



Neutral Citation Number: [2022] EWHC 1253 (Ch)

Claim No: PT-2020-000197

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

25 May 2022

Before :

JUDGE JONATHAN RICHARDS
Sitting as a Deputy Judge of the High Court

Between :

**AURIUM REAL ESTATE LONDON ULTRA
PRIME LIMITED**

Claimant

- and -

MISHCON DE REYA LLP

Defendant

Rupert Reed QC and Michael Walsh (instructed by Fieldfisher LLP) for the claimant
Ian Croxford QC, Jamie Smith QC and Michael Bowmer (instructed by DWF Law LLP)
for the defendant

Hearing dates 21 to 25 March, 28 to 31 March, 1 April and 5 to 6 April 2022
Draft judgment circulated on 16 May 2022

APPROVED JUDGMENT

Covid-19 Protocol: This judgment is handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 AM on 25 May 2022.

Judge Jonathan Richards:**INTRODUCTION****Overview of the claim**

1. The Claimant (“Aurium”) is a company incorporated in Jersey. The Defendant (“MdR”) is a firm of solicitors. Aurium claims that MdR provided negligent advice in connection with a real estate investment (the “Bayswater Project”) on a site on the Bayswater Road, London. I will make detailed findings, both of fact and law later in this judgment, but the following summary of the claim and its background will put the later discussion into context.
2. Aurium is a holding company. It incorporated a Jersey sub-holding company, Bayswater Road (Holdings) Limited (“BRHL”) and various property-holding subsidiary companies (the “Subsidiaries”) in connection with a substantial development project that was commenced in early 2014. The idea was that Aurium would “assemble” a collection of freehold titles that together covered a sizeable area of land near Hyde Park (the “Site”), with those freehold titles being conveyed to the Subsidiaries. Vacant possession of the Site would be secured, where necessary by offering tenants of leasehold premises inducements to surrender their leases, and planning permission would be secured for conversion of the Site into 55 high-end residential apartments and ancillary retail, restaurant and other accommodation. The desirable location of the Site and the increase in its value consequent on the grant of planning permission would, Aurium hoped, enable it to make a healthy profit on the venture although the precise way in which it expected to make that profit was the subject of some dispute.
3. The funding necessary to assemble the Site, and to pay necessary inducements to tenants, came from two principal sources:
 - i) Aurium’s ultimate beneficial owners included two wealthy individuals, Mr Simon Pearson and Mr Joseph Penna who provided the equity capital for the project. Between 2014 and 2017 Aurium, largely using funds provided by Mr Pearson and Mr Penna, invested over £50m in BRHL and the Subsidiaries in the form of equity and subordinated loans.
 - ii) Cheyne Capital Management (“Cheyne”) provided an initial £75m of debt finance (the “Senior Debt”) to BRHL under the terms of a facility agreement dated 17 June 2014. Initially that finance was provided for a term of 18 months but the maturity of the Senior Debt was extended on various occasions. Cheyne advanced the Senior Debt at a time when the Bayswater Project was an uncertain and risky proposition. The interest rate on that debt was 10%, a high rate that reflected that risk. Cheyne took security for BRHL’s liabilities including a charge over Aurium’s interest in both (i) the shares in BRHL and (ii) loans that Aurium had made to BRHL.
4. Mr Pearson and Mr Penna were both directors of Aurium and of BRHL. Since both companies were intended to be resident outside the UK for tax purposes some care was taken to ensure that management of both companies was located in Jersey. To that end, a corporate services provider (“Crestbridge”) was engaged to provide management services in Jersey.

5. Mdr gave legal advice in connection with the Bayswater Project. The extent of Mdr's involvement, the duties it owed, and whether those duties were owed to Aurium or to BRHL, were in dispute. It suffices to note at this stage that Mdr gave a significant quantity of advice and was involved in negotiating the legal documents under which the Senior Debt was advanced.
6. By a Development Management Agreement executed in June 2014, BRHL appointed Fenton Whelan Limited ("Fenton Whelan"), which carried on a property development business, to act as its agent on the Bayswater Project. Fenton Whelan had been founded by Mr Sanjay Sharma and Mr James Van Den Heule, and both Mr Sharma and Mr Van Den Heule would play a prominent role in the execution of the Bayswater Project.
7. By August 2014, the assembly of the freehold titles on the Site was significantly complete. Attention turned to obtaining vacant possession. I need say little about those negotiations for vacant possession that proceeded smoothly. However, the present dispute between Aurium and Mdr arises out of a negotiation for vacant possession that proceeded far from smoothly. The relevant tenant was Berkeley Credit & Guarantee Limited ("BCG"), which was a business tenant of a bureau de change located at 125 Bayswater Road under a lease (the "Lease") which was due to expire in December 2021 and so had some six years to run in 2015. The relevant Subsidiary owning the freehold was Alderton Park Limited ("APL"). By the end of 2015, BCG (which was apparently owned and operated by a Mr Felix Grovit) had rebuffed offers made to it by Aurium to pay a premium in return for BCG's surrender of the Lease.
8. BCG was a prolific correspondent, and ultimately became a litigant, on matters concerning rights and obligations under the Lease. Two issues in particular are worth highlighting in this introduction. First, BCG had formed the view that, by acquiring the freehold reversionary on the Lease, APL had inherited an obligation to pay for remedial works to the front of BCG's shop. That dispute (the "Shopfront Dispute" which was to become the "Shopfront Litigation") concerned a relatively modest sum of money in the context of the Bayswater Project as a whole, at around £40,000. APL was ultimately successful in the Shopfront Litigation, obtaining summary judgment in its favour in 2016.
9. The second issue that BCG articulated in correspondence needs to be understood in the context of the geography of the Site and the terms of the Lease. BCG's bureau de change (the "Shop") was located on the corner of Bayswater Road and Queensway. The Shop constituted the demised premises under the Lease but was part of a larger building (the "Building"). Above the Shop were a further four storeys of the Building (the "Upper Parts") which were not demised under the Lease and which were also owned by APL. A number of issues in this case arise from the fact that the landlord's repairing covenant in Clause 4.2.6 of the Lease ("Clause 4.2.6") was expressed to apply, not just to the Shop, but to the Building as a whole as follows:

throughout the Term to keep the main structure of the Building and in particular the roof void and main structural walls thereof and all common parts in good and tenantable repair and condition.
10. This wording raised a question of construction of the Lease, namely whether if the Upper Parts were demolished and replaced with new residential units, there would be a breach of Clause 4.2.6. If attention was focused on the end result of

this process, it might be said that the Upper Parts (in their new form) would be in good repair and condition. However, there was a clear concern that the intermediate demolition of the Upper Parts could be seen as involving a failure to “keep” them in good repair and condition. It was common ground that this question of interpretation is “nuanced”, with no straightforward answer to it.

11. By late 2015, Fenton Whelan considered that BCG was being intransigent in not engaging with negotiations for surrender of the Lease. BCG also commenced proceedings in respect of the Shopfront Litigation on 9 December 2015. Fenton Whelan started to wonder whether it might be possible to “build around” the Shop in some way so as to obviate the need to reach agreement with BCG on a surrender of the Lease.
12. On 21 January 2016, MdR gave some advice (the “Advice”) about the extent of BCG’s rights under the Lease. The interpretation and scope of the Advice are matters of considerable dispute. However, Aurium’s case is that in the Advice, MdR failed to advise that a proposed “build around” strategy carried a material risk of infringing Clause 4.2.6 given the “nuanced” position described in paragraph 10. MdR denies that it was asked to advise on any “build around” scheme that was articulated with sufficient precision to enable it to advise on the applicability or otherwise of Clause 4.2.6.
13. Little progress was made in negotiations between Aurium and BCG for the surrender of the Lease in 2016. Aurium’s case, which is disputed, is that it no longer felt it necessary to engage in such negotiations because it considered that the Advice had confirmed to it that a “build around” strategy was viable.
14. Obtaining planning permission from Westminster City Council (“WCC”) was central to the Bayswater Project. That process proceeded far from smoothly. The planning application was not made until 9 November 2015, just a month or so before the Senior Debt was due for repayment, making an extension to the term of the Senior Debt necessary, with a consequent increase in BRHL’s obligation to pay Cheyne the high rate of interest due under that debt. On 12 April 2016, WCC resolved to grant planning permission, but Mr Boris Johnson, then the Mayor of London, indicated that he was minded to exercise his power as Mayor to direct refusal. However, Mr Sadiq Khan was subsequently elected as Mayor and he indicated, on 18 July 2016, that he was content to allow WCC to determine the planning application without further intervention from the Mayor’s office. BRHL was only able to secure that change in outcome by agreeing to increase the contribution to affordable housing made by the Bayswater Project by £2.5m to £11m.
15. WCC formally granted planning permission on 2 March 2017. However, implementation of any proposal to “build around” the Shop would require an amendment to that planning permission under s73 of the Town and Country Planning Act 1990 (“Section 73”). Such an amendment (the “Section 73 Application”) was submitted on 4 April 2017 which set out details of a specific way of “building around” the Shop involving a demolition of the Upper Parts, but leaving the Shop itself intact.
16. By May 2017, after extensions to the term of the Senior Debt, Aurium was at an advanced stage of negotiations with KWG, a Chinese company, for the sale of Aurium’s shareholding in BRHL for a price of £158m to include the discharge of all liabilities owed by BRHL (including the Senior Debt and liabilities BRHL

owed to Aurium). Still no terms had been agreed for the surrender of the Lease because, on Aurium's case, it considered that there was no immediate pressure to agree terms since, if necessary, the Shop could be "built around". On 16 June 2017, BCG issued legal proceedings, seeking a declaration that pursuing the build around strategy set out in the Section 73 Application would involve APL breaching the terms of Clause 4.2.6 of the Lease. On 4 July 2017, KWG withdrew from negotiations to purchase the BRHL shares citing the uncertainty caused by the litigation with BCG.

17. APL instructed Mr Adam Rosenthal (now QC) to act for it in defending BCG's claim. On 12 October 2017, Mr Rosenthal advised that the chances of the build around scheme set out in the Section 73 Application being compatible with Clause 4.2.6 of the Lease were around evens. Aurium resumed negotiations with BCG eventually agreeing, on 8 March 2018, that BCG would surrender the Lease in return for a payment of £4.25 million.
18. After KWG withdrew from negotiations to purchase the BRHL shares in July 2017, there were attempts to revive that transaction, albeit at a lower price. Those attempts continued for a protracted period, but by September 2018, it was clear that KWG were no longer interested in purchasing the BRHL shares even for a reduced purchase price. KWG never bought the BRHL shares. By October 2018, BRHL had been in default on its obligations under the Senior Debt for over 18 months and the failure of the transaction with KWG meant that Cheyne was no longer prepared to exercise forbearance and enforced its security. Aurium's case is that, in consequence, it lost some £48 million of equity invested in, and loans made to, BRHL. Aurium seeks to recover that loss from MdR as damages either for breach of contract, or in tort, claiming that the Advice was negligent.
19. Almost all aspects of Aurium's claim are disputed and I will deal with the substance of each dispute in the sections that follow. However, I state at the outset some aspects of the claim that shape much of the analysis that follows:
 - i) Aurium's case is that the Advice (i.e. the specific written communication dated 21 January 2016) was negligent and that this negligence caused loss. Aurium says that, on 12 occasions after the Advice was given, MdR repeated or confirmed the substance of the Advice and that MdR acted negligently on those 12 occasions as well. However, it does not seek to establish that any negligence on those 12 subsequent occasions caused any loss. Rather, Aurium relies on these 12 occasions in support of its argument that it relied on the Advice originally given and did so reasonably. It follows that, in order to succeed with its claim, Aurium has to establish (i) that looking at matters on 21 January 2016 when the Advice was given, MdR owed a duty of care to Aurium itself and (ii) that the Advice was negligent. Actions after 21 January 2016 can certainly shed a light on the position on that date. But if Aurium cannot prove its case by reference to the Advice, it has no fallback arguments that any subsequent confirmation of the Advice was causative of loss.
 - ii) In a similar vein, Aurium's case on loss and causation is closely focused. In summary it claims damages for "loss of a chance" and relies on three propositions:
 - a) That if it had received different, non-negligent, advice Aurium would have behaved differently in its negotiations with BCG.

- b) Faced with a different negotiating position, BCG would have accepted some financial inducement to surrender the Lease prior to June 2017 and so would not have issued legal proceedings for a declaration that the proposed “build around” would be in breach of APL’s obligations under the Lease.
 - c) Without litigation from BCG, KWG would not have walked away from negotiations to purchase the BRHL shares and so would have exchanged contracts for a purchase of those shares for £158m (including procuring repayment of all debt) in or around June or July 2017 and would have proceeded towards completion of that agreement.
- iii) Aurium does not, therefore, claim that it lost an open-ended chance to sell its shares in BRHL. Its claim is based specifically on the loss of the opportunity to exchange contracts for such a sale with KWG in or around June or July 2017.

Evidence and procedural matters

20. Large transactions such as the Bayswater Project generate significant quantities of documentation. I had a large bundle of documents. I also had witness evidence from the following:

- i) For the Claimant:
 - a) Mr Sharma – who was, as noted, a co-founder of Fenton Whelan and was closely involved in the Bayswater Project
 - b) Mr Pearson and Mr Penna who were, as noted, two of Aurium’s ultimate beneficial owners
 - c) Mr Benjamin Manners, a qualified solicitor, who worked in-house as an adviser to Mr Penna
- ii) For MdR:
 - a) Mr Ian Paul, a partner in MdR’s real estate department
 - b) Mr Jonathan Warren who was, at the time, a managing associate in MdR’s property litigation group. He prepared the Advice which was reviewed, before it was sent, by Ms Chhavie Kapoor, a legal director
 - c) Ms Anita Rivera, a partner in MdR’s planning department.

Approach to witness evidence

21. In assessing the evidence, I have kept well in mind the observations of Leggatt J (as he then was) in paragraphs 15 to 21 of *Gestmin SGPS S.A. and others v Credit Suisse (UK) Limited and others* [2013] EWHC 3560 (Comm). The case before me involves a significant factual dispute about what different people believed at different times: for example, what MdR believed its instructions to be, what instructions Mr Sharma believed he had given, what Mr Sharma believed the Advice to say and how he believed his actions were affected by the Advice. Aurium’s witnesses in particular tendered their recollections of what had

happened in support of Aurium's case. Given the full contemporaneous documentary record, and the risk that all witnesses' averred recollections of what happened, or what they believed, have been affected by the civil litigation process itself, I have looked critically at any averred recollection put forward by any witness which is, or appears to be, inconsistent with contemporaneous documents. I have not, of course, treated *Gestmin* as requiring me to ignore witnesses' evidence of their recollections, or to place no reliance on that evidence (not least given the guidance given by the Court of Appeal in paragraph [88] of the judgment of Floyd LJ in *Martin v Kogan* [2020] FSR 3). I have, however, sought to test that against evidence of contemporary documents.

22. I do not accept Aurium's assertion that, in his oral evidence, Mr Warren showed a propensity "not to give straight answers". Mr Warren struck me as a transparently honest and thoughtful witness. He emphasised throughout that his recollections and memories could well have been influenced by documents that he saw after the event. He was so concerned about the risk of saying anything that was either factually inaccurate or misleading that his answers to questions in cross-examination were on occasions lengthy. However, this was not a device to avoid giving straight answers.
23. Nor I do not accept MdR's assertion that Mr Sharma was such an unreliable and unsatisfactory witness that his oral evidence should not be accepted unless corroborated by a contemporaneous document. My assessment was that Mr Sharma was seeking to tell the truth as he believed it to be. In some respects, I have found that Mr Sharma's recollection was faulty. However, I do not consider that he was consciously seeking to deceive the court. MdR submitted that Mr Sharma had misled others during the Bayswater Project and was similarly misleading in his evidence to the court now. I agree that, while the Bayswater Project was in train, Mr Sharma did on occasions "talk up" the merits of that project to possible investors among others. He did, on occasion, overstate matters. However, I do not consider that he was positively seeking to deceive anyone. Nor do I consider that the way he acted on the Bayswater Project suggested that he would be unable or unwilling to give true evidence to the court.
24. I do, however, consider that the evidence of Mr Sharma, Mr Pearson and Mr Penna has been affected by what Mann J described as "litigation wishful thinking" in *Tamlura NV v CMS Cameron McKenna* [2009] EWHC 538 (Ch). Mr Pearson and Mr Penna both lost large sums of money as a consequence of their involvement in the Bayswater Project. Mr Sharma played a central role in advising them on that project. All, I consider, have come to the view that MdR were to blame for the loss and have to an extent "back filled" their recollections so as to be consistent with that narrative. In saying this, I am not saying that these witnesses have consciously sought to mislead, just that they have demonstrated the human tendency, highlighted in *Gestmin*, to fit recollections to one's own narrative. This tendency manifested itself in, for example:
 - i) All three witnesses gave evidence that MdR was aware of a single "exit strategy" that would involve a sale of all of the BRHL shares to a third party purchaser. That was part of an internal narrative supporting Aurium's argument that MdR was responsible for the loss that arose when precisely such an exit, the proposed sale of BRHL to KWG, fell through. However, the recollection was faulty as there was no such single strategy (see paragraphs 101 to 103 below).

