the best estimate can be found[10].

145. Mr Howe's opinion is summarised in a document comparing his figures with those of Dr Champion at B575. The figures in that document are almost the same as those in the Claimant's updated Schedule. The similarity and differences between the claim in the document at B575 and that in the updated Schedule are:

a. Planned development costs of the original plan – the same at £3,318,039

b. Planned development costs of the Section 73 variations – plots 2, 3 and 4 are calculated at £103.94 per square foot at page 575, with the addition of CIL costs of £19,339, whereas the costs in the schedule are calculated at £148.27 per square foot inclusive of Community Investment Levy ("CIL") costs.

c. The costs for the additional attic area in plot 8 (also a Section 73 variation) are the same.

d. The additional losses are the same.

146. As to Dr Champion's opinion as summarised in B575, that is a little different from the counter schedule because account is taken of the so-called Section 73 variations. The similarities and differences between this document and the counter schedule are:

a. The development cost of the original development is slightly higher in the counter schedule;

b. The section 73 costs are included at B575 but not in the counter schedule.

147. The differences between the opinion of Mr Howe and that of Dr Champion are set out in the table attached to their Supplemental Joint Statement at B575 and may be summarised as follows:

a. Mr Howe uses a building cost for the original development and the Section 73[11] variations of £104/ft^2; Dr Champion uses £134/ft^2 for the original development and, if appropriate, the Section 73 variations that Mr Howe costs.

b. Mr Howe calculates offsite costs at 9.8%; Dr Champion uses a figure of 9.5%.

[10] I am grateful to counsel for the Claimant for pointing out two inconsistencies in the first draft of this judgment as to the figures for which the experts were contending and the significance of those figures to the analysis of this issue. Those inconsistencies have been corrected in this final draft.
[11] Apart from the additional attic area in plot 8, where it is agreed that a lower rate should apply.

c. Mr Howe does not add any extra figure for finance costs; Dr Champion adds £50,000.

d. The experts differ on their treatment of additional losses. (I have separated this out as Issue 9 below and shall not deal with it further at this stage.)

148. I deal first with the difference in approach as to the "per square foot" figure for building costs.

149. Mr Howe's approach to calculating this figure is take an "all-in" development cost rate of £148 per square foot, this being the figure provided by the Claimant to him (as can be seen in the Schedule at B75) and to apply that to the gross internal floor area of the development (without Section 73 variations) of 22,379 ft^2. This gives a total figure of £3,318,039. From this, Mr Howe deducts 16% to reflect "offsite costs" a figure that is said to be representative of such costs and is drawn from the table provided by the Claimant at B5556. The drainage costs of £348,955 referred to at B669 are then deductions, giving a net figure which, divided by the total internal square footage gives the net figure of £104/ft^2 for the cost of building excluding drainage and offsite costs.

150. Mr Howe then looked to the Building Cost Information Service (BCIS) Comprehensive Building Price Book to see how the building costs therein compare with the figure that he has calculated. Applying the figures for the relevant period and relevant region, those figures show a mean figure of £119/ft^2 with an inter quartile range of £104/ft^2 to £137/ft^2 (see [3.3.12] on B670), which would put Mr Howe's figure very much at the bottom of the expected range.

151. However it is Mr Shaw's evidence that his company uses a model where, instead of appointing a main contractor, the developer itself enters into direct contracts with sub-contractors and directly employing labour, thereby achieving a saving of 15-20% on typical building costs.

152. If that discount is applied to the figures referred to at [3.3.12] on B670, Mr Howe's figure lies in the middle of the range and appears less of an outlier.

153. This approach of stripping out costs other than direct build costs is helpful because the difference of opinion between the experts related to those build costs and not other costs. The drainage and offsite costs are separately added back into the total after the build costs are calculated.

154. Dr Champion's approach to the build costs involves the starting point of the BCIS figure then to apply an increase to that of 15% to reflect the fact that this is a high quality scheme, giving a total figure of which he takes to be £134/ft^2. He then cross checks this against the Claimant's costs for the Willow Grove development.

155. Mr Howe and Dr Champion have both commented on the other's approach and each were cross examined on their approach. There are potential problems with whatever approach is taken to costing in a case such as this, as Dr Champion acknowledged in his report.

156. The parties have not approached this issue on the basis that the court make detailed findings of fact on all the matters underlying the costing. Rather they have each sought to persuade the court that they have the better of the argument and that, if there is a range of costings, the evidence favours their position. That is a realistic approach to an issue which, if fully litigated, would have caused the trial to be significantly longer.

157. The major points to be taken against Mr Howe's approach are that it assumes the accuracy of the Claimant's own estimate as to development costs and that it assumes a saving for the Claimant's construction management model that is not obviously correct. The difficulties with Dr Champion's approach are that he somewhat arbitrarily ascribes an uplift to reflect the quality of this site, appears to ascribe costs based on a brownfield development (which would be higher) to what in fact was a greenfield site and fails to reflect what Mr Shaw says is the real saving from his construction management approach.

158. None of the points taken by the experts are obviously wrong such as to cause me to dismiss them out of hand. I am conscious that the Claimant's estimated development cost may be an unreliable figure and is not closely rooted in material that allows the court to examine how it is calculated. I also consider that BCIS material coupled with the obvious quality of the development (which was common ground between the parties and the experts) is likely to point to a higher build cost than might otherwise be the case. On the other hand, I accept Mr Shaw's evidence that his construction model will achieve some saving on costs.

159. Balancing these factors points to a figure somewhere in the range of Mr Howe's mean figure of £104/ft^2 and Dr Champion's uplifted figure of £134/ft^2. Doing the best I can, I take the midpoint of those figures, £119/ft^2.

160. Turning to the issue of the correct calculation of offsite costs, the difference between the position of the parties is, as noted above, negligible. I can see no obvious basis for preferring either Mr Howe's figure of 9.8% or Dr Champion's figure of 9.5%. However, it would appear that the higher figure contended for by Mr Howe includes finance costs whereas Dr Champion's lower figure may not. For reasons explored more fully under Issue 9 below, I take the higher figure for which the Claimant contends but do not separately allow for finance costs.

161. It follows then that, apart from the issue dealt with at Issue 9 below, the development costs are as follows:

Building costs – original plan = 22,379 ft^2	£119/ft^2 x 22,379	£2,663,101	
Section 73 variations – plots 2, 3 and 4 - 1,435 ft^2	£119/ft^2 x 1,435	£170,765	
Section 73 variation – plot 8 - 675 ft^2	Agreed	£54,000	
Total Building costs			£2,887,866
External works costs	Agreed		£504,955
Offsite costs	£3,066.471 x 9.8%		£300,514.16
CIL	Agreed		£227,909
Net development cost			£3,921,244.16

162. From this figure falls to be deducted the landowner distributions both for the original development and the section 73 variations. It may also be that the licence fee of £25,000 should be deducted though the experts' second joint statement appears to state that this figure would in any event be deducted from the Owners' distributions so would not be deducted twice.

ISSUE 8 – QUANTUM - VALUATION

163. It is helpful to start by summarising the issues between the valuers, then setting out their respective opinions on those issues. In this respect, I draw heavily from the table in their second joint statement at B580[12] ("the Valuation Table".)

[12] In fact, the table does not exactly match the text above especially as to what is agreed – for example paragraph 2.5 reflects a difference in opinion between the experts which is not mirrored in the Valuation Table, where the

164. The differences between the experts are:

a. The appropriate date for valuation. The dates for which each expert contends are set out in columns E and F of the Valuation Table. Given my finding in respect of the timing of completion of the development under Issue 6 above, I will take a midpoint of the valuations to reflect my findings on the valuation date issue referred to at Issue 6 above and the assumption that the increase in values between any two dates for which the valuation is known is linear.

b. Whether the floor areas as affected by the Section 73 variations should be used. In my judgment they should be used, for reasons given above. Thus the relevant floor areas are those in columns C of the Valuation Table and hence I disregard columns G and H.

c. What if any discount should be applied to the valuations to reflect contingencies.

165. Turning to the figures in the Table at B580, it follows that the court is looking for a valuation on the basis of floor Area C, but calculated according to Valuation Date E and Valuation Date F, taking the midpoint between those valuation dates to reflect the finding above. It will be noted that, in column I, Mr Raine has given the valuation based on floor areas C but valuation date E. The valuation on date F can be calculated by adding back in deductions that he has included to reflect the lower valuation at the earlier valuation dates given by Mr Morison.

166. This gives the following figures:

Plot No.	Floor Areas	MM market value	PR market value	
		Based on floor area and valuation date E	Based on floor area and valuation date E	Based on floor area and valuation date F
1.	122	£375,000	£375,000	£375,000
2.	187	£615,000	£525,000	£550,000
3.	167	£540,000	£475,000	£500,000
4.	144	£490,000	£427,500	£475,000
5.	170	£545,000	£517,750	£545,000

figures are the same. I have taken the Table to be accurate since otherwise the difference in opinions are not only unexplained but not recorded in a way that allows quantum to be calculated.

Plot No.	Floor Areas	MM market value	PR market value	
		Based on floor area and valuation date E	Based on floor area and valuation date E	Based on floor area and valuation date F
6.	170	£545,000	£517,750	£545,000
7.	140	£445,000	£422,750	£445,000
8.	228	£525,000	£522,500	£550,000
9.	116	£380,000	£380,000	£380,000
10.	98	£270,000	£270,000	£270,000
11.	98	£270,000	£270,000	£270,000
12.	127	£347,500	£347,500	£347,500
13.	64	£200,000	£200,000	£200,000
14.	98	£275,000	£275,000	£275,000
15.	69	£115,000	£115,000	£115,000
16.	69	£115,000	£115,000	£115,000
17.	108	£317,500	£317,500	£317,500
18.	102	£300,000	£300,000	£300,000

167. As counsel acknowledged in their submissions, the difference between these figures is relatively minor. In reality, it is probably within the margin of error for valuation evidence, though I note that, the valuers having agreed some figures, they were unable to agree others which suggests that they consider the differences to lie outside of any margin of error.

168. One approach to this issue is to consider it at the same time as considering other issues as to valuation evidence as set out below. However, since there is no difference in the experts' valuations of some properties, but there is a difference in their valuation of others, I consider this to be an unsatisfactory approach, since the court might have to take a different approach on the discount argument depending on whether the valuation of the properties were agreed. Rather, the court should seek to identify a figure bearing

in mind that it is valuing at the midpoint of the valuation dates proposed by the experts and therefore inevitably it does not have direct evidence of the valuation as at that date.

169. Given that Mr Morison has not valued the properties at the date of Mr Raine's valuation and that, if he had done so, he would presumably have increased the value by a similar proportion to the difference that Mr Raine has used for the difference between the earlier and later valuation dates, the court can reasonably assume that the midpoint of the range of valuation will be the midpoint of the valuation of Mr Morison on the earlier date that he takes and the valuation of Mr Raine on the later date that he takes. That leads to the following figures:

Plot No.	MM market value at valuation date E	PR market value at valuation date F	Midpoint
1.	£375,000	£375,000	£375,000
2.	£615,000	£550,000	£582,500
3.	£540,000	£500,000	£520,000
4.	£490,000	£475,000	£482,500
5.	£545,000	£545,000	£545,000
6.	£545,000	£545,000	£545,000
7.	£445,000	£445,000	£445,000
8.	£620,000	£550,000	£585,000
9.	£380,000	£380,000	£380,000
10.	£270,000	£270,000	£270,000
11.	£270,000	£270,000	£270,000
12.	£347,500	£347,500	£347,500
13.	£200,000	£200,000	£200,000
14.	£275,000	£275,000	£275,000
15.	£115,000	£115,000	£115,000

Plot No.	MM market value at valuation date E	PR market value at valuation date F	Midpoint
16.	£115,000	£115,000	£115,000
17.	£317,500	£317,500	£317,500
18.	£300,000	£300,000	£300,000
TOTAL GROSS DEVELOPMENT VALUE			£6,670,000[13]

170. I take the figures in the right hand column of this table to represent the true valuation of the individual houses subject to the Defendant's argument that those figures should be discounted.

171. Turning to the discounts for which the Defendant contends, there are two bases, in each case said to be valued at 5%:

a. A discount for "the margin of uncertainty;"

b. A discount for the simultaneous completion and therefore marketing of the Development Land and Willow Grove.

172. In respect of the first issue, Mr Raine contends that there is an inevitable discount to be given to the development value reached on a theoretical basis to reflect the fact that the sales would have been, at least at the start of the development, off plan and that there are no similar developments in the area. He supports this discount by stating that he considered the gross development value for the Development Land was, by reference to the sales or properties on the Willow Grove Site, at the upper end of the valuation range.

173. When cross examined on the issue of the margin of uncertainty, Mr Raine says that this always applies as a discount; the uncertainty of a development would never enhance rather than reduce the market value reached by more conventional means. He

[13] I am again grateful to counsel for the Claimant for pointing out errors in the calculation of the market value of plots 4 and 8 in the draft judgment that was circulated. Those errors have been corrected in [166], [169] and [179] of the final judgment.

emphasised that, at least where the site is "muddy" (that is to say incomplete), the putative buyer has to have regard to plans and drawings to anticipate the completed result and this will tend to depress what they would be willing to pay.

