Neutral Citation Number: [2017] EWHC 3018 (Ch)

CLAIM NO. HC-2014-000527

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**

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

Date: 29th November 2017

**Before:**

**JONATHAN GAUNT QC** sitting as a Deputy Judge of the Chancery Division

**BETWEEN:**

**NISON DAVID KIWAK**

**Claimant**

**and**

**(1) CHAIM REINER**
**(2) CHMR DEVELOPMENTS LIMITED**

**Defendants**

**Mr Thomas Elias** (instructed by **Asserson Law Offices**) appeared on behalf of the Claimant)

**Mr Michael Pryor** (instructed by **Clarke Mairs LLP**) appeared on behalf of the Defendants

Hearing dates:3rd, 4th, 5th, 10th and 11th July 2017

**JUDGMENT AS APPROVED BY THE COURT**
(As Revised by the Judge)

1. The Claimant in these proceedings is Mr Nison David Kiwak. He is an acting Rabbi who lives in Jerusalem, Israel. He is a respected member of the Chassidic Jewish community. His principal activity is teaching his following who consult him from time to time not only on theological matters but also on practical and commercial matters. Consequently, he told me, he has formed a number of international business contacts with whom, from time to time, he enters into business ventures.

2. The First Defendant in these proceedings is Mr Chaim Reiner. Mr Reiner is an investor in, and developer of, properties who lives in Tottenham in London. He too is a respected member of his local Chassidic Jewish community. His modus operandi is to identify properties with development potential and purchase them with the assistance of an investor who provides the necessary cash contribution ("the equity"), with Mr Reiner obtaining the balance by way of a loan secured by way of mortgage and supervising the subsequent development and disposal, the profits being split 50/50.

3. The Claimant's case (very briefly) is that he and Mr Reiner entered into a partnership in April or May 2014 with a view to acquiring a property on the above basis, that pursuant to that arrangement Mr Reiner found and bought a property, namely the Nags Head Public House at 456 Holloway Road, for £2.61m, towards which the Claimant contributed some £361,000; that the partnership was formalised by a concluded written agreement on 21st May 2014; that Mr Reiner failed to honour his borrowing obligations under that agreement and subsequently sought to cut the Claimant out of the deal and that the Claimant is entitled to a 50% interest in the property and/or an account of any profits and various declarations as to his rights.

4. At this stage it is necessary to introduce a third party, Mr Aaron Moshe Knopf. He also lives in Jerusalem and is a friend and business associate of the Claimant. The Claimant refers to him as his agent in London. He said of him:

> "*In London, I rely on an individual named Aaron Knopf to locate and inform me of potential investment opportunities. When Mr Knopf locates an opportunity which he considers will be profitable and of interest to me, he provides me with the relevant details and I decide whether to instruct Mr Knopf to purchase the opportunity on my behalf.*
>
> *In these circumstances I ultimately provide the funding and assume liability for the relevant investment and any investment agreement is accordingly documented in my name. Mr Knopf assists me by conducting some of the negotiations with co-investors or third parties and by working on arrangements for financing and other mechanics of the deal.*
>
> *My agency relationship with Mr Knopf has been ongoing for some time. When we agree that Mr Knopf will act as my agent in connection with a particular transaction, including, for example the subject transaction, we meet in my home frequently and in the course of these meeting discuss and agree the scope of Mr Knopf's instructions and authority as my agent as well as any specific terms in regards to Mr Knopf's remuneration. Mr Knopf is always advised to make it clear to the relevant parties that he is my agent and acting on my behalf.*
>
> *Mr Knopf has extensive experience dealing with investment opportunities and property development, and I have come to place a large amount of trust in his judgment and ability to negotiate and manage property investment opportunities.*"

5. Straightforward as the above account seems, I came to regard it with some scepticism. When asked to identify other transactions in London introduced by Mr Knopf, Mr Kiwak was only able to give the vaguest particulars. When it was put to him that he was an experienced property man, Mr Knopf himself firmly denied this and stated that he was relying on Mr Reiner's expertise. Mr Kiwak was unable to say what terms he had agreed with Mr Knopf to act as his agent.

6. Mr Moshe Knopf produced a Witness Statement and gave evidence at trial. He purported to confirm the contents of Mr Kiwak's Witness Statement but since a large part of that was hearsay about matters which can only have been reported to Mr Kiwak by Mr Knopf, I will concentrate on Mr Knopf's own evidence for the initial dealings between him and Mr Reiner.

7. Mr Knopf told me that between 2012 and 2014 Mr Reiner and he ran into one another at a variety of social events and began to discuss the possibility of being jointly involved in a project to purchase and develop property in London. Mr Reiner did not disagree with that. Mr Knopf insisted that he told Mr Reiner that he "*located good investment opportunities for Mr Kiwak*" and that any investment would be from Mr Kiwak's funds. He said:

> "*I explained clearly that I worked for Mr Kiwak and that any ultimate investment would be from Mr Kiwak's funds. Mr Reiner and I discussed the possibility of his partnering with Mr Kiwak on a property development investment. We discussed the possibility that Mr Kiwak could provide an investment of funds towards the purchase of a property, that Mr Reiner could arrange mortgage financing for the remainder of the purchase price, and then a special purpose vehicle could be formed to hold the property during development and the shares in that company be split proportionately between Mr Kiwak and Mr Reiner.*"

8. Mr Knopf said that Mr Reiner seemed happy with that proposal in principle and also said that he would be happy for Mr Kiwak to have a charge over the property as security for his investment. Mr Knopf went on:

> "*I also made clear that Mr Kiwak would insist that any agreement was formalised in a detailed, written agreement, and that Mr Kiwak would be the signatory on the agreement because, after all, I was only Mr Kiwak's agent and all of the funding would be provided by Mr Kiwak.*"

9. It thus appears that, at least according to Mr Knopf, any agreement he made would be subject to Mr Kiwak signing a formal document. He did not intend to create contractual relations before that.

10. Initially at least Mr Reiner had no direct dealings with Mr Kiwak and dealt only with Mr Knopf. Mr Reiner's evidence was that he regarded Mr Knopf as the principal with whom he was dealing, that until 20th May he had never heard of the Claimant and that Mr Knopf had *not* told him that he was acting as the Claimant's agent. Mr Knopf on the other hand insists that he made this clear. There is

therefore an issue as to who was the principal dealing with Mr Reiner, whether his identity was disclosed and whether these proceedings have been brought in the right name.

11. Mr Knopf has another role in the story. The dwelling house at No.1 Limes Avenue, London N11 was the home of the Knopf family, Simon Knopf and his wife and their sons, Moshe and Chaim, usually called Charles. Mr Simon Knopf died in 2004. From 1999 Mr and Mrs Simon Knopf had spent most of their time in Israel and their son, Charles, who was the only member of the family permanently resident in the UK, looked after the property. On 26th June 2003 Mr and Mrs Simon Knopf apparently executed a transfer of the house in favour of a Mark Smilow in consideration for £450,000. At the time Mr Smilow was 22. Mr Kiwak told me that he knew Simon Knopf and had advised him about disposing of his home, albeit that he had not been involved in the transaction with Mr Smilow. Mark Smilow now lives in Israel and is one of Mr Kiwak's followers. Curiously, the transfer to Mr Smilow was not registered at HM Land Registry immediately and indeed was not registered until 27th April 2007, thereby incurring substantial penalties and interest. I was given no explanation for this.

12. A further oddity is that Mr Smilow does not appear to have taken any immediate steps to take possession of the property for which he had purportedly paid £450,000. Charles Knopf, ignorant of any interest in the property on the part of Mr Smilow, continued to look after it and after his father's death in 2004 continued to arrange the letting of the property on behalf of his father's estate and used the proceeds to defray the cost of maintenance. He told me that he spent the next 10 years trying to obtain from his brother, Moshe Knopf, a copy of his father's Will and that when he ultimately did obtain it it showed that the brothers had been left equal beneficial shares in their father's estate.

13. Mr Charles Knopf told me that, for a number of reasons which I need not go into but which are by no means obviously fanciful, he suspected that the transfer presented to the Land Registry was not a genuine document and that the purported

transfer to Mr Smilow was part of a "sham". In a letter from his solicitors written in 2010 he had suggested that his brother's intention was to deprive him of his inheritance and that the reason the sham sale was conducted through Mr Smilow, a non UK resident, was in order to avoid paying CGT when the property came to be sold.