- ii) All three witnesses claimed that Mr Rosenthal's advice in October 2017 was a "bombshell", to use the words of Mr Penna. That was part of their internal narrative that MDR had originally given strong assurances on the legal efficacy of a build around proposal and were changing their advice when faced with legal action from BCG. I explain in paragraph 139 below why, in my judgment, this recollection was faulty.
25. These are examples only. However, having identified the tendency, I have examined the evidence of Mr Sharma, Mr Pearson and Mr Penna critically where those recollections are, or appear to be, inconsistent with internal documents. I saw no such similar tendency in the evidence of MDR's witnesses. That is partly because MDR's case did not rely to the same extent as Aurium's on recollections of individuals.
26. I regarded Ms Rivera and Mr Paul as honest and reliable witnesses. I considered that there was some force in Aurium's criticism that Ms Rivera's witness statement contained some passages of inadmissible opinion evidence and some passages of advocacy, rather than evidence. However, ultimately this mattered little and I have simply reminded myself that Ms Rivera's opinions are not generally admissible as evidence and that legal submissions come from MDR's counsel not its witnesses.
27. I regarded Mr Manners as an honest and reliable witness. He did not start doing any work in connection with the Bayswater Project until April 2016, by which time the Advice had been commissioned and delivered, so his evidence was of less direct relevance than that of some other witnesses.

"Empty chairs"

28. Both sides criticised the other for not producing particular witnesses leaving so-called "empty chairs". I need say little about MDR's criticism that there were "empty chairs". Aurium's criticism is based on the fact that MDR has not called Ms Kapoor, Mr Tyler, Mr Harris or Mr Strutt of MDR to give evidence. Their roles in the transaction are set out below. Aurium set out specific inferences that should be drawn from each potential witness's absence. In the light of the Supreme Court's judgment in *Royal Mail Group Ltd v Efofi* [2021] 1 WLR 3863, I will approach the request to draw adverse inferences largely as a matter of common sense. Relevant considerations will naturally be the areas on which these four individuals would have been able to give evidence, the extent of other relevant evidence in those areas and the significance of any evidence that the four individuals might have given.
29. Ms Kapoor performed a senior-level review of the Advice. She could not give direct evidence as to the scope of MDR's duty since she was not a recipient of instructions to produce the Advice. In this case it is said that MDR was in breach of its duty because of what the Advice said, or did not say. Evidence as to the process Ms Kapoor followed in reviewing the Advice would be of little relevance, and certainly of little relevance incremental to the evidence given by Mr Warren. I acknowledge that Ms Kapoor was involved in some of the later 12 occasions on which the Advice was said to have been affirmed. However, for reasons that I will come to, I consider those 12 occasions to be of limited significance. Nor do I consider that there would have been any particular benefit in cross-examining her on emails that she sent in 2017 which suggested she knew little of the build around scheme that was being proposed at that point. Ms Kapoor's knowledge,

or lack thereof, in 2017 is not directly relevant to the scope of MdR's duty in 2016. Evidence from Mr Paul and Mr Warren as to MdR's knowledge in 2016 was sufficient. I will make no adverse inference arising out of Ms Kapoor's absence.

30. I do not consider that Mr Tyler would have had much incremental relevant evidence to give. This claim concerns real estate advice. Mr Tyler was a partner in the corporate department. He would have been involved in opening matters for both Aurium and BRHL, but his subjective recollection (if he had one) as to whether there was a coherent practice of opening "corporate" matters in Aurium's name and "real estate" matters in BRHL's name would not have assisted greatly with my determination of the issue set out in Section A below since the task is to ascertain, objectively, the common intention of Aurium/BRHL and MdR. Doubtless Aurium and Mr Sharma had some discussions with Mr Tyler about their "exit strategy". But there is no reason to think that they would have said anything different to him than they did to Mr Paul who also gave evidence as to his understanding of exit strategy. In any event, my conclusions on the exit strategy that Aurium communicated to MdR have not been determined by reference primarily to the recollections of any witnesses but rather by the exit strategies that were actually being contemplated, as set out in contemporaneous documents at the time. It was suggested that Mr Tyler could give evidence on whether Mr Sandelson (a property developer who played some part in seeking to obtain vacant possession of the Shop) communicated to him a proposal by Mr Grovit that BCG surrender the Lease for a payment of £10m. However, that is a tangential issue. In any event, Mr Tyler could at most have commented on whether Mr Sandelson told him that a £10m offer had been made. He could not comment on whether Mr Grovit or BCG actually made such an offer. Mr Tyler's evidence on other issues that could potentially have held up a sale of BRHL to KWG would have been of little significance given my conclusions set out in paragraph 186. I will make no adverse finding in relation to Mr Tyler's absence.
31. Mr Harris was a director, and subsequently a partner, in MdR's real estate department. He had received first-hand Mr Sharma's instructions to prepare the Advice and therefore his evidence on that would have been of some relevance and would have added something to the evidence of Mr Warren and Mr Paul. However, I do not consider that would have been a material addition. Since Mr Sharma did not set out the request for the Advice in writing, Mr Harris would have been giving evidence as to his recollection of what was said over the telephone in January 2016. However, there is much contemporaneous written material that provides an inference as to what was said. It is difficult to see that Mr Harris could have had such a clear recollection of what was said over 6 years ago to add much to the contemporaneous written material. Mr Harris's evidence as to possible other obstacles to a successful sale of BRHL in 2017 is of little significance given the points I make in paragraph 186 below.
32. Mr Strutt was a partner in MdR's finance department. It is difficult to see what useful evidence he could have given beyond confirming that he was aware of the terms of finance documents including the Senior Debt because he had negotiated them. He could not have added significantly to the evidence on "exit strategy" for reasons that I have set out in connection with Mr Tyler. I make no adverse inference as regards Mr Strutt's absence.

The applicable legal principles

33. In *Manchester Building Society v Grant Thornton LLP* [2021] UKSC 20 and *Meadows v Khan* [2021] UKSC 21, the Supreme Court gave general guidance regarding the proper approach to determining the scope of duty and the extent of liability of professional advisers in the tort of negligence. The Supreme Court’s guidance is also applicable to a situation where it is said that negligent advice was given pursuant to a contract between a solicitor and client for the provision of legal advice (see [2] of the judgment of the majority in *Manchester Building Society*).
34. At [6] of the judgment of the majority in *Manchester Building Society*, the Supreme Court said that the following questions arise when a claimant seeks damages from a defendant in the tort of negligence (and so, by extension, when a claimant seeks damages for allegedly negligent advice provided by a solicitor pursuant to a contract):
- (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)*
35. The parties were agreed on the “actionability question”. The economic loss that Aurium seeks to recover is in principle recoverable as damages either in contract or in tort. However, all other aspects of Aurium’s claim were disputed.
36. The parties prepared an agreed list of issues. Those issues can be organised under the following broad headings which I will use as a structure for the remainder of this judgment:
- i) *Existence of duty* – Did MdR owe any obligation or duty, either in tort or in contract, to Aurium in relation to the Advice? MdR’s case is that it owed duties only to BRHL.

- ii) *Scope of duty* – If MdR owed a duty to Aurium, what was the scope of that duty? To what extent does Aurium’s pleaded loss and damage fall within the scope of that duty?
 - iii) *Breach of duty* – In providing the Advice did MdR fail to exercise the standard of skill and care to be expected of reasonably competent solicitors in any of the respects pleaded in Aurium’s Particulars of Claim? If MdR did breach its duty, what should the content of the Advice have been instead?
 - iv) *Reliance* – Did Aurium rely on the Advice in deciding whether to implement, and in implementing, a build around scheme and/or as regards its negotiating strategy with BCG when seeking to obtain vacant possession? If Aurium did rely on the Advice, what was the nature of that reliance?
 - v) *Counterfactual actions of Aurium* – If the Advice had instead have been of the nature identified in iii) above, would Aurium have acted differently as regards its pursuit of a build around scheme and/or its negotiating strategy with BCG? If yes, how would it have acted?
 - vi) *Counterfactual actions of persons other than Aurium* – If Aurium had acted in the manner set out in paragraph v) above, was there a real and substantial chance that (a) Aurium would have had the funds to, and would have been able to conclude a negotiated settlement with BCG before June 2017; (b) BCG would not have issued proceedings; (c) KWG would not have withdrawn from its first bid of £158m; (d) KWG would have exchanged contracts in or around June/July 2017 at a price of £158m and proceeded thereafter to completion; (e) it would have been unnecessary for Cheyne’s debt facility to be extended in or around October 2017? If so, what was the quantum of the chance(s)?
 - vii) *Duty nexus and loss* – Has Aurium suffered loss in the form of an inability to recover loans that it made to BRHL? Is any such loss recoverable having regard to the scope of MdR’s duty set out in paragraph ii) above?
 - viii) *Legal responsibility* – Did Aurium contribute to its loss by its own negligence, whether by itself or Fenton Whelan? If so, what reduction, if any, should there be in Aurium’s recoverable damages on account of such contributory negligence?
 - ix) *Counterclaim* – Is Aurium liable to MdR for the fees that are the subject of MdR’s counterclaim?
37. MdR suggested that a further heading should be added to that list, namely the issue of “primary causation”. My instinct is that this is not actually a separate issue that needs to be considered, at least in the circumstances of this case, but rather is an aspect of the analysis of counterfactuals to which I refer in paragraph 36.v) and 36.vi). However, I express no concluded view on this issue since, for reasons I will come to, I limit myself to making factual findings on matters of causation and counterfactuals.

[A]: TO WHOM DID MDR OWE DUTIES?**Introduction to this issue**

38. The issue set out in paragraph 36.i) above arises because, at the time the Advice was given, MdR was not instructed under a general retainer requiring it to provide all legal advice necessary to bring the Bayswater Project to a successful conclusion. Rather, MdR was engaged to provide advice on a matter-by-matter basis. That does not mean that the breadth of MdR's role was narrow. In practice MdR gave a lot of advice to both Aurium and BRHL, as demonstrated by the fact that between 2014 and 2017 they submitted invoices totalling more than £1m.
39. Nevertheless, the absence of a general retainer requiring MdR to provide all legal advice necessary in connection with the Bayswater Project makes it necessary to locate the precise contractual basis under which MdR provided the Advice, including the central question of whether the Advice was provided under a contract with Aurium, or under a contract with BRHL. I took the following aspects of that enquiry to be common ground between the parties:
- i) Since Aurium's primary case is that MdR provided its advice pursuant to the terms of an engagement letter dated 2 July 2015 dealing with matters of vacant possession (the "VP Engagement Letter"), I should start with that letter. I should apply orthodox principles of contractual interpretation to decide whether the provision of the Advice fell within the scope of the VP Engagement Letter.
 - ii) If the provision of the Advice does not fall within the scope of the VP Engagement letter as originally drafted, I should consider whether Aurium and MdR agreed, whether expressly or by implication, that the terms of the VP Engagement Letter would be varied so as to include the provision of the Advice.
 - iii) If the Advice does not fall within the scope of the VP Engagement Letter as originally drafted, or as varied, neither party suggests that there was any other engagement letter dealing with the provision of the Advice. However, both parties agree that the Advice was provided pursuant to some contract. Accordingly, if the Advice was not given pursuant to the terms of the VP Engagement Letter, I should apply orthodox principles of contractual analysis to ascertain whether such a contract was with Aurium or with BRHL.
 - iv) If the outcome of the above analysis is that MdR provided the Advice under a contract with BRHL, rather than a contract with Aurium, Aurium's claim must fail. Aurium does not seek to argue that, if MdR owed contractual duties only to BRHL, there could be a parallel duty in tort owed to Aurium.

Stage 1 – construction of the VP Engagement Letter

40. The VP Engagement Letter was dated 2 July 2015. It was addressed to Aurium and sent to Aurium by post to an address in Jersey, where Aurium was incorporated, and by email to Crestbridge. The letter started with the following paragraph:

Instructions

Thank you for your instructions to act in relation to producing and negotiating vacant possession agreements with the occupational tenants of 2 Queensway and 125 Bayswater Road, 4 Queensway and 119-122 Bayswater Road.

41. That introduces a central difficulty faced by Aurium's argument that the Advice was given pursuant to the terms of the VP Engagement Letter. Even though the Advice clearly concerned 125 Bayswater Road, it did not obviously have anything to do with "producing and negotiating vacant possession agreements". On the contrary, Aurium's own case is that the Advice was sought because BCG was unwilling to enter into any agreement to give vacant possession.
42. To deal with that difficulty, Aurium notes that the VP Engagement Letter records instructions to act "in relation to" producing and negotiating vacant possession agreements. Those, it submits are words of some width and, viewing the VP Engagement Letter in the context of dealings and correspondence between MdR and Aurium that were going on at the time, the VP Engagement Letter should be treated as covering advice that "arises out of the negotiation of [vacant possession] with BCG", in the words of Aurium's closing submissions.
43. Relevant aspects of discussions prior to execution of the VP Engagement Letter were as follows:
 - i) During 2014, Mr Paul became aware from his frequent discussions with Mr Sharma that BCG had the capacity to be a "difficult" tenant (to use Mr Sharma's expression). Mr Paul became aware of correspondence, initiated by BCG, concerning what was to become the Shopfront Litigation.
 - ii) I make no finding on the general scope of Fenton Whelan's authority to enter into contracts on behalf of Aurium or BRHL. However, as regards the provision of legal advice by MdR there was a course of dealing established between Aurium, BRHL, Fenton Whelan and MdR which involved Fenton Whelan giving instructions to MdR on behalf of both Aurium and BRHL and MdR accepting those as instructions given by Aurium/BRHL.
 - iii) On 11 February 2015, Mr Freddie Winkley of Fenton Whelan emailed Mr Harris of MdR to ask MdR to prepare a draft vacant possession agreement in relation to the Lease.
 - iv) On 12 February 2015, following instructions given to MdR by Mr Winkley, MdR sent a letter by post to BCG, stating that MdR acted for APL and setting out a general proposal under which BCG would surrender the Lease in return for a cash payment to be made in two instalments. On 20 February 2015, MdR sent BCG a further letter, in which it repeated that it was acting for APL and suggesting that "our client" (which in context must mean APL) would be prepared to pay the specific figure of £450,000 to BCG.
 - v) MdR learned from Fenton Whelan that BCG had not shown any indication to accept the proposals made in February because on 15 May 2015, Mr Winkley wrote to MdR asking them to write to BCG to offer an increased sum of £500,000.
 - vi) The VP Engagement Letter was, therefore, sent after MdR had already provided some drafting in connection with a hoped-for surrender of the

Lease. It was not suggested that this had any significant bearing on the construction of the letter.