174. On the second issue, Mr Raine refers to the fact that the Development Land and Willow Grove would have been in competition with each other and this would have resulted in a reduction in prices on each site.

175. In cross examination, Mr Raine was asked about the extent to which the developer who was in control of both the Development Land and Willow Grove might have been able to control the timing of properties coming on to the market so as to minimise the effect of marketing both sites at the same time. He responded that he had worked to the phasing that he had been given for the probable completion of properties on the site (and assumed marketing that would have ensured the properties were sold once complete).

176. In his evidence, Mr Morison accepted the possibility of the Willow Grove development having some depressive effect on the sale process of houses on the Development Land, but he doubted that the overall impact of such uncertainties would have been as great as the 10% total discount for which Mr Raine contended. He considered that demand at the relevant time was sufficiently large in this area to absorb the impact of the two developments completing at around the same time, especially as the housing at Willow Grove was generally of a smaller size such that the two developments were not directly comparable and therefore not directly in competition.

177. Of course, the uncertain nature of the development could in fact have enhanced prices in the area by making it a more attractive place to live. In any event the development is not so large as to swamp the market and again the simultaneous completion of properties on two development sites might have been attractive to some purchasers. But I accept the Defendant's contention that, on the whole, the combination of, first, the uncertainties consequent upon the fact that, at least in the early period, sales at the Development Land would be off plan and, second, that the Claimant would have been completing and marketing two developments in the same location at around the same time, would have been more likely than not to have depressed rather than enhanced prices from the theoretical gross development values on which the experts have opined and/or to have depressed the prices on the Willow Grove development from that which

the Claimant in fact was able to achieve. As the Claimant has pointed out, these factors would have been less cogent in respect of the affordable units in he Development.

178. In order to reflect the possible combined effect on the Claimant's overall profits of these two forces, I consider it more straightforward to give a single discount figure from the total value of all the properties on the Development Land, rather than giving a discount on the ultimate sale price of properties on the Development Land and, in addition, giving a discount for the lesser profit that the Claimant would have received on the Willow Grove site on the counterfactual scenario, though of course that discount must reflect the fact that, in the counterfactual scenario, both figures may have been depressed. I am not persuaded that an overall discount as high as 10% could be justified even having regard to the possible effect of the supply issues on the sale prices on both sites. On balance, I consider a 5% discount for the combination of these two uncertainties to be a sufficient mark of their probable effect on valuation.

179. Thus I find the gross development value of the Development Land, had it been completed, to be 95% of £6,670,000, that is £6,336,500.

ISSUE 9 – QUANTUM – THE ADDITIONAL COSTS

180. There are three areas of additional costs which the parties contend are relevant to the quantification of the claim:

a. Finance charges;

b. Administrative costs;

c. Legal fees.

181. The issue that arises in respect of the first of these, the finance charges, are different than the issues relating to the other two. I deal with the finance charges first.

182. In his report, Dr Champion deals with the finance charges as a cost of funding the Development. He points out at [4.3.13] that, on the Claimant's case, funding would have been necessary to complete the Development. Since it is a project specific cost, it is something that should be included in the costs of the Development. He estimates that the necessary funding would have involved borrowing £534,000 in the first year of the Development and £360,000 in the second year at an approximate cost (by way of interest) of £50,000. In the second joint statement, he refers to this issue at B572, stating

that "*if borrowing as part of a JV, it is estimated loan interest would amount to £50,000. If borrowing on a sole basis, loan interest would amount to approx. £108,000.*"

183. The Claimant's case is that the costs of funding the loan were already included in the "offsite" costs referred to above (see Mr Howe's report at [2.2.8]). The material before the court does not allow me to work out whether in fact finance costs were included by the estimates of each expert because the percentage figures given are not broken down. Indeed, Dr Champion conceded in cross examination that in fact these costs might already have been included in the offsite costs as estimated by him. Given that the interest costs are a cost of the Development that would have to be included at some point, the best I can do is to assume that they are included but to take the Claimant's slightly higher figure for development costs (the effect of which is of course is to reduce the anticipated profit from the Development), on the ground that I can be confident from Mr Howe's assertion that the interest costs have been included in his figure of 9.8% but I cannot be confident that they are included in Dr Champion's figure of 9.5%. For this reason, I make no separate discount to the claim to take account of funding costs.

184. On the other matters, that is to say administrative costs and legal fees, the parties take directly opposite stances. The Claimant's case is that these costs are additional losses that ought to be added in to the claim. The Defendant contends that they are additional losses that should be deducted from the claim.

185. The Claimant's case is that it has incurred fees, charges and expenses in respect of the Development which have been wasted because of the Defendant's breach of duty. Had the Development proceeded, these costs would have "*always have been incurred"* but the Claimant would have been able to "*offset or recover"* these costs on the Development (see Mr Howe in the joint statement at B573). Thus they should be recoverable as damages.

186. On the Defendant's side, Dr Champion considers that these costs are abortive development costs that relate to the Development and should be deducted from the claim.

187. The experts are in my judgment both wrong on the facts of this case. Whilst it is correct that abortive costs may be recoverable as a separate head of loss and that costs that would have been incurred in the Development may need to be deducted as part of those

costs, the counterfactual situation here is that the Development would have gone ahead. As I have indicated, Mr Howe says that the costs would then have been incurred in any event. If this is correct, it cannot be right that they are losses that flow from the Defendant's negligence causing the Development not to proceed that should be added to the profit that would have been realised had the Development proceeded. On the other hand, whilst they are a development cost that one might have had to discount if they had not been incurred, the Claimant has on the evidence in fact incurred such costs so to discount them as part of the claim would be to cause the Claimant to suffer twice over the loss that it would only have suffered once on the counterfactual. It follows that these costs fall neither to be added to the claim as consequential losses nor deducted from the claim as part of the costs of the Development. They play no part in quantifying the claim either way.

ISSUE 10 – QUANTUM – OTHER MATTERS

188. During the course of closing submissions, counsel for the Claimant indicated that, with the answers to the issues addressed above, it was possible for the parties to calculate the quantum of the claim. If in fact there are any outstanding matters that require determination these can be addressed as part of matters consequential upon this judgment.

CONCLUSION

189. It follows from the above that:

a. I give judgment for the Claimant;

b. The quantum of that judgment is based on the loss of a chance assessed as 32% of the profit that the Claimant would have made if the Development had gone ahead.

c. That profit is to be calculated on the findings as to the development costs and the likely value of the developed site as set out above.

190. Having seen the draft judgement, the parties have suggested corrections and made submissions on points upon which they have sought clarification and consequential matters. In the Claimant's case this has included making an application for permission to appeal. I agree that, having handed down judgment, the appropriate order is to list matters for a further hearing to deal with the outstanding issues.

AGREED CHRONOLOGY

This chronology sets out the key events and documents and attempts to summarise them in a neutral fashion. It will be followed by a short dramatis personae identifying the key individuals involved. Lines shaded blue are agreed in so far as they represent the content of witness statements

Date	***Description***	***Bundle Page No.***
2 Apr 1997	C date of incorporation	
2005	Mrs Shaw suffers serious illness and steps back from C's business [Shaw 2 §9]	
25 Sept 2007	Owners purchase the land known as The Stores, Kinnerley, Oswestry and registered at HM Land Registry with title number SL187487 for £88,000.	
6 Dec 2007	Chartland date of incorporation (as an LLP)	
31 Jan 2010	D date of incorporation (as an LLP)	
10 Feb 2014	Owners' application for outline planning permission ref 14/00581/OUT for a development of 12 dwellings	
Feb 2014	D's 'Work Schedule' re: s. 106 Agreement for the Owners; estimated completion date 4 weeks from 18 Aug 2014; fixed fee of £1,750	4573
24 Jun 2014	D's conflict check / internal risk assessment re: the Owners	4577
4 Jul 2014	Email Mr Gittins to Shaun Jones (16:19): instructed by Owners; requesting detail / copy correspondence re: proposed terms of s. 106 Agreement; any other issues we need to address?	4595
7 Jul 2014	D's 'new matter' and 'client/matter profile' documents re: the Owners	4581
16 Jul 2014	Email Mr Gittins to James Felton (Setfords) (12:48): undertake to pay Setfords' costs up to £450; request draft s. 106 Agreement and planning permission Email James Felton (Setfords) to Mr Gittins (22:06): attach draft s. 106 Agreement and decision notice	4597 4596
22 Jul 2014	D's conflict check, internal risk assessment, identity record, and 'client/matter profile' re: the Owners	4598
7 Aug 2014	Letter Mr Gittins to the Owners: have received draft s. 106 Agreement and planning permission; suggest meeting; enclose documentation re: proposed costs and pricing options; request for ID	4599
Autumn 2014	Mr Shaw discovers the School Road development opportunity [Shaw 3 §9.1]	
Sep/Oct 2014	Owners' agent calls Mr Shaw to enquire about interest in School Road development [Shaw 3 §9.2]	
Sep/Oct 2014?	Mr Glenister hears from Emma Wilde (D) about a new transaction coming in to D with a similar format to one that she was dealing with [Glenister §12]	

Date	*Description*	*Bundle Page No.*
15 Sep 2014	D's identity record re: the Owners	4572
3 Nov 2014	Email Mr Shaw to Mr Giles (18:54): C would be interested in developer/landowner agreement; explanation of agreement structure and legal charge; mutually appointed solicitor; site layout with 16 dwellings; conservative sales of £3.755m giving Owners £751k; arrangement will suit client who can defer income or who seeks to retain control [Shaw 3 §10.1] [Glenister §10]	2098
Nov 2014	Agreement between C and Owners to develop the Development Land through the Joint Venture; instruction of D [PoC §§5,6] [Def §7.3]	
12 Nov 2014	Email Mr Gittins to Shaun Jones and Mr Giles (09:58): attach copy emails with Council; let me know if points are important to developer/purchaser Email Mr Shaw to Mr Glenister (13:10): forwarding Mr Giles' email of 3 Nov 2014 [Shaw 3 §10.1]	4633
13 Nov 2014	Email Mr Giles to Mr Shaw (09:24): Owners in favour in principle; would like to have a look at a couple of Mr Shaw's sites	2100
Mid Nov 2014	D does first draft but looks like Mr Shaw had approved the bones of the structure before D was instructed [Glenister §11]	
26 Nov 2014	Meeting at Penrhos Court between Mr Shaw, the Owners, Mr Giles, and Andrew Jones; discussion of joint venture structure and proposed development, and instruction of D [Shaw 3 §11.1–11.3]	
27 Nov 2014	Email Mr Giles to Mr Shaw (09:17): Owners would like to go forward with a developer/landowner agreement; please instruct Mr Glenister to issue a draft to Mr Gittins; can we work in a nominal payment to the Owners at the outset similar to an option fee [Shaw 3 §14.1] Email Mr Shaw to Mr Glenister (09:46): forward email from Mr Giles	1243 1243
28 Nov 2014	Email Shaun Jones (Owners' agents) to Mr Gittins (11:19): you may be aware I submitted a second application for further 8 houses; verbal assurances from planner had sounded positive, but now steering towards refusal; need to find a way to swing the balance; can argue the planners can't compel car parking spaces for school use; planner trying to get it pushed into s. 106 agreement; sooner we get that completed and signed the better	4632
Nov/Dec 2014	Telephone conversation between Mr Shaw and Mr Glenister: D could act for both parties (and other preliminary meetings); discussion of effect of increased number of dwellings on profitability; Mr Glenister already involved in agreeing joint venture structure and could use existing templates [Shaw 3 §15.2–15.3, §16.1, §17.4]	
3 Dec 2014	Telephone conversation Mr Gittins / Owners	4534
10 Dec 2014	Email Mr Glenister to Mr Shaw (17:15): attach first draft development agreement for the land at Kinnerley; a similar format may suit the	1242

Date	*Description*	*Bundle Page No.*
	transaction being dealt with by Emma; would be useful if the three of us met to go through the document to refine it and consider the mechanics and timing of payments [Shaw 3 §19.2]	
11 Dec 2014	Email Mr Glenister to Mr Shaw (14:02): attaching draft s. 106 Agreement between the Owners and the Council, and plan	2602
18 Dec 2014	D's client identity record, conflict of interest check, and internal risk assessment Email Mr Giles to Mr Gittins (10:19): requesting first draft of agreement and whether s. 106 agreement completed	1249 4634
7 Jan 2015	Meeting Mr Gittins / Owners: if we completed the operative clauses didn't come into effect until commencement of development; buyer could submit another planning application; no point completing if not approved by the buyer; buyer has no issues; Mr Shaw's layout plan for 16 houses; points re: Shaun Evans and affordable housing	4635
19 Jan 2015	Mr Glenister sends revised Development Agreement to Mr Shaw [Shaw 3 §19.2]	
26 Jan 2015	Email Mr Glenister to Mr Shaw (17:04): attach draft development agreement with amendments; please read through, then make appointment to run through it again before submission to the Owners' solicitors	1241
30 Jan 2015	Email Mr Shaw to Andrew Jones: whether to leave clauses in on this deal; didn't really discuss detail other than heads of terms in offer letter; may need to make cash provision	1240
Feb 2015	Mr Shaw and Mr Giles pressing D for updates [Shaw 3 §19.2]	
27 Feb 2015	Section 106 Agreement between Owners and Council in respect of outline planning permission for 12 dwellings at the Development Land [Rep 19(1)] [Shaw 3 26.2(a)]	1305
2 Mar 2015	Outline planning permission ref 14/00581/OUT granted to the Owners for construction of 12 houses on the Development Land [PoC 7] Email Mr Shaw to Mr Glenister (14:11): do we need to get together; Mr Giles has pushed for a progress report	1901 1239
4 Mar 2015	Meeting at D's Oswestry office (Mr Glenister / Emma Wilde / Mr Shaw): going through and amending latest draft development agreement; will send to Mr Shaw who will run it past NatWest before it is sent to Mr Gittins [Shaw 3 §19.2]	1238
5 Mar 2015	Memo Mr Glenister to Mr Gittins: have now settled a first draft development agreement with C who will seek approval of the scheme in principle from NatWest; should take about a week Email Mr Glenister to Mr Shaw (11:39): attach further revised draft development agreement to run past NatWest; let me know when I can send it to Mr Gittins	1237 1236

