Neutral Citation Number: [2013] EWHC 1420 (Ch)

Case No: HC12FO4239

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 May 2013

Before:

MR DANIEL ALEXANDER QC
Sitting as a Deputy Judge of the Chancery Division

- -

Between:

LONDON & MEDWAY LIMITED Claimant

- and –

SUNLEY HOLDINGS PLC Defendant

Mr Rupert Higgins (instructed by Laytons Solicitors LLP) for the Claimant
Mr Edward Knight (instructed by Rosling King LLP) for the Defendant

Hearing date: 19 May 2013

Approved Judgment

I direct that, pursuant to CPR PD39A para 6.1, no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Daniel Alexander QC

Mr Daniel Alexander QC:

Introduction and summary

1. This is the trial of a preliminary issue in an action by the claimant, London & Medway Ltd ("L&M"), a property development consultant, against the defendant, Sunley Holdings plc ("Sunley") a property developer, whereby L&M claims a share of the profits in certain developments undertaken by Sunley. The most significant claim in the action is one for a 20% share of the profits generated as a result of introducing to Sunley a property which has become a successful block of student housing at 168-190 Fulham Palace Road, London. The paper profits from that development are said by L&M now to exceed £8 million and it claims a 20% share of them. L&M says that its entitlement to a share in these profits arises pursuant to an informal agreement made in early 2008 ("the 2008 Agreement"). Sunley in response says that L&M relinquished its right to that profit share by a further agreement in 2010 ("the 2010 Agreement"). The purpose of this trial is to determine whether the 2010 Agreement had that effect.

2. That depends on what agreement was made by the parties in 2010 which, in turn, depends on the correct construction of exchanges of e-mails in the context of the correspondence and relevant factual matrix as a whole in March to April 2010. Of particular importance is an e-mail sent by Mr Simon Maine-Tucker for L&M on the afternoon of 26 April 2010. It contains substantially the terms upon which the parties say that the 2010 Agreement was made (albeit that these terms were modified slightly as certain sums before the contract was concluded). That e-mail contained no reference to any share of profits on the Fulham Palace Road development.

3. L&M's case, in a nutshell, is that silence on the point in that e-mail means that L&M's pre-existing right to a 20% share of profits from that development under the 2008 Agreement was unaffected and remains live today. Sunley says the opposite: silence on this point means that it was thereby agreed that L&M would get no profit share for that development.

4. The dispute has arisen because of the high level of informality in the contractual dealings between the parties, not only in respect of the 2010 Agreement but also previously. The style of the interchanges is chatty and there is use of shorthand phrases, some of which are ambiguous. The correspondence is more precise about the provenance and vintage of claret to be enjoyed while considering the terms of one of the proposals than about the terms themselves. This is explained by the fact that the parties have had cordial business dealings with each other going back some years. It is regrettable because the Fulham Palace Road development is now said to be significantly profitable and there is therefore potentially a large sum at stake.

Preliminary issue

5. The preliminary issue ordered to be tried by Master Marsh on 17 January 2013 is in the following terms:

> "whether by an agreement concluded between the parties on 30 April 2010, the Claimant relinquished its right to any share of profits arising out of the property development project at l68-190 Fulham Palace Road and is consequently not entitled to pursue any such claims"

6. This trial has proceeded efficiently with written evidence served on each side on which there has been no cross-examination. For L&M, there is a single witness statement of Mr Simon Maine-Tucker, who negotiated the agreement for L&M. For Sunley, there is a single witness statement of Mr James Sunley who negotiated the agreement for Sunley. Ultimately, I have not found any areas of significant factual disagreement between the parties as to the points that really matter, although at times their respective perspectives were rather different.

Law

7. The applicable legal principles are not in dispute. They have been established by high authority for many years. To speed argument, I provided the parties' counsel with a summary of them at the hearing, from which neither dissented. The following is a précis, omitting some superfluous quotation from the cases.

8. First, in order for a contract to be created there must be offer, acceptance, intention to create legal relations and consideration. While analysis in terms of offer and acceptance is the basis upon which the court should ordinarily proceed, in some cases, this traditional approach may not always be helpful: see *New Zealand Shipping Co. Ltd v. A.M.Satterthwaite & Co Ltd* [1975] AC 154 at 167. It can be appropriate to cross-check an offer/acceptance analysis against a somewhat broader view of what, objectively viewed, the parties had agreed upon. Where there are rival offers and counteroffers, the counteroffer implicitly rejects or "kills" the original offer: *Hyde v Wrench* [1840] EWHC Ch J90.

9. Second, determining the terms upon which the contract was made requires an objective analysis from the perspective of a reasonable person standing in the shoes of the offeree: *Reardon Smith Line v. Yngvar Hansen-Tangen* [1976] 1 WLR 989; *Smith v. Hughes* (1871) LR 6 QB 597 per Blackburn J.

10. Third, in interpreting a contract, it is necessary to have appropriate regard to the context in which it was made: *Reardon Smith Line v Yngvar Hansen-Tangen* [1976] 1WLR 989 ("…what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were."). For the general principles of interpretation of contracts, which apply equally to offers, see: *Investors Compensation Scheme v. West Bromwich Building Society* [1997] UKHL 28; [1998] 1 All ER 98.

11. Fourth, in order to determine what the terms of a contract are at the end of a series of communications, it is often necessary to consider not merely the communication by way of offer preceding the ultimate acceptance, but the correspondence as a whole: see examples, in the context of compromise agreements, in Foskett, The Law and Practice of Compromise at para. 3-23 to 3-24.

12. Fifth, there are circumstances in which the post-contractual conduct of the parties is relevant to determining whether a given term has been incorporated into a contract: *Great North Eastern Railway v Avon Insurance* [2001] EWCA Civ 780 [2001] 2 All ER (Comm) 526, per Longmore LJ at [29] ("If the question is whether a term was incorporated into a contract, the subsequent conduct of the parties may be very relevant to the inquiry whether such a term was or was not agreed. Mr Flaux's submissions to the contrary were, with respect, a misapplication of the principle that the subsequent conduct of the parties cannot be relied on as an aid to the

construction of the contract, see *Miller v. Whitworth Estates* [1970] A.C. 583, 603D-E per Lord Reid, 615A per Lord Wilberforce. No such principle exists in relation to the question whether an alleged term of a contract was, in fact, agreed").

13. I have borne those principles in mind in evaluating the facts and documents in this case.

Parties

14. L&M's business consists of identifying opportunities relating to real estate and exploiting them. Typically it operates by introducing the opportunity to a property trading or development company which provides the development capital in exchange for a share in the profits. Mr Maine-Tucker is the sole Director and shareholder of L&M. He is an experienced property consultant and his contribution is usually the investment of time and effort in managing the project to the point where the profit is realised. In general, his involvement does not end with the introduction of a property. He also manages it, including the planning and development process, from introduction to completion.

15. Sunley is a substantial and well-known property trading and development company based in Mayfair. At the time of the agreement in issue, it was headed by Mr John Sunley, a well-known figure in the property world. His son, James Sunley, played an increasing role in the management of the business during the period 2008-2010 and ultimately took over control from his father. However, James Sunley would refer matters to John Sunley and discuss them with him while he remained involved. John Sunley died in early 2011.

