Case No: HC11C02557

Neutral Citation Number: [2014] EWHC 2502 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 July 2014

Before :

THE HON MR JUSTICE ARNOLD

- -

Between :

(1) RIDGEWOOD PROPERTIES GROUP LIMITED **(2) RIDGEWOOD (CLERKENWELL) LIMITED** **(3) GOLDEN LIMITED** **(4) HAMLET LIMITED** **(5) REDWAY LIMITED**	**Claimants**
- and -	
(1) KILPATRICK STOCKTON LLP **(2) FINERS STEPHENS INNOCENT LLP** **(3) STEVEN WOOLF**	**Defendants**

- -
- -

David Turner QC and **Adam Rosenthal** (instructed by **Mishcon de Reya**) for the **Claimants**
Patricia Robertson QC and **Christopher Knowles** (instructed by **Bristows LLP**) for the **First Defendant**
David Halpern QC (instructed by **BLM LLP**) for the **Second Defendant**
Emer Murphy (instructed by **Browne Jacobson LLP**) for the **Third Defendant**

Hearing dates: 14-15 July 2014

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Judgment

MR JUSTICE ARNOLD :

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Introduction

1. This is an application by the Defendants to strike out paragraph 62(1) of the Claimants' Re-Amended Particulars of Claim on the ground that it is an abuse of process because it amounts to a collateral attack upon findings made by Proudman J in three judgments in previous proceedings, alternatively for summary judgment on the ground that the plea has no real prospect of success.

Background

The Airspace Agreements

2. Between 23 March 2001 and 30 July 2004 the First Claimant ("RPG") entered into a series of contracts with Texaco Ltd (subsequently known as Chevron Ltd and then as Valero Energy Ltd) ("Texaco"), known as the Airspace Agreements, under which RPG acquired conditional options to purchase a number of sites used by Texaco as petrol filling station shops (or, in one case, RPG entered into a conditional contract to purchase the site). The scheme of the Airspace Agreements was that RPG would apply for planning permission for redevelopment of each site, which would involve the demolition of the existing shop and the construction of a building comprising a shop with flats above. On the grant of satisfactory planning permission, RPG would take a building lease of the site and carry out the development for which permission had been granted. Upon completion of the development, RPG would surrender the building lease and either acquire the freehold or a long lease of the site, subject to Texaco retaining the shop.

3. This claim concerns the Airspace Agreements relating to nine sites ("the Sites"), which were entered into in three phases, as follows.

Phase	**Site(s)**	**Date(s)**
Phase 1 (Conditional Contract)	Clerkenwell Road	23 March 2001
Phase 2 (Option)	St Katherine's, Caledonian Road, Hove, Landsdowne	24 July 2003 (Lansdowne – 31 July 2003)
Phase 3 (Option)	Blue Star, Dome, Forty Avenue, Hendon Way	30 July 2004

4. The Airspace Agreements in all three phases required RPG to obtain satisfactory planning permission before the expiry of a specific period, whereupon RPG was entitled to give notice exercising the options (in relation to Phases 2 and 3) or became obliged to complete the conditional contract (Phase 1). The periods were extended by agreement.

5. As extended, the relevant periods were as follows:

   i) Phase 1: satisfactory planning permission had to be granted by 23 December 2005, unless an appeal had been lodged by that date.

   ii) Phase 2: satisfactory planning permission had to be granted by 24 January 2006 (or 31 January 2006 for Lansdowne), unless an appeal had been lodged by that date, in which case satisfactory planning permission had to be granted by 11 June 2007 (or 18 June 2007 for Lansdowne).

iii) Phase 3: the definition of "option period" in the Airspace Agreements was ambiguous, so that satisfactory planning permission had to be obtained by either 30 December 2005 or 30 January 2006, unless an appeal had been lodged by that date, in which case satisfactory planning permission had to be granted by 17 June 2008. For the purposes of this application, the Defendants are content to proceed on the assumption that the correct date was 30 January 2006.

6. On 23 March 2013 RPG assigned its rights under the Clerkenwell Airspace Agreement to the Second Claimant. On 20 September 2005 RPG assigned its rights under the St Katherine's, Lansdowne and Hendon Way Airspace Agreements to the Third, Fourth and Fifth Claimants respectively. All the Claimants appear to be controlled by Norman Lynch. Both Norman Lynch and his son Paul Lynch act as consultants to the Claimants.

7. On 28 April 2005 Texaco entered into an agreement to sell a large portfolio of properties, which included the Sites, to Somerfield Stores Ltd ("Somerfield") and Azure Properties LLP ("Azure"), the latter being associated with Somerfield. On 21 June 2005 Texaco duly transferred the Sites to Somerfield and Azure. Texaco did not secure from Somerfield or Azure the power to compel performance of the Airspace Agreements.

8. Almost immediately, Somerfield indicated an intention not to be bound by the Airspace Agreements. Somerfield told Norman Lynch on 28 July 2005 that it regarded the Airspace Agreements as unenforceable and the First Defendant ("KS") sent Norman Lynch an email on 10 August 2005 attaching a letter from Somerfield confirming that it did not regard itself as bound by the Airspace Agreements. In the Texaco proceedings (as to which, see below), Norman Lynch accepted in cross-examination that he was aware of Somerfield's stance by 10 August 2005.

9. Notwithstanding Somerfield's stance, the Claimants continued to try and obtain planning permission in relation to the Sites within the periods required by the Airspace Agreements at least until March-April 2006. In the event, they did not obtain planning permission in relation to any of the Sites.

10. The Claimants were advised by Mark Johnstone, who is a solicitor and was a partner in KS until 31 August 2005, when he moved to the Second Defendant ("FSI"). KS instructed the Third Defendant ("Mr Woolf") in August 2005.

11. In February 2006, Mr Woolf was instructed by FSI, together with leading counsel, to advise, among other things: (i) whether by disposing of the Sites, Texaco had breached the Airspace Agreements; (ii) if so, whether the Claimants could bring an action for damages against Texaco, and if it could, what the measure of damages would be; and (iii) whether, in relation to three of the Sites, the Claimants might be best advised to withdraw extant planning appeals and pursue their claims against Texaco for damages.

12. The Claimants' evidence is that, in accordance with the advice received from Mr Woolf and leading counsel, the appeals in relation to Caledonian Road, Hove and Dome were withdrawn in March-April 2006.

The Texaco proceedings

13. On 17 May 2011 the first four Claimants, and on 16 June 2011 the Fifth Claimant, brought proceedings against Texaco ("the Texaco proceedings"). The Claimants alleged that Texaco had committed a repudiatory breach of the Airspace Agreements. The Claimants claimed damages compensating them for their loss of profits, alternatively their wasted expenditure. Texaco denied that it had breached the Airspace Agreements. In the alternative, Texaco contended that the Claimants had affirmed the Airspace Agreements.

14. Texaco brought a Part 20 Claim against Pannone LLP, the solicitors who had acted for Texaco in the sale to Azure and Somerfield. An order was made by Master Teverson on 28 September 2011 directing that the question of liability be tried as a preliminary issue. By the order of 28 September 2011, Pannone was permitted to participate in the trial on liability as between the Claimants and Texaco.

15. The trial on liability was heard on 10 to 12 and 15 October 2012 before Proudman J. The Claimants relied on the evidence of Norman Lynch. Because the trial was only concerned with liability, the Claimants say that they did not at that stage attempt to adduce wider factual evidence or expert evidence relevant to causation and loss (i.e. as to their prospects of obtaining planning permission and the quantification of their losses). Nevertheless, Norman Lynch did give evidence in paragraphs 25-32 of his witness statement about the Claimants' efforts to secure planning permission, dealing specifically with each of the Sites. Furthermore, Norman Lynch was cross-examined on what had happened in relation to each of the Sites. Although Norman Lynch said in his witness statement that he was not in the UK for much of the time, he also said that he was regularly updated as to progress by Paul Lynch and Steve Thompson (another consultant).

16. Proudman J gave her first judgment on 30 January 2013 ([2013] EWHC 98 (Ch), [2013] Ch 525). In summary, she held that:

    i) No term should be implied into the Airspace Agreements prohibiting a sale of the Sites by Texaco.

    ii) Nevertheless, Texaco had put it out of its power to perform the Airspace Agreements by assigning the Sites in the way that it had. Accordingly, Texaco had committed a breach of the Airspace Agreements.

    iii) The Claimants had consciously and deliberately affirmed the Airspace Agreements and therefore could not rely on repudiatory breach. Furthermore, the Claimants had not communicated any acceptance of repudiation before the Airspace Agreements expired.

    iv) The Claimants' claim against Texaco was not statute-barred.