Date	*Description*	*Bundle Page No.*
	Memo Mr Glenister to Mr Gittins: attach first draft development agreement for comments/approval	1235
11 May 2015	Owners raise issue of delay [Shaw 3 §19.2] Meeting Emma Wilde (D) / Mr Shaw / Andrew Jones: going through issues arising from Mr Gittins' meeting with the Owners; they want to tighten up on the timeframes and looking for an upfront payment; suggestions for amending timetables, funding, and upfront payment; possible bank moratorium Memo Emma Wilde (D) to Mr Gittins: proposed amendments to document, including upfront payment to the Owners	1234 1233
4 Jul 2015	Email Mr Shaw to Mr Glenister (06:58): can you establish how long Mr Gittins anticipates he will be reviewing the draft contract; we have many opportunities but can only look at so many so I need to determine quickly if this deal is going to happen Owners again raise issue of delay [Shaw 3 §19.2]	1229
7 Jul 2015	Memo Emma Wilde (D) to Mr Gittins: C asks when you anticipate being able to respond on revised documentation	1228
14 Jul 2015	Memo Mr Glenister to Mr Gittins: VAT situation; (in manuscript) 'PS My client says we must conclude matters by the end of August as the Bank's criteria have changed. Could we have a word please?' Email Mr Shaw to Mr Glenister (10:49): C getting frustrated over delays; 8 months since offer was accepted in principle; unable to pursue other opportunities; lenders tweaking lending criteria; need to put time limit on agreement; please see if end of Aug 2015 is realistic; C has been offered and encouraged to consider the adjacent site which has outline consent for 18 dwellings and at a price considerably less; we prefer the land on School Road although it is marginal; if sale of adjacent land is secured by others then this will have implications for us pursuing the land with the Owners; need to be ahead of the marketing and release of the combined 34 dwellings in one location in Kinnerley; bank looking to secure debt over whole site, and Owners will be party to the debt [Shaw 3 §29.6] Memo Mr Glenister to Mr Gittins: C having to forgo other development opportunities and want to complete the JV agreement by end of August; NatWest tweaking lending criteria; debt to be secured over the whole site; Owners will be party to the debt	1220 1219 1218
15 Jul 2015	Email Mr Gittins to Mr Glenister (10:30): accountants' discussion re: VAT/tax position; C apparently thinking of withdrawing because of lack of progress; please confirm that C will give Owners until end of August to complete the Agreement; C made offer in Nov 2015 and Mr Gittins received contract in Mar 2015, then further enquiries, then accountancy/tax/VAT advice; Owners would like to sign before end of August	1217

Date	*Description*	*Bundle Page No.*
	Email Sue Newell (D) to Mr Shaw: please ring Mr Glenister to discuss	2145
17 Jul 2015	Email Mr Shaw to Mr Giles (17:04): heard from Mr Glenister who has spoken with Mr Gittins; they are confident an agreement by end of August 2015 ! is realistic and achievable	2102
29 Jul 2015	Memo Mr Gittins to Mr Glenister: would the bank consider the Owners jointly and severally liable with C for the debt	1214
?	Email (possibly draft) Mr Glenister to Mr Shaw: please clarify whether Owners will be jointly and severally liable with C for bank debt	1213
17 Aug 2015	Email Mr Shaw to Mr Glenister (16:43): any word from Mr Gittins re: progress; missed call from Mr Giles Email Mr Shaw to Mr Glenister (18:05): deal not looking good because Mr Gittins has advised Owners of their liability for C's debt; debt will be limited to value of the charge and bank will give a letter to this effect; please ask Mr Gittins to explain this to the Owners; need to sign by the end of August [Shaw 3 §19.3]	1212 1211
18 Aug 2015	Email Mr Shaw to Mr Glenister (11:06): not sure why agreement is taking so long; earmarking this opportunity has been critical to our development programme, resources and cashflow; agreement for purchase in principle in Nov 2014; use of same solicitors for both parties appears to be working against us; at a loss as to why Mr Gittins did not discuss concerns over Owners' liability earlier; frustrated that you appear to see no urgency; Owners appear to have lost faith and are minded to go back to the market and seek an alternative buyer; suggest a meeting early next week [Shaw 3 §19.3] Email Mr Giles to Mr Shaw (13:54): thank you [for forwarding email to Mr Glenister?]; please let me know what happens next Memo Mr Glenister to Mr Gittins: Owners will be jointly and severally liable to C for debt to the bank, but bank expected to issue a comfort letter; please confirm whether Owners wish to proceed Email Mr Glenister to Mr Deakin (NatWest) (16:27): queries re: joint liability on bank account, purpose of security over the land, and whether bank will look to the Owners to repay indebtedness	1210 2103 1209 1208
19 Aug 2015	Email Mr Deakin (NatWest) to Mr Glenister (14:40): responses to queries	2071
20 Aug 2015	Email Mr Glenister to Mr Deakin (11:06): forwarding Mr Deakin's email; please telephone to discuss	2070
28 Aug 2015	Email Mr Shaw to Mr Giles (17:39): understand Owners concerned about personal liability as parties to loan facility; discussion of risk to Owners; advise that Owners establish an LLP between them for the purposes of the joint account which would ringfence	1247

Date	*Description*	*Bundle Page No.*
	any personal liability beyond that of the value of the land; new LLP would be tax neutral and would allow VAT to be reclaimed; Mr Shaw prepared to give personal guarantee; hope Mr Gittins has pointed out these issues; frustrated that problems are being created without C being given opportunity to address them	
Sep 2015	Instruction of D by C [Def §7.6] Meeting between Mr Shaw and Mr Deakin (NatWest): presentation of development in outline, with house sale estimates [Shaw 3 §31.2]	
1 Sep 2015	Email Mr Giles to Mr Shaw (14:46): discussions between solicitors have not covered points in Mr Shaw's 28 Aug email; will let you know what transpires	2105
2 Sep 2015	Memo Mr Gittins to Mr Glenister: met with the Owners; Owners not expected to accept personal risk; fundamental basis of the transaction has changed; arrangement will involve Owners having personal liability for bank borrowing; not prepared to proceed; if that can be overcome, Owners will require indemnity supported by a mortgage; only alternative is for C to purchase the property outright	1201
7 Sep 2015	Email Mr Shaw to Emma Wilde (D) (18:38): Mr Gittens concerned about Owners' liability; have asked bank if Owners can establish a newco LLP; Mr Glenister thinks this will not be sufficient for the bank; may need to revert to the mechanics of Cholmondeley etc where C form a newco with Owners with a JV agreement; newco is the developer; management agreement between C and newco; a little more complicated but means we are not expecting the Owners to start a newco on their own; can do this jointly with them and for them; 'Can you consider this and speak with Alan as it appears to get around his concern and we can then move forward' [Glenister §13]	1194
9 Sep 2015	Telephone call Mr Shaw to Emma Wilde (D) re: development [Glenister §13]	
11 Sep 2015	Telephone call Emma Wilde (D) / Mr Shaw: NatWest nervous about putting structure to the bank; wants Mr Shaw to do an appraisal; suggestion is that a new LLP is formed in the joint names of the Owners and C as members, same sort of scenario as Cholmondeley; side agreement between the LLP members; C would take on LLP members' obligations; Owners would retain land but put it in as security for the LLP's liability; loan would be to LLP; Owners' liability would be limited which was a big issue for Mr Gittins; need to get a formal offer on that basis so there is a lot of work to put in an appraisal; Mr Shaw needs to know if Mr Gittins is happy with the rest of it; Mr Shaw not mortgaging his house; Mr Glenister discussed with Mr Gittins; said the Owners will have to say they are going into business with C; Mr Gittins had reviewed the LLP situation; Mr Shaw happy to give	1192

Date	*Description*	*Bundle Page No.*
	indemnity/guarantee but no mortgage; explained conversation to Mr Shaw Email Dawn Jones (D) to Mr Gittins (13:54): Mr Giles telephoned; said he was under some pressure; please ring him. Various manuscript notes re: LLP arrangements	
16 Sep 2015	Meeting between Mr Gittins, the Owners, and their accountant for wide-ranging discussion on the scheme, its implications and pros and cons	4534
18 Sep 2015	D sends updated charging rates and terms & conditions to C	1177
21 Sep 2015	Manuscript note Mr Gittins to Mr Glenister: Owners will (1) enter into an LLP with C and the bank borrowing can be to the LLP; (2) Mr & Mr Shaw will indemnify the Owners in respect of their involvement in the LLP; (3) Owners will need to be able to monitor the LLP's business; (4) Owners will expect £25k Telephone call Mr Glenister / Mr Shaw: Mr Shaw agrees Mr Gittins' four points; will put the appraisal to the bank and seek approval in principle; we can then revamp the paperwork Memo Mr Glenister to Mr Gittins: your 4 points agreed; will prepare NatWest appraisal and seek confirmation that bank will proceed; then can revamp paperwork	1176 1175 1174
6 Oct 2015	Email Mr Shaw to Chris Jones (Berrys) (17:51): discussion of deal structure; Mr Glenister will be able to expand and explain in detail the provisions of the proposed agreement; hope this provides for productive and successful outcome on Monday Letter Mr Gittins to Owners: increased charging rates	2108
9 Oct 2015	Email Mr Shaw to Mr Glenister (09:30): trying to summarise the position so I can understand how we can expedite transactions in the future; initial draft agreement you sent to the Owners was a straight agreement between the Owners and C; Mr Gittins took 9 months to advise client as to implications and potential liability; inevitable that we resort back to our previous procedure of joint new limited liability company between the parties and supplemental management agreement; disappointed and frustrated it has taken so long and at such cost; I take blame for not comprehending fully the implications of what we initially proposed; could you prioritise this transaction Email Mr Glenister to Mr Shaw (12:32): have spoken to Mr Gittins; he has asked me to set out the proposed revised structure for the joint venture; initial draft Development Agreement sent out in December; not until March that I was instructed to submit to Mr Gittins; delay while Owners sought accountancy/tax advice; ongoing discussion since then as to the bank's requirements and how the JV might be restructured to address the Owners' concerns; only dealt with one landowner using an LLP arrangement; outline of structure if we follow that format; perhaps	1171 1167

Date	*Description*	*Bundle Page No.*
	we could discuss the above structure; alternatively landowners could form their own LLP which would enter into the Development Agreement with the Owners and C, but that looks more artificial from the bank's point of view; proposed structure should again be run past Mr Deakin (NatWest) Email Mr Shaw to Mr Glenister (13:42): I am happy with this structure; it would be better if the Owners are not expected to go it alone with a new LLP themselves; we need to hold their hand right through to completion of the scheme; can you put this structure to Mr Gittins for client approval so we can get their commitment asap; we will offer the same structure on Monday for Kinnerley 2	1166
12 Oct 2015	Memo Mr Glenister to Mr Gittins: steps that need to be taken in order to progress the matter, and discussion of transaction structure generally including what agreements the LLP will enter into and when	1165
22 Oct 2015	Email Mr Gittins to Mr Glenister (12:41): thank you for memo; will also need to be guarantee from Mr & Mrs Shaw; subject to contract the structure looks in order to me, but have asked for observations from accountant; doubt that they will cause a fundamental problem	1163
23 Oct 2015	Email Mr Glenister to Mr Shaw (12:07): Mr Gittins agrees to the new proposed structure, subject to Owners' comments; I am drafting documentation and will go through it with you before submitting it to Mr Gittins	1162
26 Oct 2015	Memo Mr Glenister to Mr Gittins: have drafted documents; will provide when typed and approved by C; other queries	1161
4 Nov 2015	Email Mr Glenister to Mr Shaw (10:27): attach draft agreements; any suggested name for the LLP?	1157
5 Nov 2015	Email Mr Glenister to Mr Shaw (13:38): attach draft LLP Agreement and Management Agreement showing track change amendments; amounts injected by C to be deducted from subsequent payments to the Owners; please confirm that drafts are settled and may be put to the Owners' solicitor Email Mr Shaw to Andrew Jones (15:49): extra money injected by C shouldn't come off payments to the Owners Email Andrew Jones to Mr Shaw: don't understand what Mr Glenister is getting at; on the sale of the 5th house the Owners need to have their 20%; if bank takes proceeds and there's a shortfall then C will have to make it up with its own cash Email Mr Shaw to Mr Glenister (16:16): forwarding Andrew Jones' email Email Mr Glenister to Mr Shaw (16:54): delete clause?	1156 1155 1154 1154

