Neutral Citation Number: [2021] EWHC 690 (Ch)

Case No: BL-2018-002028

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (CH D)

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

Date: **15 March 2021**

Before :

Tom Leech QC (sitting as a Judge of the High Court)

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Between :

Barrowfen Properties Limited	**Claimant**
- and –	
(1) Girish Patel (2) Stevens & Bolton LLP (3) Barrowfen Properties II Limited	**Defendants**

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Lexa Hilliard and Tim Matthewson (instructed by **Withers LLP**) for the **Claimant**
Roger Stewart QC, Angharad Start and Joshua Folkard (instructed by **Reynolds Porter Chamberlain**) for the **Second Defendant**

Hearing dates: **15th March 2021**

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APPROVED JUDGMENT

Tom Leech QC **Monday, 15 March 2021**
(**10.44** am)

Tom Leech QC (sitting as a judge of the High Court, Chancery Division):

The Application

1. This is an application for permission to re-amend the Defence by the Second Defendant whom I will call "**S&B**". The application was first made by Application Notice dated 9 February 2021 but it was not heard until the first day of the third week of the trial. The application is supported by a supplemental expert report dated 25 February 2021 by S&B's expert valuer, Mr Peter Clarke. Before I set out the amendment it is necessary for me to set out very briefly the nature of the claims and the background to the amendment and the application itself.

The Claims

2. The claim against S&B is for breach of fiduciary duty, dishonest assistance and deceit. The Claimant, whom I will call "**Barrowfen**", claims that S&B preferred the interests of the First Defendant, Mr Girish Patel, who was its de facto managing director, to the interests of the company itself, with the consequence that the development of a valuable property, which I will call the "**Tooting Property**", was delayed.

3. Barrowfen makes four claims against S&B, which I will call the "**Company Claims**", relating to its corporate governance between November 2013 and July 2015. It is Barrowfen's case that if S&B had not committed the alleged wrongs but had complied with its duties, the new management would have taken control of the company by on or shortly after 8 May 2014 and would have commenced what is described in paragraph 44 of Barrowfen's Skeleton Argument for the trial as the "**Original Development Scheme**" by January 2015: see, in particular, paragraphs 292 to 295 of the Skeleton Argument. In relation to quantum, Barrowfen's case is that the causative effect of S&B's wrongs or breaches of duty was that the Original Development Scheme was delayed by 55 months and it claims lost rental for that period totalling £4.8 million: see paragraph 301.

4. Barrowfen also makes a fifth claim in relation to the administration of the company between October 2015 and February 2016 which I will call the "**Administration Claim**". It is Barrowfen's case that if S&B had not committed the alleged wrongs but had complied with its duties, the company would not have gone into administration at all and that it would have implemented the

Original Development Scheme by April 2016. Barrowfen's case on quantum is that it has lost 39 months of rental income, totalling £3.4 million: see paragraph 311.

5. In the event, Barrowfen implemented a different scheme which is described in paragraph 46 of its Skeleton Argument as the "**Revised Development Scheme**". In the alternative to its primary case, Barrowfen claims that it would have implemented that scheme earlier than it did if S&B had not committed the alleged wrongs and complied with its duties and Barrowfen had not gone into adminstration. On its alternative case, it claims that the causative effect of S&B's conduct was that the Revised Development Scheme was delayed by seven months and it lost seven months' rental income totalling £630,000: see paragraphs 312 to 315.

6. The question whether Barrowfen would have implemented the Original or the Revised Development Scheme depends to some extent on the conduct of third parties and Barrowfen therefore relies on the "loss of a chance" principle and asserts that it lost the chance to implement the Original Development Scheme but if it had not implemented the Original Development Scheme it would have implemented the Revised Development Scheme instead. If loss of a chance principles apply, then in assessing damages the Court would normally assess the monetary value of both chances. Barrowfen also claims a number of other costs and expenses which are not relevant to this application.

The Amendment

7. I then turn therefore to the amendment. S&B has already taken number of points in its Defence in relation to both causation and quantum. The firm now seeks to add a further point, namely, that Barrowfen must give credit for the increased value of the Revised Development Scheme. This defence is set out in the proposed paragraph, 191.3.1 which is as follows:

> "191.3.1 Stevens & Bolton will contend that in the events which happened the delay in the development of the Tooting Property has led to Barrowfen securing an increased Gross Development Value for the Tooting Property in the order of a £20m increase for which Barrowfen must give credit.
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> 191.3.1.2 Further or alternatively, Barrowfen must give credit for an increase in the Gross Development Value pursuant to the appropriate figures in paragraph 8.0.11 of the 29 January 2021 report of Peter Clarke FRiCS for the events as found by the Court.
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> 191.3.1.3 In the premises, it is denied that Barrowfen has made any loss and/or averred that it has made a profit.