44. Relevant aspects of discussions between MdR and Fenton Whelan after the VP Engagement Letter was signed, and which led to the Advice being requested, are discussed in detail in Section B below. In summary: (i) MdR would have known from discussions with Fenton Whelan that BCG was not responding to overtures inviting BCG to agree to surrender the Lease for payment and (ii) MdR was aware that the Advice was expected to address legal rights and obligations under the Lease.
45. Therefore, in a general sense, I accept that the Advice arose out of unsuccessful attempts to persuade BCG to surrender the Lease. However, I do not accept that this meant that the Advice was given “in relation to producing and negotiating vacant possession agreements”. Read fairly and objectively and having due regard to the circumstances within which the VP Engagement Letter was agreed that phrase is envisaging a continuum of drafting and negotiation between MdR and a tenant, or its lawyers, with a view to documenting an agreed surrender of a lease. As MdR says, the engagement was transactional, as emphasised by other provisions of the VP Engagement Letter including:
- i) The VP Engagement Letter explained that MdR would charge on a “time spent” basis by reference to hourly charge-out rates. However, it included an estimate that fees would be £10,000 (excluding VAT, disbursements and expenses). That estimate suggests that MdR’s task was simply to draft the relatively standard-form documents necessary to effect an agreed surrender of the Lease. Moreover, the VP Engagement Letter provided that MdR would charge only 75% of time recorded if “this transaction does not proceed for any reason”. The reference to “this transaction” emphasises the transactional nature of the engagement as does the proposed 25% fee discount which becomes operative only if the anticipated transaction does not materialise.
 - ii) Moreover, the £10,000 fee estimate was caveated on the basis that it depended on “how the other side decides to respond” and notes that the estimate may need to be increased should MdR “have to repeatedly chase for documents or instructions”. This caveat demonstrates the focus on a continuum of discussions and negotiations with an engaged counterparty and not on advice that might be useful if the counterparty was not engaging with overtures to obtain vacant possession.
46. That conclusion is not altered by the fact that MdR was aware that BCG might be “difficult”. Producing and negotiating a vacant possession agreement with a “difficult” tenant fell within the scope of the VP Engagement Letter. However, providing advice when a “difficult” tenant indicated that it was unwilling to give vacant possession did not. My conclusion at Stage 1 is that the provision of the Advice did not fall within the terms of the VP Engagement Letter.

Stage 2 – Was there a variation to the terms of the VP Engagement Letter?

47. In paragraph 2.4 of its Reply, Aurium pleads that the scope of the VP Engagement Letter was “expanded” by instructions given by Fenton Whelan in January 2016 commissioning the Advice. Therefore, Aurium is, in its pleaded case, raising the question of variation although neither party took me to any authorities on the

distinction between a “variation” of an existing contract and the formation of a completely new contract.

48. Perhaps unsurprisingly given that English law stresses the importance of the intentions of the parties, determined objectively, in ascertaining the terms of a contract, *Chitty on Contracts*, 34th edition indicates in paragraph 25-036 that the question whether a contract is varied, as opposed to a new contract being formed, is to be determined by reference to the intention of the parties, as evidenced by the subsequent agreement and its surrounding circumstances. That discussion is contained in a section dealing with the distinction between a variation of a contract and a rescission of a contract and its replacement with a new contract. That is not quite the situation with which I am concerned since it is not suggested that the VP Engagement Letter was ever rescinded. However, in my judgment, similar principles should apply and the focus should be on the intention of the parties, determined objectively. In testing whether the parties agreed a variation to the VP Engagement Letter, it is appropriate to ask whether the suggested variation goes “to the very root of the contract” or not (see *British and Beningtons Ltd v N.W. Cachar Tea Co Ltd* [1923] AC 48).
49. Aurium argues that the parties’ actions are consistent with a wish to vary the VP Engagement Letter, by expanding its scope so as to include the provision of the Advice. One difficulty with that argument is that, as noted in the section that follows, the course of dealing between Aurium/BRHL at the time (prior to the agreement of an “umbrella” engagement letter on 21 November 2016) suggests that, when new instructions were given, a new engagement letter would generally be entered into.
50. In addition, as I have noted in paragraph 45.i) above, the VP Engagement Letter provided that, if a surrender of the Lease was not obtained, only 75% of normal fees would be charged. The purpose of the Advice was to perform a legal analysis of rights and obligations under the Lease, assuming that the Lease was not surrendered. Therefore, if the premise on which the Advice was prepared came to fruition and the Advice was given pursuant to a variation of the VP Engagement Letter, MdR would only be entitled to charge for 75% of the time spent on providing the Advice. It is not obvious why the parties should be taken to have intended that outcome.
51. In my judgment, if there were a variation to the VP Engagement Letter in January 2016 that permitted the Advice to be given under the terms of that letter, the variation would go to the root of the VP Engagement Letter since it would result in MdR being contractually obliged to provide advice of a fundamentally different subject matter. Whereas the VP Engagement Letter required MdR to provide non-contentious services relating to the drafting of relatively straightforward documents, the Advice required something entirely different, namely the analysis of terms of the Lease.
52. Aurium argues that there were good regulatory reasons why MdR would have wanted the Advice to be provided under the terms of a written engagement letter even if that engagement letter was subsequently varied orally. That point has some force. However, ultimately, the regulatory constraint was on MdR’s side only and therefore of correspondingly less importance in ascertaining the common intention of the parties viewed objectively. Moreover, even though it would certainly have been preferable for MdR to have a written engagement letter in place before providing the Advice, it has not been suggested that MdR would

have been precluded from providing the Advice without a written engagement letter. In my judgment, for whatever reason, the desirability of the Advice being given under a written engagement letter, or an oral variation of a written engagement letter, was simply overlooked at the time. The Advice was, after all, given under conditions of some urgency – see paragraph 83 below.

53. I have concluded at Stage 2 that the Advice was not given pursuant to an oral variation to the VP Engagement Letter.

Stage 3 – Whether the separate agreement to provide the Advice was entered into with Aurium or BRHL

54. Both Aurium and MdR referred to the principle of English law to the effect that the terms of a contract are to be ascertained by having regard to the intentions of the parties, viewed objectively. Neither party referred to any authority specifically dealing with the process for ascertaining the identity of a contracting party where that is disputed. I take it to be uncontroversial that this must be approached by ascertaining the intentions of the parties as manifested objectively. Moreover, since MdR was accustomed to accept instructions from Fenton Whelan on behalf of both Aurium and BRHL, the intentions of Fenton Whelan, as objectively manifested, are in my judgment relevant considerations.
55. The contract for the provision of the Advice was constituted by means of the email exchanges and telephone calls that I discuss in more detail in paragraphs 74 to 84 below. The contract, therefore, was partly written and partly oral. There was no express agreement, whether oral or written, as to whether MdR was contracting with BRHL or with Aurium. In those circumstances, I will determine the identity of MdR's counterparty by the following means:
- i) I will examine what the parties (including Fenton Whelan from whom MdR was accustomed to receive instructions on behalf of both Aurium and BRHL) wrote to each other, and said to each other, about the contract for provision of the Advice before that contract was formed.
 - ii) I will consider the factual matrix within which the contract for the provision of the Advice was given, including whether there was a course of dealing that resulted in MdR giving particular types of advice to Aurium and other types of advice to BRHL.
 - iii) I will consider indications to be derived from the Advice itself since the Advice may shed a light on whom it was, viewed objectively, addressed to.
 - iv) I will consider relevant aspects of the parties' conduct after the Advice was tendered.
56. I did not understand the relevance of the factors set out in paragraphs 55.i) to 55.iii) to be controversial. Aurium did not accept that the subsequent conduct referred to in paragraph 55.iv) was relevant but provided no authority for that proposition. In my judgment, given that the contract for provision of the Advice was partly oral and partly written, the subsequent conduct of the parties is relevant in determining whether MdR was contracting with Aurium or with BRHL. *Lewison on the Interpretation of Contracts* 7th Edition puts the point thus in paragraph 3.189 with that statement being approved in *Maggs v Marsh* [2006] B.L.R 395:

Evidence of post-contractual conduct is admissible in deciding what terms the parties agreed (as opposed to interpreting the meaning of the terms that they did agree), at all events where the contract is not contained wholly in writing

57. I discuss in detail the emails and correspondence by which Fenton Whelan commissioned the Advice in Section B below. Nothing in that correspondence suggests that either Mdr on one hand, or Aurium/BRHL/Fenton Whelan on the other, cared greatly whether the Advice would be addressed to Aurium or to BRHL. Therefore, the factors set out in paragraph 55.i) do not advance the matter greatly and I therefore move rapidly to analyse the factors set out in paragraph 55.ii).
58. Both BRHL and Aurium were clients of Mdr. BRHL was allocated the client reference 43822 in Mdr's internal systems. Aurium was allocated the number 41549.
59. The structure that Aurium and BRHL had chosen to hold their respective investments was relatively common. It offered a choice of exit mechanisms: Aurium could sell its shares in BRHL to a purchaser; the Subsidiaries could sell their freehold titles or BRHL could sell its shareholdings in the Subsidiaries that owned those freehold titles. In practice, a share sale was likely to be preferred to a sale of individual titles since such a share sale would not attract stamp duty land tax ("SDLT"). A sale of shares in BRHL by Aurium was likely to be preferred to a sale of shares in the Subsidiaries by BRHL since a purchaser of BRHL shares would not need to worry unduly about whether necessary assets had been "left behind" whereas this would be a concern for a purchaser acquiring shares in the individual Subsidiaries.
60. It might be thought that this structure might lead to a natural division with Mdr opening "corporate" matters (relating to a likely sale by Aurium of BRHL shares) in the name of Aurium as the most likely beneficiary of Mdr's advice on such matters and "real estate" matters in the name of the Subsidiaries in their capacity as owners of the freehold titles (or perhaps in the name of BRHL). Mdr put forward details of 17 engagements that they had opened for Aurium, BRHL and the Subsidiaries. Those engagements revealed a pattern, albeit a pattern with exceptions. Of those 17 engagements:
 - i) Ten obviously related to property, planning or construction matters or ancillary matters such as the appointment of architects. Eight of these engagements were with BRHL, or with a Subsidiary. Two (including the VP Engagement Letter) were with Aurium. The other "property" engagement letter entered into with Aurium was dated 12 May 2014. It would not have been possible for this engagement letter to be entered into in the name of BRHL because BRHL was not incorporated until 15 May 2014.
 - ii) Five related to "corporate" matters such as either a sale of BRHL shares or proposals for third parties to acquire shareholdings in BRHL. Those engagement letters were entered into with Aurium.
 - iii) Two related to the terms of the Senior Debt. Those engagement letters were entered into with BRHL which was unsurprising given that BRHL was the borrower under the Senior Debt.

61. Therefore, in my judgment, an analysis of engagement letters suggests a course of dealing: “corporate” engagements tended to be with Aurium and “property” or “finance” engagements tended to be with BRHL. The VP Engagement Letter was an exception to that pattern, as was the “property” engagement letter dated 12 May 2014, although that exception can be explained by the fact that BRHL had not been incorporated on that date. Those exceptions mean that the course of dealing showed a tendency, rather than an immutable rule.
62. MdR had an internal time recording system which permitted fee-earners to record time and to provide a narrative explaining how that time was spent. I attach relatively little significance to the fact that fee-earners would sometimes record time to the wrong file as that was a matter internal to MdR which would have had little impact on a course of dealing with Aurium or BRHL. However, more significant was the apparent fact that MdR would sometimes open matters that could not obviously be traced to a specific engagement letter. For example, in July 2014, Mr Tyler was recording time on a file called “JV and Equity Arrangements” in the name of BRHL but the engagement letter, dated 19 May 2014, for the provision of advice on joint venture arrangements was expressed to be with Aurium. In my judgment, instances such as this somewhat weaken the strength of the tendency I have described in paragraph 61 though it remains correct to describe that as a “tendency”.
63. Finally in this regard, some emphasis was placed on a paragraph of the VP Engagement Letter headed “Subsidiary and single purpose companies” as follows:
- If, as part of the transaction, you use a subsidiary company or other special purpose vehicle to enter into contractual relations, then (a) this letter is to be treated as having been addressed to it as well as you and (b) you will remain bound by the terms of this letter and responsible for payment of our fees, disbursements and expenses.*
64. If it was suggested that this paragraph (which appeared in other engagement letters as well) indicated a course of dealing under which advice given to BRHL was to be treated as given to Aurium, I reject that submission. The quoted wording provides that advice given to parent companies can be taken as addressed to subsidiary companies or other special purpose vehicles. However, it does not provide that advice given to BRHL, a subsidiary of Aurium, was to be treated as addressed to Aurium as well.
65. The Advice itself (see paragraph 55.iii) above) contains few pointers in either direction. It was not addressed expressly to either Aurium or BRHL. MdR argues that the references in the Advice to “your development scheme” and “your responsibilities under the Lease” are suggestive of advice being given to BRHL. I do not accept that. The wording is neutral as between Aurium and BRHL since both companies were holding companies, neither would themselves be carrying on development and neither was a landlord under the Lease. The wording might, perhaps suggest that the Advice was provided to APL, but neither party is arguing for that outcome.
66. The parties’ conduct after the Advice was given suggests that the contract was with BRHL, rather than Aurium. The invoice for the Advice was addressed to BRHL. BRHL paid that invoice, as demonstrated by Crestbridge’s internal ledger

allocating the expense to BRHL. That conduct indicates that both MdR and BRHL thought that the contract for provision of the Advice was with BRHL.

67. In my judgment, the factors pointing in favour of BRHL being the counterparty to the contract for provision of the Advice outweigh those pointing in favour of Aurium. My conclusion at Stage 3 is that MdR owed contractual duties to BRHL, but not to Aurium in relation to the Advice.

[B]: SCOPE OF DUTY

68. Given my conclusion set out in the previous section, Aurium's claim fails. However, it is appropriate that I should consider the other aspects of that claim, and make factual findings when doing so, in case I am wrong on that issue. Therefore, the analysis in this section proceeds on the basis that, contrary my conclusion in Section A, MdR did owe a duty of care to Aurium.
69. Two distinct issues are considered in this section. The first is concerned with identifying the nature and extent of MdR's obligations when providing the Advice. That is an exercise in contractual interpretation and is to be approached objectively in the usual way. Having identified the nature and extent of MdR's contractual obligations it is then necessary to determine the purpose (viewed objectively) of MdR's professional duties or obligations. That examination is necessary to determine the "scope of duty issue" arising at step 2 of the analysis set out in *Manchester Building Society* as set out in paragraph 34 above and gives effect to the Supreme Court's conclusion in *Manchester Building Society* that:

... the scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the reason why the advice is being given (and, as is often the position, including in the present case, paid for).

The nature and extent of MdR's obligations in connection with the Advice

The context within the Advice was requested

70. By late 2015, Mr Sharma was becoming increasingly concerned that BCG was being "difficult" (using his word). BCG had shown no interest in accepting the specific figure of £500,000 that MdR had put forward. There was a dispute as to whether BCG had indicated a figure of £10 million but BCG had certainly not made a counter-offer that Mr Sharma thought could seriously be considered. On 9 December 2015, BCG's solicitors, Muldoon Britton, wrote a letter to APL. That letter was primarily concerned with the dispute about the shopfront and confirmed that proceedings had been issued in Manchester County Court. The letter demonstrated that BCG was aware that Aurium and other companies in its group were seeking to negotiate lease surrenders with a view to demolishing the entire Building. BCG requested an undertaking that APL would comply with its obligations under the Lease.
71. On 29 December 2015, BCG wrote to WCC (the "December Letter") in connection with the application for planning permission that had been submitted in connection with the Bayswater Project on 9 November 2015. In that letter, as well as raising other issues, BCG took exception to what it understood to be a proposal in the Construction Management Plan accompanying the application for planning permission to demolish the Site (including the Building) "from the top

down”. In its letter, BCG quoted provisions of the Lease including an express covenant for quiet enjoyment given by the landlord by Clause 4.1.1 and the landlord’s repairing covenant in Clause 4.2.6. The letter made an express assertion that a “top down” demolition of the Building would involve a breach of Clause 4.2.6. Aurium places much emphasis on this aspect of the December Letter.

72. In my judgment, that emphasis is misplaced. BCG was simply saying that, if Aurium or its affiliates proceeded with the proposal to demolish the Site (including the entirety of the Building which included the demised premises) while the Lease remained in place, APL would be in breach of the covenants in Clause 4.1.1 and Clause 4.2.6. That was an unremarkable assertion: a complete destruction of the demised premises could quite reasonably be asserted to involve a breach of a landlord’s covenant for quiet enjoyment or a breach of its covenant to keep the demised premises in good repair. That this was BCG’s point was evident from the opening paragraph of the letter which included the following:

[the Lease] has some 6 years before expiring in December 2021. Therefore, it is of particular concern to us that the planning proposal referenced above purports to necessitate the demolition of our premises while we are still in occupation.

