Neutral Citation Number: [2025] EWCA Civ 39

Case Nos: CA-2023-001147, CA-2023-001156 and CA-2023-002304

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Mr. Justice Leech
[2021] EWHC 2055 (Ch); [2022] EWHC 1601 (Ch); 24 May 2023

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Thursday 23 January 2025

Before :
LORD JUSTICE NEWEY
LORD JUSTICE LEWIS
and
LORD JUSTICE SNOWDEN

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Between :

BARROWFEN PROPERTIES LIMITED	**Claimant/ Appellant**
- and –	
(1) GIRISH DAHYABHAI PATEL **(2) STEVENS & BOLTON LLP** **(3) BARROWFEN PROPERTIES II LIMITED**	**Defendants/ Respondents**

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Adam Kramer KC and Tim Matthewson (instructed by **Withers LLP**) for the **Appellant**
Roger Stewart KC and Joshua Folkard (instructed by **Reynolds Porter Chamberlain LLP**) for the **Second Respondent**
The First and Third Respondents did not appear and were not represented

Hearing dates : 24 and 25 July 2024
Additional materials provided on 30 September, 11 November and 29 November 2024

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Approved Judgment

This judgment was handed down remotely at 11 a.m. on 23 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Snowden :

1. The appeals before the court arise out of three judgments by Leech J (the "Judge"). The first, given on 21 July 2021, [2021] EWHC 2055 (Ch) was his lengthy main judgment on liability, causation and most issues of quantum (the "Main Judgment"). The second, given on 22 June 2022, [2022] EWHC 1601 (Ch) was a judgment on certain matters that had been reserved for further argument (the "Reserved Matters Judgment"). The third was an *ex tempore* ruling given at a consequentials hearing on 24 May 2023 (the "Interest Ruling").

2. The Claimant company ("Barrowfen") appeals with the permission of the Judge against his decision in the Reserved Matters Judgment that its award of equitable compensation for breach of fiduciary duty against the First Defendant ("Girish"), and damages for negligence against the Second Defendant firm of solicitors ("S&B"), should be reduced by about £2.5 million to reflect the increased capital value of a revised development scheme completed at a freehold commercial property owned by Barrowfen in Tooting, London SW17 (the "Property").

3. S&B cross-appeals with the permission of Lewison LJ. It raises two questions, (i) whether the Judge was wrong to make the deduction in respect of the increased capital value of the Property *before* applying a loss of a chance percentage to the computation of equitable compensation and damages, rather than *after*, and (ii) whether one aspect of the Judge's award of interest was wrong.

4. Although a party, Girish did not appear and played no part in the appeals. His interests were largely aligned with those of S&B.

5. For the reasons that follow I consider that Barrowfen's appeals as regards both S&B and Girish should be dismissed; S&B's appeal in relation to the deduction of the credit and application of the loss of a chance percentage ought also to be dismissed; but that S&B's cross-appeal in relation to interest should be allowed to a limited extent.

<u>The background</u>

6. The background facts are complex and were dealt with at length in the Main Judgment. For the purposes of the appeal, a summary will suffice.

7. Barrowfen's claims arose out of a dispute between Girish and other members of his family including his brother, Suresh Patel ("Suresh"), and Prashant Patel ("Prashant"). Prashant is the son of one of Girish's other brothers, Rajnikant.

8. The dispute concerned the management and control of Barrowfen. At the relevant times, the shares in Barrowfen were held in equal one-third proportions by an off-shore trust for Girish's children, an off-shore trust for Suresh's children, and a BVI company ("Bedford") that was owned and controlled by Prashant.

9. Between 2004 and 2013, Girish and Suresh were the only directors of Barrowfen. Girish acted as the managing director pursuant to a board resolution dated 20 January 1994 delegating authority to him.

10. Barrowfen's principal asset is the Property, which was acquired shortly after the company's incorporation in 1984. Prior to the outbreak of hostilities between the

family members, Barrowfen made an application for planning permission in respect of a scheme for the development of the Property which involved the construction of a hotel, a supermarket, other retail units and student accommodation. In October 2014, the planning committee of the local authority approved the application in an amended form (the "Amended Original Development Scheme").

11. By the summer of 2013, a number of differences had surfaced between the family members. In August 2013, Prashant wrote to Girish asking to be appointed as an additional director of Barrowfen, and made a number of inquiries about its business. In October 2013, Suresh also questioned certain aspects of Girish's conduct of Barrowfen's affairs.

12. Girish did not accede to Prashant's request to be appointed a director, and in February 2014 Withers LLP, who were acting for Prashant, requisitioned a meeting of the company at which to appoint him a director. This caused Girish to instruct S&B to act as solicitors for Barrowfen.

13. Thereafter Girish engaged in a course of conduct which was designed to keep him in control of Barrowfen or the Property. That course of conduct involved a number of actions which were subsequently alleged by Barrowfen in the claim to have involved dishonest breaches of Girish's duties as a director of Barrowfen, and breaches of fiduciary duty and negligence by S&B in failing to advise the company that Girish had a conflict of interest and that the company should take independent advice.

14. The Judge divided the various allegations against Girish and S&B into two categories: the "Company Claims" and the "Administration Claim".

15. The Company Claims concerned various actions by Girish in relation to Barrowfen's register of members and the forging of documents in an attempt to prevent Prashant from being appointed as a director of the company. These actions achieved their aim until August 2015 when Prashant was finally appointed to the board. However, even then, it was not until 1 December 2015 that Suresh and Prashant finally obtained control of the management of Barrowfen by revoking the resolution of 20 January 1994, thus terminating Girish's authority as managing director. Thereafter Suresh and Prashant also caused the board to terminate S&B's instructions to act on behalf of Barrowfen.

16. The Administration Claim concerned a plan to retain control of Barrowfen or to acquire the Property that was developed by Girish with advice from S&B after Prashant had been appointed to the board in August 2015. The plan was that a company owned and controlled by Girish would take an assignment of the benefit of a loan of just over £850,000 that had been made to Barrowfen by Zurich, together with its associated security. Girish's plan was that unless the other shareholders were prepared to agree to sell their shares to him, a demand would be made for Barrowfen to repay the loan, Barrowfen would be put into administration when it failed to repay, and Girish would then buy the Property pursuant to an agreement with the administrators.

17. In furtherance of that plan, Girish caused the Third Defendant ("Barrowfen II") to be incorporated, and Barrowfen II took an assignment of the loan and charge from Zurich on 1 December 2015. Girish's plan to put the company into administration was activated in mid-February 2016 after the family members had agreed some unrelated personal partnership accounts. On 16 February 2016 Girish resigned as a director of

Barrowfen. He then caused Barrowfen II to make a demand for repayment which Barrowfen could not pay immediately, and administrators were appointed by Barrowfen II the next day.

18. The validity of the assignment of the loan to Barrowfen II and the appointment of the administrators were challenged by the remaining directors of Barrowfen. Prashant and Suresh also made proposals to the administrators for Bedford to provide a loan of £4 million to refinance Barrowfen and to take it out of administration as a going concern. That proposal was objected to by Girish, Barrowfen II and S&B (in its capacity as a creditor) who proposed instead that the Property should be sold on the open market, and they used their votes to defeat the proposal that Barrowfen be refinanced by Bedford at the creditors' meeting in the administration.

19. After Bedford made a further revised offer of refinancing, in May 2016 the administrators applied to the court for directions. Girish, Barrowfen II and S&B continued to oppose Bedford's proposals. However, on 8 July 2016, Registrar Derrett directed the administrators to accept the revised loan proposals from Bedford, to terminate their appointment, and to return the control of Barrowfen to its directors. That was done on 16 September 2016.

20. After Prashant and Suresh regained control of the company from the administrators, Prashant reassessed the proposals for development of the Property. Among other things, Waitrose, which had agreed to be the anchor tenant of the Amended Original Development Scheme, had pulled out after Barrowfen went into administration and the application was made to the court for directions. By December 2016 Prashant expressed the view that the Amended Original Development Scheme containing student accommodation was no longer the right design to maximise the value of the Property.

21. At the end of December 2016, Barrowfen proposed a revised and enlarged development scheme for a mixed development of a hotel, a supermarket, other retail units and residential apartments (the "Revised Development Scheme"). Prashant secured an agreement with Lidl to become the anchor tenant of the supermarket and agreed revised terms with Premier Inns in respect of the hotel. On 22 August 2017 the Revised Development Scheme was submitted to Wandsworth LBC, planning permission was granted in June 2018, and a new section 106 agreement was entered into on 10 August 2018. Demolition works at the Property commenced shortly thereafter.

22. The Amended Original Development Scheme would have cost Barrowfen approximately £14 million to complete. The Revised Development Scheme was materially more expensive. This required Barrowfen to obtain a further loan of £8 million from Barclays Bank and a further £2.4 million of equity investment from Asian Agri Investments Limited ("Asian Agri") (which had become the sole legal and beneficial owner of Barrowfen on 6 May 2019) in order to finance the Revised Development Scheme.

23. At the trial the Judge was told that the Revised Development Scheme would be completed in April 2021 or soon thereafter. The Judge also recorded, at [219] of the Main Judgment, that it was Prashant's evidence,

> "… that Suresh and he intended to retain the Property as an investment with the exception of the affordable housing element

> which was required to be sold (and Barrowfen had already received an offer of £2.9m for that element of the scheme)."

The Main Judgment

24. In his Main Judgment, delivered on 21 July 2021, the Judge found that Girish had (dishonestly) breached his duties to Barrowfen and that S&B had acted negligently, in relation to both the Company Claims and the Administration Claim. However, he found that S&B had not been dishonest and he dismissed the claims against the firm for breach of fiduciary duty and for various other causes of action (such as conspiracy and dishonest assistance).

25. The Judge then turned to consider the issues of causation and Barrowfen's loss of the chance to develop the Property at an earlier stage due to Girish's and S&B's breaches of duty.

26. As regards the Company Claims, the Judge was satisfied that if Girish had not committed the various breaches of duty, Prashant would have been appointed a director of Barrowfen in May 2014. As regards S&B, the Judge held that if the firm had given the correct advice to Girish, he would probably have followed it and Prashant and Suresh would have taken control of the board of the company by early September 2014.