14. In 2007 Charles Knopf discovered about the purported transfer and sought to refer the matter to his local Beth Din but neither Mr Smilow nor his brother would agree to accept its jurisdiction, so the matter could not proceed by way of arbitration. The Beth Din did, however, issue an Ikul, in effect an injunction prohibiting any dealing with the property until the matter had been adjudicated. In 2010 Charles Knopf issued further proceedings before the Federation of Synagogues Beth Din. Again the Beth Din issued an Ikul. Again Mr Smilow refused to accept the jurisdiction. Then in 2014 Charles Knopf registered an interest with the property alert service of the Land Registry. This meant that he would receive an email if there were any proposed dealings with the property.

15. Moshe Knopf was fully aware of his brother's claim but said that he thought that the whole matter had gone away since (so far as he was aware) no steps had been taken since 2010.

16. As will appear, No.1 Limes Avenue is central to this dispute. The evidence of Mr Kiwak and Mr Knopf was that Mark Smilow was the beneficial owner of Limes Avenue. The evidence of Mr Reiner was that Mr Knopf told him that Mr Smilow was a mere nominee. I will have to return to this question.

17. At this point the respective parties' accounts begin to diverge sharply and in fundamental respects. I will begin with Mr Reiner's account. He said that he met Mr Knopf in early February 2014 at the Holiday Inn in Golders Green. He described his general modus operandi (summarised above) and continued:

> "*8. Mr Knopf seemed eager to invest and provided some information about his financial situation. He told me he had roughly*

*$10m of assets in the United States. He wanted over the course of time to move some or all of these investments to England. He further told me that he had approximately £1m to invest in a development in England. He expected to be able to raise approximately £900,000 of this £1m from a mortgage over a property that he owned, 1 Limes Avenue. The remainder of the £1m was in cash. He told me that he wanted to invest this £1m with me in the purchase and development of a property on the terms we discussed.*

*9. It was at this meeting that he also told me that he had some ongoing problems with the US Internal Revenue Service and because of this he always ensured that he did not have any assets registered in his own name.*

*10. On the basis of that discussion, we agreed I would proceed to find a suitable property. Shortly after I incorporated two companies. One of these was to act as a single purpose vehicle to purchase the property. The other was to purchase Limes Avenue. As Mr Knopf was not a UK resident it would not be easily possible to raise a mortgage on Limes Avenue. We therefore agreed that Mr Knopf would transfer the property to a UK based company which would raise mortgage financing on it.*

*11. On or about 24th February 2014 I incorporated CHMR Developments Limited and M&K Inestments Limited. CHMR was incorporated to act as a single purpose vehicle which would purchase the property, as indeed in due course it did. M&K Inestments was intended to be the company which purchased Limes Avenue.*"

18. He explained that the initials CHMR were his initials and that he chose the name M&K Inestments to reflect the fact that the investment was being made by Moshe Knopf. He had initially asked for the name MK Investments but it was already in use, as was M&K Investments Limited. He therefore had the company named M&K Inestments (without a "v") so the company's name would reflect Mr Knopf's initials.

19. I should say at this point that the documentary record is entirely consistent with Mr Reiner's evidence. It shows that both those companies were indeed incorporated on 25th February 2014. It also shows that as early as 24th February Mr Reiner started looking for a party prepared to lend money against the security of No.1 Limes Avenue.

20. Mr Knopf's account is that around the end of March or beginning of April Mr Reiner told him that he had located a good investment opportunity involving a property on the Holloway Road; the purchase price was approximately £2.6m; the ground floor was occupied as a casino and had upwards only rent increases every 5 years and the upper floors could be changed to residential use; Mr Reiner thought that the cost to redevelop and convert the upper floors into residential flats would be in the area of £350,000, after which each of the flats could be sold for £500,000.

21. Mr Knopf said that he and Mr Reiner discussed the possible framework for a joint venture and *provisionally* agreed to propose to Mr Kiwak that he would provide 75% of the equity financing and in exchange would receive 75% of the shares in the SPV and that the profits from the sale would be split equally between Mr Kiwak and Mr Reiner; in addition Mr Kiwak would receive a charge over the property to protect his investment; Mr Reiner would make the necessary arrangements to purchase the property and then come to Israel to meet Mr Kiwak to finalise and formalise the joint venture agreement; Mr Reiner would raise the necessary mortgage finance:

> "***At this point*** *I also discussed with Mr Reiner that it might be possible to obtain funds by raising a mortgage on a property on Limes Avenue which was owned by an associate of Mr Kiwak who had offered to provide the property as security in connection with a future investment opportunity. It was also* ***provisionally*** *agreed that Mr Reiner would proceed to take the necessary steps to raise a mortgage on Limes Avenue."*(My emphases).

22. Mr Knopf said that shortly after this discussion, Mr Reiner called him when he was in Switzerland and said that he was able to purchase the property for £2.6m but that it was necessary urgently to provide a 10% deposit; Mr Knopf consulted Mr Kiwak when he arrived in Israel the following morning and, although Mr Kiwak did not want to provide any funds before a formal, written agreement was in place, he agreed to transfer £100,000 to Mr Reiner immediately towards the deposit *in view of the trust he could place in a member of the same community.* Mr

Knopf says that he then telephoned Mr Reiner and told him that Mr Kiwak wanted to be in a partnership with him and would transfer £100,000 towards the deposit. Finally, Mr Knopf said:

> "*At around the same time Mr Reiner told me he expected to raise 80% of the purchase price for the property through mortgage financing.*"

23. Based on Mr Knopf's above account the Claimant pleads by way of amendment that in early April 2014 Mr Reiner and Mr Knopf (acting on behalf of Mr Kiwak) agreed that Mr Kiwak and Mr Reiner would enter into a joint venture to purchase and develop the property and that the express terms of this "Development Agreement" were:

(1) Mr Kiwak and Mr Reiner would purchase the property together as a business proposition; their respective beneficial interests in the property would be held by a special purchase vehicle; they would develop the property and divide the eventual profit equally;

(2) Mr Reiner would incorporate a company to be used as the vehicle to acquire and subsequently develop the property;

(3) Mr Kiwak would receive 75% of the issued shareholding in the company;

(4) Mr Kiwak's contribution would be secured by a legal charge against the title to the property;

(5) Mr Reiner would obtain mortgage funding to the value of 80% of the purchase price of the property;

(6) Mr Kiwak would provide 75% of the remaining required cash contribution and Mr Reiner would provide the remaining 25% of the required cash contribution.

24. In response to this Mr Reiner says that at all times Mr Knopf held himself out as the person who was investing. The money to be invested was to be raised in part from a mortgage on *his* property at Limes Avenue; there was no mention of him acting as an agent for anyone; Mr Kiwak's name was not mentioned at all; if Mr Knopf had told him that Mr Kiwak was the actual investor, he would have

incorporated "DK Investments Limited" rather than M&K Inestments Limited and would have wanted to meet Mr Kiwak before proceeding further; the initial agreement was that Mr Knopf would provide 100% of the non-mortgage funding; for reasons to be explained, Mr Reiner did eventually agree to provide 25% of the non-mortgage funding but that was not his normal way of doing business and he would not have agreed to it at the outset; he also never stated that he would be able to obtain 80% mortgage financing on the property; this was simply not possible; he had never obtained 80% on any project that he had been involved in and never seen a mortgage offer for 80% financing on a development project; he never requested 80% financing for the Holloway Road property; it would never have occurred to him to do so and he never mentioned achieving that in his discussions with Mr Knopf.

25. Mr Reiner also pointed out that the deal being alleged by Mr Knopf only involved the investor coming up with 15% of the purchase price (75% of 20%) which, on a £2.6m purchase would be less than £400,000; the transaction described by the Claimant made no financial sense; if Mr Reiner had agreed to fund 25% of the non-mortgage financing and also fund the construction costs he would have ended up contributing more cash than the investor; he was also to guarantee the loan and provide all the labour and expertise involved in identifying the opportunity and acquiring and developing the property; nobody would do all of this in exchange for a 50% share of the eventual profit.

26. Turning for a moment to the evidence of Mr Kiwak, he told me that at some point in the early discussions between Mr Knopf and Mr Reiner (to which he was not a party) one of the conditions for his agreement to invest funds in a joint venture to acquire and develop a property (which had not yet been identified)[1] was that Mr Reiner would arrange to obtain a mortgage over a property at No.1 Limes Avenue. Mr Kiwak said that the owner was an acquaintance and business associate who also knew Mr Knopf; he had previously approached Mr Kiwak to

[1] His witness statement had said "the Property" but was corrected in chief.

express his interest in potentially joining future investment opportunities and proposed that he would make the property available as security for future investment in a property development venture. It was agreed, says Mr Kiwak, that Mr Reiner would take steps to procure this mortgage, including by providing a personal guarantee to the lender, so that the funds obtained would be available as Mr Kiwak's investment for potential future property deals. In other words his evidence was that there had been an agreement about Limes Avenue that was prior to and wholly separate from the deal involving the Nags Head.