(a) S&B's primary position is that set out in paragraph 182-190 of its Amended Defence, namely that Prashant and Suresh wished to "exit" their investment through a sale of the Tooting Property undeveloped with the benefit of planning permission at all material times. The profit made by the development in fact is in the sum of £15,891,884

(b) The measure of loss claimed is in any event denied and/or is misconceived.

(c) Further or alternatively, the profit which would have been made by the hypothetical development is in the sum of £6,479,353.

191.3.1.4 It is in any event, denied that any loss sustained by Barrowfen, which is denied, was caused by Stevens & Bolton or is loss for which Stevens & Bolton is responsible."

8. The amendment is supported by the supplemental report of Mr Clarke, to which he has annexed two development appraisals, the first for the Original Development Scheme and the second for the Revised Development Scheme. His evidence, if I permit him to give it, is that the Original Development Scheme would have yielded a developer's profit of £6,480,000 in December 2016 when it would have been completed but that the developer's profit for the Revised Development Scheme in March 2021 (when it is almost complete) is £15,900,000. S&B argues that Barrowfen must give credit for this increase in value.

9. I add two points about Mr Clarke's evidence. First, in his original report dated 29 January 2021 Mr Clarke expressed his opinion about the gross development value of the two schemes in the context of their viability in both January 2015 and April 2016. Mr Stewart submitted that the evidence in his supplemental report arises out of the evidence which he identified in that section of his original report. Secondly, most of the inputs in the appraisals which he has carried out for his supplemental report have been agreed between the two experts in their joint statement. Indeed, as Ms Hilliard put it in opening the trial, the experts agree about almost everything. This does not mean, however, that there would not be a substantial dispute about Mr Clarke's methodology or his final figures. But it does mean that the task for Mr Alford, Claimant's expert, would be simplified if I permitted the amendment.

The Procedural Chronology

10. I turn briefly to the parts of the procedural chronology which are relevant to the present application for permission to amend:

(1) On 16 September 2020 I gave directions for Barrowfen to serve Re-Amended Particulars of Claim by 3 November 2020 and for S&B to serve a Re-Amended Defence by 24 November

2020. I also gave directions for the service of expert reports by 11 January 2021 and for service of the joint statement by 19 January 2021.

(2) On 3 November 2020 Barrowfen served the Re-Amended Particulars of Claim. It made some amendments to the causation and loss allegations but none relevant to the proposed amendment.

(3) On 26 November 2020 S&B served the Amended Defence. It did not take the point that Barrowfen must give credit for the increase in capital value between the Original and the Revised Development Schemes.

(4) On 9 December 2020 Barrowfen served the Amended Reply. I should set out paragraph 58 which is relevant to this application:

> "Paragraph 187 is specifically denied. As for the sub-paragraphs of paragraph 187: a. Barrowfen embarked on a different development in 2016 because by 2016 the old development was no longer viable. b. Prashant was advised by professionals that residential housing would be preferable to student accommodation in 2016. He acted on that advice. c. It is admitted that the development is not yet complete. d. The choice was made because by the time Barrowfen exited administration (an event caused entirely by the conspiracy of Stevens & Bolton, Girish and Barrowfen II) and Prashant and Suresh regained control of Barrowfen, the original development was no longer commercially viable. The delay was caused because it was necessary to obtain planning permission for a development that was commercially viable. e. Save as aforesaid the sub-paragraphs are denied."

(5) The expert issues were not agreed and at the PTR on 25 January 2021 I fixed the expert issues for trial (which are set out in the schedule to the Order). I excluded issues 10 to 12 which dealt with capital values because I accepted that they were not relevant to any pleaded allegation in the statements of case at that stage. But I ordered the experts to address the viability of the development. I also extended time for service of expert reports and the joint statement by agreement between the parties.

(6) On 29 January 2021 the parties exchanged experts' reports. Barrowfen's expert valuer, Mr Alford, approached the issue of viability which was then numbered as issue 8 by providing a general commentary on the market. Mr Clarke dealt with this issue by undertaking a series of development appraisals which he described as viability assessments, as I have already said.

(7) On 10 February 2021 the expert valuers signed the joint statement. They were not able to agree anything in relation to issue 8.