27. The Judge then concluded that if Prashant and Suresh had obtained control of Barrowfen through either of these routes, they would probably have raised the necessary funding and caused the company to proceed with the Amended Original Development Scheme by January 2015. The Judge assessed the overall chance of this final outcome occurring at 60%.

28. As regards the Administration Claim, the Judge considered what would have occurred if, after Prashant and Suresh had taken control of the company on 1 December 2015 (as they did), Prashant and Suresh had been told of Girish's plan to put Barrowfen into administration (either by Girish himself or S&B acting in accordance with their duties to the company). He concluded that in such a scenario there was an 80% chance that Prashant and Suresh would have found the funds to avoid the company going into administration and that they would have caused the company to commence the Amended Original Development Scheme by April 2016.

29. As regards quantum, the Judge recorded that it was common ground that it would have taken Barrowfen 20 months to complete the Amended Original Development Scheme so that, but for the breaches of duty by Girish and negligence of S&B, Barrowfen would have completed the Amended Original Development Scheme by the end of August 2016 or December 2017, rather than completing the Revised Development Scheme during April 2021.

30. On this basis, Barrowfen's main claim was for damages for the loss of the chance to obtain monthly rentals from the Property for the periods of 55 months (August 2016 - April 2021), alternatively 39 months (December 2017 – April 2021). Barrowfen also claimed various items of costs and expenses amounting in total to £756,577.09. These included costs of £401,864.73 relating to the administration, £30,243.69 relating to Barrowfen II's enforcement of its charge, and £324,468.67 in legal and professional

costs which Barrowfen incurred in changing from the Amended Original Development Scheme to the Revised Development Scheme in 2016-2017.

31. S&B disputed all these heads. It also contended that Barrowfen should give credit for the "increased developer's profit" that it was said that Barrowfen had made by completing the Revised Development Scheme rather than the Amended Original Development Scheme.

32. As regards the claim for loss of the chance to obtain rentals, the Judge held that Barrowfen would have received net monthly income under the Amended Original Development Scheme of £82,790. He further held that giving credit for a rent free period and rents actually received, the net rentals for 55 months, alternatively 39 months, under the Amended Original Development Scheme would have been £4,066,220 or £2,741,580 respectively. The Judge also awarded damages totalling £756,577.09 in respect of costs and expenses.

33. The Judge then considered further evidence from the expert valuers in order to determine the developer's profit (i) that Barrowfen had made on completion of the Revised Development Scheme and (ii) which it would have made if it had completed the Amended Original Development Scheme. In each case, this developer's profit essentially comprised the difference between the gross development value ("GDV") of the Property and the construction and finance costs of the development.

34. The GDV was arrived at in the case of both developments by applying a yield to the rental streams for the respective retail, community and hotel elements. In relation to the Revised Development Scheme the Judge added the capital values of the residential apartments; and in relation to the Amended Original Development Scheme he added a capitalised value of the rental stream from the student accommodation. The GDV of the Amended Original Development Scheme was held to be £27,308,023. The GDV of the Revised Development Scheme was held to be significantly more, namely £40,213,476.

35. The construction and financing costs of the developments to completion were assessed at £17,187,793 for the Amended Original Development Scheme and £27,585,064 for the Revised Development Scheme. Neither valuation sought to take into account any financing costs beyond the date of completion of the development.

36. The result was that the Judge held that the developer's profit on the Revised Development Scheme was £12,628,412 and the developer's profit on the Amended Original Development Scheme would have been £10,120,230. In other words, the Judge found that the Revised Development Scheme had produced an increased developer's profit of £2,508,182 more than the Amended Original Development Scheme.

37. At [672], the Judge then addressed the question of whether Barrowfen had to give credit for that capital sum against its claim for damages for loss of a chance and costs and expenses. He did so in terms that followed a discussion earlier in his Main Judgment at [329]-[335] of the relevant legal principles under the heading "collateral benefits". In that section, the Judge had analysed a number of authorities, including Fulton Shipping v Globalia Business Travel [2017] 1 WLR 2581 ("Fulton Shipping") and Primavera v Allied Dunbar [2003] PNLR 12 ("Primavera"). He stated that the general

principle was that a claimant had to give credit for any benefit which was attributable to the cause of the loss, but not for a benefit that was collateral in the sense of arising independently of the circumstances giving rise to the loss. The Judge also commented that he found particularly useful the guidance of Sir Andrew Morritt V-C in Needler Financial Services v Taber [2002] 3 All ER 501 ("Needler") at [24],

> "In my view the authorities to which I have referred establish two relevant propositions. First, the relevant question is whether the negligence which caused the loss also caused the profit in the sense that the latter was part of a continuous transaction of which the former was the inception. Second, that question is primarily one of fact."

38. At [673] the Judge held,

> "673. [Counsel for Barrowfen] submitted that Barrowfen, acting by Prashant and Suresh, took a commercial decision at its own risk to change to the Revised Development Scheme and that any additional profit was caused by their hard work. I reject that submission. In my judgment the [Revised] Development Scheme formed part of a single continuous transaction of which the breaches of duty committed by Girish and S&B were the inception (to use the formulation of Sir Andrew Morritt V-C in Needler). I have reached this conclusion for the following reasons:
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> (i) In considering this issue, it is important to keep in mind that Barrowfen's claim is that the [Defendants'] conduct delayed the development of the Property. This is not a claim, [therefore], for loss of profits (as in Fulton) or even the diminution in value of an asset (as in Primavera). It is for the loss of income caused by delay.
>
> (ii) It is also important to keep in mind that Barrowfen's case (on which it has succeeded) is that the delay only came to an end on completion of the Revised Development Scheme in March or April 2021. Since Barrowfen has claimed (and recovered) damages for delay for the period right up until the date of trial, it would be unjust if it did not have to give credit for any benefits which it had received in the meantime.
>
> (iii) Moreover, it was Barrowfen's own case and Prashant's unchallenged evidence that both the delay in carrying out the [Revised] Development Scheme and the additional costs which it incurred were caused by the Defendants' breaches of duty…
>
> (iv) In my judgment, [Barrowfen] cannot have it both ways. If Barrowfen incurred both the delay and the costs caused by changing from one scheme to the other, then the Revised Development Scheme formed part of a continuous transaction of which the Defendants' conduct was the inception. However,

> if the decision to change from one scheme to the other was not caused by that conduct, then Barrowfen is not entitled to recover damages either for the additional period of delay or the additional costs.
>
> (v) In any event, I am satisfied that both schemes formed part of a continuous transaction on the facts. It is clear that the principal factors which led Barrowfen to adopt the Revised Development Scheme were Waitrose's decision to withdraw from the [Amended Original Development Scheme] in June 2016 (before Barrowfen had come out of administration) and the professional advice which Prashant received that residential flats would be more profitable than student accommodation. He took advice and made the decision in December 2016 (only two months after Barrowfen had come out of administration).
>
> (vi) Finally, the experts were agreed that the period of 28 months to revise and implement the new scheme was a reasonable one and that the construction period of 22 months was also reasonable. I am satisfied therefore that there was no significant hiatus or gap between the decision to terminate the first scheme and the decision to adopt the second scheme."

39. At [674]-[675] the Judge dealt with a further submission on behalf of Barrowfen and gave two more general reasons in support of his conclusion,

> "674. [Counsel for Barrowfen] also submitted that Barrowfen should not have to give credit for the increased developer's profit on the Revised Development Scheme because Barrowfen intended to keep the development as an investment and it was not appropriate to set off a notional capital gain against the income losses which it had suffered. I also reject that submission. In Fulton Lord Clarke made it clear that the question whether a claimant must give credit for a benefit does not turn on the type of benefit concerned.
>
> 675. Moreover, in many professional negligence cases a claimant will recover damages from a defendant to compensate for the diminution in value of an asset. He or she will also have to give credit for any income which the asset has produced as a result of the Defendant's breach of duty. I can see no reason why the position should not be the same with income losses and a capital appreciation. Finally, I consider that the answer to [counsel's] point was put both succinctly and eloquently by [counsel for S&B] in his opening submissions (which I adopt). He said this (referring to Barrowfen's claim):
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>> "It is dependent on alleging that but for the events of which complaint was made, an alternative development would have taken place. It then seeks to compare this with the absence of rent for a period whilst an alternative development was

> undertaken. Both developments were or would have been undertaken for capital appreciation. It is therefore misconceived to take the rental claim as being a measure of loss without taking account of capital outlay and capital value."”

40. Having determined that Barrowfen had to give credit for the increased developer's profit from the Revised Development Scheme, the Judge then expressed the provisional view at [677] that he should deduct the credit *before* applying the loss of a chance percentages to the damages for the loss of rental income that he had identified. However, since the point of whether the deduction should be made before or after the application of the loss of a chance percentages had not been argued, he reserved the point for subsequent submissions and determination in the Reserved Matters Judgment.

The Reserved Matters Judgment

41. The Reserved Matters Judgment was delivered on 22 June 2022 and dealt with a number of matters. The first related to the requirement that Barrowfen should give credit for the increased developer's profit. Barrowfen advanced two further arguments as to why it should not be required to give credit for that sum at all.

42. Barrowfen's first argument was that this extra value was solely referable to Barrowfen raising an extra £10.4 million to fund the enlarged Revised Development Scheme, and that this should have been treated as collateral to the loss of rental profits. The Judge rejected that argument. He summarised his reasons at [68],

> "In conclusion, I accept that the additional profit of £2,508,182 was attributable to the additional capital which Barrowfen raised from Barclays and Asian Agri and that Barrowfen would not have been able to carry out the Revised Development Scheme without it. I also accept that it was reasonable for Barrowfen to mitigate its loss by carrying out the Revised Development Scheme. However, in my judgment the increased developer's profit which Barrowfen earned from that scheme was not collateral or *res inter alios acta*. All of those findings were reflected in my conclusions that Barrowfen was entitled to recover the lost income and additional costs up until completion of the Revised Development Scheme and that the increased developer's profit formed part of a continuous transaction of which the breaches of duty were the inception. "

43. Barrowfen's second argument was based upon the fact that the Judge's determination of the increased developer's profit only took account of the finance costs up to completion of the development of the Property. Barrowfen argued that the assessment whether there was any increase in the developer's profit should also take account of the future financing costs that Barrowfen would incur on the additional £10.4 million that it had raised to finance the Revised Development Scheme calculated over the expected 25 year life of the development.