27. Mr Knopf's Witness Statement (summarised above) simply does not tally with this, albeit that he purports to confirm Mr Kiwak's Witness Statement. Mr Knopf's first mention of Limes Avenue is in the context of the alleged "Development Agreement" of late March/early April.

28. I should also mention that, although Mr Kiwak agreed that he first met Mr Reiner on 20th May 2014, earlier in his cross-examination he had told me that there were three phases, during the first of which, which he put variously in January, February or March 2014, he had been approached by Mr Smilow who wanted to borrow against Limes Avenue; Mr Kiwak had said to Mr Smilow *"Let's make that bind with my good friend Mr Reiner, who was a good friend at that time. Let's bind it. That's when we brought in Limes in the beginning"*. The second phase was said to be when Mr Reiner identified the Nags Head. This evidence was patently untrue. Mr Kiwak had never met Mr Reiner or had anything to do with him at that stage.

29. Mr Kiwak's evidence and case is that over the course of several conversations in April it was agreed between Mr Reiner and Mr Knopf (acting on behalf of Mr Kiwak) "that Mr Reiner and I entered into a partnership to purchase the Nags Head" (which he calls "the Development Agreement") on terms that:

(a) Mr Reiner and Mr Kiwak would purchase the property together and that their respective beneficial interests would be held by a special

purpose vehicle which would develop the property and they would divide the eventual profits equally;

(b) That Mr Reiner would obtain mortgage funding to the value of 80% of the purchase price of the property;

(c) Mr Kiwak would provide 75% of the remaining required cash contribution and accordingly receive 75% of the shares in the special purpose vehicle and Mr Reiner would provide the remaining 25% of the required cash contribution.

30. There are two critical differences between these accounts. First, was the original proposed basis of the joint venture that Knopf/Kiwak would contribute about £1m, as Mr Reiner says, or that Mr Reiner would obtain an 80% loan and contribute 25% of the balance of the price in cash with Knopf/Kiwak contributing 75%, as Messrs Knopf and Kiwak say? Secondly, was Limes Avenue supposed to be a source of the Knopf/Kiwak investment or was Limes Avenue only put forward later when it became apparent that Mr Reiner could not get an 80% mortgage?

31. Before I come to my finding as to which account is to be preferred, I need to continue the story. Mr Reiner says that on the basis of his initial discussions with Mr Knopf in February, he investigated the market. He was outbid on two properties before finding the Nags Head, 456 Holloway Road. He telephoned Mr Knopf who "agreed that I would try to acquire the property for CHMR". His bid of £2.61m was accepted on 10th April 2014. He telephoned Mr Knopf to say that their bid had been accepted, they were required to exchange contracts that day and he needed £261,000 as the deposit.

32. Mr Knopf said that he was in Switzerland and could not arrange an immediate transfer. Mr Reiner negotiated a reduction of the deposit to 5%, which he borrowed and signed the Contract, which he immediately caused to be novated to CHMR Developments Ltd. Shortly afterwards just under £100,000 (in fact US $170,000) was transferred to the account of one of Mr Reiner's companies (Mr Kiwak says by him), which sum Mr Reiner used to repay part of the loan.

33. Then Mr Reiner set about arranging the financing via a mortgage broker. He applied for a loan of 65% of the price of the Nags Head in addition to a further loan of 70% of the value of Limes Avenue. He also commissioned valuations of both properties.

34. I heard evidence from Mr Jordan McBriar, who, with his father, was the broker involved in arranging finance for the acquisition of the Nags Head. He had previously arranged finance for Mr Reiner on some ten projects. He told me that since 2014 he had arranged finance for perhaps a further sixty. Mr Reiner told me that before instructing Mr McBriar's firm he had previously used another broker for some 40 transactions. That gives some indication of the degree of Mr Reiner's activity and experience in the property market. Mr McBriar told me that as of 2014 there was no product available in the market for the purchase of a development property which would provide more than 65-70% of the property's value; moreover, Mr Reiner was well aware of this as an experienced developer; indeed, he said that Mr Reiner never suggested that they should even attempt to obtain 80% financing for the Nags Head or any other property; such a suggestion would have been completely unrealistic.

35. Significantly he said that when Mr Reiner first contacted him in March 2014 about raising funds for an acquisition he had said that the remainder of the funds would be raised by an equity release of No.1, Limes Avenue. The target property was not yet known, so they began by seeking to put a mortgage in place on Limes Avenue. He was clear that Limes Avenue was identified as a source of funding for the target property at the outset and prior to exchange of contracts on the Nags Head.

36. On 10th April 2014, said Mr McBriar, Mr Reiner emailed his father to say that the target property was the Nags Head and the price was £2.61m. Mr McBriar then set about arranging a mortgage for 65% of the valuation of the Nags Head

with Omni Capital and another mortgage for 70% of the valuation of Limes Avenue with Mint Bridging.

37. By 1st May 2014 Mr Reiner had obtained valuations of both properties. The Nags Head was valued by De Villiers at £2.25m (so substantially less than the purchase price) and Limes Avenue by Matthews and Goodman at £900,000 (which was less than Mr Knopf had anticipated). This meant that the loans would only provide at most £1,462,000 (in fact less once fees and the first instalment of interest was deducted) and £630,000, leaving a shortfall of around £600,000. Mr Reiner says that he spoke to Mr Knopf and asked him if he could find the extra finance. Mr Knopf said that he would find the extra £270,000 or so needed to bring the investment (taking into account the £100,000 already contributed towards the deposit) up to the £1m initially promised but that he had no further funds available and asked Mr Reiner to fund the shortfall. Mr Reiner reluctantly agreed. This would mean that his contribution would amount to roughly 25% of the financing not funded by the mortgage on the Nag's Head.[2]

38. Mr Knopf agreed that Mr Reiner asked for more funding but attributed this to the failure to obtain an 80% loan rather than the disappointing valuations. He said that he spoke to Mr Kiwak, who refused to contribute more than the 75% of the equity financing (assuming an 80% loan) that he says he had originally agreed to.

39. Curiously, although Mr Knopf claims to have spoken to Mr Reiner a number of times between the end of April and mid-May, he said nothing in his Witness Statement about the valuations having been lower than expected. Neither did Mr Kiwak, who also attributed the request for more funds to Mr Reiner's failure to obtain an 80% mortgage. Mr Kiwak said that he was not prepared to increase the amount of equity funding that he was willing to provide (which would have been, according to his account, about £390,000) but instructed Mr Knopf to propose to

Mr Reiner that Mr Reiner should raise further monies by utilising the funds obtained from mortgaging Limes Avenue "*and that I would be willing to invest these funds towards the purchase of the property and thereby contribute these funds into our joint venture*".

40. At this point Mr Kiwak's evidence about Limes Avenue descended into incoherence. In his Witness Statement, having just said that he would not increase his equity funding, he then said that he would be willing to "invest" the Limes Avenue mortgage funds as part of his contribution. He also said that any sum in excess of the 75% of the "equity" "*was being provided voluntarily to increase the proportion of my investment in the project*". In his oral evidence, however, he repeatedly said that the Limes Avenue monies were to be a loan from Mr Smilow to Mr Reiner. There is not a trace in the documentary record of any loan agreement between Mr Reiner and Mr Smilow or of any proposal that Mr Reiner should borrow money from Mr Smilow.

41. Mr Knopf's evidence about this was wholly unhelpful. At the end of his evidence I asked him to explain Mr Smilow's part in the transaction. I asked:

> "*Mr Smilow owned a house worth £900,000. He was going to transfer it, for nothing, apparently, to Mr Reiner's company and Mr Reiner's company was then going to mortgage it and raise £630,000, which it was going to use in the purchase of the Nags Head. Now, what does Mr Smilow get out of this?*"

42. That question was followed by an embarrassed pause during which the witness was clearly at a loss what to say. Eventually he said that he believed that there was an arrangement between Mr Smilow and Mr Kiwak that Mr Smilow would get some part of the profits of the venture either by way of interest on the loan or as a share of the profits; he did not know which. Mr Kiwak, however, gave

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[2] According to the eventual completion statement, the net mortgage advance was £1,324,072, leaving a balance of £1,388,737(including stamp duty and fees), so had Knopf/Kiwak contributed £1m, they would have contributed 72% and Mr Reiner 28% of the non-mortgage funding.

no evidence of having any such arrangement with Mr Smilow and no documents evidencing any such arrangement were disclosed or produced in evidence.