11. I add that on 9 September 2020 and before the recent round of amendments, Barrowfen served Further Information of the original Particulars of Claim in answer to a Request for Further Information dated 4 July 2020. In replies 49 and 52 Barrowfen provided particulars of the losses which it claimed to have suffered in relation to both the Original and the Revised Development Schemes (as pleaded in paragraphs 116 and 117 of the Particulars of Claim). In replies 49 and 52 Barrowfen claimed that it had lost not only the profits from the rental income but the opportunity to re-invest and generate a return on those profits. This remains Barrowfen's case although (as Ms Hilliard pointed out) it has withdrawn its claim for loss of the developer's profit in relation to both schemes.

12. I turn therefore to the law on amendments. Ms Hilliard reminded me of the principles which are applicable to the determination of late applications for permission to amend. There are a significant number of authorities, in which the law on late amendments has been considered, but both parties accepted that the following statement by Carr J (as she then was) in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) at [38] was an accurate summary of the principles:

> "a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
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> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
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> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
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> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
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> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
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> g) a much stricter view is taken nowadays of non-compliance with the CPR and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

13. Ms Hilliard submitted that I should refuse permission for three reasons: first, there is no justification for S&B's delay in applying for permission to amend because S&B had instructed its expert by 21 December 2020 at the latest and he had gone on to consider the issue of capital values in his report; secondly, Barrowfen will be prejudiced by that delay because it will need to make further amendments and call additional expert and lay factual evidence; and, thirdly, the amendment has no real prospect of success. I deal with each objection in turn but I deal with the second and third issue in reverse order.

Objection 1: Delay

14. I am satisfied that there has been no real delay in applying for permission to amend for the following reasons. I accept, as Mr Stewart submitted, that the natural time to list the application for permission to amend was at the PTR on 20 January 2021. Barrowfen could have had no real complaint if S&B had applied for permission at that date. Further, even if the amendment had not been pleaded in the Amended Defence on 26 November 2020, I would not have refused permission on the grounds of delay at the PTR. In my judgment therefore the period of delay which S&B must defend is the period between 20 January 2020 and the issue of the application on 9 February 2020. In my judgment a delay of 20 days, even in the immediate run-up to trial, is not the kind of delay which would lead the court to refuse permission, provided that there is no significant prejudice and that delay can be adequately compensated in costs. There are also a number of mitigating factors in the present case:

    (1) Mr Stewart took me to RPC's letter dated 4 December 2020 in which S&B flagged up the amendment. Barrowfen was, therefore, aware of the amendment from that date. Mr Stewart

also told me that Barrowfen had only given disclosure in relation to the Revised Development Scheme in various tranches, the last on the day on which expert reports were exchanged.

(2) Experts' reports were not exchanged until 29 January 2021 and the joint statement was not agreed until 10 February 2021. It is difficult to see how the application could have been heard until the parties had served their experts' reports. It is unrealistic in my view to have expected S&B to object to further time for exchange of experts' reports or to insist that the Court hear the application in advance of exchange. In any event, both experts would have had to modify their development appraisals or produce new ones in the light of the very large member of agreement which they achieved in the joint statement.

(3) I heard Barrowfen's application to strike out parts of the Amended Defence in early February 2021 and handed down a reserved judgment on 5 February 2021. It is highly likely, therefore, that I would have dealt with this application at the same time if it had been made at the PTR.

(4) I heard the PTR and dealt with a number of applications on 5, 25 and 26 February 2021. I also put back that trial by a week to enable the parties to be ready. This was a particularly intense period and it was only because the parties (and I include Mr Girish Patel in this) were working so hard, combined with some flexibility from the court, that the trial did not go off altogether. In those circumstances, the opportunity to put this application before the court before the trial itself were very severely limited. I am therefore satisfied that S&B cannot be held responsible for the delay in the hearing of the application between the date of the application itself and the date of the hearing, given the applications with which the court had to deal.

Objection 2: No real prospect of success

15. I therefore turn to the second issue, which is whether the amendment has any real prospect of success. Ms Hilliard and Mr Matthewson cited a number of authorities on the question whether a claimant must give credit for benefits which flow from a solicitor's breach of duty: see paragraph 330 of their Skeleton Argument. Mr Stewart, Ms Start and Mr Folkard also cited a number of other authorities. For the purposes of this application it is necessary for me to cite only three of those decisions. First, in *Tiuta International Ltd v De Villiers Surveyors Ltd* Lord Sumption stated as follows at [12]:

> "This court has recently had to deal with collateral benefits in a context not far removed from the present one. The general rule is that where the claimant has received some benefit attributable to the events which caused his loss, it must be taken into account in assessing damages, unless it is collateral. In *Swynson Ltd v Lowick Rose LLP* [2017] 2 WLR 1161 at [11] it was held that as a general rule "collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss." Leaving aside purely benevolent benefits, the paradigm cases are benefits under distinct agreements for which the claimant has given consideration independent of the relevant legal relationship with the defendant, for example insurance receipts or disability benefits under contributory pension schemes. These are not necessarily the only circumstances in which a benefit arising from a breach of duty will be treated as collateral, for there may be analogous cases which do not exactly fit into the traditional categories. But they are a valuable guide to the kind of benefits that may properly be left out of account on this basis."