44. The Judge also rejected that argument. At [70]-[73], the Judge explained how he saw the issue,

> "70. I accept [Barrowfen's expert accountant's] evidence that the increased cost of funding the Revised Development Scheme over 25 years will be £1,579,682 and that the opportunity cost to Barrowfen of investing additional shareholders' funds in the scheme was £1,887,702. I also accept that the total of these costs exceeds the amount of the additional developer's profit by £959,156 …
>
> 71. I also accept that as a matter of valuation methodology it would be appropriate for Barrowfen to include future finance costs in a current valuation of the … Property … if Prashant intended to hold it as a long-term investment. I accept his evidence on this point. I also accept [S&B's expert accountant's] evidence that it would be appropriate to include future finance costs in a calculation of the developer's profit if that was the investor's intention or if one was carrying out a "Barrowfen specific" valuation. …
>
> 72. The real issue, to my mind, is whether the Court should adopt an "investor agnostic valuation" or a "Barrowfen specific valuation" for the purpose of deciding whether to include future finance costs in the calculation of developer's profit…
>
> 73. In my judgment, the decision whether to adopt an investor agnostic valuation or a Barrowfen specific valuation is not a matter of valuation methodology but a matter for legal argument…"

45. At [78], the Judge decided that it was not appropriate to include the future finance costs when assessing the developer's profit for the Property,

> "78. I accept [S&B's] submission that it is not appropriate to include any future finance costs (whether debt or equity) in the appraisal of the developer's profit for the Property and I do so for the following reasons:
>
> (1) Prashant accepted without qualification that Barrowfen could sell the Property in the marketplace as a completed development. He also accepted that if it found a more profitable investment Barrowfen could sell the Property to take advantage of it.
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> (2) He also accepted that Barrowfen "can do whatever it wants". In substance, he was accepting that the decision whether to hold or sell the Property is now one for the directors of Barrowfen and that the causative effect of the breaches of duty by Girish and S&B came to an end on the completion of the development.
>
> (3) In my judgment, therefore, any finance costs which Barrowfen has incurred or will incur after completion of the

> Revised Development Scheme and over the life of its investment do not form part of the single, continuous transaction which I found [in the Main Judgment] at [673]. Barrowfen could sell the Property tomorrow and realise the entire profit without incurring any further finance costs and could re-invest immediately in something more profitable. The decision to hold the investment for the foreseeable future is not the consequence of any breach of duty by Girish or S&B but of Prashant's own commercial judgment."

46. The Judge summarised his conclusion at [87],

> "87. I therefore find in favour of Girish and S&B on the Financial Costs Issue. In particular, I find that Barrowfen is required to give credit for the increase in the developer's profit of £2,508,182 even though Barrowfen invested additional capital of £10,397,271 in the Revised Development Scheme (based on the figures which I used in the [Main] Judgment). I also find that Barrowfen is not entitled to deduct from the increase in developer's profit either the future cost of funding the debt of £1,579,682 or the opportunity cost of investing additional shareholders' funds of £1,887,702 …"

47. The Judge then turned to deal with the issue that he had reserved for further argument at the conclusion of the Main Judgment, namely whether the credit for the increased developer's profit should be deducted from Barrowfen's losses before or after the application of the loss of chance percentages. After hearing argument on the authorities, including in particular <u>Hartle v Laceys</u> [1999] Lloyd's Rep PN 315, ("<u>Hartle v Laceys</u>") the Judge concluded, at [96]-[97],

> "96. … having heard full argument I am satisfied that my provisional view was correct and that the deduction for capital appreciation should be made before the loss of chance percentage is applied. I have held that there was a 60% chance that Barrowfen would have implemented the Amended Original Development Scheme in January 2015 and it was common ground that it would have been completed by September 2016 … What Barrowfen lost, therefore, was the opportunity to develop the Property five years earlier than it did and the value of that opportunity is to be assessed by focussing on the entire picture (as in <u>Ministry of Defence v Wheeler</u> [[1997] 1 WLR 637]), which involves a comparison between the income which Barrowfen lost with the capital appreciation which it gained.
>
> 97. In my judgment, there is no relevant distinction between the present case and <u>Hartle v Laceys</u>. As Ward LJ pointed out [at page 330], C lost the chance to sell but he did not lose the property itself. What he lost, therefore, was a 60% chance of achieving a better price at an earlier date in time. The position is the same here. Barrowfen lost the chance to develop in 2015 but

> it did not lose the Property. What it lost, therefore, was the chance of achieving an income stream at an earlier point in time but from an asset with a lower capital value. As Ward LJ put it: "He lost the chance of getting the excess of a over b but his chance of getting a - b was only 60% and so he should only recover 60% of it.""

48. Finally, in this regard, the Judge clarified whether his findings of loss of a chance in respect of the Company Claims and the Administration Claim were cumulative or alternative, and how this affected his award of damages. He summarised his conclusions at [110],

> "110. In my judgment, I made sufficient findings in the [Main] Judgment at [579] to [619] to be satisfied that the outcome of the Administration Claim was contingent on the outcome of the Company Claims and that if Prashant and Suresh had been unable to take control of Barrowfen or implement the Amended Original Development Scheme, Girish would have followed through with his plan to put the company into administration. I am satisfied, therefore, that I should award damages on a cumulative basis and I, therefore, award Barrowfen 32% (i.e. 80% of 40%) of the damages for which I found Girish and S&B liable on the Administration Claim."

49. The result of these findings was that in relation to the Company Claims the Judge assessed gross damages as £4,822,797.09 (i.e. £4,066,220 rents + £756,577.09 costs and expenses). He then deducted the credit for the increased developer's profit of £2,508,182 and applied the loss of a chance percentage of 60%, giving a net award of damages of £1,388,769.05.

50. For the Administration Claim the Judge assessed gross damages as £3,498,157.09 (i.e. £2,741,580 rents + £756,577.09 costs and expenses). He then deducted the credit of £2,508,182 and applied the loss of a chance percentage of 32% (40% x 80%), giving a net award of damages of £316,792.03.

51. The total award of damages was thus £1,705,561.08 (£1,388,769.05 + £316,792.03). I shall refer to that amount as the "Main Damages" award.

52. The Judge then dealt with the question of interest. At [127] he recorded that it was common ground between the parties that the statutory power to award interest under section 35A of the Senior Courts Act 1981 did not extend to damages for the loss of the chance of receiving rental income which Barrowfen had suffered as a result of the delay in being able to develop the Property.

53. However, Barrowfen had pleaded a claim for so-called "interest as damages". This was a claim for damages to compensate Barrowfen for the lost opportunity to reinvest and generate a return on the rental income that it would have received from the Amended Original Development Scheme. At [129], the Judge found that this claim was made out on the basis of Prashant's evidence that if Barrowfen had carried out the Amended Original Development Scheme, it would not have used the rentals generated from the

Property to repay its borrowings, but would have looked for alternative investment opportunities for those monies.

54. The Judge therefore held, at [130], that Barrowfen was entitled to interest as damages for the lost opportunity to invest the rental income which it had not received by reason of the breaches of duty and negligence in the Company Claims and the Administration Claim. As indicated above, the Judge had found that these amounts were £4,822,797.09 and £3,498,157.09 respectively.[1] To these figures the Judge applied the relevant loss of a chance percentages (60% and 32%) giving net figures of £2,893,678.20 and £1,119,410.20. I shall refer to such amounts hereafter as the "Principal Amounts". The Judge determined that the rate for calculating interest as damages on such Principal Amounts should be 2% above the base rate.

55. The Judge summarised how he intended to dispose of the action at [134],

> "134. I therefore confirm and make final my provisional finding that Barrowfen is entitled to damages or equitable compensation of £1,388,768.05 in respect of the Company Claims against both Girish and S&B. I also award damages or equitable compensation of £316,792.03 against both Girish and S&B in respect of the Administration Claim. …
>
> 135. I also award interest as damages or equitable compensation at the rate of 2% above base rate or rates on the loss of a chance percentage of the gross rental income which Barrowfen would have earned from the Amended Original Development Scheme against both Girish and S&B. In particular, I award interest on £2,893,678.20 (i.e. 60% of the gross rental income) in relation to the Company Claims and interest on £1,119,410.20 (i.e. 32% of the gross rental income) in relation to the Administration Claim….
>
> 136. I leave it to the parties to try to agree the date or dates from which interest will run, the amount of any interest and the form of any order…"

56. After the Reserved Matters Judgment was handed down on 22 June 2022, on 27 September 2022 S&B made a payment of £1,705,560.08 in respect of the Main Damages identified in paragraph 134 of the Reserved Matters Judgment.

The Interest Ruling

57. The hearing to deal with consequential matters took place on 24 May 2023.

58. Prior to that hearing the parties agreed that post-judgment interest of £36,261 would be paid pursuant to section 17 of the Judgments Act 1838 on the Main Damages of

[1] Although the Judge did not say so expressly, it is clear from the figures to which he referred that he also included the lost opportunity to invest the £756,577.09 of costs and expenses that Barrowfen had incurred as a result of the breaches of duty and negligence.

£1,705,560 from 22 June 2022 until payment of that sum had been made on 27 September 2022.

59. The first contentious issue for determination at the hearing on 24 May 2023 followed the Judge's ruling in [135] of the Reserved Matters Judgment. The issue was the date until which the interest as damages should run on the Principal Amounts that the Judge had identified in [135] of the Reserved Matters Judgment.

60. S&B contended that interest as damages on the Principal Amounts should only run until completion of the Revised Development Scheme at the end of March 2021. Barrowfen contended that interest as damages on the Principal Amounts should run until 22 June 2022 when the Judge had given the Reserved Matters Judgment.