43. The upshot was that at the end of the evidence of the Claimant's witnesses I was left unsure whether they were telling me the truth but I was quite sure that I was not being told the whole truth.

44. The completion date under the contract for the purchase of the Nags Head was 7th May 2014. As of that date, the finance was not yet in place and Mr Reiner had hopes that the valuation of the Nags Head could be improved. Another 5% fell due by way of deposit, which he paid. The vendors then served notice to complete, which would expire on 23rd May.

45. On 18th May Mr Reiner went to Israel partly for a religious festival and also in order to meet Mr Knopf to finalise the Heads of Terms. He telephoned Mr Knopf to say that the lender required Mr Smilow to have his own solicitor. Mr Knopf asked him to get his solicitors to send an email to Assersons in Israel asking them to act for Mr Smilow. On 21st May Mr Kiwak accompanied Mr Smilow to see Mr Cohen of Assersons in order to give him the necessary instructions concerning the transfer of Limes Avenue.

46. Mr Reiner said that in the course of his telephone conversations with Mr Knopf he mentioned the name of the company which he had incorporated to take the transfer of Limes Avenue, namely M&K Inestments; Mr Knopf became upset and said that that was too close to his name and that the IRS might learn of his involvement in the project. Mr Reiner thought that this was far-fetched but he agreed to incorporate another company to purchase Limes Avenue in order to accommodate Mr Knopf. Accordingly on 16th May he incorporated a company called Treecut Limited.

47. Mr Reiner's solicitor was a Mr Daniel Zysblatt of Rexton Law in Elstree. He gave evidence and told me that Mr Reiner had retained him to act on both

purchases on or about 13th May 2014. He told me that at quite a late stage Mr Reiner told him that the person investing in the Nags Head purchase objected to the name of M&K Inestments for a reason that he remembered thinking was odd and that as a result Treecut Limited was substituted as the purchaser of Limes Avenue.

48. Mr Kiwak told a different story about the reason why Treecut was substituted. He said that Mr Smilow had objected to transferring Limes Avenue to M&K because it was not a "new company". I quote from the transcript of Mr Kiwak's evidence:

> "*Then he (Mr Smilow) asks me about what is this MK? … He says: why is it called MK? What is this? Maybe it's an old company. I wouldn't want to put … build my mortgage in an old company. He has to make a new company.*"

49. I reject that explanation and evidence as being quite absurd. Had it been advanced to Mr Reiner at the time, he would have pointed out (as he did in cross-examination) that M&K Inestments *was* a new company without any liabilities incorporated specifically for the purpose of purchasing and mortgaging Limes Avenue. Moreover it is clear from the documentary record that Treecut was incorporated *before* Mr Smilow's visit to Assersons offices on 21st May, which is when he was supposed to have objected to the involvement of M&K. Further, as will appear, Mr Smilow would not have been concerned about the purchasing company because he was a mere cipher in this transaction with no personal interest in it. I accept Mr Reiner's account of the reason for the change of purchaser.

50. At this point I should record Mr Reiner's evidence about what he says he was told about the beneficial ownership of Limes Avenue:

> "*Mr Knopf assured me that Limes Avenue was his property and it had previously been his father's property. He told me that it was registered in Mr Smilow's name because of Mr Knopf's concern about the IRS. I believe it was in this conversation that Mr Knopf told me that he never paid tax and that his father had never paid tax. The property being in Mr Smilow's name had something to do with not paying tax though I do not recall the exact details.*"

51. This accords with Mr Charles Knopf's suspicions about the transfer to Mr Smilow.

52. Mr Reiner met Mr Knopf at his home in Israel on 20th May. They began discussing the Heads of Terms. Mr Reiner says that this included the basic structure on which they had already agreed, namely that Mr Knopf would contribute roughly £1m including the funds raised on Limes Avenue; Mr Knopf then said that he would like to carry on the discussions "at his manager's house" and they drove to Mr Kiwak's house.

53. Mr Reiner says that he cannot recall being introduced to Mr Kiwak by name; but they sat at a table and he discussed the Heads of Terms with Mr Knopf, Mr Kiwak not making any substantial contribution to the discussion; Mr Knopf wrote out the Heads of Terms as they were agreed but they were not finished; Mr Knopf suggested Mr Reiner go back to his hotel; he would finish writing out the Heads of Terms and they agreed to meet the next morning at 11am outside a synagogue.

54. Mr Knopf's account differs. He says that they all met at Mr Kiwak's house where Mr Kiwak and Mr Reiner "got acquainted" and Mr Reiner said that "*he was pleased to finally put a face to the name and to meet his partner in the deal, Mr Kiwak*". They discussed the various issues and details and agreed all of the relevant points. Mr Knopf then started to write down the agreed points and, because Mr Reiner emphasised the short deadline, "*it was accordingly agreed that we would draft a short agreement to reflect the terms agreed at the meeting*", rather than instructing solicitors, as Mr Kiwak had originally preferred. By putting matters that way, Mr Knopf was preparing the ground for the contention that the document that emerged was a concluded agreement, rather than mere draft Heads of Terms. Mr Knopf had drafted the first fourteen clauses, he says, when Mr Reiner said that he had to leave the meeting but would return later; Mr Knopf continued drafting "*so that the agreement could be signed and finalised when Mr*

*Reiner returned*". Mr Reiner did not return that evening – according to him, he was not expecting to. Pursuant to their discussions, however, that evening Mr Kiwak arranged the transfer of the further sum of US $450,000 (£261,000) to Mr Reiner.

55. I must now turn to the terms of the document drafted by Mr Knopf as it stood at the end of 20th May. The document is headed "456 Holloway Road, London N1 Partnership Aggreement [sic]". The parties are stated to be Mr Kiwak and Mr Reiner. Mr Kiwak was to provide funds for 75% of the equity and Mr Reiner for 25% (clause 1). The purchaser was to be CHMR Development Limited (clause 2). 75% of the shares in the company were to be allotted to Mr Kiwak and 25% to Mr Reiner, Mr Kiwak having 75% of the voting power (clauses 3 and 4). Mr Kiwak and Mr Reiner were to be joint signatories on the company bank account and both were required to authorise expenditure by the company (clauses 6 and 7). The profits were to be divided 50:50 (subject to certain variations in case of delay designed to incentivise Mr Reiner to effect the early disposal of the commercial element of the property) (clause 8).

56. Highly significant is clause (14) (the last clause drafted before Mr Reiner left the meeting). It provided:

> "*It is agreed that all funds as they become available will be used to pay of [sic] firstly the total investment of DK, meaning the initial 101K plus 283K plus 630K will be payed [sic] of [sic] first back to DK.*"

57. The explanation for the figures is as follows. 101K was the sum paid towards the deposit on 10th April. 283K was apparently the further sum which it was agreed at the meeting that Knopf/Kiwak would pay in cash towards the acquisition (the sum actually paid was £261,000). 630K was the sum to be raised by way of the 70% mortgage on Limes Avenue. (Mr Smilow was to transfer Limes Avenue to Treecut for £900,000; Treecut was to raise £630,000 by way of mortgage guaranteed by Mr Reiner and Mr Reiner was to make up the balance of the price; Mr Smilow was then to remit the purchase price to CHMR to be used to

fund the purchase of the Nags Head.) The total of the funds described in the clause as "the total investment of DK" would thus be £1,014,000. That would be consistent with (a) Mr Reiner's evidence that the sum to be invested by Knopf/Kiwak had been supposed to be about £1m all along, (b) with Hamlin's letter before claim and (c) with the original Particulars of Claim.

58. There were three blanks in the draft which needed to be completed. One (in clause 17) was merely a cross-reference which does not matter. The second was in clause 16 and the third and most significant was in clause 19 which was directed to providing for Mr Kiwak to have a second charge on the Nags Head to secure his investment.

59. It is common ground that Mr Reiner and Mr Knopf then met outside the appointed synagogue at 11am the next morning. Mr Reiner had checked out of his hotel and was on the way to the airport. Mr Knopf had brought his original draft and a photocopy. They went through the documents together.

60. Mr Reiner says that he was concerned that the mortgagee might not agree to a second charge being put on the property and that it might complicate the sale of the commercial part which was intended to take place at an early stage; he therefore wanted to get advice and so did not agree to clause 19. He noticed that the terms named Mr Kiwak as the investor rather than Mr Knopf but, when he queried this, Mr Knopf told him that this was because Mr Knopf did not want to have anything in his name "*out of concern for the IRS*".