16. Secondly, in *Fulton Shipping Inc of Panama v Globalia Business Travel SAU* [2017] 1 WLR 2581, upon which Ms Hilliard placed particular reliance, the Supreme Court held that in determining whether a benefit received by a claimant must be brought into account in assessing damages, the essential question is one of causation. Lord Clarke formulated the test in the following way at [30] (which Ms Hilliard cited):

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

17. I will come back to *Fulton*. But it was a case concerned with the repudiation of a time charter. The third case to which I refer is a professional negligence case, namely, *Primavera v Allied Dunbar Assurance Plc* [2003] PNLR 12. In that case the defendants provided negligent advice about an executive retirement plan which failed. Because it failed, the claimant did not cash it in early and the issue for the Court of Appeal was whether credit should be given for increases in its value over a later five year period. Simon Brown LJ cited an earlier decision, *Needler Financial Services Ltd v Taber* [2002] 3 All ER 501, in which Sir Andrew Morritt V-C. reviewed the earlier authorities (including the well-known decision in *Hussey v Eels* [1990] 2 QB 227) and held that they established two propositions (at 511-12):

> "First the relevant question is whether the negligence which caused the loss also caused the profit, in the sense that the latter was part of the continuous transaction of which the former was the inception. The second question is primarily one of fact."

18. Barrowfen has set out the factual background to the Revised Development Scheme and the reasons for the change from the Original Development Scheme in its Skeleton Argument: see paragraphs 303 to 306. I cannot be satisfied that if Barrowfen establishes those facts, S&B has no real prospect of persuading me that they formed part of a continuous transaction and that S&B's breaches of duty (if established) caused the decision to change from the Original Development Scheme to the Revised Development Scheme.

19. Moreover, it is Barrowfen's positive case that by the time that it had exited from the administration (for which it holds S&B responsible) – and the new management had taken control – the Original Development Scheme was no longer commercially viable and it was necessary to apply for and obtain a planning permission for a new scheme: see the Amended Reply, paragraph 58(d). As Mr Stewart submitted, it is at least arguable that if S&B caused the delay by its conduct it also caused Barrowfen to adopt the Revised Development Scheme. In my judgment, it is also arguable that this all formed part of the continuous transaction of which S&B's conduct was the inception.

20. In her oral submissions Ms Hilliard focused on *Fulton*. She accepted that the test was whether the breach caused the benefit but submitted that where the breach of duty was merely the occasion for the loss, that any increase in value could not be set off against the resulting gain. She accepted that S&B's alleged breaches of duty caused Barrowfen to revisit the viability of the Original Development Scheme, to take advice and then to swap residential accommodation for the student accommodation (as originally planned). But she submitted that it was not permissible to set off any increased capital value against the income losses to which Barrowfen's claim was now limited, by analogy with *Fulton.* In that case, the charterer's repudiation of the time-charter enabled the ship owner to sell the ship before a general fall in the market and as a consequence it realised a tangible benefit. Nevertheless, it did not have to give credit for it. Ms Hilliard submitted that the facts of *Fulton* were much stronger than the present case and that it would be quite wrong to fix a capital value now and set it off against income losses when Barrowfen plans to retain the development as an income-producing asset and has no immediate intention to realise its capital value.

21. Mr Stewart submitted that *Fulton* was a very different case. The ship owner had been deprived of a contractual entitlement to the charter fees payable under the charter and it was right in principle, therefore, that the charterer could not rely on the consequences of its own wrong to avoid its contractual liabilities. In the present case, however, Barrowfen's claim is that but for S&B's conduct, it would have carried out the Original Development Scheme but as a consequence of that conduct

it has carried out the Revised Development Scheme at a hugely increased profit. He submitted that the very delay about which Barrowfen complained caused it to undertake a more profitable scheme than the original one, and that there is no reason why it should not give credit for the value of that scheme now. He distinguished *Fulton* for two reasons: first, this is not a claim to recover the lost income for breach of a contract to let of an asset and, secondly, because the adoption of the Revised Development Scheme and its ultimate completion (which is due to take place in April of this year) was all part of a continuous transaction.