61. Prior to the consequentials hearing, and to assist with the determination of this issue, S&B's solicitors had sent a letter to Barrowfen's solicitors dated 17 May 2023. That letter set out and sought agreement to calculations of the amount of interest as damages that would be payable on the Principal Amounts to various end dates. These included March 2021, June 2022 and the date of the consequentials hearing on 24 May 2023. Although the letter calculated interest as damages on the Principal Amounts to 24 May 2023, as I have indicated, by the date of the consequentials hearing neither side was suggesting that interest as damages should be payable on the Principal Amounts after 22 June 2022.

62. In the first part of his Interest Ruling, the Judge accepted Barrowfen's argument and determined that interest as damages on the Principal Amounts should run until 22 June 2022. His reasoning is recorded in an approved note of the ruling as follows,

> "*Period*
>
> The first issue which I have to decide is the date until which pre-judgment interest runs. The question for me is whether pre-judgment interest should run only until 21 March 2021 or until 22 June 2022 when I delivered the principal judgment and the reserved matters judgment respectively.
>
> ….
>
> In this case the function of the award of damages is to compensate Barrowfen for the delay in the development of the Tooting Property. The role of damages is compensation for the loss in not developing earlier. The way in which I compensated Barrowfen was to award the income stream between September 2016 and the date on which Barrowfen would have completed the development and was able to let the Property. The function of interest is different. It is to compensate Barrowfen for being kept out of the relevant funds until final judgment. Barrowfen did not receive payment until 27 September 2022 when S&B paid the money. I agree that once the Revised Development Scheme was completed Barrowfen had an asset but its entitlement to interest did not end on that date. That entitlement only ended when the money was paid on 27 September 2022.

> I therefore accept [Barrowfen's] submissions and reject [S&B's] submissions. Barrowfen was made whole in March 2021 in the sense that it suffered no further damage but not interest. I award interest as damages from 21 March 2021 to 22 June 2022."

63. The Judge then considered a request by Barrowfen that the pre-judgment interest as damages award should be compounded. He rejected that argument and concluded his ruling in this respect by stating,

> "The amount of pre-judgment interest will be £337,229 to run to 22 June 2022 on a simple basis."

That figure of £337,229 was taken from the letter of 17 May 2023 from S&B's solicitors (above).

64. The Judge then heard more submissions directed at a further issue identified by Barrowfen in its skeleton argument. That issue was defined by Barrowfen as whether "post-judgment interest on the pre-judgment interest as damages award should run from 22 June 2022". The issue arose because the precise amount of the pre-judgment interest as damages award had not been assessed on 22 June 2022. It would seem that S&B were contending that statutory interest pursuant to the Judgments Act 1838 could only run from 24 May 2023, being the date when the precise amount of the award of interest as damages (£337,229) had been determined. Barrowfen objected that this would be unjust since it would leave a gap between 22 June 2022 and 24 May 2023 during which it would not receive interest on the £337,229 awarded as interest as damages. Barrowfen therefore contended that the court should order interest on that sum pursuant to the Judgments Act 1838 to run from 22 June 2022 pursuant to CPR 40.8(2).

65. It is not clear precisely how the oral argument developed, save that it would appear that at some point counsel for Barrowfen advanced an alternative argument that interest as damages ought to continue to 24 May 2023. In that regard Barrowfen sought the figure of £520,014 which had been given in the letter from S&B's solicitors of 17 May 2023 as the amount that would be payable as interest as damages on the Principal Amounts until 24 May 2023.

66. The Judge gave a very short further ruling on the issue, the approved note of which followed immediately after the Judge's ruling set out in paragraph [63] above. The approved note is as follows,

> "*Rate*
>
> <u>Following further submissions the judge made the following ruling on the rate</u>
>
> I am minded to grant 2% over base from 22 June 2022 to 24 May 2023. I provisionally order £520,014 in pre-judgment interest until 24 May 2023. The parties have until 2 pm to challenge this figure…"

67. After the lunch adjournment, S&B made further representations about the calculation of the £520,014. There was also a dispute in correspondence between counsel over the

basis upon which the Judge had ordered £520,014 to be paid. As ultimately sealed, however, the relevant parts of the order made by the Judge on 26 June 2023 were as follows,

> "Interest
>
> 1. There be judgment for [Barrowfen] against [S&B] in the sum of £2,225,574.08 (being £1,705,560.08 principal sum which has already been paid [on 27 September 2022] plus £520,014 interest).
>
> 2. [S&B] shall pay [Barrowfen] the sum of £520,014 by 4pm on 14 June 2023.
>
> Post-judgment interest
>
> 3. [S&B] shall pay post-judgment interest on the principal sum to [Barrowfen] pursuant to section 17 of the Judgments Act 1838 in the sum of £36,261 by 4pm on 14 June 2023."

68. As ordered, on 14 June 2023 S&B made payments of both £520,014 and £36,261 to Barrowfen.

The Appeal and Cross-appeal

69. Barrowfen does not appeal the decision of the Judge to take account of the benefits that Barrowfen obtained by carrying out the Revised Development Scheme to mitigate its losses of rental income from the Property. However, it contends that when assessing the benefits, the Judge was wrong to assume a notional sale of the Property by Barrowfen. It contends that the Judge should have assessed the benefit on the basis that Barrowfen intended to continue to hold the Property because that was Prashant's uncontested evidence. As such, it contends that the Judge should either not have taken into account the increased value of the future rentals which the Property could generate at all, or should also have taken into account the future finance costs which Barrowfen would incur over the lifetime of holding the Property, which would eliminate the increased developer's profit of £2,508,182.

70. As elaborated in the Grounds of Appeal, Barrowfen contends that,

> "(a) The correct approach was to evaluate any benefits and disbenefits of the course of mitigation adopted (the Revised Development Scheme), over the full period that the Scheme would be held for. This was the approach in British Westinghouse v Underground Electric [1912] AC 673.
>
> (b) The Judge's approach is contrary to the case law on betterment to the effect that credit need not be given for a notional increase in capital value where there are no plans in fact to sell the asset.
>
> (c) With the Judge having found that the Revised Development Scheme was part of a "continuous transaction" and

> not *res inter alios acta*, there was no pleading, factual evidence or findings, or legal justification for treating the Appellant following through its plans to hold the development as an investment as *res inter alios acta* as the Judge did. On the contrary, the position was *a fortiori* The New Flamenco (Fulton Shipping v Globalia) [2017] 1 WLR 2581, where an actual sale of a vessel was disregarded and the claimant deemed to have continued its plan of holding the vessel and chartering it out.
>
> (d) Further, the basic measure of loss that was awarded by the Judge (four years and seven months of lost net rental income on the basis that the Amended Original Development Scheme would have been held as an investment) is inconsistent with the Judge's refusal to assess equitable compensation/damages on the basis that the Revised Development Scheme would be held as a long-term investment."

71. S&B obtained limited permission to cross-appeal from Lewison LJ, essentially on two grounds. The first is that the Judge was wrong to deduct the credit of £2,508,182 before applying the loss of a chance percentage. In this respect, Lewison LJ expressed the view that he could see no basis for distinguishing Hartle v Lacey, that determining loss was a factual evaluation that the Judge had carried out carefully, and as a result he did not think that an appeal had any real prospect of success. Lewison LJ was, however, prepared to grant permission on the basis that the court in Hartle v Lacey had found the point difficult and S&B should be given the opportunity to raise the issue in the Supreme Court and this provided a compelling reason for an appeal to be heard.

72. In light of those observations, Barrowfen objected that we should not hear argument on this aspect of the cross-appeal, but should simply dismiss it, leaving S&B to apply to the Supreme Court for permission to appeal. However, Lewison LJ's order did not purport to tie the hands of the court hearing the cross-appeal, and since we were already going to be hearing argument on Barrowfen's appeal relating to the assessment of damages, we heard argument on this ground too.

73. The second ground for which S&B obtained permission to appeal was that the Judge was wrong to order it to pay £520,014 in paragraph 1 of the order of 26 June 2023. Paragraph 5 of S&B's Grounds of Appeal contended that the Judge erred in ordering the payment of £182,785 in addition to the £337,229 interest as damages because he wrongly,

> "(a) calculated that additional interest as a percentage of: (i) the principal sum owed by S&B to Barrowfen … rather than (ii) the interest as damages awarded … ; and/or
>
> (b) applied that percentage to a figure which assumed receipt by Barrowfen of a hypothetical income stream from the Amended Original Development Scheme … after completion of the Revised Development Scheme and, accordingly, Barrowfen's receipt of the credit."

74. At the hearing of the appeal, the parties were agreed that the figure of £520,014 was in any event overstated, because it failed to take into account the payment of the Main Damages of £1,705,560 that had been made by S&B on 27 September 2022. Barrowfen maintains that the Judge would have been right to award additional interest as damages on the full amount of the Principal Amounts between 22 June 2022 and 27 September 2022, and upon the difference between the Principal Amounts and the Main Damages from 27 September 2022 to 24 May 2023. It calculates that in addition to the £337,229, a further £106,101 would be due, which would bring the total award of interest as damages to £442,330.

75. For its part, as indicated, S&B does not contest the award of £337,229 by way of interest as damages on the Principal Amounts until 22 June 2022. It also now accepts that the Judge would have been entitled to award interest pursuant to the Judgments Act 1838 on the £337,229 from 22 June 2022 to 27 September 2022 in the sum of £15,455, which would give a total of £352,684. But S&B maintains that the Judge would have been wrong to order any further amount, whether by way of interest as damages or statutory interest.

Analysis

Mitigation losses and gains

76. The authorities make clear that the purpose of awarding damages for breach of contract or in tort is to compensate a claimant for loss caused by the breach of contract or tort.

77. Certain basic principles can be stated in this respect. A claimant will not be entitled to recover compensation for losses if it could have avoided such losses by taking reasonable steps in mitigation. However, if a claimant takes reasonable steps to mitigate its losses, and thereby incurs further losses or obtains any benefits, the general principle is that those further losses or benefits are required to be brought into account when assessing the compensation payable.

78. These general principles were established in British Westinghouse. In that case, turbines supplied under contract to the claimant company for use in the London Underground were deficient in power and not in accordance with the contract. After using them for a while, the claimant replaced them with turbines of a different make and design that were more efficient. It then claimed damages from the supplier under the contract and the matter went to arbitration. The arbitrator found that replacement of the defective turbines was a reasonable and prudent course for the claimant to take in mitigating the loss which it would suffer from continuing to use the defective turbines. However, he also found that even if the original turbines had been in accordance with the contract, it would still have been to the benefit of the claimant to replace them with the new and more efficient turbines, because they reduced its operating expenses and so enabled it to conduct its business more profitably.