Date	*Description*	*Bundle Page No.*
		1153
6 Nov 2015	Telephone call Mr Glenister / Mr Shaw: delete clause from LLP Agreement	1149
10 Nov 2015	Memo Mr Glenister to Mr Gittins: attach draft documents for your approval	1145
2 Dec 2015	Email Mr Glenister to Mr Shaw (11:44): have you applied for finance, or is it intended to leave this until after the JV is in place? Can you let me have details of the facilities which will be sought? Email Mr Shaw to Mr Glenister (12:03): details of bank facility application and offer; why is information useful at this stage? Email Mr Glenister to Mr Shaw (12:11): 'Alan was asking!' Email Mr Shaw to Mr Glenister (12:52): 'Total estimated build cost is over 2.2m! Are you going developing?' Memo Mr Glenister to Mr Gittins: understand that C has made formal application for bank finance and formal offer is awaited; only valid for 3 months so updated offer will be requested once detailed planning consent secured; total estimated build cost is >£2.2m and maximum bank facility is £1.0473m	1140 1139 1138 1137 1136
3 Dec 2015	Email Mr Shaw to Mr Glenister (15:27): probable scenario to reflect the realistic build and sale programme; sell plots 6 to 10 first to cover bank borrowings and leave a surplus; sale of plot 5 gives further income to pay the Owners; flexibility as to sale of affordable housing	1135
4 Dec 2015	Memo Mr Gittins to Mr Glenister: worked examples of plot sales; legal charge; copy of bank's facility letter; costs not to be passed through LLP Email from Mr Deakin (NatWest) to Mr Shaw (17:01): NatWest will support the development; formal facility and new account documentation will follow; funding structure [Shaw 3 §31.3]	1134 2467
7 Dec 2015	Email Mr Glenister to Mr Shaw (11:23): attach income distribution examples in manuscript; do these work please? Email Mr Shaw to Mr Glenister (11:44): yes; makes perfect sense	1133 1132
8 Dec 2015	Memo Mr Glenister to Mr Gittins: points on examples and form of legal charge; '3. I understand that this will not be issued until both the LLP has been formed and the detailed planning consent has been obtained' [this point appears to relate to bank facility]; facility will not be made available until detailed planning permission has been obtained, some time after JV has been entered into; could we meet to go through the papers asap	1131
11 Dec 2015	Email Mr Shaw to Mr Glenister (17:06): 'are we hopeful in being able to sign an agreement before Christmas? David Giles asking!'	1130
12 Dec 2015	Meeting between Mr Glenister and Mr Gittins to go through documents and refine them	1127

Date	*Description*	*Bundle Page No.*
14 Dec 2015	Email Mr Glenister to Mr Shaw (10:38): had a long session with Mr Gittins on Saturday refining the documents; he is seeing the Owners today to deal with pre-contract enquiries; 'it is possible but not likely'	1129
16 Dec 2015	Email Mr Shaw to Mr Glenister: do you know how Mr Gittins got on with the Owners the other day	1128
21 Dec 2015	Memo Mr Glenister to Mr Gittins: attach draft agreements in track changes; please let me know if the documents are now settled; think there must be 2 designated members of the LLP and no doubt C will be one of them	1122
22 Dec 2015	Email Mr Glenister to Mr Shaw (16:54): attach draft agreements in track changes	1120
6 Jan 2016	Meeting between Mr Glenister and Mr Gittins to work through the Development Agreement	1119
7 Jan 2016	Email Mr Glenister to Mr Shaw (09:05): have worked through the Development Agreement with Mr Gittins; attach latest draft with track changes; various points	1115
8 Jan 2016	Email Mr Shaw to Mr Glenister (16:01): bank funding offer just before Christmas, open for 3 months; can we please sign asap	1113
13 Jan 2016	Email Mr Gittins to Mr Glenister (17:13): various VAT queries; will liabilities be paid from LLP bank account; structure is different from C/Mr Shaw's other developments; useful to have explanation of how development is to be funded and operated; various other queries; LLP should be a party to the transfers to the buyers; Owners would like to complete by end of month	1111
14 Jan 2016	Memo Mr Glenister to Mr Gittins: easements and plans; if documents approved then C to bear expense of preparing approved documents	1110
15 Jan 2016	Memo Mr Gittins to Mr Glenister: various VAT queries; will liabilities be paid from LLP bank account; structure is different from C/Mr Shaw's other developments; would be useful to have explanation as to how the development process is to be funded and operated in practice; various other queries; LLP should be a party to the transfers to the buyers; Owners would like to complete by end of month Email Mr Glenister to Mr Shaw (15:51): attach Mr Gittins' memo, please telephone to discuss	1104 1103
21 Jan 2016	Email Mr Shaw to Mr Haynes (Colin F Whitfield & Co Ltd) (13:49): C and Owners solicitors accountants seeking clarification re: structure of process for undertaking joint venture; mechanics slightly different from Cholmondeley Estates development; agreement between Owners and LLP (members being the Owners and C), and management agreement between LLP and C obliging	1100

Date	*Description*	*Bundle Page No.*
	C to carry out the development; bank loans to LLP, then advanced to C; sales income retained by LLP's lawyers and distributed; Owners receive 20% gross proceeds and C gets remaining 80%; various queries re: VAT treatment; hoping to sign agreements before the end of this month but before signing the LLP will need to be established; offer in principle by NatWest to LLP	2173
	Email Sue Newell (D) to Mr Shaw (14:19): attach agreement drafts	
25 Jan 2016	Memo Mr Glenister to Mr Gittins: Mr Haynes to act for LLP; will obtain confirmation that sales are zero rated for VAT; receipts paid into LLP account; bank can step into Development Agreement and perform the LLP's and C's obligations	1097
26 Jan 2016	Manuscript note Mr Gittins to Mr Glenister: Owners have no real control over borrowing left with LLP if C decides not to proceed	1094
28 Jan 2016	Email Mr Shaw to Mr Glenister (17:33): Mr Haynes happy to act for the LLP and familiar with the VAT issues and liabilities in relation to these types of JV/Landowner agreements; he is confirming VAT position with HMRC; VAT treatment of distribution of sales income from LLP to landowner and C	1090
29 Jan 2016	Email Dawn Jones to Mr Gittins (10:04): forwarding Mr Shaw's 28 Jan email	1089
1 Feb 2016	Email Mr Shaw to Mr Glenister (11:08): anticipate sales of £185 to £194 per sq ft, i.e. sales income between £1.5m and £3.68m, with £700k to £736k distribution to the Owners	1088
	Email Mr Haynes (Colin F Whitfield & Co Ltd) to Mr Shaw: accounting treatment of bank loans to LLP lent on to C, and consequential tax issues; VAT treatment of profit distributions; VAT treatment of development	1086
2 Feb 2016	Memo Mr Gittins to Mr Glenister: various points; confirmation of how development process will be funded in practice; whether expenditure will be from LLP account; relationship between C's contribution and bank funding; 'I think a lot of what you say applied when the development partners were a land owner and Milford, which is not the case here, where the developer is the LLP'; LLP should join as the builder; various manuscript notes	1080 1079
	Email Mr Shaw to Mr Glenister (09:35): where are we on School Road? I'm leaving for the airport in the morning first thing and will be away in the Alps for February; Owners were hoping for signing before Christmas, your new target was end of Jan; if we lose the deal it will jeopardise Argoed Lane as we do not want any adjacent site to compete or blemish ours; this is why we were determined to have both! Happy to call in to sign a power of attorney [Shaw 3 §19.4]	1078
	Meeting between Mr Shaw and Mr Glenister to work through Mr Gittins' note and amendments to documents, and take instructions	

Date	*Description*	*Bundle Page No.*
3 Feb 2016	Email Mr Shaw to Mr Haynes (Colin F Whitfield & Co Ltd) (14:51): sale income paid into LLP, and distributed by the LLP not C; so LLP repays the bank loan direct; if properly documented do you see a problem?	1077
5 Feb 2016	Memo Mr Glenister to Mr Gittins: accounting mechanics; C's contribution to be introduced and expended prior to bank loan; development agreement between a company and the landowners, but LLP will be the borrower and the liability will be limited to the LLP's bank account; service media and foul drainage; LLP should join in the transfers; architect's certificates; house sizes, both parties will want to achieve the best value available; amendments to LLP Agreement agreed; further amendments to Development Agreement; hopefully documents now fully settled Email Mr Haynes (Colin F Whitfield & Co Ltd) to Mr Shaw: tax treatment of loan from the LLP if documentation does not record actual repayment of loans by LLP to C; would prefer repayment of loan to appear in the books Email Mr Shaw to Mr Haynes (cc Mr Glenister) (13:02): don't see why LLP members can't distribute the loan amounts to the bank via C	1075 1074 1073
12 Feb 2016	Email Mr Glenister to Mr Shaw (16:59): had another session with Mr Gittins; hopefully agreed final amendments to various documents; will forward tracked copies; not clear as to how financial arrangements work; please set out details; not sure that the agreements reflect how the cash trail works; Mr Gittins spent a day with the Owners who will come up with a name for the LLP Email Mr Shaw to Mr Glenister (17:33): bank loans paid into LLP and forwarded to C for settlement of suppliers and labour; all sale receipts paid into the LLP and distributed; need careful documentation and audit trail	1071 1068
15 Feb 2016	Email Mr Glenister to Mr Shaw (11:07): please confirm that C's cash injection is paid into LLP account and applied in similar way from there; I think in effect C is paying the bills as agent for the LLP Email Mr Shaw to Mr Glenister (11:16): why would C pay contribution to LLP for it to be lent back to C; C will spend its contribution before then spending the loan which will be advanced to C from the LLP in tranches Email Mr Glenister to Mr Shaw (11:39): LLP Agreement says C will pay sufficient sums to LLP towards development costs as required over and above bank funding; JV Agreement states the LLP will pay the development costs; I would have thought all cash movements should pass through the LLP account Memo Mr Glenister to Mr Gittins: Mr Shaw has explained cash movements; C will pay development costs direct until bank funding available; bank funding paid into LLP account; LLP loans bank funds to C to pay further development costs; C repays the	1067 1066 1065 1063

Date	*Description*	*Bundle Page No.*
	loan by way of a first call on its profit share; you may wish to spell this out in amending the LLP Agreement	
23 Feb 2016	Mr Shaw attends D's Oswestry office to go through Mr Gittins' amended draft agreements (including Mr Gittins' amendments) with Mr Glenister [Shaw 3 §19.4]	1059
Mar 2016	Mr Glenister indicates that he will establish the LLP before exchange and completion of the Agreements [Shaw 3 §21.5] Council gives C an informal 'heads-up' indication that it will approve the increase to 18 dwellings [Shaw 3 §21.6]	
1 Mar 2016	Email Alison Whitelaw to Mr Gittins (14:41): name of LLP after my grandfather who used to own the land Memo Mr Glenister to Mr Gittins: proposed LLP name not available; proposes alternative; please provide Owners' dates of birth for the purposes of the LLP formation Email Mr Glenister to Mr Shaw (16:54): name of LLP [Shaw 3 §19.5] Email Mr Shaw to Mr Glenister (17:08): 'Excellent! Can I sign???'	1058 1057 1055 1054
4 Mar 2016	Memo Mr Glenister to Mr Gittins: enclose engrossments of Agreements and copies for your file; please have these executed by the Owners; suggest that Mr Evans also executes on behalf of the LLP; on my counterpart I will have Mr Shaw execute on behalf of the LLP as C is the other designated member and Mr Shaw is a director of C; also enclose copy of Form LL1N01 to form the LLP; please confirm that each of the Owners has consented in order that I may sign the form on behalf of everybody D requests Owners to execute the Agreements [Shaw 3 §19.6]	1052
7 Mar 2016	Email Mr Shaw to Mr Glenister (08:41): do you have a slot today to go through Kinnerley 1? Marked in manuscript: 'Yes – 2.15? Will still need to meet on Friday re Church Lane' Mr Shaw attends D's offices to go through documents and sign them [Shaw 3 20.1] [Glenister §14]	1050 1048
9 Mar 2016	Mrs Shaw attends D's offices to be advised re: liability under guarantee and to sign documents [Shaw 3 §20.1] [Glenister §16] Email Mr Glenister to Mr Shaw: think we are ready to go; could you let me have £25,080 please; this comprises initial payment of £25,000 plus £40 Land Register fee to register the Legal Charge and £40 to register the LLP; please confirm land value Email Andrew Jones to Mr Glenister (15:38): money has been transferred and will be in your account tomorrow	1042 1046 1043
11 Mar 2016	D's application to incorporate the LLP [Shaw 3 §27.1] Letter D to Companies House: 'We enclose Form LL1N01 together with a cheque for £40 being your fee and look forward to receiving the Certificate in due course'	1667 1040 1496