61. After going through the draft, Mr Reiner initialled or signed each page of the original and both gentlemen then initialled or signed each page of the photocopy which did not have the blanks filled in. Mr Reiner took the photocopy and left Mr Knopf with the original.

62. Mr Knopf, however, says that at this meeting "*we were able to finalise the terms of the JV and fill in the gaps*". He says that he asked Mr Reiner if he wanted

him also to fill in the gaps in the photocopy "*but because he was in a rush he said that was not necessary and that we should send a copy of the completed JVA after Mr Kiwak had signed it*". Mr Knopf continued:

> "*I asked Mr Reiner if he at least wanted some record of the agreement and accordingly wanted to take the extra copy of the incomplete agreement which I would sign in some form to provide him with some form of evidence that he and Mr Kiwak had reached an agreement substantially in the terms of the JVA. I accordingly signed each page of this copy and gave it to Mr Reiner.*"

63. Mr Knopf's evidence is therefore that Mr Reiner agreed and signed the copy of the draft with all the gaps completed and that that constituted or evidenced a concluded agreement with Mr Kiwak. He and Mr Kiwak produced a version with the gaps in clauses (16) and (19) filled in and signed by Mr Reiner, on which each page was also initialled by Mr Reiner. Mr Reiner's evidence was that he did not agree to the additions, that the document he initialled and signed did not have clauses (16) and (19) completed and that it had been completed later by Mr Knopf; the document he produced, which he referred to as draft Heads of Terms and each page of which was signed by Mr Knopf, did not have the blanks filled in for the simple reason that he had not agreed to those terms.

64. I have to say that I believe Mr Reiner's account. The reasons he gave why he could not agree then and there to Mr Kiwak having a second charge seem not only plausible but only sensible in the circumstances. The fact that both gentlemen took the time to initial every page indicates to me that they must have had time to complete the blanks in Mr Reiner's copy which, had they been agreed as per the Claimant's version, could hardly have taken more than a minute. Moreover, the blanks in the original produced by the Claimant appeared to be in a different coloured biro to Mr Knopf's existing draft and signatures.

65. It is important to recognise that the question whether Mr Kiwak was to have a second charge was not a detail or mere machinery. The Claimant's position in the negotiation was that it was to be a condition of his investing that he would have

a second charge and Mr Reiner's position was that he could not agree to that without Omni's agreement and without taking further advice. In my judgment they had not reached a consensus about that and they were therefore not ad idem and had not completed a contract. Mr Reiner initialled the draft to show where they had got to, but it remained draft Heads of Terms. That is how he said he understood it at the time. He told me that he frequently did business in his community on this basis, the formal contract only being drawn up by solicitors after completion. I accept that evidence.

66. It was argued on behalf of the Claimant that the "agreement" was sufficiently certain to be a contract. That is not the point. There was not a completed agreement, alternatively, putting it at the highest, if there was an agreement it was conditional on further agreement as to the second charge, agreement on which was never reached because Omni refused to agree to it.

67. On 22nd May 2014 Mr Reiner went to Rexton Law's offices in London to sign the documents regarding the mortgage financing. He was expecting the funds on Limes Avenue to have been sent to Assersons in Israel and immediately transferred back to Rexton Law as part of Mr Knopf's investment. By the time he got back to his office, Mr McBriar had called to say that Mint, the lender, would not be proceeding because they had received a call saying that Limes Avenue did not belong to Mr Smilow.

68. Mr Reiner's account is confirmed by the other witnesses. Charles Knopf told me that on 22nd May 2014 he received an email from the Land Registry alert service that a priority search had been undertaken on Limes Avenue in favour of MHS Finance Limited (Mint). He contacted their solicitors, explained his outstanding claim to the property, told them of the Beth Din proceedings and the Ikul and sent them a copy of the Ikul and the transfer. The solicitor was very concerned and told him that Daniel Zysblatt was acting for the proposed purchaser.

69. Charles Knopf knew Mr Zysblatt very well and had instructed him previously. He called Mr Zysblatt, told him about the Beth Din proceedings and asked who Mr Reiner was. Mr Zysblatt told him that he knew Mr Reiner well, that he was a genuine and substantial businessman and that the transaction was a legitimate one. He said that Mr Cohen at Assersons Law was acting for Mr Smilow. Charles Knopf then called Mr Cohen who said that he had met Mr Smilow and his father. Charles Knopf was surprised because he knew that Mr Smilow's father lived in the United States. He asked Mr Cohen for a description of the "father" from which he suspected that the person in question had been Mr Kiwak, as indeed it had. He found a picture of Mr Kiwak on the internet, emailed the link to Mr Cohen and asked if that was the person who had identified himself as Mr Smilow's father. Mr Cohen confirmed that it was.

70. Mr McBriar confirmed that financing had been arranged and put in place on both the Holloway Road and Limes Avenue properties and that at the last moment a problem arose on the title to Limes Avenue so that no funds could be raised upon it.

71. Mr Zysblatt told me that on the day of completion he received a call from MHS's solicitor who told him that she had been contacted by Charles Knopf who said that he had a claim to the beneficial title of Limes Avenue and that proceedings were ongoing in a Beth Din. Mr Zysblatt knew Charles Knopf well and regarded his claim as serious. MHS's solicitor told him that MHS was not prepared to proceed with the financing. He then reported that to Mr Reiner. Mr Zysblatt confirmed to me that all necessary steps had been taken to allow the purchase of Limes Avenue to proceed and that the only reason that it did not was Mr Charles Knopf's intervention.

72. It is therefore quite clear that the failure of Mr Reiner to be able to borrow against Limes Avenue was not in any way his fault but was caused entirely by the concerns of the intended mortgagee as to the title. I make that clear because it is part of the Claimant's case that Mr Reiner was in breach of an obligation to obtain

funds by raising a mortgage on Limes Avenue. Not only did Mr Reiner not undertake any such obligation contractually but the reason that the purchase and mortgage fell through was not his fault. He had taken all the necessary steps to obtain the mortgage loan. In my judgment, Moshe Knopf, who knew of his brother's claim, was taking a calculated chance on his brother not finding out about the proposed transfer.

73. The Limes Avenue loan having fallen through the day before the Notice to Complete expired, Mr Reiner was in a pickle. A deposit of £261,000 was at risk. He asked around but none of his contacts could come up with the necessary funds fast enough. His view was that if the property was purchased with funds provided by another investor, the deal as outlined in the Heads of Terms could not go ahead and would have to be changed. He reported to Mr Knopf that he had not been able to find anyone. Mr Knopf rang back and said that he had found a Mr Heller who was willing to lend but wanted a second charge and he gave Mr Reiner Mr Heller's telephone number. Mr Reiner telephoned Mr Heller. Mr Heller doubted if he could get the funds quickly enough. Mr Reiner reported the position to Rexton Law who contacted Mr Heller's solicitors but then told Mr Reiner that it was obvious that Mr Heller would not be providing the necessary funds.

74. Having made no progress by mid-afternoon, Mr Reiner called a company that he had previously done business with, Freedex Express Limited. He said that he needed £630,000 to complete a purchase the following day. Freedex offered the necessary funds but Mr Reiner only drew down £350,000, since he found the rest from his own resources. CHMR accordingly completed the purchase. Shortly afterwards Mr Reiner was able to repay Freedex with funds from another investor.

75. Mr Reiner felt badly let down by Mr Knopf. He felt that he had not come up with the promised funds and had put Mr Reiner in a very embarrassing situation. His preference would have been to repay Mr Knopf his investment less the costs he had incurred in trying to pursue the joint venture.

76. The position of Messrs Knopf and Kiwak, however, is that Mr Reiner had let *them* down by not obtaining the mortgage loan secured on Limes Avenue which it was his obligation to obtain. Mr Kiwak said in his Witness Statement that this was a breach of Mr Reiner's obligations under the JVA (meaning the "agreement" said to have been constituted by Mr Knopf's signed draft). (In fact there was no term in the JVA under which Mr Reiner committed himself either to raise 80% of the purchase price by way of mortgage or to raise a mortgage on Limes Avenue.) Nevertheless, Mr Kiwak took steps over the following week to obtain funds equal to those that would have been released by Limes Avenue. His case is that he succeeded but that Mr Reiner frustrated his efforts and wrongfully cut him out of the deal. I will have to consider those events in due course, but it is time for me to make findings of fact concerning the events so far.

77. I find as a fact that Mr Reiner never offered or agreed to provide 80% mortgage financing for the proposed purchase. I accept the evidence of Mr Reiner and Mr McBriar that this would have been wholly unrealistic and that Mr Reiner never asked his broker to seek a loan of that LTV ratio.