79. On a case stated by the arbitrator, the Divisional Court held that the claimant could recover damages equal to the cost of the replacement machines, but the judgments proceeded on the basis that the claimant did not have to give any credit for the pecuniary benefits which it had obtained by using the new turbines in its business. The House of Lords reversed that latter decision.

80. Viscount Haldane stated the basic principles at page 689-690,

> "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps….
>
> … this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.
>
> …
>
> … provided the course taken to protect himself by the plaintiff in such an action was one which a reasonable and prudent person might in the ordinary conduct of business properly have taken, and in fact did take whether bound to or not, a jury or an arbitrator may properly look at the whole of the facts and ascertain the result in estimating the quantum of damage."

81. Viscount Haldane then applied those principles to the facts, holding, at pages 691-692,

> "I think the principle which applies here is that which makes it right for the jury or arbitrator to look at what actually happened, and to balance loss and gain. The transaction was not *res inter alios acta*, but one in which the person whose contract was broken took a reasonable and prudent course quite naturally arising out of the circumstances in which he was placed by the breach. Apart from the breach of contract, the lapse of time had rendered the appellants' machines obsolete, and men of business would be doing the only thing they could properly do in replacing them with new and up-to-date machines.
>
> The arbitrator does not in his finding of fact lay any stress on the increase in kilowatt power of the new machines, and I think that the proper inference is that such increase was regarded by him as a natural and prudent course followed by those whose object was to avoid further loss, and that it formed part of a continuous dealing with the situation in which they found themselves, and was not an independent or disconnected transaction."

82. Viscount Haldane thus held that in assessing damages, the arbitrator would be entitled to take into account both the cost to the claimant of buying the new turbines in mitigation of its loss, but also should take into account the increased profits that it subsequently made from using the new machines in its business. His rationale was that

these amounts were the consequences of a continuous course of conduct taken by the claimant to deal with the breaches of contract. Since the point was dealt with as a matter of principle, however, Viscount Haldane did not explain precisely how or for what period such increased profits should be taken into account: the matter was remitted to the arbitrator.

83. In the same way as Viscount Haldane focussed on the question of whether the losses or benefits in question resulted from a continuous course of conduct taken by a claimant to deal with breaches of contract, other cases have also emphasised the importance of the role that principles of causation play in the analysis.

84. In Fulton Shipping, a charterer had wrongly repudiated an extension of the charter of a cruise ship from 2007-2009. After accepting the repudiation as terminating the charter, the owners sold the ship for $23.765 million. They claimed damages for the loss of profits on the two years' extension of the charter. The charterers claimed that they should be given credit against those damages for the fact that the owners had made an advantageous sale, because if they had retained the ship until the end of the charter in 2009 (by which time the market in cruise ships had collapsed due to the global financial crisis in 2008), they would only have been able to sell the ship for $7 million.

85. The trial judge held that the charterers could not require the owners to bring the benefit of selling the ship for a higher price in 2007 into account so as to reduce their liability. That decision was reversed by the Court of Appeal but restored by the Supreme Court. Lord Clarke explained, at [29]-[34], that the key issue in all cases where it was contended that a benefit had to be brought into account, either as a result of a breach of contract or as a result of mitigation, was that of causation,

> "29. … On the facts here the fall in value of the vessel was in my opinion irrelevant because the owners' interest in the capital value of the vessel had nothing to do with the interest injured by the charterers' repudiation of the charterparty.
>
> 30. This was not because the benefit must be of the same kind as the loss caused by the wrongdoer… As I see it, difference in kind is too vague and potentially too arbitrary a test. The essential question is whether there is a sufficiently close link between the two and not whether they are similar in nature. The relevant link is causation. The benefit to be brought into account must have been caused either by the breach of the charterparty or by a successful act of mitigation.
>
> 31. On the facts found by the arbitrator, the benefit that the charterers are seeking to have brought into account is the benefit of having avoided a loss of just under about US$17m by selling the vessel in October 2007 for US$23,765,000 by comparison with the value of the vessel in November 2009, namely (as the arbitrator found) US$7m.
>
> 32. That difference or loss was, in my opinion, not on the face of it caused by the repudiation of the charterparty. The repudiation resulted in a prospective loss of income for a period

> of about two years. Yet, there was nothing about the premature termination of the charterparty which made it necessary to sell the vessel, either at all or at any particular time. Indeed, it could have been sold during the term of the charterparty. If the owners decide to sell the vessel, whether before or after termination of the charterparty, they are making a commercial decision at their own risk about the disposal of an interest in the vessel which was no part of the subject matter of the charterparty and had nothing to do with the charterers.
>
> 33. As I see it, the absence of a relevant causal link is the reason why they could not have claimed the difference in the market value of the vessel if the market value would have risen between the time of the sale in 2007 and the time when the charterparty would have terminated in November 2009. For the same reason, the owners cannot be required to bring into account the benefit gained by the fall in value. The analysis is the same even if the owners' commercial reason for selling is that there is no work for the vessel. At the most, that means that the premature termination is the occasion for selling the vessel. It is not the legal cause of it. There is equally no reason to assume that the relevant comparator is a sale in November 2009. A sale would not have followed from the lawful redelivery at the end of the charterparty term, any more than it followed from the premature termination in 2007. The causal link fails at both ends of the transaction.
>
> 34. For the same reasons the sale of the ship was not on the face of it an act of successful mitigation. If there had been an available charter market, the loss would have been the difference between the actual charterparty rate and the assumed substitute contract rate. The sale of the vessel would have been irrelevant. In the absence of an available market, the measure of the loss is the difference between the contract rate and what was or ought reasonably to have been earned from employment of the vessel under shorter charterparties, as for example on the spot market. The relevant mitigation in that context is the acquisition of an income stream alternative to the income stream under the original charterparty. The sale of the vessel was not itself an act of mitigation because it was incapable of mitigating the loss of the income stream."

86. Although both British Westinghouse and Fulton Shipping were breach of contract cases, it was not suggested to us that any different approach should apply to a case of breach of fiduciary duty or professional negligence.

87. In the instant case, the result of Girish's breaches of duty and S&B's negligence was a delay in the date at which Barrowfen came under the control of Suresh and Prashant, with a consequential delay in its ability to commence the Amended Original Development Scheme when it would otherwise have been able to do so. Barrowfen therefore lost the opportunity to receive a rental stream from the Property after the

Amended Original Development Scheme could have been completed in August 2016 or December 2017. As the Judge correctly emphasised in the Main Judgment at [673], Barrowfen's main claim was for damages to compensate it for the loss of the chance of receiving such rental income from the Property.

88. The Judge also found that by the time that Barrowfen was under the control of Suresh and Prashant and able to progress the development of the Property, the directors reasonably took the view that the Amended Original Development Scheme was no longer commercially desirable and that it was appropriate for Barrowfen to incur further costs in formulating and implementing the Revised Development Scheme to mitigate its losses of rental income from the Property.

89. In British Westinghouse it was necessary to quantify the losses that the claimant suffered as a result of the supplier's breach of contract in delivering defective turbines together with any further losses suffered or benefits received as a result of the steps reasonably taken by the claimant to mitigate its loss by buying more efficient turbines to replace them. The losses caused by mitigation included the cost of replacing the machines: the benefits included the increased profits that the claimant company was able to obtain from using the replacement machines in its business.

90. In the same way in the instant case, it was first necessary to quantify the losses to Barrowfen directly caused by the breaches of duty by Girish and negligence of S&B, and then to quantify and take into account any further losses suffered or benefits received as a result of the reasonable steps taken by Barrowfen to mitigate those losses.

91. As regards direct losses, Barrowfen was entitled to claim damages in respect of its loss of the chance of obtaining rentals from the Property if it had been developed in accordance with the Amended Original Development Scheme at an earlier date than it was in fact developed. It was also entitled to recover the costs of the administration and of resisting enforcement of the Barrowfen II charge, which it would not have had to spend had it not been for the breaches of duty and negligence.

92. As regards further losses caused by the steps taken in reasonable mitigation of its loss of rentals, the Judge held, and there is no dispute, that Barrowfen was entitled to recover damages in respect of the legal and professional costs and expenses of changing its proposals from the Amended Original Development Scheme to the Revised Development Scheme.

93. The Judge also rightly recognised that by completing the Revised Development Scheme rather than the Amended Original Development Scheme, Barrowfen's Property was capable of generating a greater level of rental income and capital sums from sale of the residential units than would otherwise have been the case. In my view he was right to consider that this was a benefit which was caused by the steps taken in mitigation and was required to be brought into account in the same way as the ability to earn increased profits from the use of the replacement machines was required to be brought into account in British Westinghouse.

94. That ability to earn an increased future rental stream and capital values for the residential units was reflected in the increased GDV – the price a notional purchaser would pay for the Property. In assessing the overall amount of this benefit the Judge also accepted - and I agree - that it was appropriate to deduct all the construction and

finance costs incurred to bring the Revised Development Scheme to completion. This gave rise to what the Judge referred to as the increased developer's profit of £2,508,182.

95. As indicated above, Barrowfen criticises that basis of valuation, which implied a notional sale of the Property on completion of the Revised Development Scheme, as being inconsistent with the unchallenged evidence of Prashant that Barrowfen has no intention of selling the Property. Barrowfen's argument is that because there will be no actual sale, the loans that it incurred to carry out the Revised Development Scheme will not in fact be paid off, the costs of such borrowing will continue to be incurred, and Barrowfen will continue to be unable to invest the funds subscribed for equity share capital elsewhere. Accordingly, so it contends, the continuing costs of borrowing and lost investment income over the entire anticipated 25 year lifetime of the Property should be brought into account to offset the increased capital value of the future rental stream and sale proceeds of the residential units that it will obtain from the Property.