Date	*Description*	*Bundle Page No.*
	Date of the LLP Agreement and the Development Agreement, exchanged by D in counterpart [PoC §17] [Shaw 3 §20.2]; documents 'dated off in a face to face meeting' between Mr Glenister and Mr Gittins [Glenister §18] Execution of legal charge over the Development Land in favour of the LLP [PoC §18], and registration by D [Shaw 3 §21.5(b)]	1646 1816 1701
14 Mar 2016	Email Mr Glenister to Mr Shaw: further to completion of the LLP Agreement, exchange of the Development and Management Agreements and completion of the Legal Charge on 11 Mar 2016, I attach copies of the completed Development Agreement; if you require copies of any of the other documentation let me know; summarises key dates in the Development Agreement; please note that I will not remind you as these dates arise [Shaw 3 §21.1] D invoice to C including 'preparing and settling the forms of the Development Agreement, LLP Agreement (Wallace (Kinnerley) LLP) Development Management Agreement and Legal Charge from the Land owners in favour of the LLP; Completing those documents; registering the LLP at Companies House and to include registering the Legal Charge at Companies House' Memo Mr Glenister to Mr Gittins: attach certified copies of Legal Charge and Counterpart [Shaw 3 §21.1] Memo Mr Glenister to Mr Gittins: need evidence of Mr Whitelaw's correct name for Land Registry	1030 1033 1038 1029
Mar 2016	Mr Glenister summarises the key dates in the Development Agreement and the steps C needed to take [Shaw 3 §21.2]	
25 Mar 2016	LLP date of incorporation [PoC §19]	1666
8 Apr 2016	D applies to register the charge over the Development Land in favour of the LLP	999
Apr 2016	D assists C and Owners to set up LLP bank account [Shaw 3 §21.5(c)]	
Apr/May 2016	Mr Shaw makes telephone offer to Mr Giles to purchase the Development Land for £525k [Shaw 3 §22.2]	
6 Apr 2016	Email Mr Shaw to Mr Glenister (09:38): do we have the registered LLP co. no.? Email Mr Glenister to Mr Shaw (10:42): attach copy of LLP certificate of incorporation for your information [Shaw 3 §27.2]	1028 1026
7 Apr 2016	Email Lynda (Chartland) to Mr Deakin (NatWest) (09:26): details of LLP and partners Memo Mr Gittins to Mr Glenister: attach ID for Mr Whitelaw; is this all you need?	1020 1022

Date	***Description***	***Bundle Page No.***
11 Apr 2016	Email Mr Deakin (NatWest) to Lynda (Chartland), cc Mr Shaw (15:15): list of information required in order to commence process of opening account	1019
12 Apr 2016	Email Mr Shaw to Mr Deakin (NatWest) (13:11): LLP is the New JV company set up at your request to facilitate the loan advance; loan will then be advanced to C as principal contractor; sale proceeds will be paid into LLP joint account for distribution by solicitors; details of expected loan requirements; transactions will be in £200k tranches and into C which we anticipate will be the advance development float; no cash necessary to be injected into the business	1009
13 Apr 2016	Email Mr Deakin (NatWest) to Mr Shaw (11:48): please provide dates of birth for Mr Shaw and three other partners; do you have the postcode for Andrew; what are the split of 'shareholdings' Email Mr Deakin (NatWest) to Mr Shaw (11:55): what is your residential address Email Mr Shaw to Mr Glenister (15:27): could you find out the dates of birth of the shareholders of the LLP and the shareholding; assume C has 50% and the others 16.6% each Email Mr Glenister to Mr Shaw (17:00): Owners' dates of birth; 'The capital is £1.00 each. The profit share is dealt with in the LLP Agreement'	1008 1007 1005 1004
19 Apr 2016	Email Andrew Turvill (Chartland) to Mr Shaw: meeting with Close Brothers tomorrow at 4:30pm; further meetings on 26 Apr with Stuart Williams at Aldermore and Steve Grant at UTB (United Trust Bank)	2089
20 Apr 2016	Meeting between Mr Shaw and Close Brothers	2091
26 Apr 2016	Email Mr Shaw to Mr Giles (13:45): C remains fully committed; has taken far longer than expected; we have purchased the adjacent site for construction of 18 dwellings; could not run the risk of an alternative developer building out a scheme concurrently with ours and for it not to be in keeping with our vision of style and quality for this part of the village; we therefore decided to control the delivery of all the dwellings across both sites; if Owners' circumstances have changed, we would be willing to offer £525k for outright freehold sale	2113
29 Apr 2016	Email Steve Grant (United Trust Bank) to Mr Shaw: will look to advance up to 60% GDV at 7% interest; security to be provided; other information required	2082
1 May 2016	Incorporation of MW2	
May 2016	Council gives C a further informal 'heads-up' indication that it will approve the increase to 18 dwellings [Shaw 3 §21.6]	

Date	***Description***	***Bundle Page No.***
4 May 2016	Telephone call Mr Glenister / Mr Shaw: various queries raised by Mr Gittins re: Mr Shaw's offer to buy out the Owners early; offer is £525k of which £25k already paid; original contract would remain in place rather than substituting new conditional contract; reserved matters planning permission should be obtained in 3 to 6 months; then deal with any onerous pre-development conditions and complete the purchase 28 days thereafter; would not need bank funding for the purchase Mr Glenister and Mr Gittins have discussed Mr Shaw's £525k purchase offer; Mr Shaw instructs Mr Glenister that the Agreements are to remain in place and that a separate conditional contract is not necessary [Shaw 3 §§22.2–22.3]	991
11 May 2016	Email Mr Giles to Mr Shaw (09:33): 26 Apr proposal well received on basis that 525k is entirely new money going forward; please confirm submission of detailed planning application Email Mr Shaw to Mr Giles (11:55): offer is £525k to include £25k already paid; prepared to cover additional legal fees going forward; layout plan is with planning officer for comment Email Mr Giles to Mr Shaw (13:57): taking instructions	2112 2111 2110
May 2016?	Mr Giles tells Mr Shaw that the Owners prefer to proceed with the Joint Venture than a sale of the Development Land [Shaw 3 §22.5]	
6 Jun 2016	Owners' 'reserved matters' planning application (ref 16/02503/REM) to amend the 2 March 2015 outline planning permission to increase number of dwellings to 18 [Shaw 3 §21.6]	
10 Jun 2016	Deadline for 'reserved matters' planning application to be made to Council [Shaw 3 §21.3]	
14 Jun 2016	Email Andrew Jones to Mr Glenister (12:01): I submitted the planning application last week Email Mr Glenister to Mr Shaw (13:02): are we going to exchange contracts?? Email Mr Shaw to Mr Glenister (16:01): seeks confirmation as to position if reserved matters secured on 10 Sep 2017, with further 6 months to secure finance and further 3 months to commence development; is the ultimate long stop 10 June 2018 or 10 Sep 2017?	988 2183 987
15 Jun 2016	Email Mr Glenister to Mr Shaw (16:30): planning permission must be granted by 10 Sep 2017; C has 21 days from receipt of reserved matters planning permission to decide whether to rescind; if reserved matters not approved by end of application period then either party may rescind; once approval issued, timescales are triggered: C has 6 months to obtain funding and complete mortgage, then commence development in 3 months and complete within 36 months of date of implementation of planning permission (unless period extended) [Shaw 3 §21.5(a)]	986

Date	***Description***	***Bundle Page No.***
6 Jul 2016	MW2 acquires Willow Grove for £590k [Rep §15B] [Shaw 3 §23.2]	
15 Jul 2016	Email Mark Perry (Council planning officer) to Andrew Jones (12:17): 'reserved matters' planning application to increase number of dwellings to 18 is not in accordance with the outline planning consent; either need to reduce number to 12 or make a full planning application, which will require the principle of the development to be considered afresh Email Andrew Jones to Mark Perry (Council planning officer) (12:56): if reserved matters was not in accordance with outline then the application shouldn't have been validated Email Mark Perry (Council planning officer) to Andrew Jones (14:27): if reserved matters planning application is withdrawn, fee can be transferred to a new full planning application for 18 dwellings; may wish to provide more supporting information / justification as the material considerations will be different Email Andrew Jones to Mr Glenister (15:46): hit a bit of a snag; can't submit reserved matters application for 18 units since the outline planning permission referred to 12 units; planning officer has only just raised this; please confirm that nothing in the contract prevents C from withdrawing the reserved matters application and going back with a new full application; suspect Owners are regretting signing up and if C breaches the contract in any way they will jump on it as their get-out Email Mr Glenister to Andrew Jones (16:50): Development Agreement requires planning permission to be pursuant to the 2 March 2015 outline planning permission; application must seek to maximise on value, and Owners required to give all reasonable assistance, but on strict construction the application needs to be made pursuant to the existing outline application; if Owners will not agree to new application for 18 units then will need to pursue application for 12 units; is it possible to obtain permission for 12 units and then vary to 18 units?	2059 2058 2058 984 983
15 Sep 2016	Email Amanda Cooke (D credit control) to Mr Glenister: client is now on stop; file due for debt recovery; do not do any further unnecessary work; will send letter of claim to client and charge interest	4313
13 Oct 2016	C's full planning application ref 16/04719/FUL for a development of 18 dwellings (replacing the Owners' 'reserved matters' planning application to amend the 2 March 2015 outline planning permission to increase number of dwellings to 18) [Shaw 3 §21.8]	2039
18 Nov 2016	Email Andrew Turvill (Chartland) to Mr Shaw: Steve Grant (United Trust Bank) keen to do business; possibility of taking affordable plot out of the first phase	2086
23 Nov 2016	C submits modifications to the Council to deal with highways officer request [Shaw 3 §21.8]	

Date	***Description***	***Bundle Page No.***
Feb 2017	Mr Shaw has telephone call with local estate agent: Owners have offered him opportunity to buy the Development Land [Shaw 3 §24.1] Mr Shaw telephones Mr Giles to express his frustration and disappointment [Shaw 3 §24.1]	
28 Feb 2017	Council's planning committee votes to defer the formal planning decision until the following month [Rep §13]	
1 Mar 2017	Email Mr Shaw to David Foden (16:48): report re: planning committee meeting; planning officer in favour; committee praised layout and design but voted 5-4 against, and appear adamant that the scheme remains 12 units; they decided to avoid a formal decision and requested planning officer to suggest grounds for refusal; conscious that the Owners prefer to realise capital asap; happy to consider outright purchase of the site but needs to be subject to consent as it relies on bank funding; if purchasing speculatively for cash, would need to be at a level to reflect the risk and no bank finance; to be in cash position, would need to await the completion of the last three units at Penrhos Court which are all sold and due for occupation in June; if this is Owners' preference then would be prepared to pay £400k subject only to contract; would require option to purchase additional land for £100k, with C to be responsible for costs of planning application over additional land Email David Foden to Mr Glenister (16:54): forwarding Mr Shaw's email Email Mr Shaw to Mr Giles (17:18): in same terms as email to David Foden [Def §§23.2, 24.1] Email Mr Shaw to Mr Giles?: Mr Shaw still happy to consider a purchase of the Development Land, contingent on planning consent and completion of Penrhos Court, for £400k plus option for adjacent land at £100k [Shaw 3 §22.6]	973 973 2451
3 Mar 2017	Email Mr Giles to Mr Shaw (11:56): taking instructions Email Andrew Jones to Mr Shaw (15:59): planning officer called and asked how we wanted to proceed; said we were considering options but not keen on removing 1 or 2 houses; he is on our side and frustrated by the committee and suggested we could put together more arguments why the numbers should stay as they are	2118 2449
Mar 2017	Mr Shaw informs Mr Giles that he is not happy to walk away from the Joint Venture; Mr Giles informs Mr Shaw that the £400k offer is not acceptable to the Owners [Shaw 3 §22.7]	
11 Mar 2017	Initial expiry of the Application Period under the Development Agreement [PoC §15(a)(i)] (but extended to 11 Sep 2017)	
15 Mar 2017	Telephone call Mr Gittins / Mr Whitelaw: Mr Gittins had had a look at the matter; can't start advising if there is a dispute; easier to discuss with Mr Glenister; didn't think it would undermine the	4543

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	Owners' position but needed consent; Mr Giles said yes; last offer of £400k based on 12 houses; original planning permission would expire soon; Mr Giles frustrated about the history; Mr Shaw presumably trying to maximise on value but Mr Whitelaw didn't think it would benefit them; Mr Gittins would have a word with Mr Glenister and come back when he could	
20 Mar 2017	Telephone call Mr Gittins / Mr Giles: Mr Giles spoken to Mr Shaw who wasn't happy to walk away; had spent £60k to £70k; £400k not acceptable; £345k said it all, i.e. application date finished then; could appeal but £345k ended it completely; Mr Gittins needs to look at agreement, will have a word with Mr Glenister Telephone call Mr Gittins / Mr Giles: Mr Gittins spoken to Mr Whitelaw; looked at position; thought they had until 18 month date or 8 weeks from determination of planning application; planning not refused; would speak to Mr Glenister and say Owners were fed up and would refer to independent legal advice; Mr Giles minded to approach Mr Shaw saying there was other interest, let's release it and go own way; Mr Gittins wouldn't refer to other interest as C might ask for consideration for release; C had offered £400k and a reasonable offer might be £500k; Mr Giles would go back to Mr Shaw; Mr Gittins can speak to Mr Glenister but couldn't get into conflict situation Meeting Mr Glenister / Mr Gittins: Mr Gittins explaining situation; if parties end up at odds, would need to refer the Owners away; looked at agreements and concluded that 18 units would be more beneficial to Owners than 12; would have word with Mr Giles; if Owners wanted to look more critically at the arrangement Mr Gittins would need to send them away	4540 4541 4542
28 Mar 2017	Council resolves to grant planning permission for the Permitted Development (i.e. 18 dwellings?) subject to conditions and s. 106 agreement to secure 2 affordable dwellings [PoC §22] [Def §23.2] [Shaw 3 §24.2]	2050
Mar / Apr 2017	Owners advised by local estate agent to sell the Development Land instead of proceeding with the Joint Venture [PoC §24] [Def §24] Owners' agent steers them towards sale of the Development Land, potentially to third party [Shaw 3 §24.2]	
Apr 2017	C and Owners negotiating sale of the Development Land to C for c. £512,000 [Def §23.4] Mr Shaw indicates to the Owners' agent that C might be prepared to buy the Development Land for £512.5k subject to contract and execution of the s. 106 Agreement, with further proposal over additional land [Rep §14C] Telephone call between Mr Shaw and Mr Giles; Mr Shaw may be willing to purchase Development Land outright for £512,500,	