73. On page 3 of the December Letter, BCG expressed “particular concern as to the demolition (see 4.2.6 above)” and asked that any “consent to demolish adjoining properties make specific reference to our interest and the need to protect it and the building itself from damage in the execution of adjoining demolition works”. That also was a reasonably unremarkable point: BCG was simply pointing out that Clause 4.2.6 required APL to keep the entirety of the Building in good repair and wanted to make sure that demolition of adjoining buildings did not result in a breach of this covenant. In the December Letter, BCG was certainly not commenting on the effect of any proposal to “build around” the Shop by demolishing the Upper Parts and leaving the Shop intact, not least because the Construction Management Plan contained no proposal for any such works.
74. WCC forwarded the letter on and eventually it came to the attention of Mr Sharma. Mr Sharma in turn forwarded the letter on to Mr Paul at MdR under cover of an email dated 5 January 2016 that contained the following paragraphs:

125 Bayswater is setting up for a fight. We would prefer to buy him out, but he has thus far refused to agree. Thus, our plan must be to build around him.

On reading his letter, I am particularly concerned about the provision of the lease regarding the ‘roof void’ – the structural walls can be maintained as part of our build if required.

I think we must now reply to him given to neglect to do so at this stage must weaken our case in any future court proceedings.

75. The “provision of the lease regarding the ‘roof void’” to which Mr Sharma referred was Clause 4.2.6. BCG had underlined part of that clause, including the part relating to the roof void, and Mr Sharma had focused on that. Mr Sharma was “particularly concerned” about that provision because he saw it as a possible constraint to any proposal to “build around” the Shop that involved demolishing the roof right at the top of the Building. The extent to which he told MdR that any

scheme to build around the Shop would involve a demolition, whether of the roof or otherwise, is addressed later in this judgment.

76. Mr Paul replied the same day (5 January 2016) writing:

I agree and some of the points raised by the owner of 125 BR may on the face of it have legal merit. I have forwarded this letter to my litigation colleague, Jonathan Warren and we will revert with a draft response for you to send.

77. I have concluded that Mr Paul's reference to "legal merit" did not express any, even preliminary conclusions, on whether a "build around" scheme would infringe Clause 4.2.6. Mr Paul was commenting on points made in the December Letter, but that letter was not purporting to address the effect of any "build around scheme". I consider it unlikely that Mr Paul would have looked at the Lease, or formed any view as to the scope of the landlord's repairing covenant contained in Clause 4.2.6 in the time that it took him to respond to Mr Sharma's email. Rather, I consider that Mr Paul was saying that the points made in the December Letter were not obviously bad or misconceived and that they warranted further consideration by a specialist litigator such as Mr Warren.
78. Mr Warren sent an email to Mr Sharma, copied to Mr Paul, Mr Harris and Mr Tyler on 6 January 2016. He did not disagree with the suggestion (first raised in Mr Sharma's email of 5 January 2016) that a response to the December Letter should be prepared. However, having reviewed correspondence with BCG, he urged a "co-ordinated strategic" approach. I have concluded that he meant that the recent correspondence from BCG, and the Shopfront Litigation, which had just been commenced, should be viewed as a strategic whole.
79. There was then a call some time on the afternoon of 8 January 2016 involving, possibly among others, Mr Warren and Mr Harris of MdR, and Mr Sharma and Mr Winkley of Fenton Whelan. MdR made no attendance note of that call and neither MdR nor Fenton Whelan sent any follow up email that confirmed the discussion during that call. It is clear, however, that some call took place because on 11 January 2016, Mr Warren emailed Mr Winkley and Mr Sharma to thank them "for your time on Friday afternoon [discussing] the situation with regards to 125 Bayswater". The rest of that email, however, deals with the Shopfront Litigation and sheds no light on what instructions, if any, were given with regard to the Advice which dealt with matters other than the Shopfront Litigation.
80. The scope of discussions on the call of 8 January 2016 was a matter of considerable dispute. Mr Sharma's evidence was that, during that call, he communicated the essence of the build around scheme he had in mind, requested written advice on "whether and how we could build around the unit in a way that would not infringe the terms of BCG's lease" and explained that MdR's written advice would be the basis upon which Fenton Whelan decided whether or not to pursue that build around scheme. The only MdR attendee on that call who gave evidence was Mr Warren and he said that he could not remember the detail of what was discussed. I will make findings on this issue in paragraph 86 below after considering other aspects of the discussions and correspondence leading up to the Advice.
81. However, it is clear that whatever the precise discussions on 8 January 2016, following that call there was a change of emphasis. Whereas, in the run-up to the

8 January 2016 call, both Fenton Whelan and MdR had been focused on a perceived need to send a response to the December Letter to BCG, after that call, the focus was on MdR providing some sort of advice to Fenton Whelan on APL's rights and obligations under the Lease. That change in focus was brought out in an internal email that Mr Harris sent to Mr Warren on 18 January 2016 in which Mr Harris wrote:

I have just had a call from Sanjay.

He would like us to confirm what he can and can't do in terms of development whilst the lease remains in place as he needs to get his technical team working on the re-design.

82. Eight minutes after Mr Harris sent this email, Mr Warren responded setting out his view that MdR would “need to effectively prepare a development constraints report for this property”. These email exchanges had been copied to Mr Paul who responded simply by saying “Agreed”, also on 18 January 2016.
83. On 19 January 2016, Mr Sharma emailed Mr Warren writing:

We really need the advice on the 125 tenant's rights and how we can build around him. If we decide to alter our planning permission [it] requires lead time and we do not want to miss our committee date. Please advise when we can expect to receive this analysis.

84. 58 minutes later, Mr Warren replied, saying that work had started and promised a response by Thursday 21 January and providing a costs estimate of £3,000 plus VAT. Mr Sharma emailed back the same day, agreeing the costs estimate and asking Mr Warren to proceed. The Advice was provided two days later on 21 January 2016 and MdR charged £3,000 for it.
85. Aurium's case is that pursuant to the various communications that I have just summarised it asked MdR to provide advice on the question “Is demolition and reconstruction a breach of the repairing covenant set out in Clause 4.2.6 of the Lease?”. It argues that the centrality of this issue was made abundantly clear by the fact that: (i) BCG had itself highlighted the difficulties posed by Clause 4.2.6 in the December Letter (ii) Mr Sharma had explained to MdR that he was considering “building around” the Shop, (iii) it would have been obvious to experienced property lawyers that “building around” would necessarily involve demolition and rebuilding of the Upper Parts but (iv) in any event, Mr Sharma had made this clear by emphasising the importance of the roof void in his email of 5 January 2016 and would have made it clear during the call on 8 January 2016.

Conclusion as to the advice that was specifically requested

86. I do not accept Mr Sharma's evidence summarised in paragraph 80 above. I have concluded, for the following reasons, that Fenton Whelan did not commission the Advice during the call on 8 January 2016:
- i) Mr Warren's email of 11 January 2016 represented the follow up from the call of 8 January. It deals exclusively with the Shopfront Litigation, including recording Fenton Whelan's instructions that MdR were authorised to accept service of proceedings therefore obviating the need for BCG to obtain permission to serve proceedings on APL, a Jersey company, out of the jurisdiction. No instructions to prepare any advice are recorded

in that email. That suggests that the Shopfront Litigation was the focus of discussion on 8 January.

- ii) The assertion that Fenton Whelan commissioned the advice on 8 January is inconsistent with later emails and actions. Mr Harris's email of 18 January 2016 reads as if it is relaying Fenton Whelan's first instructions to prepare the Advice. If, in fact, the Advice had been requested 10 days previously, then one might expect to see an indication of irritation or annoyance on either Mr Sharma's or Mr Harris's part since it would follow that Mr Warren had done nothing in response to a request for advice for 10 days. There is no hint of any such annoyance or irritation.
- iii) When Mr Sharma stressed his urgent need for the Advice in his email of 19 January 2016, he did not make the point that MdR had already had 10 days to get started. Mr Sharma would have made this point if it were justified since he was not averse to making complaints about MdR's service level when he thought he needed to.

87. I have also concluded that MdR were not told during any of the email exchanges or discussions leading up to the provision of the Advice that Mr Sharma had in mind a "build around" plan which would involve any demolition of the Upper Parts. I have reached that conclusion for the following reasons:

- i) Mr Sharma's evidence, which I accept, was that he first had the idea that he might be able to build around the Shop in late 2015 by performing some research over Google that showed examples of build around schemes in London and Shanghai. In cross-examination, he was shown some possible results that a Google search might have produced, none of which involved any part of the building concerned being demolished. Mr Sharma accepted in cross-examination that he would have seen images of the Spiegelhalter jewellers in East London being literally "built around" with two sections of a department store being built either side of it, but without any demolition of the Spiegelhalter jewellers.
- ii) Mr Sharma nevertheless said that the build around scheme he was contemplating did envisage demolition of the Upper Parts. In his witness statement he said that, in or around September 2015, he asked a firm of structural engineers (Axiom Structures) and a firm of architects (PLP Architecture) to "look at ways that we could potentially build around BCG's unit from a structural, engineering or architectural perspective" and that they "subsequently confirmed" that a build around proposal was feasible. He said in paragraph 73 of his witness statement that he asked a construction consultancy (Gardiner & Theobald) to look at how much it would cost to build around the Shop and was told that it would add £1m to construction costs. It was of some significance precisely what kind of "build around" Mr Sharma asked for advice on. It was also of some significance whether Mr Sharma received a favourable response before or after the Advice was commissioned. Yet Mr Sharma's witness statement did not address these details. Nor were any documents provided that confirmed any "sign off" by Axiom, PLP Architecture or Gardiner & Theobald before January 2016 because, Mr Sharma said, all the discussions took place orally.

- iii) In his oral evidence, Mr Sharma sought to fill in some of the gaps I have identified. He said that there was an oral sign-off on a build around scheme involving a demolition before the Advice was commissioned. However, that involved him giving oral evidence on matters that took place over 6½ years ago which was uncorroborated by contemporaneous documents. Obviously at some point Mr Sharma obtained advice that a build around involving demolition was viable because such a scheme was the subject of the Section 73 Application. However, I do not accept, on the basis of purely oral recollections and given the tendency that I have identified in paragraph 24, that such confirmation was received before the Advice was commissioned.
- iv) In its closing submissions, Aurium argued that Mr Warren accepted in cross-examination (Day 10, page 45 lines 10-19) that Mr Sharma had, in his email of 5 January 2016 mentioning the “roof void” (see paragraph 74 above) communicated a specific instruction that the build around scheme under consideration would involve a demolition of the roof void. I do not agree when the cross-examination is read as a whole. The cross-examination of MdR’s witnesses on their understanding of “the build around scheme” was necessarily based on a premise that such a scheme had been communicated with adequate precision to MdR. But MdR’s witnesses, including Mr Warren, all denied the validity of that premise. Therefore, when Mr Warren answered “Yes” to a question as to whether Mr Sharma’s concern, when writing his email of 5 January 2016, was that Clause 4.2.6 “may prevent him pursuing the build around scheme by which he will be accommodating the bureau de change”, Mr Warren was simply accepting Mr Sharma’s formulation of his own subjective concerns. He was not accepting that he or MdR had been told that any build around scheme would involve demolition of the Upper Parts.
88. Therefore, I find that Fenton Whelan did not instruct MdR to provide legal advice on a specific build around proposal that would involve a demolition of the Upper Parts. Fenton Whelan and Mr Sharma were not in a position to commission advice on a proposal as specific as this because they were not, in January 2016, sure what kind of build around scheme would be viable from a construction perspective. Given Fenton Whelan’s own lack of certainty, Mr Sharma’s instructions to MdR would have been correspondingly general. In my judgment, viewed objectively, MdR were asked to provide a high-level overview of BCG’s rights and obligations under the Lease together with practical advice as to the manner in which, and the methods by which, construction works around BCG’s premises could appropriately be designed and executed to reduce the risk of legal claims. The advice requested was not only high-level, it was also preliminary in the sense that Fenton Whelan would consider MdR’s advice on legal issues together with advice from construction professionals with a view to putting together a build around scheme that satisfied all necessary constraints. In due course, MdR would be asked for further advice on whether the build around scheme that emerged from this process respected BCG’s rights and obligations under the Lease and under general law.
89. I am reassured in this conclusion by the fact that it is consistent with the instructions that Mr Harris relayed in his email of 18 January 2016. It is also consistent with the Advice itself which indicates in a number of places that no firm proposal for development had been communicated to MdR. As noted in Section D below, an early paragraph of the Advice refers to the fact that there

“may” have to be an alteration for the development scheme of the Building. The executive summary of the Advice refers to “any scheme you prepare” for building around the Shop, suggesting that MdR were not aware of any scheme then “prepared”. The conclusion expressed on Clause 4.2.6 is prefaced by the words “This obligation [i.e. Clause 4.2.6] needs to be considered in the light of the plans you have for the Building” also suggesting that there had been limited communication of any such plans to MdR. While there are references to the Upper Parts in the Advice, nothing states expressly that they were to be demolished. If MdR had been told that the Upper Parts were necessarily to be demolished, that would have been recorded in the Advice.

90. Aurium asked me to draw adverse inferences from what it submitted was a wholesale failure by solicitors within MdR (with the exception of Ms Lorna Bowry, who was an associate in the Planning department) to keep proper attendance notes. This is not a trial of an action against MdR for failure to keep attendance notes and so I need make no findings as to the generality or other of any such failings. However, it is relevant to consider what implications, if any, should flow from the fact that no solicitor at MdR kept an attendance note of the telephone call on 8 January 2016 and there is now some considerable dispute as to what advice MdR were asked to give.
91. I was referred to paragraph 11-182 of *Jackson & Powell on Professional Liability* (9th edition). That paragraph makes the unexceptionable point that it is prudent to confirm advice and instructions in writing. It also states that, if there is no written record of advice given, so that a solicitor is only able to describe his or her usual advice, rather than the advice actually given, the client’s recollection of that advice is likely to carry more weight. However, there is no dispute in this case as to what advice was given, although there is a dispute about the instructions. At [52] of his judgment in *Prime London Residential Development Jersey Master Holding Limited v Withers LLP* [2021] EWHC 2401 (Comm), HHJ Pelling, sitting as a deputy judge of the High Court, was critical of solicitors for failing to keep an attendance note of a meeting at which “decisions were being taken as to how to proceed in what had become a commercially sensitive situation”. I respectfully understand that criticism. However, in my judgment, no such criticism can be made as regards the call on 8 January 2016. There was a record of that call in the form of Mr Warren’s email of 11 January 2016. I have already explained my conclusion that no request for the Advice was made during the call of 8 January 2016. MdR cannot be criticised for failing to document instructions that were not given during that call. In a similar vein, given my conclusion that Mr Sharma was in no position to know whether the ultimate “build around” scheme pursued would involve demolition, he gave no particulars of such a scheme that MdR could have documented in an attendance note.
92. Aurium is correct to observe that MdR did not need detailed plans to provide some advice on whether a proposal to demolish and rebuild the Upper Parts could result in a breach of Clause 4.2.6. However, to give advice of that kind, MdR would need to be told that the build around scheme Fenton Whelan was considering would necessarily involve a demolition and reconstruction of the Upper Parts. MdR were not given instructions to this effect. As part of its arguments on the 12 instances of further reliance (see paragraphs 140 and 141 below) Aurium argues that MdR must have known, in January 2016, that a demolition and reconstruction of the Upper Parts was proposed because when they knew full details of the build around scheme in 2017, MdR simply confirmed the advice given in 2016. I do not accept that. First, two of the 12 instances relied

upon took place shortly after the Advice was given, at which point MdR would have no greater knowledge of the detail of any build around proposal that they had at the time of the Advice. The remaining instances took place in 2017, over a year after the Advice was given, so in my judgment shed little light on what MdR knew when it gave the Advice. Second, even in 2017, MdR was not asked to express an opinion on whether the build around scheme then proposed would breach Clause 4.2.6. Therefore, any similarity between the advice given in 2016 and that given in 2017 does not indicate that MdR was, in 2016, being asked to give advice on a specific build around scheme involving demolition.