96. On the figures, the effect is stark. The Judge accepted that the present (discounted) value of Barrowfen's future costs of borrowing and the lost investment opportunity for the equity subscription over 25 years would amount to £3,467,384 (£1,579,682 + £1,887,702). That exceeds the £2,508,182 increased developer's profit by some £959,202.[2] Barrowfen contends that the net effect is that the Judge should have held that carrying out the Revised Development Scheme has actually left it worse off than if it had carried out the Amended Original Development Scheme, and so there is no benefit caused by the breaches of duty or negligence which it should be required to bring into account and set against its damages.[3]

97. I do not accept Barrowfen's argument. In my view the Judge correctly applied the overriding principle established by British Westinghouse and identified by Lord Clarke in Fulton Shipping that the benefits that must be taken into account are those which are caused by the breaches of duty or negligence for which compensation is sought, or which are caused by the actions reasonably taken to mitigate the losses caused by those breaches of duty or negligence.

98. In the instant case, the breaches of duty by Girish and negligence by S&B delayed the development of the Property and deprived Barrowfen of the opportunity to receive rentals from the Property for the period by which completion of the development was delayed. The company also incurred redesign and increased construction and financing costs in devising and carrying out the Revised Development Scheme in order to mitigate the losses of rental income. In the words of Viscount Haldane in British Westinghouse, that was a continuous dealing by Barrowfen with the situation in which it found itself, and was not an independent or disconnected transaction.

99. However, once the development of the Property was completed, Barrowfen had successfully mitigated its loss of rental income because it was able to receive rentals from the Property. It was no longer dealing with the situation caused by the breaches of duty or negligence. In this respect I agree with the short reason given by the Judge at paragraph 78(2) of the Reserved Matters Judgment, that "the causative effect of the

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[2] In paragraph [70] of the Reserved Matters Judgment the extra loss is said to be £959,156. The small difference of £46 is unexplained and appears to be an arithmetical error.

[3] Although Barrowfen contends that, over its anticipated lifetime, the Revised Development Scheme will be less profitable than the Amended Original Development Scheme would have been, Barrowfen did not follow that contention through to its logical conclusion by claiming an additional £959,202 in damages.

breaches of duty by Girish and S&B came to an end on the completion of the development".

100. Although Barrowfen takes a pleading point in ground (c) of its Grounds of Appeal (above), it was its own case that carrying out the Revised Development Scheme was a reasonable course of action to take to mitigate its loss of rental income, and that being so, I cannot see that there was anything unjust in the Judge recognising the fact that after completion of that development, Barrowfen was no longer acting to mitigate its losses. This was not a case in which an unpleaded external factor was held to break a chain of causation, but simply the natural end of the course of conduct upon which Barrowfen itself relied to claim various items of expense as reasonable mitigation of its losses.

101. The benefit which Barrowfen had by this stage obtained as a consequence of its action to mitigate its loss was the enhancement that the Revised Development Scheme brought to the value of the Property, namely an ability to generate an enhanced revenue stream and the proceeds of sale of the residential units. The approach of the Judge to valuing that benefit on the basis of the present price that a purchaser would pay for the Property was entirely conventional.

102. However, Barrowfen was not similarly bound to continue to incur the financing costs of the loans that it had incurred to carry out the development, and neither was it bound to continue to forgo the future investment opportunities for its equity share capital. As the Judge held, after completion of the development, Barrowfen was free to take whatever decision it wished as to how to use or dispose of the Property, and it could do so independently of any continuing effects of the breaches of duty or negligence for which Girish or S&B were liable. In particular, as Prashant acknowledged, the company was free to decide whether to sell or retain the developed Property.

103. Indeed, the simple point is that Barrowfen's contention that the Revised Development Scheme is not a benefit for which it should give credit, but has left it worse off than if it had carried out the Amended Original Development Scheme, is entirely dependent upon Barrowfen's own commercial decision not to sell the Property. It is clear on the evidence that once the Revised Development Scheme had been implemented by way of mitigation, Barrowfen's decision to retain the Property (and thereby continue to incur the finance costs and miss out on the alternative investment opportunities for its equity share capital) rather than to sell the Property (which would enable it to bring those costs to an end and to take up alternative investment opportunities), has been its own independent commercial choice. Although Barrowfen has chosen to continue to own the Property, this is no longer part of a continuous course of conduct to deal with the situation in which it found itself as a result of the breaches of duty or negligence for which compensation is payable. That situation has been dealt with, and there is no reason why Barrowfen should be entitled to visit the adverse consequences of its further commercial decisions as regards the Property upon the defendants.

104. I consider that this basis for assessment of compensation is entirely consistent with the reasoning in Fulton Shipping. As the extract from Lord Clarke's judgment (above) makes clear, the key to his reasoning was that the decision of the owners to sell the cruise ship was taken independently of the breach of the charterparty for which damages was claimed. In particular, the decision to sell the ship was not taken to mitigate the losses of the income stream from repudiation of the charterparty. The defendant could

therefore not require the consequences of the sale to be brought into account. In the instant case, although the carrying out of the Revised Development Scheme was undertaken in reasonable mitigation of the loss of rental income from the Property, once the Revised Development Scheme had been completed, Barrowfen's decision whether to sell or retain the Property was an independent one which was not connected with the mitigation of those losses.

105. In common with the Judge, I have analysed the issue in terms of causation. I do not think that any different result is required by the cases on "betterment" as suggested in sub-paragraph (b) of Barrowfen's grounds of appeal.

106. The expression "betterment" has been used in cases of damage to property where a claimant replaces a damaged asset with a new one, or repairs it in such a way as to end up with a better asset than before. Barrowfen suggests that these cases establish that where a claimant intends to hold a replacement property rather than sell it, it need not give credit for any increase in capital value. I do not agree that this is what the decisions show.

107. The cases on betterment were analysed by Rix LJ in The Baltic Surveyor [2002] 1 Lloyd's Rep 623. At [84]-[85], after referring to British Westinghouse, Rix LJ affirmed that cases in which a claimant is permitted to recover damages based upon the cost of acquiring a new replacement for its old, damaged property, without giving credit by way of "a new for old deduction", ought to be exceptional. However, Rix LJ referred to two "recognised examples" of cases where such credit need not be given. He said that these were (i) cases of the repair of chattels and (ii) the destruction of buildings, provided that a replacement building is necessary to prevent the collapse of a business or loss of profits.

108. The example of the latter type of case, upon which Barrowfen primarily relies, is Harbutt's Plasticine v Wayne Tank and Pump [1970] 1 QB 447 ("Harbutt's Plasticine"). The claimant company's factory burned down due to the defendant's defective design of some equipment in the factory. In order to keep its business going, the claimant rebuilt a new factory on the site of the old. The Court of Appeal held that the claimant was entitled to the entire cost of replacement and did not have to give credit for the fact that it had a new factory rather than an old one.

109. Lord Denning MR explained this at page 468,

> "The destruction of a building is different from the destruction of a chattel. If a second-hand car is destroyed, the owner only gets its value; because he can go into the market and get another second-hand car to replace it. He cannot charge the other party with the cost of replacing it with a new car. But when this mill was destroyed, the plasticine company had no choice. They were bound to replace it as soon as they could, not only to keep their business going, but also to mitigate the loss of profit (for which they would be able to charge the defendants). They replaced it in the only possible way, without adding any extras. I think they should be allowed the cost of replacement. True it is that they got new for old; but I do not think the wrongdoer can diminish the claim on that account. If they had added extra

> accommodation or made extra improvements, they would have to give credit. But that is not this case. I think the judge was right on this point."

110. Widgery LJ agreed, stating, at page 473,

> "It was clear in the present case that it was reasonable for the plaintiffs to rebuild their factory, because there was no other way in which they could carry on their business and retain their labour force. The plaintiffs rebuilt their factory to a substantially different design, and if this had involved expenditure beyond the cost of replacing the old, the difference might not have been recoverable, but there is no suggestion of this here. Nor do I accept that the plaintiffs must give credit under the heading of "betterment" for the fact that their new factory is modern in design and materials. To do so would be the equivalent of forcing the plaintiffs to invest their money in the modernising of their plant which might be highly inconvenient for them. Accordingly I agree with the sum allowed by the trial judge as the cost of replacement."

111. Cross LJ agreed at page 476,

> "I do not think that the defendants are entitled to claim any deduction from the actual cost of rebuilding and re-equipping simply on the ground that the plaintiffs have got new for old. It is not in practice possible to rebuild and re-equip a factory with old and worn materials and plant corresponding to what was there before, and such benefit as the plaintiffs may get by having a new building and new plant in place of an old building and old plant is something in respect of which the defendants are not, as I see it, entitled to any allowance. I can well understand that if the plaintiffs in rebuilding the factory with a different and more convenient lay-out had spent more money than they would have spent had they rebuilt it according to the old plan, the defendants would have been entitled to claim that the excess should be deducted in calculating the damages. But the defendants did not call any evidence to make out a case of betterment on these lines and we were told that in fact the planning authorities would not have allowed the factory to be rebuilt on the old lines. Accordingly, in my judgment, the capital sum awarded by the judge was right."

112. At the risk of stating the obvious, the instant case does not fall into either of the exceptions mentioned by Rix LJ in The Baltic Surveyor and is plainly distinguishable on the facts from Harbutt's Plasticine. The breaches of duty and negligence by Girish and S&B did not cause any damage to the Property requiring it to be rebuilt or repaired. Barrowfen simply lost opportunities to earn rental income by developing the Property sooner rather than later; and Barrowfen mitigated its loss of that income by choosing to carry out a revised development rather than the original one that had been planned.

113. If anything, given that the Revised Development Scheme was different and larger in size and scope from the Amended Original Development Scheme, the instant case more closely resembles the situation that would have arisen in Harbutt's Plasticine if the claimant had chosen (as Lord Denning MR put it) to "add extras" when rebuilding its factory. All three members of the court indicated that this would have required some credit to be given.