16. Mr Maine-Tucker had developed a good personal relationship with John Sunley and his family over the years. Mr Maine-Tucker regarded him as something of a mentor. Mr Maine-Tucker says that no deal that he had previously brought the Sunley had lost money and that as a whole they had provided a significant profit for Sunley. These earlier deals were done on the basis that L&M would be paid between 35% and 50% of the profits.

17. Although Mr Maine-Tucker says that his relationship with James Sunley was less cordial than with his father, there is some evidence that, as regards the effect of the 2008 Agreement, James Sunley took a less tough line with L&M than his father was adopting. Moreover, all of the correspondence between Mr Maine-Tucker and James Sunley is friendly, even though Sunley thought that Mr Maine-Tucker had cost them money. Mr Maine-Tucker is frequently referred to affectionately as "Simes".

The 2008 Agreement

18. The pleaded claim arises out of the 2008 Agreement, an oral agreement made on 9 January 2008 by Mr Maine-Tucker on behalf of L&M and James Sunley on behalf of Sunley. This agreement was later evidenced in writing by a letter dated 15 January 2008 (Sunley says it was also evidenced by a letter dated 19 December 2007).

19. By that agreement, L&M says that the parties entered into a joint venture the essence of which was that L&M would introduce property development opportunities to Sunley in exchange for a 20% share in the profits made as a result of such developments. There is a dispute as to whether the agreement set up a joint venture but it is not material for present purposes. It is not

in dispute that Sunley would pay 20% of pre-tax profits on relevant projects falling within the scope of that agreement, namely those introduced by L&M to Sunley.

20. The backdrop and rationale for the 2008 Agreement was the deteriorating state of the property market in late 2007, as a result of the financial crisis and credit crunch. L&M was potentially exposed and wanted to join forces with a larger organisation while maintaining a degree of independence. John Sunley agreed that Mr Maine-Tucker should come under the wing of Sunley group and the 2008 Agreement was negotiated with James Sunley to that end.

21. In order to understand what follows, it is necessary to set out the main terms of the 2008 Agreement. These were contained in a letter from James Sunley to Mr Maine-Tucker which said, inter alia:

> 1. Effective commencement date: 1st February 2008
>
> 2. You'll provide a list of current projects you are looking at or you have an existing situation ongoing with other parties, and any profit emanating from these will be included within our deal.
>
> 3. You will not be bringing any projects with historic losses to the party!
>
> 4. Monthly draw down we agreed will be £12,500 pcm + VAT. We will pay in arrears upon receipt of an invoice, and it will be recognised that the cumulative of these monthly sums will be paid back as a priority return to Sunley from the first deal completed. London and Medway will not be responsible for paying back these costs if we divorce.
>
> 5. In the unlikely event that we do wish to get divorced, either side will give the other one months notice and London and Medway will receive profit in respect of any deals already in Solicitors hands.
>
> 6. It is understood that of the transactions you enter into some of which we may or may not fund, 80% of the pre tax profits from these will be payable to Sunley upon receipt of revenues the balance to yourself. In the event that Sunley inject equity, this will be charged to the project at the same time at the same rate as that payable to the bank on that particular project.
>
> 7. Deals we ask you to look into or assist will be rewarded on a discretionary basis.
>
> 8. Sunley will cover prior authorised deal costs on all deals whether successful or abortive.
>
> 9. We agreed that you would keep your company name etc etc but just simply make reference to London and Medway being "A Sunley Group Company"
>
> I hope the above covers what we agreed in which case will you sign and return a copy of this letter. It only remains for me to say how much we look forward to having you onboard and to a mutually profitable and exciting future.

22. The letter was duly signed and returned marked "Agreed!" by Mr Maine-Tucker.

23. The 2008 Agreement involved payment of guaranteed sums to L&M referred to as "drawdown". These were regarded by Mr Maine-Tucker as important because they provided guaranteed income at a time when the business climate was uncertain. This guaranteed income was the quid pro quo for the lower share of profit (20%) as opposed to 35% or 50%. Whereas previously he had been working on a profit-share only basis, the 2008 Agreement involved a mix of a lower share with a guaranteed sum each month. So, in essence, Mr Maine-Tucker was trading the chance of a higher but uncertain profit for the certainty of an element of fixed payments.

24. The drawdown sums can be regarded as akin to recoupable advances against profits. They were later reduced by agreement to £8,333 per month. Over the life of the agreement these total drawdowns amounted to £233,330 and, as noted above, the agreement provided that, at least to some extent, they were to be repaid out of the profits from the deals.

25. Sunley agreed to let Mr Maine-Tucker work out of its Berkeley Square offices and attended regular property meetings. In effect, he operated as an independent consultant but integrated into the Sunley operation.

The Fulham Palace Road development

26. Mr Maine-Tucker had high hopes for the Fulham Palace Road development.

27. When he introduced it to Sunley, the site had planning consent for retail and residential development in the form of luxury flats and commercial space including two pre-let agreements to good retail tenants, making it bank-fundable. However, it was not in an ideal location for expensive flats.

28. Mr Maine-Tucker believed that an alteration of the planning consent to provide for student accommodation instead would be more appropriate and more profitable. He thought that this was the secret to unlocking the value in the site. He therefore recommended to the board of Sunley that they should proceed with the development on that basis, saying that profits of up to £7.3 million could be expected from the site if they followed his plan. Sunley took up this recommendation in investing in the project, although they chose to do so as a joint venture with other developers to spread the risk (albeit reducing the profits).

Planning problems

29. Mr Maine-Tucker's scheme required an application for new planning consent which he says would have required "sensitive handling". It was by no means certain that planning approval would be obtained for student housing. That is confirmed by a planning report dated 18 March 2008, in which Mr Maine-Tucker was advised by planning consultants that, while Hammersmith & Fulham Council's planning policies could be viewed as supporting such use, that was uncertain, and there might, additionally, be local resident objections because of the intensification of use caused by student housing. They referred to a previous project which had been refused planning permission for "overdevelopment". Although the consultants were optimistic that permission would be granted, their caution proved justified.

30. The Fulham Palace Road development did not proceed smoothly. First, there were considerable problems in obtaining the planning permission. Mr Maine-Tucker says that part of the reason for this was that he had been replaced in leading the planning aspects of the project by Mr Rory Gleeson who, he says, did not pursue the application in the most sensible way. While that may or may not be justified, the fact that Mr Maine-Tucker thought the planning application would require sensitive handling shows that the outcome was not a foregone conclusion, no matter who was dealing with it. The planning consultants' fear that it might run into local objections that student housing would have an adverse impact on local residential amenity was to some extent justified by the fact that the planning authority said, on 15 April 2009, that the development was unacceptable. Their objection was that the number and concentration of the student accommodation units was an inappropriate and un-neighbourly development which would be likely to harm the existing amenities of occupiers of neighbouring residential properties. In the event, planning permission was twice refused. It was only granted following appeal and amendment of the plans after the 2010 Agreement had been made. The fact that there were unresolved planning difficulties would have been known to the parties at the time of the 2010 Agreement.