17. After explaining the background and the issues, Proudman J made the following observation at [18]:

> "It is Texaco's case in the action that the claimants could not have obtained satisfactory planning permission in accordance

with the terms of the airspace agreements. It is common ground that these are matters of causation which do not fall within the ambit of the preliminary issue I have to decide. However it is difficult to separate the issue of causation from that of the claimants' approach to performance. On the facts it is highly relevant to the preliminary issue whether the claimants believed that they could obtain satisfactory planning permission in accordance with the terms of the airspace agreements. I am therefore dubious whether Master Teverson would have ordered a preliminary issue in the current form, omitting all causation issues, if he had appreciated this. Although I have been asked not to, and I do not, make any findings about causation, not least because the parties say that they have not come prepared to address it, I draw attention to this difficulty."

18. In the context of the issue on affirmation, Proudman J made the following findings:

"84. … on the facts of the present case it can be inferred that the claimants knew precisely what they were doing. Mr Lynch accepted in his evidence that from the time the claimants learned that the transfers had been made they were 'working under advice'. The advice received by Ridgewood can be gauged by what the claimants did. Ridgewood proceeded with the airspace agreements, treating them as in full force, rather than claiming that the sale was a breach of a kind entitling them to repudiate.

85. On 30 November 2005 the claimants were plainly considering a claim against Texaco. There is a manuscript note of a telephone conference between Mr Johnstone and Steve Thompson, a consultant to Ridgewood, iterating the importance of complying with the airspace agreements in the meantime.

86. In oral evidence Mr Lynch said that the claimants' aim was to 'establish a loss of the profit that we were going to suffer'. He accepted that there was no doubt in his mind that the sales had taken place and that there was a breach of the option agreements. There was therefore a strategy of continuing with the airspace agreements on the basis that if planning permission were obtained the claimants would be able to crystallise their loss in proceedings against Texaco.

87. The claimants' strategy appears from a number of documents: …

88. The claimants say that it was only when (on advice) they realised that the airspace agreements could no longer be enforced that they withdrew their planning appeals. Texaco says that it was only when the claimants realised that the prospects of securing planning permission on appeal was

hopeless that they changed their strategy and accepted the breaches.

…

90. In relation to Clerkenwell Road, again, planning permission was refused after the expiry of the option. Mr Lynch said that the application might have been considered prior to the option expiry date but that this could not happen because of difficulties in notifying Azure. However he eventually accepted that although instructions were given to serve Azure the fault in not doing so was that of the claimants' own agents rather than that of Texaco or Azure.

91. In relation to Blue Star, there was again no satisfactory planning permission in place prior to expiry of the option. The claimants allege that this was the fault of Texaco because the claimants' acoustic consultants were not granted access to the site for a sound survey. However the necessary work had not been completed for the requisite highways study, a matter which was treated separately by the claimants. The claimants had themselves made a mistake about the option expiry date and it was in any event too late to achieve satisfactory planning permission or a non-determination enabling them to keep the option alive.

92. The same applies to Forty Avenue in that, by the time the problem of access became apparent, it was too late to obtain planning permission.

93. In relation to Hove, no valid planning permission was obtained owing to the fault of the claimants. Again, with the Dome, it seems clear that the claimants wanted to keep an appeal on foot in order to establish a platform for suing Texaco.

94. In relation to St Katherine's, Hendon Way and Lansdowne, no planning applications were submitted at all. Mr Lynch alleges that the reason for this was because it became known that Texaco had sold its interest in the properties to Azure and there were 'problems coming to the surface' with the new owners of the sites. However the difficulties with access did not apply to any of these sites and the assertion by Somerfield and Azure that the airspace agreements were personal to Texaco was known, as Mr Lynch accepted, on 8 August 2005.

…

96. There was a positive decision to perform the airspace agreements so that in the event of a claim against Texaco the claimants would not face an argument that they failed to comply with their own obligations. The performance

> comprised trying to get planning permission, giving notifications under the terms of the agreements and obtaining positive assurances from Texaco and its agents. The closest Ridgewood came to reservation of rights was in their complaint that they had been denied access to Blue Star and Forty Avenue (a complaint which was not pursued very vigorously and which only affected two of the sites) and there was never any general reservation of rights. The performance continued right up until expiry of the airspace agreements."

19. Proudman J adjourned the question of whether the Claimants were entitled to damages for breach of the Airspace Agreements which did not depend on the Claimants having terminated the Airspace Agreements for repudiatory breach for further argument. Prior to the further hearing, the Claimants applied for permission to amend their Particulars of Claim if needed, and Pannone applied for summary judgment dismissing that part of the claim.

20. Following the second hearing on 22 and 23 April 2013, Proudman J gave her second judgment on 26 April 2013 ([2013] EWHC 1441 (Ch)). In summary, she held that:

    i) The Claimants' claim for non-termination damages was not already pleaded, and accordingly the Claimants required permission to amend.

    ii) The Claimants would be given permission to amend.

    iii) Taking into account what had actually happened, all of the Airspace Agreements had lapsed for reasons unconnected with Texaco's breach by transferring the Sites without reserving a right to perform the Airspace Agreements.

    iv) It was nevertheless arguable that, as the Claimants contended, damages should be assessed as at the date of breach, namely 21 June 2005, and that what had actually happened thereafter was legally irrelevant. Accordingly, the application for summary judgment would be dismissed.

    v) There would be judgment for the Claimants on liability for breach of the Airspace Agreements, but without prejudice to the ability of Texaco and Pannone to argue that this gave rise to nominal damages only.

    vi) The issues of causation and the measure of damages would be adjourned for further argument.

21. Proudman J explained the procedural situation and her reasons for refusing summary judgment as follows:

> "2. My [first] judgment was restricted to the preliminary issue identified by Master Teverson in his order dated 28 September 2011, namely that of liability of the defendant to the claimants.
>
> 3. It was common ground that questions of causation were to be comprised within quantum rather than liability. Disclosure had

not been given on causation and the claimants said they had not put in their evidence on that issue or otherwise addressed it at all. The exclusion of causation caused some difficulties on the facts of this case as I identified in paragraph 18 of the judgment. Therefore in some respects I did trespass into the field of causation where it was not possible to extract it from that of liability.

4. At the present hearing, but not, unfortunately, at the trial of liability, I was referred to *The Trademark Licensing Co. Ltd., Lonsdale Sports Ltd v Leofelis* [2012] EWCA Civ 985 where I note Lloyd LJ's observation at [39]:

> 'In my experience, at any rate in a breach of contract case where there are likely to be serious issues as to the basis on which the damages payable are to be calculated, where a party has been held liable for breach of contract at a liability trial, it is a good idea for the judge who hears the liability trial to determine the basis on which damages should be payable, though not of course the details of amounts, just as it is right for such a trial to cover any live issues as to causation.'

5. It may be that one of the reasons why it was possible to separate the issue of causation from the preliminary issue was because the defendant and Pannone thought that they were dealing with repudiatory anticipatory breach only. On that basis it might be logical to decide the issue of whether there was a breach through anticipatory termination and, if so, whether it was accepted. Where a claim for non-termination damages is being pursued there is less point in separating liability from causation entirely and the court ought to decide whether the breach prevented the claimants from being able to obtain planning permission.

…

11. On 20 February 2013, with an eye to this hearing, the claimants applied to amend their particulars of claim. The defendant and Pannone indicated that they would oppose. On 8 April 2013, Pannone, supported by the defendant, applied for summary judgment dismissing or striking out that part of the claim formulating the damages sought, namely [9] and [10]. That application was supported by a witness statement from Andrew Blair of Clyde & Co. LLP, Pannone's solicitors. I think it is fair to say that this witness statement does not adduce any fresh evidence but merely draws together evidence that was before the court on the trial of liability in convenient form.

…

26. I should deal with certain technical matters relating to the summary judgment application first. It is true that the application has been brought late in the day after the first leg of the preliminary issue has been tried, but that is accounted for by the way in which this point about non-termination damages has arisen. I accept that I have jurisdiction: see *The Trademark Licensing Co. Ltd v Leofelis* (above). Mr. Pymont has not adduced evidence going to causation so I have only heard one side of the case. It is said that he has had that opportunity; the claimants have not complied with CPR 24.5 and served evidence in response to Mr. Blair at least seven days before the summary judgment hearing.