78. I find as a fact that until the meeting in Israel on 20th May Mr Reiner knew nothing of Mr Kiwak and thought that he was dealing exclusively with Mr Knopf as principal and that he continued to believe that, notwithstanding Mr Kiwak's name on the Heads of Terms, because of Mr Knopf's explanation that he wanted to keep his name off the documents.

79. I find as a fact that Limes Avenue was proffered by Mr Knopf as a source of funding at the outset; that he described it as his property and said that he had about £1m to invest, £900,000 of which he hoped to raise from Limes Avenue and that in the light of that proffered contribution (and the expectation of being able to raise a 65% loan) Mr Reiner looked for a property costing in the region of £2.5m.

80. I find that there was no concluded JV agreement in early April 2014 but simply a mutual intention to pursue a joint venture along the above lines. I reject

the suggestion that the original intention was that Knopf/Kiwak would provide 75% of 20% of the purchase price and be entitled to 50% of the profits, while Mr Reiner would find the investment opportunity, arrange for a loan to the SPV of 80% guaranteed by him, contribute the other 25% of the balance and arrange and supervise the subsequent development, all for the other 50% of the profits. Such a deal would have been so unbalanced as to be incredible.

81. I find that the proposed cash contributions changed to 75/25 after the disappointing valuations, at which point Knopf/Kiwak refused to increase their contribution beyond £1m (which included 70% of the valuation of Limes Avenue) and Mr Reiner had perforce to fund the shortfall to be able to complete.

82. I find that the terms of the so-called Partnership Agreement (the JVA) were not finally agreed, in particular clause 19, and that no such binding agreement was concluded.

83. I find that the failure to raise funds on Limes Avenue was due to no fault on the part of Mr Reiner, who had taken all the steps needed to raise a mortgage against it, but was brought about by Mr Charles Knopf's intervention and because Moshe Knopf had attempted to sell Limes Avenue despite knowing of his brother's claim.

84. There was no evidence of any loan agreement between Mr Smilow and Mr Reiner or CHMR or of any financial arrangement between Mr Smilow and Mr Kiwak. The only evidence I have as to Mr Smilow's role was Mr Reiner's evidence that he had been told by Mr Knopf that Mr Smilow was holding Limes Avenue as his nominee because he was concerned to keep his name off any traceable transaction or assets for fear of tax consequences. In the absence of any other explanation, I accept that Mr Knopf did say that to Mr Reiner and that Mr Smilow was indeed holding Limes Avenue as nominee for Mr Knopf.

85. I find that, notwithstanding the heading of the Heads of Terms document, it was never the objective intention of the participants to create a partnership. The venture was always to be carried forward via the corporate vehicle already incorporated for the purpose. Mr Elias submitted that there was a partnership notwithstanding that the parties intended to operate through a limited company because:

(a) There was an initial partnership either by virtue of the April agreement or from the moment a contribution to the deposit was paid; the shares in CHMR were never transferred "so the parties' interest were never subsumed within the corporate structure" – (this seems to accept that if the shares had been transferred there would have been no partnership, partnership thus being an interim arrangement);

(b) The agreement to share the profits 50/50 was not reflected by the company structure.

86. I am not persuaded by these arguments. I have found that there was no agreement in April, only an understanding between Mr Knopf and Mr Reiner that they would pursue a joint venture. The intention was to vest the property in an SPV, not to hold it as a partnership asset. The agreement as to the profit shares was capable of being given effect as an agreement between shareholders and was not incompatible with the company structure. I have also found that neither party intended to create a contractual relationship until a written agreement was concluded and that no written agreement was concluded on 21st May.

87. Mr Elias referred me helpfully to Khan v Miah [2000] 1 WLR 2123 to show that a partnership may arise as soon as the parties have done enough to be found to have commenced the joint enterprise in which they had agreed to engage. That case, however, was not a case where the enterprise was to be carried out by a company. More in point, in my judgment is Valencia v Llupor (2012) EWCA Civ 396, where the claimant had invested £80,000 in the defendant's restaurant business in the expectation of entering into a partnership agreement but the parties did not intend to create the legal relationship of partnership until they had entered

into a formal agreement, this being shown by the use of the familiar phrase "subject to contract". Here the parties did not intend to create a legal relationship until they had a written contract, which I have held they did not have, and the contract they were negotiating was not to form a partnership (that was merely a misnomer) but for the property to be acquired by a company in which both parties would own shares. The payments made by Knopf/Kiwak were made at times when there was no contract or agreement and on the basis of trust as between two members of the same religious community.

88. Although Mr Reiner felt badly let down by Mr Knopf and would have preferred to have nothing further to do with him, nevertheless he wanted to do everything properly in accordance with rabbinical law in order to protect his reputation in the community and he therefore took advice from Rabbi Eisner. The Rabbi advised that he should give Mr Knopf an opportunity to come up with the funds; if he did, he should be allowed to continue as an investor in the property, though not necessarily on the terms previously discussed.

89. Before I turn to the subsequent exchanges, I should mention a curious side issue in the case. It concerns the provenance of an email address, "alglen@neto.net.il". Mr Kiwak said that that was his email address named after a secretary called "Glen". Mr Reiner said that when communicating with "Alglen" he thought he was communicating with Moshe Knopf. Mr Kiwak said that Mr Knopf did not have an email address or use a computer; Mr Knopf was, he said, computer illiterate. This seems surprising in the case of a person Mr Kiwak had described as having acted as his agent in business transactions. All but one of the Alglen emails were unsigned but the one that is signed, dated 22nd May 2014 and timed at 16:50, which said "*I have 600K ready to send*" was signed "*Moshe*". Mr Kiwak explained that he had been impersonating Mr Knopf to get Mr Reiner's attention, but I accept Counsel's submission that the content of the email was quite enough to do that. Moreover, Mr Kiwak had emphatically said in cross-examination that he would "never" give Mr Knopf his email address to pass on to somebody else; yet it was clear that the address in question must have been given

to Mr Reiner by Mr Knopf since Mr Reiner used it on 10th April to request payment of $170,000 to his bank account. I find, on a balance of probabilities, that the Alglen address was Mr Knopf's email address and that when communicating with Alglen Mr Reiner was communicating with Mr Knopf, as he supposed. There is further support for this in the email exchanges after 23rd May, which I will come to.

90. I have now rejected the evidence of Mr Knopf and Mr Kiwak on most of the issues in contention. The question arises why they gave the evidence they did. I think the answer is fairly simple. They wanted to place the blame on Mr Reiner for the situation in which he found himself on 22nd May by showing that the predicament had been caused not by them but by:

(a) Mr Reiner promising and failing to obtain an 80% mortgage; and

(b) Promising and failing to obtain a mortgage over Limes Avenue, which had only been introduced in order to make good the shortfall resulting from failure (a).

To do this they fabricated an agreement in early April involving an 80% mortgage and a 75/25% split of the remaining equity, not involving Limes Avenue, which property they pretended was not supposed to have been required for the Nags Head investment at all. When the Limes Avenue loan fell through, they knew that they had let Mr Reiner down but, in an attempt to stay in the deal, tried as we shall see, to borrow the missing funds elsewhere. It is quite clear that neither of them had ready funds available.

91. I have already referred to the attempt to obtain a loan from a Mr Heller which foundered upon Mr Heller's insistence on having a second charge and Omni's refusal to agree to that. Mr Kiwak said that over the next days after 23rd May 2014 he met with a number of business associates at his home and succeeded in arranging alternative funding:

(a) From a Swiss company called AMY SA for £250,000;

(b) From a company called James Sherwin Enterprise Limited in Israel for £600,000; and

(c) From a colleague called Yechiel Stern for £250,000.

I was shown resolutions by AMY SA and James Sherwin Enterprise Limited and a manuscript agreement between Mr Kiwak and Mr Stern. All these offers were conditional upon Mr Kiwak providing a letter from CHMR Developments signed by Mr Reiner stating that he required the investment for the purchase of the Nags Head, a copy of the sale contract, the completion statement and all the mortgage documentation.

*92.* On 29th May Alglen emailed Mr Reiner saying "*we have the funds ready in Europe we need some documents for the orderly release and transfer please contact"*. The documents were not specified. Mr Reiner replied *"I'm not sure what I'm doing. Will let you know. I have someone offer me 100% of funds and 50% partnership. I can have funds within the next hour, no interest. No documents to sign. Will let you know. In the worst case I'll bring you another good deal"*. That elicited the reply from Alglen *"This hurts me much … I have become partner at closing (thank you for finding the loan for the partnership, which I also pay the iskah) and I have worked hard to come up with the funds today, let us please continue*". Mr Reiner replied *"If the funds can be in my account (you have my details) within the next hour then we can talk. I must pay back my loans today now. Otherwise I will have to take someone else I don't have any other option"*.