31. Planning permission was not the only problem. The development went ahead via a special purpose vehicle, BHE Property Developments Limited, with co-investors, one of which went into liquidation with attendant problems.

32. The upshot was that, by the beginning of 2010, both parties were less than enamoured with the other's handling of aspects of the Fulham Palace Road development and the prospects of success were highly uncertain. James Sunley appears to have attributed some blame for the lack of success of this development to Mr Maine-Tucker. In one of those e-mails, he said that it has been a "disaster". In another, he says that the auditors wanted Sunley to "take a big hit" on Fulham Palace Road. The impression given is that he thought it would have been better had Mr Maine-Tucker never brought this development project to Sunley. It is noteworthy although not directly relevant that, even at the end of 2010, well after the 2010 Agreement, the Fulham Palace Road development was still regarded overall by James Sunley as having made a loss. As he put it an e-mail of early 2011, it was "in the red as per bank valuation". Earlier in the year, before planning permission had been granted, there must have been still greater uncertainty as to whether it would ever make money.

33. More recently, things appear to have turned around on this development and Mr Maine-Tucker's earlier optimism now appears to be justified. As noted, planning permission was ultimately granted, following appeals, and property values have doubtless risen somewhat from their depressed levels. Mr Maine-Tucker describes it as now being a "great success" and points out that it features in Sunley's corporate brochure. L&M says that, as of today, Sunley is sitting on a large unrealised profit on this development, partly as a result of L&M's efforts with respect to the project. Whether that is so does not arise for decision on this application.

34. It may be right that this is how things are looking now, but there is nothing in the contemporary documentation to suggest that, at the time of the agreement in issue, either side believed that Fulham Palace Road was going to prove significantly profitable. This is relevant to the present dispute and formed part of the factual matrix of the agreement. It is easier to believe that the parties would have agreed that the development consultant was to forego a share of profits on a project which was believed to have run into the sand than on one which was looking

as though it would become the most profitable deals introduced pursuant to the 2008 Agreement as L&M contends it has now become. I return to that matter below.

Other developments in which L&M was involved

35. There is, in the action, another claim for a profit share on the so-called Barstable House development in Bristol which Sunley says is premature because it has already paid a provisional sum of commission (based on an interim account of profit on that development) of £26,449 to L&M. The actual sum due remains to be determined and is irrelevant for this preliminary issue.

36. It is also necessary to mention some other developments which L&M had introduced to Sunley.

37. First, a development in Thatcham which L&M had introduced during the currency of the 2008 Agreement. This did not yield a profit until after the agreement was terminated but under the terms of the agreement L&M was entitled to a 20% share when it accrued. The ultimate share to which L&M was entitled was £29,380.

38. Second, a development called The Greyhound (a public house) which was introduced to Sunley after the termination of the commission agreement. L&M ultimately agreed to "put the deal through" Sunley but no terms were agreed as to the remuneration that L&M was to receive for that deal. This deal was done at a time when John Sunley was in greater charge of Sunley and L&M was "content to leave the basis of my remuneration to John Sunley's discretion". L&M paid the profits from that deal to Sunley's solicitors without deducting anything for L&M's remuneration.

39. Third, there were some apparently earlier developments pursuant to the 2008 Agreement, at Crowborough, Dover (Barwick) and Clapham.The latter two appear to have generated very limited revenue and Crowborough does not seem to have produced a great deal either.

Termination of the 2008 Agreement

40. Relations are said by Mr Maine-Tucker not to have been quite as cordial with James Sunley and his colleague, Mr Gleeson (with whom Mr Maine-Tucker has found it particularly difficult to work) as they had been with John Sunley. There was friction between Mr Maine-Tucker and Mr Gleeson as a result of the latter's perceived rudeness and his turning down of another opportunity for investment which had proved profitable. By November 2009, Mr Maine-Tucker had had enough of working effectively as a part of the Sunley group with Mr Gleeson (who had taken over running the Fulham Palace Road development) being a key source of his unhappiness. This led to Mr Maine-Tucker terminating the 2008 Agreement by notice in November 2009. However, at the time of termination, Mr Maine-Tucker expressed the hope to John Sunley, which was reciprocated in a friendly note suggesting lunch, that there would be other things they could work on together.

The position following termination

41. There were matters outstanding following termination of the 2008 Agreement which the parties viewed differently.

42. Following termination, Mr Maine-Tucker says and I accept, that L&M was concerned to achieve the following

(a) to agree and be paid remuneration for The Greyhound (which was not subject to any agreement);

(b) to be paid the 20% profit share for Thatcham;

(c) to avoid falling out with the Sunley family.

43. As to the latter, Mr Maine-Tucker says that this was not because it was necessary for him to keep his options open for doing business with them in the future but because of a personal relationship with John Sunley and his family. While I find it easy to accept that this was one reason and that it was not strictly necessary for him to do so, it is clear that he regarded it as desirable to keep options open for doing business with Sunley in future. Sunley is a substantial property developer which had been providing L&M not only with a guaranteed income but office accommodation in London and the benefit of being associated with a major name in the field. Mr Maine-Tucker plainly wanted to remain in the property development business and wanted to continue doing deals with Sunley.

44. Mr Maine-Tucker's evidence, which I accept and which is consistent with the contemporary documents and James Sunley's briefer evidence, is that Sunley was initially approaching the consequences of termination from a different perspective. Sunley's initial priority appears to have been to recoup the drawdowns out of profits and ensure that these were paid back in full. Because the profits made by Sunley had been less than the drawdowns, in Sunley's view, L&M owed Sunley money.

45. There were even different views within Sunley as to how much was owed, because of some confusion over whether all of the sums earned by Sunley were to be set against the drawdown or only the 20% of the total profits representing L&M's share. If it was the latter, the notional "debt" to Sunley would be repaid out of earnings at a lower rate.

46. That may have reflected a misunderstanding of the requirements of the 2008 Agreement but, overall, Sunley's position was that L&M had cost it money and that the drawdown should be repaid. Sunley was, it appears, initially viewing the drawdowns in the 2008 Agreement as repayable advances against profits rather than guaranteed payments with a profit entitlement on top, perhaps paying insufficient attention to the clause concerning termination.

47. Mr Maine-Tucker too approached negotiations in the same way at some points. He did so, not on the basis of his acknowledgement of any legal obligation to repay but because of a kind of obligation in honour (or possibly a desire) to continue to work with Sunley until the money he had been paid by Sunley had been earned back for them. At a later point, Sunley also approached the negotiations by acknowledging that they would pay for deals even where there was no contractual obligation to do so. Thus there had been no agreement for L&M to be paid a profit share on The Greyhound (it fell outside the 2008 Agreement). Nonetheless both sides acknowledged, almost from the outset, that this project should be treated as though it had formed part of the deal and 20% would be paid on it.

48. Neither side's overall stance was unreasonable. To the contrary, they both appear to have been willing to bring debts of honour into the terms of the 2010 Agreement as part of resolving all of the issues under the 2008 Agreement once and for all and to provide a basis upon which they could continue to do deals in future.