27. By CPR 24.4 the respondent should be given at least 14 days' notice of the issues which it is proposed that the court will decide at the hearing. However Mr. Pymont was given the opportunity to ask for an adjournment but made it clear that he did not want to do so as he was alleging that the application fell to be dismissed in any event.

28. Nevertheless Mr. Pymont puts his marker down to say that the claimants have been left with inadequate time to prepare detailed evidence in answer to the evidence led by Mr. Blair, let alone to serve it at least seven days before the hearing. The basis for the application is the allegation that the claimants will not be able to advance a factual basis for the damages they claim. The rationale of Master Teverson's order was to leave matters of causation over and in such circumstances, says Mr. Pymont, it was incumbent on the defendant and Pannone to give the claimants full notice of any claim to short-circuit matters. However Mr. Pymont fixed his colours firmly to the mast of saying that Mr. Blair's evidence went largely to the events which actually happened which are, in his contention, largely irrelevant.

…

"51. Although I can and indeed should decide matters that are fully argued before me it does not seem to me that it is appropriate or fair to do so in present circumstances. The issue of causation and measure of damages should I believe be argued as another free-standing preliminary issue before any hearing on quantum. As Lloyd LJ said, this involves a determination of the basis on which damages should be payable although not the details of the amounts. The defendant and Pannone now know what the argument is but it should be properly presented either with points of claim and defence on the issue or, at any rate, with a list of agreed issues. The claim is for a sum in excess of £50 million and it is proportionate to deal with it in this way rather than simply to uphold or dismiss it without full opportunity given to both sides to argue it. I bear in mind Mr.

> Pymont's stricture that owing to the terms of Master Teverson's order he has not had the opportunity to address the evidence relevant to his case on causation. He also relies on the observation of Mummery LJ in *Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceutical Company 100 Ltd* [2006] EWCA Civ 661 that summary judgment is inappropriate where,
>
> > '… even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.'
>
> …
>
> 53. I suspect that in order to support his assertion that the claim for damages for non-termination breach was already adequately pleaded Mr. Pymont made as few amendments to the existing pleading as possible. However, it seems to me that now that it has been made plain that the claimants' claim in respect of the same loss whether or not they terminated the airspace agreements the pleading is adequate for purpose. Mr. Pymont will be held to that pleading when it comes to causation and its inadequacies, if any, can be relied on in due course. All the arguments, including those already deployed before me, can therefore be adduced on causation and the basis on which damages is payable.
>
> …
>
> 55. It follows that I also propose to dismiss the claim for summary judgment. The test is whether the claimants have any reasonable prospect of success. The test is not the balance of probabilities. After a day and a half of difficult legal argument, I am not prepared to hold that the claimants have no reasonable prospect of success but the claimants must decide for themselves whether to garner all the expert evidence that they say they need."

22. Proudman J's reasons for holding that, taking into account what had actually happened, all of the Airspace Agreements had lapsed for reasons unconnected with Texaco's breach were as follows:

> "44. On the basis that the defendant is entitled to look at what actually happened to see if the condition attached to the airspace agreements of obtaining planning permission could in the events which have actually happened have been performed, Mr. Pymont relied on three specific reasons why planning permission was not obtained. All of such reasons were, he says, caused by the defendant's breach. First, he said that the

claimants' joint venture partners in relation to three of the sites (three connected companies all with 'Weybridge' in their names who had taken upon themselves the obligation to obtain planning permission and whose funding was crucial to the development) pulled out as soon as they heard of the transfers. Mr. Lynch of the claimants said in a witness statement that Weybridge ceased to do any further work under the joint venture agreements, 'because it found out that [the defendant] had sold its interests'.

45. However there is no arguable case to this effect. The joint venture agreements were made after the transfers and Mr. Lynch agreed under cross-examination that Weybridge was aware of the transfers from the outset. Mr. Lynch then said that Weybridge pulled out when it found out that 'there were problems coming to the surface with the new owners of the site'. The problems he referred to were difficulty in obtaining access to the Blue Star and Forty Avenue sites which were not of course subject to the joint venture agreements at all. In any event the option periods for the joint venture sites as extended lapsed on 24 January 2006, 24 January 2006 and the 30 December 2005 respectively and no applications for planning permission were made at all in relation to any of them, so that the airspace agreements lapsed on expiry of the relevant option periods. Denial of access in relation to Blue Star and Forty Avenue took place on 25 November 2005 although the required steps to obtain access (formal request from the defendant) had not been taken and the claimants' representative Mr. Paul Lynch (Mr. Lynch's son) did not press the matter in any event. An e-mail dated 2 December 2005 shows that the real reason why Weybridge did not pursue any application for planning permission was their commercial view of the risk inherent in the applications themselves. I referred to this point in my judgment.

46. Secondly, Mr. Pymont relied on the denial of access itself. However, this too is a hopeless allegation on the facts. For a start, the claimants' agents made a mistake about the final option dates so that they were too late in any event to obtain the required surveys before obtaining planning permission. The final date for doing so was 4 November whereas they thought it was 25 November. Secondly, even on the basis of 25 November, the claimants' agents drew attention to the supposed urgency of that date but Mr. Paul Lynch did not respond or press for access. In any event it is hard to see how denial of access could be a breach arising from the transfer of the sites as opposed to a free-standing breach.

47. Mr. Pymont's third point was that planning permission was not obtained for the Clerkenwell site because of complaints by

> Azure that it had not received a copy of the planning application which caused delay. However, the reason no notice was given to Azure was nothing to do with the transfer to Azure. The claimants knew of the transfer and the fact that Azure had to be notified but, as Mr. Lynch accepted under cross-examination, the reason notice was not given was because of the claimants' mistake. In any event, the reason the claimants lost Clerkenwell was simply that although they knew that they could preserve the airspace agreements by launching an application against non-determination before the deadline they failed to do so, either as a result of their own choice or because of a mistake regarding the deadline date.
>
> 48. Mr. Blair's evidence in support of summary judgment goes into considerable detail, taking each site independently, as to the lack of merit in the claimants' claim, alleging that they have no realistic prospect of establishing that the loss of the benefit of the airspace agreements was caused by the defendant's breach.
>
> 49. I agree that, taking into account what actually happened, all the airspace agreements lapsed for reasons unconnected with the breach consisting of transfer without reservation of a right by Texaco to perform. However, all this is predicated on the failure of Mr. Pymont's argument as to how damages should be assessed on a non-termination breach."

23. Following the third hearing on 26 and 27 July 2013, Proudman J gave her third judgment on 30 July 2013 (30 July 2013). In summary, she held as follows:

    i) Contrary to the Claimants' claim that they had lost an opportunity to make profits by performing the Airspace Agreements which should be valued as at the date of the breach, the Claimants had not lost any opportunity since they made every attempt to realise their opportunity and had failed on grounds which had nothing to do with Texaco's breach. Accordingly, damages should be assessed in the light of what had actually happened, rather than as at date of the breach and ignoring what had happened subsequently. On that basis, the Claimants had suffered no loss.

    ii) The Claimants' attempt to contend that they would have had a real prospect of obtaining planning permission if Texaco had not breached the Airspace Agreements was an abuse of process, because it was an impermissible attempt to re-litigate matters which had already been decided against them in the first and second judgments.

    iii) The Claimants' alternative claim for wasted expenditure failed for essentially the same reasons.

24. Proudman J's reasons for holding that, having regard to what had actually happened, the Claimants had suffered no loss were encapsulated at [18]:

> "My immediate reaction is that the claimants' assertion is an unattractive one. In circumstances in which they deliberately kept the airspace agreements alive, waiting to see what would happen, it seems unmeritorious for the claimants to pursue the point that their loss was suffered on 21 June 2005. They seek to adduce expert evidence to ascertain what might hypothetically have happened as to planning permission looked at from 21 June 2005 when what actually happened is in evidence and I have made findings about it. The claimants' case now is that they lost an opportunity, or a chance, which must be valued as at the date of breach while I have found that they did not lose any opportunity since they made every attempt to realise their opportunity and failed on grounds which had nothing to do with Texaco's breach. I held that the claimants, in affirming the contract, took into account as a conscious strategy the possibility that either Texaco would in practice perform through leaning on Azure or, if it did not, that the claimants would be in a better position to claim damages at the end of the day if they obtained planning permission."