Date	*Description*	*Bundle Page No.*
	subject to contract and execution of the s. 106 Agreement; offer involves separate negotiations re: adjacent land [Shaw 3 §22.8]	
4 Apr 2017	Mr Giles attends C's offices and tries to persuade Mr Shaw to allow the Owners to walk away from the Joint Venture [Shaw 3 §28.5(d)]	
7 Apr 2017	Email Kim Brown (Council solicitor) to Mr Glenister (10:48): instructed to prepare the s. 106 Agreement; please provide details re: owners and land, and copies of title and plan; please undertake to pay Council's costs of £450 Email Mr Glenister to Sue Newell (11:32): forwarding Kim Brown's email; 'Pfc new file'	968 968
10 Apr 2017	Email Mr Giles to Mr Shaw (08:58): Owners prefer to go forward with offer rather than go forward with joint venture; please confirm £512k payable in full within 14 days of s. 106 Agreement being completed; will then report to Mr Gittins [Def §24.2] Email from David Giles to Mr Shaw mentioning figure of £512k [Rep §14D] D conflict check / risk assessment and 'New Matter' forms re: s. 106 Agreement Email Mr Glenister to Kim Brown (Council solicitor) (17:16): request draft s. 106 Agreement for approval Email Mr Glenister to Mr Shaw (17:17): please put me in funds for £450 in respect of Council's s. 106 Agreement costs Telephone call Mr Gittins / Mr Whitelaw: subject to completion of s. 106 Agreement, would complete purchase in 14 days, so wants paperwork drawn up now; agreed price is £512,500 but Mr Whitelaw doesn't want the £25k to be part of that; Mr Shaw has spent £68k on the site; no objection to option in principle; 'We could revert to the JV', would probably be more money but would need to pay to monitor the site and Mr Whitelaw would prefer to have the money now to do up his own cottage; need to know how long option period would be; Mr Giles will be in touch	2122 969 966 964 4539
11 Apr 2017	Memo Mr Glenister to Mr Gittins: have received contact from Council re: s. 106 Agreement; will deal with it and let you have draft for your approval when settled with the Council. Marked in manuscript: 'Reply—can I see a copy of the final draft [illegible] approve it prior to completion / AG 12.4.2017'	962
19 Apr 2017	Agreement by Owners to sell the Development Land to C for £512k [Def §24.3] Email Mr Giles to Mr Shaw (17:12): trying to move things along so that s. 106 Agreement can be completed; please confirm that £512k would be payable in full; further questions re: the option over additional land [Rep §14E] [Shaw 3 §22.10] Email Mr Shaw to Mr Giles (18:11): we confirm agreement to proceed at £512k; will be in position to complete 14 days after validation	2123 2125

Date	*Description*	*Bundle Page No.*
	of s. 106 Agreement; happy to agree 12 month option or conditional purchase	
20 Apr 2017	Telephone call Mr Gittins / Mr Whitelaw: explaining difference between option and conditional contract; not worth creating conditional contract if buyer can effectively withdraw for any reason, which is basically an option; don't have details of the price; need to know whether option is part of the deal; might need input into planning application and need to know area involved; Mr Glenister doesn't have draft s. 106 yet; it's for him to deal with it but Mr Gittins wants to approve the final version; Mr Whitelaw has extremely limited resources and wouldn't be able to pay bill; Mr Gittins won't bill until he has funds; Mr Whitelaw not sure what Mr Giles was doing, always wanting to be kept in the loop but not keeping Mr Gittins in the loop	4636
1 May 2017	United Trust Bank commission Knight Frank valuation of the development for secured lending purposes	2397
2 May 2017	Email Mr Shaw to Mr Glenister (14:53): we have agreed 2 weeks ago the purchase of School Road with Mr Giles for £512k subject to contract and the imminent s. 106 Agreement; please ask Mr Gittins if he has instructions to proceed [Shaw 3 §22.10] Email Mr Shaw to Mr Giles (15:06): await confirmation of acceptance of outright purchase offer	960 959
3 May 2017	Email Mr Shaw to Mr Glenister (10:30): forwarding email from Mr Giles: offer of £512.5k stc is acceptable to the Owners so please ask Mr Glenister to press ahead; extra land is 0.33 acre at £98.6k; if option agreed solicitors can be instructed; Owners will retain right of way Email Mr Glenister to Mr Shaw (17:15): Mr Gittins is so instructed subject to contract; also understands that there will be an option to acquire two additional plots; do you have a plan and can you give further details re: option	958 956
10 May 2017	Knight Frank valuation of School Road development for United Trust Bank: GDV £4.83m	2346
23 May 2017	Email Mr Glenister to Mr Shaw (16:49): please get Andrew to send a plan; should be new contract for sale of Development Land to C for £512.5k with completion, say, 14 days after s. 106 Agreement completed; current contract will be rescinded and LLP wound up; please confirm option price and period Email Mr Shaw to Mr Glenister (17:01): all correct; will ask Andrew to send a plan [Shaw 3 §22.10]	953 952
24 May 2017	Email Mr Glenister to Mr Shaw (17:08): do we need any easements over Owners' retained land? Email Mr Shaw to Mr Glenister (17:24): forwarding email from Andrew Jones re: need to connect to electricity supply	951 950

Date	***Description***	***Bundle Page No.***
7 Jun 2017	Telephone call Mr Glenister / Mr Shaw: option should oblige C to apply for planning permission; not necessary for Owners' retained land to have benefit of easements; general service media easements will be reserved out of their retained land	949
11 Jun 2017	Date by which LLP was obliged to apply for planning permission [PoC §15(b)]	
14 Jun 2017	Email Andrew Jones to Mr Glenister (10:39): plan attached. Marking in manuscript. Email Mr Glenister to Andrew Jones (12:01): do you have layout plans? Points re: roads and service media Email Andrew Jones to Mr Glenister (14:02): haven't done layout for option land, but intend to show road extending to northern boundary Mr Glenister file note: spent 40 units drafting transfer in respect of main development land which will also be used for the option land together with plans	948 947 946 945
21 Jun 2017	Email Mr Glenister to Mr Shaw (14:14): various points re: draft contract, draft option, and draft transfer; would be useful to go through them together before submitting documents to Mr Gittins	943
23 Jun 2017	Email Mr Shaw to Mr Glenister (19:07): we hear s. 106 agreements taking a considerable time; can option be triggered regardless of securing reserved matters before 10 Sep 2017 deadline, to buy more time? Mr Shaw recalls having another 6 months after triggering agreement to secure funding and commence site work	942
Jul 2017	C / Mr Shaw renege on agreement to purchase the Development Land because C has committed funds elsewhere and unlikely that deadlines will be met [Def §24.4]	
1 Jul 2017	Memo Mr Gittins to Mr Glenister: understand it is agreed as follows: 1. Owners will sell red-edged area for £512.5k subject to contract, and will grant option over green-edged area with C to apply for planning permission, option price to be open market value; all previous documentation to be cancelled and LLP dissolved; enclose first draft contract; understand Mr Glenister preparing transfer and option, points re: road/service media. Marked in manuscript: 'IG / See me chief / been in / has [illegible, possibly 'alternate']'	940
14 Jul 2017	Email Mr Glenister to Mr Shaw (17:15): Mr Gittins' draft contract allows the Owners to retain £25k licence fee; has that been agreed? Option would provide for C to apply for permission with price to be open market value; thought the price was a straight £98.6k	938
17 Jul 2017	Email C to D (14:26): planners frustrating or incompetent; still awaiting draft s. 106 Agreement; Council may cause further delay if they try to sneak through extra conditions; delay compromises	937

Date	*Description*	*Bundle Page No.*
	C's position as deadline looms; C also frustrated by having had to set aside and earmark the purchase money which is in effect C's business and group working capital; in precarious position having invested >£65k; have decided to reluctantly commit capital elsewhere for now where it can be put to more effective use, to prevent spending more on abortive legal fees and compounding C's loss if terms of agreement cannot be satisfied; but if s. 106 Agreement does appear before 10 Sep 2017, C will continue to rely on the LLP Agreement, or can resurrect the revised and preferred proposal by the landowner to sell the land to C when C's capital becomes available; please notify Mr Gittins accordingly [Def §23.4] [Shaw 3 §22.16] [Glenister §23] Memo Mr Glenister to Mr Gittins: C frustrated with Council planning department; no draft s. 106 agreement; Council may introduce further conditions; delay threatening C's position under JV agreement; C frustrated by having to set aside and earmark purchase monies under the proposed revised deal which is in effect C's working capital which could otherwise be employed in other projects; C has invested >£65k; C has reluctantly decided not to proceed with the revised agreement but to commit its capital elsewhere for now where it can immediately be put to more effective use; however should the s. 106 Agreement be concluded by 10 Sep 2017 then C will be able to continue to rely on the terms of the existing Agreement, or deal can be revised by clients in due course	936
18 Jul 2017	Email Mr Giles to Mr Gittins (16:25): will go and see Mr Shaw and come back to you Memo Mr Gittins to Mr Glenister: have sent 17 Jul 2017 note to Mr Giles and asked him to discuss position with Mr Shaw. Marked in manuscript 'Please let me have a copy of any Sec 106 draft [illegible] when you receive it.' [Shaw 3 §22.11]	4539 935
19 Jul 2017	Email C to D [Def §23.4] Various missed calls from Mr Giles to Mr Shaw [Shaw 3 §22.19] Email Mr Giles to Mr Shaw (13:42): missed calls; sending copy of email to Mr Glenister; I can no longer starve my companies waiting for this deal which is dragging on too long and it now appears I will lose in the long run in any event due to the timings in the JV LLP not being met; I am also eager for the mounting legal costs to be halted; I have therefore had to commit my funds elsewhere and in the unlikely event that the 106 lands in time then we will rely on the JV for now and may be able to resurrect an outright sale when these funds come back in; will call on return from France on 5 Aug Email Mr Giles to Mr Shaw (14:52): seems deal is at an end; are you content for us to seek a deal elsewhere with immediate effect?	2132 2130 2465

Date	***Description***	***Bundle Page No.***
	Email Mr Shaw to Andrew Jones (18:29): [in same terms as email at 20:35] Email Mr Shaw to Mr Giles (20:35): there is to be no relaxation of the terms of the JV agreement beyond the 10 Sep deadline; you have made it clear to us previously that your client would prefer not to pursue the agreement; this is why we have been careful fully to comply with the terms of the agreement to ensure satisfaction of our obligations; we are the injured party and have incurred >£65k costs to secure valuable detailed consent for Owners' benefit; facing reality of having rug pulled from beneath us by not being able to meet 10 Sep deadline; on damage limitation exercise by halting legal fees and putting to better use our working capital; 'Clearly, and as stated, if we are able to retrieve the situation by securing the S106 before the deadline then of course we will and will continue to rely on the terms of the JV agreement. It is important that you don't give your client unrealistic expectations that we are prepared to volunteer to walk away from the JV agreement as we will continue to do all we can to perform to the obligations of the current agreement as we have to date' [Def §24.5] [Rep §14H] [Shaw 3 §§22.16, 22.19]	2129
25 Jul 2017	Mr Giles contacts Mr Gittins: if the Owners can delay or withhold approval of s. 106 Agreement, they might then be able to terminate the JV arrangement	4535
Aug 2017	C discovers that Owners have put the Development Land on the market [PoC §26]	
8 Aug 2017	Email Andrew Jones to Mark Perry (Council planning officer) (17:35): please let me know who is dealing with s. 106 Agreement so that I can chase them up direct	2064
11 Aug 2017	Email Andrew Jones to Kim Brown (Council solicitor), Mark Perry (Council planning officer) and others (16:30): still waiting for s. 106 Agreement; how are we supposed to run our business; I expect a draft s 106 agreement at beginning of next week to be checked and signed; if I don't hear anything then we will have someone sitting in reception until something finally happens; we are under contract to obtain consent by the end of August, otherwise will be in breach and will lose deposit and forfeit £70k costs; please can we just have our s 106 Agreement	2066
14 Aug 2017	Email Kim Brown (Council solicitor) to Mr Glenister (09:31): find attached s. 106 Agreement for approval; detail at para. 1.4 (third schedule) needs completing; please confirm tenure of affordable dwelling; understand some urgency	934
15 Aug 2017	Payment C to D: £450, ref "School Rd 106 Fee" Email Mr Glenister to Kim Brown (15:35): attach draft agreement; grateful to have engrossment Agreements for execution;	932 930