The negotiations for the 2010 Agreement

49. The negotiations for the 2010 Agreement took place, mainly in correspondence and partly in a meeting, between January and April 2009. Mr Maine-Tucker says with some justification that the negotiations at points became "hopelessly muddled and confused". This is because, on some occasions, the parties appear to not to have been able to understand or coherently respond to the detail of the proposals that the other was making.

50. However, that was largely so as regards matters of rather picky points of financial detail which needed resolution for a particular reason. Mr Maine-Tucker was approaching the negotiations on the same basis as Mr James Sunley in that he proposed that the parties should agree to do future deals out of which the drawdown would be repaid. As a result, the parties had to agree how much drawdown was notionally to be repaid and thus deducted from future deals: the greater the figure, the less valuable would be Mr Maine-Tucker's share of any profits from those future deals. This resulted in an issue as to how much drawdown was outstanding and how it should be calculated, with the parties initially adopting different positions even as to how that calculation should be approached. Aspects of that sub-dispute are, at some points, difficult to reconcile with any arguable obligation arising out of the 2008 Agreement and it was really this issue that caused most of the confusion.

51. Mr Maine-Tucker is critical of James Sunley's approach to this issue in his evidence but it appears from the correspondence that both sides were finding it genuinely hard to identify the correct basis for determining the net drawdown and the parties were feeling their way to a fair way of treating the matter. For example, Mr Maine-Tucker's initial e-mail in Janaury 2010 put at £130,695. James Sunley's next calculation put it at "net £95,000". Mr Maine-Tucker's final proposal at the end of April put it at £12,473. This divergence is explained by the fact that the 2008 Agreement was itself unclear as to two key things: what profits were to be set against the gross drawdown and what costs should be deducted.

52. Despite that, as I explain below, the parties were able to agree on the overall structure of the agreement and do so reasonably clearly.

53. I also have reservations about some of Mr Maine-Tucker's evidence as to how difficult James Sunley was being. For example, he says in his witness statement that James Sunley "sought to force me to introduce more business to the Defendant by withholding payment of some of the monies I had already earned until I had introduced further profitable deals" (paragraph 66(d)). However, in paragraph 64 where he says that that his intention was "to give the Defendant the opportunity to earn back any Drawdown balance by doing another deal or deals for the Defendant so that the profits achieved on those deals would settle the balance". I do not detect in the contemporary correspondence any attempt by James Sunley to force Mr Maine-Tucker to do further deals. Rather, it appears that, notwithstanding termination of the 2008 Agreement both sides were fairly keen to continue working together. Moreover since Mr Maine-Tucker had started off negotiations by what was in effect an acknowledgement of sorts that

Sunley had not made money out of him overall, the fact that part of the profit share payment would be forthcoming only upon completion of a further deal does not appear to have been very controversial.

54. The underlying issue in the negotiations was simple. Under the terms of the 2008 Agreement, L&M would have been entitled to keep hold of both the drawdown and a 20% profit share on top if the agreement was prematurely terminated and the parties "divorced" even if, overall, Sunley had lost money. While that might have been the strict contractual position, any rational businessman with a desire to do future business with Sunley or anyone else would appreciate that he would have to find some way of, in effect, wiping the slate clean. Otherwise his "pitch" to Sunley for a new relationship could be unattractively summarised as follows: "I lost you money overall. I got nearly a quarter of a million pounds out of you over the last couple of years. I provoked "divorce". Please "marry" me again and pay me a share of profits." That is why the 2010 Agreement had to deal with the past and find a way of drawing a line under it, regardless of the strict legal obligations arising out of the previous relationship.

Approach

55. The parties are agreed that, in the light of the authorities, to resolve this dispute it is necessary to consider the correspondence as a whole.

56. L&M contends that only the last few exchanges really matter but accepts that it is necessary to determine their meaning and effect, to view them in the context of the earlier exchanges. Sunley contends that the earlier correspondence is important because it sheds light on how the reasonable person would have interpreted the most significant final exchanges. In my judgment, there is merit in both sides and ultimately no real difference of approach. In what follows I focus on the key document upon which L&M relies and use the earlier exchanges to assist in answering the question as to what, objectively viewed, that would have meant to the notional reasonable person on the critical issue, profits on Fulham Palace Road.

57. To facilitate analysis, I divide the correspondence into: (i) initial exchanges, (ii) establishment of the broad structure of the deal and (iii) final adjustments.

(i) Initial exchanges

58. The first attempt to kick off negotiations was an e-mail of 6 January 2010 from Mr Maine-Tucker to James Sunley. It was headed "Thatcham and our agreement" and said:

> "James
>
> Good to hear Sunley junior is all there! Snow chains are going back on the cars again!
>
> Total draw down from Sunley to end of November totals: £233,330.
>
> Amounts directly paid back to Sunley reflect the Crowborough deal (see below) and increased sale on Priestgate at 21k. I have not included reclaimed costs from third parties (Clapham and Dover etc).
>
> Therefore drawdown total is £212,330.

Our agreement dated 15th January 2008 states that 80% of revenue before tax should be paid to Sunley. This figure reflects the different risk reward nature of the relationship and that we would receive only a 20% share, otherwise we would be asking for 50% of the profits as per Parkwood.

The monthly draw down was then reduced from £12,500 to £8,333 for the remaining 10 months of the term, to help reduce your overhead. We did not demand an increase in profit share at the time even though the risk reward profile had changed, to compensate us for this 'loss'.

There is some debate between us regarding the mechanics of paying back the drawdown within the terms of the agreement. My interpretation of the agreement has always been that we pay over 80% of all revenues whatever the drawdown then owed. Your view is that the debt should be paid off before the profits split. This obviously contradicts point 6 of the agreement as if so, there would be no need to put this clause in and a simply 20/80 profit split after all priority returns paid etc. Furthermore when we did the Crowborough deal and were paid 20K, Sunley invoiced us for 80% of this, although the drawdown to be repaid was higher which hopefully supports my case.

In the case of Thatcham you are due £102,043-75.(Guy will pick up the tab for Runnacles, so do not forget to re-invoice him for that and any costs already paid out etc).

I am hoping that when you see that my proposed 20% of this figure is £20,408.75 which is even less than half the 1% into fee (and I did all the work), you might take a different view.

If you were to agree to the above, this would then reduce the amount of drawdown owed to £130,695. To help, we would then of course continue to do deals to Sunley but still on a 20/80% split (I need to eat!) and only after the total drawdown had been repaid would we be given leave by you to renegotiate a better percentage.

I think on balance this is fair and although I could walk away, I am not in the habit of letting people down.

Can I please have a response from you as soon as possible?

Kind regards

Simon"

59. Two points merit comment. First, by this e-mail L&M was proposing a deal which acknowledged that it would be obliged to pay the un-recouped part of the drawdown (put at £130,695) out of some of the profits on future deals which it was willing to do. Second, L&M was not, at that point, asking Sunley to pay any further sum up front as such. To the contrary, it appears from the final line to be an offer from L&M to Sunley to do something (earn out of future deals) to compensate for the notional loss since the alternative presented is "I could walk away". He said that this was proposed by Mr Maine-Tucker because he was not in the habit of letting people down.