93. Finally under this heading, I make findings on some points on which MdR was not asked to advise. First, MdR was not asked to advise on what Aurium described in its closing submissions as the “Clause 4.2.6 Claim” which was defined as BCG’s claim, contained in the December Letter, that the “build around” scheme would breach Clause 4.2.6. MdR was not asked to advise on this for the simple reason that BCG was making no such claim for reasons I have explained in paragraphs 71 to 73.
94. Second, MdR was not asked to advise on commercial “strategy”, including how Fenton Whelan should position any idea of “building around” in its commercial negotiations with BCG. If MdR had been asked to advise on this issue, it would have been recorded in the Advice.

Conclusion on the extent of MdR’s duties in connection with the Advice

95. In the section above, I have focused on those issues on which MdR was, viewed objectively, asked to advise. However, the law recognises that solicitors can be subject to a duty to give advice on matters going beyond the strict limits of their retainer. In *Boyce v Rendells* (1983) 268 EG 268, the Court of Appeal gave the following statement of the law:

[I]f, in the course of taking instructions, a professional man like a land agent or a solicitor learns of facts which reveal to him as a professional man the existence of obvious risks, then he should do more than merely advise within the strict limits of his retainer. He should call attention to and advise upon the risks.

96. Subsequently, in *County Personnel (Employment Agency) v Alan R Pulver & Co* 1 WLR 916, the judgment of Bingham LJ indicated that the duty was engaged not just where a solicitor had actual knowledge of “obvious risks” but also where a solicitor “should be alerted to risks which might elude even an intelligent layman”.
97. Therefore, MdR’s duty was to provide both (i) the advice that Fenton Whelan had requested (outlined in the section above) and (ii) advice on the existence of the kind of other risks that are dealt with in *Boyce v Rendells* and the *County Personnel* case.

Conclusion on the “scope of duty” issue

98. I now consider the purpose (viewed objectively) for which the Advice was requested and given. That will enable me to determine the scope of MdR’s professional duty by applying the guidance from *Manchester Building Society* which I have set out at paragraph 69 above.

99. Lord Hodge and Lord Sales, in the majority of *Manchester Building Society*, emphasised the importance of analysing the risks that the duty was supposed to guard against in determining the scope of duty. As they put it:

... one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk.

100. Aurium correctly notes that it is relevant to look at the extent of Mdr's knowledge of factual matters connected with Aurium's possible loss in ascertaining the risks against which, viewed objectively, the Advice was supposed to protect Aurium from. I agree with Aurium that the following partners or employees of Mdr had actual knowledge of the following matters which are relevant in determining the scope of Mdr's duty. I also agree that these matters are relevant to considering the purpose of the Advice and the risks it was supposed to guard against:

- i) Mr Paul and Mr Warren in particular knew that BCG was litigious and tenacious in the defence of what it believed to be its rights. They had seen BCG pursue the Shopfront Litigation and they had been told about BCG's dismissive rebuff of the early offers of £450,000 and £500,000 for the grant of vacant possession.
- ii) Mr Strutt in particular knew that the interest payable on the Senior Debt was high. Although he would not have known all the financial details of the Bayswater Project, he would have appreciated that the longer that BRHL was locked into this expensive funding, the more the financial viability of the project would have suffered.
- iii) As a consequence both Mr Strutt and Mr Tyler would have known that if Aurium tried to sell BRHL, but the sale failed to complete, BRHL would remain locked into the expensive Senior Debt and would have little to show for all the time, effort and expense spent in trying to complete that sale. They would have realised that such a failed sale could have serious financial consequences indeed.

101. Mr Sharma, Mr Pearson and Mr Penna all gave evidence suggesting that Aurium had told Mdr of a fixed and settled "exit strategy" that would involve Aurium selling its interest in the Bayswater Project (most likely by selling its shares in BRHL) once planning permission was granted. I am not, however, able to accept that evidence. Aurium in fact had no settled "exit strategy" and so there was no such single strategy that could have been communicated to Mdr. Of course, there were parameters within which Aurium had to, or chose to, operate. For example, I accept Mr Sharma's evidence that Aurium wanted to be invested during the "steep part of the risk curve": so that it would be taking risks associated with the assembly of the Site, and the grant of planning permission and so benefit from the high rewards that could be achieved if those risks could be navigated. Therefore, I consider it unlikely that Aurium would, all other things being equal, wish to maintain a significant equity investment after the point at which planning permission had been granted since after that point, the Bayswater Project would become a lower risk construction project that offered commensurately lower reward to an equity investor. I am prepared to accept that of all the exit strategies that were possible, Aurium considered that the most desirable was a sale of 100% of its shares in BRHL and communicated the hope of such an exit to Mdr.

102. However, as Mr Sharma remarked in his oral evidence, “life and business are dynamic”. Therefore, right from the point at which the assembly of the Site was substantially complete in 2014, Aurium was actively considering exits, or partial exits, that would involve something other than a sale of 100% of its interest after the point at which planning permission was obtained. For example:
- i) In August 2014, Aurium held detailed discussions with a potential investment vehicle called QAYA for QAYA to take a 50% equity stake in the Bayswater Project, well before the point at which planning permission had been obtained.
 - ii) Also in August 2014, Aurium engaged MdR to draft a term sheet setting out terms on which a company called Peninvest Limited would acquire a 50% equity stake in BRHL.
 - iii) From April 2016, Fenton Whelan sought to obtain £90m from Santander’s pension fund by way of subscription for preference shares in BRHL, with some of those funds to be used to repay part of the Senior Debt, some being used to repay loans made by Aurium and some being used to fund working capital. Discussions with Santander continued until October or November 2016 when they concluded without a deal being reached.
103. None of the above proposals completed. Nevertheless, it is scarcely surprising that Aurium was considering its strategy throughout. It was engaged in a high-risk, high-reward venture. Right from 2014 there were other investors potentially interested in taking on some of that reward and risk, but each had their own requirements and of course any deal would require agreement on price. This dynamic process of considering, and soliciting, investments from third parties is at odds with the impression given by the witness statements to the effect that MdR were made aware of a single “exit strategy” consisting of a sale of 100% of Aurium’s interest in BRHL after the point at which planning permission was granted. The true position is that Aurium’s exit could have taken a variety of forms. It could have reduced its interest in the Bayswater Project by bringing in a co-investor before planning permission was obtained. It might have tried to sell all of its interest after planning permission was obtained but found that a prospective purchaser wanted Aurium to keep “skin in the game” (as Mr Sharma put it) by retaining a meaningful equity interest during the construction phase. Reluctant though it was to remain invested during the lower risk construction phase, Aurium might have had no choice if a buyer could not be found at the right price. That conclusion is not altered by the fact that Mr Sharma described the Senior Debt as a “bridge to planning” in emails with Mr Paul. That term certainly indicated that it was hoped that the Senior Debt would be refinanced after planning permission was granted, but says little about the nature of Aurium’s exit from the structure.
104. In its written closing submissions, Aurium argued that the relevant risk, which the Advice was intended to protect against, can be formulated as follows:

207. The risk of harm to Aurium in this case was that it would suffer the loss of its investment by not be able to sell BRHL to a developer within the term of the Cheyne finance because of BCG’s refusal to give up [vacant possession].

105. I reject that formulation of the risk or risks that, viewed objectively, were to be guarded against by the provision of the Advice for the following reasons:
- i) The formulation is at odds with the high-level and preliminary nature of the advice requested as outlined in paragraph 88. MdR were not asked to provide advice on the implications of any particular build around scheme for a successful sale of all or part of the Bayswater Project.
 - ii) It was not a “given” that Aurium’s exit would necessarily involve a sale of 100% of its interest in the Bayswater Project once planning permission was obtained for the reasons I have given above. Accordingly, viewed objectively, the purpose of the Advice was not to guard against the risk of that particular kind of transaction failing to complete. The different possible exits from the Bayswater Project could give rise to different risks of failure. The Advice could not have been designed to protect Aurium from any one of those exits failing.
 - iii) The trigger for the risk that Aurium identifies is “BCG’s refusal to give up [vacant possession]”. Vacant possession would only be forthcoming if BCG and Aurium/Fenton Whelan negotiated a commercial agreement. However, in requesting the Advice, Fenton Whelan were not asking for MdR’s views on how to conduct those commercial negotiations; they were asking for legal advice. MdR was not, therefore, protecting anyone against the risk of failure of commercial negotiations which MdR had no hand in formulating.
 - iv) Whether any failure by BCG to give vacant possession would cause a sale of BRHL to fall through depended on a range of commercial issues on which MdR was not asked to advise, nor able to advise. For example, a purchaser with a low cost of funds, such as a sovereign wealth fund, might not regard it as a “deal breaker” if BCG refused to give vacant possession. BCG’s lease had less than 6 years to run. A delay of that magnitude might not be that significant for such a purchaser. By contrast, a different purchaser paying a full price and having a higher cost of funds might be much more concerned about a failure to obtain vacant possession. Similarly, whether a failure to obtain vacant possession of the Shop caused a problem with the Senior Debt would depend on whether Cheyne were prepared to grant extensions or dispensations. MdR was not asked to advise on any issues relating to the Senior Debt as part of the Advice.
106. Given the high-level and preliminary nature of the advice that Fenton Whelan requested, I prefer the formulation of the scope of duty that MdR put forward in its closing submissions. The risk that the Advice guarded against was the risk that some aspect of BCG’s rights or obligations were overlooked. That might result in Fenton Whelan devising a “defective” build around scheme and either waste costs in doing so or having to incur additional costs to make the defects good. Such a defective build around scheme might also generate costs associated with litigation brought by BCG to enforce rights given to it under the Lease that had been overlooked. Avoiding the incidence of these costs and ensuring that any build around scheme that was developed took proper account of BCG’s legal rights was the purpose of the Advice.

[C]: DUTY NEXUS AND LOSS

107. I take this section out of its natural order because it can be dealt with shortly in the light of my conclusions in Section B above. Aurium's claim is for £53.142m of loss said to have been suffered when loans Aurium made to BRHL became irrecoverable following Cheyne's enforcement of its security for the Senior Debt consequent on the failure of attempts to sell BRHL to KWG. As well as failing because MdR did not owe Aurium, as distinct from BRHL, any duty (see Section A above), it also fails because the loss claimed fell outside the scope of MdR's duty, even if that duty had been owed to Aurium (see Section B above).
108. So as to ensure that necessary factual findings are made, in case I am wrong in my conclusions on the law, I will deal with a factual dispute between the parties as to whether Aurium had even suffered the loss claimed. At the beginning of the trial, the evidence on this issue was equivocal: there was plenty of evidence that the process of enforcing security resulted in Aurium losing its interest in its shares in BRHL. However, there was much less evidence that it had also lost its interest in loans made to BRHL. Uncertainty on this issue was compounded by the fact that BRHL's accounts for its years ended 31 December 2017 and 31 December 2018 (which were approved and authorised by BRHL's board on 11 October 2019) recorded BRHL as remaining liable to Aurium under shareholder loans with no mention being made of any post-balance sheet event that resulted in Aurium no longer being entitled to payment under those loans.
109. On the final day of the trial, after the evidence had closed, Aurium applied to introduce further evidence on the fate of the loans to BRHL. The substance of that application was not opposed and I allowed it. The new evidence served demonstrates, and MdR does not dispute, that the loans Aurium made to BRHL were compulsorily transferred to Park Modern Limited, a company controlled by Cheyne, as part of the enforcement of security for the Senior Debt. Therefore, I find that Aurium has lost £53.142m as it claims. I do not see any need in this judgment to adjudicate on the competing arguments of the parties as to whether the belated disclosure of this documentation did, or did not, involve any breach of Aurium's obligation to provide disclosure.

[D]: BREACH OF DUTY/CONTRIBUTORY NEGLIGENCE**The applicable standard**

110. I did not understand the parties to disagree with the following propositions of law:
- i) MdR is to be judged by reference to the objective standard of a reasonably competent practitioner (see *Midland Bank Trust Co Limited v Hett, Stubbs & Kemp* [1979] Ch 384 at 402H to 403B). MdR is not to be judged by reference to the standards of a particularly meticulous or conscientious practitioner.
 - ii) Since MdR held itself out as having expertise in the specialist area of property litigation, it should be judged by reference to the standard of a reasonable firm of solicitors with a department specialising in real estate litigation (*Agouman v Leigh Day* [2016] EWHC 1324 (QB) at [83]).

The Advice and its interpretation

111. The Advice was headed:

STRICTLY PRIVILEGED AND CONFIDENTIAL PREPARED SOLELY FOR THE PURPOSES OF LEGAL ADVICE AND IN ANTICIPATION OF PROCEEDINGS

That, however, was simply “boiler plate” wording. It did not advise that there was a risk that BCG might bring proceedings in connection with any “build around” scheme and did not seek to quantify the extent of that risk.

112. The Advice also used separate defined terms for the “Building” and the demised premises which were referred to as the “Property”. Those definitions were used consistently and coherently, the effect being to differentiate between those rights and obligations that affected the demised premises and those that related to the whole Building.

113. In total, the Advice ran to six pages and had the following structure:

i) The first section was headed “Introduction”. It set out the purpose of the Advice as follows:

Although you have sought to enter into negotiations to terminate the Lease and get possession of the Property, it now appears that you may have to alter your development scheme for the Building in order to accommodate the Lease.

The purpose of this note is to advise you as to the rights available to the occupational tenant at the Property and the potential claims that they could make in relation to the development of the upper parts of the Building together with the neighbouring buildings.

ii) The second section was headed “Summary”. It appeared in a yellow box, as did other paragraphs of the Advice that MDR considered conveyed essential messages. After making the general point that the Lease contained a number of rights for BCG and obligations on APL as landlord, the summary read:

Any scheme you prepare must be designed so as to enable the tenant to continue to trade throughout the duration of the works. If the development prohibits trade then you could be faced with a claim for damages or an injunction.

Notwithstanding, this there are a number of practical steps that you can take in order to insulate yourself from claims being made against you.

iii) The third section was headed “The Lease”. It described the extent of the demised premises, summarised easements granted as part of the Lease (under the heading “Rights Granted”) and quoted express covenants granted pursuant to the Lease (including Clause 4.2.6 and the express covenant for quiet enjoyment contained in Clause 3.1.1 of the Lease). This section also summarised the implied covenant on the part of the landlord

not to derogate from its grant. After setting out the text of Clause 4.2.6, the Advice contained the following paragraph in a yellow box for emphasis:

This obligation [i.e. Clause 4.2.6] needs to be considered in the light of plans you have for the Building. This covenant only requires you to keep the main structures in good repair. It does not necessarily prevent you from altering the structure however, the works you carry out must be done in such a way that does not leave the structural parts in a poor state of repair.