93. Alglen replied essentially asserting that there was a partnership in being which owned the property. It concluded "*Please send the docs needed and we can send the funds asasp*". As far as I can tell, Alglen had not yet specified what documents were needed.

94. Mr Reiner replied *"Will talk later. I must pay 350K now. I'm trying to get the funds. I'll call you shortly. Just can't take the pressure from the lender"*. A few minutes later he emailed again *"In either way our agreement will have to change. As you didn't turn up with the 75% will have rearrange a meeting"*. Mr

Reiner was making it clear that he did not regard himself as committed any more to the previous arrangement.

95. On 30th May in the early afternoon Alglen e-mailed complaining that Mr Reiner had not telephoned the day before and continuing:

> "*It pains me to see we are starting a collision course. Of course I know the pressure you have – believe me I didn't think there would be any problem 4 years ago it already went through two beth dins a the fed bd said there is no ikul I was sure it was over I worked hard to bring the funds – the money was ready yesterday in a European account – I asked for some difs and you didn't respond I don't thing its right to send money to your solicitor before we speak and get things strait* [sic]".

The significance of this email is the statement that the author did not think there would be any problem with Limes Avenue. He is trying to exculpate himself. That shows (a) that the author knows perfectly well that he should have come up with the Limes Avenue funds and (b) that the author is almost certainly Mr Knopf. That email was written in reply to one from Mr Reiner enclosing his solicitors' account details and saying "*I am of course not looking to cross you out. You know even more how much pressure and stress I have from all this. I still have them all on my back. Any new agreement can only be done once I get confirmation that funds are in solicitors' account"*.

*96.* On 1st June Mr Reiner sent another email to Alglen saying that he had to pay the loans the next day and that Alglen could send the money to any solicitor in the UK to hold to his order but he would need confirmation that the solicitor in question had cleared funds and that they were unconditional and allocated for the Holloway Road deal. He continued *"Once we get confirmation on the above, we will sit down and agree on the way forward. But if we don't get the confirmation from your solicitor before 12.30pm tomorrow, we will consider that there are no funds available for this deal"*. In that case he said that he would have to explore all the available options which would include taking in a different partner or selling

the whole building or anything that would get him out of the current situation *"I got in because of you"*.

97. Alglen replied on the 2nd *"We are waiting for the documents needed to make the transfer, yes we have the money yes we have a solicitor in London waiting, yes, you have the option to continue without any problem, but we need these docs to transfer the money"*. Also on 2nd June Alglen sent what appears to have been the first request which specified precisely what documents were required. They said *"the bank requires"* a copy of the sale contract, the completion statement and a letter from CHMR requesting the investment of the required amount.

98. On the same day Mr Reiner asked his solicitors for the completion statement, the mortgage offer and the contract and then forwarded then to Alglen. Still no money arrived. On the 8th June Alglen emailed Mr Reiner that he was getting ready to send the money to their lawyer but he understood that the papers still were not "*what the bank wants"* and said that they wanted a letter to show that the funds were needed for the purchase of the property by the partnership.

99. Mr Reiner replied asking for a copy of the letter from the bank so that he would know exactly what they needed. This provoked an angry email from Alglen on 9th June protesting that they had had the funds ready since 29th May (which was plainly not the case) and blaming Mr Reiner for not discussing the matter with them on the telephone. Mr Reiner replied on the 10th June saying that he was not sure what needed to be discussed on the telephone; Alglen had written that their bank needed some information and he had simply asked them to forward the email from the bank to be clear what they needed.

*100.* On 11th June Alglen replied saying that he was still waiting for the document he had asked for and that there was no email as the bank had asked for the documents *"through a person we are getting the money from"*. Mr Reiner replied *"We still have no idea what docs you need*" and that, if the funds were being raised by way of a loan from a third party, to get that person to forward to

him the bank's request. *"You wrote it's for "money laundering purposes" so if such request exists this should be very easy to show us"*.

101. In the evening of the 11th June Mr Reiner emailed Alglen referring to his conversation with Rabbi Moishe Kohn (RMK). The email continued:

> "*RMK spoke to Rav Kiwak (RK) (which I believe speaks on your behalf please advise if this is not the case) RK told him that in principle you have now decided that you want to withdraw from the Shitfes [partnership] but you want your deposit back. I have told him that I'm happy to proceed with that but need time to find a new investor who will replace those funds. I also agree that I will give you security for the full amount due to you or to put funds by a third party. RK called back that he wants asap a breakdown of all costs incurred from the delay and wants that we prepare a redemption statement. I can confirm that once you confirm to me that those were your instructiosn I will do my best to have it ready by tomorrow*."

102. The reference to Mr Kiwak speaking on Alglen's behalf shows clearly that Mr Reiner believed himself to be communicating with Mr Knopf. The belief in question was not corrected by Alglen in a subsequent email. That is another reason for believing that Mr Knopf was Alglen, contrary to the affirmed evidence of Mr Kiwak. It also appears from this email that both parties were at least contemplating concluding matters by Mr Reiner repaying the funds that he had received (£361,000) less some unspecified costs.

103. On 12th June Mr Kiwak issued proceedings in this Court for a declaration that he had a lien, alternatively an equitable charge over the Nags Head for the sums advanced or to be advanced pursuant to a partnership agreement dated 21st May 2014; a declaration that his security rights took priority over the rights of Mr Reiner and CHMR; alternatively restitution of the sums advanced; a declaration that Mr Reiner held 75% of the issued share capital in CHMR on trust for the Claimant absolutely; further or alternatively, damages for breach of the agreement and/or equitable compensation for breach of fiduciary duty and/or an account of all sums paid under the agreement; interest and costs.

104. Early on 13th June Mr Reiner received a letter from Hamlins, solicitors acting for Mr Kiwak which asserted that he had entered into an agreement dated 21st May 2014 and summarising its terms. They said (incorrectly) that £383,000 had been advanced by Mr Kiwak and asserted that *"the balance of the sums to be advanced by our client towards the purchase price which would be circa £600,000"* were to be protected by a third charge. They asserted that Mr Kiwak had a lien or an equitable charge over the freehold of the property for the full amount of the sums advanced and a claim for breach of the agreement or breach of fiduciary duty and called for an undertaking by Mr Reiner and CHMR that neither would dispose of or deal with the shares in the company or the property.

105. Mr Reiner replied that afternoon saying that Mr Kiwak had made contact with Rabbi Kohn who was acting as the middleman and said that his main concern was to secure the funds he had sent to Mr Reiner. He then corrected the statement that those amounted to £383,000 and said that they only amounted to £361,000 odd and offered to return that amount within 14 days less the costs incurred in connection with Limes Avenue.

106. On 15th June Mr Reiner sent an email to Alglen saying:

> *"The local rabunim specially Rabbi Eisner … have followed all our correspondence from the last weeks – your demands, our replies and the way you replied back.*
>
> *After Rabbi Eisner talking to you on the phone and after reading all emails – without going into details I can only confirm that they have given us an heter [permission] to sell the property. They have also said that we should pay your money back as soon as we possibly can. … We confirm again that we will return your money as soon as we can we estimate within 14 days and even possibly this week."*

107. Mr Reiner was making it clear that the joint venture was at an end, Knopf/Kiwak having failed to come up with all the promised funds and thereby having imperilled the whole purchase. Mr Kiwak, on the other hand, regards Mr Reiner as having behaved improperly by not having sent the documents requested.

In his Witness Statement he acknowledges that Mr Reiner had sent him documents but says that they were incomplete or insufficient for his purposes. He had not, however, supplied any documents setting out precisely what was needed in addition to what had been sent. Moreover, nowhere in his evidence did he acknowledge the fact that the shortage of funds had been caused by the failure to make the contribution which had been promised in time for completion. The Claimant's case at trial was that this was all Mr Reiner's fault, which I have held it was not. On 16th June Alglen replied to Mr Reiner's email accusing him of having "*cheated us*" and stolen his property.