60. The e-mail response from James Sunley on 8 January 2010 was as follows:

> "Simes
>
> Noted below. You say you have never lost Sunleys money to which I think it only fair we await inspectors decision on FPR (which should be swift) before discussing further. We have £1.5m at stake. Good weekend and CLARET."

61. Mr Sunley was thereby indicating, in a cordial manner, that it was premature to discuss the issue until it became clearer whether Fulham Palace Road (FPR) would get planning permission.

62. This was followed by a letter of 28 January 2010 from James Sunley saying:

> "Dear Simon,
>
> Please find enclosed your final draw being November 2009, together with a statement which sets out your position vis a vis Sunley post the Thatcham success and Orchard Lea abortives. Total balance net £95,000 approximately.
>
> I have completely ignored Fulham Palace Road which has taken a dramatically different course than we first envisaged and also Peterborough which I view as a favour of yours to John Ferree it being his project".
>
> It was a pity we could not capture the whole of Thatcham but equally that hitherto our efforts to source additional equity funding partners has proved unfruitful. At least I warmed up Mayfair and you solved the lease extension.
>
> Hopefully The Greyhound transaction can wipe the slate and we can move into the black in 2010."

63. This letter enclosed a statement setting out the drawndown payments received and payments made/profits received in respect of Thatcham.

The March meeting

64. Mr Maine-Tucker and James Sunley met in the week beginning 1 March 2010 to discuss the issue. Mr Maine-Tucker made his position clear that L&M did not owe Sunley anything and that Sunley owed it profits. He put forward a different and lower figure for the un-recouped drawdown to that advanced in January. He proposed a way of resolving the matter which ultimately became the basis for the deal: he offered to waive his share of profits in Fulham Palace Road provided that he was paid on both Thatcham and the Greyhound (for which there was no contractual entitlement to payment under the 2008 Agreement). Mr Maine-Tucker says, and I accept, that James Sunley did not find the "sweetener" of Fulham Palace Road to be very interesting at the time. That is true, but I think that the proper analysis is that he did not think it was much of a sweetener because, in his view, foregoing a right to a chance of profits on an enterprise which looked to be loss making was throwing into the deal something of very limited value. Limited attention was therefore paid to it.

Subsequent correspondence

65. Following that meeting, on 5 March 2010, the net profit due to Sunley in respect of The Greyhound came through and L&M passed it on to Sunley in full. The sum came to £93,505.31.

(ii) Establishment of the structure of the deal

66. James Sunley took up the negotiations again in an e-mail of 16 March 2010. This said:

> "Simes
>
> When do you want to have a chat?
>
> Sunley are £29K down on SMT net (offsetting all profits from Thatcham and Greyhound againstyour total draw) investment in you since Feb 2008 (ie you have had salary/draw but total receipts from Thatcham and Greyhound and aborts negative net 29K) and auditors want us to take a big hit on Fulham Palace Road.
>
> We have no deals in pipeline and none of the deals you referred to pre our Feb consummation have come to anything.
>
> Have been through with JBS and he thinks you are still over £190K deficit as only 20% of profit on those two deals (in which Sunley played a serious part) should be offset against your draw. I disagree his approach [sic].
>
> Bottom line is you have earnt an OK wage from Sunley over past 2 years, we have not made any profit on you. Our investment in you has cost us money.
>
> Make a case and proposal why and how it will be different in future?
>
> Best James"

67. This e-mail is representative of the perspective that Sunley had in the negotiations. First, that it believed that L&M had lost Sunley money when the aggregate drawdown was taken into consideration. Second, that Sunley regarded those payments as an "investment" in L&M, which it expected to have repaid. Third, that it thought that Fulham Palace Road would be loss making. Fourth, that there was uncertainty within Sunley itself as to the basis upon which profits would be notionally set off against the drawdown – in particular as to whether it was the whole or only L&M's share. James Sunley invited L&M to address these matters, including by explaining why future deals were likely to be different.

68. Mr Maine-Tucker responded with a long e-mail the following day, 17 March 2010. Although headed "without prejudice" it has been referred to by both parties without objection. I can summarise some of the points it made. First, the e-mail said that L&M's position was based on the 2008 Agreement. Second, it said that L&M thought that if all the transactions put forward had been undertaken by Sunley, they would be in profit. There was particular reference to a project which Sunley did not undertake but which, it was said, would have made £2.5 million. Third, it reminded Sunley that the 20/80% profit split reflected the balance of risk and reward and that the drawdown was in effect Sunley risking its money in exchange for a higher profit share. Fourth, it noted that L&M could have undertaken the Greyhound deal itself. Fifth, it said

that L&M was expecting some good future deals but that, while the parties were in dispute, there was no advantage in discussing them. Sixth, it contained a lengthy explanation for why it was wrong to blame Mr Maine-Tucker for Fulham Palace Road. Mr Maine-Tucker did not there say that he thought that Fulham Palace Road was likely to come good, only that he was not responsible for the problems with it. Seventh, it made it clear that Mr Maine-Tucker was concerned not to fall out with the Sunley family. It concluded with the following proposal:

> "I offered you what I still maintain is a fair and equitable solution by e-mail on 6th January, given the attached agreement between us, but you have not supported it.
>
> I still propose that I should be paid 20% of the revenues on Thatcham and The Greyhound. I also suggest, as a sweetener that I relinquish my 20% interest in the Fulham which would of course double if you buy the other half of the company. If this is agreeable, I will continue to work with Sunley on future deals a 20/80 split until the drawdown is repaid fully and thereafter we can discuss percentages on a deal by deal basis.
>
> It has been a tough couple of years for all of us and I am positive that I can produce some good results for you boys over the next year.
>
> Please can I have your final response to this proposal by return as we are now in month three of negotiations over this matter."

69. Nothing in this e-mail suggests that Mr Maine-Tucker thought that the Fulham Palace Road development would ultimately yield significant profit. L&M's potential share was regarded by him as no more than a "sweetener" thrown in to ease the deal. The e-mail again acknowledges that there was a drawdown to be repaid and that this would be done by profits out of new deals, which he was keen to do, on substantially the same profit share basis as previously until the outstanding drawdown had been repaid.

70. This did not provoke an immediate response from Sunley and Mr Maine-Tucker chased. On 14 April 2010 he chased again. In that e-mail, he also referred to the fact that his directorship of the joint venture company for development of Fulham Palace Road had only recently come to an end, when he had apparently been asking to be removed for some time. This shows that, by that stage, Mr Maine-Tucker effectively wanted nothing to do with this development and is some further confirmation that it was regarded as of no real commercial interest to him.

71. James Sunley responded by e-mail on 15 April 2010 to summarise his thinking and to make a counter proposal. The e-mail made similar points to those made previously about how Sunley viewed the 2008 Agreement and continued:

> "As to Fulham Palace Road the less said the better. Thank goodness we didn't invest 100%. Ely by the way are now in receivership.
>
> As I see it, we agree the drawdowns totalled £233,330 exclusive of abortive. You want 20% of the £206, 900 returned on Thatcham and The Greyhound, 0% of FPR i.e. £41,380. You want this deducted from the drawdown. You will continue to work on future deals on the 80:20 basis so long as you receive 20% net profit each deal as we go

along and which will be set against the drawdown level to reduce it. You will receive nothing on FPR.