- iv) In the next section, under the heading “Potential Claims”, the Advice summarised claims that could be brought in connection with works being carried on at the Building. The analysis was divided into two sections, one dealing with claims under the terms of the Lease and one dealing with claims in nuisance. The section dealing with potential claims under the terms of the Lease did not contain any discussion of Clause 4.2.6.
 - v) The next section was headed “Defences”. It was largely concerned with defences that might be available to claims based in nuisance, but also contained a discussion of the Party Wall etc. Act 1996. There was no discussion of Clause 4.2.6 in this section.
 - vi) The final section was headed “Practical Steps”. Much of the section appeared in a yellow box and its focus was largely on practical steps to be taken during construction works. The Advice stated that “... if you follow[s] the practical steps set out below you should be able to defend a claim for nuisance or interference with land from your tenant or other land owners.”
114. I do not accept Aurium’s submission that, when MdR wrote, in the “Summary” section, that following MdR’s practical steps would “insulate” Aurium from claims, it was offering a cast-iron assurance or failing to advise on “litigation risk” associated with the build around scheme. Both MdR and Aurium knew that BCG was litigious. It had, after all, only recently issued proceedings in connection with the Shopfront Litigation. Reading the word “insulate” in its proper context, the meaning is clear. Works done during the development phase must not restrict BCG’s trade. During the development phase, there are practical steps that could be taken to reduce the risk of BCG claiming, or claiming successfully, that its trade is being interfered with. MdR was not offering any guarantee or advice that BCG could bring no claim, or no successful claim.
115. At points in its submissions, I understood Aurium to be asserting that the section of the Advice I have set out in paragraph 113.iii) was setting out a concluded view that demolition of the Upper Parts, followed by their reconstruction, would involve no breach of Clause 4.2.6 provided that the (reconstructed) Upper Parts were left in good repair at the end of the process. I reject that interpretation. The entirety of that paragraph takes its colour from the opening sentence to the effect that Clause 4.2.6 “needs to be considered in the light of the plans you have for the Building”. That makes it clear that no concluded views are being offered on the scope of Clause 4.2.6 and that further detail on the “plans you have for the Building” is necessary before any concluded view can be given. In a similar vein, the paragraph goes on to explain that alterations to the structure may be permissible under Clause 4.2.6 (as emphasised by the use of the word “necessarily”) but only if those alterations leave the structure in a good state of

repair. Consistent with the high-level and preliminary nature of the advice requested, the Advice offers no conclusion on the implications of any demolition of the Building, or the Upper Parts, for a claim under Clause 4.2.6.

116. It follows that I also do not agree with MdR that the use of the word “necessarily” in the relevant section of the Advice was intended to convey any sense of doubt as to whether a demolition of the Building or Upper Parts would breach Clause 4.2.6. The Advice was not communicating any risk in this regard because it simply did not address any distinction between “alteration” and “demolition” for the purposes of Clause 4.2.6.

Application of the objective standard to the Advice

117. Aurium criticises the Advice for being “banal in its legal observations, lacking in any appropriate detail and [failing] properly to identify, and still further to address the very issue on which Mishcon had been instructed to advise.” I reject that criticism. MdR offered the kind of high-level and preliminary advice that had been requested.
118. Aurium also criticised the process that MdR, particularly Mr Warren and Ms Kapoor, followed in order to produce the Advice and the way in which the Advice was conveyed. I reject the contention, set out in Aurium’s written closing submissions, that Mr Warren failed to consult leading textbooks on property law when preparing the Advice as I accept Mr Warren’s evidence that he did do so, and indeed Mr Reed QC said, in answer to a question from me, that Aurium did not invite me to disbelieve that evidence. Therefore, Mr Warren would have had in mind when preparing the Advice the following general propositions of law which are explained in paragraph 13-063 of *Woodfall on Landlord and Tenant*:
- i) The covenant in Clause 4.2.6 to “keep” the main structure of the Building in good repair could potentially be infringed by a demolition of part of the Building, including a demolition that was a staging post towards a rebuilding of the part demolished.
 - ii) However, the position is nuanced. The extent to which Clause 4.2.6 prohibits demolition involves a question of construction of the lease to determine what the parties to the Lease are to be taken as having contemplated to be permissible. Relevant to that issue are, among others, the scope of the covenant against alterations.
119. Aurium criticises the Advice for failing to explain that the overall question is one of construction of the Lease and the nuanced issues to which such a question can give rise. It makes an unfavourable comparison between the Advice and the opinion provided in 2017 by Mr Rosenthal of counsel. I do not accept those criticisms. As I have found, MdR was not presented with a build around scheme and asked to advise whether it would breach Clause 4.2.6. Moreover, in January 2016, BCG was not asserting that any build around scheme infringed its rights under the Lease as BCG only became aware subsequently that such a scheme was proposed and would only have seen the details of that proposal in the Section 73 Application. Against that background, MdR’s task in January 2016 was to provide the high-level advice and preliminary advice I have set out in paragraph 88. Mr Rosenthal was asked to answer a very different question from that posed to MdR in January 2016. His task was to advise whether a specific build around scheme, that was by then fully articulated in the Section 73 Application, infringed

BCG's rights under the Lease in circumstances where BCG had issued legal proceedings claiming that its rights were infringed. The high-level advice that MdR was requested to provide could be given in a number of ways. A different adviser might have worn its knowledge of the principles applicable to construction of repairing covenants more heavily and given a treatise on principles such as those set out in paragraph 13-063 of *Woodfall*. However, MdR was quite entitled, given the lack of detail it was given on any build around scheme, to take the different course adopted in the Advice of advising that Clause 4.2.6 warranted further consideration and was best considered in the light of plans that Fenton Whelan had for the building. Even though the ultimate question was of contractual interpretation, that was a reasonable course to follow since it would enable the question of contractual interpretation to be applied to a suitably specific proposal.

120. Aurium counters that, even if MdR had not been specifically requested to provide advice on whether a demolition of the Upper Parts would result in a breach of Clause 4.2.6, MdR should nevertheless have drawn that risk to Aurium's attention on the basis that it was an obvious risk of the kind dealt with in *Boyce v Rendells* and the *County Personnel* case.
121. On balance, I disagree. Mr Sharma had not asked MdR to advise on even a general proposal for a build around scheme that involved a demolition of the Upper Parts. Therefore, the risk of Clause 4.2.6 operating as an obstacle would not have been obvious from Mr Sharma's instructions. Aurium nevertheless invites me to conclude that it would have been obvious to any experienced property lawyer that development of the Site would have to involve some demolition of the Upper Parts. After all, it was argued, it could scarcely be expected that Aurium's plan for luxury flats on the Site could be accommodated by retaining the mansard roof on the Building. To similar effect, Aurium emphasised that Mr Sharma had himself referred to the significance of restrictions on works on a "roof void" in his email of 5 January 2016 which drew a distinction between the upper walls which "can be maintained" and a "roof void" which, by implication, could not be retained.
122. However, lawyers are not property developers. I accept Mr Paul's evidence that his understanding of a "build around" scheme, as a general concept, was as something that may or may not involve some element of demolition of the property being built around. That was a reasonable view for a specialist real estate lawyer to hold. While a property developer might have concluded in 2016 that a successful "build around" would have to involve some element of demolition, at least of the roof of the Building, I am not satisfied that would be obvious to a property lawyer. While a Spiegelhalter-type build around might well look "eccentric" (as Mr Walsh put it in his oral submissions), I do not consider that a reasonably experienced property lawyer would regard it as a non-starter.
123. With the benefit of hindsight, Mr Sharma's reference to the roof void in his email of 5 January 2016 does acquire some significance, as it suggests that Mr Sharma had in mind a distinction between the roof void, which had to be demolished, and "structural walls" that could possibly be retained. However, it was reasonable for MdR not to spot that inference in 2016. Having been asked for high-level and preliminary advice, MdR were not obliged to try to anticipate what build around scheme might ultimately emerge. MdR's approach, of alluding generally to the need to consider Clause 4.2.6 further in the light of Fenton Whelan's specific plans for the building, was a reasonable one in the circumstances.

124. Aurium argues that MdR was negligent in failing to instruct counsel. I disagree. It was entirely reasonable for MdR to conclude that the high-level advice it was asked for did not need the advice of specialist counsel.
125. Nor do I accept that the Advice was negligent in focusing unduly on the potential for claims in nuisance with a corresponding lack of focus on the potential for claims by BCG alleging a breach of Clause 4.2.6. It was reasonable for the Advice to devote much of its space to the possibility for claims in nuisance. Whatever kind of build around scheme Aurium followed was likely to generate noise and dust which could lead to such claims and MdR therefore, understandably, set out some detail on how the risk of such claims could be minimised. However, claims based on Clause 4.2.6 were different and would depend on the precise nature of the works undertaken. Once MdR had, reasonably, highlighted the need to consider Clause 4.2.6 further in the light of Fenton Whelan's specific plans for the Building, it was reasonable for MdR to say little more on the subject of Clause 4.2.6.
126. In my judgment, even if, contrary to my conclusion in Section A, MdR owed duties to Aurium in connection with the Advice, it did not negligently breach any duties so owed. It follows that there is no need to consider the question of contributory negligence.

Alternative advice that could have been given

127. My conclusion in paragraph 126 provides a further reason why Aurium's claim fails. However, it is right that I should make further factual findings, particularly on the extent of Aurium's "loss of a chance" that will depend on how Aurium and others might have behaved in a counterfactual world in which Aurium had received different advice. In its submissions, Aurium naturally used the expression "non-negligent advice" to describe this concept. However, since I have concluded that the Advice was not negligent, that would not be an appropriate term. I will instead use the expression "Alternative Advice" to describe the advice that MdR should have given if, contrary to my conclusion, it was under a duty to advise Aurium of risks arising from Clause 4.2.6 if Aurium pursued a build around scheme that involved a demolition and rebuilding of the Upper Parts.
128. I need not decide whether such Alternative Advice would have taken the form of a single letter or memorandum (along the lines of the Advice itself) or whether it would have been the outcome of an iterative process in which MdR identified issues, asked for more information and then firmed up its conclusions. What is important is the overall advice that a reasonable lawyer, experienced in property litigation matters, would have given if asked in 2016 to advise whether a proposal to "build around" the Shop by demolishing and rebuilding the Upper Parts, but leaving the Shop in place, would breach the requirements of Clause 4.2.6. In my judgment, the effect of that advice would be that there was around a 50-50 chance that such a "build around" scheme would breach the requirements of Clause 4.2.6. That conclusion would have been reached following a process of reasoning similar to that of Mr Rosenthal in his advice in October 2017 and would have involved explaining that the question is one of construction of a contract, and the principles that apply to such questions of construction. The Alternative Advice would also have explained that the precise nature of the building works had the capacity to affect the outcome so that a long interval between the demolition of

the Upper Parts and their reconstruction would be a negative feature, whereas a short interval would have been more positive.

[E]: RELIANCE

Applicable legal principles

129. There was no material dispute between the parties on the applicable legal principles which can be summarised as follows:

- i) Aurium has to establish that there was factual reliance on the Advice. Christopher Clarke LJ explained that concept as follows in *Hunt v Optima Cambridge Ltd* [2015] 1 WLR 1346 at [54]:

In order to recover in the tort of negligent misstatement the claimant must show that he relied on the statement in question ... It must operate on his mind in such a way that he suffers loss on account of his reliance, e.g. by buying at too high, or selling at too low, a price, or making an agreement or doing something which he would not otherwise have made or done.

- ii) Aurium must establish that its reliance was “reasonable” in the sense that, for example, its reliance did not hinge on a misinterpretation of the Advice or an unreasonable belief as to what it meant. That is not a separate test, but rather is an aspect of factual reliance since, if Aurium were relying on an unreasonable interpretation of the Advice, it would be relying not upon the Advice itself, but rather on its own unreasonable interpretation (see *Housing Loan Corporation v William H Brown* [1999] Lloyd’s Rep PN 185 at 191 to 195).

Analysis

130. Aurium’s pleaded case, as pursued in its closing submissions, is that it relied upon the Advice “and further repeated confirmatory advice given by [MdR] between January 2016 and September 2017” in the following ways:

- i) It believed it could demolish the Upper Parts, including the structure and roof of the Building, without breach of Clause 4.2.6 or significant litigation risk.
- ii) It made the Section 73 Application so that it could implement a build around scheme; and
- iii) It did not appreciate that what it refers to as the “Clause 4.2.6 Claim” had merit and so did not increase the price it was prepared to offer BCG for vacant possession and accordingly did not engage in realistic negotiations with BCG with a view to obtaining vacant possession.

131. The references to the “further repeated confirmatory advice” is to the 12 instances I have mentioned in paragraph 19.i) above. As noted in that paragraph, Aurium must, at a bare minimum, establish factual reliance on the Advice itself as distinct from alleged repetitions or confirmations of it. I accept, however, that the 12 instances relied upon might shed some light on how Aurium responded to the Advice itself.

132. MdR places some emphasis on the way the Advice was communicated. I am prepared to find that no director of Aurium ever read the Advice. I am also prepared to find that minutes of Aurium board meetings at which the difficulties with BCG were discussed did not refer to the Advice in sufficient detail to suggest that the Advice operated directly on the minds of Aurium's directors.
133. However, MdR communicated the Advice to Fenton Whelan, as was their course of dealing with legal advice given on the Bayswater Project generally. Moreover, as MdR were aware, Aurium was looking to Fenton Whelan for advice on how to deal with the difficult situation with BCG. Aurium, in turn, was aware that Fenton Whelan had received the Advice from MdR, even if Aurium's directors were not familiar with the detailed text of the Advice.
134. Aurium ultimately approved the recommendations that Fenton Whelan made as to how to approach the difficulties with BCG. If in making those recommendations, the Advice operated on Fenton Whelan's mind I am prepared to accept that this constituted reliance by Aurium since Aurium knew that Fenton Whelan had the Advice in mind when formulating its (Fenton Whelan's) recommendations which Aurium ultimately accepted. In the remainder of this section I will, therefore, focus on the extent, if any, to which Fenton Whelan relied on the Advice as a shorthand for the above analysis.
135. I reject Aurium's case that there was reliance on the Advice of the kind set out in paragraph 130.i). As I have explained in paragraph 115 the Advice expressed no view on whether a demolition of the Upper Parts, followed by a reconstruction, would breach Clause 4.2.6. The Advice gave no view on "litigation risk" either. Therefore, I do not consider that Fenton Whelan actually read the Advice as confirming the matters set out in paragraph 130.i). To the extent that it did so, that would have been an unreasonable reading of the Advice. I am only reinforced in that conclusion, which I regard to be clear from the face of the Advice, that Mr Sharma accepted in cross-examination that he would have had "real doubts" about how works that involved demolishing the Upper Parts could be said to leave them in a good state of repair, which the Advice stated to be necessary. That indeed was the reaction of Mr Winkley at Fenton Whelan when he read the Advice who wrote, in an email to Mr Sharma dated 21 January 2016:

Main issue is the apparent requirement to maintain the structure of the building. Ultimately sounds like we cannot demolish from first floor up. Need to confirm with Mishcon.

136. I do not consider that the averred reliance set out in paragraph 130.ii) adds much to the analysis. The reason why an application for amended planning permission was made was so that some kind of build around scheme could be implemented if necessary. So the real issue is whether that amended planning permission was applied for in reliance on an assurance conveyed by the Advice that such a build around scheme would be viable. The answer to this question is as set out in paragraph 135 above. The Advice gave no assurance on the viability or otherwise of any build around scheme and Fenton Whelan could not reasonably have read the Advice as conveying such an assurance.
137. In support of the averred reliance set out in paragraph 130.iii), Aurium refers to evidence of the negotiations between Fenton Whelan in which Fenton Whelan took a tough line. I am prepared to accept that Fenton Whelan genuinely formed the view by mid-2016 that there were sufficiently good prospects of

implementing a “build around” scheme should BCG refuse to give vacant possession that the maximum offer that should be made to BCG was £1.5m (the estimated incremental costs of that build around scheme). However, Fenton Whelan cannot have formed that belief based on the Advice which, as I have found, was silent as to the legal viability of any build around scheme. If Fenton Whelan considered the Advice gave them confirmation as to the viability of any build around scheme, it was not reasonable for them to form that view.