108. Having reviewed the post-completion emails, I accept the following submissions made by the Defendants' Counsel, Mr Michael Pryor:

(a) The compiler of the Alglen e-mails overstated the position by saying that there was money in a bank account ready to go, when the best that could be said was that there might have been money held by the proposed funders of a property purchase in their bank accounts;

(b) On 1st June Mr Reiner gave a very clear ultimatum to deposit funds by 12.30 the next day, which the Claimant never met. Mr Reiner was entirely open about his position from his email of 29th May 2014 when he indicated that he was considering his position;

(c) Mr Kiwak said that a bank needed certain documents to release the funds; Mr Reiner provided the documents that he understood Alglen had asked for;

(d) Mr Reiner asked on four occasions to see the "bank's" request so that he could understand what other documents might be wanted but Alglen prevaricated; there was no bank involved;

(e) Mr Reiner, whether or not he was obliged to, gave the Claimant a chance to come up with the extra funds if he had them or could get them.

109. What happened next was as follows. As we have seen the claim as originally issued principally sought the return of the monies advanced. (The

Claimant can hardly have been entitled to his money back and a declaration that three-quarters of the shares in CHMR were held on trust for him.) The Claimant applied for a restriction contending that he was entitled to a charge to protect the £361,000 invested. This put Mr Reiner in difficulties because it meant that he was unable to refinance the Omni loan, which was repayable after 6 months.

110. On 24th July 2014 Mr Reiner offered to deposit the money in a solicitor's bank account in exchange for withdrawal of the application but that offer was not accepted, the Claimant wanting undertakings and terms extending beyond the need to protect the initial investment. Mr Reiner applied for an injunction requiring the Claimant to withdraw the application, which was granted by Barling J on 29th October 2014. By their Defence dated 9th October 2014 the Defendants had admitted that the true payer of the two advances was entitled to repayment of the £361,000 less set-off of a counterclaim for damages, relating principally to the expenses of the abortive Limes Avenue transaction, estimated at just under £35,000.

111. As a term of the order made by Barling J, the Defendants undertook to pay the full sum of the advances into Court by 31st October and did so. The money was paid out following the order of His Honour Judge Jarman QC made on 3rd March 2016 upon Mr Knopf assigning to the Claimant any interest he had or might have in it. Following the order of Barling J removing the restriction, CHMR was able to sell a long lease of the basement and ground floor of 456 Holloway Road on 26th November 2014 for £2,058,160 and thus redeem the Omni charge. An application for planning permission to develop the upper floors of the building into residential flat was subsequently rejected and an appeal has been recently dismissed. In the meantime CHMR has presumably had to fund the outstanding loans. It seems very unlikely that CHMR has made or will make any profit out of the acquisition of the Nags Head.

112. Now I come to the legal analysis of these various events. The Claimant says that a partnership between Mr Kiwak and Mr Reiner was formed on or about 11th

April 2014 when Mr Kiwak contributed the first advance towards the purchase of the Nags Head on the terms of the agreement set out in paragraph 29 above. I have rejected that. Those terms were never agreed and the first advance was made with a view to there being a joint venture the detailed terms of which remained to be agreed but which would involve Knopf/Kiwak contributing approximately £1m towards the purchase of the Nags Head.

113. Secondly, the Claimant says that there was a concluded written agreement on 21st May 2014. I have explained why I do not accept that submission. The document which Mr Knopf and Mr Reiner signed outside the synagogue on 21st May was not a final concluded legally binding contract. What that document did do was to set out and reaffirm the revised understanding as to the contributions – the Defendants to provide mortgage financing secured on the property and 25% of the "equity", with Knopf/Kiwak providing 75% of the "equity", amounting to about £1m.

114. Alternatively, the Claimant says that, if there was no April agreement or May agreement, then there was a constructive trust along the lines of Pallant v Morgan such as arises where there is a joint venture arrangement which falls short of a concluded agreement; in the further alternative that Mr Reiner held the sums advanced on resulting trust for Mr Kiwak.

115. The elements of a Pallant v Morgan constructive trust were neatly encapsulated by Lord Scott in Cobbe v The Yeomans Row [2008] UKHL 55; [2008] 1 WLR 1752:

> "*A particular factual situation where a constructive trust has been held to have been created arises out of joint ventures relating to property, typically land. If two or more persons agree to embark on a joint venture which involves the acquisition of an identified piece of land and of subsequent exploitation of, or dealing with, the land for the purposes of the joint venture, and one of the joint venturers, with the agreement of the others who believe him to be acting for their joint purposes, makes the acquisition in his own name but subsequently*

*seeks to retain the land for his own benefit, the Court will regard him as holding the land on trust for the joint venturers.*"

116. As was made clear by Chadwick LJ in Banner Homes v Luff [2000] Ch 372, it is essential to the application of this principle that, in reliance on the arrangement or understanding, the non-acquiring party should do something which confers an advantage on the acquiring party in relation to the acquisition of the property or is detrimental to the ability of the non-acquiring party to acquire the property on equal terms. It is the existence of the advantage to the one, or detriment to the other, gained or suffered as a consequence of the arrangement or understanding, which leads to the conclusion that it would be inequitable or unconscionable to allow the acquiring party to retain the property for himself, in a manner inconsistent with the arrangement or understanding which enabled him to acquire it.

117. Here is it said that the payment by the Claimant of £361,000 towards the acquisition was such a benefit conferred on the acquiring party. My difficulty, here, however, is in seeing why equity should come to the assistance of the Claimant to any greater extent than implying a resulting trust of the cash. The arrangement under which Knopf/Kiwak were to have shares in the company holding the property (not in the property itself) and a share of the profits was dependant on their providing £1m towards the purchase price before, not after, the acquisition. The fact is that Knopf/Kiwak (whoever one regards as the principal) did not honour their side of the arrangement, thereby putting Mr Reiner into very great difficulties. If one tried to design a beneficial interest to reflect what did happen rather than what was supposed to happen, it would look nothing like the terms of the arrangement that the parties were in fact contemplating. Mr Reiner has always accepted that he had to pay the advances back subject to any counterclaim he may have and, admittedly under pressure of litigation, they have been paid back.

118. The Defendants submitted that there were a number of different possible ways of analysing the legal effect of the events but that the different analyses all led to the same place, namely that the Defendants owed the Claimant/Mr Knopf nothing further but possibly were owed something themselves. First, they submit that there was no partnership in April. I agree. Secondly, they say that there was no concluded agreement on 21st May 2014. I agree.

119. Alternatively, they say that if there was a formal legal agreement to create a partnership, it was an executory agreement and the creation of a partnership depended upon the parties making the contributions needed to complete the purchase of the Nags Head; the failure of Mr Knopf to provide the £630,000 was a repudiatory breach, which was subsequently accepted by the Defendants and therefore no partnership was created; the effect of the payer being in fundamental breach of the understanding as to the contribution was that he was no longer entitled to insist on being a party to the venture but only to the repayment of the money. Alternatively, the Defendants submit that if there was a joint venture agreement which did not create a partnership, it was terminated by acceptance of repudiatory breach.

120. I have held that there was not a legal agreement to create a partnership or a concluded joint venture agreement but, if I had held otherwise, I would have held that the failure to come up with the £630,000 element of the contribution to be secured on Limes Avenue was a breach of a condition precedent to the formation of either a partnership or the joint venture agreement. All along the venture had been premised on Knopf/Kiwak contributing £1m in time for completion. I agree that the term as to the amount of the contribution was "fundamental" but I prefer the condition precedent analysis to the repudiation analysis.

121. I have not so far addressed the question of who was the principal, Mr Kiwak or Mr Knopf. In view of my earlier findings, this question is somewhat academic. If Mr Kiwak was in fact the principal, it does not matter whether Mr Reiner was aware of that. Secondly, I accept that the monies which were advanced were Mr

Kiwak's and that he was entitled to reclaim them. They came from a JP Morgan Chase Bank account in the name of a New York Attorney, Maurice E. Barenbaum. I was not shown any documentary evidence that these were Mr Kiwak's funds but both Mr Kiwak and Mr Knopf said that they were, the proceedings were brought in Mr Kiwak's name initially principally for the recovery of those funds and Mr Knopf was happy to assign any claim he might have to those monies (which he denied were his) to Mr Kiwak in order to enable the funds to be paid out of Court. Since I have held that there was no contract or partnership or trust, there is no point in pursuing this question further.

122. The Defendants counterclaimed for the costs of arranging finance for the Tree Cut loan and the emergency loan which Mr Reiner had to raise in order to complete. In his Closing Submissions Mr Pryor accepted that the damages counterclaim would only arise if there was a concluded agreement, which I have held there was not. It follows that Mr Kiwak was entitled to the return of the monies advanced without any deduction.

123. I have therefore rejected the claim in its entirety apart from holding that Mr Kiwak was entitled to the return of the monies advanced. I invite Counsel to agree and draw up a suitable Minute of Order and to seek to agree any ancillary matters.