I propose paying the £41,380 now, but with £20,000 deferred until we complete the next SMT deal acquisition (on which you will be getting 20% on the result).

Thus if you receive £41,380 the drawdown level will be reduced to £191,950 – correct? I intend rounding it up to cover the abortive hitherto – is that fair?"

72. Therefore, at this stage, Sunley understood that the only payments to L&M were to be in respect of the completed Thatcham and Greyhound deals and that L&M was not to get anything from Fulham Palace Road (FPR). Part of that profit was to be deferred. The reference to "abortives" was to costs incurred in respect of deals that had not been proceeded with. The overall structure, thus summarised, was a mixture of the parties' original positions. One the one hand, Sunley recognised L&M's right to a profit share over and above the drawdowns but was negotiating on the basis put forward by Mr Maine-Tucker at the outset namely that the drawdowns should be repaid out of the profits of future deals.

73. It was submitted on behalf of L&M that, despite it being so described, Sunley's earlier e-mail was not in fact an offer but an invitation to treat. I do not think it matters greatly because whether it was or not, it was proposing a deal which was squarely based on no profit share being payable on Fulham Palace Road.

74. Mr Maine-Tucker responded the same day by e-mail saying that he would contemplate the "offer" while drinking Chateau Montrose 2000. Having done so, he responded substantively the next day. This e-mail of 16 April 2010 is of some importance. Its subject line was "Response to your proposal" and the body of the text said:

"James

I will deal with FPR (I have some ideas) and Granton in separate e-mails.

The reality is that though our written agreement which terminated end of November, I owe nothing to Sunley and Sunley owe me £41,380. However, I am grateful to you for attempting a solution to find a way forward so that we can continue to do transactions.

Based on your proposal and with your agreement and disregarding the history and any rounding up etc., I think we should keep it very simple.

1. Sunley need to recover £41,380 from future deals done as a priority return. We will receive 20% on profits until this figure is recovered.

2. Sunley will pay us £20,000 as a one off payment on completion of the next deal regardless.

3. Sunley will pay us today £21,380.

I trust this is what you are hoping to achieve?

Best

Simes..."

75. In this e-mail, first, the reference to dealing with FPR in separate e-mails was potentially ambiguous. It could have meant that Mr Maine-Tucker was going to make a separate proposal as to how to deal with the potential profits on Fulham Palace Road. But it could have been referring to something quite different and not concerned with profit shares. Second, other than that, it proposes a deal whereby Sunley pays L&M £41,380, representing the profit on the completed deals other than Fulham Palace Road with part held back until the next deal is completed thereby giving L&M an incentive to bring a further deal. Third, L&M recognises a notional "debt" in the sum of £41,380 which is to be recovered out of profits on future deals. To that extent, L&M is there recognising, as it had done previously, that L&M should "pay back" some of the money paid over by way of drawdown, albeit only out of future profits from future deals.

76. This e-mail is important because it confirmed the overall structure of the proposed agreement which was finally concluded.

77. There followed a further e-mail from Mr Maine-Tucker of 16 April 2010 with some details about a Granton deal that had been lost allegedly through wrongdoing of others. It is of limited importance.

78. James Sunley then sent an e-mail relating to Fulham Palace Road and headed "Student Housing Investment" on 20 April 2010 saying:

> "Simes
>
> Was wanting to discuss this with JBSsr tomorrow morning and put to bed but was awaiting your comment FPR."

79. "JBSsr" appears to be a reference to John Sunley. At that point, perhaps reflecting the ambiguity in the reference to FPR in the 16 April 2010 e-mail, James Sunley was waiting to hear what Mr Maine-Tucker had to say about Fulham Palace Road. A similar chasing e-mail followed on 21 April 2010 indicating that he was still awaiting a response on this issue.

80. Shortly after that e-mail, on 21 April 2010, Mr Maine Tucker responded by a further e-mail. This is also important since it clarifies what the reference to FPR was about. It was headed "Student Housing Investment" and said:

> "FPR email to come was only to make some suggestions re possible JV bank or third party. I had meetings with Investec and BarCap recently. In truth without knowing the latest I might be making too many assumptions but happy to help if you can give me the latest.
>
> Otherwise your emailed proposal re Sunley and us going forward and my e-mail back condensing it stands and I would walk away from any profit share in FPR. I assume you can now green light this and we can proceed once first tranche of money paid over? Hope that makes sense and call if any doubt.
>
> S"

81. This e-mail made it clear that there was no intention to make a claim in respect of profits on Fulham Palace Road and that the earlier proposal had not intended to do so. The reference to FPR in the earlier e-mails was explained as relating simply to certain ideas that Mr Maine-Tucker had had to help the project along (which remained loss making). This indicates that he regarded the earlier proposal as excluding a right to a share in Fulham Palace Road, even though it did not expressly say so.

The structure of the deal

82. In my judgment, by that point in the negotiations, the basic structure of the deal which had been "condensed" by the 16 April 2010 had been clarified and was understood in outline on both sides.

83. Following confirmation that L&M's proposal did not include any element of profit share for L&M on the Fulham Palace Road development, the proposed deal consisted of three broad elements:

A. Payment by Sunley of the 20% profit share on deals other than Fulham Palace Road (the profit share element) – at that stage, proposed to be £41,380;

B. Repayment by L&M to Sunley of a sum but only out of profits on future deals (the prior return element) – at that stage, proposed to be £41,380;

C. An element of contingent and deferred payment of part of the profit share element dependent on completion of a future deal (the payment timing) – at that stage, proposed to be £21,380 immediately with a further £20,000 on completion of the next deal.

84. The 16 April 2010 e-mail was followed 10 days later by an e-mail from James Sunley on 26 April 2010. It is not easy to follow every aspect of the calculations in it and they do not matter for present purposes but there are the following tolerably clear elements. First, Mr James Sunley was re-iterating the point that he thought that Sunley did not owe L&M anything on the basis of the 2008 Agreement. Second, he pointed out that if L&M was paid an additional sum the notional drawdown figure would increase ("you will have had drawings of £274,085"). Sunley was thereby treating the additional profit share as akin to drawdown on the basis that what mattered to Sunley was that this was money which was passing from Sunley to L&M. Third, the figures appear to have taken account of abortives and so differ from those previously discussed. Fourth, the e-mail took the basic structure summarised above as a starting point and made adjustments to the figures. The e-mail said:

> "I am willing to make the £20,000 plus £20,755 payment on completing next deal acquisition but only if you accept that the £78,877 is the priority return".

85. In effect, what this was doing was proposing adjustments to elements A and B of the basic structure. As to element A, it was proposing that the sum be £40,755 instead of £41,380. As to element B, it was proposing that the sum should be £78,877 instead of £43,380. As to element C, the proposed terms for payment remained the same – part immediately and part on completion of the next deal. The e-mail also sought clarification as to how L&M thought the

repayment would be taken out of future profits by reference to a somewhat confusing worked example.