138. More specifically, I reject Mr Sharma’s evidence that his approach to a meeting with Mr Grovit at the Bulgari Hotel on 9 February 2016 was influenced by a perception that he had a “bulletproof position to build around [BCG]”. During that meeting Mr Sharma certainly told Mr Grovit that, if he was not prepared to agree a figure for BCG to give vacant possession of the Shop, BCG would get nothing as Aurium could always build around him. But that was the kind of positioning that takes place in negotiations. Mr Sharma wanted to introduce Mr Grovit to the idea that Aurium was considering alternatives to paying BCG for a surrender of the Lease to try to focus his mind on the need to reach a (reasonable) settlement. It would make sense to do that even without a “bulletproof” position. As I discuss in Section F below, I do accept that Mr Sharma might have handled the meeting differently if he had known the position was “nuanced”. However, it does not follow from this that he took the line he did at this meeting because he thought his position was strong. It certainly does not follow that any belief in the strength of his position came from the Advice itself since the Advice gave no assurance as to the strength of his position, saying only that Clause 4.2.6 needed to be considered in the light of Fenton Whelan’s plans for the building. There was, therefore, no reliance of the kind set out in paragraph 130.iii).
139. Mr Sharma, Mr Pearson and Mr Penna all sought to support Aurium’s case on reliance by giving evidence of their recollections of shock and anger on receiving Mr Rosenthal’s advice which, they said, showed how incorrect the Advice had been. I consider that their recollections of anger have, over time, become reinterpreted as supporting their internal narrative that MdR were to blame rather than simply as the inevitable anger and upset they felt on receiving unwelcome news. The contemporaneous documentary record contains no real suggestion of a feeling that the Advice had been incorrect. Mr Sharma’s initial response was muted: he described Mr Rosenthal’s advice as “not great, more literal than I expected”. Mr Sharma, Mr Pearson and Mr Penna were quite prepared to complain about MdR’s service levels when they felt it was warranted, but none of them suggested to MdR that the Advice had been shown to be wrong. I acknowledge Mr Sharma’s point that Aurium was still reliant on MdR to help to complete a transaction, but, if these individuals seriously felt that the Advice had underpinned the entire strategy with BCG and had proved to be wrong, they would at least have asked for some explanation. MdR was disinstructed on matters relating to BCG shortly after Mr Rosenthal gave his advice, but I consider that to be consistent with a dissatisfaction at the way MdR were handling that dispute rather than dissatisfaction with the Advice.
140. My conclusion on the absence of reliance, therefore, is driven by what the Advice said, or how it could reasonably have been read. The 12 instances of alleged further reliance do not alter my conclusion. The first two instances consisted of emails sent by Mr Warren just before and just after Mr Sharma’s meeting with Mr Grovit at the Bulgari Hotel on 9 February 2016. The first email, sent on 29 January 2016, records that BCG had, through its lawyers requested a without prejudice meeting. It comments on a “robust stance” being in place but does not

suggest that MdR offered any view on the merits or otherwise of any build around proposal. By the second email, sent on 9 February 2016, Mr Warren provided some comments on a follow-up email to BCG which was business-like in its tone and also made no mention of a build around proposal.

141. The remaining 10 instances all took place over a year later. Collectively these other 10 instances might indicate that both MdR and Mr Sharma came over time to lose sight of the fact that the Advice was both high-level and preliminary. But they cannot alter the ordinary meaning of the Advice itself or my overall conclusion that no reliance was placed on the Advice.

[F]: COUNTERFACTUALS

142. Since Aurium's claim has, by this point of the judgment failed for a number of reasons, I will limit myself to factual findings in this section. I set myself the limited aim of ensuring that, if I am wrong in any of my conclusions set out above, I am nevertheless making sufficient factual findings to enable a superior court to reach a determination, if necessary, without the need for an expensive retrial. Nevertheless, in deciding what factual findings to make I will bear in mind the legal principles set out in the judgment of the Court of Appeal in *Allied Maples Group v Simmons and Simmons* [1995] 1 WLR 1602 to the following effect:

- i) To the extent Aurium's claim relies on the proposition that it would have acted differently had it received the Alternative Advice rather than the Advice, it retains the burden of proving that it would have behaved as claimed.
 - ii) Since Aurium's claim is based on loss of a chance, I must evaluate whether, if Aurium had behaved differently, as it claimed, it would have had a "real and substantial" chance of recovering all or part of the loans it made to BRHL as part of a successful sale of BRHL shares to KWG for a consideration of at or around £158m in or around June or July 2017. That is a question of causation.
 - iii) If Aurium would have had such a "real and substantial chance", it is then necessary to quantify the magnitude of that chance as part of the process of quantifying Aurium's loss.
143. The parties were agreed as to the parameters of the investigation required by paragraph 142.ii). I must consider (per the parties' agreed list of issues):
- i) The prospects of Aurium reaching a negotiated settlement with BCG before June 2017 under which BCG gave vacant possession of the Shop in return for payment.
 - ii) The prospects of BCG not issuing legal proceedings.
 - iii) The prospects of KWG not withdrawing from its first offer of £158m for the BRHL shares.
 - iv) The prospects of KWG exchanging contracts in or around June or July 2017 for a purchase of BRHL shares for a consideration of £158m and proceeding thereafter to completion.

- v) The prospects of the Senior Debt not needing to be extended in October 2017.

The respective characteristics and situations of Aurium and BCG in the context of their negotiations for vacant possession of the Shop

144. The issues raised in paragraph 143.i) and 143.ii) require me to make findings about how Aurium and BCG might have been expected to act if Aurium had been aware, in January 2016, that a build around scheme involving a demolition and reconstruction of the Upper Parts had only 50-50 prospects of success. Any such evaluation has to take into account the relevant attributes of Aurium and of BCG that would have affected such a hypothetical negotiation and I start with those.

Aurium

145. Aurium was engaged in a risky venture, albeit one that involved the prospect of high reward. It had borrowed £75m from Cheyne at 10% annual interest, compounded quarterly. It had invested considerable amounts of its own funds in the project. If the necessary planning permission was not granted for the project then Aurium would be facing a significant loss on its investment, even if the Senior Debt, which ranked senior to Aurium's loans to BRHL, could be repaid. Even if planning permission was granted, Aurium would still make a profit on sale of the BRHL shares only if it could find a purchaser who was prepared to value the Bayswater Project at a price in excess of the amount that Aurium had invested plus the principal amount of the Senior Debt plus accrued interest.
146. Aurium's high risk, high reward strategy required it to pay high prices for the components of the Site. That was seen most clearly in the price it paid to acquire the Black Lion Pub on Bayswater Road in 2014, which was right at the heart of the Site. The vendor gradually bargained up the sale price from Aurium's initial offer of £12m to a closing price of £27m, the second highest price ever paid for a pub in the United Kingdom. The perceived commercial value of the premises at the time was £7.5m.
147. Right from commencement of the Bayswater Project, money was tight. The Senior Debt had largely been spent on site assembly and related matters and as at July 2014, BRHL had just £18,567.55 in its bank account but there were creditors needing to be paid of £150,000. This meant that from as early as 2014, Aurium and BRHL were dependent on Mr Pearson and Mr Penna making contributions into the project from their own resources. In practice, they were prepared to make such contributions: between them injecting £5,782,975 of extra capital into the Bayswater Project between 2016 and 2017, for example. However, the financing of the project was, from an early stage, insecure and dependent on the willingness of Mr Pearson and Mr Penna to make further equity contributions.
148. The planning process was protracted and added further financial stress. The original terms of the Senior Debt required an application for planning permission to be made before 31 July 2015, with a failure to meet this deadline constituting an event of default. However, there was slippage in the planning process from the outset. The initial feasibility stage was delayed by 6 months and early discussions with planning officers revealed concerns on heritage grounds. BRHL was forced to seek, and obtain from Cheyne on 31 July 2015, a variation to the terms of the Senior Debt that extended the repayment date by 6 months to 16 June 2016 and extend the deadline for applying for planning permission to 15 December 2015.

149. BRHL reached agreement with Cheyne on a further £5.8m of funding on 3 March 2016, £1.32m of which was earmarked for funding vacant possession agreements with tenants on the Site but, in doing so, had to meet Cheyne's costs and expenses. Even this additional funding was not enough and, in April 2016, Fenton Whelan initiated the discussions with Santander to which I have already referred, seeking to obtain some investment in the project from them.
150. BRHL missed the extended repayment deadline under the Senior Debt. Cheyne agreed a one-month extension, but only on terms that BRHL paid cash interest at the default rate totalling £937,252 (funded by Mr Pearson and Mr Penna putting Aurium in funds to make an equity injection into BRHL). BRHL missed that deadline as well and obtained a further one-month extension at the cost of £815,427 (also funded by Mr Pearson and Mr Penna). Around this time Cheyne served a "reservation of rights" letter on BRHL, warning that an event of default had occurred and paving the way for Cheyne to enforce its security. A pattern of one-month extensions to the Senior Debt continued. By August 2016, Mr Sharma accepted in cross-examination that the project was on monthly, if not weekly life support, and reliant on Mr Pearson and Mr Penna agreeing to fund costs. Moreover Mr Pearson and Mr Penna were becoming increasingly reluctant to fund those costs.
151. The process of securing planning permission was continuing in parallel. The final application was made on 9 November 2015, within the revised deadline agreed with Cheyne. WCC resolved to grant permission on 12 April 2016. I have already outlined the additional financial costs imposed on the Project as a consequence of the Mayor of London's initial direction to refuse permission, which was only rescinded in July 2016 after it was agreed that the project would contribute £2.5m more towards affordable housing. I quite accept that, once the Mayor of London had been persuaded not to require WCC to refuse the planning application, Aurium would have had practical comfort that planning permission would ultimately be granted. However, that was practical comfort only. The formal grant of planning permission would not come until a s106 agreement had been reached with WCC and this took time. Planning permission was not formally granted until 2 March 2017.
152. The cumulative effect of the delays in obtaining planning permission, the increased costs involved in doing so and the higher than expected interest expense consequent on the Senior Debt being outstanding for much longer than expected meant that by November 2016, the project was in deep financial difficulties. The extent of those financial difficulties can be gauged from the fact that Aurium was in advanced discussions with Mr Gary Le Men, a wealthy individual, to provide £5m of funding for a projected rate of return of 47%. Even with this level of return on offer, Mr Le Men was not prepared to provide what was, both for him and for the project, a relatively modest amount.
153. Aurium's financial position was a weak point in any negotiations with BCG. Having spent much more on the Bayswater Project than it had hoped to, there was little surplus available to make an eye-catching offer to BCG that could be expected to provide a firm basis for negotiation. There was also an understandable reluctance on Fenton Whelan's part to recommend making such an eye-catching offer which did not stem simply from irritation that Fenton Whelan came to feel with BCG's stance. By 2017, the Lease had just four years to run. That was significant, but it was hardly a "ransom" position. Even in February 2018 by which time BCG's actions had, on any view, been a significant factor in the

transaction with KWG failing to complete, Mr Sharma felt that the £4.25m paid to BCG for surrender of the Lease was likely to be an overpayment.

154. Aurium's financial position also made it vulnerable to any manoeuvres by BCG that increased the length of time for which BRHL was forced to continue incurring the high interest on the Senior Debt. The protracted planning process had already resulted in BRHL incurring much more interest than it hoped although that was attributable to factors other than BCG's actions. However, by late 2016, when it looked increasingly likely that planning permission would be granted and that BRHL could be sold, any threat to derail that sales process was a potent threat indeed.
155. That said, Aurium had some strong cards in its hand as well. If BRHL could be sold successfully to a purchaser prepared to take over the dispute with BCG, all would be well. Moreover, the possibility of such a sale was a weak point in BCG's position since, if the purchaser had a low cost of funds, that purchaser might not necessarily care too much if development of the Site had to be delayed. Therefore the leverage that BCG could exert over BRHL, which was party to the expensive Senior Debt, by threatening to protract matters, could not be exerted over a purchaser with a low cost of funds.

BCG

156. BCG was directly or indirectly owned by Mr Grovit. At the time MdR were instructed to make initial overtures suggesting a surrender of the Lease for a payment of £450,000 or £500,000, neither Aurium nor Fenton Whelan knew much about him. However, by June 2015, Fenton Whelan had seen an article in the Daily Mail, which described Mr Grovit as a "secretive and ultra-wealthy" businessman with a background in "property speculation". The article also referred to Mr Grovit's perceived litigiousness describing how he engaged in what Wright J referred to in *Berkeley Administration Incorporated v McClelland* [1990] FSR 505 as an "explosion of litigation" when employees of his Chequepoint business tried to set up a rival bureau de change. Mr Grovit was a wealthy and litigious counterparty who knew a lot about property. Negotiations to obtain a surrender of the Lease were always going to be difficult even if Aurium had had a perfect understanding of the prospects of a build around scheme succeeding.
157. Mr Grovit also appeared to have a good degree of information on the Bayswater Project as a whole. From 2014 to 2017 BCG wrote a variety of letters, and took a variety of steps, seeking to disrupt attempts to develop and sell the Site. There is no need to itemise them. It is sufficient to say that they were numerous and included objections throughout the planning process, many of which were of questionable validity. Fenton Whelan found, a week after the unsuccessful meeting at the Bulgari Hotel, that doors to the basement of the Building had been locked which was problematic since utility meters and the water tank for the Upper Parts were located there. Not infrequently, BCG sent letters, or took action, at a time when they would have great impact. Most strikingly, BCG sent its letter of 18 May 2017 explaining its view that the build around scheme set out in the Section 73 Application infringed its rights under the Lease just three days after Aurium had entered into heads of terms with KWG. The timing could not have been better from BCG's perspective. I consider that Mr Sharma's suspicions that Mr Grovit was obtaining some inside information from someone associated with the Bayswater Project were well-founded.

158. Mr Grovit and BCG showed a willingness to engage in a protracted campaign. BCG simply failed to respond to offers that were communicated to it by Fenton Whelan or MdR. They were not averse to making far-fetched claims in support of their refusal to countenance a surrender of the Lease. At the meeting at the Bulgari Hotel, Mr Grovit indicated that an app that BCG was developing was so valuable and had such strong ties to the Shop as to make the Lease worth more than the entire Bayswater Project. BCG made no counter-offer until as late as 9 August 2017 when it indicated that it would require an amount equal to two years' worth of the costs BRHL was incurring in holding the Site. This was in effect an offer to surrender the Lease for a price no less than £16m. (Mr Sharma said in his evidence that Mr Sandelson had relayed through Mr Tyler at MdR that Mr Grovit had indicated in October 2015 that BCG would surrender the Lease for £10m. There is no record in the contemporary documents to any such figure. It would have been unlike BCG, which was a punctilious correspondent, to communicate such an offer purely orally to Mr Sandelson who had no clear authority to represent APL. I make no finding on whether Mr Sandelson mistakenly told Mr Tyler that an offer had been made, but conclude that BCG made no such offer.)
159. Moreover, BCG showed signs that its ambitions were not limited to obtaining a good price for surrender of the Lease. On 3 February 2016, it wrote to Cheyne enquiring whether Cheyne would sell its interest in the Senior Debt. BCG repeated its enquiries on 10 August 2016. Fenton Whelan was informed of these approaches which Cheyne did not accept. However, they offer a clue as to the scale of BCG's ambitions. Mr Grovit was a wealthy individual. He could have afforded to buy the Senior Debt if Cheyne wished to sell. If Cheyne had sold, Mr Grovit would effectively have acquired the entire Bayswater Project since BRHL was in no position to repay that debt on the due date, so Mr Grovit would simply have had to wait for the inevitable default to occur, enforce the security and take possession of the BRHL shares and with it the entire interest in the Site.
160. All told, BCG had both strong and weak points in its position. Its financial position and willingness persistently to make it difficult for Aurium to develop or sell the Site were strong points. However, there were weaknesses in the form of the relatively short term remaining on the Lease which meant that its negotiating position could evaporate if Aurium was able successfully to sell BRHL to a purchaser with a low cost of funds.

How would Aurium have acted if it had received the Alternative Advice rather than the Advice?

161. In its written closing submissions, Aurium said that, if it had received the Alternative Advice, and so had been aware that the build around scheme it was proposing had around a 50-50 prospect of success, it would have adopted a more constructive and conciliatory course with BCG. It would have made much higher offers of compensation to BCG of at least the sum of £4.25m that BCG ultimately accepted in March 2018. It would have continued to deploy the threat of building around the Shop as part of a negotiating strategy, but would not have deployed that threat as aggressively as it was deployed during the meeting in the Bulgari Hotel referred to in paragraph 158. Examples of the threats Aurium said it would have deployed included starting a "soft strip" of the Upper Parts and erecting hoardings around the Building warning of impending building works designed to intimate to BCG that implementation of a build around scheme might be imminent.