25. Proudman J's reasons for holding that the Claimants' attempt to contend that they would have had a real prospect of obtaining planning permission if Texaco had not breached the Airspace Agreements was an abuse of process were as follows:

> "42. In any event, it seems to me that it would be an abuse of process to try and re-run arguments already made in the same action (albeit at different hearings on different issues) when I have felt able to make findings based on the evidence which I heard and the documents I saw. To my mind there are many instances in which the claimants seek to do this on the facts, relating to their ability to obtain planning permission. For example in relation to the Clerkenwell site (on which Mr. Pymont relies, presumably as the high point of his case) Mr. Lynch suggested in evidence that the application for planning permission might have been submitted earlier but for difficulties in notifying Azure. I held in my first judgment that the failure to notify Azure was the claimants' fault; see [90]. In April, the claimants tried to run the same point and I again rejected it, holding that loss of the airspace agreement was unconnected with the breach: see [47] and [49] of my second judgment. The point is raised yet again, more elaborately, in [19] of the claimants' points of claim, but in my judgment it is not open to them to have another bite of the cherry and (as he says he intends to) for Mr. Pymont to adduce further evidence as this would be an abuse of the processes of the court.
>
> <u>What happened was in consequence of the breach and cannot be determinative of what would have happened if Texaco had not been in breach</u>

43. In the points of claim Mr. Pymont goes through each of the sites, attempting to demonstrate how, if things had been different, there is an arguable case that the claimants would have obtained planning permission.

44. Mr. Pymont relies on Mr. Dixon's assurances that the claimants' position was protected notwithstanding the transfers, saying that if the claimants had not been misled by Mr. Dixon and had been apprised of the true position things would have been different. I cannot see how he can so rely in the face of Mr. Lynch's evidence and my finding that the claimants knew the material facts regarding the breach. On one hypothesis the claimants took the assurances as meaning that notwithstanding the absence of a right at law to perform, nevertheless Texaco would be able to lean on its assignees to perform, in which case the claimants consciously elected to proceed with their attempts to obtain planning permission in the hope that Texaco would be able to perform. Alternatively, the claimants took the assurances to mean that they were legally protected, in which case there would have been no difference between the world in which there had been a breach and a world in which there had not. There would have been no difference irrespective of the breach. I cannot see how Mr. Dixon's assurances were part and parcel of subsequent events dependent on the breach.

45. Secondly, the claimants in the points of claim allege that the claimants believe that Texaco would extend time limits in the airspace agreements. Again, I do not see how subsequent events can be said to have been affected by the breach. In the world where there had been no breach the claimants would have acted in the same way. In any event, all the documentation shows that the claimants were conscious of the deadlines for planning permission and tried to meet them. They did not ask for any extension of time. I note that it is fundamental to Mr. Pymont's case that the assessment of damages is to be carried out by reference to the parties' legal rights and obligations and not by reference to expectations that they might act so as to confer gratuitous benefits. Finally, it is trite law that where there has been a breach, although the guilty party must be assumed to have acted so as not to commit the breach, it is also assumed that he acts in the manner most favourable to himself. Accordingly, Texaco would have assigned the sites, but making sure that its assignees were legally bound. In such circumstances it is obvious that the assignees would not have permitted Texaco to extend time limits in the relaxed way suggested.

46. It seems to me that Mr. Pymont's argument is just an attempt to reargue old ground and is an abuse of process. I am satisfied

> by Mr. Ayliffe's responses in Pannone's points of defence to the allegations made in relation to each site but I do not need to go over them. It is plain that the claimants were aware of the need to abide by the contractual deadlines and in any event they elected to affirm the contracts."

26. Proudman J granted the Claimants permission to appeal, but no appeal was brought. The Claimants says that this was because (i) they considered that it would be difficult to appeal Proudman J's conclusion in relation to affirmation and (ii) they did not have sufficient funds to pursue an appeal.

The present proceedings

27. The present proceedings were issued on 26 July 2011 and subsequently stayed pending the outcome of the claim against Texaco. The stay was lifted on 30 August 2013.

28. The Claimants claim damages against the Defendants for breaches of their duties of care. The Claimants allege that the Defendants negligently failed to advise the Claimants about their right to elect to terminate the Airspace Agreements prior to March 2006. The Claimants' case is that, if the Defendants had advised about the potential repudiatory breach of the Airspace Agreements by Texaco and that the Claimants could either continue to perform, notwithstanding the fact that Azure and Somerfield were probably not bound to comply with the Agreements, or terminate the Agreements and claim damages for loss of the chance of performing, the Claimants would have elected to terminate and sue for damages, and would not have continued their efforts to secure planning permission.

29. The heads of loss for which damages are claimed by the Claimants are set out in paragraphs 62 and 63 of the Particulars of Claim as follows:

    i) loss of the opportunity to terminate the Airspace Agreements and to bring a claim for damages for loss of the chance of securing planning permission and developing the sites for profit, alternatively for the expenditure wasted prior to the termination of the Agreements (paragraph 62(1));

    ii) wasted expenditure incurred in continuing to perform the Agreements after 21 June 2005 (paragraph 62(2));

    iii) costs incurred in attempting to mitigate the loss suffered by bringing the claim against Texaco (paragraph 63).

30. By the present application, the Defendants seek to strike out, alternatively to obtain summary judgment dismissing, the claim to the first of these heads of loss. For the avoidance of doubt, the Defendants all deny breach of their duties, but they accept that that is an issue for trial.

<u>Assessment of damages for professional negligence</u>

31. It is convenient before turning to the Defendants' applications to address an area of law which underlies both of them. This is the correct approach to the assessment of

damages for breach of contract, and specifically professional negligence. Although I was addressed at some length on this topic, I did not detect any real difference between the parties as to the applicable principles, as opposed to their application to the facts of the present case. There are two sets of principles which are relevant.

32. The first set of principles concerns the date of assessment. For present purposes, these may be summarised as follows:

    i) The overriding principle in any claim for contractual damages is that they are compensatory. The damages should represent the value of the contractual benefit of which the claimant has been deprived by the breach of contract.

    ii) *Prima facie* damages are to be assessed as at the date of breach without regard to subsequent events.

    iii) It is possible to depart from that rule where it is necessary to ensure that the claimant is not over-compensated or under-compensated having regard to events which have occurred since the date of breach, in particular where matters which were contingencies at the date of breach have become established facts subsequently.

    iv) One way of departing from the rule where this is necessary is to assess the damages as at a later date. Another approach is to assess damages as at the date of breach, but in the light of subsequent events.

33. The leading authorities in the general law of contract for these propositions are *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12, [2007] 2 AC 353 and *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] UKHL 2, [2001] 1 WLR 143. It is clear that the same principles apply to claims for professional negligence: see *Kennedy v Van Emden* [1996] PNLR 409, *Charles v Hugh James Jones & Jenkins* [2000] 1 WLR 1278, *Dudarec v Andrews* [2006] EWCA Civ 256, [2006] 1 WLR 3002 and *Whitehead v Searle* [2008] EWCA Civ 285, [2009] 1 WLR 549.

34. The second set of principles concerns the quantification of damages in claims for professional negligence against solicitors and barristers where the lawyer's negligence has resulted in their client losing the chance to bring a claim against a third party. In such a case, the court must value the chance that has been lost. That requires the court to assess the client's prospects of success. If the underlying claim was bound to fail, it will have had no value and the claimant will have lost nothing as a result of the defendant's negligence: see in particular *Dixon v Clement Jones* [2004] EWCA Civ 1005, [2005] PNLR 6 at [24]-[30] (Rix LJ).

<u>The Defendants' application to strike out</u>

35. The Defendants' application to strike out paragraph 62(1) of the Particulars of Claim is made under CPR r. 3.4(2)(b). This provides that the court may strike out a claim if it is an abuse of process. One basis upon which a claim may be struck out as an abuse of process is if it amounts to a collateral attack upon a previous judgment. The Defendants contend that paragraph 62(1) amounts to collateral attack upon the judgments of Proudman J in the Texaco proceedings.