Date	*Description*	*Bundle Page No.*
	considerable urgency; undertaking to be responsible for Council's fee [Rep §15(1)]	928
	Telephone call Mr Glenister / Andrew Jones: low cost units can be made available for rental; can let Mr Gittins have draft agreement	927
	Memo Mr Glenister to Mr Gittins: s. 106 Agreement issued at last; attach a copy with suggested amendments which have been submitted to the Council; please ensure Owners are available to execute the Agreement. Marked in manuscript 'Reply—1. I have sent a copy to my clients and asked them to telephone me straight away—Noted / 2. No plan—please supply copy—herewith / 3. No copy PP—please supply copy—herewith / 4. What's the position on the parking?—[illegible] shown on drawing / AG 15.8.2017'	4533
	Email Mr Gittins to Owners	
16 Aug 2017	Mr Whitelaw informs D that he does not want to continue to pursue the Joint Venture; D informs the Owners that it will have to cease acting for them if they attempt to frustrate the Development Agreement [Def §24.6]	
	Mr Gittins believes that the Owners seek advice on how to delay approval of the s. 106 Agreement until expiry of the Application Period; he advises them to seek independent legal advice [Def §24.7]	925
	Email Mr Glenister to Andrew Jones (11:24): attach s. 106 Agreement showing amendments tracked; sent to Council yesterday; cc Mr Gittins	2128
	Email Mr Shaw to Mr Giles (18:13): two missed calls; better to communicate by email; have received draft s. 106 Agreement after threatening Council; amended drafting and completed blanks, and awaiting final proof for signature; hope we can receive it before 10 Sep 2017; 'The situation remains we shall continue to rely on the terms of the JV agreement in accordance with my email of 19 July'	4537
	Telephone call Mr Gittins / Mr Whitelaw: Mr Whitelaw says this is bad news as he wanted to sell to someone else and didn't want to carry on the Development Agreement with Mr Shaw; Mr Gittins advises re: obligation to complete the s. 106 Agreement and presumes it will be acceptable, but not sure whether s. 106 Agreement or issue of planning permission is required before 10 Sep; had previously made clear to Mr Giles that Mr Gittins cannot continue to act if there was going to be an attempt to frustrate the provisions of the agreement; re-reading agreement, wondered whether issue of planning permission would satisfy the conditions but didn't mention this to Mr Whitelaw; Mr Gittins said he would consider the paperwork and ring him back	4533 4533
	Email Mr Gittins to Owners: they need to take independent advice due to Mr Whitelaw's wish to sell to a third party as that gives rise to a conflict	
	Letter Mr Gittins to Owners	

Date	***Description***	***Bundle Page No.***
17 Aug 2017	Email Kim Brown (Council solicitor) to Mr Glenister (10:29): s. 106 agreement approved with amendment to schedule re: tenure of dwellings; look forward to hearing that agreement is now approved Telephone call Andrew Jones / Mr Glenister: Council's amendment to s. 106 Agreement third schedule is acceptable to C Email Mr Glenister to Kim Brown (Council solicitor) (12:32): confirm that the form of the s. 106 Agreement is now fully agreed; grateful if you will let me have engrossments asap [Shaw 3 §24.3] Mr Glenister sends draft s. 106 Agreement approved by the Council to the Owners [Def §27.2.1] [Shaw 3 §24.3] [Glenister §26]; Mr Gittins sends engrossments to DTM [Glenister §26] Memo Mr Glenister to Mr Gittins: I have now settled the form of the s. 106 Agreement; Council has accepted my amendments; have asked for engrossments. Marked in manuscript 'Reply—I am still waiting for instructions. AG 17.8.2017'	924 920 921 919
18 Aug 2017	Email DTM to Mr Gittins (13:03): instructed by the Owners; they are quite upset by turn of events and manner in which Mr Gittins has conducted it; had believed relationship was one of friendship; D has acted from outset knowing that it also acted for Mr & Mrs Shaw and would continue to do so; clear potential for conflict; current situation of D ceasing to act with imminent deadline leaves Owners in difficult position and exposed to considerable risk; please set out rationale for decision to act (given potential conflict) and decision to cease to act; DTM must advice Owners re: SRA; please confirm D responsible for DTM's fees to review documentation; please confirm that DTM has all necessary contractual documentation; please have all original papers delivered to DTM on 21 Aug 2017; please advise what monetary advances made to the developer; please advise relevance of 10 Sep deadline, what is required to be done and consequences of failure to do it	4637
21 Aug 2017	Letter Kim Brown (Council solicitor) to Mr Glenister (received 25 Aug 2017): enclose s. 106 Agreement in triplicate for execution; please return with £450 cheque, to be sealed and completed by Council	914
22 Aug 2017	Email Mr Gittins to DTM (10:59): arranging for files to be copied and couriered; Development Agreement requires issue of planning permission and approval of reserved matters by 10 Sep 2017; failing that, Owners can terminate by serving notice; Mr Glenister waiting for engrossment of s. 106 Agreement from Council; Mr Gittins has not approved wording which is a requirement; will respond in detail to remainder of email asap	4639
24 Aug 2017	Email Mr Shaw to Mr Glenister (14:35): can you enquire/push Council re: engrossed s. 106 Agreement Email Mr Glenister to Mr Shaw (14:40): I have just chased this	918 2201

Date	*Description*	*Bundle Page No.*
	Email Mr Glenister to Kim Brown (Council solicitor) (14:41): are you able to let me have engrossments of s. 106 Agreement?	916
	Email Kim Brown (Council solicitor) to Mr Glenister (14:57): documents sent to you; let me know if not received (marked 'FYId to C A Shaw / IG 24/8/17' in manuscript)	915
25 Aug 2017	Memo Mr Glenister to Mr Gittins: attach engrossments of s. 106 Agreement and copy letter from Council; please arrange for execution by Owners and LLP, and return for completion with Council; draft planning permission acceptable to C	913 912
	Conversation Mr Glenister / Mr Gittins: Mr Gittins no longer instructed; s. 106 Agreement sent on to others but he cannot say who	4640
	Letter Mr Gittins to DTM: attach copy of memo from Mr Glenister and engrossments of s. 106 Agreements; have informed Mr Glenister that no longer instructed	911
	Telephone call Mr Glenister to Mr Shaw: not received engrossed s. 106 Agreement signed by Owners; Mr Gittins informed him that Owners have instructed new solicitors because Mr Gittins can no longer act as result of conflict of interest; Mr Shaw instructs Mr Glenister to put pressure on the Owners to sign the s. 106 Agreement [Shaw 3 §24.4]	910
	C sends draft s. 106 Agreement to the Owners [PoC §27]	
	Email Mr Shaw to Mr Giles (17:33): have eventually extracted s. 106 Agreement from Council; Owners have decided to appoint new solicitors at eleventh hour, causing further delay and frustrate performance of agreement; third parties are offering to sell the land to Mr Shaw on the basis that Chartland are messing the Owners about; strange way of operating and doesn't bode well for healthy working relationship [Shaw 3 §24.5]	
29 Aug 2017	Email Mr Giles to Mr Shaw (08:20): D unable to act for Owners; all papers sent to DTM; Mr Glenister fully aware [Shaw 3 §24.6]	909
	Email Mr Shaw to Mr Glenister (16:42): what is going on?	908
	Draft letter Mr Gittins to Owners: apologise profusely for hurt and upset caused; will write to DTM with explanation; decision not taken lightly; sorry for way I addressed you and for tone of emails, and for not meeting in person to explain the position; hope sentiments will lessen the upset	4544
	Letter Mr Gittins to DTM: sorry Owners are upset by the way I dealt with decision to refer them to independent advice; my 2 emails of 15 and 16 Aug and my letter of 16 Aug were formal written communications making an important point; decision to refer them to independent advice was not taken lightly, and to safeguard their best interests; dismayed to hear impact of decision on Owners; Mr Gittins first instructed in Jun 2014 re: s. 106 Agreement; Nov 2014 proposal of joint venture; issue of representation considered internally in the firm, with Owners'	4533

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	agent, and with the Owners; Owners did not wish to change solicitors; little risk of conflict of interest provided D not involved in negotiation of fundamental or commercial terms of the agreement; explained that negotiations would need to be referred to Mr Giles; if Owners had instructed another firm then that firm would have needed to complete s. 106 Agreement, increasing costs; discussion with Owners on 3 Dec 2014 and meeting on 7 Jan 2014, considered issue of representation at length; Owners consented; Mr Gittins would take care to refer to Mr Giles for negotiation of any points which might give rise to a conflict; issue of conflicts kept in mind and reviewed throughout the transaction; referred to Mr Giles; made improvements to proposed JV terms; input from accountants including meeting on 16 Sep 2015; JV paperwork completed Mar 2016; provided for establishment of new LLP with agreements; LLP contracted to develop the land, Owners contracted to sell units to buyers, sale proceeds to be paid to LLP and distributed; work completed; subsequent proposal for outright purchase of land by C; Mr Gittins not involved in planning permission or negotiating sale terms; sale terms agreed by Jun 2017 and Mr Gittins asked to draft contract; C decided not to proceed; 'The joint venture paperwork therefore remains effective'; have not approved wording of s. 106 Agreement as required by clause 3.5.2 Development Agreement; Mr Giles contacted on 25 Jul 2017 and said that if Owners could delay or withhold s. 106 Agreement they might be able to terminate JV arrangement; Owners had become increasingly frustrated with planning delays and preferred to sell the property outright; Mr Gittins spoke to Mr Whitelaw on 16 Aug 2017; attach copy of attendance note; apparent that he did not wish to continue with JV and preferred sale to a third party; also attach 5 notes and an email; felt that Owners needed advice on whether they could lawfully delay approval of s. 106 Agreement or otherwise ensure that conditions not met by 10 Sep, or whether there was any other mechanism to bring their obligations under the JV to an end; Owners needed independent advice due to Mr Whitelaw's wish to sell to a third party; might have been better to meet with them but they needed to be aware as early as possible; situation not readily foreseeable at the outset; you have file and can advise the Owners; do not agree to contribute to Owners' costs of reviewing contracts and advising, but happy to assist and explain background to the contractual documents; will write off work in progress as gesture of goodwill; not declining to act further for Owners if they decide to continue with the joint venture; no knowledge of fund transfers to LLP or anyone else other than £25k licence fee to Owners	
30 Aug 2017	Email DTM to Mr Gittins (10:15): no issue with Mr Gittins writing to Owners direct; happy for contact details to be provided to Mr Glenister for the purpose of progressing the matter	4642

Date	*Description*	*Bundle Page No.*
	Email Andrew Jones to Mr Glenister (11:20): had call from Ian Kilby (Council); they're ready to sign s. 106 Agreement but need signed version from Owners; was it D or Owners who caused change of solicitors? C not going to let Owners wriggle out; C considering starting work on site if possible [Shaw 3 §24.7]	908 907
	Email Mr Glenister to Mr Gittins (11:32): C screaming at him; what am I supposed to say? timing is critical; will have to write to Owners directly if can't get new solicitors' details immediately [Shaw 3 §24.6]	906
	Memo Mr Gittins to Mr Glenister: DTM now acting for Owners; provides DTM's details	904
	Email Mr Glenister to DTM (12:19): chasing signed s. 106 Agreement; DTM can contact him to discuss Joint Venture structure [Shaw 3 §24.7]	903 901
	Email Mr Glenister to Andrew Jones (12:22): have DTM contact details and asked for executed s. 106 Agreement	
	Email exchange Mr Glenister / Mr Shaw (12:46 / 12:51): contact with DTM; did D advise Owners they couldn't act; (IG) don't know but suspect that may be the case	905
	Telephone call Mr Shaw / Mr Glenister: have DTM contact details; can Mr Shaw push things forward; discussion of Owners' obligation to enter into planning agreement, and clause 3.6 of Development Agreement	900
	Telephone call Mr Shaw / Mr Glenister: DTM email; Mr Shaw suspects Owners seeking to escape; DTM aware of timescales	
31 Aug 2017	Email DTM to Mr Glenister (11:06): DTM now acting for Owners; need to review matters; doing our best to comply with 11 Sep 2017 deadline; if deadline cannot be met that will be as a result of D ceasing to act	899 898
	Email Kim Brown (Council solicitor) to Mr Glenister (12:01): understand some urgency re: s. 106 Agreement; please drop off executed agreements asap	897
	Email Mr Glenister to Kim Brown (Council solicitor) (12:06): awaiting executed agreements; hopefully can complete and have permission issued next week	2206 896 894
	Email Mr Glenister to Mr Shaw (14:23): forwarding email from DTM; please phone	891
	Email Mr Shaw to Andrew Jones (14:27): I will ring him now	
	Email Mr Glenister to DTM (14:28): urgency re: s. 106 Agreement	
	Email DTM to Mr Glenister (16:29): D cannot continue to act because of conflict of interest; Owners have acted promptly in instructing new firm to advise re: s. 106 Agreement; potential conflict arose prior to exchange of the Agreements; LLP not incorporated so Agreements are invalid, and transaction cannot continue; D should inform professional indemnity insurers; s. 106 Agreement defunct in any event because developer and manager not party to it; points re: s. 106 Agreement [PoC §28] [Def §28.2] [Shaw 3 §24.7]	