162. In dealing with this issue, I proceed on the basis of my finding of fact set out at 137 above, to the effect that in the “actual” world, Mr Sharma had a genuine belief that Aurium had good prospects of implementing a build around scheme without any breach of BCG’s rights under the Lease. As I have explained, the Advice could not reasonably have supported that belief. However, Mr Sharma came to hold that belief nonetheless. Therefore, part of my enquiry will involve asking how Mr Sharma and Fenton Whelan would have acted in a “counterfactual” world if, having received the Alternative Advice instead, they believed that the build around scheme had only a 50% chance of being effective.
163. I am prepared to accept that, if it had received the Alternative Advice, Fenton Whelan would have struck a more conciliatory tone in its dealings with BCG. That would have resulted in Fenton Whelan causing less conscious annoyance to BCG than it did. So, for example, Fenton Whelan would not have told BCG that it needed to travel to APL’s business premises in Jersey if it wished to inspect an insurance policy covering the Building. It would not have sought indemnity costs when it succeeded in the Shopfront Litigation on the ambitious basis that BCG declined to withdraw its claim when invited to do so.
164. Any strategy of the kind outlined in paragraph 161 depended on Aurium being able to do two things. First it had to be in a position to make an offer to BCG that would be taken seriously. Second, it had to be in a position to threaten, plausibly, to implement a build around strategy if BCG refused that offer. Fenton Whelan knew that Mr Grovit was a seasoned negotiator. He would have tested any threat of a build around strategy to see if it was a bluff and would have seen through it if it were.
165. In my judgment, had he received the Alternative Advice, instead of a confrontational meeting at the Bulgari Hotel, Mr Sharma would at that meeting have signalled some willingness to make a modest increase to the offer of £500,000 that had already been made, not expecting that to be accepted, but hoping to get negotiations moving.
166. However, Aurium would not have wished to make a serious offer to BCG (by which I mean an offer at a level it would expect BCG to accept and which, if not accepted, would trigger express threats of pursuing a build around scheme) until it had received planning approval that would permit it to implement a build around scheme or, at the very least, was confident that that approval would be granted imminently. If it did otherwise, it would have been concerned that BCG would simply call its bluff. At the very least that could mean that BCG would not take the offer seriously. At worst, it could have resulted in BCG commencing proceedings on the basis that Aurium was proposing to start building works for which it had no planning permission. Either outcome would defeat the purpose of making a serious offer backed by a threat. Aurium submits that Mr Grovit would have been cowed by threats of implementation of a build around strategy because he would expect WCC, given their support for the Bayswater Project to date, to grant the necessary planning approvals. I reject that. Even if he expected that WCC might ultimately grant planning approval for a build around proposal, he would have realised that a threat to implement a build around scheme without planning permission was empty and vulnerable to legal challenge.
167. In addition, Aurium’s financial situation meant that it would not have wished to make a serious offer to BCG until it knew that planning permission for the development as a whole had been granted or would shortly be granted. Aurium

would have been aware that BCG was likely to insist on receiving most of its payment up front. If it successfully induced BCG to accept a serious offer, it would not want to pay a large amount to BCG only to find that this was wasted when a failure to obtain planning permission meant the project as a whole failed. Planning permission was not granted in the “real” world until March 2017 and there is no reason to expect that it would be granted earlier in a “counterfactual” world.

168. Even in the “real” world in which he thought that the build around scheme had good prospects of not infringing BCG’s rights under the Lease, Mr Sharma was concerned to ensure that the Section 73 Application did not derail or defer obtaining planning permission for the whole Bayswater Project which was the main prize. It was that thinking that resulted in the Section 73 Application not being made until 4 April 2017, after the main planning permission was formally granted. I do not consider that Mr Sharma would have advised Aurium to act more speedily in making a section 73 application in the “counterfactual” world in which he knew the build around scheme had only a 50-50 chance of success. Therefore, in my judgment the earliest a section 73 application would have been made in the counterfactual world was after the planning difficulties with the Greater London Authority had been resolved (in July 2016). Although by then formal planning permission for the whole Bayswater Project had not been granted, and there remained a s106 agreement to negotiate, I accept Mr Sharma’s evidence that WCC’s resolution to grant planning permission, coupled with agreement reached following the Mayor of London’s intervention, gave substantial practical assurance that planning permission would be forthcoming.
169. July and August 2016 being the holiday season, I do not consider much progress would have been made on preparing a section 73 application until September 2016. There were some defects in the actual Section 73 Application that Aurium submitted as the proposal set out in that application interfered with the façade of the Shop and blocked off a rear fire escape. I am satisfied that such defects would have been present in any section 73 application submitted in September 2016. Allowing three months for the application to be prepared and three months for it to be approved (estimates that Mr Sharma accepted as reasonable in cross-examination), the earliest that Aurium could have received a planning approval for a build around scheme in the counterfactual world would have been March 2017.
170. For all of those reasons, even in the counterfactual world, in which it had received the Alternative Advice, I do not consider that Aurium would have even been in a position to make a serious offer to BCG, backed up by a credible threat of a build around if the offer was not accepted, until around March 2017.
171. Aurium invites me to conclude that, because in the “real” world, BCG was ultimately offered, and accepted, £4.25m to surrender the Lease in March 2018, Aurium would have offered it £4.25m in the counterfactual world as well. I do not accept that, because there were significant differences between the circumstances prevailing when £4.25m was offered in the real world, and circumstances that would have prevailed in the counterfactual world in March 2017:
 - i) By February 2018, BCG had shown that it had the nerve and the ability to act in such a way as to affect KWG’s willingness to proceed with a purchase

of BRHL. Put shortly, in March 2017, BCG had not yet fully shown what it could do.

- ii) By February 2018, negotiations for a sale of BRHL to KWG were back on, albeit for a contemplated purchase price of £143.5m. Aurium would certainly not wish to countenance the prospect of the transaction with KWG failing for a second time and were prepared to pay a fuller price to mitigate this risk. In March 2017, BCG had not yet derailed any transaction.

172. There is another guide to the level of likely offer that would have been made in March 2017, namely the offer that Cheyne communicated to BCG on 18 July 2017. By that stage, BCG had shown something of what it could do because KWG had effectively ceased negotiations to purchase BRHL (although there remained some prospect of the transaction going ahead if BCG could be induced to give vacant possession). However, even in those circumstances, Cheyne communicated an offer of just £1m to BCG. In my judgment, that figure took into account the financial constraints of the Bayswater Project. In its closing submissions, Aurium pointed to its willingness to pay full prices for vacant possession of crucial sites such as the Black Lion Pub. I accept that. However, Aurium paid £27m for that pub towards the beginning of the Bayswater Project, when optimism was higher and finances stronger. It was operating under very different financial circumstances in March 2017.
173. The offer of 18 July 2017 was made before Mr Rosenthal gave his advice (that the chance of the build around scheme working was no better than evens). Therefore, in my judgment, what caused the offer to increase from £1m in July 2017 to £4.25m in March 2018 was a combination of two factors: (i) a perception that the chosen build around scheme might be less likely to succeed than Fenton Whelan had thought and (ii) a concern that BCG had shown it could derail one transaction with KWG and that the same thing might happen again. Factor (i) would have been operative in the “real” world in March 2017, but factor (ii) would not.
174. It follows, in my judgment, that the price that Aurium would have offered BCG in March 2017 was somewhere between £1m and £4.25m. I will select the midpoint between these numbers. A serious offer, made in the counterfactual world in March 2017, would have been for £2.63m.

How would BCG have responded to that offer?

175. In my judgment, there is no “real and substantial” chance that BCG would have accepted an offer of £2.63m to surrender the Lease in or around March 2017. Indeed, I do not consider that there was a “real and substantial” chance that it would have accepted an offer less than £4.25m.
176. First, there is the obvious point that the offer BCG ultimately accepted was for £4.25m. That in itself gives rise to significant doubt as to whether BCG would have accepted a lower offer in March 2017.
177. The process in the real world that resulted in BCG accepting the £4.25m is instructive. It took from July 2017 to March 2018 for BCG to agree to surrender the Lease. During negotiations, BCG started by requesting a price that equated to two years’ worth of interest on the Senior Debt (approximately £16.5m at that point). A bit later it indicated that it might be prepared to accept £12.5m only to

revert back to its former position of asking for around £16.5m. On or around 22 September 2017 BCG made further enquiries to see if Cheyne might sell its interest in the Senior Debt. Some significant movement came towards the end of 2017 or early 2018 when BCG intimated it might be prepared to accept £7m. On 19 January 2018, Mr Stickney of Cheyne wrote to Mr Grovit to say that £7m was simply unaffordable. Whether because of inside information on the position of the Bayswater Project or whether because of his commercial judgment, Mr Grovit appears to have accepted that and following this email, there was reasonably quick progress towards the agreed final number of £4.25m.

178. It is clear from BCG's conduct of negotiations in the real world that it wished to take its time to ensure that it was obtaining as much from the Bayswater Project as it reasonably could. It did not accept £4.25m until it had spent considerable time and effort in trying to obtain a higher sum and until it knew that its third attempt to acquire the Senior Debt had not been successful. In my judgment, BCG would not have been rushed into acceptance of an offer of £2.63m in March 2017 and would not have been rushed into accepting £4.25m even if that sum had been offered. Rather, in my judgment, BCG would have responded to a serious offer by asking for more (probably an amount equal to two years' interest on the Senior Debt since that was its first real counter-offer in the "real world" negotiations) and when that counter-offer was inevitably rejected, since the Bayswater Project's finances could not support it, BCG would have moved to litigation, just as it did in the real world.
179. Moreover, BCG would have considered timing issues seriously. It would not have engaged in any serious discussion on price until it knew, from its source close to the Bayswater Project, that Aurium and BCG were close to agreeing heads of terms. That was the point at which BCG had maximum leverage since it could threaten to derail that transaction. In short order after realising that it would not obtain compensation equal to two years' interest on the Senior Debt, BCG would have acted to test whether it could, by litigation that threatened to derail the transaction with KWG, nevertheless obtain more than Aurium was then offering. Precisely as it did in the "real" world, BCG would have issued proceedings, at a time of maximum impact, in late May or early June 2017 before the transaction with KWG had built up momentum.
180. Aurium argues that in the counterfactual world, its negotiating strategy would have given BCG an uncomfortable dilemma: either to accept Aurium's offer and give vacant possession or to take legal proceedings for an injunction restraining the development and face having to give a cross-undertaking in damages that would have involved considerable risk. I do not accept this. In the "real" world, BCG never sought an interim injunction restraining any development, which would have involved material risk under the cross-undertaking. Rather, it sought a declaration that the works that were the subject of the Section 73 Application would infringe its rights under the Lease which would not normally be expected to require any cross-undertaking. BCG would have made the same claim in the counterfactual world.
181. Nor do I accept Aurium's argument that a more constructive tone in negotiations that would have been adopted in the counterfactual world would have made BCG more inclined to reach a settlement. There was certainly an "edge" to correspondence between Fenton Whelan and BCG in the "real" world. Mr Grovit had personally annoyed both Mr Sharma and Mr Van Den Heule as was perhaps to be expected since he was denying highly motivated individuals the outcome

that they wanted. I am prepared to accept that there was a degree of personal ill-feeling between BCG and Fenton Whelan in the “real” world that made constructive negotiations more difficult than they would otherwise have been. However, even if BCG and Fenton Whelan had behaved perfectly civilly to each other in negotiations in the counterfactual world, I consider that would have had no significant bearing on BCG’s willingness to accept any offer below £4.25m made in March 2017. BCG was clearly looking to make a lot of money from the Bayswater Project. It would not have accepted a low offer even if Fenton Whelan had throughout been pleasant to Mr Grovit and his staff.

182. My conclusion is that, even in the counterfactual world, there was no real or substantial chance of either (i) BCG accepting an offer from Aurium of £2.63m (or indeed any offer below £4.25m) made in or around March 2017 or (ii) of BCG deciding not to institute proceedings, in or around May or June 2017, for a declaration that a proposed build around scheme would infringe its rights under the Lease.

How would KWG and Cheyne have acted?

183. In the “real” world, KWG had originally not insisted that APL’s obtaining of vacant possession of the Shop should be a condition to KWG’s acquisition of BRHL. BCG’s commencement of litigation set in train the following sequence of events that altered that position and led the transaction to collapse:

- i) On 23 June 2017, just a week or so after BCG commenced proceedings, KWG indicated, in an email to Mr Sharma that the existence of the litigation, as distinct from the merits of BCG’s arguments, caused KWG concern. In an email sent the same day, Mr Sharma paraphrased KWG’s concern as follows:

... the very risk of the suit materialising and getting in the press is something they are keen to avoid.

- ii) On 4 July 2017, KWG sent an email explaining that their position was that vacant possession of the Shop was a condition to the transaction. KWG was no longer prepared to proceed with a transaction under which the Lease remained in place. There was an attempt to agree terms relating to such a condition.
- iii) On 13 July 2017 KWG outlined its proposals. In essence, completion of any agreement to purchase the BRHL shares would be conditional on Aurium procuring vacant possession of the Shop within 6 months. If vacant possession was secured within 3 months, no financial penalty would attach. However, after that the purchase price would fall by £3m for each month’s delay in obtaining vacant possession. If vacant possession had still not been obtained within 6 months, KWG would not be obliged to complete, would receive its deposit back and would receive an additional payment equal to its deposit.
- iv) KWG’s requirement for vacant possession of the Shop drove Cheyne to make the increased offer of £1m to BCG referred to in paragraph 172. However, it soon became clear that this offer would not be accepted. BCG rejected it in peremptory terms by email dated 24 July 2017, making it clear that it expected Cheyne to communicate an offer “based on what [surrender of the Lease] is worth to you, and not what you think the location is worth

to us”. It indicated that the two figures were “miles apart”. From that point, it was clear that BCG would not be agreeing to give vacant possession in any short order and Aurium concluded that KWG’s offer in paragraph iii) above was “punitive” and could not be accepted without, in the words of Mr Van Den Heule, “having a good steer that the [bureau de change] will leave”. From 24 July 2017, it was clear that no transaction with KWG would close in or around July 2017.

184. In the counterfactual world, BCG would have issued legal proceedings around the time Aurium and KWG agreed heads of terms and those proceedings would have had precisely the same effect in derailing the transaction. In the counterfactual world, Cheyne would have communicated an offer of more than the £1m referred to in paragraph 183.iv) to BCG. However, even if Cheyne had immediately communicated an offer of £4.25m in the counterfactual world that would not have been enough to reach a speedy agreement and so save the deal with KWG. As I have explained, BCG wanted to take its time to be sure it was receiving a large sum from the Bayswater Project. It would not have been pressurised into agreeing a speedy deal even if Cheyne’s opening offer had been considerably higher than the £1m it offered in the real world.
185. My conclusion, therefore, is that even in the counterfactual world in which Aurium had received the Alternative Advice, there would have been no exchange of contracts with KWG for a sale of BRHL for a consideration (including repayment of BRHL’s debts) of £158m in or around June or July 2017.
186. During the trial, MdR argued that there were other reasons why KWG would not have exchanged contracts or, if it had, conditions precedent to completion would not have been satisfied. Given my conclusion above, there is no need for me to lengthen an already lengthy judgment with a detailed analysis of those issues.
187. Once Aurium and KWG had failed to exchange contracts in or around June or July 2017, events would have proceeded as they did in the real world, with Cheyne ultimately calling a default under the Senior Debt and Aurium suffering exactly the same loss as it did in the real world. Accordingly, in my judgment, Aurium lost no real or substantial chance of avoiding its loss by receiving the Advice rather than the Alternative Advice. Having concluded that the chance lost was not “real or substantial”, I need not quantify the extent of that chance.

[G]: THE COUNTERCLAIM

188. MdR has counterclaimed for unpaid fees that were the subject of two invoices both dated 1 November 2017 for £95,595.80 and £126,803.20. In addition, MdR claims interest, at the rate applicable of 8% per annum, for the period from 1 December 2017 relying on its standard terms of business which provide for interest to be payable at the rate applicable to judgment debts if an invoice remains unpaid for 30 days or more after delivery.
189. Aurium’s sole defence to the counterclaim relies on its argument that MdR was negligent in the provision of the Advice. Since that argument has failed, MdR’s counterclaim succeeds and it obtains judgment for the amount of £222,399 plus interest from 1 December 2017 as claimed.

[H]: DISPOSITION

190. Aurium's claim is dismissed. Judgment is given for MdR on its counterclaim. I invite the parties to agree the form of an order and will hear from them at a consequential hearing if they are unable to reach agreement.