The law

36. The law on collateral attack was reviewed by Sir Andrew Morritt V-C, with whom Potter and Hale LJJ agreed, in *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1 at [28]-[38]. The Vice-Chancellor concluded at [38] the cases established the following propositions:

> *"*(a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of process of the court
>
> (b) If the earlier decision is that of a court exercising a criminal jurisdiction then, because of the terms of sections 11 to 13 of the Civil Evidence Act 1968, the conviction will be conclusive in the case of later defamation proceedings but will constitute prima facie evidence only in the case of other civil proceedings. (It is not necessary for us to express any view as to whether the evidence to displace such presumption must satisfy the test formulated by Lord Cairns LC in *Phosphate Sewage Co Ltd v Molleson* 4 App Cas 801, 814, cf the cases referred to in paragraphs 32, 33 and 35 above.)
>
> (c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings.
>
> (d) If the parties to the later civil proceedings were not parties or privies of those who were parties to the earlier proceedings then it will only be an abuse of process of the court to challenge the factual findings and conclusions of a judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such a re-litigation would bring the administration of justice into disrepute.*"*

37. The test formulated by Lord Cairns LC in *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App Cas 801, 814 to which the Vice Chancellor referred was as follows:

> "My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been, ascertained by me before."

I note that all the cases in which this test had been applied which were discussed by Morritt V-C were cases in which the earlier proceedings were proceedings in which the relevant party had been convicted of a criminal offence. Furthermore, it does not appear to me that Morritt V-C treated this test as applicable where the earlier proceedings were civil proceedings which did not involve the same parties (or their privies) as the later proceedings.

38. The doctrine prohibiting collateral attack has been applied in a number of claims for professional negligence following earlier litigation. Counsel for KS, who argued this part of the application on behalf of all the Defendants, particularly relied on the

decision of the Court of Appeal in *Laing v Taylor Walton* [2007] EWCA Civ 1146, [2008] PNLR 11. In that case there had previously been proceedings between Mr Laing and a Mr Watson. The key issue in the first proceedings was what had been agreed between Mr Laing and Mr Watson with regard to a proposed development and a shareholding in a company called NFI which had been formed to promote that development. Mr Watson claimed that it had been agreed that he would be entitled, either directly or through a company called Burkle, both to a 12.5% share in the profits of the development and to a beneficial interest in a 12.5% shareholding in NFI. Mr Laing claimed that it had been agreed that Mr Watson was to be entitled to 12.5% of the profits, with his interest in the 12.5% shareholding being only as security for that share of profits. The judge at the first trial, after hearing evidence from Mr Laing and Mr Watson, concluded that Mr Watson's account of what had been agreed was true. There was no appeal by Mr Laing against that conclusion.

39. Subsequently Mr Laing brought proceedings for professional negligence against a firm of solicitors whose partner Mr Kelly had drafted two written agreements between Mr Laing and Mr Watson. In essence, Mr Laing alleged that the written agreements failed properly to reflect what had been agreed between Mr Laing and Mr Watson as Mr Laing had instructed. Mr Laing expressly alleged that the findings of the judge in the first case had been wrong and that Mr Laing was exposed to the risk of such adverse findings by the defendants' breach of duty. The defendants applied to strike out the claim as an abuse of process. The application was unsuccessful at first instance, but succeeded on appeal.

40. The leading judgment was given by Buxton LJ, who held that the claim was an abuse of process for the following reasons:

"**Bringing the administration of justice into disrepute**

> 25. I therefore conclude that it would bring the administration of justice into disrepute if Mr Laing were to be permitted in the second claim to advance exactly the same case as was tried and rejected by H.H. Judge Thornton. If H.H. Judge Thornton's judgment was to be disturbed, the proper course was to appeal, rather than seek to have it in effect reversed by a court not of superior but of concurrent jurisdiction hearing the second claim. That the second claim is in substance an attempt to reverse H.H. Judge Thornton is important in the context of wider principles of finality of judgments. In *Hunter*, at 545D, Lord Diplock said that the proper course to upset the decision of a court of first instance was by way of appeal. Where, wholly exceptionally, a collateral, first instance, action can be brought it has to be based on new evidence, that must be such as entirely changes the aspect of the case: see per Earl Cairns L.C. in *Phosphate Sewage v Molleson* (1879) 4 App. Cas. 801 at 814. The second claim in our case not merely falls short of that standard, but relies on no new evidence at all.
>
> 26. It is however argued that all of that is irrelevant, or at least not conclusive, where the second claim is, unlike the claim in *Phosphate Sewage*, not between the same parties. The

appellant relied on, and Langley J. was impressed by, observations by Lord Hoffmann in *Hall v Simons* [2002] 1 A.C. 615 at 705H, on the status of claims of abuse of process in negligence actions against solicitors involved in earlier proceedings:

> 'I see no objection on grounds of public interest to a claim that a civil case was lost because of the negligence of the advocate, merely because the case went to a full trial. In such a case the plaintiff accepts that the decision is res judicata and binding upon him. He claims, however, that if the right arguments had been used or evidence called, it would have been decided differently.'

In the present case, Mr Laing perforce accepts that the decision of H.H. Judge Thornton is binding on him. The obligation to Mr Watson placed on him by that judgment is the loss that he seeks to recover in the second claim against TW. That judgment against him was only obtained by Mr Watson because of the negligence of Mr Kelly. Accordingly, the second claim does not seek to reverse the decision of H.H. Judge Thornton, but rather seeks to recover from TW the cost to Mr Laing of that decision.

27. I of course agree that it will not necessarily, or perhaps usually, be a valid objection to a claim for solicitors' negligence in or about litigation that the claim asserts matters different from those decided in that litigation. That is so not only of cases where the solicitors have made what might be called administrative errors that have prevented the earlier proceedings from being properly pursued or their outcome challenged by the proper means (e.g. *Walpole v Partridge & Wilson* [1994] A.C. 106); but also where errors in assembling the evidence or understanding the law are alleged to have led to an incorrect result, as was the case in *Hall v Simons* itself. But the present case is significantly different from those just mentioned. The difference is that, as shown in [19] above, in order to succeed in the new claim Mr Laing has to demonstrate not only that the decision of H.H. Judge Thornton was wrong, but also that it was wrong because it wrongly assessed the very matters that are relied on in support of the new claim. That is an abusive relitigation of H.H. Judge Thornton's decision not by appeal but in collateral proceedings, and in substance if not strictly in form falls foul of the *Phosphate Sewage* rule.

…

Unfairness

30. TW claimed that it would in any event be manifestly unfair to them to permit Mr Laing to reopen the issue between himself and Mr Watson. Mr Watson had claimed privilege for various documents that might assist the case; and Mr Watson himself had indicated that he would not attend a further trial. I doubt whether there are any other documents that could make a substantial addition to what is already before the court, but the absence of Mr Watson from the trial of the new claim is significant. H.H. Judge Thornton based his conclusions largely on his acceptance of the evidence of Mr Watson, which the trial court in the new claim will be deprived of. I am not entirely certain that this issue, taken on its own, would demonstrate manifest unfairness to TW; but what it does very firmly underline is that the new claim will indeed be a re-run of the first case, in both of which proceedings Mr Watson, for exactly the same reasons in each case, is a central witness.

31. On the other side of the coin it was argued that it was unfair to Mr Laing, and possibly improper on the part of TW, that when Mr Kelly, a partner in TW, supported the case that Mr Laing seeks to put in the new claim TW should, as it was put, seek to shield themselves from that claim by relying on the judgment of H.H. Judge Thornton. There might be something in that complaint if Mr Kelly's evidence had not been available to H.H. Judge Thornton, who had a clear view of the role that Mr Kelly had played. The limited assistance that Mr Kelly gave to Mr Laing's case, and the fact, found by H.H. Judge Thornton, that he was unaware of a central issue between Mr Watson and Mr Laing, Mr Watson's first agreement, shows that it is not improper for unfair for TW to rely on the findings of H.H. Judge Thornton."

41. Moses LJ agreed with Buxton LJ and added:

"36. I should explain why I conclude that the challenge is impermissible. Allegations of negligence during the course of litigation, against solicitors or advocates, will normally involve an attempt by a claimant to demonstrate that the previous conclusion of the court would have been different, absent negligence on the part of the lawyer. In many cases it will, indeed, be necessary to do so in order to prove causation and loss. The paradigm is the loss of a case due to negligent advocacy. But to bring such proceedings for negligence does not bring the administration of justice in to disrepute; *Hall v Simons* teaches to the contrary.