86. That e-mail was sent to Mr Maine-Tucker at 14.21 and was headed "Response to your proposal". It may have formed part of the same e-mail string as the earlier 16 April 2010 e-mail, which condensed the proposed terms (see Annex A to the Defence which presents them in this way) but it does not matter greatly whether it did. In my judgment, this was James Sunley engaging with and proposing adjustments to the same basic structure as before. There is no suggestion that, at that point, anyone would have thought that this was proposing terms which would preserve L&M's right to a share of profits on Fulham Palace Road.

87. At 17.01 on 26 April 2010, i.e. the same afternoon, Mr Maine-Tucker responded. That e-mail, is, like the earlier one, headed "Response to your proposal". It is the most important e-mail in the case and I set it out in full.

> "James
>
> Based on our agreement dated 15th January 2008 – (see Crowborough below)
>
> As per our discussion, I have tightened up the figures, disregarded the abortives and simplified the structure.
>
> Gross actual revenue paid to Sunley from our work:
>
> | | |
> |---|---|
> | Crowborough | £16,000 |
> | Dover (Barwick) | £760 |
> | Clapham | £322 |
> | Thatcham | £146,900 |
> | Greyhound | £56,875 |
> | TOTAL | £220,857 |
> | TOTAL DRAWDOWN | £233,330 |
> | Sunley owed | £12,473 |
> | Further drawdown to SMT | £20,000 (26 April 2010) |
> | Further drawdown to SMT | £20,000 Paid on completion of next deal as a one off. |
>
> Therefore Sunley receives £52,473 as a prior return. Then remainder of profits split 80/20 in Sunley's favour.
>
> Please signal your acceptance and confirm when we will receive first payment so we can start bringing some new deals in."

88. It was submitted by L&M, with the help of evidence from Mr Maine-Tucker that this e-mail represented a "re-booting" of the negotiations, namely that they were starting afresh at this

point with a proposal in which the entitlement to profits on Fulham Palace Road was not excluded.

89. Mr Maine-Tucker says that this was "formulated as a new and comprehensive offer designed to stand on its own". I am unable to take account of the evidence of his subjective intentions on this matter or James Sunley's subjective view the other way that at the time (as now) James Sunley believed that L&M had relinquished any rights it had to profits in FPR as part of the agreement.

90. However, the 26 April 2010 e-mail does not appear, on its face, to be new at all. Rather, objectively viewed, it looks like adjustments to the existing structure proposed by both sides with somewhat revised numbers for the individual elements.

91. Although, of course, as a matter of law, this offer implicitly rejected previous offers and is to that extent free-standing, it cannot be objectively interpreted in isolation from what went before.

92. In particular, in my judgment, this offer, like the previous one and the one before that, all maintained the essential structure to which I have referred above. They each involved adjustments to the numerical values within that framework. Thus, in this offer, in contrast to the proposal earlier that afternoon from James Sunley, element A was proposed to be £40,000 instead of £40,755; the sum in element B was proposed to be £52,473 instead of £78,877; element C remained essentially the same. It is true that the basis for calculation of the various elements was slightly different to that previously advanced and the language used to describe the elements was somewhat different ("drawdown" as opposed to "drawings" in the previous e-mail from James Sunley) but, objectively viewed, I think that the reasonable person in the position of an offeree of that proposal, would have taken this e-mail as simply making adjustments to the figures, while maintaining the existing structure established about a month before.

93. Nothing could have been easier, had this offer intended to represent a completely fresh start, for it to have said so. It did not. In title, content, structure and terms, it appeared to be a continuation of what went before. Nor is there anything in the response to it which suggests that it was taken as being a new start. James Sunley appears to have treated it as a continuation of the structure which went before with some numerical adjustments to which he responded with numerical adjustments of his own (see below).

94. I am unpersuaded by L&M's argument that, because first sentence says "Based on our agreement dated 15th January 2008", this signals a radical change of starting point and that a profit share on Fulham Palace Road was somehow to come back into the picture.

95. There are several points that conflict with L&M's interpretation.

96. First, the e-mail says "I have tightened up the figures". This suggests that the e-mail is simply proposing a change in the numbers not in the fundamental terms of the deal.

97. Second, the e-mail says that calculation is "As per our discussion". It is not clear what discussion this is referring to and there is no reference to anything other than the meeting in the evidence of either side. However, in that earlier discussion there was reference to L&M giving up any claim to profits on Fulham Palace Road. In so far as it is a reference to the earlier

correspondence, all the recent exchanges had proceeded on the basis that there would be no right to profits on Fulham Palace Road. This language also suggests that the proposal is a continuation of earlier discussions rather than a fresh beginning.

98. Third, the entries for gross actual revenue appear to be an attempt to bring into account all of the sources of revenue from the beginning of the 2008 Agreement and beyond including Greyhound (from after it ended). This looks like a complete list. No attempt is made to attribute any sum in respect of Fulham Palace Road to the credit side of Sunley. Although those figures only purport to relate to "actual revenue paid" to Sunley, in my view, objectively regarded, this e-mail is attempting to sum up everything that L&M has brought to Sunley by way of profit, with a view to calculating a net figure for what Sunley is "owed", having regard to the payment of drawdown. In particular, no attempt is made to insert, to reduce the drawdown, any figure for profits which might become due to Sunley on Fulham Palace Road, even at a more modest level than that contemplated when the deal was originally done. Silence on this topic is here only consistent with attributing a "0%" or no claim to this development as referred to in the earlier e-mail both as regards share of profit to Sunley (affecting the drawdown) and share of profit to L&M.

99. Fourth, the e-mail states that the structure is "simplified". In my judgment, that does not suggest that the structure of the proposal is to be fundamentally changed from what went before. Moreover, the fact that there is a reference to simplification seems to me to provoke reference to the earlier material to determine from what simplification was being undertaken. It highlights the fact that it cannot be seen in isolation.

100. L&M may be right to say that the strict conditions for implication into this offer of a term excluding any claim for profits on Fulham Palace Road on the basis of necessity for business efficacy are not satisfied. However, Sunley does not contend that such a term exists because it is necessary to imply it on that basis. Its case is that the agreement was made on these terms because, on the true construction of this offer, that was what the deal contemplated.

101. I am satisfied that this argument is correct and that Sunley's construction is to be preferred, when the e-mail is objectively viewed against the background of the earlier communications. I prefer to determine the question as a matter of the true construction of the offer but, in so far as it matters, I am also satisfied that the notional bystander, when appraised of all of the correspondence, would have said that this was the basis upon which that proposal was being advanced. This is not because a term of that kind has to be implied to make sense of the deal but because it was clear that this is the basis upon which the parties were dealing.

102. Nor am I persuaded that the correct analysis is based on Sunley "banking" an earlier agreement by L&M not to claim any such profits. The right analysis as a matter of law is that, on the true construction of this e-mail, L&M was offering to making complete provision for addressing all the historical mutual claims for profits and notional "debt" (from the drawdown payments) arising out of the 2008 Agreement which had previously been asserted by the parties. That was with a view to establishing a renewed basis for doing further deals.