22. I cannot decide this argument and whether *Fulton* is distinguishable on this application. It seems to me that it is properly arguable that Barrowfen will have to give credit for the increase in capital value. The points which Ms Hilliard makes about the date of valuation for both schemes, Barrowfen's evidence that it intends to keep the development and also that it has suffered consequential losses which also ought to be taken into account may all be very good points. But they are not points which I can decide now and are properly made in closing submissions at trial. I am not satisfied that the proposed amendment has no real prospect of success and I will not refuse to permit it for that reason.

Objection 3: Prejudice

23. I therefore turn to the question of prejudice, which I consider to be the more difficult issue on this application. In its Skeleton Argument Barrowfen identifies five reasons why it will be prejudiced by the amendment which cannot be compensated for by costs or by costs alone: see paragraph 328. I will deal with each item in term:

    (1) *Expert valuation evidence*: Ms Hilliard relied on the fact that it will be necessary to obtain expert evidence Mr Alford and vary the list of issues. Based on the current timetable, the experts will give evidence on 24 March 2021 (i.e. in ten days) and I am satisfied that it is possible for Barrowfen to obtain the necessary evidence from Mr Alford and serve a reply to Mr Clarke's report within that time. As I have stated, most of the inputs are agree and Mr Alford should have access to a development appraisal model which would enable him to produce the appraisals and to discuss them with Mr Clarke. Quite properly, Ms Hilliard did not suggest that it was impossible for him to prepare and serve a supplemental report.

    (2) *Further disclosure*: Ms Hilliard submitted that it will be necessary to obtain further disclosure relating to the valuation of the Tooting property and, in particular, valuations obtained during

the negotiations for funding with Barclays Bank. Given the level of agreement between the experts about their rental valuations, I am not satisfied that any historic valuations prepared for the purposes of applications for finance will assist me to determine what the capital values of the Tooting Property were at the relevant times. However, if Ms Hilliard wishes to put in historic valuations prepared for Barclays to Mr Clarke, I consider that she has sufficient time to locate and disclose them before he gives his evidence. Indeed, Barrowfen has pleaded a positive case that it is entitled to recover the professional costs of Lambert Smith Hampton and Savills and ought therefore to be able to disclose their original reports and might well have done so in order to make good the case that those costs are recoverable.

(3) *Amendment:* Ms Hilliard also submitted that it would be necessary to re-amend the Particulars of Claim to advance a case that Barrowfen would have re-invested the rental income from the original development scheme if it had received it at an earlier time. I disagree. It already forms part of Barrowfen's case that it lost the opportunity to re-invest and generate a return on the profit which had would have made from renting out the property during the earlier period of 39 or 55 months as the case may be. See, in particular, responses 49 and 52 to which I have referred (above). This response was not withdrawn when Barrowfen chose to amend to withdraw its claim for developer's profit. It relates to the additional interest or opportunity costs which Barrowfen would have been able to earn on the rent which it would have received earlier.

(4) *Expert accountancy evidence*: Ms Hilliard also submitted that it would be necessary to obtain accountancy evidence about the present value of the future interest burden of the additional borrowing which Barrowfen had to take in order to complete the Revised Development Scheme. I am not satisfied that it would be impossible for the expert valuers to provide this evidence in their development appraisals and Mr Stewart took me to the relevant parts of Mr Clarke's development appraisals in which he had included finance costs. But even if it is necessary to obtain expert accountancy on this issue, this is not in my judgment a sufficient reason to justify refusing the amendment by itself. If the experts cannot deal with this issue, then it can be dealt with as part of the consequential matters following judgment. Parties often adduce evidence of their finance costs after judgment to justify a claim for interest, whether for statutory interest or interest as damages and, if necessary, I can direct an enquiry on this issue should it arise.

(5) *Factual evidence*: Finally, Ms Hilliard submitted that it would be necessary to call factual evidence on the negotiations with Barclays and in relation to the lost opportunity to re-invest. Again, I am not satisfied that this is a sufficient reason to disallow the amendment. It has been part of Barrowfen's case that it lost the opportunity to re-invest the rental income or the net rental income from the original development scheme since least 11 September 2020. If it wanted to call evidence on this issue, it should have done so to support its case. Moreover, as I have already stated above, I am not satisfied that factual evidence in relation to negotiation for Barclays has any real relevance to the capital value of the Tooting Property subject to the Revised Development Scheme. Nevertheless, if she does wish to adduce any further evidence in order to deal with these issues, I will permit her to do so.

24. In conclusion, I will therefore grant permission to amend, subject to any orders for costs sought by Ms Hilliard. I will also give permission to Barrowfen to produce a supplementary report by Mr Alford in answer to Mr Clarke's supplemental report, and if Ms Hilliard does want to adduce any additional evidence in order to meet the other issues she has identified, I will hear from her about when and whether that should be done.