114. That approach is also supported by the analysis of British Westinghouse and Harbutt's Plasticine by Lord Hope in Lagden v O'Connor [2004] 1 AC 1067. At [29] Lord Hope emphasised that the claimant in British Westinghouse had chosen to replace the defective turbines, and at [30] he contrasted that with a situation in which a claimant has no choice but to spend money to minimise loss, and this results in an incidental benefit that the claimant did not want. After referring in this respect to Harbutt's Plasticine, Lord Hope continued, at [34],

> "… if the evidence shows that the claimant had a choice, and that the route to mitigation which he chose was more costly than an alternative that was open to him, then a case will have been made out for a deduction. But if it shows that the claimant had no other choice available to him, the betterment must be seen as incidental to the step which he was entitled to take in the mitigation of his loss and there will be no ground for it to be deducted."

In the instant case, it is clear on the Judge's findings of fact that, albeit a reasonable one to take, it was Barrowfen's choice to devise and proceed with the Revised Development Scheme rather than simply to find a replacement for Waitrose and to implement the Amended Original Development Scheme.

115. Nor do I consider that Barrowfen can rely upon an alternative explanation of the decision in Harbutt's Plasticine given by Rix LJ in The Baltic Surveyor, or a further theory advanced by Leggatt J (as he then was) in Thai Airways International v KI Holdings [2016] 1 All ER (Comm) 675 ("Thai Airways").

116. In The Baltic Surveyor at [85], Rix LJ suggested that one explanation of Harbutt's Plasticine might be that the claimant had not in fact derived any relevant advantage from rebuilding its factory. He commented,

> "So in the case of replacement buildings: the building may be new, but buildings are such potentially long-lived objects that the mere newness of a building may be entirely by the way. Of much more importance to a business owner is whether the replacement answers the needs of his business. Even where the replacement is of a moderately bigger size, … in the absence of any reason for thinking that the bigger size is of direct benefit to the claimant, he has merely mitigated as best he can. If, however, it were to be shown that the bigger size (or some other aspect of betterment) were of real pecuniary advantage to the claimant, as where, for instance, he was able to sublet the 20% extra floor space he had obtained in his replacement building, I do not see why that should not have to be taken into account. It is after all

> a basic principle that where mitigation has brought measurable benefits to a claimant, he must give credit for them: see British Westinghouse, where defective machines were replaced by new machines of superior efficiency. "

117. In Thai Airways, at [76]-[78] Leggatt J referred to this extract and suggested that Rix LJ's reference to a claimant obtaining a "real pecuniary advantage" supported a theory that the distinction between Harbutt's Plasticine and British Westinghouse was that the benefit that the claimant in British Westinghouse was required to bring into account was a "monetary benefit". He continued,

> "79. As Rix LJ indicated in The Baltic Surveyor (at para 85), cases such as the Harbutt's Plasticine case in which no credit was given for any betterment in receiving new for old are best explained on the basis that the claimant did not obtain any proven pecuniary advantage. As a result of their mitigating action, the plaintiffs in the Harbutt's Plasticine case acquired a new factory which may have had a higher market value than the old factory which it replaced. But in circumstances where the plaintiffs had not wanted a new factory and had no known plans to sell it, this did not give them any more money. The position would have been different if it had been shown, for example, that the new factory would cost less to run. In such circumstances, in so far as it could be demonstrated that this benefit had been or was going to be realised in cash, credit would have to be given for it – as it had to be given in the British Westinghouse case.
>
> 80. The hypothetical examples of the man who has to buy a first class ticket to reach his destination when his train is cancelled and the claimant who hires a Rolls Royce when it is the only car available are explicable in the same way. The additional amenity of first class travel, although resulting from a step reasonably taken in mitigation of loss, does not confer any pecuniary advantage. Likewise, in so far as the claimant enjoys the benefit of a better car, it is not a benefit which either takes the form of money or which she could readily realise or be expected to realise in terms of money. The case where an impecunious claimant uses the services of a credit hire company to obtain a replacement vehicle is again similar in nature.
>
> 81. I conclude that, in assessing damages for breach of contract, credit must be given for any monetary benefit, whether chosen or not, which the claimant has received or will receive as a result of an action reasonably taken to mitigate its loss. By a "monetary benefit", I mean a benefit which either takes the form of money or which the claimant could reasonably be expected to realise in terms of money."

118. For my part, I very much doubt that the members of the Court of Appeal in Harbutt's Plasticine or Rix LJ in The Baltic Surveyor had in mind the distinction between

"monetary benefit" and other benefits to which Leggatt J referred in Thai Airways. For example, in Harbutt's Plasticine Lord Denning MR thought that if the claimant had chosen to "add extras" when rebuilding its factory, it would have had to give credit for those extras, even though there was no suggestion whatever on the facts that the claimant would have intended to turn such extras into money by selling the factory.

119. Moreover, in The Baltic Surveyor Rix LJ referred to the basic principle established by British Westinghouse as being that a claimant should bring benefits into account if they were a "measurable benefit" rather than only if they were a "monetary benefit". I consider that the Judge was entitled on the facts to take the view that Barrowfen obtained a measurable benefit as a result of carrying out the Revised Development Scheme in place of the Amended Original Development Scheme.

120. I would therefore dismiss Barrowfen's appeals against the credit required to be given for the increased developer's profit arising out of the Revised Development Scheme.

Application of the loss of a chance percentages

121. As I have indicated, as a matter of principle, British Westinghouse requires an overall assessment to be made of losses suffered and benefits obtained by the claimant, in each case caused by the breaches of contract or breaches of duty in question. Focussing on the issue of causation naturally requires an assessment of what would have occurred in the counterfactual in which there had been no such breaches.

122. The Judge held that in a counterfactual in which there had been no breaches of duty and negligence relating to the Company Claims, Prashant and Suresh would have obtained control of Barrowfen earlier than they did, and there was a 60% probability that the Amended Original Development Scheme would have commenced in January 2015. The Judge also held that once Prashant and Suresh had taken control of Barrowfen on 1 December 2015, in a counterfactual in which there had been no breaches of duty and negligence as alleged in the Administration Claim, there was an 80% probability that Prashant and Suresh would have caused Barrowfen to commence the Amended Original Development Scheme in April 2016. The chance that the company would have commenced the Amended Original Development Scheme in that counterfactual was therefore (100% - 60%) x 80% = 32%.

123. In the two cumulative counterfactuals to which the breaches of duty and negligence related, there was thus a total 92% (60% + 32%) chance that Barrowfen would have carried out the Amended Original Development Scheme and a residual 8% chance that it would not. But the increased developer's profit of £2,508,182 identified by the Judge was the difference between the value of the Property as actually developed under the Revised Development Scheme and the value which it would have had under the Amended Original Development Scheme. Since the lower reference point for calculation of that figure was based upon an assumption that the Amended Original Development Scheme would have been carried out, there is no logical basis for requiring that increased developer's profit to be brought into account in any scenario in which Barrowfen would not have implemented the Amended Original Development Scheme.

124. Put another way, in the two counterfactuals in which there had been no breaches of duty or negligence, the Judge held that there was an 8% chance that the Amended Original

Development Scheme would not have been implemented. But no-one suggests that Barrowfen would have left the Property undeveloped in that situation: that would have made no commercial sense. The only logical conclusion is that in such a situation Barrowfen would eventually have implemented the Revised Development Scheme and thus ended up with a property of the same enhanced characteristics as in real life. In that counterfactual, the breaches of duty and negligence could not be said to have caused Barrowfen to receive any benefit, since it would have carried out the Revised Development Scheme of its own accord.

125. That is why, in my view, the Judge was right in principle to deduct the increased developer's profit of £2,508,182 from the damages attributable to loss of rentals and costs in each counterfactual *before* multiplying the net result by the loss of a chance. That had the correct arithmetical effect of requiring Barrowfen to give credit for a total of 92% of the £2,508,182. In contrast, the arithmetical effect of deducting the £2,508,182 *after* applying the loss of a chance percentage to the amount of lost rentals and costs in each counterfactual would have been to require Barrowfen to bring 100% of the increased developer's profit into the account, even though not all of that increased developer's profit would have been caused by the breaches of duty or steps taken in mitigation of loss.

126. Since I consider that the Judge adopted the correct approach to the application of the loss of a chance percentages to the increased developer's profit as a matter of principle, it is unnecessary to consider in any great detail whether he was bound to do so by the decision in Hartle v Laceys. However, since the point was argued, I will say something about that decision.

127. In Hartle v Laceys, the claimant purchased a property and entered into a covenant restricting development without the written consent of the vendor (V). V failed to register the covenant. The claimant then received a subject to contract offer of £400,000 from a developer (Berkeley Homes) in June 1988 for the property. His solicitor negligently failed to advise him that the property could be sold free of the covenant (because it had not been registered) and instead notified V of the proposed sale.

128. V then registered the covenant and sought to extract a ransom value for releasing the covenant to allow development of the property. Eventually, in February 1989, it was agreed that the covenant would be released on payment of £35,000 by the claimant to V. By this time the developer had withdrawn its offer, the market fell, and the property was later sold for only £150,000.

129. The Court of Appeal held that the claimant was entitled to recover damages for the lost chance of selling the site to the developer before registration of the covenant, and proceeded itself to assess those damages. It held that in the counterfactual in which the solicitor had not been negligent, there was a 60% chance that the sale would have proceeded to completion before V sought to register the covenant, and that it would have realised £360,000 (net of the costs of sale).

130. At page 329, Ward LJ stated that at first sight the damages for the loss of the chance of achieving such a sale should be assessed at 60% of £360,000 = £216,000, and credit should then be given for the proceeds of the actual sale of £150,000, so reducing the damages to £66,000. However, he then went on to explain that this was not the correct approach, and that the actual proceeds of sale should be deducted before application of

the loss of a chance percentage, so that the amount of damages should be (£360,000 - £150,000) x 60% = £126,000.