37. But such cases differ from the instant appeal in two important respects. Firstly, in the normal run of case, the impugned conduct of the lawyer is independent of the factual conclusions of the court; those conclusions are only relevant to prove causation and loss. His case does not, in reality, involve any

> challenge to the findings or conclusion of the court. He merely contends that, in the light of the negligence of which he now complains, the court's conclusions would have been different. But this not so in the present case. As Buxton L.J. has demonstrated …, the claimant cannot establish that his adviser's drafting of the agreements was negligent without challenging the judge's findings as to credibility and fact. …
>
> 38. Secondly, generally in actions against legal advisers arising out of litigation, the losing party's allegations of negligence could not have been advanced in the case which he lost. They arise only after the case is concluded. But in the present case, the claimant had every opportunity during the course of the trial to raise, as he would have it, the inadequate drafting. …"

42. Laws LJ agreed with both judgments.

43. It appears from Buxton LJ's judgment that he treated the test in *Phosphate Sewage* as applicable even though the earlier proceedings were not for a criminal offence and even though the later proceedings were not between the same parties (or their privies). I have to say that I am doubtful whether this is correct, but in my judgment it is binding on me. Even if Buxton LJ was wrong about that, however, it does not seem to me substantially to affect Buxton LJ's reasoning with regard to the criteria stated by Morritt V-C in *Bairstow* at [38(d)].

Application to the present case

44. *Does paragraph 62(1) involve a collateral attack on Proudman J's findings?* Unlike Mr Laing's pleading against the solicitors in the *Laing* case, paragraph 62(1) does not explicitly attack Proudman J's findings in the Texaco proceedings. Indeed, it does not mention those findings. The question whether a claim is an abuse of process because it amounts to a collateral attack upon a previous court decision must be one of substance, not form, however.

45. Counsel for KS submitted that, as a matter of substance, paragraph 62(1) did amount to a collateral attack on Proudman J's findings. In summary, she argued that, in order to establish their claim for lost profits, the Claimants had to prove that they had lost the opportunity to obtain planning permission, but Proudman J had found that Texaco's breaches of the Airspace Agreements had not caused the Claimants any loss because in fact the Claimants had attempted to obtain planning permission in respect of the Sites, but in each case had failed to do so for reasons unconnected with Texaco's breaches.

46. Counsel for the Claimants disputed that paragraph 62(1) involved a collateral attack on Proudman J's findings, and submitted that the true position was that it was the Defendants who were trying to rely upon her findings as an answer to paragraph 62(1). He pointed out that Proudman J was not required to decide, and did not decide, that a claim for damages for repudiatory breach of contract by Texaco would have had no value had the breach been accepted by the Claimants in the late summer or autumn of 2005. Because of her conclusion that Texaco's repudiatory breach had been affirmed, the only issue which then arose was whether the Claimants had a real

chance of showing that a claim for simple (non-repudiatory) breach had any value. This required assessment of a counter-factual scenario as to what would have happened if Texaco had included a provision within the relevant agreements with Somerfield and Azure which protected the Claimants' rights. By contrast, he argued, the counter-factual scenario which arose in the current proceedings was different and required an assessment of what would have happened if the Defendants had not been in breach of their duty. In such circumstances, the Claimants' case was that the Claimants would have terminated the agreements with Texaco, the Claimants would not have continued with any attempts to obtain planning permission and damages as against Texaco would have been assessed as at the date of breach and without reference to subsequent events.

47. Counsel for the Claimants submitted that it was for the party who advocated a departure from the date of breach rule for assessing damages to establish the necessary justification, relying on *Ageas (UK) Ltd v Kwik Fit (GB) Ltd* [2014] EWHC 2178 (QB) at [37] (Popplewell J). Counsel for Claimants argued that it followed that it was for the Defendants to show that damages should not be assessed as at the date of breach without regard to subsequent events and that it was the Defendants who were seeking to rely upon Proudman J's findings for that purpose.

48. In my judgment, just as the question whether a claim is a collateral attack is one of substance, not form, it does not depend on the incidence of the burden of proof. If Proudman J's findings are taken to be correct, then it must follow that the claim advanced in paragraph 62(1) is unsustainable. Accordingly, as counsel for the Claimants was constrained to accept during the course of argument, the claim advanced in paragraph 62(1) necessarily carries with it the contention that Proudman J's findings were wrong. Accordingly, I concluded that it does involve a collateral attack on those findings.

49. Before leaving this question, I should explain why I consider that this conclusion applies to all of the Sites when it might be said that two of them stand in a different position. In her first judgment, Proudman J did not make any specific findings in relation to Caledonian Road, while her only specific finding in relation to Dome was her finding at [93] that the Claimants wanted to keep an appeal on foot. In her second judgment, however, Proudman J made a general finding at [49] that, having regard to what had actually happened, *all* of the Airspace Agreements had lapsed for reasons unconnected with Texaco's breach of contract. It is convenient to note at this point that she evidently accepted Mr Blair's analysis of the evidence in relation to each Site.

50. *Would it be manifestly unfair to the Defendants?* I do not see why it would be manifestly unfair to the Defendants to be required to defend paragraph 62(1). The Defendants were not parties to the Texaco proceedings. Nor did either Mr Johnstone or Mr Woolf give evidence in those proceedings. Thus the Defendants are in the same position as any other defendant who has to defend a claim made against him.

51. *Would it bring the administration of justice into disrepute?* Counsel for KS submitted that it would bring the administration of justice into disrepute if the Claimants were permitted to re-litigate Proudman J's findings. Those findings had been based upon the evidence of Norman Lynch, which was the evidence which the Claimants had chosen to rely on, and the documentary evidence that was before the court. If the Claimants wished to contend that Proudman J's findings in the light of that evidence

were wrong, their proper remedy was to appeal. Thus, so Counsel for KS argued, there was a close parallel between the present case and *Laing*.

52. Counsel for the Claimants submitted that any claim should ordinarily be determined on its merits and that it would not bring the administration of justice into disrepute to allow paragraph 62(1) to be decided upon the true facts. The Defendants had neither been parties to, nor involved in, the Texaco proceedings. He sought to draw a parallel between the present case and *Bairstow*, where the Court of Appeal's decision on the facts was that the claim would not bring the administration of justice into disrepute and was not an abuse of process.

53. In my judgment, the answer to the question whether it would bring the administration of justice into disrepute to permit the Claimants to re-litigate the matters determined by Proudman J depends on two factors. The first is whether the Claimants had a proper opportunity to put their case on those matters before Proudman J. The second is whether the Claimants were in a position realistically to challenge Proudman J's findings by means of an appeal. I will consider these in turn.

54. In my view, the Claimants did have a proper opportunity to put their case before Proudman J. It is fair to say that, as Proudman J repeatedly noted, the order made by Master Teverson was for trial only of liability and did not include causation. One can therefore understand why the Claimants said during the hearing before Proudman J, and maintain now, that they did not prepare for that trial on the basis that they needed to adduce evidence as to causation. Nevertheless, one of the issues on liability was affirmation. It is clear that the Claimants did prepare for trial on the basis that they needed to adduce evidence as to affirmation. Although it was apparently adduced for that purpose, rather than for the purpose of establishing the Claimants' case on causation, Norman Lynch did give evidence in his witness statement as to the steps the Claimants had taken to obtain planning permission after 21 June 2005 and he was cross-examined on those matters. The Claimants did not adduce evidence as to the legal advice they had received, but that was their choice. As Proudman J pointed out, there was an inevitable overlap between the issues of affirmation and causation, and this became particularly significant once the Claimants decided to advance their alternative claim for non-repudiatory breach during the course of the first hearing.

55. If the Claimants were taken by surprise by the course taken by the first hearing, their remedy was to seek to adduce further evidence at the second hearing, but they did not do so. On the contrary, as Proudman J was careful to point out, at the second hearing counsel then appearing for the Claimants took his stand on the proposition that damages should be assessed as at the date of the breach and later events were legally irrelevant. That argument ultimately failed. Even so, Proudman J considered the Claimants' arguments which had been advanced as to why planning permission had not been obtained and dismissed them on the merits in her second judgment at [44]-[48]. Nor did the Claimants seek to adduce further evidence at the third hearing, even though Proudman J appears to have left open the possibility of the Claimants obtaining expert evidence in her second judgment at [55]. She again considered and dismissed the Claimants' arguments on the merits in her third judgment at [43]-[46], albeit that she also held that the attempt to re-argue these matters was an abuse of process.