103. It is said on behalf of L&M that Sunley was operating on the basis that Fulham Palace Road was unprofitable. That is true but it does not assist L&M. It is contended that it suggests that Sunley was therefore indifferent to the concession that no profits were to be claimed and that

the parties could not therefore have understood silence as suggesting that they were not to be claimed by L&M. I am unable to accept that argument. To the contrary, it seems to me to provide a reason why both parties were operating on the basis that any claim for profits on this development was no more than a "sweetener". Excluding such a claim made sense on both sides precisely because it was perceived to matter little to either side. Sunley, we know, thought such a claim valueless but there is nothing in the evidence to suggest that Mr Maine-Tucker attributed significant value to the chance of some profits on this development.

104. Indeed, objectively viewed, had he done so, one would have expected a claim to such profits to have been expressly maintained in his e-mail of 26 April 2010 or at an earlier stage with detailed justification for why it should be brought into account both for reducing the drawdown and as a basis for a claim for profits. Mr Maine-Tucker was not reluctant to apply profits from a deal (The Greyhound) which, because it was not even within the scope of the 2008 Agreement, should not strictly have been applied to reduce the drawdown or as the basis for a share. He was not reluctant to bring matters into account expressly when he wished to do so. That provides further support for the argument that, if it was not said to be included, the claim for profits in respect of Fulham Palace Road was thereby excluded.

105. From March 2010, Mr Maine-Tucker had indicated a willingness to give up a claim to profits with respect to Fulham Palace Road and that the previous proposals were put forward on this basis. Mr Maine-Tucker says that in this e-mail "[d]eliberately the offer made no mention of FPR". While it may have been Mr Maine-Tucker's intention to preserve a right to profits on Fulham Palace Road as a result, I cannot accept that this is how a reasonable person in the position of an offeree would have taken it, in the light of what had gone before.

106. I also find it hard to understand why, if it was so important that a claim to profits from Fulham Palace Road was still to be maintained, this was not spelled out by Mr Maine-Tucker. His negotiating partner had previously said that the less that was said about Fulham Palace Road the better. Mr Maine Tucker cannot have thought that James Sunley would have been expecting him to be resurrecting a claim to profits from that development which had been excluded from James Sunley's e-mail of only a few hours earlier without saying anything about it.

107. Against that background, in my judgment, had the 26 April 2010 e-mail offer been intended to preserve such a right to profits (in the sense that it should objectively be construed as so providing) it would have spelled that out.

108. To summarise, it is, in my view, clear taking all these matters into account, that silence in respect of Fulham Palace Road in that e-mail is, in context, objectively to be construed as excluding any claim in respect of it.

(iii) Final adjustments

109. Following that e-mail, there was again some chasing for a response. On 30 April 2010, Mr James Sunley said in a short e-mail:

> "Simes

> I propose setting the line at £60,000 and if you agree will send you a cheque today for £20,000 with £20,755 owing at the next completion. Any abortives between now and that completion will be added to the "line". Happy?
>
> J"

110. That e-mail, sent at 13.30, constituted a counter-offer to that made on 26 April 2010 by L&M. It proposed (i) a minor adjustment in L&M's favour in respect of element A (£40,755 instead of £40,000) together with (ii) a minor adjustment in Sunley's favour in respect of the sum in element B (£60,000 taking account of abortives instead of £52,473). Otherwise it preserved the terms and structure of the earlier offer. This offer was accepted by L&M less than an hour later by an e-mail response from Mr Maine-Tucker saying "Happy! Thank You". These final adjustments plainly did not affect the construction of the offer on 26 April 2010 as it applied to Fulham Palace Road.

Stepping back

111. In my view, this is a case in which the correspondence speaks for itself and there is very limited need to have recourse to much of the surrounding circumstance to resolve any ambiguity. I have nonetheless set out the background above at some length to enable the full context of the agreement to be understood.

112. In my judgment, the only really important element of factual matrix for resolution of this particular issue other than the correspondence is the fact, which is common ground, that neither party at the time of the agreement (and therefore the notional reasonable offeree) attributed any significant value to the potential profits claim on the Fulham Palace Road development for a number of good reasons. On Sunley's side it was viewed as a potential disaster. On L&M's side it appears to have been viewed as having a slight chance of turning a profit, but not enough even really to press for a profit share on it weakly at the outset.

113. It was therefore rational for the parties to treat relinquishing such a claim only as a sweetener. A reasonable person would not have thought, after all of the written communications since 17 March 2010, when it was suggested by L&M itself that the Fulham Palace Road profits were to be given up, that, all of a sudden, on 26 April 2010, they were to come back into account again, as part of the overall resolution of the disputes arising out of the 2008 Agreement.

Post-agreement events

114. L&M contends that its case is supported by events following the agreement. Although *Great North Eastern Railway v Avon Insurance* suggests that the court is not wholly precluded from considering such matters in appropriate cases, L&M did not suggest that they are decisive in this case.

115. Light reliance was placed on the fact that James Sunley did not respond to an e-mail from Mr Maine-Tucker on 30 September 2010 dealing with other matters where in a rather cryptic footnote he said

> "PS Please do not forget that I am still in the frame for 20% of profits on Fulham Palace Road".

116. L&M contends that this would have been met with a robust denial had Sunley thought that such a claim had been given up rather than silence.

117. L&M also relies on the fact that James Sunley responded to a request for information about the Fulham Palace Road development in January 2011, indicating that it was still loss making at that stage. L&M also says that, while Sunley rejected such an entitlement (apparently raised during a lunch) in an e-mail dated 16 March 2011, it was not until 23 May 2011 that Sunley formally raised the 2010 Agreement itself as a bar to such a claim.

118. I am unpersuaded that any of this material takes the case further. The first e-mail, it is said in correspondence, was taken as an attempt at humour given that the project was still not profitable. It was hardly a square raising of a claim. The second communications are explicable on the basis that the parties were continuing to deal with each other. In these, L&M's request does not actually assert any claim or say why the information is sought and there would have been no reason not to respond to a cordial request for information.

119. The response to the issue being raised at lunch from James Sunley firmly rejects any such claim on the basis that Fulham Palace Road had been a disaster. I do not see how, given the relatively informal nature of these dealings, the rejection of a claim on this more general basis by James Sunley can be treated as supportive of the case that, on its true construction, such a claim was agreed to be preserved in early 2010. Moreover, when the claim was squarely made it appears to have been squarely rejected on the basis advanced by James Sunley in this action (see e-mail of 23 May 2010: "this was confirmed in April 2010 emails which included you giving up any claim on FPR").

Application to adduce further evidence

120. An application was made by Sunley shortly before the hearing to adduce in evidence a witness statement from one of Sunley's solicitors exhibiting a further letter from Mr Maine-Tucker to John Sunley's widow dated 18 October 2012. It is of no real relevance. The application was not pursued and, if formally necessary, it will be dismissed. I note, in passing, that the contents of the letter highlight why reliance on post-contractual interchanges to determine the basis upon which a deal was made is inadvisable.

Conclusion

121. For these reasons, I answer the question raised by the preliminary issue as follows:

> By an agreement concluded between the parties on 30 April 2010, the Claimant relinquished its right to any share of profits arising out of the property development project at l68-190 Fulham Palace Road and is consequently not entitled to pursue any such claims.