Date	*Description*	*Bundle Page No.*
	Telephone call Mr Glenister to Mr Shaw: DTM have discovered issue with incorporation of LLP making Agreements invalid [Shaw 3 §24.8]	
1 Sep 2017	Email DTM to Mr Glenister (09:27): please let us have response to 31 Aug 2017 email by noon Email Mr Glenister to Mr Shaw (10:09): copy of DTM's 31 Aug 2017 email; D can no longer act for C; request Mr Shaw to telephone Mr Glenister [Shaw 3 24.8] Email Mr Glenister to DTM (11:59): transaction is joint venture; no conflict of interest as substantial common interest; conflict has now arisen so D will advise C to instruct new solicitors; won't comment on DTM's 31 Aug 2017 email Telephone call Mr Shaw to Mr Glenister: D can no longer act; C should confirm which new solicitors it instructs [Shaw 3 §24.8] Email DTM to Mr Glenister (12:55): please advise who will be acting for C; please confirm whether DTM's 31 Aug 2017 email has been forwarded to C	890 888 887 885 886
4 Sep 2017	D delivers 5 document files to C (nos 097560/148 (4 files) and 097560/176 (1 file))	884
6 Sep 2017	C instructs Billy Hughes & Co in place of D [PoC §29] Email from DTM to C's new solicitors advising that the Agreements are invalid because the LLP had not been incorporated [PoC §29] but that the Owners are willing to comply with the Agreements if they are enforceable [Rep §20] Letter from Billy Hughes & Co to DTM: deadline for s. 106 Agreement expires imminently; Owners blatantly trying to frustrate the agreement; Mr Giles tried to persuade C in Apr 2017 to walk away; discovered that Owners were marketing site for development in Aug 2017; C has improved Owners' position by procuring planning permission for 18 dwellings; value of site increased; Owners required to execute and return the s. 106 Agreement immediately, failing which C will issue proceedings against Owners; C will not agree to remove Legal Charge [Def §§24.8, 32.4.3] Email DTM to Billy Hughes & Co (12:55): Owners not seeking to frustrate the legal process and were progressing with matters until turned away by D; 'It was only because my firm happened to be instructed that the issue of the lack of capacity in entering into the agreements was identified'; all agreements invalid; C should be issuing proceedings against D; Owners confirm that if they are bound to legally enforceable agreements they are willing to comply with them; please confirm basis on which agreements are binding if one party did not exist at time of execution	2208 2211
7 Sep 2017	Email Billy Hughes & Co to DTM (09:16): C not to blame	

Date	***Description***	***Bundle Page No.***
11 Sep 2017	Final expiry of the Application Period under the Development Agreement (following extension) [PoC §23]	
11 Oct 2017	WPSAC email DTM to Billy Hughes & Co (12:55): Owners have no desire to become embroiled in dispute with D and are content for C to pursue D; Owners also do not wish to pursue C; proposal that Owners waive all claims they may have against Billy Hughes & Co's clients in relation to the land and all associated matters to include the agreements; in consideration, Billy Hughes & Co's clients are to agree that Owners are discharged from further performance, all accrued rights are waived, and the LLP will release the Legal Charge; Owners would further offer to give C first refusal to purchase the land at £500k, that offer being open for 7 days; offer is made pursuant to CPR Part 36 [Def §24.9] [Rep §14J] [Shaw 3 §28.4]	2214
8 Nov 2017	Letter Billy Hughes & Co to D: letter of claim Email Huw Jenkins (United Trust Bank) to Mr Shaw: Argoed Lane site (i.e. Willow Grove) is excellent; we can be as flexible as you need to be	4753 2085
15 Nov 2017	Letter Billy Hughes & Co to DTM: please confirm what claims Owners have against Billy Hughes & Co's clients, whose position is reserved entirely in relation to all issues connected with the Joint Venture [Rep §14J] [Shaw 3 §28.5(g)] Email DTM to Billy Hughes & Co (20:01): attached offer made to D today (for D to purchase the land for £500k); C now at risk as to damages; if C succeeds against D, may be vulnerable to mitigation argument; Owners' offer to sell the land to C will be disclosable; offer has expired but may be capable of being reopened [Def §32A.6] [D RFI §4(iii)] [Shaw 3 §28.7]	2215 2216
16 Nov 2017	Email DTM to Billy Hughes & Co (09:08): our clients have not made any allegations of breach of contract against your clients, save for recent allegation that failure to correspond with DTM constitutes a repudiatory breach of contract	2217
22 Nov 2017	Letter D to Billy Hughes & Co: acknowledges C's letter of claim	4762
Nov/Dec 2017	Conversations between Mr Shaw and third parties including Mr Ellis re: School Road development [Shaw 3 §29.5]	
9 Jan 2018	Email Edward Davies to Mr Shaw: could we meet later today; want some idea of what level of funding could be provided	2093
2 Mar 2018	Deadline for planning approval of building & design specs under 2 Mar 2015 outline planning permission [Shaw 3 §9.3]	
22 Mar 2018	Letter Kennedys to Billy Hughes & Co: instructed by D; will respond to 8 Nov 2017 letter in due course	4763

Date	***Description***	***Bundle Page No.***
26 Mar 2018	Email Mark Perry (Council planning officer) to Andrew Jones (11:54): please give me an update on School Road s. 106 application Email Andrew Jones to Mr Shaw (11:59): please forward to Mr Giles; they need to stop messing about and sign!	2069 2069
6 Apr 2018	Email DTM to Billy Hughes & Co (11:36): waiver and release agreement between C and Owners Email Billy Hughes & Co to DTM (16:54): release of Legal Charge	2218 2219
13 Apr 2018	Email Mr Giles to Mr Shaw (16:30): please ask solicitor to sign termination agreement Email Billy Hughes & Co to DTM: please provide draft deed of release Email Mr Shaw to Mr Giles (16:56): email has been sent requesting draft deed of release Incorporation of Village Artisan Ltd; Derek Ellis appointed as director	2137 2219 2138
23 Apr 2018	Email DTM to Billy Hughes & Co (18:01): termination of contracts	2220
25 Apr 2018	Legal charge re: Willow Grove development	
14 May 2018	Letter Billy Hughes & Co to Kennedys: please confirm identity of insurers; response to 8 Nov 2017 letter is substantially overdue Second letter Billy Hughes & Co to Kennedys: please provide D's files and documents, and confirm details of insurance cover	4766 4767
15 May 2018	Letter Kennedys to Billy Hughes & Co: letter of claim was not valid but will treat it as served yesterday; will consider request for files; will not disclose details of insurance cover	4769
21 May 2018	Email Mr Giles to Mr Shaw (08:51): please ask solicitor to respond re: termination of JV	2139
4 Jun 2018	Email DTM to Billy Hughes & Co (13:59): tried calling; please call as it is imperative for Owners to mitigate their losses Email Billy Hughes & Co to DTM (17:59): have returned call; C's position is that they will procure release of legal charge; will not enter into other agreements with Owners	2221 2222
5 Jun 2018	Email DTM to Billy Hughes & Co (12:40): C has no claim against D if agreements are valid; if C considers agreements are not invalid then that defeats C's claim against D; 'Why broker a deal for the sale of the land to a third party if that is not in fact your client's actual position?'; until C accepts that agreements are invalid, C could pursue the Owners; all the Owners seek is C's acceptance that the agreements are invalid [D RFI §4(iv)]	2223
7 Jun 2018	Email DTM to Billy Hughes & Co (13:11): understand C agrees that the contracts are invalid and that the Owners may sell the land	2225
15 Jun 2018	Letter Kennedys to Billy Hughes & Co: letter of response is in finalised format; would not be beneficial to issue proceedings prematurely	4779

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21 Jun 2018	Letter Kennedys to Billy Hughes & Co: response to C's letter of claim [Rep §5]	4781
3 Jul 2018	Email DTM to Billy Hughes & Co (10:56): wording of undertaking to release DS1	2228
13 Jul 2018	Email Mr Giles to Mr Shaw (11:13): please look at emails to your solicitor; I will ring you shortly	2140
16 Jul 2018	Email Mr Giles to Mr Shaw (11:20): not far off but please speak to Billy Hughes again	2141
20 Jul 2018	Email Billy Hughes & Co to DTM (15:55): holding executed DS1; please confirm sale timetable Email DTM to Billy Hughes & Co (16:34): contract and s106 almost in agreed form; further amendments awaited early next week; completion expected asap after that	2231 2230
23 Jul 2018	Email Billy Hughes & Co to DTM (12:22): undertakings re: DS1 form	2233
6 Aug 2018	Email Billy Hughes & Co to DTM (21:49): undertakings withdrawn; clients may be prepared to provide further undertakings; planners are chasing signature of the s 106 agreement	2235
8 Aug 2018	Email DTM to Billy Hughes & Co (10:30): awaiting approval of contract for sale and s 106 agreement; anticipating formal approval today; in touch with Council re: s 106 agreement; will request further undertaking	2236
8 Oct 2018	Email Billy Hughes & Co to DTM (20:02): phone call from Mr Giles; sale of the land not being held up by clients; clients pursuing D and are not standing in the way of any proposed sale of the land	2237
9 Oct 2018	Email DTM to Billy Hughes & Co (09:02): sent deed of termination, but not signed; that stands in the way of the sale Email Mr Giles to Mr Shaw (13:29): deed of termination sent on 23 Apr	2238 2142
11 Oct 2018	Letter Billy Hughes & Co to DTM: not standing in the way of the sale; Owners maintain that the agreements are invalid and C agrees; no need for any termination agreement since C does not intend to pursue the Owners and there are no contractual documents to terminate; C actively pursuing D; DTM had accepted that no termination agreement was required; have obtained signed DS1; reasons given by DTM for delay to sale had nothing to do with termination agreement; DTM has not requested any further undertaking; clients will not tolerate being blamed for delay; please copy to Mr Giles	2239
6 Nov 2018	Letter Billy Hughes & Co to Kennedys: service of claim	4806
28 Nov 2018	Email Mr Shaw to Edward Davies (11:56): details of funding opportunities: Park Hall and Calverhall; developments paying the landowner 'as we go' to avoid upfront purchase costs and stamp	2095

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	duty, with lender having benefit of full first charge to secure funding; hope you will consider schemes; will require £1.5m to £1.7m funding; have teamed up with a colleague and preferred contractor	
13 Mar 2019	Section 106 Agreement entered into by Owners in respect of their full planning permission [Rep §19(2)] [Shaw 3 §26.2(b)]	
14 Mar 2019	Council grant full planning consent to Owners for School Road development [Shaw 3 §26.2(b)]	
18 Apr 2019	Email from Wrekin Housing Trust to Andrew Jones (16:22): offer to purchase affordable dwellings at Willow Grove [Shaw 3 §26.2(c)] Registration of Village Artisan Ltd as proprietor of the School Road site [Def §30F]	2469
3 Jun 2020	Commencement of Willow Grove sales [Def §30C.1]	
22 Jul 2021	Application to discharge planning conditions for School Road development	3584
14 Sep 2021	LLP date of dissolution	
20 Sep 2021	Council discharges planning conditions for School Road development	3582
26 Oct 2021	Section 73 variation application by C in relation to plot 5 Willow Grove	4529
1 Dec 2021	School Road development starts	
8 Dec 2021	Letter Kennedys to Billy Hughes & Co: development is going ahead, with a different entity linked to C; Chartland applied for planning permission; Village Artisan Ltd has same registered office as C; invite explanation	4870
20 Dec 2021	Council grants section 73 variation in relation to plot 5 Willow Grove [Shaw 4 §2.7, Shaw 5 §2.5]	209
4 Jan 2022	Section 73 variation application by Emlex Ltd on behalf of Village Artisan Ltd in relation to plots 3 and 4 School Road	3645
8 Feb 2022	Letter Billy Hughes & Co to Kennedys: C has no interest in the land which was sold to Village Artisan Ltd; Village Artisan Ltd is an occupier of one of the other units at the location of C's previous premises and Chartland's premises; Village Artisan Ltd approached Chartland for assistance in satisfying planning conditions	4872
10 Feb 2022	Letter Kennedys to Billy Hughes & Co: Owners are proceeding with the development but land not yet sold; is the developer Chartland or Village Artisan Ltd?	4873
3 Mar 2022	Council acknowledgement that section 73 variation application re: plots 3 and 4 School Road is being withdrawn	3649

Date	***Description***	***Bundle Page No.***
22 Mar 2022	Section 73 variation application by Emlex Ltd on behalf of Village Artisan Ltd in relation to plots 2, 3, and 4 School Road (to increase size and nature of dwellings)	172
10 Nov 2022	Council grants section 73 variation application by Emlex Ltd on behalf of Village Artisan Ltd in relation to plots 2, 3, and 4 School Road (to increase size and nature of dwellings) [Shaw 4 §§2.2–2.3, Shaw 5 §2.4]	178
7 Dec 2022	Memorandum of Sale in relation to 5 Willow Grove for £690k [Shaw 5 §2.6]	213
6 Jan 2023	Section 73 variation application by Mr Shaw in relation to development at Hopton	232
9 Mar 2023	Order of Bright J ordering C to provide security for costs in sum of £150k by payment into Court, with alternative provision for personal guarantee	84
17 Nov 2023	Council grants section 73 variation in relation to Hopton development [Shaw 4 §2.8, Shaw 5 §2.6]	232