56. As to whether the Claimants were realistically in a position to challenge Proudman J's findings on appeal, I have set out above the reasons the Claimants have given for not appealing even though they were given permission. In my judgment, the claim that the Claimants did not have the funds to pursue an appeal has not been substantiated, but in event it cannot justify the Claimants suing the Defendants instead. As for the suggestion that the Claimants perceived difficulty in challenging Proudman J's finding of affirmation, I have no difficulty in accepting the credibility of that explanation, but it does not explain why the Claimants did not appeal against Proudman J's dismissal of their claim for non-termination damages. If Proudman J's findings were wrong, as the Claimants now contend, then they had a viable claim for damages against Texaco.

57. In my judgment, given that the Claimants did have a proper opportunity to put their case on the matters in question before Proudman J and that they were realistically in a position to challenge her findings on appeal, it would bring the administration of justice into disrepute if the Claimants were permitted to challenge those findings in these proceedings rather than by an appeal in the Texaco proceedings.

58. *Does the new evidence satisfy the* Phosphate Sewage *test?* In response to the Defendants' application, the Claimants have served witness statements from both Norman Lynch and Paul Lynch. Norman Lynch deals in particular with the legal advice which the Claimants received. He also says that Paul Lynch and Steve Thompson were responsible for the day to day work regarding obtaining planning permission. Paul Lynch addresses the position regarding planning permission with respect to each of the Sites in detail. He also exhibits a preliminary expert report from Nigel Bennett of Metropolis Planning and Design LPP in which Mr Bennett opines that, as at 21 June 2005, the Claimants' prospects of obtaining satisfactory planning permission in respect of the Sites ranged from good to excellent.

59. In my judgment this evidence does not satisfy the *Phosphate Sewage* test. While it is fair to say that Paul Lynch's statement does contain some evidence in relation to certain Sites which was not placed before Proudman J, as will become clear when I deal with the Defendants' summary judgment application, it does not entirely change the aspect of the case, nor is it evidence which could not have been obtained with reasonable diligence at the time of the Texaco proceedings. As for Mr Bennett's report, this suffers from the fundamental defect that, by and large, it only considers the position as at 21 June 2005.

60. *Conclusion*. Accordingly, I conclude that paragraph 62(1) of the Particulars of Claim is an abuse of process and should be struck out.

The Defendants' application for summary judgment

61. The Defendants contend that, even if paragraph 62(1) of the Particulars of Claim is not struck out as an abuse of process, the Claimants' claim for that head of loss should be summarily dismissed.

Principles applicable to summary judgment applications

62. There is no dispute about these. They were conveniently summarised by Lewison J (as he then was) in the context of defendants' applications in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]:

> "As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8].
>
> iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*.
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10].
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550.
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63.

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

63. This summary was cited with approval by Etherton LJ (as he then was, with whom Sullivan LJ and Wilson LJ, as he then was, agreed) in *AC Ward & Son v Catlin (Five) Ltd* [2009] EWCA Civ 1098, [2010] Lloyds Rep IR 301 at [24].

The rule in Hollington v Hewthorn

64. For the purposes of the Defendants' application for summary judgment, Counsel for the Claimants submitted that the judgments of Proudman J were inadmissible as evidence of the facts found by virtue of the rule in *Hollington v Hewthorn*: see *Bairstow* at [15]-[27] (Morritt V-C). Counsel for FSI, who argued this part of the case on behalf of all the Defendants, did not contest this proposition. Instead, he contended that Proudman J's findings were amply supported by the evidence before her, most of which had also been put before this court. The Claimants themselves had put in evidence Norman Lynch's witness statement in the Texaco proceedings, the transcript of his cross-examination and some of the documents referred to. The Defendants had put in evidence Mr Blair's statement. Although not all of the documents which were in evidence before Proudman J had been put in evidence before this court, in most cases the key passages were quoted, or at least summarised, in the transcript and/or by Mr Blair. Counsel for the Claimants did not dispute that the Defendants were entitled to rely upon the underlying evidence in so far as it was before the court, but submitted that caution was required in so far as the underlying evidence was incomplete. I accept that submission.

Is there a real prospect of success?

65. The Defendants contend that the Claimants have no real prospect of succeeding in the claim for damages in paragraph 62(1) of the Particulars of Claim since, having regard to the events which actually happened, the value of the lost chance was nil. In short, what had actually happened after 21 June 2005 was that the Claimants had continued to attempt to obtain satisfactory planning permission until March-April 2006, behaving in exactly the same way as if there had been no breach of contract by Texaco, but they had failed for reasons unconnected with Texaco's breach. In those circumstances, the court should depart from the date of breach rule for assessment of damages, since applying that rule would give the Claimants a windfall.

66. Counsel for the Claimants did not seriously dispute that, if subsequent events demonstrated that the Claimants had not had a real chance of successfully obtaining planning permission for reasons unconnected with Texaco's breach, then this would be a proper case in which to depart from the date of breach rule. He submitted, however, that the evidence established that the Claimants had a real prospect of establishing that they had had a real chance of getting planning permission even if events after 21 June 2005 were taken into account.

67. In considering whether the Claimants have a real prospect of success, it is necessary to consider the evidence in relation to each of the Sites individually. In each case, I shall refer to Proudman J's findings, not as evidence of the facts found, but simply as a convenient starting point for the analysis of whether the Claimants have a real prospect of establishing that they have lost a chance of value because the facts are otherwise than as she found.

68. *Clerkenwell Road*. Proudman J found at [90] of her first judgment that planning permission was refused after the expiry of the option and that the application was not considered before expiry because Azure was not notified of the application through the fault of the Claimants' agents. She gave further reasons for this conclusion in her second judgment at [47]. Her findings are supported by Mr Blair's evidence in paragraphs 31-36 of his witness statement, which analyse the documentary evidence and the evidence of Norman Lynch at the first hearing of the Texaco proceedings. In summary, he says that an application for planning permission was made on 8 September 2005, but it was not determined until 15 February 2006, and no appeal on the ground of non-determination was filed in time. Norman Lynch suggested in his evidence that the application was delayed by a failure to notify Azure, but accepted that the Claimants had failed to ensure that this was done.

69. Paul Lynch deals with this Site in paragraphs 13-20 of his witness statement. His account is consistent with Mr Blair's analysis. He explains that the application had been due for consideration by the local authority at a planning committee meeting on 15 December 2005, but that the application was removed from the agenda because Azure complained that it had not been notified.

70. Counsel for the Claimants relied upon clause 4.2.7.1 of the relevant Airspace Agreement, which provides that Texaco shall:

> "at the request and cost of the Developer support the Developer in making and pursuing a Planning Application and/or an Appeal and/or Proceedings".

He submitted that, if Azure had been adequately bound by Texaco, Azure would have been subject to a duty to cooperate with the Claimants and therefore would not have been able to rely upon not being notified of the application to delay the decision.

71. I do not accept this submission. Clause 4.2.7.1 requires Texaco to support the Developer "at the request of … the Developer". Let it be assumed that the same obligation was imposed on Azure. That would not relieve the Claimants of the obligation to notify Azure of the application. On the contrary, Azure would only be obliged to support the application if notified of it and requested to do so. Accordingly, I conclude that the Claimants have no real prospect of successfully establishing that they have lost a real chance to obtain planning permission in relation to this Site.

72. *Caledonian Road*. As noted above, Proudman J did not make any specific finding in relation to this Site. Mr Blair deals with this Site at paragraphs 54-60. In summary, he says that an application for planning permission was made on 19 October 2005 which was refused on 21 December 2005. He suggests that an appeal purportedly filed against this refusal on 20 January 2006 was not in fact filed until after 26 January 2006 and was too late. Furthermore, the Claimants were obliged by clause 4.2.3.A of the relevant Airspace Agreement to obtain an opinion of planning counsel that an appeal had a greater than 50% chance of success, but had not done so. He also says that the appeal was withdrawn on about 13 April 2006, that Norman Lynch's evidence was that it was withdrawn on legal advice and he draws the inference that the Appellants had been advised that the appeal was hopeless.

73. Paul Lynch deals with this Site in paragraphs 24-27 of his witness statement. He provides evidence that the appeal was indeed filed on 20 January 2006. He also says that, following the advice received by the Claimants from Mr Woolf and leading counsel in March 2006, he instructed the Claimants' planning consultants to withdraw the appeal and they did.

74. Counsel for the Claimants took issue with Mr Blair's interpretation of clause 4.2.3.A of the relevant Airspace Agreement (which was also the interpretation which had formed the basis for some cross-examination of Norman Lynch). This provides:

> "If a Planning Application is refused by the Local Planning Authority then the Developer shall (provided that Planning Counsel has advised that such an appeal has more than a 50% chance of being successful) at its own expense as soon as practicable lodge an appeal with the Secretary of State and prosecute the Appeal with all reasonable speed and diligence."