131. Ward LJ explained his reasoning in the following passage of his judgment at page 330. He referred to "a" as the lost sale proceeds and "b" as the actual proceeds, and posed the question as whether damages should be (a x 60%) – b, or (a – b) x 60%,

> "I have come to the conclusion that the latter approach is the correct one. Take slightly different facts. Assume just for the sake of the argument that Berkeley Homes were in [the defendant's] office with banker's draft for £375,000 in one hand and pen poised in the other to sign contract and conveyance when the [solicitors for V] telephoned to say they had registered their charge, so the deal was lost. One might well then say that Mr. Hartle had lost a certain sale, or one as certain as certain can be. His damages would be a - b with no discount because the chance is assessed at 100%. If the chance were 99%, one would make the 1% reduction. On the facts we have found a - b is to be reduced by 40%.
>
> The unfairness of the former solution can be tested in this way. Assume we had found an 80% chance of a sale. 80% of £375,000 is £300,000. Assume the property was sold 12 months later for £300,000. It cannot be right that the loss of such a high chance does not sound in damages. If the [(a-b) x 60%] formula is adopted, then the loss of the chance always has a value.
>
> … Mr. Hartle did not lose everything when he lost this sale. He lost the chance of the sale but he did not lose the property itself. He retained the chance to sell it at some indeterminate time for some indeterminate price. He lost the chance of getting the excess of a over b but his chance of getting a - b was only 60% and so he should only recover 60% of it."

The key to Ward LJ's reasoning was his characterisation of the case as one in which the negligence of the defendant caused the claimant to lose the opportunity to get the difference between the higher price of the intended sale to the developer and the lower price of the sale that actually took place later.

132. S&B contends that the instant case is distinguishable from Hartle v Laceys. It argues that because its negligence caused Barrowfen to lose the opportunity to carry out the Amended Original Development Scheme, the value of that lost opportunity should be discounted to reflect the chance that it would not have eventuated; but that because Barrowfen received the certain benefit of the Revised Development Scheme, there is no basis for discounting the credit that should be given for that benefit. I do not accept that submission: it confuses the various heads of loss and benefits that are being taken into account.

133. As I have indicated above, there is no doubt that the damages payable to compensate Barrowfen for the adverse consequences of losing the opportunity to carry out the Amended Original Development Scheme must be discounted to reflect the possibility

that it might not have carried out that scheme in any event. That is why, for example, the damages for the lost opportunities to obtain rentals from the Property if the Amended Original Development Scheme had been carried out, were each multiplied by a loss of a chance percentage that (cumulatively) left an 8% chance that the Amended Original Development Scheme might not have been carried out in any event.

134. However, the issue between the parties relates to the treatment of a sum of £2,508,182 which, by its very nature, represents the difference between the developer's profit that Barrowfen would have made if it had carried out the Amended Original Development Scheme and the developer's profit that it actually made by carrying out the Revised Development Scheme. As I see it, that difference equates directly to the difference in the lost and actual sale values to which Ward LJ referred in Hartle v Laceys, and so naturally requires the application of a percentage factor to reflect the chance that such profit would have been made.

135. Further, given that the exercise upon which the court is engaged is the neutral one of taking account of all losses and benefits caused by the breach, the approach cannot be different depending on whether the outcome for the claimant turns out to be positive or negative. That can be illustrated by considering the position if the outcome in the instant case had been similar to that in Hartle v Laceys, i.e. that the Property had turned out to be worth less at completion of the Revised Development Scheme than it would have been worth if the Amended Original Development Scheme had been carried out. In such a case, in addition to the loss of revenue from rentals until completion, Barrowfen could have claimed compensation for the diminution in capital value of the Property caused by the loss of the opportunity to carry out the Amended Original Development Scheme. But that diminution would have to be discounted to 92% to reflect the fact that even if there had been no breaches of duty or negligence, there was an 8% chance that Barrowfen would never have carried out the Amended Original Development Scheme.

136. The point can be expressed using the same formula as Ward LJ adopted in Hartle v Laceys. If "a" is the profit that would have been obtained if the Property had been developed according to the Amended Original Development Scheme, and "b" is the actual profit obtained when developed according to the Revised Development Scheme, then the breaches of duty and negligence caused Barrowfen to lose the chance of getting "a" rather than "b". However, since the chance of getting "a" rather than "b" was only 92%, the losses that Barrowfen could recover would be (a-b) x 92%.

137. Alternatively, if "b" is greater than "a" (as is the situation in the instant case, since the Revised Development Scheme has produced a property that is more valuable than if the Amended Original Development Scheme had been carried out), then "a – b" will be a negative value, signifying that this is an amount for which credit is required to be given by Barrowfen, rather than an amount for which S&B is liable.

138. I would therefore dismiss the first aspect of S&B's cross-appeal.

The award of £520,014

139. I have set out above a summary of the arguments and events that led to the Judge's order awarding Barrowfen £520,014 as "interest". The issues in this regard have undoubtedly been confused by the failure to distinguish between an award of "interest

as damages" (which is an award of damages at common law) and an award of "interest on damages" (which is an award of interest pursuant to statute). What is, however, clear, is that the underlying basis for the award of "interest" in both cases is essentially the same – namely to compensate the claimant for the loss of use of money.

140. As the Judge indicated in the first part of his Interest Ruling, set out at paragraph [62] above, his decision to award Barrowfen interest as damages was designed to compensate Barrowfen for being unable to invest the Principal Amounts. In that initial ruling, the Judge explained that although the completion of the Revised Development Scheme meant that Barrowfen no longer suffered any loss of rentals, it remained unable to invest the Principal Amounts until S&B paid the Main Damages of £1,705,560 on 27 September 2022. S&B does not question that reasoning or appeal the Judge's rejection of its argument that the award of interest as damages should have ceased when the Revised Development Scheme was completed in March 2021.

141. Although the Judge correctly noted that Barrowfen remained unable to invest the Principal Amounts until the Main Damages were paid on 27 September 2022, in his initial ruling on 24 May 2023, he did not award Barrowfen interest as damages until 27 September 2022. He awarded interest as damages only until 22 June 2022 in the sum of £337,229.

142. This is not surprising: it was what he had been asked to do by Barrowfen in its skeleton argument for the consequentials hearing, which only sought an award of "pre-judgment interest as damages" until 22 June 2022. The reason for that limited request was clearly that the parties had agreed that S&B should pay £36,261 in statutory interest pursuant to the Judgments Act 1838 on the award of £1,705,560 as Main Damages. That agreement for payment of statutory (post-judgment) interest covered the period between the Reserved Matters Judgment on 22 June 2022 and payment on 27 September 2022.

143. Although the Main Damages of £1,705,560 were less than the Principal Amounts because of the credit given in respect of the increased developer's profit on the Revised Development Scheme, that does not affect the analysis. The parties and the Judge were all proceeding on the basis that Barrowfen's claims for loss of the chance to receive rental income and costs and expenses had been reduced to an award of Main Damages by the Reserved Matters Judgment on 22 June 2022 and Barrowfen's entitlement to compensation for loss of use of the Principal Amounts after that date would be addressed by an award of statutory interest on the Main Damages.

144. Resolution of these issues only left one further matter outstanding – namely whether interest pursuant to the Judgments Act 1838 on the award of £337,229 interest as damages should run from 22 June 2022 or should only run from 24 May 2023 when that precise amount of damages had been finally assessed. This point was addressed by Barrowfen in its skeleton argument for the consequentials hearing as follows,

> "Barrowfen also contends (but S&B disputes) that post-judgment interest on the pre-judgment interest as damages award should run from 22 June 2022. Barrowfen relies upon Novoship (UK) Ltd v Mikhaylyuk [2013] EWHC 89 (Comm), which held (at [32]-[46]) that where pre-judgment interest is assessed on a date after judgment has already been given for the principal sum,

> interest under the Judgments Act may still start to run on both the principal and pre-judgment interest from the date of the earlier final judgment. Such an order may be made pursuant to CPR 40.8(2). This is the just order in this case. It was obvious from the Reserved Matters Judgment (which determined the principal amount on which interest would run and the rate of interest) that there would be a significant sum of interest to be paid and (at least approximately) what that sum would be, but there has been a gap in time until this hearing. If post-judgment interest is not awarded on this element from 22 June 2022, Barrowfen will be prejudiced in that there will be a gap in the interest awarded if pre-judgment interest does not continue to accrue until the date of the consequentials hearing (and Barrowfen will argue in the alternative that if post-judgment interest does not run on this element from 22 June 2022, then pre-judgment interest should continue to accrue after that date)."

145. As can be seen, the bulk of this paragraph addresses the issue of interest under the Judgments Act 1838 on the award of £337,229. The alternative argument alluded to briefly by Barrowfen in parentheses at the end of this paragraph regrettably does not make clear that the "pre-judgment interest" that it reserved the right to contend should continue to accrue, was in fact interest as damages in respect of loss of use of the different (and much larger) Principal Amounts. Moreover, because no transcript of the consequentials hearing is available, it is unclear how the oral argument on the ability to order post-judgment statutory interest on £337,229 from 22 June 2022 developed into an argument on whether to award pre-judgment interest as damages on the much larger Principal Amounts from that date.

146. In my judgment, for the reasons that I have given, it was implicit in the agreement that the parties had reached as to the payment of statutory interest from 22 June 2022 to 27 September 2022 that Barrowfen's loss of use of the Principal Amounts would be compensated by an award of statutory interest on the Main Damages (which were based upon the Principal Amounts, less credit for the increased developer's profit). As I have indicated, that approach was reflected in the way in which Barrowfen presented the issues to the Judge in its skeleton argument.

147. What no-one brought to the attention of the Judge, and he seemingly did not appreciate, is that by making both the order for payment of interest as damages on the Principal Amounts for a period after 22 June 2022 and making the order for payment of statutory interest of £36,261 on the Main Damages for a period that also ran from 22 June 2022, he was inevitably giving Barrowfen an element of double recovery for loss of use of the same underlying rentals, costs and expenses.

148. Since no-one suggested that the agreed order for payment of £36,261 should not have been made, it seems to me that it was not appropriate for the Judge in effect to be asked by Barrowfen to revisit his earlier ruling for the payment of £337,229 by way of interest as damages to 22 June 2022. The only remaining decision should have been the one identified by Barrowfen in its skeleton argument (see above). That issue was disputed at the time, but is now conceded by S&B, which accepts that the Judge would have been entitled to award £15,455 by way of interest on the £337,229 pursuant to the

Judgments Act 1838 and CPR 40.8(2) for the period from 22 June 2022 to 27 September 2022.

149. As such, I would allow this second aspect of S&B's cross-appeal, set aside the Judge's order for payment of £520,014, and substitute an order for payment of £352,684.

Lord Justice Lewis:

150. I agree.

Lord Justice Newey:

151. I also agree.