Counsel submitted that the correct interpretation of this clause was that the Claimants were obliged to file an appeal if planning counsel advised that it had a greater than 50% chance of success, but not prevented from doing so if the prospects were lower.

75. Counsel for FSI did not seriously dispute that this was at least arguably correct. Accordingly, I conclude that the Claimants have a real prospect of success in relation

to this Site. I would point out, however, that this is no reason why this point could not have been taken by the Claimants before Proudman J. Nor is there any reason why the evidence as to when the appeal was filed could not have been adduced.

76. *Hove*. Proudman J found at [93] of her first judgment that no valid planning permission was obtained through the fault of the Claimants. Her finding is supported by Mr Blair's evidence in paragraphs 42-47 of his witness statement. In summary, an application for planning permission was filed on 30 November 2005, one day after the last day for filing an application eight weeks before the expiry of the option. Mr Blair suggests that this was due to a mistake by the Claimants. Furthermore, he says that the original application was defective and this was not corrected until 13 December 2005. He also says that an appeal by the Claimants filed on 24 January 2006 was premature and invalid due to the omission of documents. Finally, Mr Blair points out that Norman Lynch accepted in cross-examination that the fault lay with the Claimants and not with Texaco.

77. Paul Lynch deals with this Site in paragraphs 28-34 of his witness statement. He says the planning application is dated 28 November 2005. It can be seen from his exhibit that this is correct, but also that the application is stamped "Received 30 November 2005" on every page. Counsel for the Claimants submitted that this was not conclusive as to when it was in fact received by the planning authority. Paul Lynch does not say that it was filed on any other date, however. Thus he does not contradict Mr Blair's evidence. Nor does Paul Lynch address the point made by Mr Blair about the defect in the original application.

78. Paul Lynch also says that an appeal was filed on 23 January 2006, which would have been on time if the application was correctly filed on 28 November 2005. He does not address the point made by Mr Blair about the defect in the appeal. In any event, the appeal was premature if the application was not filed until 30 November 2005. He goes on to say that the Claimants gave instructions for the appeal to be withdrawn on 31 March 2006, following the advice received, but that does not assist the Claimants if the appeal was premature. Accordingly, I conclude that the Claimants have no real prospect of success in relation to this Site.

79. *Blue Star and Forty Avenue*. Proudman J found at [91]-[92] and [96] of her first judgment and [45]-[46] of her second judgment that no satisfactory planning permission was obtained for these Sites by the expiry of the option period and that this was not the fault of Texaco. Her finding is supported by Mr Blair's evidence in paragraphs 61-70 of his witness statement. In summary, he says that no application for planning permission was made in respect of these Sites. He also says that, in so far the delay was caused by difficulties in getting access to the Sites for a sound survey, as suggested by Norman Lynch in his evidence, this was the Claimants' fault, not Texaco's. In short, he suggests that this was because the Claimants' acoustic consultant turned up at the Sites without a prior appointment and therefore was refused access.

80. Paul Lynch deals with these Sites in paragraphs 35-46 of his witness statement. His evidence is broadly consistent with that of Mr Blair. He attributes the Claimants' failure to apply for planning permission to their inability to obtain a sound survey. His explanation for the failure to obtain a sound survey is as follows. He says that in October 2005 he visited the managers of the filling stations at the Sites in person to

say that the Claimants' acoustic consultant would be in touch in due course to arrange an inspection. He then says that the consultant contacted him on 31 October 2005 to request him to arrange access on 2 and 3 November 2005. He then says that the consultant attempted to access the Sites on 2 November 2005, but was refused access. He does not say that between 31 October 2005 and 2 November 2005 he contacted the Sites to arrange access for the consultant on that date as the consultant had requested. It is therefore not surprising that the consultant was refused access. This cannot be attributed to any breach on the part of Texaco. Accordingly, I conclude that the Claimants have no real prospect of success in relation to this Site. It is not necessary to go into the question of the highways study mentioned by Proudman J.

81. *Dome*. Proudman J found at [93] of her first judgment that the Claimants wanted to keep an appeal on foot. Mr Blair deals with this Site in paragraphs 48-53 of his witness statement. In summary, he says that the application for planning permission was filed on 2 November 2005 and not determined before the expiry of the option period on 30 December 2005. Although the Claimants filed an appeal dated 29 December 2005, it was not actually received by the planning authority until 25 January 2006. This was out of time and the option lapsed. Mr Blair also refers to Norman Lynch's evidence that the appeal was withdrawn in March 2006 (actually on 13 April 2006) on legal advice, and draws the inference that the Claimants had been advised that the appeal was hopeless.

82. Paul Lynch deals with this Site in paragraphs 47-56 of his witness statement. He says that the application for planning permission was filed "on or around 31 October 2005". More importantly, he provides good evidence that the appeal was hand delivered on 29 December 2005. He agrees that the appeal was withdrawn on 13 April 2006, but says that this was a result of the Defendants' advice.

83. Counsel for the Second Defendant submitted that Norman Lynch had accepted in cross-examination that the Claimants would not have obtained planning permission because the chief planner had changed and the new chief planner did not like tall buildings of the kind the Claimants were proposing. I do not accept this. When it was put to Norman Lynch that there was therefore no point in proceeding with the appeal, he replied that there was a point, which was that it would have extended the time for obtaining planning permission and that this was nothing unusual.

84. I conclude that the Defendants have a real prospect of success in relation to this Site. I would point out, however, that this is no reason why the evidence regarding the delivery of the appeal could not have been adduced by the Claimants before Proudman J.

85. *St Katharine's, Lansdowne and Hendon Way*. Proudman J found at [94] of her first judgment that no applications for planning permission had been submitted in respect of these Sites at all. She did not accept that this was due to Texaco's breach. She gave further reasons for this conclusion in her second judgment at [45]-[46]. Her findings are supported by the evidence of Mr Blair in paragraphs 71-78 of his witness statement, which analyse the documentary evidence and the evidence of Norman Lynch at the first hearing.

86. Paul Lynch's evidence in paragraph 60 of his witness statement is that these sites were the subject of joint venture agreements between the Third-Fifth Claimants and

three Weybridge companies dated 20 September 2005, that under those agreements Weybridge were to submit the relevant planning applications, that Weybridge failed to submit any planning applications and that he does not know why not. This confirms the accuracy of Mr Blair's analysis. In my judgment, it follows that the Claimants have no real prospect of success in relation to these Sites.

87. *KS's alternative argument*. Counsel for KS also advanced an alternative argument on causation based on the assumption that, properly advised, the Claimants would terminated the Airspace Agreements before 31 August 2005 (when KS's retainer came to an end). In the event, Texaco had waived the Claimants' breach of clause 4.2.1.1 of the Airspace Agreements relating to the Phase 2 Sites, which required the submission of planning applications within 60 days of the Agreements, on 7 September 2005. Counsel for KS argued that that would not have happened if the Agreements had already been terminated by then, and thus Texaco would have had a complete defence to any claim in respect of those Sites. Given my previous conclusions, this argument is only relevant to Caledonian Road. In answer to it, Counsel for the Claimants relied on a number of points, and in particular evidence in Norman Lynch's witness statement that there had been a prior oral agreement with Texaco. In my judgment the Claimants have a real prospect of success on this issue.

88. *Wasted expenditure*. Although paragraph 62(1) contains an alternative claim for wasted expenditure, I did not understand counsel for the Claimants to dispute, if the Claimants did not have a real prospect of successfully obtaining planning permission, then this claim would also fall.

Conclusions

89. For the reasons given above, I conclude that paragraph 62(1) of the Particulars of Claim should be struck out as an abuse of process. If I am wrong about that, I would grant the Defendants summary judgment dismissing that plea in relation to all the Sites except Caledonian Road and Dome.

Postscript

90. After this judgment had been circulated to the parties in draft, the Claimants discontinued their claim in its entirety. In those circumstances, counsel for Mr Woolf requested me not to hand down the judgment. Having regard to the fact that the claim has been discontinued (rather than compromised), leaving a minor costs issue still be resolved, and to the fact that the judgment does contain some analysis of the proper approach to an application to strike out a claim as an abuse of process because it amounts to a collateral attack on previous judicial findings, I have concluded that it is in the public interest that I should hand down the judgment despite that request.